

Pope & John Lecture

OPINIONS I SHOULD HAVE WRITTEN

Judge Nancy Gertner (Ret.)

In 1991, the Chicago law firm of Pope & John Ltd. established a lecture series at Northwestern University School of Law. The Pope & John Lecture on Professionalism focuses on the many dimensions of a lawyer's professional responsibility, including legal ethics, public service, professional civility, pro bono representation, and standards of conduct. The Northwestern University Law Review is pleased to present the November 12, 2014 Pope & John Lecture by Judge Nancy Gertner.

AUTHOR—Judge Gertner was a judge of the United States District Court for the District of Massachusetts from 1994 to 2011, when she retired to join the faculty of the Harvard Law School. At Harvard Judge Gertner has taught criminal law, criminal procedure, gender and judging, law and forensic evidence, law and neuroscience, as well as sentencing. She was a graduate of the Yale Law School, where she also taught for ten years, while serving as a judge. Prior to the bench, Judge Gertner spent two decades as a criminal defense lawyer, civil rights, and women's rights lawyer. In August 2008, Judge Gertner received the Thurgood Marshall Award from the American Bar Association Section of Individual Rights and Responsibilities, the second woman to receive the award after Justice Ruth Bader Ginsburg. In August 2015, Judge Gertner received the ABA's highest award for achievements for women, the Margaret Brent Women Lawyers of Achievement Award.

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INTRODUCTION

Thank you for this extraordinary opportunity to give the Pope & John Lecture. My plan is to speak about opinions I should have written during my seventeen-year tenure as a United States District Judge for the District of Massachusetts.¹ But before I do, I have to frame the discussion. I will first give you an introduction to my career and why my unusual background made me chafe at the pressures I felt. I call those the pressures to duck, avoid, and evade. I will then explain how I resisted them, and how I wished I had resisted more, leading finally to the title of this talk, “Opinions I Should Have Written.”

I. MY BACKGROUND

I began to write a book about judging the day I joined the federal bench of the United States District Court for the District of Massachusetts. I recorded everything I did and why, noting the palpable change from who I had been on April 26, 1994, when I was a civil rights and criminal defense lawyer, to who I was supposed to be on April 27, 1994, when I was sworn in as a judge. One thing was clear: I had not emerged from that induction ceremony freed of all entangling views, “stripped down like a runner,” shedding the “baggage of ideology” as the *New York Times* characterized Justice Thomas’s testimony during his confirmation hearings for the Supreme Court.²

I was the opposite: I had been a zealous advocate, a trial lawyer, a criminal defense lawyer. I knew what I believed in. Indeed, I had regularly announced those beliefs in articles, speeches, on panels, in briefs, in the record before the Senate, in the *Boston Globe* and *New York Times*, and even in demonstrations on the Boston Common. In short order those

¹ This discussion will be part of a book on judging that has been immeasurably supported by a 2014 residency in Bellagio, Italy, sponsored by the Rockefeller Foundation.

² Linda Greenhouse, *In Trying to Clarify What He Is Not, Thomas Opens Question of What He Is*, N.Y. TIMES, Sept. 13, 1991, at A19.

opinions would grace the pages of my book, *In Defense of Women: Memoirs of an Unrepentant Advocate*. I never had what some have called the confirmation conversion, a change in my views motivated by a desire to secure a judicial appointment. As Chief Justice William Rehnquist observed in his memorandum in *Laird v. Tatum*, “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”³

I knew exactly where I had come from. I was a forty-eight-year-old woman, more significantly, a feminist, joining a bench that was overwhelmingly male. The first woman, Judge Rya Zobel, a mentor of mine, had then been on the court for fifteen years. A second, Judge Patti Saris, came on only months before. And like Judge Saris, I was the mother of school age children; the children of other judges were adults, no longer living at home.

While many federal judges ascended to the bench after a lucrative career, or came from wealth, I did not. I was born on the Lower East Side of Manhattan, to parents of modest means, neither with college degrees. I was married to the Legal Director of the American Civil Liberties Union, not a job from which one makes money.

For most of my career, I saw myself as an outsider, now becoming a judge, the consummate insider. Candidly, I was uncomfortable; I had not anticipated what the “moment after” would look like, as would some who had been preparing for that moment for years. The problem was not the work. I could not have been more qualified. For twenty-four years, I had taught law in elite law schools and practiced it; I had litigated, civil and criminal cases, trials and appeals, federal and state, in the Northeast and across the country.

Ironically, the problem wasn’t even the role; I was ready for the struggle between my former advocacy and the judicial oath I had taken. That’s what I looked forward to. Every new judge has to move to something like “neutral,” however defined, or try to do so. We select judges in their late forties and older, after a life lived in the profession and in the world, with their attitudes and their experiences, expressed and unexpressed.

I understood that there would be pressure to prove my neutrality, by acting against type, the former defense lawyer feeling the pressure to be a harsh sentencer, the civil rights lawyer who regularly finds for employers. How was I supposed to deal with my values, the substantial experience that

³ 409 U.S. 824, 835 (1987) (Rehnquist, J.) (order denying motion to recuse).

I brought to judging? I remembered what it was like to visit clients in prisons, to hear the prison doors clanging shut. I represented women discriminated against; I had been discriminated against. Was I supposed to ignore these experiences? Could I? Could anyone? And more significantly, should I? How did my gender figure in, if at all, and why do we ask that question of a woman, not a man? Was gender a meaningful category at all, given class, race, and status differences among women?

But while these were the challenges I expected, I speak today of the pressures that I did not expect, pressures which may surprise the public, lawyers, and scholars. I felt the pressure to avoid, evade, or duck not only constitutional questions. Avoiding constitutional questions if at all possible is integral to the concept of judicial restraint.⁴ What I saw were the pressures to avoid just about any principled decisionmaking, the very kind of reasoned judgments which I believed common law judges were supposed to engage. Sometimes it was explicit, like the judicial trainer who urged judges to manage their cases by avoiding writing decisions. “If you write a decision,” he said, “you failed.” Or another who began his lecture on civil rights with, “Here’s how to get rid of these cases!” Sometimes it was unstated, as when judicial training sessions focused almost exclusively on “case management,” relegating a single session on opinion writing for the last day of the training session—and making it optional. Or it came out in the extraordinary emphasis some chief judges put on the statistical reports to the Administrative Office of the U.S. Courts, reports which measured only the number of cases opened or closed, or the number of motions pending, rather than their complexity, the quality of the adjudication, or the adequacy of the reasoning.⁵ These were pressures—or better yet, incentives—that cut across the usual political and ideological lines other scholars have written about. While they were presented to us as efficiency measures, and neutral in their impact, they in fact affected the way the job of judging was done, and, advertently or inadvertently, the

⁴ To James Bradley Thayer, the doctrine meant that judges should defer to legislatures in close constitutional cases. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 134–36 (1893). To Herbert Wechsler, judicial restraint meant refraining from constitutional judgments unless grounded in neutral principles. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). Alexander Bickel characterized judicial restraint as avoiding constitutional questions for which the country was not yet ready to deal with. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (2d ed. 1986).

⁵ In effect, my observations from a real world experience of judging underscore Judith Resnik’s prescient observations in her 1982 article, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing the extent to which the judge was a manager, moving the case along, seeking a resolution which typically was not a formal decision, and pointing out the negative consequences of that approach). What she inferred from the judicial administration’s emphasis on statistics, efficiency, speedy resolution, etc., in 1982, I took from the cues—subtle and not-so-subtle—of trainers, chief judges, and colleagues.

outcomes. Indeed, in my view, the result of “duck, avoid, and evade” was a bench that seemed to be more reticent about the exercise of judicial power at all than were prior generations of judges. This was a passive judiciary, even timid, all the more extraordinary for being the first independent judiciary in the world.

Before I go further, let me make it clear there were obviously exceptions to these observations. There were the cases you could not duck, avoid, or evade, when major issues were teed up before you—the constitutional challenges to the Affordable Care Act or to the laws holding same-sex marriage illegal. And the tactics of evasion were more easily indulged in by the federal district court, with which I was the most familiar, that could control its docket in all sorts of ways, less so the appellate courts (and certainly not the Supreme Court) or the state courts.⁶ There were surely judges who were prepared to engage with the issues, no matter what the impact on their caseload, to get to the merits even when there was an arguable procedural out. There may well be regional differences, federal courts with different cultures and different leadership. And I had wonderful colleagues who have uncovered terrible injustice with the FBI, dealt with affirmative action, or ruled on profound questions involving the First Amendment. There were heroic judges in the tradition of those that ended segregation, ensured voting rights, and addressed prison reform. There still are.

But the everyday, run-of-the-mill cases suffer a different fate, as many federal litigants would attest; these are the cases I want to address. I want to describe the thousands of small decisions—technical, procedural—that a judge makes that opens the courthouse door or slams it shut.

One small example to set the stage: A man was injured while using a saw. He sued the manufacturer—and won—in a case assigned to another judge. The manufacturer appealed; the jury’s verdict was reversed and a new trial was ordered. The case was then assigned to me. Between the appeals court decision and the reassignment, the man died. His lawyer missed a deadline for filing a notice of the man’s death and substituting his estate as the plaintiff. My clerk and I were dutifully reviewing my six-month list, the list that I had to send to the Administrative Office of the U.S. Courts listing motions pending over six months. He noted that I had

⁶ Ironically, because state court judges lacked the staff of a federal court judge—two clerks per federal district court judge, three for the chief—they lacked the resources to “get rid” of cases on summary judgment. On summary judgment, ruling for the defendant required a decision of some sort and the resources to produce it, which they did not have. And because state court judges did not have an individual docket—cases assigned only to one judge—it was just as easy to deny summary judgment and order the case on a trial list—over which another judge would preside.

discretion to dismiss the case; it would make my numbers look better. But I also had the discretion to allow the case to go forward. And then he added—ingenuously and with passion: “Justice in the world says let his estate—his family—have another trial.” And so I did. Efficiency was surely important, but it was one value among others, values like access to justice or keeping a family that suffered one egregious loss from suffering another at the hands of less than competent counsel.

II. DUCK, AVOID, EVADE

I describe here the incentives/pressures I felt, in a very general fashion with more detail to come in my book on judging. And to make it clear, I simplify—even oversimplify—the themes that were explicit and implicit as follows:

Decry the “vanishing trial,”⁷ but do everything you can to end cases as quickly and summarily as possible. Value efficiency above all, which meant encouraging the parties in a civil case to settle, or those in a criminal case to plead guilty. Confidential settlements were always good no matter what the issue; don’t look too deeply to see if the issues were fairly litigated. *Any* closing after all is as good as *any other*.

If the case does not settle, dismiss it on a technicality, announcing that you had “no choice” but to do so. If you must write something, write “denied or allowed” on the docket with a perfunctory analysis, or announce it in open court or in an unpublished opinion. Those approaches are quicker, but have little precedential value beyond the case in front of you. If you have to issue a formal written opinion—which you would do if the case was finally resolved and might be appealed—look first to whatever procedural hurdles you can find to defeat merits review. (Recall the trainer, “Here’s how you get rid of these cases.”)

If you got past the procedural barriers to the merits, do so in perfunctory opinions too often drafted by your law clerks. Engage in a ritual incantation of rights that no longer had any substance. Civil rights cases, for example, as I have written elsewhere,⁸ lose overwhelmingly no

⁷ The debate about the “vanishing trial” has graced the pages of many books, from academic literature to litigation treatises. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 468 (2004) (“[T]rials were 19.7 percent of all civil rights dispositions in 1970 and 3.8 percent in 2002.”); Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at N1 (describing decline in federal civil trials).

⁸ Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 116–23 (2012), http://www.yalelawjournal.org/pdf/1111_aau9fyvc.pdf [<http://perma.cc/JEW2-TR3H>]; Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration’s “Signature” Achievement*, in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT FIFTY (Samuel R. Bagenstos & Ellen D. Katz

matter how many times the “N-word” was uttered, or how often the woman was called a “bitch.” You have a right to x or y (e.g., a right to suppress evidence illegally obtained, not to be selectively prosecuted, to the full disclosure of exculpatory evidence, etc.); it was just that the judge just never saw a set of facts that would qualify as a violation.

Use the doctrines in criminal cases that enabled ducking—avoiding a remedy for any violation of the law. If you find a constitutional violation, say it was harmless, the officer’s actions were made in good faith; indulge in balancing tests that invariably muddy the analysis. While sometimes the approach was entirely fair, there was a risk: The habit of excusing errors over and over again made courts unable to see them when they occurred. It sounded like justice but it was not just.

Apply the Federal Sentencing Guidelines in a way that discourages litigating anything, from discovery disputes to constitutional issues. For example, some judges make it clear that any motion to suppress would lead the defendant to lose the benefit of the “acceptance of responsibility” deduction under the Guidelines,⁹ a deduction which might lower his sentence. Or cut the bills of appointed defense counsel for having the temerity to prepare a defense rather than proceed immediately to plea and sentencing. Follow Sentencing Guidelines when you didn’t have to, when the courts of appeals affirm virtually all of the lower court sentences since the Supreme Court’s decision in *United States v. Booker*¹⁰ so long as the Guidelines are correctly “computed,” even if they are not actually followed in the sentence the judge imposes. In fact, apply the Guidelines even when they resulted in sentences that nearly everyone agrees were excessive. Guideline sentencing was surely more efficient; you had only to, as the NPR stock market commentator says, “do the numbers.”¹¹

Over all, indulge in the mythology of “no choice.” Write as if procedural decisions did not involve a selection among competing issues, as if procedural rules were self-executing. In civil rights cases, in sentencing, I heard respected colleagues tell me, “They had no choice to do x or y ,” or, “the law required this result.” They had no choice but to grant

eds.) (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406671 [<http://perma.cc/PBQ9-9DRE>].

⁹ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2014).

¹⁰ 543 U.S. 220 (2005). See U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, pt. A, at 111 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf [<http://perma.cc/GBR8-2BL7>] (“Since *Booker*, where the Court anticipated that appellate review would tend to ‘iron out’ sentencing differences, the role of appellate review remains unclear, the standards inconsistent, and its effectiveness in achieving uniformity in sentencing is increasingly questionable.”).

¹¹ See, e.g., *Marketplace: Economic Anxiety*, AM. PUB. MEDIA (Oct. 26, 2015) (downloaded using iTunes) (a morning report on the U.S. economy hosted by Kai Ryssdal).

summary judgment in this discrimination case or that civil rights case—this was so even when the case concerned ambiguous concepts like “discriminatory animus” or complex circumstantial proof.¹² The law, they insisted, compelled them to dismiss this case on the pleadings, or to impose this or that sentence. Robert Cover, speaking of the antislavery judges who enforced the Fugitive Slave Act rigorously, described this as the “judicial can’t” (as distinguished from “judicial cant”).¹³

Surely there were instances in which a judge had no choice. The decisional and statutory law had changed dramatically, especially in areas I cared about, from the time I started practicing until I became a judge. A more conservative Supreme Court had curtailed civil rights, habeas protection, and sure criminal constitutional procedure. Yet, even so, under the same circumstances in which colleagues felt compelled, I experienced choice.

I experienced choice on the ministerial level: How much time was I to give to this case? Do I schedule an evidentiary hearing or legal argument? Would I allow a reply brief or shut down the debate? Was it at the top of the pile or the bottom? Would I draft the decision or allow the clerks to do it, when they had no sense of the context of the law, or send it to a magistrate who did not have life tenure and was more likely to be more cautious than I was? *When* you decide affects *what* you decide—in a deliberative pretrial setting, after a hearing or on the papers, or in the midst of a trial with a jury impatiently waiting.¹⁴ If you don’t give the lawyers the

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Discrimination cases are about intent—in the language of the statute, whether an action was taken “because of” race or gender bias. Proof of intent is rarely direct. It is usually circumstantial, even multidetermined. In tort or contract cases, contests about intent require jury trials. Judges recognize that divining a person’s intent is messy and complex and that this issue usually involves a material dispute of fact for a jury to decide. Employment discrimination cases, in contrast, are typically resolved on summary judgment, although discriminatory intent may be more difficult to identify on a cold record than is the intent of a contract’s drafters or a putative tortfeasor’s state of mind.

Gertner, *Losers’ Rules*, *supra* note 8, at 112 (footnotes omitted). *See generally* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (discussing how courts will “slice and dice” the evidence to fit it into the existing summary judgment standards).

¹³ Martha L. Minow, *Judging Inside Out*, 61 U. COLO. L. REV. 795, 800 (1990) (referring to “moments when a judge experiences a barrier against doing even what he thinks is right” (citing ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975))).

¹⁴ Judicial decisionmaking in an ordinary busy trial court, federal or state, surely resembles decisionmaking in other contexts under circumstances of uncertainty and with limited information. The circumstances under which that decisionmaking is structured—how rushed, how deliberative, how much information—plainly affects the outcome. *See generally* Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (presenting an empirical study of the impact of various cognitive illusions on judicial decisionmaking); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (describing biases that result from the use of different heuristics).

time to develop the facts, you, the judge, will never hear them. If you don't enable those without access to the evidence time to get it, they will lose. Judicial shortcuts, procedural rules, affected not just the speed of justice, but the quality. Efficiency was not neutral; it affected outcomes.¹⁵

And I experienced choice on the substantive level: What legal concepts to apply? When was I satisfied with the research? How often did a judge want to say, as I often did, "There may well be district cases that say *x*, but they make no sense"? I would critique the work of law clerks who just picked out quotes from Westlaw, the computerized legal research system, out of context, and then served them to judges who repeated them over and over again in their decisions that made less and less sense. It was like the child's game of telephone: the hollow repetition of words until the meaning and context are lost.

Choice was everywhere, as Judge Cardozo described: "There is nothing that can relieve us of 'the pain of choosing at every step.'"¹⁶ And this was so even with decisions that appeared to be "only procedural."¹⁷ You chose efficiency over access to justice; you chose expedition over a more complete understanding of the case; you chose case management over principled decisionmaking.

But don't get me wrong. I understood the importance of efficiency; justice delayed, as they said, could well be justice denied. But this was not the only value, not the only goal to emulate. (I am reminded of a program in which another judge and I were teaching judges of the former Soviet Union about Western concepts of the judicial function. The judge who presented before I did announced to the assembled group, "The most important thing is—to be on time." I passed her a note: "Actually," I said, "I think they know how to be on time. It is the justice part that may need work.") Meaningful access to justice, a judge who will look deeply into your case and issue a reasoned decision, not just single word "denied," was also critical.

This was especially true in public rights litigation, the area in which I had spent much of my professional career. Public rights litigation has law

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Even mechanical changes in how cases are processed—how they are guided through administrative screens, how much oral argument is allowed (if any), whether staff attorneys or law clerks are assigned to them, whether the deciding panel has any visiting judges, and so forth—might affect how close they come to a reversal.

Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1118 (2011).

¹⁶ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 67 (1924).

¹⁷ See Elizabeth M. Schneider & Nancy Gertner, "Only Procedural": *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2013).

reform as its goal and not merely the compensation of plaintiffs. It may be about vindicating rights, the right to be free from employment discrimination or police misconduct, or it may be about the enforcement of the environmental laws. But despite its public interest purpose, it plays out in the context of private adjudication, brought by “private attorneys general,” who assume the role of the state in securing compliance with the laws. Through a reasoned opinion, the court “explicate[s] and give[s] force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”¹⁸ Opinions articulate the norms of employment discrimination; they define the limits of police conduct or the boundaries of prison discipline. When the judge ducks, avoids, or evades, the development of the substantive law is necessarily stalled.

III. WHY IS THIS HAPPENING?

What had happened here? Were my observations anecdotal, unique to my judicial experience, or did something happen to the federal bench in the '90s?

I can only speculate. My research is still preliminary. The debate in the media and in political campaigns about judicial activism may have played a role. The concept of “judicial activism” is incoherent—or worse—pernicious. Judges are “activist” when the speaker disagrees with the case’s outcome. Otherwise, the judge is “fair and meticulous.” The activist debate, conducted decibels louder than it should, affected judging. Too often the fear of criticism, I suspected, led judges to avoid decisionmaking at all. And this was especially so when ethical rules precluded a judge from responding to the criticism.¹⁹

The message on the bench matched the message the judges received when they were selected. A judicial selection process now so divisive encourages the selection of judges who have perfected the art of avoiding controversy. If the judge wants to go up the judicial ladder, from magistrate judge to district court, from the district court to the appellate court, he or she has every incentive to do so.

While the campaign to change civil litigation that gained traction with Newt Gingrich’s “Contract with America” in the 1980s was not immediately successful in effecting radical changes in the tort system, it surely contributed to a change in the legal discourse. During most of my

¹⁸ Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984).

¹⁹ See Nancy Gertner, *Remarks of Hon. Nancy Gertner*, 64 N.Y.U. ANN. SURV. AM. L. 449 (2009) (describing the impact of ABA rules limiting judges’ ability to respond to criticism).

tenure as a judge, the predominant concern about modern litigation was not access to justice for the many without counsel, or for those whose claims were excluded by increasingly rigid or rigidly enforced procedural rules, but rather the problem of nuisance suits against corporations, with high costs of discovery (particularly e-discovery) that pressured well-heeled defendants to settle.²⁰

A burgeoning judicial bureaucracy, in response to the belief—potentially overblown in some districts but not all—of overwhelming caseloads, led to “managerial judging,” where judging meant only moving the cases and engaging in dispute resolution.²¹ It contributed to the pressure to dispose of cases earlier and earlier, without jury trials, when information was limited, and when the judge had little else but his or her preconceptions to go on.

Of course, the concerns about the costs of litigation and delay were not completely illegitimate, but they did not apply across litigation categories and across jurisdictions (Massachusetts and the District of Columbia, for example, had among the lowest number of cases per judge). Nor did concerns about cost and delay apply in the individual discrimination cases, to habeas corpus, or to prisoner’s rights cases.

Professor Harold Koh of Yale Law School put it best: “When you cannot measure what is important, you tend to make important what you can measure.”²² We can measure the numbers of cases resolved, but not the significance of the work or the quality of the judging. We can measure how quickly cases are closed, but surely not whether there was a fair resolution. With the sole exception of recent cases in which defendants have been exonerated through DNA testing, judging has no meaningful feedback loop, no way of knowing if these are just outcomes. Closing a case, dismissing it, is its own reward.

IV. RESISTING THE PRESSURES

What did I do? I resisted these pressures. I was profoundly uncomfortable with duck, avoid, evade.

If I had a choice, I would err on the side of allowing a case to proceed to trial, such as the case of the man whose arm was injured. If I had a

²⁰ See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (presenting 2009 data from the Federal Judicial Center refuting the Supreme Court’s assumption that new pleading rules were necessary to address excessive discovery costs and coerced settlements).

²¹ See Resnik, *supra* note 5.

²² Harold Hongju Koh, Keynote Address, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1529 (2014).

choice because the law allowed the case to proceed or be dismissed, I would get to the merits.

And I wrote decisions. I wrote hundreds and hundreds of opinions for publication, even when I did not have to. I wrote to explain what I decided to the public I served. I wrote simply, taking pains not to hide behind legalese. (The first three or four pages of every decision was in effect a press release.) I wrote even when I was compelled to do something with which I disagreed, when I was in effect compelled to dismiss a case or sentence someone to a ridiculous term. I wrote precisely because I wanted to make certain that my years as an advocate would not improperly affect my judging. By making my struggles with my values transparent, I would hope to limit them.

I wrote when the result didn't make sense in order to critique the formulaic responses that enabled it. (One judge asked me why I had all the interesting cases. I didn't. I had the same caseload as all the others.) I wrote after the last 5-4 decision of the Supreme Court to say out loud, this decision is difficult to follow. I raised questions about whether courts were obliged to follow the letter of a divided decision, or read the tea leaves and predict the direction the court is likely to go.

I was so concerned with judges not writing opinions that my first essay after leaving the bench was called *Losers' Rules*,²³ addressing the structural impact of a district court admonished not to write opinions. In *Losers' Rules*, I decried the fact that judges were pressured to write opinions only when granting a defendant summary judgment in an employment case, and not when denying it. As I described it:

When the defendant successfully moves for summary judgment in a discrimination case, the case is over. Under Rule 56 of the Federal Rules of Civil Procedure, the judge must "state on the record the reasons for granting or 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. Of course, nothing prevents the judge from writing a formal decision, but given the caseload pressures, few federal judges do. . . .

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,

²³ Gertner, *Losers' Rules*, *supra* note 8.

the odds are good that the circuit court will affirm the district court's pessimistic assessment of the plaintiff's case.²⁴

Over time, precedent gets more and more one-sided. Even worse, the way judges view these cases fundamentally changes. "If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial."²⁵ The ostensibly neutral case management admonition—"don't write an opinion unless you have to"—had a real world impact on the substantive direction of the law.

So I wrote opinions when I denied summary judgment, trying to describe when the evidence passed muster, and not simply when it did not.²⁶ A recent decision of the EEOC extending the civil rights laws to gays and lesbians²⁷ was based in part on a 2002 decision of mine in a case that could have easily have been dismissed based on case after case that intoned: the civil rights laws do not cover homosexuality.²⁸ If I had said that—and only that—following legions of cases in which the issue was not examined or badly briefed, I would have been affirmed by an appellate court facing similar pressures to duck, avoid, and evade.

And in the area that was the most painful, sentencing, I wrote opinions about the Federal Sentencing Guidelines, distinguishing them when I thought appropriate, or decrying them, trying to create a common law of sentencing. (Many of these decisions, post-*Booker*, are now accepted legal principles.) In effect, I tried to create a common law of sentencing in the interstices of an onerous sentencing system.

In fact, I kept track of my sentences. If the public were concerned about disparity, I would write to show others what my reasoning was; perhaps they would follow my lead. And I would be internally consistent—

²⁴ *Id.* at 113–14 (footnotes omitted).

²⁵ *Id.* at 115.

²⁶ *See, e.g.,* *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 334–39 (D. Mass. 2011) (concluding that genuine issues of material fact existed, distinguishing the "Stray Remarks Doctrine," which was cited in case after case, granting summary judgment); *Chao v. Ballista*, 630 F. Supp. 2d 170, 177–78 (D. Mass. 2009) (concluding that the plaintiff had stated an Eighth Amendment claim for supervisory liability when the subordinate engaged in between 50 and 100 incidents of sexual contact over a year, among other facts, when countless other courts had simply denied the claim without explanation).

²⁷ *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16, 2015). The decision quoted from my decision in *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), identifying the extent to which discrimination against women and men derives from stereotyping about what "real men" and "real women" are supposed to do and say. In effect, discrimination against homosexuals, I suggested in 2002, has the same genesis, and should lead to the same result.

²⁸ *Centola*, 183 F. Supp. 2d at 408.

what I did on day one, I compared with what I did on my last day in office—my reasoning, the factors I considered, the standards I interpreted. I kept track of where the people I sentenced were—what happened to them. I kept track so that I could try to understand what worked, so that the process would not be automatic, so that I would not lose my critical perspective, or my humanity.

I wish I had written more—hence the title of this talk.

V. OPINIONS I SHOULD HAVE WRITTEN

I wish I had written more in the areas of the law in which trial judges are obliged to make critical decisions sometimes in less-than-ideal conditions—like evidentiary rulings made in the heat of a trial or jury instructions at its close.²⁹ When the court makes a ruling and explains it in open court, or worse, doesn't explain it, just announces “sustained” or “overruled,” lawyers have to depend upon post-trial motions before the trial court, if any are filed, or appellate court recitations to explain what happened. And with all respect to my colleagues on the appeals court, there were more times than I could count when the First Circuit's account of my trial didn't remotely match what I had experienced.³⁰

I wish I had written opinions describing why I crafted the jury instructions the way I did, rather than leaving it to the appeals courts to reconstruct—and often mangle—my rationale. I produced written instructions for juries, in effect a pamphlet with a table of contents. I submitted a draft of those instructions to counsel, inviting them not only to look at the content, but the order and the language. I conducted elaborate hearings on the record and described the choices I made in open court, but my words had limited precedential value. I wish I had written more.

²⁹ In post-conviction cases, mistrials, or death penalty cases where I made the time for a more deliberative hearing, I was able to write opinions on evidence. *See, e.g.*, *United States v. Hebshie*, 754 F. Supp. 2d 89, 112–15 (D. Mass. 2010) (finding defense counsel ineffective in handling arson evidence); *United States v. Green*, 405 F. Supp. 2d 104, 109 (D. Mass. 2005) (“The more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more.”); *United States v. Hines*, 55 F. Supp. 2d 62, 67–73 (D. Mass. 1999) (limiting admissibility of expert handwriting comparison testimony, while allowing in testimony from an expert psychologist on eyewitness identification).

³⁰ In a stark example, *United States v. Pena*, 586 F. 3d 105 (1st Cir. 2009), *aff'g* No. 1:05-cr-1-332-NG (D. Mass. 2008), the First Circuit affirmed me for making the decision not to hold a hearing on fingerprint identification when, in fact, I had made the opposite decision, scheduling a hearing, requiring the presence of the Government's witnesses, and inviting the defendant to cross examine! Worse yet, the court affirmed my “findings” on the bona fides of fingerprint analysis when I made no such findings, and indeed, outlined for the lawyer the areas of the science, which were subject to challenge. For a description of how it happened that the court got it so wrong, see Nancy Gertner, *Commentary on The Need For A Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 789 (2011).

I encouraged lawyers to pretry the issues in motions before me in advance of trial, precisely to avoid the cognitive pressures of making decisions when the jury is sitting in the courtroom, impatient to proceed with the case.³¹ And this was especially true in criminal cases. Ruling “by the seat of one’s pants” effectively meant erring on the side of the government’s position in forensic cases, which as recent innocence cases and the report of the National Academy of Science³² suggest, have simply been wrong.³³ I reached the point that I issued a procedural order, requiring a pretrial hearing in cases involving ballistics evidence, in order to make certain that the issues were at least aired in a careful way. The order provided that in the wake of the NAS Report, admissibility of trace evidence “ought not to be presumed; that it has to be carefully examined in each case, and tested in the light of the NAS concerns, the concerns of *Daubert/Kumho* case law, and Rule 702 of the Federal Rules of Evidence.”³⁴

Then there are the opinions that I would like to rewrite. In *United States v. Green*,³⁵ I criticized a staggeringly inadequate expert presentation on ballistics testimony in a case with a potential death penalty, but instead of excluding it, I limited the testimony, noting:

I reluctantly come to the above conclusion [limiting the testimony but not excluding it] because of my confidence that any other decision will be rejected by appellate courts in light of precedents across the country, regardless of the findings I have made. While I recognize that the *Daubert–Kumho* standard does not require the illusory perfection of a television show (CSI, this wasn’t), when liberty hangs in the balance—and, in the case of the defendants facing the death penalty, life itself—the standards should be higher than were met in this case, and than have been imposed across the country. The more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more.³⁶

I wish I had written more sentencing opinions, even more than I did. The real sentencing law post-*Booker* is being created by the district courts, struggling with an advisory guideline regime. But while the Guidelines are supposed to be advisory, without an alternative framework for sentencing,

³¹ See *supra* note 14.

³² NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 85–110 (2009).

³³ See Gertner, *supra* note 30, at 790.

³⁴ Procedural Order: Trace Evidence at 3, *United States v. Oliveiran*, No. 1:08-cr-10104-NG (D. Mass. Mar. 8, 2010).

³⁵ 405 F. Supp. 2d 104 (D. Mass. 2005).

³⁶ *Id.* at 109 (footnote omitted).

without a careful Guideline critique, Guideline sentencing provides the path of least resistance for the busy judge, a set of numbers in which to “anchor” their decision.³⁷ The appellate courts are doing little more than checking the lower courts’ math—did you compute the numbers correctly—and if the computations are correct, affirming virtually every sentence in decisions that provide little guidance or coherence. Some district court judges are writing about what they are doing—Judges Mark Bennett, Lyn Adelman, John Gleason, Jack Weinstein, to name a few—but their decisions are not widely known. (The United States Sentencing Commission only posts the decisions of the appellate courts on its website, decisions that say next to nothing.) I wish I had done more to critique preposterous mandatory minimum sentences, a Guideline structure that treated alike the man who dealt drugs while he was living in his car, with the man who dealt drugs to buy a car, that trivialized factors that affected recidivism (such as family circumstances or drug addiction), and emphasized factors that did not (such as drug quantity).

When I left the bench I promised myself that I would speak about these issues—the passive bench; the pressures to duck, avoid, and evade; the extent to which civil rights laws are being judicially overturned; and especially, judicial complicity in a criminal justice system that is so clearly broken. And I shall.

³⁷ Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006).