

## HALLOWS LECTURE

MARQUETTE UNIVERSITY LAW SCHOOL  
APRIL 14, 2009

# BEYOND DECISIONAL TEMPLATES: THE ROLE OF IMAGINATIVE JUSTICE IN THE TRIAL COURT

THE HONORABLE SARAH EVANS BARKER\*

Introduction by Dean Joseph D. Kearney

*It is my privilege as dean to welcome you to our annual Hallows Lecture. This lecture stands in memory of E. Harold Hallows, a member of the Wisconsin Supreme Court from 1958 to 1974 (and chief justice during the final six of those years). That is an impressive run on a state supreme court. But it is not all that moved the Law School to create this lecture. For E. Harold Hallows was, for an even much longer time, a professor here at Marquette University Law School. For twenty-eight years—from 1930, the year he graduated from the University of Chicago Law School, to 1958, the year he was appointed to the court, he was Professor Hallows. Professor Hallows taught a generation of Marquette law students courses such as Equity and Equity II, even as he practiced law in Milwaukee and helped to lead various law-reform efforts. In short, E. Harold Hallows was a practitioner and a professor, of energy and distinction, even before his service as a justice.*

*How appropriate, then, that more than a decade ago the Law School determined to create an annual opportunity, in Chief Justice Hallows's memory, for a distinguished jurist to spend a day or two within the Law School community today. Truly the Hallows Lecture is a centerpiece of our academic year. I am especially pleased that two of the Hallows Lecturers during my time as dean have elected to join us this afternoon for this year's lecture: Chief Justice Shirley Abrahamson, fresh off her reelection to the Wisconsin Supreme Court, and Judge Diane Sykes, of our Class of 1984, who, as a member of the United States Court of Appeals for the Seventh Circuit, must deeply regret that she has deprived herself of a similar opportunity to stand in further judicial elections.*

*Over the years the Hallows Lecture has thus included individuals of different judicial philosophies, state and federal judges, men and women, alumni and non-alumni. What it has not previously included is an individual who has made his (or her) career primarily as a trial judge.*

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\* District Judge, United States District Court for the Southern District of Indiana.

*Today we correct that historical oversight, in spectacular fashion, with the visit—and Hallows Lecture—of the Honorable Sarah Evans Barker, United States District Judge for the Southern District of Indiana. Judge Barker holds her undergraduate degree from Indiana University and her law degree from American University's Washington College of Law. She had a distinguished law practice in her native Indiana, serving variously as an assistant United States Attorney, a lawyer in private practice, and then the United States Attorney for the Southern District of Indiana. She was nominated to her current position by President Ronald Reagan in 1984 and confirmed by the United States Senate in short order, twenty-five years (and one month) ago to this day.*

*To state the matter simply, over the past quarter-century, Judge Barker has become one of the nation's most highly regarded federal district judges. She has presided in numerous high-profile cases, from the constitutional challenge in the 1980s brought by the American Booksellers Association and others against Indianapolis's ordinance directed at pornography, to, more recently, class-action litigation involving Bridgestone and Firestone tires, to, more recently still, the constitutional challenge to Indiana's voter-identification law. In the last of these matters, Judge Barker's ruling was upheld by the Seventh Circuit and then, last year, by the United States Supreme Court, with Justice Stevens citing Judge Barker's "comprehensive . . . opinion."*

*There is so much more that could be noted about Judge Barker's judicial service, from her past tenure as Chief Judge of the Southern District of Indiana to her leadership of her peers as the current president of the Federal Judges Association. But I wish to stand down, in favor of our hearing from a woman who has been—who is—an outstanding judge and who does us a great honor by coming to Milwaukee to deliver Marquette University Law School's Hallows Lecture. Please join me in welcoming the Honorable Sarah Evans Barker.*

I am delighted to be here this afternoon on this auspicious occasion and to see, among members of the faculty and more than a few students, so many judicial colleagues and friends dotted around this impressively large audience. Thank you all for coming. I am particularly grateful for Dean Kearney's generous and kind words of introduction. His effusions remind me of the familiar quip made years ago by Mae West, who said that "sometimes too much of a good thing is wonderful."

The Dean's introduction also put me in mind of a recent criminal trial, where I was presiding, which involved a brand-new, fledgling defense lawyer who was clearly appearing in her very first trial. That fact was made even more conspicuous by her careful effort to use just the right words for everything. Thus, in her cross examination of the government's witnesses and in her statements to me up at the bench, she always referred to her client as the "alleged defendant." Well, that gaffe was not lost on my crackerjack law clerks, so, during one of the early recesses in the proceedings, they asked, "Did you notice that, Judge—that she was referring to the defendant as the

alleged defendant?” I allowed as how I had, indeed, noticed that same thing. Whereupon, the law clerks asked, “Are you going to correct her, Judge?” And I said, “No, but if she starts referring to me as the ‘alleged Judge,’ I might have to intervene.” So I regard it as an altogether fine introduction if I am simply not referred to as an alleged something or another. I thank you, Dean, especially for that.

Allow me to remark as well on the great honor that I feel in having been invited to deliver this prestigious Hallows Lecture, knowing particularly that I follow in the footsteps of several truly extraordinary jurists who also have been accorded this privilege. When I learned that Justice Hallows, when he was a professor here at Marquette Law School, had taught Equity, I felt a special connection to him, since, when I was in law school, the only course in which I managed to pull down the top grade in the class was Equity. I thought at the time that I had a distinct advantage in terms of doing well in that class, since I had grown up in a family in northern Indiana where I was one of six children—which meant there was a lot of equity dispensed by my parents around the dinner table and elsewhere in getting us all raised properly. It is probably true that my mother deserved that award more than I did. In any event, this lectureship, which was endowed in Professor Hallows’s name, has a rich tradition associated with it, and it is both my pleasure and my honor now to be a part of that tradition and that history.

Recently, Judge Richard Posner wrote what has already become a widely read and highly acclaimed book (I describe it that way not just because he is on our court of appeals and reviews my decisions on occasion). That book is entitled *How Judges Think*.<sup>1</sup> It begins with the observation that there are pervasive, often unrealistic conceptions among the public, including even members of the legal profession within the legal academy, with regard to what judges do and, in particular, how they decide their cases.<sup>2</sup> This widespread lack of clarity, Judge Posner explains, emanates from many sources. Part of the problem is that the issues before the courts, as well as the language we use in deciding the issues, are often both arcane and esoteric. In addition, the decisional process tends to be cloaked in secrecy. It doesn’t help that judges as a group also tend to be coy and a bit cagey about what we do, Judge Posner admits.<sup>3</sup> Furthermore when decisions are “handed down,” they come without even a hint of the public relations, spokespersons, and spin that we now expect from all other fields of public endeavor. Instead, judicial decisions just arrive, naked and unarmed, like a new baby. They are accompanied by no

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1. RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

2. *Id.* at 2.

3. *Id.*

explanatory press releases, and there are no appearances on the Sunday morning talk shows from the deciding judges to explain exactly what was going on and why the particular decision got made. No surprise, then, that it is difficult for outsiders to know what happened during the decisional process. Sometimes it's even difficult for judges to fathom another judge's decisional process (and I say that kindly). So Judge Posner's book is an impressive and, I think, welcome effort to shed some light on what is really going on here.

Now, most people assume and properly expect that judges play by the rules of the judicial process—we interpret statutes and the Constitution as faithfully as we possibly can, according to our understanding of them; we follow decisional precedent fairly and closely; we issue our decisions together with carefully articulated, reasoned analyses; we operate within the procedural boundaries; and we hew closely to the ethical guidelines. Most of the time, most judges do all these things. By faithfully following these rules of the road in decision-making, judges also accomplish two added goals: they give predictability to the law, and they endow it as well with stability. Indeed, the issue of whether a newly selected judicial nominee can and will stay within established legal boundaries is one of the primary concerns that U.S. senators have when they conduct their confirmation hearings on the President's judicial nominees. One of the strongest criticisms leveled at judges arises from the perception that certain judges and certain judicial decisions have exceeded the boundaries of accepted, proper, analytical constraints. Disregard of those constraints is, of course, what gets referred to as “judicial activism,” and no one I have ever run into or read about thinks it's a good thing.

Judging in accordance with the applicable rules matters; it matters a lot, and not just to judges. There is a healthy, legitimate, valuable skepticism that runs against the notion of allowing judges to operate solely on the basis of their own discretion and their own sense of what a proper outcome should be in any particular case, even when judges are really smart and really sincere and really acting in good faith. I know for a fact that most judges work hard to fulfill our oath to uphold and defend the Constitution and to do equal justice to the rich and poor, and so forth, and the entire judiciary devotes no small amounts of time and energy to figuring out what the controlling facts are in any given case and what the rules of law are and how they must be woven together into a just outcome.

That said, there come times when in certain cases and under certain circumstances, a literal, rigid adherence to these interpretive rules yields absurd results, and in such situations, Judge Posner will tell you, judges are, in fact, compelled to *make*, rather than merely apply, the appropriate rules of law. That, briefly stated, is Judge Posner's central thesis. In such situations, he writes, judges are not only permitted to act as legislators, they are required

to do so.<sup>4</sup> To quote him: “A combination of structural and cultural factors imposes a legislative role on our judges that they cannot escape.”<sup>5</sup> “What looks to the critics of the judiciary like willfulness might actually be the good-faith performance of a vital judicial role . . . .”<sup>6</sup>

Judge Posner coins the term “legalists” to describe judges whose inflexibility prevents them from seeing that it sometimes becomes necessary to legislate from the bench, to exercise broad discretion, to make new legal policy, and to look outside conventional legal texts—statutes, constitutional provisions, and precedent—for other helpful analytical tools.<sup>7</sup> “For legalists,” he writes, “the law is an autonomous domain of knowledge and technique.”<sup>8</sup>

Now I have said earlier that “judicial activism” in the sense of simply abandoning the accepted constraints is felt by everyone to be a bad thing. Whether the territory explored by Judge Posner falls into that kind of disreputable and, indeed, dangerous activism is, however, quite another question, and that question I do not propose to address directly today. I want today to set aside the debate over whether judicial activism is ever a good thing or whether it is ever, under any circumstances, constitutionally proper or permissible for judges to act as legislators when they decide certain kinds of cases. For now, let’s just drill in Judge Posner’s territory and in doing so provisionally accept a part of his premise. Let’s accept the proposition that, at least on occasion, and in at least some cases, applying the established rules and procedures does not yield a workable, pragmatic, just outcome, and that there are some cases in which the ordinary analytical and decisional templates simply don’t work.

When judges are confronted with such situations, Judge Posner posits that “an open area” is created: a gap or an analytical space occurs where the usual decisional methods fail to yield a sufficiently nuanced, flexible, workable, and just result, and when judges find themselves needing to operate within this space, he goes on to say, they are both intellectually and legally allowed to exercise a broad form of “decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by ‘the law.’”<sup>9</sup> Judge Posner’s book is, of course, provocative, and whether he is right in finding a theoretical basis for full discretion here will, as I said, be debated. But at a minimum I think he is correct in identifying the

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4. *Id.* at 372.

5. *Id.* at 4.

6. *Id.*

7. *Id.* at 7–8.

8. *Id.* at 8.

9. *Id.* at 9.

phenomenon of “open space” and then in saying this: “How [judges] fill in the open area is the fundamental question.”<sup>10</sup> For that issue—what, in fact, happens in the “open area”—is what I want to take up in these remarks. I, too, perceive that these decisional gaps or spaces do, in fact, occur and that, in fact, it is not always clear how to fill them. So, my hope today is to throw some light on how federal *district* court judges, in contrast to Judge Posner’s focus on the appellate courts, from time to time also find themselves operating within this decisional space—this space in which something more is required of them as trial judges than a rigid or even strict adherence to the established rules and procedures.

Trial judges, I think more even than appellate judges, are not infrequently drawn into areas where something more is required in terms of their involvement and decision-making than the explicit dictates of statutes, procedural rules, and precedent would suggest. However, in the trial court, that “something more” is less a need for judicial legislation than it is a demand for what we might call “judicial imagination.” And this demand for “judicial imagination” on the part of trial judges manifests itself more as a matter of trying to arrive at the best strategies for resolving particular cases than it does as an exercise in making the legal rulings that crop up in those cases.

So this is what I would like to help you see more clearly: the amount of strategic discretion vested in trial judges which translates into opportunities for them to use their judicial imaginations is very extensive. In fact, in exercising—perhaps I should say, in enacting—that imagination, what trial court judges are able to do vastly exceeds the creative opportunities available to appellate judges. The flexibility allowed appellate judges is primarily in the form of decisional discretion, by which appellate judges are able to give broad play to their intellectual and analytical capacities. Appellate activism typically receives much closer scrutiny and generates more disapproval by the public and the media as well as the legal academy than does the less visible, strategic discretion entrusted to trial judges. But in truth, discretion and power are hardly less significant or influential or creative when applied by “the lower courts.” In fact, it might be said that it is in these “lower courts” that the most interesting and most creative, indeed, the most imaginative activity actually occurs. That might especially be said, with perfect objectivity, of course, by a “lower court” judge like myself, and the most brilliant appellate judges would, no doubt, affirm that opinion as well.

Before moving into a closer look at what I shall refer to as “imaginative justice” in the trial court, I should emphasize this: for judges, operating within

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10. *Id.*

this decisional space is absolutely, clearly, the exception and not the rule. Most cases filed in the trial courts, as well as the appellate courts, are routine squabbles for which the routine analytical and decisional approaches work just fine. The facts underlying each dispute are developed and stabilized, the appropriate procedural steps are followed, the controlling precedents are articulated and applied, and decisions are rendered. This tried-and-true approach is appropriately applied in most cases and most situations confronting the trial court judge, and, frankly, there are simply too many cases on our respective dockets to give anything other than routine attention to most of them.

So where and how does the need for this “something more” present itself? Judges are called upon to use their imaginations primarily in the non-routine situations where there is a strong need to devise solutions that more closely respond, first, to the real nature of the problems the parties have placed before them and, second, to the real goals which brought the parties to court. These are typically cases in which the law is either too limited in its reach or doesn't match the need for a solution. And the underlying “Catch-22,” of course, lies in the nature of courts as opposed to the nature of legislative bodies. The legislature can refuse to act: it's too hard and too complicated, they can say; when they don't have the votes, they can say, “Come back again in ten years, if you're still alive.” But the courts can't take a pass: if a judge refuses to resolve a case, no matter the incomplete state of the applicable law, it's time for disciplinary action against the judge.

So, judges are typically required to act, and in fulfilling that requirement, at the trial level, their role is, of course, to find honest facts and to apply the applicable law to resolve cases that arise under the Constitution and acts of Congress. To perform these tasks, trial judges sometimes become involved in the cases even before an initial pleading is filed. That can happen, for example, in certain criminal cases where prosecutors seek legal protections to obtain and preserve evidence or want search warrants, wiretaps, grand-jury subpoenas, and the like, and it can happen in civil cases when expedited pre-complaint discovery is sought. So trial judges are required to begin shepherding their cases from the very earliest stages and on through what can turn into very protracted and complex discovery processes. All sorts of motions are generated along the way that require judicial rulings, and only eventually, often after many months and sometimes years, is a final resolution hammered out, either by a trial or by settlement or in criminal cases by plea agreements.

Even such a brief overview as this reminds us of the many ways in which judges must intervene to manage and expedite the disputes before them—which is to say, it pushes into the foreground the existence of a large

operating space. The fact that cases are often highly complex, that they involve complicated and difficult underlying factual controversies concerning which the law is anything but clear, and that they also involve multiple parties located everywhere between Bangor and Honolulu, and sometimes throughout the rest of the world as well, explains why so often these cases linger so long on our dockets. Trial judges wind up literally living with these cases during the many months they repose with us, a fact which, among other things, allows us to become well acquainted with the parties as well as their lawyers.

In addition, there are huge numbers of cases that get filed with us each year—lots and lots of cases. Truly, there is no shortage of judicial business. In fact, almost every federal district court judge I know must work on tiptoes in order to keep up with the flow. At any given time on my own docket, for example, I carry approximately 500 civil and another 75 criminal cases. Recent calculations show that, nationally, trial judges alone dispose of some 98% of the 35 million cases that are resolved by both federal and state courts combined.<sup>11</sup> The Administrative Office of U.S. Courts recently released caseload statistics for the federal courts for 2008, which indicate that nearly a quarter of a million civil cases (just the civil cases) were filed last year in the federal district courts, one-eighth of which wound up going in due course up to courts of appeals.<sup>12</sup> To handle that quarter of a million civil cases, plus all the criminal cases with their Speedy Trial Act requirements, there are a total of 678 federal district court judgeships (and a total of 975 judges, including senior judges).<sup>13</sup> So trial judges in the federal system are not sitting around twiddling their thumbs.

Now, even though what I have said so far is already known to most of you, it nonetheless helps explain the environment in which judges operate. When they are confronted with a need or an opportunity to move out of the box, they can do one of two things: either help construct a practical path that will lead the parties themselves to resolve their dispute or, failing that, craft a legal result that is also practical and workable from everyone's standpoint. Those prosaic qualities of practicality and workability are very important, because it is through them that the parties perceive the legal system to be fair and therefore legitimate. What is tolerable to the parties strengthens the system, even if the process does start to look like the "I Love Lucy" candy factory assembly line.

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11. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 4 nn.14–15 (2007).

12. ADMIN. OFFICE OF THE U.S. CTS., 2008 JUDICIAL BUSINESS 13–14 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBus2008.pdf>.

13. *Id.* at 38 tbl.12.

It must be stressed again, of course, that judges are permitted to move into this mode and occupy this decisional space only when the law permits it and when the parties and the judge think it will be helpful. In short, the occasion arises when the usual templates are not working and therefore something else seems to be called for. But, when is that likely to happen? Are there identifiable circumstances or reliable markers that judges and litigants and lawyers can rely on to signal when something more is needed from the judge?

I think there are. In fact, I think I can identify five situations that tend to push the trial judge beyond the usual forms of dispute resolution—five situations that call for some measure of decisional imagination in order to bring about a workable and just result. These are things that most judges do intuitively, almost instinctively, but in the strict sense, when they move into this mode, they are moving outside the usual decisional paradigms.

First are those cases in which a disconnect exists between the facts, the law, and the perceptions of the parties. The facts go one direction, the law seems to go another direction, and the parties' expectations, even when they are on the same side in the litigation, are inconsistent and diffused. If the parties could articulate their state of mind, which they can't, they would say, "We don't know what we want, but fix it." In such a situation, the usual decisional templates will not take you to a simple, straightforward result.

Let me give you an example. A few years back, I was assigned an Eighth Amendment jail-conditions case which involved the Marion County Jail, the facility that serves Indianapolis, Indiana. It is a large metropolitan jail, which had been subjected to many years of overcrowding, inadequate funding, substandard services to the inmates, and general deterioration of the structure. The conditions were very bad—one could clearly say, inhumane—and even a five-year-old could conclude that they were, in fact, unconstitutional.

Now by the time I inherited that case, it had been on the docket of our court for nearly twenty years. The parties, as well as the community and local government, had reached a complete stalemate in terms of how to go about correcting the unconstitutional conditions. There were no public funds available to fix the place up or to build a new facility, nor was there any political will to do what was obviously required.

Eighth Amendment law is both clear and fairly well settled. When citizens are incarcerated, either as pretrial or post-trial detainees, they are entitled to have certain minimum rights protected, including the right to safe, secure, healthy surroundings. The lawyers and this judge knew the law and knew that it was not being complied with. There was no dispute over the court's finding of unconstitutional conditions.

The problem was what to do about them. How could a remedy be effected, especially in view of the fact that, as the lawsuit was framed, the only named defendant was the Marion County Sheriff? While he was by far the most cooperative and willing sheriff who had held that office during the long history of this case, he was virtually powerless by himself to effect a solution to the problems of overcrowding and inadequate dietary and health services and basic cleanliness. Although the jail was nominally the sheriff's responsibility and the court had already ruled that it was being operated in an unconstitutional way, in fact, the poor sheriff did not have the power to turn away prisoners arrested by the police, taken into custody, and delivered to him for detention, nor did he have the power or money to build a new jail or open auxiliary facilities. He also had zero capacity to allocate funds he hadn't been given in order to upgrade the food and maintenance at his jail. But technically, since he was the only named defendant in the lawsuit, he was the only person whom the court could hold in contempt for all these failures.

We held lots of hearings and lots of conferences among the lawyers, and I made periodic trips to the jail to see and smell for myself just how bad it was. But not until we decided to bring together all the primary players in local government, all the governmental officials who were, in the truest sense of the term, the real parties in interest, in an effort to elevate this mess to the point where it was being dealt with by those who could actually bring about a solution, did we begin to make headway.

Now, that was the little flash of judicial imagination, if I may say so. I had no power to summon all those people over to my court; I could only invite them and hope that somehow, based on my personal powers of persuasion, I could get everyone I needed to come sit around the conference table in my chambers all at one time to try to figure out what could be done. So, the presiding judge of the county courts was there, the member of the city council who served as chair of the criminal justice committee, the county auditor, the state prosecutor, and public defender, the county attorney, a representative from the Indiana Department of Corrections, our district's U.S. Marshal (who housed federal prisoners at the Marion County Jail), and finally, the sheriff and his jail commander and some other high-ranking members of his department. Of course, the lawyers on the case were present, along with one highly interested newspaper reporter. We essentially staged a political pow-wow. Together, starting that day and extending over the course of approximately another year, we worked to find a way solve the problem.

The key turned out to be large numbers of local arrestees who were being detained while they awaited their initial appearances. If the pace of processing those arrestees were increased, then the numbers in the jail would drop dramatically. In addition, the county was able to contract with a private

jail to provide some extra beds and space. So it was the local state court trial judges who led the way in devising procedures that kept people moving and finally resulted in detention for only the worst of each day's crop, and for that, those judges deserve great credit. Those judges also were wonderfully creative and imaginative in devising an entirely new local system. In the end, after nearly twenty-five years, a consent decree was entered and the case was closed.

Such a successful outcome would not have been achieved if only the usual litigation procedures had been pursued. In fact, during all the time that the usual procedures had been followed, they had completely failed. Was what we did judicial activism? Probably. Was it necessary? I think so. Was it defensible? Yes, and it was defensible in my opinion because we were careful to stay within the boundaries of proper judicial discretion and we did not ultimately exceed our lawful powers. Between the time of the finding of unconstitutional conditions and the subsequent finding that the sheriff was in contempt of that order, until the end when I entered the final consent decree, interestingly enough, I never issued a single other order beyond scheduling orders. And no appeal was ever taken.

The second kind of case in which this kind of judicial imagination is especially valuable occurs when the goals of the parties involved in the litigation extend beyond both the four corners of their case and the traditionally available remedies. This situation arises most often and most clearly with requests for injunctive relief. It also arises where a single violation of law, once it has been established as such, requires a more expansive remedy.

For example, a construction contractor operating as a sole proprietor fails to withhold and pay over the monies to cover union benefits for his handful of employees. The union then sues to get the monies and to pay them into their members' welfare and benefits fund. The suit is technically filed to recover the overdue payments, but what the union really wants is to get the contractor back on schedule for *future* payments. When these cases arise, the judge often has to sit down with both sides to see what arrangements can be made, given the realities of, let's say, the seasonal nature of the contractor's business or other such problems the guy is having with his business. So the judge tries to find out if there are any other arrearages and what his income stream looks like. These are essentially mediations, of course, but they are strongly affected by two factors: first, the raw, lurking power of the court to impose an unknown but possibly very unpleasant, top-down decision, if the parties don't get real, and second, the capacity of the court to recognize or suggest intelligent, practical solutions—in other words, to exercise good “judicial imagination.” It's that exercise that brings things back into balance.

I was the United States Attorney in Indianapolis years ago, when the air traffic controllers went on strike. The Department of Justice chose our district to file its request for an injunction requiring the controllers to cease their illegal strike and return to work. The judge issued the order, but no one complied with it, as is always a danger in large labor or other social actions. The air traffic controllers continued to stay away from work, and they busied their days with demonstrations and press conferences. They decorated their cars with placards and would drive them in single-line formation, caravan style, around and around the control tower. As an easily enforceable contempt sanction, the judge then ordered each controller to surrender one automobile, which vehicle was to be impounded by the U.S. Marshal for as long as the strike continued. This instantly created a large number of single-car families and a very large number of unhappy spouses and restive teenage children. In Indiana, where driving a car is regarded as a fundamental right, it was one of the most effective and imaginative contempt sanctions I have ever witnessed, both enforceable and creatively painful, and when the many spouses started complaining directly to the court about the gross unfairness of this order, we knew the strike was about to peter out.

Now this was not just imaginative, and it does not make for just a good story. The context, after all, is one in which direct judicial power failed. The court itself, using the normal tools, was in danger of being perceived as impotent. And it was in the face of this abyss that a savvy old judge came up with a sideways thrust that let everybody know the law was still there, and that it works.

We have been discussing the category of cases in which “judicial imagination” becomes valuable because the goals in some significant way extend beyond the four corners of the case or beyond the usually available remedies. Nowhere can you see this better than at a criminal sentencing hearing. The sentence should, of course, be just, reasonable, and fair, but also folded into that sentencing is the attempt to deter such offenses in the future (not only by the defendant but by others as well). Very often there is also a strong need for rehabilitation. This mix requires almost every time a huge amount of judicial imagination—of what used to be called “wisdom”—and the best judges I have known have been perceptive enough and flexible enough to fashion appropriately imaginative sentences, including very carefully crafted terms of probation or supervised release as well as considerable jail time.

There was, I think, a fundamental policy error in the prior federal-sentencing-guidelines regimen which we had in place until recently: the one-size-fits-all decisional straitjacket that was placed on judges’ discretion removed the opportunity for handcrafted outcomes and substituted for

intelligence a kind of blind mechanical fate. There are large issues of value and philosophy mixed into this, of course, but from the bench what I saw were also serious practical problems. In particular, I recall instances in which sentences were meted out and not a single person in the courtroom—not the prosecutor, not the defense counsel, not the judge, and certainly not the defendant or her family—felt that the sentence was just. In short, removing judicial imagination entirely from the criminal sentencing process debased our system of justice; in practical terms, it led to outright disrespect both for the law and the result.

The third circumstance in which judges must be particularly imaginative is when they deal with the proverbial “Big Cases.” By “big case,” I mean class actions and multidistrict litigation brought under antitrust, patent, or securities law as well as those brought under mass-tort and product-liability theories. These cases almost always entail complicated and complex case management procedures. Just getting the parties identified and organized, the legal issues framed, and the relevant evidence collected—these are huge, time-consuming tasks. A judge who, with imagination and experience and judgment, can noodle these things out and move the case ahead provides great service to the parties and to the public. The judicial role here is to guide the process, while being careful not to usurp the parties’ prerogatives in shaping, and hopefully resolving, their litigation. But in performing that critical role, the judge most often moves out onto a tree limb armed only with personal insight and accumulated understanding. There is almost no practical instruction or guidance that can be found in case law, statutes, or the rules of procedure. And in these cases, the case-management challenges very often outweigh the difficulties of resolving the mere legal merits.

Almost nine years ago, I was assigned the Ford-Firestone tire case. As you may recall, that was a product-liability multidistrict litigation. It arose out of allegations that Firestone had manufactured defective tires and that Ford had then installed them on vehicles improperly. All told, approximately 800 separate personal injury cases were filed: they came not only from around the United States, but also from several foreign jurisdictions. In addition, two accompanying product liability class actions were filed as original matters in my court and became part of the multidistrict litigation. Our first and biggest task was simply to organize the parties and the cases. We—and by this I don’t mean the royal “we,” but a whole team: myself, a magistrate judge, a special master, a courtroom deputy clerk, and my law clerks, plus a few more I shanghaied into helping us—created committees of lawyers; we developed a separate docket control system and website; we structured and oversaw the discovery process and added a procedure to resolve discovery disputes promptly; we consolidated and scheduled the motions briefings and all related

submissions; we conducted pretrial conferences, telephone conferences, and courtroom hearings as if they were repeating seasonal festivals; and, finally, we had literally hundreds of separate settlement conferences. Each legal decision we made on the pretrial motions was, of course, appealed to the Seventh Circuit, but the process barreled on; we never had the luxury of waiting for an appellate decision before moving ahead with the next steps. It was the trial-court version of crowd control at Disneyland.

At every juncture in this Big Case, we were on our own in terms of developing and executing a strategy. Beyond the Manual for Complex Litigation, there were no templates. We made it up as we went. Was that judicial activism? Some people might call it that. But did it work? And more importantly, did it prevent our federal judicial system in this high-profile instance from collapsing into a diffuse arbitrariness that would have caused people to lose faith in what we were doing? I believe so. After nine years, I have today approximately ten of these Ford-Firestone cases still pending, all of which were only recent referrals to my docket by the MDL panel, so those came to us well after the vast majority of the original cases had been resolved. Most of those resolutions, you may be interested to know, came through negotiated settlement conferences or court-ordered dismissals on procedural grounds.

There are two final situations I will touch on only briefly as I round out my five sets of circumstances in which a premium is placed on the trial judge's discretionary powers and judicial imagination. Number four occurs when judges find it necessary to exercise the contempt powers—in other words, either to punish or correct conduct that disrupts or threatens to disrupt the court proceedings, or to sanction offenders when the court's orders have been violated. I can tell you from troublesome, first-hand experience that these often ticklish, sometimes volatile occasions call for judicial discretion a la mode. The judge here acts only to vindicate the court's authority, so whatever sanctions are imposed have to be surgical: the aim is to secure compliance with previously issued court orders or to right the behavioral balance among the participants in open court, but go no further. The law says what a judge can do in these circumstances, but not how to do it. There is a great deal both emotionally and intellectually at play here. What language does the judge use? What tone does the judge employ? Precisely how has the offending conduct played out in the presence of the court—how did it impede or disrupt the proceedings? How exactly should the response be crafted? The only effective guides on which a judge can reliably draw in dealing with contempt are a strong sense of self-restraint coupled with the creativity to craft a response that is, as the Goldilocks story put it, “not too hot, not too

cold, just right.” The object, after all, is de-escalation with compliance, as opposed to carpet bombing for the sheer fun of it.

Fifth and finally, a special need for judicial imagination arises in public and political cases. Often these cases come in surrounded by a storm—the issues are charged and subject to hot public debate. This means that beyond the need to articulate a legal analysis carefully and to apply the law properly, the judge must somehow also grapple with a serious extra-legal imperative: the need to bring the public along—the need to give the public a clearer, fuller picture of the legal dimensions of the dispute. Often, when the media have distorted or have failed themselves to understand the true nature of the legal issues, the court needs to play an educational role as well as a decisional one. Election-law cases and voting disputes are good examples here. First Amendment speech and religion cases, excessive-force or search-and-seizure issues, governmental regulation of various benefit programs such as Medicaid, school-law and education-related conflicts, jail-conditions cases—all of these can provoke free-floating, needlessly unbalanced public reaction. If we are to maintain basic respect for the judicial system, not to mention the rule of law, the courts in these types of cases need considerable latitude—discretionary space—for ad hoc adjustments that technically extend beyond the mere legal merits.

Thus, it has been my practice to schedule oral arguments on motions for summary judgment in these kinds of cases, in part to allow the public to have a window into the arguments and counter-arguments involved in the case. When a case needs to be decided according to a larger timetable, such as the effective date of the statute under review or prior to an election deadline, I do what I need to do to get my ruling out in a timely fashion, which includes time for an appeal as well. Whether to allow the filing of amicus briefs and by whom are also decisions that crop up in public and political cases and are entrusted to the sound discretion of the trial judge.

Now let me at least try to bring all of this together. Jerome Frank, the prominent Second Circuit judge and legal-realist scholar, some eighty years ago wrote something that accurately reflects the facts of life then and now, but that also admits a symptom of dis-ease, a state of unhealthiness about the judicial process: “[J]ustice,” he said, “depends on a creative judiciary. But the compulsion to make appearances deny the fact of judicial innovation and individualization means that the most important task of the judge must be done in a sneaking, hole-in-corner manner. The judicial genius must do his work on the sly . . . .”<sup>14</sup>

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14. JEROME FRANK, *LAW AND THE MODERN MIND* 152 (Transaction Publishing 2008) (1930).

In this lecture this evening, in an effort to demonstrate the way trial judges think and what trial judges are tasked with doing, I admittedly have used a variety of terms which I have left undefined: judicial imagination, discretion, wise discretion (which, of course, also implies unwise discretion), decisional gap, creativity, activism. I've also drawn upon some of Judge Posner's terms: "legislation," "open area," and so forth. The lack of definition by me is intentional because it is significant. It reflects very accurately the current state of affairs when it comes to the process of judicial decision making—practical necessity combined with theoretical confusion—and that combination can create the uncomfortable feeling of sneaking around.

You can see this situation in the five examples I have described for you of imaginative adjudication in the federal district courts. All of the cases, all of these situations, move the district court judge into decisional territory in which the usual props and guy wires are absent. This is Judge Posner's "open area" of judicial decision-making. At the appellate level, the judge, as a "constrained pragmatist," to use another of his terms, enjoys a certain amount of permission to "legislate," or at least to reduce to specific words in a public, innovative, enforceable document, a workable and just result.<sup>15</sup>

But the problems facing the district court are usually quite different. There, it is not so much a matter of judicial "legislation"; there, the requirement is more for what I have called judicial "imagination." As I have tried to make clear, there is a vast array of circumstances in which trial judges must problem-solve where the only resources they have to draw upon are their own sense of judicial discretion and their own judicial creativity. The usual guides—statutes, precedents, regulations, the Constitution, even well-established common-law principles—are missing in action. The judge appears to be standing out there on some hill all alone, surrounded by the fog and din of battle, doing the best he or she can under the circumstances.

But here is the point I want to make: standing alone does not mean standing alone and free. Even when the trial judge acts in the "open area," there are true constraints on her decisional powers. When the usual or traditional guy wires disappear from the process, that does not mean that the judge floats off into outer space. Like astronauts performing their space walks far beyond earth's gravitational pull, judges too remain tethered to the mother ship if they hope to survive the experience. The notion that there is some area of complete decisional freedom where judges are permitted to act out their libertine subjective preferences is a silly and uninformed illusion.

So what are the constraints on trial judges when they exercise these discretionary powers? Certainly, the most important one is the rule of law,

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15. POSNER, *supra* note 1, at 13.

which provides the fundamental backdrop. This is, after all, a legal process, not political science or sociology or even economics (I say with particular deference to Judge Posner). The trial judge's actions have to conform to the rule of law, but also have to pass muster with the parties and the public and the appellate panels. I would put these latter requirements loosely in a category called "cultural restraints." It would not pass muster at a contempt hearing, for example, if I took off my shoe and threw it dramatically at the offender as an expression of judicial disrespect.

Besides cultural restraints, there are also important practical parameters: the actions taken by a judge have to be enforceable—they have to work, to be realistic and within the reach of the court's actual powers. The people on the receiving end of the court's orders have to know precisely what they are being required to do, and if they don't do it voluntarily, the trial judge has to be able to make them do it, often with the help of the United States Marshal. Finally, not only do the exercises of discretion and imagination in the trial court have to be legal, practical, and within cultural norms, they have to stay within the four corners of the case before the court—they have to be about the particular problems the court is being asked to solve. They are, what I would call, "case dependent."

Let me conclude, then, with what I hope you will receive as some challenges that arise from the (admittedly one-sided) discussion we have been having here. We know for a fact, despite the polarizing views about judicial activism, as well as the charges of judicial activism that get levied at certain judges and certain decisions, most of which clearly fall wide of the mark, that no judicial system can exist in good health and function well or be long supported by the public without there being substantial space for judicial discretion. We know that, without judicial discretion, the American judiciary would degenerate slowly into one more example of unresponsive and generally impotent bureaucracy. Indeed, you can see evidence of this in certain other judicial systems around the world. We know that the exercise of discretion is far more constrained than casual glance would perceive it to be. And yet we also know that, as critical a role as discretion or imagination plays in the decisional process, it continues, sometimes even within the judiciary but certainly outside it, to be dogged by the sense that what is going on is furtive and sneaky and not fully legitimate.

So here are my challenges to you: could those of you who are law professors focus more scholarly attention on the actual operation of creative, legitimate judicial discretion—the need for it as well as the invisible constraints upon it? We not only need honest, open recognition of this sustaining and often life-giving function, but also some well-founded scholarly attention given to theories of creative discretion which are

predicated on the real necessities that drive it. Perhaps you could focus on “best practices” in this area of judicial decision-making; but to find them and recognize them as such, you will have to get underneath the case law to see what is really going on. During class discussions with your students, perhaps you could focus their attentions now and then on the “open spaces” that are presented to judges as decisional opportunities, discussing with them the creative, discretionary options that are, or are not, available to fill those spaces, including why judges and lawyers should or should not go in certain directions in certain situations. That would provide students with at least a rudimentary vision of what a creative and fully functioning judiciary looks like.

As for those of you who are practicing attorneys, perhaps you could, with greater intentionality, help spot those spaces and help fill them by suggesting ways to the judges that their discretion could be more effectively exercised. Some of the most successful discretionary strokes I have made during my career have been made in consultation—indeed, virtually in tandem—with highly creative lawyers who were appearing before me.

Next to last, let me suggest that law schools devote some thought and attention to finding ways to develop continuing-education curricula for judges on this subject. Remember, we are talking here about underground matters—things buried in reticence—and the primary way judges now learn about them is through on-the-job training (you might say “trial and error”).

Finally, let me express my strong hope that all of us who share this calling to be members of the legal profession look for and use whatever opportunities present themselves—some which will no doubt be modest, some more substantial and conspicuous—to help the public understand that in the long run, judicial imagination—properly shaped and properly grounded and properly exercised—is very much in the public interest. This is the biggest challenge of all, of course, but without some success on this front, the risk is that much of what is best and most valuable about our system of justice will fall victim to the lack of public understanding and public acceptance.

I want to say again in closing what a great honor it has been for me to be with you this evening and to have the opportunity to talk about serious things. Thank you very much.