Hallows Lecture

The Role of Imaginative Justice

The Hon. Sarah Evans Barker, United States District Judge for the Southern District of Indiana and one of the nation's most highly regarded federal district judges, gave the 2009 Hallows Lecture at Marquette University Law School. In the lecture, "Beyond Decisional Templates: The Role of Imaginative Justice in the Trial Court," she presented her thoughts on a 2008 book, *How Judges Think*, by the Hon. Richard Posner of the United States Court of Appeals for the Seventh Circuit. In the book, Posner suggests that there are instances when deciding a case in the best manner requires a judge to do "something more" than what is conventional. Judge Posner refers to those cases as falling in "open spaces" in the law. The full text of Judge Barker's lecture can be found at 92 Marq. L. Rev. 667. This is an excerpt.

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.

I should emphasize this: for judges, operating within 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 nonroutine 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 that 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. . . .

[T]here 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, 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."

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. . . . ■

Nies Lecture

The Copyright Act of 2026

The annual Helen Wilson Nies Lecture on intellectual property law was recently delivered by Jessica Litman, the John F. Nickoll Professor of Law and Professor of Information at the University of Michigan. Professor Litman's Nies Lecture was entitled "The Copyright Act of 2026." The full text, including footnotes, appears at 13 Marq. Intell. Prop. L. Rev. 249. This excerpt begins after Professor Litman has posited that the goals of copyright should be to nurture the creation, dissemination, and enjoyment of works of authorship.

Those are general goals that should shape the way that copyright law rewards creativity and investment in creative endeavors. I find it easy to imagine a variety of different new copyright laws that would meet those goals. Every few years, I ask all my copyright students to try to write one, and they've come up with very useful and very different ways of doing it.

When copyright lawyers and copyright scholars sit down at real tables in real conference rooms and try to talk about reforming the copyright law, though, everything is much more difficult. Copyright scholars have, by and large, no constituency and no political clout, so folks are going to listen to us only if they feel we have something worthwhile to say. Recently, as I've said, the view of much of the copyright bar is that we don't. Indeed, I'll go further, and say that at least some highly respected copyright lawyers have