Unretiring Thoughts from a Retiring Criminal Defense Lawyer

How Healthy Is the Rule of Law?

Ellen Henak's career as a lawyer began literally with a splash of mud. Now, as she is ending a distinguished career specializing in criminal defense appellate work, she worries that such work is getting splashed with mud, figuratively speaking. Her critique is measured but forthright.

She remains committed to the values of her work and does not regret her career path. But one factor in her decision to retire was that "the developments in the law were starting to make me doubt whether there really was a rule of law."

Henak didn't plan on being a criminal defense attorney in Wisconsin. But she ended up as a public defender in Milwaukee before joining her husband, Robert, also a well-known defense lawyer, in the Henak Law Office. Among the other ways she has served the legal profession is as a long-time adjunct professor at Marquette Law School, teaching appellate advocacy.

As she heads into retirement—she is no longer teaching as an adjunct professor, but finishing work on her cases is a more gradual process—Henak sat down with the *Marquette Lawyer* for a sort of "exit interview." The conversation ranged over her career and how she believes the legal system has changed. Let's start at the beginning, if briefly.

Entering the Profession and Coming to Wisconsin

In one of the pivotal "accidents" in her career, Henak applied in 1983 to be a clerk for a justice of the New Jersey Supreme Court, after graduating from the New York University School of Law. She was scheduled for a job interview with the justice at his home office.

"He forgot I was coming," Henak said. "I had gotten off the train in Morristown, New Jersey, and a big truck promptly went by, completely splattering me with mud. It didn't matter that I had an umbrella, because it came up the other direction.

"So I show up at his house. He's leaving to go to the grocery store, and I'm standing there, drenched and full of mud. I had kind of gone, 'Oh, well, I'm not getting this job.' I have no idea what I ended up saying to him because I had written it off completely. And I didn't get that job, but when a new justice came, the first justice handed my résumé to her." And Henak was hired.

After the clerkship ended, she looked for positions in New York City. Her goal was to work in litigation. She interviewed with the City of New York. "They wanted me to do their more corporate/transactional type stuff," Henak said. "When I interviewed, I had a cold, and I'm a Midwesterner. This came across as me being not aggressive enough for litigation. But they did want to hire me. So they called me back. Here we go accidental again. My father and I came up with this strategy. I came in for a second interview, we had a nice little chat, and I said, 'Look, what I want to do is litigation, and if you don't want to give me litigation, I'm not interested.' And I got up and began to walk out. Long story short: I got the litigation job."

She and Rob met in law school and married. "He had always wanted to do criminal law, so he was working for Legal Aid in New York City, which is their equivalent of the public defender. At that point, we had him doing criminal law and me defending cops.

"But he's a rural boy," Henak said. "New York was not the place for him. So after we got married and had a kid on the way, I said 'okay' to looking elsewhere." He had clerked for Judge James E. Doyle, a federal district judge in Madison, Wisconsin (father of Wisconsin's future governor, James E. Doyle, Jr.).

An opening came up for Rob at a well-known Milwaukee criminal defense firm, Shellow, Shellow & Glynn. Ellen Henak said, "We decided that since I was going to have a baby then anyway, we'd just move, and I would find a job afterward. I eventually did. At one point, I was doing overflow work for Shellow, Shellow & Glynn, which kind of slid me into criminal appeals because that was what Rob was doing.

"I realized it was a good fit," Henak said. "I liked the kind of thoughtfulness it allowed for." She also found that she was comfortable with the clients. Before going to law school, she was a special education teacher. "I'm actually not surprised that, coming out of special ed, I found there were a lot of learning disabilities among the clients—not always, but often—and I found that actually my special education background was an advantage. I could pick up certain psychological reports or that kind of thing and see things that a lot of the attorneys with a different background were not seeing."

Finding the Public Defender's Office

Her next career turn came in 1991: "There was an opening for a half-time job at the public defender's office, which I ended up snagging. I'm sure that they were fine with my legal skills, but there was something else in my background they wanted, which was they were just computerizing. When I went to high school, my high school was ahead, and I had done programming. My hobby at that time was doing some programming, some computer stuff.

"That was a very good fit for me for a very, very long time," Henak said. "It started as half-time. When my youngest was going into kindergarten, there was an opportunity to go three-quarters time, and that is what I did. . . . What I liked about that was that it allowed me to do two things that a lot of public defenders don't have the luxury to do." One was that, with family members of defendants, "I had time to listen, and I realized very quickly that when you don't have that time, there are pieces that get missed. . . .

"The other thing it allowed me to do was a little bit more [for clients]. With criminal appeals, you don't win very often. . . . You can do a certain amount of—I think, for lack of a better term—social work, and sometimes that's the most important part. Sometimes that has much more of an impact on somebody's life." Henak elaborated: "It allowed me to do, and I've continued to do, things like help the [client in prison] who calls and says his dad just died and whom in the prison should he talk to. Most of the public defenders would have been able to tell somebody whom to contact, but I could take the time to sometimes pick up that phone and ease it through."

Why did she leave her public defender position? "There were some changes in the public defender's office," she said. The office had grown greatly in her time there. "Part of growing, with any institution, is that it tends to harden lines of authority and it tends to regularize some things." That meant some changes in how she was expected to work. "And there was a tendency for one-size-fits-all rules to come down."

Doubts About the Fairness of the System

But there was more to her decision to leave the public defender's office and join Rob's firm.

Henak was working frequently on cases involving Wisconsin's law known as Chapter 980. The law allows people convicted of violent sexual crimes who served their full sentences to be confined indefinitely as potential threats to people. "I am not and have never been convinced of this whole premise that, on the one hand, we can hold somebody criminally responsible [and thus incarcerate them] because they understood their actions," she said, and "then we turn around and say, on the other hand, that those same actions meant that they couldn't control themselves—so we're committing them [after their sentence is completed]. To me, there's a disconnect there."

In addition, Henak was concerned about the factors involved in deciding if someone should be committed and remain locked up. "The whole premise of 980 law just felt like a misuse of science to me," Henak said. "I looked at some of what passed for the psychology and science in the area. It never felt soundly based to me. One day, the fact that my client did one thing would mean that, of course, they are a predator; and the next day, the fact that they did the opposite would mean, of course, they're a predator. There was a lot of that.

"The bigger problem with the 980s was that when it was ruled constitutional, the Wisconsin Supreme Court said, well, it's barely constitutional, but it's okay because it does A, B, C, D, E (let's pass over what the specifics are). Over the next ten years, we eliminated A, we eliminated B, we eliminated C, we eliminated D as protections, and we eliminated E. Yet we said 'no problem.'

"Part of me says: what do you mean by a rule of law when you allow this?"

Henak described where the law led for one of her clients. Even though he had completed his sentence, it took an additional 13 years to bring him to a civil trial on whether to continue to confine him. He was committed and locked up the entire time. Eventually, he was released.

The Shortage of Defense Lawyers

Henak said that not many lawyers in Wisconsin are doing post-conviction work, at least after the first direct appeal. There are a number of reasons for this, she explained. One reason is that it can be very hard to make money at it, she said. Others include the discomfort of lawyers with prevailing so rarely and the fact that the procedures in the cases are different from other litigation and are highly technical.

Henak added, "Honestly, at this point, I still do criminal law because somebody has to. Do I believe that there's really a rule of law going on? No, I do not."

Does she think that that strong statement has become more true or less true in recent years?

"I think it has become more true, and I think it is for a couple of reasons, none of which I think bode well for the future. I'm not a big fan of electing judges. My reason is less about whom we get as judges and more about what it does to the conversation. And you see it in the current Wisconsin Supreme Court election. Candidates

start running on all sorts of things that are not about rule of law. . . .

"As we've seen more and more money go into our judicial races (and now it's come down from not just the supreme court race, we are now seeing it in circuit court races, we are seeing it in court of appeals races), they do not take the time to explain to people what the judges are doing a good deal of the time—which is not criminal law." For campaign themes, "It's just lock them up. And that has become the standard.

"Put that together with the lack of resources in the criminal justice system. . . . Systems tend to end up valuing what they measure. What do we measure in the criminal justice system? How many convictions. Not 'Were they the right convictions?' But 'How many convictions, and how quickly did we process the cases?'"

Respect for the work of defense attorneys has also declined. "[Criminal defense attorneys] will get yelled at by absolutely everybody. You have to have a certain kind of personality. I come from a family of eccentrics, so I'm not that geared to what other people think most of the time. . . . My dad was going to skip down the street with his briefcase no matter what I did.

"But you [as a defense attorney] are the person that everybody can afford to yell at. The client can afford to yell at you. Whether you're private pay or public defender, for the most part, you're stuck with that client because you have to ask the court to get out most of the time, and the courts don't like to do that. They feel that it just passes the problem along.

"And the judges can afford to yell at you if they're frustrated. They do not yell, for the most part, at prosecutors in the same way, partly because a lot of them come out of those offices—those are their friends."

A "No Harm, No Foul" Standard for Appeals

What about the law itself? Asked for a leading example of her concern, Henak said that the Wisconsin Supreme Court is making it harder and harder to establish on appeal that an erroneous ruling at trial was prejudicial error, as compared to harmless error.

"One of the things that's been happening is that, if there was a mistake," the rule was "no harm, no foul." But what is harm? "What it's supposed to be is that there's a reasonable probability of a different result—not that the jury would have come out differently, but that this is important enough that we can see a good chance that they would have. Well, it used to be that you [the appellate courts] looked at the evidence and said, 'Is this a major piece of evidence?' If I could convince the court this was a major piece of evidence that either came in and shouldn't have or didn't come in and should have, the courts would say, 'Well, we're not the jury. A reasonable jury could hear this, and we really ought to send this back.'"

"Systems tend to end up valuing what they measure. What do we measure in the criminal justice system?" — Ellen Henak

Henak pointed to a recent ruling by the Wisconsin Supreme Court that, in her view, amounted to saying, "Why does it matter since the defendant was probably guilty anyway?"

As for the standard applied to ensure that attorneys representing people in criminal proceedings are providing effective assistance of counsel: "We're getting very close to ruling that if the body [of the attorney] is breathing next to you [the defendant], if that attorney is sitting there and breathing, it's okay."

Henak agreed that an underlying theme in her views was the increasing politicization of the system and increasing pressure on the system, especially prosecutors and judges, to take into account popular sentiment. "I'm glad that politicians and others at least give lip service to the idea that we should have representation of everyone, because the day we stop giving lip service is the day we stop even feeling like it's important," Henak said.

What's the future for this sector of the profession in Wisconsin? "Rob and I have a policy that we will take any phone call that comes. We may have to tell somebody we can't help them, but we used to take collect phone calls from the prisons, regularly. We take letters; we answer every letter that comes. I don't know who's going to do that when we're gone because it used to be us and Howard Eisenberg."

Has she thought about whether getting splashed with mud as she went for her first job interview was a metaphor for things that have happened during her career?

"I have. I actually have."

Yet would she do it again? "Yes. Yes."