

Burton Lecture

President Hall, Dean Thompson, past distinguished public service award recipients and friends. An invitation to come to Albany is, for me, hard to resist. Albany is my second home – I started a lifetime of learning here as a history major at the University at Albany – I started my career in public service here first working and then serving in the Assembly and I ended my 24 ½ years of state service as a member of the greatest state high court in the nation – The New York Court of Appeals. For me, Albany is my alpha and omega.

When Dean Thompson invited me, he forwarded a list of past award winners and their Burton Lectures – an impressive group with a wide array of thoughtful topics. It occurred to me that in light of John Burton’s service under Governor Dewey as budget director, I might take on the weighty issue of budget reform. The legislature, after a tough decision from my old court, has done what legislatures often do when faced with a decision they don’t like – they have proposed an amendment to New York’s Constitution that, if approved by the voters, will make *Silver v. Pataki* a footnote in history. I do know a thing or two about the budget process – I served in the Assembly (our budgets were on time 50% of the time); I was on the court for *Silver v. Pataki* the first time it came to the court on procedural issues, and I’ve studied the historical background of the 1926

Constitutional budgetary provisions that continue in effect today.

But the nature of judging is to decide an issue with legal principles and the debate over how New York should create its budget is a political matter. There is no law answer to this complex and difficult decision. The answer will come at the end of the political process – from the voters, and that is the way it should be. I think I’ll leave the policy debate to others. Eighteen years on the bench have taught me that I should not stray from what I know best – working with the law – judging.

For the next few minutes, let me draw on some of my experiences as a trial and appellate judge to give you my view of judging. Because I came to judging with experience in how the public perceives issues, let me juxtapose my view of judging to the public’s perceptions in that regard. Perhaps we might learn a little about both.

For seven years, I worked as a trial judge in New York State Supreme Court. I would submit that the work of a trial judge is merely a reflection of the nature of the human conflict presented. Trial court judges are confronted with a host of disputes – federal judges may be called upon to decide if one playwright’s efforts have unfairly mimicked another’s, while another may be asked to supervise the trial of a complex multinational drug conspiracy. As a state court judge, my

cases ran the gamut of complex commercial litigation to divorce. Each has a distinct human element to the law problem presented. The legal issues were not abstract – they involved, for the most part, the problems of people.

Trial judges work within a framework of rules and procedures that express the outer limits of acceptable behavior. Easy cases are those that ask for what must or, cannot, be given. They resolve themselves quickly with little difficulty and rarely an appeal. The vast majority of cases at the trial level fall somewhere in between. Here is the heartland for the trial judge. Most of these cases are resolved without a final decision from the court – they are settled. The role of the judge in reaching the result may differ somewhat depending on the forum, but much of what the trial judge does involves managing the resolution of the dispute while staying within the boundaries established by the law.

Public attention to trial court work generally focuses on the exceptional case – today, it is Michael Jackson and after him, someone else will become the focus of the “talking head experts” of court T.V. and Larry King. One thing I have noticed in the eleven years since I last served as a trial judge – public attention to sensational trials has increased exponentially. But, public attention to these cases generally focuses on the star status of the parties, or the unusual, often macabre details of a horrific crime – people do slow down to look at accident scenes, don’t

they? Have you noticed how rarely the judge becomes a major focus of the trial – good trial judges work in the shadows – their rulings are delivered without rancor – they control the trial with fairness, not flair. I think it safe to say that for the most part, public perception of what happens at the trial court level closely mirrors the proceeding.

Appellate judging has a different dimension. A large number of cases still have a distinctly human character to them – domestic cases and criminal matters come to mind. However, the texture of the trial is often washed out in the record. Prior experience at the trial level is helpful to the appellate judge – the difficulties of a trial are not often apparent from the questions and answers of a transcript. I remember a particularly difficult defendant who called me every name in the book and added a few obscene gestures for good measure – the transcript read: “defendant gesturing and shouting!” Hardly an accurate picture.

But the vast majority of appeals, as one would expect, focus on a legal issue developed at the trial level. The conflict has refined itself to a review of the judge’s solution to the legal issues of the case. What remains then are the cases that present claims of misapplication of the rules – a challenge to the trial court’s resolution of the problem.

Appellate judging, by its nature, examines the legal issue for what it is – a

legal issue. And here a critical difference comes into play between the public's perception of judging and the process itself. Appellate judges, for the most part, set to the task of resolving the statutory conundrum, the contractual ambiguity, the constitutional challenge within a framework of legal principles. Each Judge has, to be sure, a competing set of legal theories available for resolution of the task: for example, Mr. Justice Scalia finds comfort in the plain language of a statute to determine its meaning while others, notably Justice Breyer, prefer to extend their analysis of a statute to its structure, function and purpose as revealed in the expressions of congressional committees or members of Congress who played a role in the statute's enactment. The debate is constrained however – it takes place within the context of the meaning of the statute; it does not examine the wisdom of the policy choices reflected in the statute.

But public perception of appellate judging is quite different. Because the law issue is often difficult to grasp, the public tends to seize on the result as an affirmation of the legitimacy of the policy choices that underlie the dispute. Let me offer up several examples to prove my point.

The first time *Silver v. Pataki* came to the New York Court of Appeals, the issue was solely one of standing. Did Speaker Silver and other members of the Assembly have standing to challenge the legality of the Governor's line item

vetoed of non-appropriation bills that had been altered by the legislature? Standing is not a terribly interesting legal issue – it ranks right up there with notice pleading – you all know about notice pleading, don't you?

Standing is a legal concept that ensures that the courts are not suckered into giving a view on a legal issue as merely an advisory opinion. Each party must actually be part of a dispute – a real disagreement – and each must stand for the side they seek to represent. A party without a real stake in the dispute might not pursue his rights with vigor and resolve – worse yet, it might concede it's position and compromise others similarly situated. Thus, in *Silver v. Pataki*, the only issue before the court was did the Speaker have a sufficient nexus to the claim to assert it in court? We said he did. Standing is quite distinct from the substantive issues that were at play in *Silver v. Pataki*.

The press, of course, saw this as a huge victory for the Speaker – and I suppose it was in the sense that his lawsuit survived. Many viewed the decision as a significant setback for the Governor, politically – some conjectured that the Governor's bargaining power for the next budget would be undercut. All of that may be true.

I doubt anyone on my old court viewed that decision as a “victory.” To be sure, we were not foolish enough to think that the decision would not garner public

attention and public comment on who “won,” but those concerns – important as they may be in a world of public opinion – have nothing to do with the merits of the legal arguments involved, or with the job of judging.

Permit me to offer a few federal corollaries. In my first year on the Second Circuit, I sat on a panel that heard a case captioned *Swedenburg v. Pataki*. Mrs. Swedenburg owns a vineyard in Virginia. She doesn’t make a lot of wine, but I’m told its quite good wine and she has a number of New Yorkers who would like to buy her wine through her website. Unfortunately for her, New York does not allow direct sales of wine from out-of-state wineries unless they establish an office in New York and that, for Mrs. Swedenburg, is far too expensive a proposition.

Now, if Mrs. Swedenburg sold cheese, the New York regulatory scheme would clearly be unconstitutional as a state regulation that impairs interstate commerce. But, when this nation repealed Prohibition through ratification of the 21st Amendment, it also authorized each state to regulate the transportation, importation and use of alcohol within that state’s borders. The language of that section of the Amendment tracks efforts by Congress before the ratification of the 18th Amendment and Prohibition to allow a state to control the use of alcohol within its borders. Our decision was premised on a legal analysis of the 21st Amendment and New York’s regulatory scheme. However, most press accounts

looked at the matter as a free trade issue. They discussed the case in terms of whether the court would permit internet sales of wine.

Tying the policy issue to the legal issue is a distinct mistake – one gets the view that the court is “for” or “against” the ultimate policy concern – interstate sales of wine.

I must confess, the irony of all of this is not lost on me as there were a number of emerging boutique wineries in my old Assembly district and easy access to out-of-state markets by New York wineries would decidedly advance their concerns. But the legal issue here has nothing to do with whether out-of-state sales (or purchases) of wine is a good or a bad idea. We will soon have an answer to how the Supreme Court viewed my resolution of the case. When that decision is reported, I guarantee it will be discussed in the context of whether the Court has permitted or foreclosed boutique wineries to the use of the internet to market their wines.

Lastly, just this past Saturday, the New York Times reported a case from the Second Circuit involving a massive class action against the tobacco industry which sought to serve as a national punitive damages pool for all current and former smokers since 1993. The headline read – *Tobacco Industry is Given a Victory by Panel of U.S. Judges*. I sat on that case with Judge Oakes of Vermont and Judge

Pooler from Syracuse. The law issue in the case involved the availability of a mandatory class action (one in which a class member cannot opt out) when the relief sought is punitive damages. Punitive damages are an interesting creature of state law – they are invoked to punish a wrongdoer (in this case, the tobacco companies) for reprehensible conduct. But bad conduct alone is not enough – a plaintiff seeking punitive damages must also show how the conduct injured them. In addition, the Supreme Court has told us that the punitive damages must, in some way, reflect the severity of the compensable injury – if the punitive award is disproportionate to the compensatory claim, 5th Amendment concerns about the taking of one’s property come into play. Thus, the entitlement to, and size of, a punitive damages award is directly tied to the unique circumstances of each plaintiff’s claim.

A national punitive damages claim differs significantly from the purpose of a non opt-out class action. Non opt-out class actions generally are used to divide up a defined fund – a pool of available money by a group of claim holders whose claims are essentially the same. Quite simply, the plaintiffs made a valiant attempt to adapt a non opt-out class action to this case, but it just didn’t fit.

The case had nothing to do with whether the cigarette companies did engage in bad conduct – the legal issue was discrete and limited. To be fair to the *Times*,

the article did note that the case turned on the “technical legal issues” I just mentioned. My wife and others often accuse me of being too “technical” when I issue a decision they don’t like.

Appellate judges work with the knowledge that their efforts will often be misunderstood by the public. Acknowledging the significance of a decision is not a concession to the public’s interest in a case. Nor is the silence of a judge when faced with public approbation an act of arrogance. In a free society, judges will often be taken to task – fairly or unfairly – for their decisions. Judging is just that – making judgments on legal issues within the constraints of previously announced principles or appropriately enacted statutory schemes. There will always be “good and bad” judges in the give-and-take of public comment on judicial decisions. I have done this job long enough to know that today’s accolades will be followed by tomorrow’s brickbats.

In 1803 Chief Justice John Marshall, a late Adam’s appointment, penned the seminal case of *Marbury v. Madison* and established the Supreme Court’s power to declare acts of Congress unconstitutional. President Jefferson – a distant cousin of Marshall – quickly called for the Chief Justice’s impeachment. Such is the nature of judging.

In my office in Geneseo, I have a pen and ink drawing and a picture – both

serve as guideposts in my life with the law. The pen and ink drawing is of the Livonia Post Office. You see, I was born and raised in Livonia. I live just 3.5 miles from the home my father built 54 years ago for my family – my 84 year old mother still lives in that house. My roots run deep there. Every morning I go to the post office to get my mail and I often run into an old school classmate or friend who has read something in the paper about a case I have written. Occasionally, the classmate/friend will say, “Dick” – no one calls me judge in Livonia – “what the hell were you thinking of when you wrote that decision?” I smile – occasionally offer a brief explanation, and then I go to work. Every once in a while I think about a decision and wonder – will I hear about this case at the Livonia Post Office? I call it the “Livonia Post Office Test.” I must confess I invoked the Livonia Post Office Test several times at the conference table at the New York Court of Appeals.

Holmes reminded us that common sense does have its place in the law and despite public mis-perception at times about what I do, I try to keep myself grounded in the real world of human endeavor I knew so well as a trial judge.

The picture in my office was taken just off old U.S. Highway #1 in North Carolina in the Spring of 1968. My three fraternity brothers and I were on our way to Ft. Lauderdale for as much beer and sun as we could encounter in five days. But

there, along the road near Jericho, North Carolina was a sign – **“YOU ARE IN THE HEART OF KLAN COUNTRY – WELCOME TO NORTH CAROLINA – JOIN THE UNITED KLANS OF AMERICA, INC. HELP FIGHT INTEGRATION AND COMMUNISM.”** That sign stopped us cold in our tracks – it made us realize how different that place was from our homes in New York. I keep that picture in my chambers to remind my clerks how much our nation has changed in just one full generation. I keep that picture in chambers to remind me that judging is a noble calling – judges, throughout our nation’s history, have stood as the final protectors of individual constitutional liberties, and will continue to do so long into the future.

Thank you.