

The Justice Series: Foreword

*Judge Nancy Gertner**

Justice. You don't hear the word very much in law firms, even in law school courses. I was a federal district court judge for seventeen years; I didn't hear it much in court either—in the presentations of the lawyers, their memoranda, or my colloquies with other judges. But justice, fulfilling the law's promise of justice, is the focus of the series by Jon Hanson and Dean Strang. Reclaiming justice and identifying its opposite is what the book explains, examining how courts claim neutrality while serving power, obscuring normative choices under doctrines of certainty and objectivity.

I recall a number of times during my judicial career when this came into focus. In one instance, I was in Prague, Czech Republic. I had been asked to teach judges from the former Soviet Union—judges who had trained under a totalitarian regime and now were supposed to judge in free countries. I was the second to speak. Another judge, a state trial judge, was first. She began very deliberately looking at each of the judges seated there with their pens and notebooks. She said with great authority: "Ladies and Gentlemen. The most important thing is . . . to be on time!" The judges nodded, each and every one. I was aghast. I rustled my papers, trying to get her attention. Finally, I passed her a note: "These judges were from the *former Soviet Union*! They know how to be on time; it's the justice part they need to learn."

Strang and Hanson's series is about reclaiming "the justice part." The law's promise—what propels law students to law schools, and what propelled me in the 1970s. The law's promise of equality for black people, for women, and for other marginalized people; the law's promise of fair procedures for criminal defendants. It is what propelled me to stand before juries and courts of appeals, as well as students, television cameras, and lay audiences. And it was what animated me when I was on the bench (I left in 2011 to teach). It still does.

A small example: A man was injured while using a saw. He sued the manufacturer and won. 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 to me, 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 reminded me that I had discretion to dismiss the case; and if I did, it would lower my case load numbers—the number of active cases which I was obliged to report to the Administrative Office of the U.S. Courts in Washington. But I also had the discretion to allow the case to go forward. And then he added, "*Justice in the world* says let his estate—his family—have another trial." And so I did.

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"Justice in the world." There were surely times when I was on the bench, in my judicial robe, on an elevated platform, with the American flag behind me, with lawyers on both sides talking about rules, four-part tests, and precedent. It looked like justice; too often it was not. It was about imposing formulas that made no sense but would shield my decision from reversal. It was about intoning abstract standards far from the real people whose interests they supposedly served.

Sometimes I felt like the princess in the Hans Christian Andersen story, *The Princess and the Pea*. The prince knew that he had found his princess because she was able to feel the pea through twenty mattresses and twenty feather beds. I looked for the just kernel under the layers and layers of hyper technical rules, and rigid formulas—layers that no longer bore any relation to the purposes the law was intended to serve. "Does this make sense," I asked my clerks. How did these rules evolve to be what they are? And often—too often—I was forced to conclude that I could not do what I believed to be just. A statute, a decision of the Supreme Court or the Appeals Court precluded it.

Whitney North Seymour, United States Attorney for the Southern District of New York from 1970 to 1973, said of Judge Learned Hand: "[Hand's] opinions suggest a builder trying to fit each stone into its proper place but also concerned that the resulting edifice will not offend esthetic taste." "Esthetic taste" to me is a metaphor for my law clerk's admonition, to do "justice in the world."

This series is about that edifice, that kernel the princess was looking for, the law's promise. It is about finding the route to reclaim justice from a system gone astray.