What I Ate For Breakfast And Other Mysteries Of Judicial Decisionmaking

By Alex Kozinski*

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Judge Kozinski is a graduate of UCLA, having received his A.B. degree in 1972 and his J.D. degree in 1975. He was born in Romania and emigrated from that country at the age of 12. His views have been influenced by his childhood experiences in Romania, which he remembers as a dreary and oppressive place with a failed economy despite its wealth of human and natural resources.

I. Introduction

It is popular in some circles to suppose that judicial decisionmaking can be explained largely by frivolous factors, perhaps for example the relationship between what judges eat and what they decide. Answering questions about such relationships is quite simple; it is like being asked to write a scholarly essay on the snakes of Ireland: there are none.

But as far back as I can remember in law school, the notion was advanced with some vigor that judicial decisionmaking is a farce. Under this theory what judges do is glance at a case and decide who should win; and they do this on the basis of their digestion (or how they slept the night before or some other variety of personal factors). If the judge has had a good breakfast and a good night's sleep, he might feel lenient and jolly; if he had indigestion or a bad night's sleep, he might be a grouch and take it out on the litigants. Of course, even judges can't make both sides lose; I know, I've tried. So a grouchy mood, the theory went, is likely to cause the judge to take it out on the litigant he least identifies with, usually the guy who got run over by the railroad or is being foreclosed on by the bank. This theory immodestly called itself Legal Realism.

Just to prove that even the silliest idea can be extrapolated to an even more illogical conclusion, Legal Realism has spawned Critical Legal Studies. As I understand this so-called theory, the notion is that since legal rules don't mean much anyway, and judges can reach any result they wish by invoking the right incantation, the rules should be abolished and judges should engraft their own political philosophy onto the decisionmaking process, using their power to change the way our society works. So, if you accept that what a judge has for breakfast determines his decisions that day, the idea here seems to be that judges should be encouraged to have a particular and consistent diet so that their decisions will consistently favor one set of litigants over the other.

This, of course, is largely nonsense. But like most nonsense it contains little seeds of truth from which tiny birds can take intellectual nourishment. The little truths are these: Under our law judges do in fact have considerable discretion in certain of their decisions: making findings of fact; interpreting language in the Constitution, statutes and regulations; determining whether officials of the executive branch have abused their discretion; fashioning remedies for violations of the law, including fairly sweeping powers to grant injunctive relief. The larger reality, however, is that judges exercise their powers subject to very significant constraints. The importance of these restraints is often underestimated by the Legal Realists and their progeny. The fact is that judges cannot simply do anything they well please.

II. Restraints on the Judiciary

A. The Perils of Self-Deception

Constraints on the judiciary come in many forms, some subtle, some quite obvious. I want to focus here only on three that I believe are among the most important. The first, and to my mind the most significant, is internal: the limits of the judge's own self-respect. Cynics and academics (a redundancy, some might say) tend to make light of this if they consider it at all. Don't make that mistake. Judges have to look at themselves in the mirror at least once a day, just like everyone else; they have to like what they see. Lord knows, we don't do it for the money. If you can't have your self-respect, you might as well make megabucks, say by going into investment banking!

More concretely, the job is just too big to be done by one person alone. You have surrounded yourself with eager young law clerks far too smart to be fooled by nonsense. I know of no judge who will tell his law clerks: I want to reach this result, write me an opinion to get me there. You have to give them reasons and those reasons better be plenty good; any law clerk worth his salt will argue with you if the reasons you give are unconvincing. If you should choose to abandon principle to reach a result, you will not be able to fool yourself into believing that you're just following the law. Your law clerk will never allow you such an easy way out. It will have to be a deliberate choice to

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abandon principle, and that is a choice that, by and large, judges are not willing to make. As Senator Thurmond said at the opening session of the U.S. Claims Court a few years back, "[y]ou are in a different world when you put a robe on. It is something that just makes you feel that you have got to do what is right, whether you want to or not. I think the moment you put on that robe, you enter this ultra-world."[1] A little corny, perhaps, but true.

B. Peer Pressure and the Review Process

The second important constraint comes from your colleagues. If you are a district judge, your decisions are subject to review by three judges of the court of appeals. If you are a circuit judge, you have to persuade at least one other colleague, preferably two, to join in your opinion. Even then, litigants petition for rehearing *en banc* with annoying regularity. Your shortcuts and errors are mercilessly paraded before the entire court and, often enough, someone will call for an *en banc* vote.

If you survive that, judges who strongly disagree with your approach will file a dissent from the denial of *en banc* rehearing. If powerful enough, or if joined by enough judges, it will make your opinion subject to close scrutiny by the Supreme Court, vastly increasing the chances that *certiorari* will be granted.[2] Even Supreme Court justices are subject to the constraints of colleagues and the judgments of the Congress or a later Court.

Now, don't get me wrong, just about any judge can get away with cutting a corner here or there. There are too many cases and too little time to catch all of the errors, deliberate or unintentional. But what you absolutely cannot get away with is abandoning legal principles in favor of result on a consistent basis. Any judge who tries to do this cuts deeply into his credibility and becomes suspect among his colleagues. There are, from time to time, district judges whose decisions come to the court of appeals with a presumption of reversibility. I have heard lawyers say, with good reason, that they dread winning before those judges because it becomes very difficult to defend their judgments on appeal. Circuit judges who break the rules too often become especially vulnerable to *en banc* calls and ultimately to reversal by the Supreme Court.

C. Reading the Election Results

The third important constraint on judicial excesses lies in the political system, a constraint often overlooked but awesome nonetheless. By its nature, the political process seldom can react to specific cases, although it does so from time to time. The surge of legislative activity in reaction to the Supreme Court's *Grove City* decision is an example.[3] But the political process generally operates in much blunter ways. Examples of these from the past include President Roosevelt's plan to pack the Supreme Court and proposals to cut back on the jurisdiction of the federal courts. The most recent example is the removal of three justices of the California Supreme Court. There are many explanations for why the justices were removed and I don't pretend to be an expert. My own guess is that the electorate was persuaded that these three justices simply were not playing fair; they were using the power of their office to engraft a political agenda onto the law.

III. A More "Realistic" Explanation

Now, there is an unspoken premise to all of this, namely that there are more or less objective principles by which the law operates, principles that dictate the reasoning and frequently the result in most cases. This is not a fashionable view in academia today. It is nevertheless true.

A. The Importance of Words

These principles are not followed by every judge in every case, and even when followed, there is frequently some room for the exercise of personal judgment. But none of this means that the principles don't exist or that judges can use them interchangeably or ignore them altogether. Let me give you an example of one principle that I think is extremely important: Language has meaning. This does not mean that every word is as precisely defined as every other word, or that words always have a single immutable meaning. What it does mean is that language used in statutes, regulations, contracts and the Constitution does place an objective constraint on our conduct. The precise line may be subject to dispute at times, but the language used at the very least sets an outer boundary that those interpreting and applying the law must respect. When the language is narrowly drawn, the constraints are fairly strict; when it is drawn loosely they are more generous, but in either case they do exist.

An example of a Constitutional provision that is very strict is contained in art. II, section 1, cl. 5: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President . . . ." This language allows little or no room for interpretation. While there could possibly be some debate as to whether someone born of American parents abroad would be considered a natural born citizen, there is absolutely *no* room to argue that someone like me, who was born outside the United States of foreign parents, is eligible to be President. Language here, indeed, provides a firm and meaningful constraint on conduct.

Obviously not all clauses of the Constitution are as narrowly drawn as this provision. For example, the fourth amendment prohibits unreasonable searches and seizures. What is unreasonable is subject to differences of judgment. But it is not a judgment made in a vacuum. It must be made in light of almost two centuries of interpretation and our shared notions of individual privacy and personal autonomy. I submit that, regardless of what any particular judge may subjectively think, a warrantless nighttime search of every house on a particular block would not be reasonable even under the most exigent of circumstances. Again, marginal cases may present difficult problems of line-drawing, but this does not negate the fact that the language of the Constitution does provide a meaningful constraint for the large majority of cases.

B. The Role of Precedent

Another very important principle is that you must deal squarely with precedent. You

1. 1 Cl. Ct., at CLVII (1982).

2. *See, e.g.*, Pangilinan v. INS, 809 F.2d 1449 (9th Cir. 1987) (Kozinski, J., dissenting from denial of rehearing en banc), *rev'd*, 108 S. Ct. 2210 (1988); Durns v. Bureau of Prisons, 806 F.2d 1122 (D.C. Cir. 1986) (Wald, C.J.), *vacated and remanded*, 108 S. Ct. 2010 (1988); Falwell v. Flynt, 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J.), *rev'd*, 108 S. Ct. 876 (1988).

3. S. 557, 100th Cong., 1st Sess. (1987), *enacted as* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988); H.R. 700, 99th Cong., 2nd Sess. (1985); S. 431, 99th Cong., 1st Sess. (1985); H.R. 5490, 98th Cong., 2d Sess. (1984); S. 2568, 98th Cong., 2d Sess. (1984).

may not ignore it or distinguish it on an insubstantial or trivial basis. Few of us write on a truly clean slate and what has gone before provides an important constraint on what we can do in cases now before us. Precedent, like language, frequently leaves room for judgment. But there is a difference between judgment and dishonesty, between distinguishing precedent and burying it. Judges get incensed when lawyers fail to cite controlling authority or when they misstate the holdings of cases they cannot distinguish in a principled fashion. When judges do this, it is doubly shameful; the results are far more damaging. I have heard lawyers complain, with good reason it turns out, that within the same circuit there will be two lines of authority on the very same subject. The two lines go off in different directions without acknowledging each others' existence, like ships passing in the night. In such circumstances lawyers have much difficulty in advising clients how to conduct their affairs, the rule of law depending on who the judges in their case happen to be. Perhaps some of this is inevitable in our system, but we must all work to make it the exception rather than the rule.

C. The Impact of Judicial Bias

Let me give you a final principle that is not frequently recognized as such, but is, in my view, extremely important. We all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts. These are important, and uniquely so for a judge, but often in ways that are not widely understood. Frequently, as a judge, something will bother you about a case that you can't quite put into words, something that will cause you to doubt the apparently obvious result. It is important to follow these instincts, because often they will lead to recognition of a crucial issue that turns out to make a difference. But in these circumstances it is even more important to doubt your own leanings, to be skeptical of your instincts. It is frequently very difficult to tell the difference between how you think a case should be decided and how you hope it will come out. It is very easy to take sides in a case and subtly shade the decision-making process in favor of the party you favor, much like the Legal Realists predict. Unlike the Legal Realists, however, my prescription is not to yield to these impulses with abandon, but to fight them. If any person, as a judge, finds himself or herself too happy with the result in a case, this is reason to stop and think. Is that result justified by the law, fairly and honestly applied to the facts; or when viewed by others will it be revealed as merely a bit of self-indulgence? The desire of most judges to do the right thing is the cause of much soul-searching in these circumstances.

IV. The Risks of Judicial Self-Indulgence

Judging is a job where self-indulgence is a serious occupational hazard. One must fight against it constantly if one is to do the job right. What ultimately is most objectionable in the teachings of the Legal Realists and their modern day disciples is that they play on judges' already inflated egos by telling them that they can follow their leanings with abandon and everything will be all right. Everything will not be all right. There are awesome forces in our society that extract a heavy price for judicial self-indulgence. Judges have traditionally held a special place in the public's mind as arbiters of our disputes and protectors of our individual freedoms. But judges can only do that job if they are trusted.

In standing up for our Constitution, judges are frequently called upon to make decisions that are highly unpopular: releasing convicted criminals; striking down legislation that has wide public support; allowing nazis to march in neighborhoods populated with survivors of Auschwitz. By and large, the public has been willing to accept decisions such as these because they trust judges when they say that the Constitution requires this, believing that the unpopular result serves a higher principle that protects us all.

Woe be us when that trust in the judiciary is lost. If the public should become convinced -- as many academicians apparently are already -- that judges are reaching results not based on principle but to serve a personal or political agenda, unpopular decisions may become not merely points of dissatisfaction but the impetus for far-reaching changes that could affect our way of life for years to come, perhaps permanently.

There are signs on the horizon and they ought not to be ignored. The defeat of chief justices in elections in three states a couple of years ago is one of them. In one of those states, California, two other justices were defeated, giving the current governor an unprecedented opportunity to appoint 5 of the 7 Supreme Court justices. Throwing judges out of office on the basis of the way they voted on cases, rather than their qualifications or personal integrity, seems to me a very serious cause for alarm. Also highly alarming are the recent battles in the Senate over the appointment of Supreme Court Justices and judges of the lower federal courts. Judicial appointment and tenure has suddenly become a political football in a way that has serious implications for our way of life. It will not stop there. If the current climate continues, it seems likely that we will see further attempts to fiddle with the jurisdiction of the federal courts, or to limit the scope of judicial review or to circumscribe the appointment or removal process. The independence of the judiciary will be undermined or lost, and with it will go the important functions it performs in our constitutional scheme of government.

V. Conclusions

The decline of the judiciary is not inevitable. We can all help reverse this trend. Each one of us exerts an influence on this society. This is true even if we are not involved in making governmental policy, or helping to appoint judges, or arguing important cases, or writing legislation, or commenting on the development of the law. What each one of us says and does in the daily practice of our profession makes a difference, and the ethos we carry into our daily lives will determine in which direction that influence will be exerted. You can carry with you the cynical view, spawned in the halls of academia, that anything goes. Or you can use your talents and influence to defeat that view.

I urge you to do the latter. Cynicism is as dangerous as it is easy. It is far more difficult to argue in support of reason and principle, but it is vital that we all do so. If you are a lawyer or law clerk, challenge the judge whenever you think he is yielding to self-indulgence. If you work for the government, make sure the positions you take are legally and morally defensible. If you are in private practice, don't make any argument your

client is willing to pay for on the hope that the judge might be foolish that day. If you are in academia, criticize judicial self-indulgence wherever you see it and teach the next generation to do the same. Whatever you do, respect the law and respect yourself. It is absolutely vital to the survival of our society.

(Editor's Note: A relevant example of Judge Kozinski's work appears below. A related article follows.)

Oki America, Inc. v. Microtech International, Inc.

872 F.2d 312, at 314 (9th Cir. 1989)

(Concurring Opinion of Judge Alex Kozinski)

Nowhere but in the Cloud Cuckooland of modern tort theory could a case like this have been concocted. One large corporation is complaining that another obstinately refused to acknowledge they had a contract. For this shocking misconduct it is demanding millions of dollars in punitive damages. I suppose we will next be seeing lawsuits seeking punitive damages for maliciously refusing to return telephone calls or adopting a condescending tone in interoffice memos. Not every slight, nor even every wrong, ought to have a tort remedy. The intrusion of courts into every aspect of life, and particularly into every type of business relationship, generates serious costs and uncertainties, trivializes the law, and denies individuals and businesses the autonomy of adjusting mutual rights and responsibilities through voluntary contractual agreement.

In inventing the tort of bad faith denial of a contract, *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d. 1158, 206 Cal. Rptr. 354 (1984), the California Supreme Court has created a cause of action so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law. *Seaman's* gives nary a hint as to how to distinguish a bad faith denial that a contract exists, from a dispute over contract terms, from a permissible attempt to rescind a contract, or from "a loosely worded disclaimer of continued contractual responsibilitity." *Quigley v. Pet, Inc.*, 162 Cal. App. 3d 877, 890, 208 Cal. Rptr. 394 (1984).

Small wonder: It is impossible to draw a principled distinction between a tortious denial of a contract's existence and a permissible denial of liability under the terms of the contract. The test – if one can call it such –seems to be whether the conduct "offends accepted notions of business ethics." *Seaman's*, 36 Cal.3d at 770, 206 Cal. Rptr. 354, 686 P.2d 1158. This gives judges license to rely on their gut feelings in distinguishing between a squabble and a tort. As a result, both the commercial world and the courts are needlessly burdened: The parties are hamstrung in developing binding agreements by the absence of clear legal principles; overburdened courts must adjudicate disputes that are incapable of settlement because no one can predict how – or even by what standard – they will be decided.

Seaman's throws kerosene on the litigation bonfire by holding out the allure of punitive damages, a golden carrot that entices into court parties who might otherwise be inclined to resolve their differences. Punitive damages once were reserved for truly outrageous conduct; even then, awards were relatively small. *See, e.g., Lanigan v. Neely*, 4 Cal. App. 760, 89 P. 44 (1907) (punitive damages awarded for breach of promise of marriage when plaintiff's reliance on the promise resulted in pregnancy); *Scheps v. Giles*, 222 S.W. 348 (Tex. Civ. App. 1920) (punitive damages awarded for wrongful discharge where employer publicly called employee a liar and ordered her out of his sight). Today punitive damages are obtained in cases involving fairly innocuous conduct, *see, e.g., April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983) (plaintiff sued defendant for erasing videotapes of television shows, although the contract explicitly authorized such erasure; jury awarded $14 million in punitive damages); *Klimek v. Hitch*, 124 Ill. App. 3d 997, 80 Ill Dec. 289, 464 N.E. 2d 1272 (1984) (landowner sued his neighbor for trespass and destruction of a hedgerow; court awarded $10 compensatory damages and $14,500 punitive damages), often in amounts that seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint.

This tortification of contract law--the tendency of contract disputes to metastasize into torts--gives rise to a new form of entrepreneurship: investment in tort causes of action. "If Pennzoil won $11 billion from Texaco, why not me?" That thought must cross the minds of many enterprising lawyers and businessmen. A claim such as "defined" by *Seaman's* is a particularly attractive investment vehicle: The potential rewards are large, the rules nebulous, and the parties unconstrained by such annoying technicalities as the language of the contract to which they once agreed. Here, for example, the contract was largely beside the point. Microtech instead relied on statements in Oki's pleadings, rumors racing through the Oki grapevine, and a letter in which Oki's president offers his interpretation of the contract. On the basis of these minutiae, Microtech ginned up a claim of $600,000 in compensatory damages and $2.5 million in punitive damages. And why not? Even a one in ten chance of winning would justify an investment of over $300,000 in attorney's fees.

As this case illustrates, business relationships are complex organisms, not always as neatly structured as one could wish for. The record presents plausible support for both sides insofar as the contract dispute is concerned. That issue settled early in the litigation, everyone presumably having learned a valuable lesson on the need to tidy up business relationships.

But the case drags on, kept alive by Microtech's vain hope of parlaying a business squabble into a $3.1 million gold mine. The judicial machine keeps churning, fueled by the energies of the lawyers, the parties, a district judge, three appellate judges, their respective staffs and other myriad components of the judicial process, all to resolve a claim that turns out to be next to frivolous. One shudders to imagine the resources that would be consumed in adjudicating a more colorable *Seaman's* case. We surely have more pressing claims on our limited resources – safeguarding the environment, protecting the rights of the accused, preventing encroachments on constitutionally protected liberties, to name a few – than helping Microtech soothe its bruised feelings over a quarrel with its supplier.

The eagerness of judges to expand the horizons of tort liability is symptomatic of a more insidious disease: the novel belief that any problem can be ameliorated if only a court gets involved. Not so. Courts are slow, clumsy, heavy-handed institutions, ill-suited to oversee the negotiations between corporations, to determine what compromises a manufacturer and a retailer should make in closing a mutually profitable deal, or to evaluate whether an export-import consortium is developing new markets in accordance with the standards of their community *See generally* Synderman, *What's so Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. Chi. L. Rev. 1335, 1361 (1988).

Moreover, because litigation is costly, time consuming and risky, judicial meddling in many business deals imposes onerous burdens. It wasn't so long ago that being sued (or suing) was an unthinkable event for many small and medium-sized businesses. Today, legal expenses are a standard and often uncontrollable item in every business's budget, diverting resources from more productive areas of entrepreneurship. Nor can commercial enterprises be expected to flourish in a legal atmosphere where every move, every innovation, every business decision must be hedged against the risk of exotic new causes of action and incalculable damages. *See generally*, P. Huber, *Liability: The Legal Revolution and its Consequences* 153-71 (1988).

Perhaps most troubling, the willingness of courts to subordinate voluntary contractual arrangements to their own sense of public policy and proper business decorum deprives individuals of an important measure of freedom. The right to enter into contracts – to adjust one's legal relationships by mutual agreement with other free individuals – was unknown through much of history and is unknown even today in many parts of the world. Like other aspects of personal automony, it is too easily smothered by government officials eager to tell us what's best for us. The recent tendency of judges to insinuate tort causes of action into relationships traditionally governed by contract is just such overreaching. It must be viewed with no less suspicion because the government officials in question happen to wear robes.

Fortunately, the tide seems to be turning. The California Supreme Court is once again leading the way. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), has taken a bite out of *Seaman's* by holding that tort remedies are not available for breach of the implied covenant of good faith and fair dealing in an employment contract. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), revived the common sense rule that third parties cannot sue insurers for unfair insurance practices, overruling *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

But much remains to be done. As this case demonstrates, *Seaman's* is a prime candidate for reconsideration. Others come to mind: *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (rejecting the notion that a contract can ever have a plain meaning); *Casey v. Proctor*, 59 Cal. 2d 97, 109, 378 P.2d 579, 28 Cal. Rptr. 307 (1963) (holding that a release of unknown claims has no effect in the absence of evidence "apart from the words of the release"); and *April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983) (holding that a party can be liable in tort for actions authorized by the contract). At long last, however, we seem to be moving in the right direction.