On the Virtues of A Wild Justice

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In the 1970s, I was fortunate to persuade the Columbia Law School, where I taught, to let me offer an experimental seminar called "Writing About Law" along with Jeff Greenfield, a Yale Law graduate, who was then a political consultant and later a prominent prime-time network broadcaster. The premise of the course was simple: instead of legal writing aimed at courts and legislators, students would write assignments every week, hopefully learning to present legal topics to an intelligent audience in plain language. The potential audience might be composed of readers with legal training as well as the laity, but the writing would not rely on terms of art, jargon, or other "insider" meanings. Students would prepare Op-Ed pieces and news reports of recent Supreme Court decisions; profile leading legal figures; make campaign videos; and draft issue-dominated speeches for supposed policymakers or political candidates. Jeff and I read their papers every week, scrawled our comments, and returned them before the next class.

Most of our actual class time was spent on group critique. Students would bravely read their assignments and wait for a barrage of queries, criticism, and even some praise. At the time Jeff had more experience with these interventions than I did because he had created quick moving political ads; he was a tough, but thoroughly fair, taskmaster.

It was this regular critique and prompt feedback method that proved the greatest value to students, allowing them to develop a skill combining legal savvy, investigative journalism, and personal expression. They had to

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write to deadline and justify every comma. Apparently it was great training. Much to the dismay of my colleague, the late Louis Lusky2 (who thought law school should only train lawyers who went into practice after graduation), at least three of the students, Tamar Lewin, Robert Krulwich, and Larry Tell, chose to join the press rather than practice law.3 Lewin, a veteran New York Times reporter, has had a remarkable career. Krulwich, noted for truly inventive ways of making the complex intelligible to both radio and television audiences, now co-hosts NPR’s RadioLab.4 The late Larry Tell was an investigative journalist for many years and worked for the New York Law Journal, Barron’s, and Business Week.5

One of the reasons for the seminar’s success was the way the public learned about how the law had dramatically changed just a few years earlier. Rather than limited to straightforward reports of legislation or lurid coverage of sensational trials, journalists began to explain the way law and legal institutions actually worked in generally understood language. Anthony Lewis of the New York Times was the pioneer who opened up this territory, first as a daily journalist who explained complicated Supreme Court decisions in a manner that was accessible to the common reader without sacrificing accuracy.6 Later he extended his range with the best-selling story of the famous right to counsel case in his best-selling book Gideon’s Trumpet.7 Many followed in his footsteps in daily journalism,8 and others produced excellent non-fiction as well as powerful novels about the law in action. Indeed, Gideon’s Trumpet was followed by so many excellent books—dealing with lawyers and clients enmeshed in the law, the sophisticated political and policy issues at stake, and the strategy and tactics employed—that just listing them would take up a considerable

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4 See Yale Univ., supra note 3.
5 Amateau, supra note 3.
7 See ANTHONY LEWIS, GIDEON'S TRUMPET (1965). The book won an Edgar Award from the Mystery Writers of America for Best Fact Crime book and was later made into a made-for-TV movie. Lewis was also the author of other books about the law including MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).
8 A (very incomplete) list of reporters who have provided the public with legal journalism of the highest quality would have to include: Ruth Abrams, Emily Bazelon, Joan Biskupac, Lloyd Dennison, Fred Graham, Linda Greenhouse, Dahlia Lithwick, Adam Liptak, Jack Mackenzie, Tony Mauro, Jeffrey Rosen, Jeffrey Toobin, and Nina Totenberg.
amount of time. Many of these books focused on a single litigation; others dealt more widely with litigation campaigns; all gave space to the human drama of men and women colliding with the legal system. Some were ready made for film; others had a defined reform or policy agenda.

Perhaps this genre’s greatest success was Richard Kluger’s *Simple Justice.* When Richard, an up and coming editor at a New York publishing house, told me he was going to tell the background story of the five cases that became *Brown v. Board of Education* (“Brown”), I doubted he could do the extensive traveling and massive research required while supporting his family and editing the books of others. But he pulled it off brilliantly. I recently revisited *Simple Justice*—it well deserves the many awards and general acclaim it received.

There seems no end to legal subject matter beckoning talented writers. Given the number of such books and articles that have emerged since the sixties, editors and readers have anointed the form. The clash between: personalities and contending ideologies; greed and ideals; and the presence of the selfless and the self-interested locked in conflict, have brought thousands closer to the mysteries of the law. You can get a sense of their impact by scanning the blogosphere where legal opinions, constitutional interpretation, and tactical insights are the common currency of many who never took a course in contracts or torts.

Evan Mandery’s *A Wild Justice* is not only a worthy successor of the work of Lewis and Kluger, but one that actually takes writing about the law to a new level. Let me state my interest. Evan is not only a friend, but one who speaks so highly of me in his book that my opinion of his work could be considered biased. I am the very essence of a conflict of interest. But having warned you of an appearance of bias I will go on and tell you of Evan’s achievement. Let me come at one of the signal virtues of the book obliquely: when I joined the legal staff of the NAACP Legal Defense Fund in 1961, it was six years after the second *Brown* decision indicated that

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10 See RICHARD KLUGER, SIMPLE JUSTICE (1975).


desegregation should proceed with "all deliberate speed." It took until the late 60s and early 70s for school assignment principles to be clarified and for Brown to be enforced with any degree of rigor. This delay in enforcement occurred despite the Civil Rights Act of 1964, which for the first time clearly authorized the federal government to play a significant role in facilitating integration. In the North, white parent resistance, housing patterns, and narrow Supreme Court decisions limited opportunities for real integration.

This state of affairs led some critics to claim that, if the Court had not meddled, segregation might have withered away. However, these critics provided no explanation as to how this would happen—especially given the then-power of segregationists in Congress and the persistence of views of racial superiority, overt or latent, in much of the population.

In 1991, a scholar named Gerald Rosenberg published a book called The Hollow Hope, arguing that reformist court decisions did not bring about social change. The most hollow of the hollow hopes, according to the author, was Brown: he believed that it failed to produce much change and was not even much on the minds of civil rights leaders. Some years later, Michael Klarman argued that Brown's main impact was not to foster integration, but to harden the lines between white southerners and civil rights activists.

Then in 1996, the leading academic researcher on the subject, Gary Orfield, concluded that public school desegregation was being rapidly

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14 See CHARLES T. CLOTFELTNER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 25-26 (2004) (noting that in the first decade after Brown there were only "token" steps to desegregation and listing Supreme Court cases that clarified school desegregation in the late 60s and early 70s).
15 See GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 485 (5th ed. 2005) (stating that the Civil Rights Act of 1964 gave the Attorney General the power to initiate desegregation lawsuits, ending the need for private lawsuits).
16 See id. at 491 (discussing how "white flight" impacted housing patterns and created many majority white school districts by the time desegregation was actually implemented); Girardeau A. Spann, The Future of School Integration in America, 46 U. LOUISVILLE L. REV. 559, 599 (2008) (stating that Northern schools were not integrated by the Supreme Court based on the distinction between de jure and de facto segregation).
18 See id. at 169.
19 See id.
dismantled by Supreme Court decisions approving the end of court-supervised-local-assignment-plans and by school district administrators who turned their backs on integration.21

Apparently, the courts were not powerful enough to produce integration, but they did have the power to dismantle it where it occurred.22 So many think Brown was decidedly a mixed bag when it came to integrating classrooms.23

Was Brown therefore wrongly decided? Would America’s racial problems have been better then and better now if segregation had been upheld as constitutional? I suppose Justices Scalia and Thomas would have been tempted to rule for its constitutionality if they had been on the Court in 1954, since there was certainly evidence that the framers of the Fourteenth Amendment would have tolerated separate but equal public schools. I have discussed this thesis elsewhere at length.24

All of this leads to the question of whether Furman v. Georgia (“Furman”)—which basically found the American death penalty unconstitutionally arbitrary—should have been brought, knowing in hindsight, that Furman led to reinstating the death penalty under a regime of guided discretion in Gregg v. Georgia (“Gregg”).25

A Wild Justice allows us to consider this question with a firm background in how both Furman and Gregg were actually decided. I think that is Evan Mandery’s greatest achievement. He put in the hard work of finding the best available witnesses to the events, and had not only the temerity to interview them, but the charm to get them talking. If his focus is not specifically on the decades that followed the Court’s revival of the death penalty in 1976, A Wild Justice allows us to measure developments in the decades that followed the Court’s revival of the death penalty in 1976 with a firm sense of the sources from which they flowed and to consider whether what followed was contingent or determined.26

22 See id. at 16–17.
Carol Steiker, in my opinion the sharpest and wisest of the hundreds of analysts who are drawn to thinking and writing about the contemporary death penalty, (along with her brother and collaborator, Jordan) has concluded that what resulted from Gregg was a myth of counter-factual rationality. In short, guided discretion allowed jurors and the public to believe that death verdicts were not arbitrary. Guided discretion, according to Professor Steiker, was a kind of “Great Oz” rule of law that promised due deliberation based on sensible principles, but behind its rational-looking façade, we discover the same fraudulent concoction of race, class, morality, lousy lawyering, and just plain bad luck, which characterized the administration of capital punishment before Furman and Gregg.

After canvassing the issue, Mandery notes that at least one thing is clear—after Furman, the forces in favor of capital punishment prevailed by re-instituting the death penalty in the manner suggested by Chief Justice Burger’s dissent. For decades thereafter, at least until recently when the tide has perhaps turned again, most of the big legal battles over issues that could have confined Gregg to a narrow class of cases were lost by the abolitionists.

To echo one set of reactions to Brown, would capital punishment have withered away if the Court had left it alone? I believe such a suggestion hardly passes the laugh test—a lust for the death penalty was triggered by the threat it would be taken away. Fool with a toddler’s blankie or pacifier and you will know what I mean. The reaction to Furman tapped into a public consciousness that in many states was dominated by retributive reactions and ideas. To the small extent that change has occurred, it has changed largely due to the last 35 years of experience with what has accurately been called a “broken system,” the rise and revelations of the innocence movement, and most importantly, the availability of life without parole sentences.

To explain why we have the system we have, Professor Steiker lays out alternative realities that I will greatly oversimplify. She explores three counterfactual scenarios—story lines that might, in her judgment, have happened in order to learn more about what actually did happen and

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29 See MANDERY, supra note 26, at 313.
30 See id. at 399–401; MANDERY, supra note 26, at 313.
31 See id. at 277–78.
33 See MANDERY, supra note 26, at 247–48.
First, she proposes that the Court could have decisively rejected the constitutionality of capital punishment even as early as the mid-1960s and that, while “it undoubtedly would have produced a backlash, especially as the crime rate rose,” it “might not have been quite as strong as the one that greeted Furman.”

Secondly, instead of temporarily abolishing the death penalty, and not developing “the complex body of Eighth Amendment regulatory law that followed,” the Court could have properly left the constitutional issue in local hands. This would have avoided the hostility provoked by federal court meddling. “[C]onflict over the death penalty,” she writes, “would be far more concentrated outside the South, in states where abolitionist activists, politicians, and judges were more prevalent.” Perhaps state supreme courts in such jurisdictions would rule on state constitutional challenges to capital punishment in a less charged atmosphere, free of the intense backlash produced by Furman.

Finally, she proposes a later constitutional abolition, 15 years later in fact with the Supreme Court ruling in favor of McCleskey in the infamous 1987 case which actually rejected a challenge to the constitutionality of the death penalty by a 5-4 vote based on its racially discriminatory pattern of imposition. “Had the Court done so,” she writes, and held in favor of McCleskey based on his statistical case for the influence of race in Georgia’s capital sentencing process, “the death of the death penalty would have inexorably followed.”

She concludes magisterially: “Chance events in Supreme Court litigation—the precise timing of a grant of review, the shift of a single vote—could have radically altered not only America’s course of abolition or retention but also, quite profoundly, the shape of death penalty. Only by unsettling the past can we keep in mind how unsettled the future is.”

I must admit that this foray into what Professor Steiker calls “Sliding Doors,” after the fascinating movie about contingent realities left me almost breathless, and ready to admire her scholarship and severely
critique some of her premises. Playing out these counter-factual possibilities suggests that it is a result of contingency, not necessity, that we have the kind of capital regime we do and that, what she calls “chance events,” for example the timing of a review grant or a single vote switch in the Supreme Court, played a decisive part in the course of abolition or retention.

In turn, this brings me back to A Wild Justice for it is only through the microscope of reliable history can we grasp these chance events and evaluate possibilities of the sort Professor Steiker has provocatively raised. We can learn much from exploring imaginings of contingency but even more, I suggest, from linking our search to good history—a history which not only tells a dramatic story that holds our attention, but one which brings us back to the basic assumptions of the actors and reactors and the concrete world in which the events unfolded. To cite just one example, though a critical one, we now know because of Evan Mandery’s research an eleventh hour negotiation between Justices Stewart and White led to the four-year abolition of the death penalty, a mammoth backlash against that decision and finally the subsequent erosion of Justice Stewart’s commitment and the re-assertion of Justice White’s skepticism.

The result was Gregg and its progeny. It is a decision that I hope never rests in peace. May its grave be ever visited by witches, goblins, and tough-minded scholars carrying with them well-worn copies of A Wild Justice.

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43 See id. at 777-86.
44 See MANDERY, supra note 26, at 216-17.