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Complexities and pitfalls in interpreting the law

One of my favorite observations about the nature of law comes from Raymond Chandler in his novel "The Long Goodbye": "(Lawyers) write the laws for other lawyers to dissect in front of other lawyers called judges so that other judges can say the first judges were wrong, and the Supreme Court can say the second lot were wrong. Sure, there's such a thing as law. We're up to our necks in it."

So what is the law? The fact is that during the past decade around 20 percent of the U.S. Supreme Court's docket has been decided by votes of 5-4. And this is what drives non-lawyers crazy: How can nine of the smartest judges in America so often come to such wildly divergent conclusions?

The Law Day answer is that a 5-4 decision shows the extreme complexity of law. But the May Day answer claims the radical indeterminacy of the law makes it so malleable that in close cases a judge can pretty much reach any conclusion he or she wishes.

The reaction to this cynicism has been the insistence by recent Supreme Court appointees that law absolutely binds a judge's decision.

In her testimony before the Senate Judiciary Committee on her nomination to the Supreme Court in 2009, Sonia M. Sotomayor responded to a question as to what role "heart" plays in a judge's decision-making: "(Judges) don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law."

A year later Elena Kagan made similar comments before the same committee in her testimony: "What the judge does is to apply the law. ... [I]t might be hard sometimes to figure out what the law requires in any given case, but

it's law all the way down."

Both Sotomayor and Kagan won nominations to a court whose current chief justice describes his job as no more than objective baseball umpiring.

So if judging is so clear-cut, we are back to Square One: How can the court make the public understand why almost one-fifth of its docket is decided 5-4?

Professor Dan Kahan of Yale Law School contends that the problem of a judge's believing that law "compels" a single answer is that, when faced with a genuinely close question, judges might believe that "frankly acknowledging the vulnerability of their reasoning to counterarguments will invite the suspicion that they are deciding on the basis of some personal value or interest."

The unfortunate result is that "(j)udicial opinions are notoriously even comically unequivocal. It is rare for opinions to acknowledge that an issue is difficult, much less that there are strong arguments on both sides."

The result is what Kahan calls "exaggerated certitude in judicial opinion writing" (Want examples? Google "Dissents of Justice Antonin G. Scalia.")

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So how should a judge write? Kahan recommends that judges should cultivate the quality of aporia in their opinions.

Aporia is an attitude that recognizes the "inescapable (perhaps tragic) difficulty" of an issue. It acknowledges that some problems may not have satisfactory solutions. Kahan stresses that an aporetic approach does not preclude a judge from reaching a definitive outcome or resolution.

CRIMINAL PROCEDURE

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"But it necessarily treats as false ... any resolution of the problem that purports to be unproblematic."

A refreshing example of an opinion that actually finds a case problematic is a recent habeas corpus decision from the 9th U.S. Circuit Court of Appeals, *Sessoms v. Grounds*, 776 F3d 615 (9th Cir. 2015) (en banc).

Tio Dinero Sessoms was a 19-year-old who turned himself into police when he heard he was a murder suspect. His father told him to be sure to ask to see a lawyer before talking to the police. Before any *Miranda* warnings were given in the interrogation room, Sessoms asked, "There wouldn't be any possible way that I could have a lawyer present while we do this? ... My dad asked me to ask you guys ... uh, give me a lawyer."

The police ignored this and told him that it was in his best interest to talk with them without a lawyer. After finally receiving his *Miranda* warnings, Sessoms waived his rights, made incriminating statements and was then charged and convicted of murder.

Sessoms filed for federal habeas corpus after being denied relief throughout the California state court system. The California

courts did not find his comments sufficiently clear to be a proper invocation of a *Miranda* right to counsel. However, the 9th Circuit in a 6-5 en banc decision found for the defense and sent the case back for a new trial.

The most interesting opinion was filed by Chief Judge Alex Kozinski. He joined in an opinion for the five dissenters asserting that the conviction should be affirmed and no relief granted. Yet he also filed a separate opinion intriguingly labeled "Chief Judge Kozinski, reluctantly dissenting."

Kozinski begins by stating, "This is a sad and troubling case. There can be no doubt that Tio Sessoms meant to ask for a lawyer."

So why is he dissenting?

Because, Kozinski stresses, the issue on federal habeas review is a very narrow one. According to the habeas statute, the only question is whether the state's decision was "unreasonable." Kozinski says he has no doubt the California courts were wrong.

But, under habeas review, being wrong is not enough; the court must go beyond that to find the decision was actually unreasonable. And Kozinski says he cannot do so. He gives the state appeals court's opinion the backhanded compliment that it was "carefully crafted to exploit every ambiguity in the timid utterances of a scared and lonely teenager."

Faint praise indeed.

Kozinski concludes by stating that he is glad his side lost: "It's just as well that [my] view does not command a majority. ... I'm glad that a majority is able to conclude that the state courts were unreasonable. I hope their view prevails in the end." If not, Sessoms will spend his remaining days in prison, "half a century or more caged like an animal."

How refreshing to read an opinion that honestly discusses the truly tragic situations judges can confront in their work.