



A judge speaks with candor about judicial cop-outs

By HARVEY SILVERGLATE | March 28, 2007

Rarely does an audience get to hear a sitting judge deliver anything more than the usual clichés about “blind justice” and the like. In her 90-minute keynote (including 45 minutes of Q&A) to the annual Innocence Network Conference held this weekend at Harvard Law School, Massachusetts’s own federal district judge Nancy Gertner displayed a level of candor unusual for someone in her position (disclosure: Judge Gertner and I were law partners for 16 years). Judge Gertner’s target: the glaring flaws in our legal system that produce a disturbingly large number of wrongful convictions each year and the judiciary’s reluctance to deal with them head-on.

With her trademark mixture of humor and sarcasm, Judge Gertner — a former high-profile criminal-defense and civil-rights lawyer — saved her sharpest criticism for those aspects of the justice system beholden to a “hopeless formalism” that all too readily elevates strict procedure over substantial justice. She compared some modern judges to those who, in the antebellum period, enforced the Fugitive Slave Laws despite a gnawing concern that somehow justice was not being done when an escaped slave was returned to the South. Her point was that a judge is in fact able to combine adherence to law with the dictates of justice and conscience, but that formalism is the all-too-easy enemy of such a balancing.

She also lambasted the notion that “finality” should preclude courts from reviewing serious errors in “closed” cases. This “arid obsession with procedure” must yield, she told a sympathetic audience, to a higher commitment to accuracy and justice. Along these lines, she noted that Massachusetts is one of only nine states that do not have laws guaranteeing inmates’ access to DNA evidence. Nor has the Commonwealth yet seen fit to establish a formal innocence commission to examine erroneous convictions and recommend changes to a system that, “while the best in the world,” remains “very much flawed.”

Attendance by members of state and local innocence projects, which are springing up like dandelions at law schools and law firms all around the country, far surpassed any prior year's confab. Also in attendance in record numbers were exonerees who were rescued from long-term prison and even death sentences by the work of lawyers, law students, and others working with or inspired by Barry Scheck and Peter Neufeld's original Innocence Project at Cardozo Law School in New York in 1992. Our own New England Innocence Project, currently run out of the Boston-based white shoe law firm Goodwin Procter LLP, was represented at the conference by a number of area lawyers and their exonerated clients.

Perhaps Gertner's most titillating revelation was her announcement that she is currently working on a memoir, tentatively titled *From Red Suit to Black Robe*. (Gertner typically wore a red dress when she tried jury cases — a practice, many prosecutors noted with dismay, that seemed to draw jurors' attention away from whatever the prosecutor preferred they focus on.) Presumably the memoir will be chock full of the frank observations of the legal system that characterized Gertner's speech, much to the chagrin of those who would prefer the view espoused (at least in public) by most judges: that all is well as long as Lady Justice does not remove her blindfold.