

# Good Judging and Good Judgment

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Judges should be independent, but judges should also be accountable. When does independence become lawlessness?

For most of our history, we have conducted a sporadic national debate about good judging — what it means to be a judge and when judges act lawlessly. Occasionally, those debates have been cast in dramatic terms, with real or threatened impeachments.

More recently and more characteristically, states have turned to disciplinary bodies that, like judges, exercise a broad range of powers — from private admonition to removal from office. Given such graded powers, judicial disciplinary bodies must use the gradations thoughtfully. Equally, however, judges must not confuse independence with irresponsibility.

In our most populous state, a drama is unfolding that illustrates the damage possible when both the judiciary and its watchdogs lose a sense of proportion. In this sad tale we see the terrible straits into which good principles, misapplied, can drive our legal system. The judiciary, the legislature, an independent commission, and the American Bar Association have all leaped into the fray, each making bad matters even worse.

The first act opened when Justice Anthony Kline, a respected and senior judge on California's intermediate appellate court, wrote a 1991 opinion holding that a court may not vacate a trial court judgment to implement a settlement agreement between parties to a civil suit.<sup>1</sup> There is much to be said for this position. It commended itself as dictum to the U.S. Supreme Court, when it faced a related issue a few years later.<sup>2</sup> Some, but not all, academic opinion has agreed with Justice Kline.<sup>3</sup>

As it happened, in *Neary v. Regents of the University of California*,<sup>4</sup> the California Supreme Court disagreed with Justice Kline, ordering the trial court to vacate judgment entered on a jury verdict in order to effectuate the parties' agreement. Justice Kline was not convinced. Over the next several years, Justice Kline tried to persuade his high court that he was right, in majority opinions refusing to extend *Neary*<sup>5</sup> and in concurring opinions applying it while denouncing its rationale.<sup>6</sup> His Supreme Court didn't budge.

In December 1997, Justice Kline apparently decided he couldn't stand it any more and, in a case presenting the same issue, dissented, writing that he could "not as a matter of conscience

apply the rule announced in *Neary*."<sup>7</sup>

That's wrong. Even if there are circumstances in which a judge may knowingly refuse to follow governing law, this isn't one. The law involved was clear and recent, and the higher court had declined earlier invitations to rethink its position. The law in question is neither a threat to the legal system nor the stuff of high morality. Sensible people can and do disagree about how far a court should go in effectuating parties' settlement. Some would argue that an outcome to which both parties to an ordinary civil dispute agree is just. Without going that far, we regularly allow civil parties great procedural leeway: stipulating to facts known to be false; submitting to unconstitutional assertions of territorial jurisdiction; embodying in consent decrees remedies for which the law provides no justification.

Justice Kline is obviously entitled to his views about the right path for this somewhat esoteric doctrine to take. And any rational view of judicial independence suggests several ways for a judge to express his views. A majority opinion written *dubitante* is one course. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit recently took this route in an antitrust

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#### Footnotes

1. *Neary v. Regents of the University of California*, 278 Cal. Rptr. 773 (1991), *rev'd*, 834 P.2d 119 (1992).
2. *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18 (1994). *Bancorp* declined to implement the part of a settlement calling for vacation of an appellate opinion making new law in an important area. The unanimous opinion was broad and in dictum said that the same principle applied to trial court decisions, even those that made no new law.
3. Compare Jill Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991) (taking Justice Kline's view of the matter) with

Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) (taking a more complex view of the question).

4. 834 P.2d 119 (1992).
5. See *People v. Barraza*, 35 Cal. Rptr. 2d 377 (1994) (refusing to extend *Neary*, which arose in a civil case, to allow reversal of a criminal conviction and substitution of conviction for an alternate crime that would not require deportation of the convicted defendant).
6. See *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 24 Cal. Rptr. 2d 632, 638-40 (1993) (Kline, J., concurring) (criticizing *Neary* rule in case in which court declined request for stipulated reversal based on "extraordinary circumstances" exception to *Neary* rule).
7. *Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 2d 489, 491 (1997) (Kline, J., dissenting).

case, writing a majority opinion that demonstrated why the rule he applied under compulsion of governing precedent was not sensible.<sup>8</sup> The Supreme Court responded by granting certiorari and adopting Judge Posner's view.<sup>9</sup> A powerful concurring opinion, in which Justice Kline recognized an obligation to follow the law while saying why he thought the present view not desirable is another possibility. If Justice Kline wanted to argue his case at greater length, a law review article or speech would provide other outlets for his disagreement with his high court. If Justice Kline found the point at issue so significant that he could not conscientiously follow the law announced, recusal is another possibility, perhaps even recusal accompanied by an explanation.

What Justice Kline is not entitled to do is to continue to vote in cases while announcing that he will refuse to follow a recent, authoritative ruling of his state's highest court. A dissent written under these circumstances is not merely a signal of intellectual disagreement with the high court. It is a refusal to adhere to the constraints of judging. A judge possesses legitimate power only by virtue of submitting to the discipline of law. Without the willingness to recognize such boundaries, a judge should not wield the power of the office.

Yes, one can posit dramatic, extreme examples in which, perhaps, a judge may have some limited right or duty to protest a deeply immoral law. Justice Kline, in a published defense of his action, compared himself to Justices Marshall and Brennan of the United States Supreme Court, who toward the end of their careers routinely dissented

from the imposition of the death penalty.<sup>10</sup> There are two things wrong with this analogy. First, intermediate appellate justices occupy a different institutional position than do justices of the highest court. Second, if high court judges have greater leeway anywhere for dissent it has to be in matters of life and death, though one could respectfully argue even there that fidelity to law requires acquiescence.

If the judge was wrong, the next protagonist may have matched him in bad judgment, though, for reasons that will soon appear, one cannot be sure. Like many states, California has a body charged with enforcing judicial discipline, the Commission on Judicial Performance. The sanctions available to the Commission range from the nearly trivial — a private letter of reproof — to the severe — removal from office. It also has available a range of processes, from staff investigation to formal charges and hearing. The Commission invoked the most public and serious of its processes — charging Justice Kline with “conduct prejudicial to the administration of justice” and “willful misconduct.” It is difficult to imagine anyone's thinking that Justice Kline should be removed from office for a single uncharacteristic act that did not affect the outcome of a case (if only because two other judges followed controlling precedent). Because the Commission's deliberations are appropriately confidential, we cannot know its motivation for taking the route it did.

The most charitable view of the Commission's action would see it as a public response to Justice Kline's equally public declination to follow governing

law. If so, its public charges were a calculated counterweight to the public dissent of Justice Kline. An appellate justice's announcement that he no longer considers himself bound by the law sends ripples through the legal system and arguably demands an equally public announcement that such behavior is not part of a judge's tool kit. But if the Commission took such a view, one might have hoped that it would have accompanied its charges with a statement that it was not contemplating removal from office. Not to say so at the outset risked just the sort of almost hysterical reaction that in fact ensued. As matters now stand, the surest sign that the Commission is taking such a path would be a rather quick resolution of the case — a quick settlement in which Justice Kline accepted his responsibility to follow the law and the Commission moved on to the far more serious matters on its docket.

There are less charitable constructions of the Commission's actions. If one views the question solely as a question of how to bring Justice Kline back to his characteristically judicial ways, one would think of a private letter, reminding the judge of his duty to follow the law.<sup>11</sup>

Such a letter requires informal written notice to the judge but can be issued without any public announcement, charges, or hearing. On this view of things, more elaborate, and potentially serious, action would follow only if this ordinarily sensible judge demonstrated that he had not gotten the message.

Another possibility, of course, is that the Commission was displaying the same poor judgment as Justice Kline. A

8. See *Khan v. State Oil Co.*, 93 F3d 1358, 1362-64 (7th Cir. 1996) (criticizing but following Supreme Court precedent), *rev'd sub nom.* *State Oil Co. v. Khan*, 522 U.S. 3 (1997). Judge Posner concluded his analysis and criticism of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), by stating: “But all this is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the U.S. Reports for prophetic clues to overruling. It is not our place to overrule *Albrecht*; and *Albrecht* cannot fairly be distinguished from this case.” 93 F3d at 1364.
9. See *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997). The Court noted: “Despite what Judge Posner aptly described as *Albrecht's* ‘infirmities, [and] its increasingly wobbly, moth-eaten foundations,’ there remains the question whether *Albrecht*

deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.” *Id.* at \_\_\_, 118 S. Ct. at 284 (citation omitted).

10. *J. Anthony Kline, Justice Kline Defends His Dissent*, CAL. LAW., Sept. 1998, at 25, 26.
11. In the parlance of the California Commission, such letters are “advisory” and constitute “corrective action” rather than “discipline.” See CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, 1997 ANNUAL REPORT, at 36 (Rule 110 (c)), 21 (“An advisory letter may be issued when the impropriety is isolated or relatively minor....”).

relatively young agency, it may be still finding its way. But if that is the explanation, the Commission needs to hear from critics that this is the wrong path. Any judiciary the size of California's — with fifteen hundred judges — has some genuinely bad actors — intemperate, incompetent, or corrupt persons now sitting as judges who dishonor their offices and distort justice. In recent months, California's Commission has disciplined one judge for tricking a convicted felon into waiving his right to prompt sentencing, so the judge could consider depriving him of medical care while in prison,<sup>12</sup> another judge for extorting sexual favors from a criminal defendant in return for reduced sentences for her and her accomplices,<sup>13</sup> and a third for altering judicial records to conceal his acts of bias towards friends who were parties or lawyers.<sup>14</sup>

A good prosecutor does not devote attention to litterbugs when faced with roaming murderers. Similarly, no body with disciplinary authority over the judiciary should squander public funds and reputation in prosecuting an isolated act of uncharacteristic bad judgment when faced with such an array of far worse behavior.

If bad judgment lay behind the Commission's charges, things promptly got worse. In response to the Commission's charges, the California Judges Association and the American Bar Association weighed in, ABA President Jerome Shestack writing that the Commission "should not be 'second-guessing' a judicial opinion."<sup>15</sup> "Second-guessing" hardly captures the behavior in question, in which a judge announced that he was declining to follow what he recognized as governing law.<sup>16</sup> The ABA does neither the judiciary nor itself credit when it defends such behavior.

Matters could have become even worse. The state legislature joined the chorus passing a bill that would strip the

Commission of the power to punish a judge for any dissenting opinion or judicial decision. That was wrong for two reasons. Like the judge's dissent and the Commission's charges, it lacked proportion. Faulty exercise of prosecutorial discretion calls for replacing or reprimanding the prosecutor, not repeal of the substantive law. Worse, the legislation was substantively wrong. We *should* have the power to discipline a judge who decides a case as a result of a bribe or confessed racial bias. Yet the bill would have prevented discipline in such a case.

Many of the opening acts of this drama have not been pretty. But they are not beyond rescue. The Governor has saved the legislature from its fit of ill-judgment by vetoing the bill. The charges remain pending against Justice Kline. Common sense, which has been in short supply in this matter, suggests a quick resolution via an agreement, in which Justice Kline promises to abide by governing law — even when he doesn't like it — and the Commission dismisses charges or issues a private letter of reproof. At that point, perhaps all concerned can exhale and get to the really difficult problems confronting the legal system — of which this is not one.

For those of us who are bystanders, the lessons are equally important. First, believers in judicial independence must recognize that this icon of justice comes linked to its siblings — fidelity to law and accountability. Judges are powerful, but their power comes at the cost of a constraint; without that constraint power ceases to be legitimate. Judicial independence should not mean independence of law. Second, bodies that discipline judges need to see behavior in context and to exercise appropriate prosecutorial discretion. Without that discretion, such bodies will themselves become part of the problem. Finally, the broader public — academics, bar and

jurist's associations — must recognize that a defense of judicial independence does not mean defense of every act by every judge. Instead, any discerning defense of judicial independence will mean disapproval of some judicial behavior. For us, just as much as for judges, wisdom must include a sense of proportion.



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12. *In Sharp Rebuke State High Court Censures Jurist*, L.A. TIMES, August 11, 1998, at A3.

13. *Ex-Judge Censured for Sexual Relationship with Defendant*, L.A. TIMES, January 6, 1999, at B1.

14. *Madera Justice Kicked Off Bench*, THE [S.F.] RECORDER, January 4, 1999, at 1.

15. *Judge Faces Discipline: Commission Charge over Justice's Opinion*

*Unleashes Firestorm of Protest*, CALIF. ST. B.J., Aug. 1998, at 1-3 (quoting ABA President's letter).

16. "I acknowledge that the opinion of the California Supreme Court in *Neary* ... requires that the motion before us be granted. I would deny the motion, however, because I cannot as a matter of conscience apply the rule announced in *Neary*." *Morrow*, 69 Cal. Rptr. 2d at 491 (Kline, J., dissenting).