

war-related crimes by eliminating mercy from the military justice system would ignore the fact that mercy extended in soldier versus soldier cases actually promotes, rather than destroys, responsibility for others. Mercy enables the defendants to make a fresh start, reflects the community's gratitude for prior service, and recognizes communal and command responsibility for crime. The mercy-givers are themselves potential future victims, and they accept the risk of the defendant's future conduct. Mercy is not cheap and easy but reflects the mercy-giver's willingness to take risks on the strength of the relationship with the defendant. Defendants are already in close relationship with their victims and their commanding officers, responsible to and for them in the future, and bonds of gratitude, trust, and mutual commitment are formed and strengthened by the mercy-giving.

Thus, when we consider the light sentences given to soldiers who have committed serious—or even unspeakable—crimes (such as Lt. William Calley, who served only four months in prison for his role in the My Lai massacre), we must realize that this is not a case of institutional denial or a cover-up, but, rather, it is part of a culture in which soldiers protect one another and understand that the violence of war sometimes causes aberrant behavior.

Much has been written about wrongful convictions and the reasons behind them, but this is not the focus of *When Law Fails*. Instead, whether describing how thousands of African-American residents of Tulsa, Okla., were never able to collect compensation for damages caused by the rioting of a white mob in their neighborhood (discussed in "When Law Fails: History, Genius, and Unhealed Wounds after Tulsa's Race Riot," by Charles Ogletree), or the clemency petitions that were summarily denied in the name of finality (discussed in "Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State," by Austin Sarat), the thread uniting the 10 essays in *When Law Fails* is

that, although true justice is a worthy aspiration, our system can rarely achieve it. Or, as Markus Dubber, a professor at the State University of New York at Buffalo, School of Law, notes in "Miscarriage of Justice as Misnomer":

Here it might be useful to consider the relationship between the rule and the exception in the penal process. As long as miscarriages of justice are regarded as exceptions to the rule of justice delivery, then their exposure does little to challenge the legitimacy complacency of the penal process. The problem with miscarriage of justice is not that they are miscarriages or even miscarriages of justice. They are not miscarriages at all because the system does not seek to do justice in the first place. **TFL**

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### ***Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts***

By James P. Gray

Square One Publishers, Garden City Park, NY, 2008. 326 pages, \$21.95.

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#### REVIEWED BY AMY B. AUTH

"Who is the judge on the case?" As a lawyer, how many times have you asked that question or had another lawyer ask it of you? Consider the amount of time, and thus money, we lawyers spend thinking about the judges assigned to our cases. We consult other lawyers who have appeared before the judges or perhaps even seek out former law clerks to gain insight into a particular judge, and then we use this insight in planning our litigation strategy. But how much time do any of us spend thinking about what it is like *being that*

*judge* and having to deal with our case? Not much, I suspect. And those of us who practice mainly in federal courts probably think even less about what it is like to be any of the many types of state court judges, especially the types who preside over matters other than ordinary civil trials.

Judge James P. Gray has thought about these things in depth, and he addresses them in *Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts*. The book is essentially a textbook for new judges and those seriously thinking about becoming a judge, so its intended audience is a relatively narrow subset of the legal profession. Nevertheless, the book will be of wider interest because, in addition to offering advice to judges and would-be judges, Gray offers his perspective on the role judges should play in and out of the courtroom, and he makes important points that can benefit the practicing lawyer as well.

Gray knows life as a judge. The son of a former federal district court judge, Gray has been a California state court judge for almost 25 years. He has sat on a variety of courts, ranging from traffic court to probate and family court to criminal court. He notes that, although being a judge has the benefit of not having to have to bill your time in six-minute increments or worry about bringing in business, wearing the robe also has its drawbacks—including lower pay, increased scrutiny of one's life, and the inability to defend oneself from public criticism. Gray also notes that judges are required to be generalists in an age when lawyers are becoming more and more specialized—a fact that is well-known to those of us who have worried about appearing in a complex commercial or patent case in front of a judge who may have spent his or her career as a criminal lawyer. As Gray aptly points out, civil cases "involve factual patterns that are limited only by humankind's creativity, emotion, negligence, carelessness, and stupidity." He not only understands the day-to-day practicalities of being a judge but also has thought about the role of a judge in the community at large.

Gray believes in activist judges, not

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necessarily in the political sense that comes up in election years, but rather with respect to their day-to-day, in-the-trenches role in the courtroom. He believes that, regardless of the type of case before a judge, and regardless of whether the case is just beginning, in the midst of discovery, in trial, or in the process of being settled, judges should be activists in moving the case along and, in particular, in trying to settle the case. Moving the case along means not allowing counsel to play “procedural gotcha” or otherwise cause unnecessary delay. Delay, he notes, more often benefits lawyers than it does clients. The judge should anticipate potential discovery issues at the outset and ask the parties what the court can do to help move the case along in addition to setting settlement conference and trial dates.

Judge Gray also believes that judges should take an active role in the discovery process, including identifying and sanctioning lawyers who act unreasonably, addressing discovery disputes request-by-request with all the attorneys if necessary, offering the courthouse as a location for depositions, and reminding counsel that Saturdays are available for depositions as well. Gray’s suggestions for moving discovery along, which are probably not appealing to most lawyers (can you imagine sitting down with the judge as he or she goes through your document requests one by one?), admittedly are likely to cut down on the number of discovery disputes brought before the court. Gray also believes in drafting and issuing tentative decisions in order to focus the parties on the critical issues. At first, the idea of a tentative decision may seem disconcerting, but lawyers should welcome a preview of how the judge intends to rule—the knowledge gives the attorneys an opportunity to change the judge’s mind. Not surprisingly, Gray also believes in firm trial dates and no continuances, because continuances are a means of delay that, again, more often benefit the lawyers than the parties.

Gray’s belief in judges’ taking an active role in moving a case along is aimed primarily at moving the case toward settlement. Indeed, he devotes an entire chapter to his thoughts and

advice on mediating and settling cases, and he himself mediates his own cases. Lawyers may disagree as to whether the judge assigned to the case, who will ultimately preside over the trial, should participate in settlement conferences, but Gray offers perceptive insights into the settlement process. He notes that settling is the only way that a party, particularly a plaintiff, can maintain control over the outcome of his or her case. Gray also notes that, often, for corporate defendants to authorize settlement, the corporate officers involved in the dispute will need some “political cover”; they will want the decision they made that led to the lawsuit to be viewed as a “plausible mistake that ‘could have been made by anybody under the circumstances.’” Gray understands that some cases will not be settled and that some parties will insist on their day in court, but he believes that only a small number of cases fall into this category.

A considerable portion of *Wearing the Robe* is devoted to the variety of different types of courts in our judicial system, including the various levels of criminal courts, family courts, juvenile courts, drug courts, probate courts, traffic courts, and others. In many of these courts, the judges deal directly with the parties themselves and not with attorneys. Many people come before a court only one time in their lives, and they will judge the entire judicial system on the basis of that experience. Therefore, Gray believes that judges should ensure that all parties feel that they were able to tell their side of the story and were treated fairly, so that even losing parties will accept the results and leave with a favorable view of the judicial system. Gray genuinely believes that people listen to and respect the man or woman wearing the robe and that judges can have a significant impact on people’s lives, especially in courts such as traffic court or probate courts.

According to Gray, judges can promote a greater understanding of and respect for our judicial system by participating in community activities such as inns of court, teaching, engaging members of the media as much as possible, and creating community programs. In

Massachusetts, for example, Magistrate Judge Leo Sorokin is heavily involved in the Court Assisted Recovery Effort (CARE) program, which is an intensive one-year program designed to assist those on supervised release or probation to lead sober, employed lives. Sorokin himself presides over weekly sessions with the probation officers, prosecutors, defense attorneys, representatives from treatment contractors, and the participants themselves. (For more information on the CARE program, see [www.mad.uscourts.gov/outreach/recovery.htm](http://www.mad.uscourts.gov/outreach/recovery.htm).) The success of Massachusetts’ CARE program supports Gray’s belief that individuals listen and respond to the individual wearing the robe and that positive interaction between individuals and the court will promote greater respect for our judicial system.

As noted, *Wearing the Robe* contains tips for practicing lawyers, and, even though many of those tips may seem self-evident, it is for that very reason that they are worth repeating. Gray tells us, for example, that, although motions to dismiss may impress the client, they rarely move the case forward. With respect to trials, he considers opening statements to be of fundamental importance, even in bench trials. He advises lawyers to resist the temptation to dump every document produced during discovery into evidence during the trial; instead, they should focus on the documents they plan to use in closing arguments. With respect to settlements, to which Gray devotes a significant portion of the book, he says that lawyers should keep in mind the psychological impact of their offer and consider using a neutral business accountant to reach a fair settlement. In addition, once a settlement is reached, he tells lawyers to get the settlement recorded right away.

For the most part, Gray is proud of the American judicial system and believes that it works. He notes that, although lay people often cite the McDonald’s hot coffee case as an example of an outrageous verdicts and the court system run amok, few people know that the evidence at the trial indicated that there had been multiple similar incidents that had resulted in severe inju-

ry without the company's having taken any corrective action. Nor do critics of the verdict realize that the court reduced the plaintiff's award because of her own negligence.

But Gray also recognizes the problems of our judicial system, and he offers suggestions for improving it, including adopting a modified English rule for attorneys' fees, which would give the trial judge the discretion to award reasonable attorneys' fees to prevailing parties. Under this approach, the judge would be able to award attorneys' fees in cases that should never have been brought or should have been abandoned once relevant facts were discovered, but judges should not award fees in a way that would make it "ruinous for parties to pursue the righteous prosecution or defense of appropriate cases." Gray also recommends more interaction between the judiciary and the media, including allowing cameras in the courtroom.

His most important recommendations relate to the criminal justice system, and he suggests considering the

legalization of drugs. His other recommendations with respect to the criminal justice system stem from the idea of "restorative justice." As Gray notes, 95 percent of all prisoners will be released, and prisons do not adequately prepare these people for this eventuality. He recommends not only helping prisoners address why they were sent to prison in the first place but, more important, the need to provide them with basic skills training, including reading, writing, and job and parenting skills, as well as drug and alcohol treatment, so that these people do not end up back in prison. Gray also recommends that, given the cost of keeping convicts in prison, especially with respect to an aging prison population that results from longer and longer sentences, we should also reconsider whom we send to prison. Gray points to the case of a former California legislator who had routinely voted for longer and longer prison sentences, until he himself had to spend two years in prison for election fraud. Once in prison himself, the legislator realized that many people

in prison simply did not belong there. After his experience, the legislator was quoted as saying, "We should reserve our prison space for people we are afraid of, not people we're mad at." Coming from a judge who has worn the robe for so long, his suggestions are at least worth considering.

*Wearing the Robe* compels us, as lawyers, to look beyond our own interests in our particular cases and to consider for a moment the important role played in our judicial system, at all levels, by the person wearing the robe. **TFL**

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## **ENVIRONMENT** *continued from page 64*

focusing specifically on the unique insights of the senior officer featured on the page. The sidebars support what is in the text, as opposed to distracting from it. At the same time, as with Michaels and Balling's book, the best way to follow the text and to get maximum benefit from the sidebars is to read the text first, then go back and read the sidebars. But reading the sidebars included is valuable.

This paper is worth reading for three specific reasons. First, the discussion does not fall anywhere in the left-vs.-right, environment-vs.-economy spectrum and thus presents a unique perspective on global warming. Like Lomborg's book, this paper takes a truly global view of climate change. At the same time, the authors do not lose their perspective on the issue of just why the United States should care about the problem. Second, the authors acknowledge and tackle head-on a vital issue: making decisions and taking action in the face of imperfect knowledge. The authors have spent their entire adult lives working on important and complex problems and have succeeded in positions of tremendous responsibility. They acknowledge that they do not know everything about climate change but have concluded that the evidence and the consensus within the scientific community are strong enough that we need to act now. As they state on pages 9-11 of their paper, it is a question of managing risk not of arriving at absolute certainty. Those pages alone make this work worth reading.

The third reason to read this paper is Appendix 2, "Cli-

mate Change Science—A Brief Overview," which is well-written. In this section, the authors specifically state that they sought out scientific experts to determine both the consensus and range of views within the scientific community. They showed that the current consensus is that the significant increases in average global temperature over the last half-century can be attributed to human activity (with a certainty of more than 90 percent); that those increases have already affected many natural systems on Earth; and that future climate change is inevitable (page 56). At the end, they also briefly discuss abrupt climate change, pointing out that were abrupt change to occur, it would be a significant challenge even for well-developed countries.

Each of the works reviewed here can help lawyers improve their understanding of the current discussions about global warming. **TFL**

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