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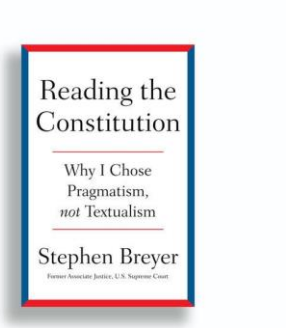

UN BENCHED: WHY *FORMER* JUDGES SHOULD "OUT" THE CRIMINAL LAW'S FAULTS

By Joel Cohen

Retired Supreme Court Justice Stephen Breyer's new book is a formidable, scholarly work. In *"Reading the Constitution: Why I Chose Pragmatism, not Textualism"* (Simon & Shuster,2024), Breyer explains why, as a sitting Justice, he pursued a philosophy of "pragmatism" -- not "originalism" nor "textualism".

Breyer doesn't use these words, but, clearly, the tropism of his decisional life frequently sought legal mechanisms to achieve "better" results (if the outcomes he adamantly opposed were in any way avoidable). Put differently, he typically advocated for a result that both he and those who think like him would consider more humanistic and would square with their personal sense of justice. Breyer chooses the term "making society more workable" in employing ways to interpret the Constitution.

In explaining his views on the pivotal abortion, health care or gun rights decisions, however, Breyer, oddly, never challenges the Court's rightwing opinions for their seeming intransigence – indeed, their strident unwillingness to address these issues with a meaningful dose of modernity that intends a "living Constitution." That is, a Constitution that should often need to leave the horse and buggy in the barn when one takes to the "workability" road.

Breyer almost seems engaged, instead, in a purely intellectual discourse with his former colleagues with whom he has been in decisional disagreement over many burning issues of the day. As if to say: "They see it that way and I see it this way, but I respectfully submit that mine is simply better. Sometimes, I persuaded them. Whether I did or not, though, we have always greatly respected and admired one another." He followed up his publication date with an op-ed in the New York Times to make that precise point, perhaps lest one mistakenly conclude, given his book's spate of publicity, that the sharply divided Justices typically fight to the bitter end when in disagreement.

And probably that's true – certainly in his case. He is, after all, known for his unparalleled courteousness. As one reads his account of his years on the bench, the Justices seem, perhaps by design, to belong to a social club composed of members who simply have differing philosophies of life under law. Ergo, *viva la difference!* You almost want to hear Justice Breyer – importantly, *former* Justice Breyer

-- say: “These decisions by my colleagues on the right are somewhat antediluvian -- a reality that urgently needs to change for the sake of the nation.” Although, clearly, a demonstration of antipathy certainly isn’t required.

And yes, Democratic House Speaker Tip O’Neill, famously, would often share a collegial beer with Ronald Reagan in the evenings after they would fight it out at the White House over a proposed piece of legislation. Their *mano a mano* skirmishes, though, typically resulted in meaningful compromise over important matters, not occasional acerbic dissenting opinions.

As a practicing lawyer who recognizes the need to “go along to get along,” I accept it. But not every reader of Breyer’s volume – particularly lay readers – will or does. Jennifer Szalai, a book reviewer for the New York Times who is not a lawyer, for example, takes Breyer to task for failing, in her estimation, to be bold. In a review entitled *“A Justice’s Alarm is Muffled by Naïve Tedium.*” (N.Y. Times, 3/28/24), she observes that, “one might have thought that this new book would afford him the opportunity to let loose . . . [b]ut his voice in the book barely rises above a whisper. . . . [t]here is a profound and generous kindness embedded in his remarks, a determination to think the best of people but his incredulity makes you wonder what alternative universe Breyer is living in.”

And although her commentary is arguably overly critical of Breyer, Szalai is essentially right: when things need dramatic change, those in the best position to recognize it, as Breyer surely is, should “speak out” *publicly* and explain precisely why, without circumnavigation. Indeed, why gun restrictions, why a woman’s right to choose, why affordable health care and the curing of other problems are extremely important in a free society – and why each of these things are and can be made to be workable under the Constitution as a pure matter of problem solving.

And, frankly, in the instance of the law’s frailties, probably no one is better equipped to do so than *retired* judges (as is Breyer), no matter how courteously they choose to do so. After all, they who have had to deal with how the law often fails are at a point in the continuum of their lives and careers where they are no longer shackled by the restricting or ethical chains of what is “acceptable *judicial* conduct.”

Put directly, those no longer constrained by any protocol of silence need, as they say, to simply “tell it like it is” – to tell their readership precisely how the courts can make society better. Indeed, the unambiguous goal? To help the legislature, the bench and bar as well as the public, better understand the many imposing problems that exist in the law, keeping intellectual discourse to a minimum (unlike in the instance of the Breyer book). I suspect his lay readership would want this extremely intellectual individual who has so vibrantly served the nation to tell it, from the perspective or having dealt with vast problems with the law, to explain in simple terms “what’s wrong with the law” and what can *constitutionally* be done to improve it.

Undeniably, lawyers who practice in the vineyard of the law, professors and legal commentators are equipped to critique the law and its practices. Nonetheless, they simply don’t have the *gravitas* or the community’s acceptance of their objectivity in making their assessments. Much of their commentary might be seen as impractical and far too aspirational as presenting ideas for an almost Voltairean world without a true, unbridled ability to say that “justice can and should surely be meted out in a better way.”

Judges who have actually sat on the bench but no longer do can best speak to issues in the criminal sphere, for example, that have troubled them – indeed, have blocked them. For instance:

- Lawyers are accorded insufficient latitude to "zealously" represent defendants.
- The grand jury system unfairly treats defendants.
- Too many innocent defendants plead guilty.
- Defendants are unable to depose critical prosecution witnesses before trial.
- Mandatory minimum sentences are nonsensical.
- Prosecutors are accorded too much discretion in filing charges, basically forcing guilty pleas.
- The law fails victims of police misconduct by according qualified immunity to police who engage in wrongful conduct against them.

Sure, I, for one, can address these issues and others like it in writings, seminars, or speeches, as can Professor X or Y or better legal commentators. And sitting judges who don't have skin in the game in any particular case where judicial ethics might constrain them can do so too albeit, necessarily, in severely muted terms. Admittedly there is, indeed, an occasional judge here or there who has sat on a case who sometimes circulates her decision to the applicable legislature, to disclose her frustration with the state of the law that constrains her ability to dispense a better form of justice.

Still, most sitting judges are typically unable or unwilling to "speak" to problems with the law with the same ability or efficacy of a respected *retired* judge who has actually been -- but is no longer -- forced to sit on cases that implicate disturbing issues such as those raised above. They simply lack the ability to do anything about it because the law – typically statutory or rule-based -- has tied their hands. Or, perhaps equally important, because they are restricted by a myopia born of the position, they *currently* hold that simply won't allow them to effectively see beyond the four corners of the case before them and what the law compels them to do in that case. As if they silently tell themselves: "This is the law and what it outright compels me to do, to allow or disallow."

I totally get it. And so, I'd enjoy having a few glasses of wine with Justice Breyer – *in vino veritas,* after all – in order to see what he really thinks when the wine has infused his thinking (and maybe persuade him to write *that* book). Other retired judges willing to participate in an open-minded discussion of where the law – especially, the criminal law -- is imperfect (or indeed seriously defective) and requires radical change are invited! (We may need a few bottles of wine, especially if the judges are open to recognizing that in their past, they've actually meted out what they realize, at least now, were injustices compelled by the current state of the law).

Joel Cohen, a former state and federal prosecutor, practices white collar criminal defense law at Petrillo Klein & Boxer. He is the author of "Blindfolds Off: Judges on How They Decide" (ABA Publishing, 2014), and an adjunct professor at both Fordham and Cardozo Law Schools coteaching a course based on the book.