Chasing Justice: My Story of Freeing Myself After Two Decades on Death Row For a Crime I Didn't Commit

By Kerry Max Cook

William Morrow, New York, NY, 2007. 342 pages, $25.95.

Reviewed by Elizabeth Kelley

The Innocence Project, which is based at Benjamin Cardozo School of Law, reports that there have been 200 post-conviction exonerations based on new DNA testing in U.S. history—and the majority of these cases involved African-Americans. The Death Penalty Information Center reports that, since 1973, 124 people on death row have been released and later have been acquitted, received pardons, or had all charges dropped (DNA was a substantial factor in only 15 of those cases). Although the United States has the best legal system in history, these exonerations show that the system is far from perfect. Indeed, for all that is good about our criminal justice system, we are still haunted and ashamed by stories like Kerry Max Cook's. One reason is that Blackstone's words—"Better that ten guilty persons escape than that one innocent suffer"—have been burned into our national psyche.

Chasing Justice is a powerful and revealing book that must be read by anyone who wants to ensure that wrongful convictions do not happen in the future. Today the author of the book, Kerry Max Cook, is a husband and father living in upstate New York. Some of you may have seen him on Broadway or on television; his story was told in the play "The Exonerated," and he provided post-performance commentary during the show's Broadway run.

Between 1978 and 1999, however, Cook resided on death row in the state of Texas. He was convicted of the brutal rape and murder of a young woman and sentenced to death, even though, unlike many others who have been wrongfully convicted, he had hard-working trial counsel. Cook endured not only the brutality of death row but heartbreak after heartbreak as appellate courts rejected his claims. However, thanks to the zeal of the Centurion Ministries and its team of lawyers, he was freed and could begin a new life.

When John Grisham's *The Innocent Man* was published last year, readers, especially those who are not lawyers, found its true account of the wrongful convictions and eventual exonerations of two men to be compelling. I recommended *Chasing Justice* to a friend of mine, an English professor, who had just finished reading *The Innocent Man* and was overwhelmed, but she said that she couldn't bear to read another book on the same topic that was also so heartbreaking! Yet Cook's *Chasing Justice* can be distinguished from Grisham's book by the sheer power and authenticity that emanates from a first-person narrative. Cook does not merely enable you to visualize his torment; he forces you to share his prison cell with him. We are outraged as a prosecutor distorts and withholds evidence. We are shocked and disillusioned as a trial judge denies Cook the opportunity to present evidence that has a real possibility of leading to his acquittal. We mourn the death of his beloved father and brother, who die while he is incarcerated. And we puzzle over Cook's inability to reintegrate into the world after his freedom has been so painfully won.

Cook endures not only the agony of a death sentence hanging over his head for 22 years but also sadistic treatment by guards and fellow inmates. Those who might ordinarily dismiss reports of horrible prison conditions by saying that the inmate should have thought of that before committing the crime obviously cannot say that here. Granted, prisons are meant to punish, but the conditions and scenes Cook describes offend any standard of decency.

Some might cite Cook's 22 years on death row to argue that we should accelerate the appellate process, but it took that long to prove Cook's innocence, and speeding up state-sponsored killing will not make us any safer. Texas, Cook's state, is the nation's leader in executions—and also in homicides per capita.

What sustained Cook during all those years was the knowledge that he was innocent as well as his belief in God. But make no mistake: Cook's knowledge and his faith did not provide him with confidence. Too many people had deserted him and too many doors had slammed in his face. He could have little belief in a system that had wrongly convicted him and continued to fail him. While reading *Chasing Justice*, one wonders how much more Cook can endure. Then, a new setback, a new indignity, is visited upon him, and alas, he continues to endure. His emotional and physical strings are very, very taut, and just when we think they will break, he miraculously holds himself together.

Kerry Max Cook is angry and bitter, but he has every right to be, and it would seem unreal if he were not. Yet Cook's anger and bitterness do not just hang in midair; rather, *Chasing Justice* exposes all those factors that led to the wrongful conviction of Cook and many others: prosecutorial misconduct, mistaken eyewitness testimony, junk science, and jailhouse snitches. How many wrongfully convicted men and women suffer in our prisons today? *Chasing Justice* reminds us that work remains to be done. We must correct the system to prevent wrongful convictions in the future. **TFL**

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The Failure of Corporate Law: Fundamental Flaws & Progressive Possibilities

By Kent Greenfield

University of Chicago Press, Chicago, IL, 2006. 288 pages, $45.00.

Reviewed by Christopher C. Faille

Who gets what as a result of a corporate bankruptcy? There is an order of precedence, well established in law, that is applicable in principle (though with differences in practice) whether the bankruptcy is a liquidation or a reorganization. The creditors of the company have claims against its assets that are prior to the claims of the owners of equity. In addition, the creditors' claims differ among one another in priority according to the terms of the contracts by which the corporation's debts to them were incurred.

Imagine a newly bankrupt corporation as a seesaw with a much heavier weight at one end than at the other. The lighter end, accordingly, is up in the air and the heavy end is on the ground. In terms of the right to receive a payoff, the most senior or best secured debt instruments have first dibs, and, after they are paid, other payments follow in legally defined sequence, with the owners of equity sitting on the ground. At some point, moving down the seesaw, the tangible assets of the estate run out. But, if we're assuming that there is some good will for the ongoing enterprise, there is still some value to be distributed. We can call that point the fulcrum.

The holders of the fulcrum security are reimbursed by the transformation of their instruments into equity in the reorganized company. The next class of securities after that gets nothing. As the image suggests, the original equity holders are sitting on the ground, so they'll always be below the fulcrum. Now, there are few sentences in which the word "always" literally belongs. But, in the rare case when the original equity holders do recover something, it is a good indication that the bankruptcy system was misused. If there was still that much value in the original enterprise, it probably shouldn't have sought the protection of the court in the first place.

The preceding paragraphs state some fairly well-known facts. But the implications of these facts aren't as commonly understood as they should be. For example, the fact that the equity holders are in last place when a corporation is in its death throes suggests that, when a corporation is not bankrupt, the equity holders, sitting on the ground keeping everybody else in the air, hold a certain pride of place.

We might change the analogy and think of an airplane in flight. This particular airplane is subject to only one manner of crash—cockpit first. Each of the passengers has a better chance of survival than the cockpit-inhabiting pilot—the equity holders—which makes a certain intuitive sense on both sides. Anyone in possession of any corporate security or instrument has, in principle, bought into a specific position in the passenger-to-pilot continuum—a specific trade-off of control, return, and risk. Both in the event of a crash and in the more usual event of a flight that does not crash, each is entitled to the benefit of his or her bargain, and no one is entitled to more than that.

Of course, in a corporation that has a lot of outstanding shares of equity, the equity holders can't literally exercise their piloting prerogative. They must do so through surrogates known as directors. From such considerations arise two crucial principles of corporate law: (1) that the leading role in corporate management is played by the directors, who have a good deal of discretion in how they exercise their leadership; and (2) that the directors are expected on the whole to employ that benefit to maximize the value of the equity of the corporation.

Advocates of the doctrine known as "corporate social responsibility"—Kent Greenfield is one of them—question or deny these principles. Proponents typically come up with a long list of "stakeholders" to whom "corporations" (read: directors) are obliged and deny the equity holders any pride of place on the list. I don't believe, in general, that these advocates have much of a case. Even so, I have to say that they've had more capable champions than Greenfield is in *The Failure of Corporate Law*. He brings little new or interesting to the table.

Greenfield barely mentions the insolvency-driven rationale for the centrality of equity. When he does briefly discuss the topic, he comes up with the following statement: "Framed in contractual terms, one can imagine a corporate contract that does not link the residual claim on financial assets to be distributed in case of liquidation with a sole claim on the attentions of the directors." This is, in part, a simple expression of incredulity that the directors' obligations in normal times, when bankruptcy is not a looming threat, could have much to do with the possibility of insolvency. But incredulity is not an argument.

Yes, we could, as Greenfield suggests, "imagine" breaking that link, as one can imagine just about anything else one likes. The point remains, however, that in the real world, as opposed to the realm of imagination, the historical development of such a link was nonetheless a perfectly rational development, and one that we shouldn't hasten to weaken.

On another point, Greenfield complains that existing precedents give a corporation no obligation to obey the law. According to Greenfield, courts do sometimes "talk about" such a duty, but they don't really mean it. "Indeed, there is not a single, modern case that holds directors liable to shareholders just because the directors or the corporation broke the law."

I suppose his statement is right. Similarly, I doubt that there is any modern case that holds doctors liable to patients just because the doctors acted negligently when treating their patients. Rather, doctors are liable if their negligence causes the patient an injury. The same tort law principle applies to the relations between directors and shareholders. Why should this amaze a former law clerk to a Supreme Court justice? I suspect that Greenfield is blinded to such an obvious fact by his gleaming vision of the "progressive possibilities" of a new system of corporate law that would turn these institutions into engines for good and hold directors responsible for something like bringing about the greatest happiness for the greatest number.

The Failure of Corporate Law, then, is an object lesson in the distortions to the human reasoning apparatus that

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old-fashioned, undiluted Benthamite act-utilitarianism can inflict. Looking at any action from every possible point of view—and considering how the action affects everyone's interests—is simply an impossible task, whether for morality or for jurisprudence, whether for bearers of witness, for irresponsible rakes, or for corporate directors. We are humans, not gods, and we do best when we work from quite particular projects, duties, and loyalties. Litigation serves a social purpose best when it is aimed at righting not abstract wrongs but specific injuries, and directors can set their own course sensibly when the law instructs them to use their business judgment (allowing for some side constraints) for the good of the owners of the equity they represent. **TFL**

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Young J. Edgar: Hoover, The Red Scare, and the Assault on Civil Liberties

By Kenneth D. Ackerman

Carroll & Graf Publishers, New York, NY, 2007. 466 pages, $28.95.

Reviewed by Henry S. Cohn

In 1959, "The FBI Story," a movie that starred Jimmy Stewart, portrayed the Federal Bureau of Investigation at its professional best. Just a few years later, however, as investigative reporters began to reveal the bureau's multiple problems, the FBI lost its Jimmy Stewart cachet. As a result, J. Edgar Hoover (1895–1972), the FBI's director under seven Presidents, was no longer viewed as a hero; he became, as Kenneth D. Ackerman writes, "perhaps one of the most hated men in American history." Ackerman's *Young J. Edgar* will not restore the director's former reputation.

In 1924, Harlan Fiske Stone, attorney general under Calvin Coolidge, asked young Hoover to reorganize the Justice Department's bureau of investigation. Stone (later a Supreme Court justice) was disturbed by the series of raids on so-called Reds that Attorney General A. Mitchell Palmer had launched in 1919 at the end of the Wilson administration. Stone was also concerned about the bureau's incompetence under Warren G. Harding, who had followed Wilson and preceded Coolidge as President. To Stone, Hoover, a 29-year-old Justice Department attorney with a reputation for diligence, was just the person to put the bureau on an honest and constitutional footing.

J. Edgar Hoover, the FBI's director under seven Presidents, became, as Kenneth D. Ackerman writes, "perhaps one of the most hated men in American history." Ackerman's Young J. Edgar *will not restore the director's former reputation.*

Stone, however, was unaware that Hoover had been the mastermind of the "Red Raids." Attorney General Palmer had foolishly entrusted the task to Hoover, and this is a major focus of Ackerman's book. Hoover hid his direct involvement in the raids, and, over the years, he minimized his role in them and maximized his surprise at their virulence. Ackerman considers Stone's choice of Hoover to have been a "dreadful mistake."

Ackerman clearly succeeds in establishing his claim. In 1919, Palmer was almost assassinated by an anarchist, who was never identified but was suspected of being a Russian Bolshevik. Capitalizing on post-World War I unrest, Palmer developed a plan to seize and deport anarchists to their country of origin—primarily the Soviet Union. In those days, deportation actions were assigned to the Department of Labor, and Palmer had to convince Secretary of Labor William B. Wilson of the soundness of his plan. Wilson and his lieutenants initially viewed Palmer's actions as an unwarranted power play and rejected Palmer's requests to start the deportation process. But Palmer elevated Hoover from a special assistant in the Justice Department to the head of the department's newly created Radical Division, and Hoover worked with Secretary Wilson's immigration chief, Anthony Caminetti, to change Wilson's mind and allow the deportations. Hoover and Caminetti succeeded, and putative troublemakers were deported, including the fiery Emma Goldman. On Nov. 7, 1919, and Jan. 2, 1920, thousands of people were arrested in a brutal fashion and held without bail in cramped quarters.

Although Hoover and Caminetti directed the raids, they did not publicize their involvement in them. Palmer basked in Hoover's success and contemplated a presidential run in 1920. At first, the public supported the arrests, but then, after Communist revolutions in Germany and Hungary collapsed, and steel, coal, and police strikes in the United States failed, the Red Scare cooled and Palmer became an object of ridicule. Most of the people who had been detained were released and Palmer disappeared from the political scene. Hoover, of course, never gave up the battle against the "enemy within."

In addition to providing generous evidence of Hoover's involvement in the Palmer raids, Ackerman provides excellent portraits of the lawyers who alerted the public to the harm to civil rights that Palmer's actions caused. Clarence Darrow was one such lawyer, even though he failed to persuade the Supreme Court to overturn the conviction of his client Benjamin Gitlow for criminal anarchy. And Felix Frankfurter, then a professor at Harvard Law School, risked his career by bringing habeas corpus actions on behalf of the radicals and made a lasting negative impression on Hoover.

Young J. Edgar also presents in full detail an unsung hero of the opposition, Louis F. Post, a newspaper editor who had risen to prominence as campaign manager for reformer Henry George in his 1886 candidacy for mayor of New York City. Post's liberal record impressed President Woodrow Wilson, who installed the editor as an assistant secretary in the Department of Labor in 1913. Post reluctantly approved Attorney General Palmer's actions against Emma Goldman and initially did not formally object to the raids that Hoover organized. Assuming the position of acting secretary of labor in 1920, however, Post rescinded 80 percent of the outstanding deportation orders that had resulted from the raids. Palmer and Hoover struck back, inducing a congressional ally to introduce an impeachment proceeding against Post. Post avoided impeachment by testifying at a committee hearing that there was a lack of factual basis for the deportations that Hoover sought. Post left the Labor Department and resumed his writing career, later supporting the Progressive Party's nominee, Robert LaFollette, for President in 1924.

Although Ackerman proves his anti-Hoover thesis, *Young J. Edgar* is not as nuanced or polished as the author's last book, *Boss Tweed,* which I reviewed in the August 2005 issue of *The Federal Lawyer*. *Young J. Edgar* consists of short chapters and is peppered with numerous asides in footnotes. Ackerman presents Hoover as the epitome of evil and his opponents as incapable of error, thereby giving the book the flavor of a lawyer's brief. Ackerman is also not always fair in his use of evidence against Hoover. In the footnote on page 42, for example, he notes that "[t]here is a theory that Edgar was born to an African-American mother and adopted by the Hoovers, based on discrepancies in certain birth and census records. But this has not been substantiated, and the genealogist who investigated the claim believes it to be false." Yet, on page 408, Ackerman writes, "Edgar's legend—a plausibly gay man who harassed gays, a possible descendant of an African American who harassed civil rights leaders ... is a far cry from the young eager beaver who came to work at the Justice Department in 1917." Ackerman thus cites no evidence that Hoover's mother was African-American, but uses the "legend" that it is "possible" that she was to take Hoover to task for his harassment of civil rights leaders. One would think that there is enough well-established negative material about Hoover to allow Ackerman not to cite an unsubstantiated rumor.

Young J. Edgar, despite its flaws, does point out the dangers associated with hiring zealots to protect the country from supposed terrorists. Perhaps this example of the harm caused by abuse of authority and violation of the public trust can be a lesson for today. **TFL**

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The Most Democratic Branch: How the Courts Serve America

By Jeffrey Rosen

Oxford University Press, New York, NY, 2006. 238 pages, $25.00.

Reviewed by Justin F. Marceau

Jeffrey Rosen believes that Supreme Court decisions tend to mirror public opinion, and that this is a good thing. The Supreme Court's recent decision in *Massachusetts v. EPA*, for example, found that global warming may require the federal government to take protective action. At the same time, polls indicate that more than 85 percent of Americans view global warming as a likely problem, and more than 60 percent view it as an immediate and serious problem. Rosen sees this as no coincidence, and, in *The Most Democratic Branch*, he argues that the Court's basing its decisions on public consensus helps to fortify its legitimacy. Do Supreme Court decisions in fact mirror public opinion, and should they?

Just asking this question might have resulted in a failing grade in my high school government class, a class that provided a healthy dose of the notion the United States has three separate and equal branches of government. But this is exactly the edifice that Rosen challenges in *The Most Democratic Branch*. According to Rosen, the idea that unelected judges protect minorities is not just a romantic myth; it is undesirable. Rosen disagrees with both the conservative view that courts are packed with activist judges rendering unpopular decisions and the liberal view that courts should intervene to curb that timeless enemy—the tyranny of the majority. But Rosen's position is anything but a middle ground or a compromise between these two dominant schools of thought. Instead, Rosen takes a position that is, in many ways, more radical than these. He believes that our courts historically have assumed—and must continue to assume—a subsidiary role in interpreting the Constitution.

Rosen's first principle is that deference and democratic values go hand in hand. In Rosen's view, deferring to Congress is usually the best way to effectuate the will of the people. If, however, Congress is "failing to represent the wishes of the majority" on a particular issue, then the Court may effectuate the will of the people and not defer to Congress, and that is why Rosen, in the title of this book, calls the judiciary "the most democratic branch." If Congress has not spoken on an issue and the public is divided, then, Rosen believes, the courts should restrain themselves and "leave the ultimate resolution to political actors," because "courts are most likely to act foolishly when they wrongly believe that they alone can save the nation from a dispute that the political branches are unable to resolve." Rosen sums up his argument in the book's epilogue, entitled "Constitutional Futurology," in this way: "No matter what methodology they choose, judges can best promote democratic values by consistently and straightforwardly practicing judicial deference—that is, by avoiding judicial unilateralism."

In order to avoid reaching this controversial crescendo of deference too abruptly, Rosen first analyzes the history of backlashes and acceptance that followed certain key decisions made by the Supreme Court. Specifically, Rosen divides his discussion into five parts: (1) the history of judicial defer-

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ence, (2) cases involving race, (3) cases about the right to life and the right to death, (4) cases about politics, and (5) cases about civil liberties. As to each of the five, Rosen boldly concludes that "courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people."

Rosen's history of judicial deference provides a fresh and engaging look at some of the early Court's most famous decisions. Identifying Chief Justice John Marshall as the paradigm of a democracy-oriented jurist, Rosen discusses the political realities facing Marshall at the time he wrote *Marbury v. Madison* and *McCulloch v. Maryland*. This discussion is essential to Rosen's argument, because no theory of constitutional interpretation can be taken seriously if it cannot adequately justify these two decisions, as these decisions have become givens in our constitutional system. Notably, however, Rosen rejects the common reading of *Marbury* that treats the courts as the ultimate interpreters of the Constitution.

Rosen's theory also passes a second litmus test for interpretive theories: it discredits the *Lochner* era decisions, which initially stood as an obstacle to Franklin D. Roosevelt's New Deal reforms. In fact, Rosen's use of the *Lochner* era decisions as an example of the vulnerability of an overly independent judiciary is compelling. He points out that the Supreme Court's sudden change of heart as to the *Lochner* era cases—popularly known as the "switch in time to save nine"—may have saved the Court. Had the Court failed to capitulate to the will of Congress and the President—as Rosen agues throughout the book that it must—it is likely that Congress would have approved substantial revisions to the Court, the least of which would have been Roosevelt's plan to add additional justices who were favorable to his legislation.

Rosen believes that the Supreme Court should defer to Congress even if Congress enacts legislation that is not authorized by the Commerce Clause or any other enumerated power. This position leads to some uncomfortable moments during Rosen's discussion of certain difficult cases. For example, because of the high level of public support for segregation during the 1890s, Rosen describes *Plessy v. Ferguson*'s 1896 upholding of "separate but equal" as "an uncontroversial demonstration of judicial restraint." Rosen criticizes *Plessy* as a decision lacking grounding under even the most conservative originalist school of interpretation, but, given that, according to Rosen, judicial restraint and deference to the political will—and not allegiance to any particular school of interpretive thought—is a sine qua non of a responsible judiciary, Rosen approves of the decision, even if he dislikes the result. That should raise some eyebrows. Similarly, Rosen is forced to concede that Justice Robert Jackson's dissent in *Brown v. Board of Education* makes "plausible arguments for judicial restraint." In the end, though, Rosen acknowledges that, "[a]lthough the point is arguable, *Brown* does not appear to be an example of judicial unilateralism." In light of the fact that *Brown*, like *Marbury v. Madison* and *McCulloch v. Maryland*, has become a given in our legal system, it would probably have been difficult for Rosen to conclude that the case was wrongly decided.

Other examples abound. Rosen applauds Justice Holmes' infamous holding that forced sterilization laws were constitutional, stating that the decision was consistent with the "public enthusiasm for eugenics" at the time. Rosen criticizes the Court's unwillingness, in the first case involving partial-birth abortion, to accept without question congressional findings that "partial-birth abortions are never necessary to preserve a woman's health," calling it judicial unilateralism. And he praises the holding in *Bowers v. Hardwick*—that sodomy laws were constitutional—for being "consistent with public opinion," because "51 percent of the respondents in a Gallup poll approved of" the decision when it came down. Finally, Rosen heralds the Court's refusal to strike down President Franklin D. Roosevelt's internment of Japanese-Americans during World War II as "an effort to avoid unilateralism." Whatever one's views on these politically charged issues, it is certainly a radical position to assert that the Supreme Court performs its role best when it defers to Congress (or to the polls) in deciding such controversial cases. For many, just the fact that some state court judges are elected is worrisome enough. Ratifying public opinion as a school of interpretive thought takes this misguided expansion of democracy one step further.

The question of the death penalty provides both anecdotal support for the descriptive part of Rosen's thesis (that courts mirror public opinion) and a basis for moral outrage at the normative part of it (that courts *should* mirror public opinion). Rosen notes that, in 1972, about 50 percent of the public supported the death penalty, and he stresses that, following the Supreme Court decision that year outlawing capital punishment, public support for the death penalty rocketed to 65 percent. In Rosen's view, the Court had no choice but to correct itself, as it did in 1976, by "[b]owing to the extreme negative reaction" and allowing the death penalty to be imposed again. This example helps Rosen to make his case that courts' deference to the polls serves to preserve the judiciary's legitimacy. Indeed, something of the same backlash that occurred in the United States after the 1972 decision seems to be emerging in European countries that have abruptly (if not democratically) outlawed the death penalty in order to qualify for membership in the European Union; the *New York Times* has reported that some Eastern European states are experiencing all-time highs in support for the death penalty.

But America's experience with the death penalty also reveals the underbelly of Rosen's thesis. Leaving decisions of life and death to the complicated process of majoritarian politics is morally irresponsible. The maneuvering and political horse-trading that define congressional politics are ill suited to the task of protecting disenfranchised people from the will of the majority. Rosen believes that the will of the majority must (and ultimately will) govern, but, in fact, I am not convinced that a majority of Americans would support

a proposal to have the Eighth Amendment (or any other constitutional provision) interpreted by a democratic vote. It is possible, therefore, that Rosen's thesis of majoritarian interpretation is itself countermajoritarian and, therefore, in a sense, self-refuting.

Rosen's thesis is intriguing, but, at the end of the day, I remain hopeful that my high school civics textbook was right—the tyranny of the majority must be checked by the courts. *The Most Democratic Branch* calls to mind Winston Churchill's famous remark, "[d]emocracy is the worst form of Government except all those other forms that have been tried from time to time." One might add that an independent judiciary is the worst way to safeguard politically unpopular rights, except for all those other ways that have been tried. Rosen is correct that history shows that backlashes are likely when the Court pursues constitutional courses that are inconsistent with public opinion. Adjudication by popular vote, however, is not the answer. **TFL**

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Indefensible: One Lawyer's Journey Into the Inferno of American Justice

By David Feige

Little, Brown and Co., New York, NY, 2006. 276 pages, $24.95.

Reviewed by Elizabeth Kelley

Emile Zola would have written *Indefensible* if he could have created a first-person account of the Bronx public defender's office during the past 15 years. David Feige's *Indefensible* has all the realism that alerted 19th-century readers, including Clarence Darrow, to the injustices, poverty, and social inequality of that era. Like many of the great 19th-century novels, *Indefensible* is a rich collection of portraits—some scathing, others sympathetic—of the cast of characters (*la comédie humaine*) who work in the Bronx Criminal Courthouse. But make no mistake: *Indefensible* is not fiction.

In *Indefensible*, David Feige periodically muses that, when he was a public defender, he could have been doing other things with his life. Although he is now a law professor, his 15 years as a public defender clearly represented a calling, and, at the risk of sounding trite, one can say that he made a difference and that he changed lives. Feige is not just smart and well educated; he is compassionate and perceptive. As a public defender he used these qualities to help his clients, and he now uses them to give us a colorful and searing account of the reality of criminal defense practice.

Feige does not merely describe the people he encountered—he names names. He admires some judges, for example, William Mogulescu, "one of my favorite judges. As difficult as he can be, he is usually thoughtful and almost always fair. But he is also a big bully. Moge does what he does because he believes that you have to be a bully in the criminal justice system to get anything done. To his credit, it's also true that what he wants done is usually the right thing."

But Feige has utter disdain for other people:

> A completely Looney Tunes jurist, with an Elmer Fudd face, a Casper the Ghost complexion, and a wisp of hair that seemed drawn out of his scalp, Curci was known for his utter unpredictability and his wonderfully inventive vocabulary. Court officers and stenographers assigned to his part kept a running glossary of his hilarious malapropisms and incomprehensible phrases, such as "dangerosity," "the psychic transmogrification of the Gestalt," or "assidulosity"—as in "I will sign your subpoenas with great assidulosity, Counselor!"
>
> An old-school jurist, the kind that wound up on the bench by slipping the right person thirty-eight thousand dollars in an envelope, Curci read *Soldier of Fortune* with great assidulosity and loved nothing more than to play with guns. Once, during an attempted murder case, he famously instructed a court officer to hand him the alleged murder weapon. "I assume this is unloaded?" said Curci, jacking the slide commando-style and pointing the weapon in the direction of the defendant while half the courtroom ducked. "Uh-hhh, I sure hope so, Judge," said a petrified ADA.

And Feige appreciates the flair of some of his colleagues, as we see in the following descriptions:

> In one corner, sitting across from a well-coiffed white guy, is Murray Richman, the self-proclaimed king of the Bronx bar. Murray's stature in the legal community is hard to overstate—he represents rappers (it was his client that went to prison in the Puff Daddy trial) and politicians, hustlers, and fraudsters, charging them tens and sometimes hundreds of thousands of dollars for the privilege. He is a self-made guy who glad-hands his way through the courthouse as if he's the mayor. In a sense, he is.
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> Already past the age of usual retirement, Not-a-worry Murray looks a little like a puffin, resplendent in brash tie and matching pocket square. His expensive double-breasted suit covers a thick midsection, and his hair is combed in a way that suggests a great deal of attention has been lavished on every strand. He has a wide, round face and twinkly eyes, and he greets people with a "howyadoin?" honed by years of ingratiating practice. A charmer, Murray brings a winning theatricality to every sentence he utters. And he is utterly unselfconscious—as if he's completely forgotten that he'd long ago temporarily cast himself in a part written for someone larger, leaner, and more debonair.

Feige knows above all else that he and other criminal defense lawyers are often hanging by a thin emotional

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thread:

> It's those times that we do everything right on behalf of a deserving client and still wind up getting crushed that can drive defense lawyers completely over the edge. That's certainly what happened to a lawyer I once knew.
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> Standing in front of a gallery of waiting clients and enervated witnesses, she is rumored to have done what I've wanted to do many, many times after a horrible, unconscionable ruling: she looked up at the judge and reportedly said, plain and simple, "Fuck you, you nasty bitch." It wasn't under her breath, and it wasn't the whisper that a lawyer can often get away with. It was loud and proud and impossible to ignore. ...
>
> I don't know whether the judge tried to hold her in contempt right then or whether the courtroom was silent for a second as, perhaps realizing what she'd just done, or perhaps having second thoughts about having done it, she turned away from the judge, away from her client, and away from the defense table and sprinted toward the exit. What I did hear, though, is that she ran. And when the shocked court officers grabbed her, trying to figure out what to do, she struggled, and that—far more than disrupting the court or even calling the judge a bitch—was (at least in the bizarre world of the Bronx) unforgivable. She was arrested and charged with criminal contempt and resisting arrest.

Burnout is a theme that permeates *Indefensible*. Feige describes the day in the office when he could not take any more. He went into a small coat closet, closed the door, sunk against the wall, and wept. But then he got up and returned to fight more battles. What gnaws at Feige—and, indeed, at many of us in the criminal defense bar—is the daily parade of misery we witness. It is a world where clients often plead guilty just to get out of the courthouse and where docket control trumps justice. Clients—whether they are guilty or not—are frequently mentally ill or mentally retarded. Feige tells a particularly touching story about Cassandra, one of his longtime clients, whom he turns in to the police—with her consent—for a jail stay because she needs food, shelter, and medication.

At the heart of it all, we sense that Feige actually likes and enjoys many of his clients, and in turn, we like and enjoy them as well. For example, we can't help but root for the male client to whom Feige lends a suit from the public defender's wardrobe closet for an interview at Victoria's Secret.

In *Indefensible*, Feige offers no solutions as to how to make the system function more efficiently or fairly. Indeed, you sense that he believes that the problems are too overwhelming—that the system is too far gone. Perhaps, however, Feige has offered his own solution: zealously representing hundreds of clients and now shining a light on a courthouse that is typical of so many across the country. **TFL**

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Same Sex, Different States: When Same-Sex Marriages Cross State Lines

By Andrew Koppelman

Yale University Press, New Haven, CT, 2006. 204 pages, $35.00.

Reviewed by Alison M. Smith

Civil unions, domestic partnerships, gay marriage—these terms have all been used repeatedly over the past few years. Should we dispense with them and just use "marriage," regardless of the sex of the spouses? Andrew Koppelman, a professor of law at Northwestern University, does not address this question in his book, *Same Sex, Different States*. Instead, he takes a practical approach to the issue of same-sex marriage. He offers a legal doctrine for courts to use in dealing with same-sex marriages in our mobile society.

In this short but comprehensively researched book, Koppelman takes his readers through the current debate and shifting cultural landscape on the issue of same-sex marriage. He asserts that the federal Defense of Marriage Act (DOMA) "is likely unconstitutional" in light of the U.S. Supreme Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Enacted in 1996, DOMA allows all states, territories, possessions, and Indian tribes to refuse to recognize an act of any other jurisdiction that designates a relationship between individuals of the same sex as a marriage. DOMA also declares that the terms "marriage" and "spouse," as used in federal statutes and regulations, exclude homosexual marriage. Thus, for example, when a same-sex couple gets legally married in Massachusetts (the only state that sanctions same-sex marriage) the spouses may not file a joint federal tax return.

In *Romer v. Evans*, the Supreme Court struck down a provision of Colorado's constitution that repealed local ordinances that provided civil rights protections for gay persons and that prohibited all governmental action designed to protect homosexuals from discrimination. The Court held that, under the Equal Protection Clause, legislation adverse to homosexuals was to be scrutinized under the "rational basis" test, but that Colorado's classification failed to pass even this deferential standard of review. The Colorado provision was held unconstitutional because it imposed a special disability on homosexuals that was not visited on any other class of people and because the arguments that the state presented could not justify the classification. In *Lawrence v. Texas*, the Court struck down a state statute criminalizing sodomy and

held that the Fourteenth Amendment's due process privacy guarantee extends to the protection of consensual sex between adult homosexuals. Koppelman concludes that *Romer* and *Lawrence* "together establish a fairly clear rule: If a law singles out gays for unprecedentedly harsh treatment, the court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval."

Same Sex, Different States also includes a chapter analyzing the significance of the "mini-DOMAs" that 40 states have enacted. A mini-DOMA, as Koppelman explains, declares that the state enacting the legislation has "public policies against recognizing same-sex marriages in other states." The primary value of the book, however, is its clear presentation of the conflict of laws or choice of law doctrine as it applies to a state's recognition of transactions performed elsewhere. Generally, courts address choice of law problems by using an "interest analysis" that attempts to discern which state has the greater interest in the transaction. The Restatement (Second) of Conflict of Laws, § 283(2), states that "[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."

Koppelman suggests that the current debate regarding the recognition of same-sex marriages may find analogies in cases that deal with the recognition of out-of-state racially mixed marriages. Koppelman's discussion of the issue is well written and insightful, and, even if the miscegenation cases do not provide all the answers to questions that arise with respect to the recognition of out-of-state same-sex marriages, they do provide a road map for arriving at an answer. Consider the following scenario. Dexter and Daniel are longtime residents of Massachusetts who decide to marry. After the wedding, the couple resides in Massachusetts for another decade or so. During this time, they adopt twins (Bert and Ernie). Dexter and Daniel ultimately decide to move to Utah for the beautiful scenery. Unfortunately, Dexter dies in Utah. Should Utah recognize the union validly entered into in Massachusetts, at least to the extent of finding Daniel automatically entitled to custody of the children? Which state has the most significant interests in the union?

Setting forth four types of dual-state gay marriages—migratory, evasive, visitor, and extraterritorial—Koppelman offers a workable compromise designed to balance the interests of states and those of gay couples. In terms of the above example, Dexter and Daniel's marriage would be categorized as a migratory marriage, in which, Koppelman suggests, "if an incident can be characterized without reference to the marriage—if it can be called a 'parental right' or a 'right to enforce a judgment'—then it should be recognized as such." Daniel, therefore, should get custody of the twins.

Evasive marriages are marriages outside a couple's home state where the couple has traveled from their home state for the express purpose of evading that state's refusal to recognize their union; such a marriage could be invalidated or not recognized if it violates the strong public policy of the couple's home state.

The third category—visitor marriages—are those in which a couple is temporarily present in a state that fails to recognize the marriage. Koppelman believes that, in this instance, the marriage should be recognized because to do otherwise would limit the parties' constitutional right to travel.

The final category—extraterritorial marriages—are those in which the parties have never lived together within a state that prohibits same-sex marriage, but their union is relevant to some litigation there. For example, assume that Dexter and Daniel had remained in Massachusetts but that Dexter owned property in Utah. Upon Dexter's death intestate, Daniel should inherit the property, because, according to Koppelman, "there is clear authority in favor of recognition" of out-of-state marriages.

Same Sex, Different States is an excellent source for all who may be interested in the debate over the recognition of same-sex marriages in our mobile society. **TFL**

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