

James E. Fleming, editor, *NOMOS LIII: Passions and Emotions* (New York: New York University Press, 2013): 289-303 [displayed here by permission of New York University Press: all cites and references should be to the published NYU *NOMOS* volume].

Systems and Feelings

Ken I. Kersch

-

reflection. Its central claim is that, in deciding cases, today judges are increasingly pressed educated/trained/inclined to think of themselves not as doing justice between the parties before them, but rather of resolving the dispute to produce rules which fit as neatly as possible into a broader regulatory system. As such, judging (once a moral exercise, centered on the parties to the lawsuit, who were truly *seen*) is now largely an occasion for the engineering and maintenance of a larger and impersonal administrative and regulatory system (in which the parties less complicated, individualized human beings, now mere

T1 0 0 1 198.05 366.55 BT11zuinceiB3i-10(elw95e(n)-/-90

reverse them and revive an earlier (which is doubtful) to do so would be extremely radical (not to mention, potentially, highly reactionary).²

What are We Talking About When We Talk About Empathy?

West is very good about surveying the array of actual and possible criticisms of the use of and judging. But, despite the fact that she anticipates some of my own objections, and attempts to meet them, I remain unpersuaded by her arguments, and continue to hold those objections nevertheless.

really means in this discussion. It needs to be clarified.

alking in his shoes. Indeed, to suggest otherwise
lingua franca of
 If by
 empathy, West simply means the ability of the judge to have a rich ability to understand the nature of the situation of both litigants imagination as a route to full information³

-e

opposed to it. If empathy means a rich ability to inhabit the situation, no one, even today, is

²

Review 78 (1998): 1489-1545.

³ See Susan A. Susan A.

Boston University Law

, *Cardozo Law Review De Novo* (2009): 133-148;

⁴ As such, an empathizing Court is a liberal Court.⁵ And a conservative Court is heartless. It seems clear to me that contemporary conservatives are attacking selective liberal empathy something that is apparent not only in these political conflicts, but in politicized

6

There is, incidentally,
 as synonymous with liberalism (as conservatives understand perfectly) than r of
 the empathetic judge, Judge J. Skelly Wright.

J. Skelly Wright: Scientist

Judge Wright was a southerner from New Orleans who grew up poor, and who struggled economically during the Great Depression.⁷ As the first district judge to place a school board under an injunction ordering a desegregation plan, and, in turn, the first district judge to draw up his own desegregation plan in the face of inaction by a board, Wright was a pioneer in wielding judicial power aggressively to advance social reform.⁸ He was also a staunch defender of Warren Court activism.⁹

concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen,

conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of a

10

¹¹ Michael Bernick describes him as a judge

12

d empathy instead of following

(pursuant to its duties) the dictates of reason.¹⁵

and his compatriot Herbert Wechsler, which insisted that the Court hew strictly to the dictates of the abstract principle

into the system that he is concerned with, and trying to reform. West misses this.¹⁹ Wright himself believed in systems regulation. Tellingly, in contrasting the activism of pre-New Deal

halt a revolution in the role of *government as a social instrument*, while the Warren Court is

²⁰ In contrasting Wright with law and economics school judging, for example, we have not a case of individualized justice versus a regulatory system, but a case of dueling systems — one focused on efficiency, and the other on egalitarianism. Of course, one can argue that, as a social value, efficiency is unfeeling and cold-blooded, and

empathetic and less caring society ?

a lament for the lost

egalitarian judge --

broader topic of empathy and political philosophy, of which both types of systems-regarding judges are simply instruments

relationship to the emergent modern administrative state.²¹ In making this point despite the *Williams v. Walker-Thomas* is an exception to this trend on the liberal/Realist side rather than yet another illustration of it I think she is absolutely right.

Is Wright role of judges as its helpmeet -- really that master of economics, statistics and the slide rule, rather than the master of Blackst West, 7). Not if we look to the , who, e.g., striking re-imaging of the symbol of justice under a progressive state:

Instead of having her eyes blindfolded, she would wear perched upon her nose a most searching and forbidding pair of spectacles, once which combined the vision of a microscope, a telescope, and a photographic camera. Instead of holding scales in her hand, she might perhaps be figured as possessing a much more homely and serviceable set of tools. She would have a hoe with which to cultivate the social garden, a watering pot with which to refresh it, a barometer with which to measure the pressure of the social air, and the indispensable typewriter and filing cabinet with which to record the behavior

accomplishment. The process has been brilliantly detailed by the intellectual historian Thomas
since Wes

union then set upon him to drive him out of business, with picketing and other forms of direct action, which sought to tar his business with the label Senn would have had common law protections against this type of injury to his business. But the Norris LaGuardia Act was aimed at eliminating those protections to promote unionization. In a bone-chilling

process of deciding cases? If so, is this necessarily a good thing? Are Blackstone and black letter law synonymous with

inhabit squatter camps (and, briefly, a Chicago brothel, while bedding down temporarily with the
e aunt) -- until, inevitably, they are driven out by police (in one scene but
certainly not all the police are portrayed as empathetic to the teenagers plight -- "How do you
think I feel?" snaps one, "I have kids at home myself.") the police turn on the firehoses
nonetheless, and the trio is forced to move on yet again. Along the way, one of them (Tommy)
loses his leg to a freight train, and must is saved
by doctor who is willing to treat him for free, after the kids rouse the Doctor at his home late at
without anesthesia, outside, by the light
of a bonfire

choice but to lock them up

Sure you do, Eddie says, with dripping skepticism. But soon he breaks down, launching into a bitter, heart-breaking lament about riding the rails and homelessness, and the spreading joblessness, and his despair, and the despair of others across the country, before dissolving in

Wild Boys of the Road, a moving film, is ultimately hopeful—a paean to the promise of the emerging social welfare state. But it, of course, elides some of the more tragic elements of building systems, and the perhaps paradoxical movement away from treating people as individuals in service of a more secure, more equal, future.³¹ Cases like *Senn* are needed to give us a fuller picture. This modern state was forged in a hail of economic, political, and moral crises: depressions, wars, social movements for group equality. Its aims may have been, in part, compassionate. But it involved systems-building in service of those aims, with all of the focus on statistics and aggregates the construction of any elaborate regulatory system entails. Its re-

