Opportunity v Opportunism

by Lev Tsitrin

It is odd that two near-identical words could mean very different things. Opportunity, the dictionary.com informs us, is "a situation or condition favorable for attainment of a goal" – a definition that has no connotation of bad faith (in fact, its connotations are highly positive, as in "America is the country of opportunity"), while opportunism – whose hallmark is "the sacrifice of ethical principles" – just reeks of bad faith; saying that "America is the country of opportunists" would be no compliment, to say the least..

This difference fascinates me because, while I don't consider myself an opportunist, I try not to lose any opportunity to bring to light the opportunism of federal judges. And so it was the other day, when I attended a "listening session" organized by the local community board, and my district's

congresswoman, Representative Yvette D. Clarke.

In a way, the wind was in my sails – ProPublica's revelations of Supreme Court Justice's Clarence Thomas luxury vacations that were paid by his billionaire friend, were quickly followed by *Business Insider*'s story of the wife of Chief Justice Roberts making a million plus a year by running a legal recruiting business, at least one of her recruits arguing a case before her husband's Supreme Court – or a *Washington Post* story breaking now, of off-the-books payments to Clarence Thomas' wife, all pointed to the fact that not all was well with the judiciary – and in fact, Representative Clarke added yet another facet herself when she replied to my question, by pointing out that the Senate Committee on the Judiciary recently asked Chief Justice Roberts to testify regarding Supreme Court's seemingly tarnished (or at least, very checkered) record of ethics – and he refused, causing the Committee to proceed with hearings on Supreme Court's ethics on its own.

Now, none of this pointed to judicial impropriety (that is, to the fact that justices ruled improperly in any of the cases) – but only to the "appearance of impropriety" – i.e., the gut feeling that such, clearly opportunistic, behavior may look improper to the public. The question I posed to Representative Clarke, however, wasn't about "appearances of impropriety" – but about actual impropriety of judges being "corrupt and malicious" while deciding cases.

Her reply was to suggest that I send her the detailed description of what happened – which I did. At 1,500 words it is somewhat lengthy, but I wanted to present it here – since it is, for a change, not about judicial opportunism that manifests itself in judges using their position to get some material perks, but about the kind of judicial opportunism that the mainstream press refuses to talk about, and that results in total trampling of judicial procedure – and with it, of justice itself. In publishing its stories about judges,

mainstream journalists love to hover on the edge of the "appearance of impropriety." Well, here is how the actual impropriety looks – at least, to my eye. But you be the judge:

Dear Representative Clarke,

I'm the guy who asked you, during the listening session at Brooklyn College you held on May 4, to assist me with bringing to the House Judiciary committee's attention the issue of judicial fraud – federal judges having given themselves, in Pierson v Ray, the right to act from the bench "maliciously and corruptly" and diligently exercise it by replacing in their decisions parties' argument with the bogus argument concocted by judges themselves out of thin air so as to decide cases the way they want to, not the way they have to, in brazen violation of "due processes of the law" which the Constitution presumably guarantee us. In federal courts, we most certainly have "the rule of men and not the rule of law." You told me to write to you in detail about this.

So here is what happened to me. I wrote a book on the role of ideology in ideological violence, "*The Pitfall of Truth: Holy War, its Rationale and Folly*" and since no publisher would take it, I decided to publish it myself – for aren't we a land with "liberty for all"?

One of the key steps in book publishing is obtaining, from the Library of Congress, cataloging-in-publication keywords (CiP) that make a book visible in the "marketplace of ideas" that are our libraries and bookstores, allowing them to stay abreast of the upcoming titles in their area of interest, and to pre-order them. It turns out however, that the library gives those keywords *only* to books published by corporations. Books published by authors are explicitly excluded.

Clearly, the goal is to give library acquisition funds to corporate publishers, and to make invisible the books that did not pass the gauntlet of editorial censorship (a publisher is

of necessity a censor of books, and the government apparently does not want authors to speak out of their own mouths.)

Seeing in this restriction an obvious "crony capitalism" scheme, and a violation of my free speech rights, I sued in the Court of Federal Claims (*Overview Books v US*, 05-775C) – for aren't we the land with "justice for all"?

Oddly, the government did not offer any counter-argument, preferring to pretend that I claimed that I was eligible for CiP keywords under existing rules, and demanding that the case be dismissed – rather than rebutting my lawyer's argument that the rule was unconstitutional on both the First and Fifth Amendments' grounds. Clearly, I won the case – but Judge Lettow, instead of simply awarding me the victory because the government's side refused to offer a counter-argument, himself concocted the government's counter-argument in his decision, citing his own research on facts and law – and (unsurprisingly) awarding victory to his own argument! Needless to say, my lawyer was denied the ability to rebut this "argument" because the first time we ever saw it was in the decision itself – and by that time, the case have been already decided. Put simply, Judge Lettow turned into a government's lawyer and instead of adjudicating case *Overview Books v US,* adjudicated an entirely different case from which he obviously should have recused himself – *Overview Books v US and Judge Lettow.*

We appealed – which did not help, and appealed further to the Supreme Court. As I tried to google its status, I came across Library's own study of its CiP program ("*CiP Poised for Change*") – it came up in the search because it cited my case – and it showed that the argument concocted by Judge Lettow in his self-assigned capacity of the government's lawyer was utter hogwash. Judge Lettow stated that CiP ineligibility rule did not introduce censorship – but the study stated unequivocally that the purpose of CIP ineligibility was "vetting" of books (i.e. censorship). Furthermore, it showed

that there was no rational basis for the rule whatsoever. While Judge Lettow tried to downplay the role of CiP in the sales by calling it "accidental" to the book's success, the study calls CIP "critical" to the exchange of information and ideas in America. Judge Lettow claimed that PCN, a number that the Library of Congress may assign to a book, is a viable alternative to CIP and its searchable keywords – but unsurprisingly, the study shows that PCN does nothing whatsoever for the book, but is merely a way for the Library of Congress to get millions of dollars worth of books for free (I say "unsurprisingly" because a number can never match a keyword). Judge Lettow claimed that librarians object to author-published books – but it turns out, according to the study, that the two thirds of them don't.

The Supreme Court did not take the case but, armed with the new facts – and Judge Lettow's admission that he had no First amendment jurisdiction (though despite it, he still dedicated a couple of pages of his decision to a free speech "analysis") – my lawyer refiled the case in the court with undisputable First Amendment jurisdiction – the Eastern district court of New York (08-CV-1842) where Judge Vitaliano proceeded in an exactly opposite direction, and turned *my* lawyer by suppressing in his decision my lawyer's argument and declaring that my lawyer did *not* argue what he manifestly argued – that Judge Lettow had no First Amendment jurisdiction, and that there were new facts. Simply put, instead of adjudicating *Overview Books v US,* Judge Vitaliano adjudicated *Not Overview Books v US and Judge Vitaliano.*

Further appeal did not help, and seeing judges brazenly denying me "due process" – and the victory that would result from it, I sued judges themselves for fraud (*Tsitrin v. Lettow*, US District Court for the District of Columbia 2011-cv-02057; *Tsitrin v. Vitaliano*, US Eastern District Court of New York 2011-cv-05589; *Tsitrin v. Jacobs, Katzmann and Livingston*, US Southern District Court of New York 2012-

cv-01411).

The DAs defending them argued in response that in *Pierson v Ray* judges gave themselves the right to act from the bench "maliciously and corruptly": "In Pierson v. Ray, the Supreme Court explained: Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

Needless to say, this is Orwellian on any number of levels. Firstly, there is sheer bizarreness of US district attorneys defending malice and corruption. But no less important is the obvious fact that *Pierson v. Ray* does the very opposite to what it claims to do: while it claims to be implemented "for the benefit of the public," it's practical effect is to deprive the public of the protection of constitutionally-sanctioned "due process of the law" from arbitrary judging – which most definitely does not benefit the public, and despite all its protestations to the contrary, it most certainly does protect "a malicious or corrupt judge" like Lettow or Vitaliano – which is not to the public benefit either.

Somehow, the fact that the full third of American government –

federal judiciary – is officially "corrupt and malicious" gets no coverage in the mainstream media; nor are the lawmakers interested – I could not get Senator Gillibrand's or Schumer's office to respond. Hopefully, you'll be able to pass this to you colleagues on the House Judiciary Committee so the seemingly taboo subject of the absence of "due process" in the judicial decision-making process be finally broached, and the broader public become aware of it. Trying to bring this issue to light, I wrote a book on the subject that is available on Amazon – "*Why Do Judges Act as Lawyers?: A Guide to What's Wrong with American Law*" which goes into very great detail about what happened, and explores various implications of the fact that the Constitutionally-guaranteed "due process of the law" is being replaced by arbitrary judging as exemplified in *Overview Books v US*.

As I said, I hope you will share this with your colleagues on the House Judiciary Committee so the bizarre anomaly of the "corrupt and malicious" judging could be corrected.

Many thanks for taking my question at the listening session – and I look forward to hearing from you.

Sincerely,

Lev Tsitrin

Lev Tsitrin is – as mentioned in the letter – the author of "Why Do Judges Act as Lawyers?: A Guide to What's Wrong with American Law"