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Judges as Umpires

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I. INTRODUCTION

This Article, "Judges as Umpires" was inspired by the Senate Judiciary hearings on the nomination of John Roberts to be Chief Justice of the Supreme Court, and the metaphor was again invoked during the hearings on the nomination of my former colleague, Samuel Alito, to be an Associate Justice of the Supreme Court.

In his testimony before the Senate Judiciary, Committee, Chief Justice Roberts ushered a new metaphor into the legal lexicon when he proclaimed: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . ."[1] That metaphor is helpful insofar as it conveys the idea that judges must render decisions based upon guiding legal principles rather than their view of policy, or a desire to achieve a given result.

Although I doubt that few in the public appreciate it, judges often render decisions that achieve a result they do not like and enforce laws they do not agree with. Indeed, anyone who has been a judge for any length of time has most certainly been placed in the difficult position of doing just that. It is not something we like to do, but it is something that we do routinely regardless of the level of personal difficulty.

To the extent that viewing judges as umpires helps inform the public about that aspect of the court system, it serves a somewhat useful, although limited, purpose. In the context in which Chief Justice Roberts

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* Judge, United States Court of Appeals for the Third Circuit. I would like to thank everyone involved with planning the Hofstra University Kaplan Lecture Series, from which this Article was adopted. I particularly want to thank Dean Demleitner, for extending the invitation, and Professor Lane whom I suspect to be one of the primary conspirators responsible for the invitation.

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

used the metaphor, it did convey that fundamental concept to the general public.

Nevertheless, the metaphor has more profound implications and that is clearly the context in which it was offered and it is the context in which it is usually invoked. I realize, of course, that the confirmation hearings of both Chief Justice Roberts and Associate Justice Alito were largely theater and that the metaphor was offered in that context. However, the metaphor has become accepted as a kind of shorthand for judicial "best practices," that obscures a complex dynamic that is far more amorphous, elusive and troublesome than its simplistic appeal suggests.

In the first place, judges may not be able to systematically decide cases based upon objective application of a set of rules because judges may not agree on what the rules are. Those familiar with capital habeas practice will appreciate the difficulty judges and lawyers can sometimes have trying to decide if a particular scheme of capital punishment reflects a weighing statute, or a non-weighing statute. The answer to that question is not always apparent, yet it can quite literally determine if someone lives or dies.

We have all heard a great deal about judicial activism and legislating from the bench, and the umpire metaphor was clearly intended to mitigate concerns about a judicial nominee's tendency to overturn or ignore legislation.

However, we have now been saddled with an image of judges who are able to ignore the many kinds of bias that affect everyone else and discharge their duties in a mechanical manner that is removed from the society and its many forces.

In fact, one former judge who appeared as a witness in support of then Judge Alito, referred to being transformed upon becoming a judge. The witness suggested that, ascending to the bench both required and enabled judges to decide cases without being swayed by bias or personal, ideological, or political leanings.[2] This portrait of the judiciary merits a great deal more analysis and discussion than it has received.

Each of us, be we student, teacher, lawyer, judge or just thoughtful participant in the democratic process, is a product of social, cultural and

2. *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 655-56 (2006) (statement of Edward R. Becker, Senior Judge, U.S. Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania) ("When you take that judicial oath, you become a different person. You decide cases not to reach the result that you would like, but based on what the facts and the law command.").

economic forces that shape us in many different ways and pull us in many different directions. We are aware of some of these influences, but each of us is also the product of social forces that we are unaware of that are even more powerful, more enduring, and I believe often far more insidious than the forces we are aware of and can therefore guard against.

As I hope to explain, given the forces upon each of us as individuals, professionals, and judges, it may be that the metaphor that has come to symbolize the ideal of objective adjudication is actually counterproductive because it assumes a reality that is based upon an abstract principle rather than our every day reality.

The principle is a noble one indeed, and one that nearly all judges aspire to; however, we do a real disservice to any thoughtful inquiry into the role of judges by assuming that the principle is readily achievable. Moreover, the public's readiness to embrace that metaphor may chill honest discussion of the role of judges and thereby move us *farther from* the principle of objective adjudication rather than *closer* to it.

Moreover, there are some areas of the law, and some situations, where detached and objective application of legal principles may actually detract from, rather than add to, the quality of our jurisprudence. I realize that this Article may be misinterpreted and that some may understand this to mean that judges are comfortable with allowing personal beliefs to shape their jurisprudence, or that I am comfortable doing so. I cannot stress too strongly that is not the case.

A little later in this Article, I will discuss a few situations where judges have very openly anguished over the conflict they felt between legal principles they had to apply in a given case, and their own personal beliefs. I believe these examples illustrate the possibility that there may well be situations where we can only achieve objective jurisprudence by first recognizing the conflict between personal beliefs and legal precepts and proceeding accordingly, rather than simply relying upon the appealing, but anesthetizing metaphor.

I hope the examples will also illustrate that, in certain situations, the tension between personal belief and textual mandate can actually advance the quality and durability of our jurisprudence.

II. JUDGES AS UMPIRES

As Professor Neil Siegel of Duke University College of Law explains in a soon to be published article in which he analyzes the umpire metaphor against the backdrop of certain Supreme Court cases:

"The Court sustains its institutional legitimacy over the long run not by pursuing the impossible task of simply applying 'the rules,' but by articulating a vision of social order that resonates with fundamental public values."[3]

Professor Siegel argues that the Constitution is far more than a legal document.[4] He concludes that it is a kind of national prose that is woven into the fabric of our society and our institutions.[5]

That view does far more to explain the post-depression overruling of the *Lochner* era, as well as the sea change of such landmark cases as *Gideon v. Wainwright*[6] and *Brown v. Board of Education*;[7] cases that could well be viewed as wrongly decided if jurisprudence was merely the mechanical application of text and precedent.

However, even that view is not entirely satisfying because it does not address what I think is the fundamental misconception that the entire metaphor for objectivity rests upon. The umpire metaphor obscures the reality of personal bias. Getting beyond that bias is extremely difficult even for the most introspective and sincere judge. I submit that we will never get beyond it if we do not allow for the certainty that each of us harbors some bias in some degree, and that our bias may be impacting a given decision in ways in which we are simply not aware.

A story that Nelson Mandela reveals in his autobiography, *Long Walk To Freedom*,[8] illustrates the point and exemplifies the tenacious tentacles of bias and the extent to which it can cloud our objectivity.

Mandela tells of how he was smuggled out of South Africa while resisting the apartheid regime so that he could attend a meeting that was to be held in Africa, outside of his native country.[9] He recounts how relieved he was upon finally reaching the landing strip where an airplane awaited his arrival to fly him to the location of the meeting.[10] As he relaxed in his seat he saw that the flight crew, including the pilot was Black, and he tells of how he was instantly seized with fear knowing that his life depended upon a Black pilot's ability to fly an airplane.[11] It was not until that moment, he reveals, that he fully understood the extent to

3. Neil Siegel, *Umpires at Bat: On Integration and Legitimation*, CONST. COMMENT. (forthcoming 2007).
4. *Id.*
5. *Id.*
6. 372 U.S. 335 (1963).
7. 347 U.S. 483 (1954).
8. NELSON MANDELA, LONG WALK TO FREEDOM (1995).
9. *Id.* at 292.
10. *Id.*
11. *Id.*

which racism had seeped into even his view of humanity.[12] Once he realized this, he resisted his initial urge to get off the plane and go home.[13]

As powerful as that story is, the findings of a study that was recently conducted here in the United States may illustrate the power of subliminal bias in a context that has a more obvious correlation to the kind of disputes that come before judges.

The February 3, 2007 issue of *New Scientist* reported a study that was conducted by Joni Hersch, a professor of law and economics at Vanderbilt University Law School.[14] She analyzed a 2003 government survey of over 2000 recent immigrants from various countries whose skin tones were rated on an eleven-point scale during interviews.[15] After controlling for fluency in English, education, occupation, previous work experience and country of origin, she found that immigrants with the lightest skin earned an average of eight to fifteen percent more than those with much darker skin.[16] Each extra point of lightness on the scale was roughly equivalent to one extra year of education in terms of salary increase.[17]

She also found that taller immigrants earned more than their shorter cohorts even after all identifiable variables such as education, skin color, skill, experience and country were controlled for.[18] In fact, she found that each inch of height advantage translated into one percent more income.[19]

I mention this study and Mandela's recounting of his own realization of the racist deceit hidden deep within him to illustrate the difficulty of divorcing ourselves and our decisions from the infinite array of images and forces that begin to shape each of us the day we are born. I doubt very much if any of the employers in Professor Hersch's study were aware that their assessment of the skill, productivity and labor of their employees was affected by such seemingly irrelevant factors as skin color or height. Yet, that is what her study found.[20]

I assume you will agree that Mandela's epiphany and Professor Hersch's study are disturbing, but I want to relate one more story which

12. *Id.*
13. *Id.*
14. *The Money of Colour*, NEW SCIENTIST, Feb. 3, 2007, at 6.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See id.*

will convey more directly how subliminal forces impact judges. Several years ago I was chair of the Pennsylvania Sentencing Commission. During my tenure as Chair, the Commission attempted to reassess sentences that were recommended in the lower range of the state sentencing guidelines in order to facilitate sentencing to boot camps and to encourage alternative sanctions that were being proposed as part of then pending legislation.

While the legislation was pending, a trial judge from one of the rural counties in Pennsylvania explained his support for the legislation by saying that he would no longer have to send the residents of his county to that prison outside of Philadelphia that housed all those criminals. He was referring to the State Correctional Institution at Graterford—a prison on the outskirts of Philadelphia whose inmate population is largely Black and Latino.[21]

There may be other explanations for his remark, but it is hard for me not to conclude that he viewed the people from his predominately White and rural county who were convicted of serious crimes differently than he viewed people who resided in the disadvantaged enclaves of Philadelphia who were convicted of the same crimes. And I hope that you are as equally troubled by the implications for class, caste and racial bias implicit in his comments as I am.

We should all be concerned that similar subconscious distinctions may affect sentences in our criminal courts. This is particularly problematic when a suggested sentence falls at the margins of a particular guideline and the judge has more discretion about the range of sentences. Or where the suggested sentences include both a custodial and a noncustodial sentence. In those cases, objectivity may not be much of a match for the social lenses that shape the image of the suburban middle class defendant differently than his or her economically disadvantaged cohort.

The state judge's comments, Professor Hersch's study, and Nelson Mandela's epiphany all illustrate in varying degrees the extent to which our decisions are influenced by bias that we are not even aware of. If bias can cloud the vision of Nelson Mandela and cause him to accept the teaching that Blacks are less capable than Whites, I submit that none of us is immune from its poisonous sting, a sting which often we cannot even feel and are therefore not aware of. Moreover, if we are to rise

21. *See* DAVID BARTON SMITH, FOX SCH. OF BUS. & MGMT., TEMP. U., AN INDEPENDENT ASSESSMENT OF THE HEALTH, HUMAN SERVICES, CULTURAL AND EDUCATIONAL NEEDS OF MONTGOMERY COUNTY 20 (2006), http://www.mcfoundationinc.org/pdfs/Montco_Needs_Asses.pdf.

above the social and economic tethers that bind *us*, we must first recognize and confront the difficulty of escaping the nuanced messages that have rained down upon each of us since we first drew breath.

As I suggested earlier, I doubt that we can begin to approach the ideal of objective analysis unless we first recognize our human frailties, and admit that we are as vulnerable to society's messages as everyone else. We judges must resist the temptation to assume that we are beyond the reach of the forces that shape the mindsets and beliefs of our non-jurist peers.

There is, of course, something special and unique about the role and responsibilities of judges in any society that values the dignity of the individual and the rule of law. And this is certainly true in a system that values the independence of the judiciary as much as our legal system professes to. Therefore, I am not suggesting that judges engage in jurisprudence that undermines the respect the society must have for the courts, or that we rest our jurisprudence on foundations that cause reasonable observers to question our impartiality. I am suggesting that we judges can best fulfill our noble role by admitting and confronting our vulnerabilities and frailties rather than proclaiming that, unlike everyone else, we can rise above them because of the demands of our high office.

In the final analysis, judicial objectivity can not be achieved unless we judges recognize that we have been exposed to the same social afflictions as everyone else, and that our immunity may be no stronger than anyone else's.

Harvard University Professor of Psychology Daniel Gilbert may have said it best when he wrote the following in an Op-Ed article in the *New York Times*: "[J]udges . . . strive for truth more often than we realize, and miss that mark more often than they realize. Because the brain cannot see itself fooling itself . . . ."[22]

Viewing judges merely as objective umpires chills the very introspection required to achieve a more objective jurisprudence. Consequently, it becomes more difficult to achieve the kind of objectivity we should all want in our judges and our jurisprudence. This is true for several, fairly obvious, reasons.

First, the politicized and polarized climate of recent years has made it exceedingly difficult for anyone engaged in the discussion to look critically at the jurisprudence that characterizes "their side" of an issue.

22. Daniel Gilbert, Op-Ed., *I'm O.K., You're Biased*, N.Y. TIMES, Apr. 16, 2006, § 4, at 12.

Rather, persons on both sides of the "judicial activism divide" throw accusatory stones at those on the other side of the divide.

The phrase "judicial activism" is itself as unfortunate as it is meaningless because it offers little more than reflexive criticism and convenient sound bites. More importantly, the increasingly polarized climate surrounding the courts makes it extremely difficult for us judges to admit either publicly or privately that we are the product of our experiences, and burdened by human frailties like all other mortals. We are, perhaps, too concerned that admitting this will call our own jurisprudence and judicial fitness into question, thereby making our judgments suspect, and opening us to criticism that we are not at liberty to rebut. Given the political posturing surrounding the hot-button issues of the day, that concern is not without substantial justification.

Yet, I submit that if we take a second to think about the kinds of decisions judges are often required to make, we might agree that, at least in some cases, legal analysis not only allows for personal beliefs to impact our jurisprudence, it sometimes requires it. One popular legal observer has stated:

> [C]onscientious judges recognizes [sic] a clear distinction between judicial interpretation and imposing personal preferences. Thus, in interpreting the Constitution, they invoke text, structure, history, and precedent as crucial guides. But by the same token, it is pretense to suggest that judges can somehow compartmentalize—and then ignore—their own values when choosing among interpretive methods and results.[23]

As we consider the umpire metaphor, it is also important to remember that the vast majority of cases will result in unanimous agreement among the judges deciding the case as well as the different courts that may consider the issue. In our court, as in all of the courts of appeals, the vast majority of appeals result in unanimous decisions either to affirm or to reverse.

From the judicial perspective, the vast majority of these cases are fairly clear cut, relatively easy to resolve, and usually involve none of today's hot-button issues where personal values may have a greater tendency to affect one's jurisprudence. As a former federal prosecutor explained:

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23. Edward Lazarus, *Overall, The Miers Nomination Is Troubling–But It Does Have One Virtue*, FINDLAW, Oct. 13, 2005, http://writ.news.findlaw.com/lazarus/20051013.html.

> For the most part, today's intense debate over the proper role of the courts—that is, the debate over judicial activism—focuses on a small number of Supreme Court decisions. This is unfortunate, because the lower federal courts decide far more seemingly unremarkable civil cases that matter a great deal for understanding when judges overreach. Unlike the cases that capture everyone's attention, these cases turn not on vexing issues of constitutional interpretation, but rather on how the facts of the lawsuit should be weighed—and on who should weigh them.[24]

Moreover, even when cases do involve "vexing issues of constitutional interpretation"[25] the facts and law are often so clear that there is little room for a judge's personal view to impact his or her decision.

However, I think we should candidly admit that there are other instances where there is enough play in the factual or precedential joints to allow personal beliefs to affect our adjudication. I do not say that this is a good thing, but I do believe it is unavoidable, and that our jurisprudence will be strengthened by admitting this dynamic rather than denying its existence. In fact, the quote from Professor Siegel that I shared earlier explains how this subjectivity has enriched our jurisprudence and furthered its evolution from "*separate but equal*" to *Brown v. Board of Education*.[26]

Although there is clearly a danger in allowing subjectivity to impact jurisprudence, as I suggested at the outset, some legal inquiries can only be resolved by judges relying upon personal experience, background and belief.

One legal commentator has argued that such issues as whether a search or seizure is "reasonable," whether a given governmental purpose is "compelling," whether a given punishment is "cruel and unusual," and I would add whether a given governmental act or omission "shocks the conscience"—are but a few examples of areas where it is difficult, if not impossible, for a judge's ruling to be divorced from his or her own personal experiences.[27] I note that the same is true with regard to whether a particular set of circumstances reflect conduct that is so severe and pervasive that it evidences an objectively hostile or abusive work

24. Seth Rosenthal, *The Jury Snub: A Conservative Form of Judicial Activism*, SLATE, Dec. 18, 2006, http://www.slate.com/id/2155723.

25. *Id.*

26. *See* Siegel, *supra* note 3 and accompanying text.

27. *See* Lazarus, *supra* note 23.

environment for purposes of employment discrimination under Title VII.[28]

Each of these inquiries opens the door to the judge's values and beliefs. Yet, it is neither possible nor desirable to attempt to apply these doctrines in a sterilized manner that isolates the judge's decision from the judge's experiences. After all, how else could the terms have meaning. These terms are not absolute; they have no meaning in the abstract.

First Amendment jurisprudence is another, and more highly charged, example of this. Whether we advocate original intent or subscribe to the notion that the Constitution is a living and evolving document, proper resolution of many free speech issues requires a judge to rely upon his or her view of the extent to which certain material offends contemporary standards of decency.[29]

It just may be that the rulings of even the most respected jurists differ on such issues because they have different experiences, and different frames of reference, and therefore view the relevant legal authority through different lenses.

Yet, I submit that the strong independent judiciary guaranteed under the Constitution comes about as close to constructing a system of objective jurisprudence as is humanly possible. It may be impossible to construct a system of law that would not allow, and perhaps occasionally even invite, subjectivity into the decision-making process. I submit that doing so, even if possible, is not as desirable as would appear given the politically charged discourse of the day.

Judge Harry Edwards, former Chief Judge of the D.C. Circuit Court of Appeals, has observed:

> While a judge typically will not need to resort to personal beliefs in deciding cases, some consideration of these beliefs may be unavoidable in the occasional "very hard" case where the legal arguments are indeterminate. In such a case, a judge's informed and critical development of his beliefs is a prerequisite to intelligent resolution of the dispute. Further, in all cases, the nature of one's personal beliefs should be consciously, rather than subconsciously, recognized.[30]

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28. 42 U.S.C. § 2000e-2(a) (2000).

29. *See* Miller v. California, 413 U.S. 15, 30-32 (1973) (approving a standard whereby "triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient'").

30. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 409-10 (1983-84).

Judge Edwards further explains, "The real threat that a judge's personal ideologies may affect his decisions in an inappropriate case arises when the judge is not even consciously aware of the potential threat."[31]

As I argued at the outset, we can never be fully aware of all that is percolating beneath the surface of our consciousness. We must therefore admit the very real possibility that our subjective beliefs may even define the seemingly objective application of neutral principles of law. However, as Professor Siegel suggests, that is not necessarily bad.[32] That may just be a jurisprudential dynamic that allows the law to evolve with changing times. The danger, of course, is that the parameter of judges' subjective view of the law is no parameter at all. It does not define a principled way of resolving legal disputes or interpreting legal texts. Yet, I believe our jurisprudence has often been strengthened by frank discussion of subjective beliefs in the context of a particular case or controversy.

I realize there is also danger here because it is very easy to applaud judicial expressions of personal belief that one agrees with as enriching jurisprudence, while viewing expressions of belief one disagrees with as the boogeyman of judicial activism. However, that is not as dangerous as our continuing to delude ourselves into thinking that our decisions are solely the result of our objective application of neutral legal principles, and that we judges have the ability to rise above ourselves.

Rather than indulging the pretense that judges are umpires and that umpires merely "call'um as they see'um," we should accept the fact that the law is flexible enough and strong enough to accommodate a far more honest approach to adjudication.

Perhaps one of the best examples of this tension between personal belief and adherence to neutral legal principles is Justice Blackmun's rather public attempts to reconcile the death penalty with the limitations of the Eighth Amendment. In his dissenting opinion in *Furman v. Georgia*, in 1972, responding to the majority's decision to strike down Georgia's death penalty statute, he explained: "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . . . Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement."[33]

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31. *Id.* at 410.
32. *See* Siegel, *supra* note 3 and accompanying text.
33. 408 U.S. 238, 405, 414 (1972) (Blackmun, J., dissenting).

As we know, several years later, Justice Blackmun reversed that stance and consistently voted to strike down death penalty statutes as unconstitutional. Thus, in 1994, in *Callins v. Collins*, he proclaimed:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.
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> . . . .
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> . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[34]

One can certainly view Justice Blackmun's attack on the death penalty as being beyond the bounds of objective, textually based jurisprudence. One can also view his statement in *Callins v. Collins* as consistent with the guiding principle of evolving standards of decency that is now enshrined in Eighth Amendment jurisprudence and conclude that his expression of personal belief was an appropriate part of the Court's constitutional inquiry and discussion. It may yet impact the Court's Eighth Amendment jurisprudence if it hasn't already done so.[35]

In the words of Professor Siegel, Justice Blackmun's pronouncements "resolve an Eighth Amendment analysis in a manner that articulated a vision of social order that resonated with fundamental public values."[36]

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34. 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting).

35. In a question and answer session that followed my presentation of these remarks, Professor Monroe H. Freedman, of Hofstra Law School, observed that Justice Blackmun's statements in *Callins v. Collins* were based on equal protection and due process considerations. I do not disagree with that interpretation of Justice Blackmun's analysis. Nevertheless, Justice Blackmun's articulation of his objection to the death penalty relies upon moral and philosophical (i.e., "intellectually obligated") considerations rather than the Fourteenth Amendment.

36. Siegel, *supra* note 3.

On my own court, in a 1995 case of *Flamer v. Delaware*, then Judge Timothy Lewis referred approvingly to Justice Blackmun's philosophical and oral challenge to the death penalty in a case involving an appeal from a decision of the Supreme Court of Delaware upholding a death sentence.[37] In his dissent in *Flamer*, Judge Lewis wrote:

> To be sure, Justice Blackmun was correct. . . . [T]here are times when it becomes appropriate for a judge to reflect upon the law that he or she is called upon to apply, and to express views, genuine and unfeigned, that reveal a sincere and earnest belief. . . . Something is terribly wrong when a body of law upon which we rely to determine who lives and who dies can no longer, in reality, reasonably and logically be comprehended and applied; . . . . Yet this is how cluttered and confusing our nation's effort to exact the ultimate punishment has become. This cannot be what certain fundamental principles of liberty and due process embodied in our Constitution . . . are all about.[38]

The dissents penned by Justice Blackmun and Judge Lewis are examples of judges not merely calling balls and strikes. Rather, their experience and sensitivity informed their resolution of the weighty legal issues in the case before them.

I submit that our jurisprudence was enriched rather than retarded by their very personal expressions of their own misgivings. In that regard, I cite once more from Justice Blackmun in dissent, this time from *DeShaney v. Winnebago County Department of Social Services*, which he wrote in 1989.[39] There, in explaining why he disagreed with the majority's conclusion that the plaintiff had not established the state action that was the condition precedent to establishing jurisdiction he stated:

> Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy". But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.
> . . . But such formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo . . . formalistic legal reasoning . . . .
> . . . [T]he question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or

37. 68 F.3d 736, 772 (3d Cir. 1995) (Lewis, J., dissenting).
38. *Id.*
39. 489 U.S. 189, 212-13 (1989) (Blackmun, J., dissenting).

> narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[40]

Justice Blackmun is expressing the old adage that where one comes out depends in large part upon where one goes in. And where one goes in has a great deal to do with the kind of subliminal forces that I mentioned at the beginning of this Article.

In his book, *Courts on Trial*, while commenting on the extent to which the values and life experiences of judges affect their jurisprudence, the late Judge Jerome Frank of the Second Circuit Court of Appeals wrote: "Frankly to recognize the existence of such prejudices is the part of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect."[41] Although, I doubt we can truly ever be confident that we have "nullified the effect of bias,"—particularly where we remain ignorant of its presence, I do agree that we move closer to that objective when we engage in the kind of self examination and introspection Judge Frank was advocating.

Thus, the recent rush of accusations of "judicial activism," and legislating from the bench only enhances the danger that we judges will allow personal values and beliefs to impact our jurisprudence. This is because it is increasingly difficult to engage in the kind of personal and introspective inquiry exemplified by the dissents I have just referred to, and the concerns expressed by Judge Frank.

Moreover, not withstanding analogies and metaphors of umpires and balls and strikes, it is impractical to expect judicial decisions to be exclusively controlled by the text of legislation or constitutional provisions, and we should not delude ourselves into thinking that rigid formalism necessarily advances our jurisprudence.

A popular legal commentator recently observed, quite correctly I think:

> All significant legislation is riddled with gaps that need to be filled in by courts. While judges are guided in their "interstitial" lawmaking function by what they perceive to be the intent of the legislature, it is disingenuous to suggest that judges do not add content to the frameworks provided by legislatures. Judges, of course, don't write

40. *Id.* at 212-13 (citation omitted).

41. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY OF AMERICAN JUSTICE 414 (1973) (quoting *In re* J.P. Linahan Inc., 138 F.2d 650, 652 (1943)).

> new law on a blank page, but they do write important law between the lines of what legislatures have already written.[42]

Chief Justice Harlan Fiske Stone stated nearly seventy years ago:

> [O]ne of the evil features, a very evil one, about all this assumption that judges only find the law and don't make it, often becomes the evil of a lack of candor. By covering up the lawmaking function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do.[43]

Although Chief Justice Stone was referring to statutory interpretation, his observation applies with even greater force to the far more difficult task of interpreting the Constitution.[44]

As I cautioned at the outset, I am not suggesting that we should rest content knowing that judges are influenced by other than their objective interpretation of neutral principles of law. I am suggesting that the umpire metaphor has done a real disservice to the very kind of jurisprudence it purports to advance.

III. CONCLUSION

And now, I thought it might be helpful and help us better understand how the umpire metaphor has dumbed down the public's appreciation of the constitutional role of judges. Professor Siegel reminds us of professional baseball's definition of a "strike."[45]

The Official Rules of Major League Baseball define the strike zone as follows:

> The STRIKE ZONE is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the knee cap. The Strike Zone shall be determined from the batter's stance as the batter is prepared to swing at a pitched ball.[46]

It may be easier to apply First Amendment jurisprudence than apply that definition. As Justice Potter Stewart observed in *Jacobellis v.*

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42. Lazarus, *supra* note 23.
43. *Id.*
44. *See id.*
45. *See* Siegel, *supra* note 3.
46. Major League Baseball, Official Rules: 2.00 Definition of Terms, http://mlb.mlb.com/mlb/official_info/official_rules/definition_terms_2.jsp.

Ohio, at least with pornography, you "know it when [you] see it."[47] But how does one determine the precise moment when a batter is prepared to swing at a pitch?

And, what about the batter who wears his pants extremely high and above the waist. Does he thereby gain an unfair advantage by narrowing the strike zone as would be the case if the umpire interprets the rule literally, or does the umpire apply the strike zone definition as it would have existed had the batter worn his pants in the anticipated manner—clearly a policy decision based upon what the umpire believes the drafters intended rather than what they actually said. What did the framers of the definition intend?

In conclusion, I think it fair to say that the umpire metaphor would be more accurate if, rather than proclaiming that we merely call balls and strikes like an umpire, we recognize that the strike zone is actually defined by the umpire who is calling the balls and strikes. Without that realization the umpire metaphor resembles Shakespeare's poor player who struts and frets his hour upon the stage telling tales that are full of sound and fury that signify nothing.

I hope that this Article will stimulate more thoughtful discussions about the role of judges and judges as individuals, and that they will not be misinterpreted as advocating result-oriented jurisprudence. In sharing these thoughts with you, I wanted to be as candid as possible even though I realize the risk that some may conclude that I am not troubled by the dynamic I have described. I am troubled by the fact that our jurisprudence is shaped by personal beliefs, but I am more troubled by pretending that judges can somehow become perfect objective adjudicators at the flip of a switch, or the wearing of a robe.

Chief Justice Stone was right seventy years ago in describing that assumption as "the evil of a lack of candor. . . . [that] miseducate[s] the people and fail[s] to bring out into the open the real responsibility of judges for what they do."[48]

47. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
48. Lazarus, *supra* note 23.