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HAMLET IN THE DISTRICT COURT: FACING PERSONAL ETHICAL DILEMMAS

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Professor Gray's paper[1] is a fine addition to scholarship. I am honored to be asked to respond to it. In doing so, I intend to examine the problem from a slightly different vantage point.

I. SELF-DISCIPLINE

The milieu in which a federal judge works is distinct from that of the state courts—which I take to be the primary focus of Professor Gray's paper. For a federal judge, the protections of life tenure and a stable salary, as well as the prestige attending the job, breed independence. We do not politic. We ignore what others—excepting, of course, the student Law Reviews—think of us.

We are autonomous. Joined to our autonomy is self-discipline.

While I follow federal rules on judicial ethics scrupulously, I am less concerned with discipline imposed by others than I am with our individual self-government. I have little use for judicial policing. I will police myself. My colleagues will police themselves. That should be enough for the men and women entrusted with the positions we occupy.

The question, for me, is one of self-accountability—not, "What will others make me do?" but rather, "What shall *I* do?" Ralph Waldo Emerson expressed similar sentiments in his famous essay "Self-Reliance":

> What I must do is all that concerns me, not what the people think. This rule, equally arduous in actual and in intellectual life, may serve for the whole distinction between greatness and meanness. It is the harder,

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1. *See* Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

> because you will always find those who think they know what is your duty better than you know it.[2]

With respect to our "reactive" ethical duties—the "thou shalt nots" of judicial deportment that Professor Gray catalogs so nicely—I believe I know my responsibilities. And I believe my fellow judges know theirs.

I am not naive. I recognize that judges err and that they sometimes need tutelage. Crooks need to be thrown off the bench. As for others, even the finest moral compass will occasionally need recalibration in a society that, in general, grows increasingly diverse.

Education is the key. Educational programs for judges—both in-house and through our law schools—are of great value. This conference is a shining example.

In more extreme circumstances, advisory opinions from other judges may be useful in pointing out ethical lapses or potential improprieties. It is awkward for judges to advise other judges, but the method is superior, in my opinion, to referring ethical questions to lay oversight committees.

Usually the matter is resolved by talking it over with another judge. If there is a question, the rule is, "Don't do it." More formal judicial committees are unnecessary in my court.

If maintaining judicial independence—the bedrock principle underlying Article III—is our goal, then we judges must police ourselves. We should protest efforts to deny us opportunities for self-education.

Legislation restricting reimbursement of expenses from law schools for judges who attend legal education seminars, for instance, is nothing but a short-sighted slap at our independence.

The judges I know are sufficiently self-reflexive to need no moral referee. Where guidance from another judge through an advisory opinion is necessary, no judge that I have met would fail to respond appropriately.

II. AFFIRMATIVE JUDICIAL ETHICS

I am therefore less preoccupied with what I should not do on the bench than with what I should be doing. With respect to a judge's affirmative ethical duties, the moral universe is not well-charted.

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2. RALPH WALDO EMERSON, *Self-Reliance*, *in* THE COMPLETE ESSAYS AND WRITINGS OF RALPH WALDO EMERSON 145, 150 (Brooks Atkinson, ed., 1940).

I will touch upon two questions that have lately been of concern: First, what should the judicial role be in a society where the financial resources of litigants are often radically unbalanced? Second, how should judges use their time?

A. Judicial Role

It is a truism that a judge is to be no respecter of wealth. The fortunate and the penurious will receive an equal and unbiased hearing before a neutral arbiter. This is equal justice under the law—at least in theory.

As a practical matter, I think no one will dispute that there is no level playing field in our courts. There is an inherent imbalance in civil cases between plaintiffs and defendants. Plaintiffs, who seek compensation for injuries from mass torts, or reinstatement to jobs from which they have been allegedly illegally fired, or injunctions to protect their communities from environmental damage, tend to be poor. Defendants, frequently major corporations and repeat players in the courts, tend to have sufficient resources to litigate claims effectively.

I do not need to tell you that there is also an imbalance in criminal cases, *Gideon*'s[3] fortieth anniversary notwithstanding.

Is it possible, in the face of this reality, for a judge to remain a neutral referee? Is it advisable? Is it permissible for the judge to intervene on behalf of the poor litigant? Is it advisable? What are the boundaries for such intervention?

In one case I recently addressed, women who were the victims of domestic abuse were having their children removed from their care—on the ground that the children were being "neglected" because of the abuse suffered by the mothers.[4] A full evidentiary hearing demonstrated that much of the problem was due to bureaucratic inefficiency and outmoded institutional biases.

Of particular concern was the failure of New York's "18-B" indigent legal representation system. The women frequently lost custody of their children because assigned counsel, working for grossly inadequate compensation, were late, unprepared or even absent from vital court proceedings.

To me, there was an ethical imperative to address the state 18-B crisis, which I viewed to be of constitutional dimension and to require federal intervention.

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3. Gideon v. Wainwright, 372 U.S. 335 (1963).
4. Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

Another set of cases led me to the same issue: To what degree is judicial intervention on behalf of the poor necessary? In the spring of 2003, I voluntarily accepted nearly 500 backlogged habeas corpus cases.[5] The experience has been enlightening in a number of ways. One issue that recurs is the quality of representation received by defendants in state criminal trials.

We need not worry, in general, about wealthy defendants. They can afford skilled lawyers, investigators and experts.

To a large extent, we should also be comforted by the quality of representation that indigent criminal defendants receive in this state. My experience having read through the trial records of hundreds of these habeas cases over the last several months has in this respect been heartening. The Legal Aid Society and other such organizations, which represent many of the state defendants, are staffed by fine and dedicated lawyers who for the most part do an outstanding job representing their clients both at trial and on appeal. Most other appointed counsel and retained counsel do well by their clients.

My chief concern is with the representation that some middle-class defendants receive. With sufficient resources to disqualify them from having appointed a state-sponsored lawyer, they must navigate the marketplace of legal representation with little information that might enable them to make rational purchasing decisions. They are frequently charged financially exhausting fees which they feel trapped into paying.

Once they have retained counsel, these defendants must usually proceed without the benefit of experts or investigators; their attorney will often be reluctant to expend resources on the client.

I recently granted the writ to a state prisoner, convicted of second degree murder and sentenced to twenty-five years to life in prison, whose counsel never invested the time necessary to actually visit the crime scene.[6] If he had, he would have learned that the only significant evidence of his client's guilt—the testimony of a woman that she saw from the window of her apartment the defendant on the fire-escape of the victim's apartment—was a physical impossibility.

Recognizing that investigation of a crime scene will inevitably entail costs to an attorney, I held that a lawyer, having accepted the responsibility of representing a criminal defendant, owes a duty to his client that will on occasion require him to make time and financial outlays that might be considered unfair for an ordinary businessman

5. *See In re* Habeas Corpus Cases, 298 F. Supp. 2d 303 (E.D.N.Y. 2003).

6. Thomas v. Kuhlman, 255 F. Supp. 2d 99 (E.D.N.Y. 2003).

who, unlike a licensed attorney, has not voluntarily adopted an enhanced ethical obligation to society.

In another habeas case, the defendant was charged in the 1980s with sexually abusing a number of children. Counsel promised to represent the defendant for a fee of $30,000—half of which was paid up front.[7] When the second half was not forthcoming, counsel sought to withdraw but was ordered to proceed by the court. His defense of his client seemed, all in all, competent but, after the default in compensation, lackluster. What struck me was how deficient the representation was in comparison to what a wealthy man would have received. Had the defendant been wealthy he would probably have been out on bail instead of in jail awaiting trial. He would have been helping his attorney round up the witnesses he needed for his defense. He would have been under intense psychiatric treatment in an effort to demonstrate to the district attorney and the court that he was never, or was no longer, a danger to the community. He would likely have negotiated a plea to reduced charges and received a shorter prison term. If the case had gone to trial there would have been appropriate psychiatrists and expert witnesses testifying on his behalf. There would have been full trial briefs, with co-counsel at the defense table. There would have been psychiatrists at the sentencing, and the sentencing proceeding might have been lengthy and comprehensive. The resulting sentence would probably have been different because of treatment and rehabilitation considerations.

How far can a judge go in assuring that all litigants get a fair shake and a real opportunity to see justice done? That is an ethical issue that recurs almost daily. It is an issue whose contours are ever-shifting. It is a dilemma that the judge himself must face in private.

B. Using Time

Let me briefly touch on another pressing problem. How should judges be using their time to best serve society? Should we restrict ourselves solely to deciding the cases before us and issuing narrow decisions—so-called "minimalist" opinions, to use Cass Sunstein's term?[8]

I do not believe in such a limited role for the judge. Ours is a privileged platform from which we can, if we have the will, do much

7. Eisemann v. Herbert, 274 F. Supp. 2d 283 (E.D.N.Y. 2003).

8. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

good (or bad) beyond the immediate disputes being argued in the wells before us.

Of course our most important job is to resolve legal disputes. But in a common law system like ours, what we say in a decision and how we say it will potentially have a profound impact that resonates beyond the case at hand. Generating legally comprehensive decisions is an obligation of the judge—one admittedly fraught with risks, but necessary for the progress of the law and the betterment of society. At least in the federal district courts we can experiment with new doctrine and work toward bettering the law and its administration.

In clarifying the law, what efforts, if any, should the court direct at alleviating the structural injustices faced by the poor and oppressed? Even-handedness in disputes may suffice as a motto or a hortatory goal, but in practical terms being "fair" does not always equate with being "even-handed." Perhaps this is just to restate the distinction between law and equity which Aristotle makes in his *Nichomachean Ethics*.[9] At any rate, it is an issue ever before a judge.

How shall we handle sentencing under the federal guidelines, and mandatory minimum or enhanced sentencing statutes? Shall we write and rail publicly against perceived and unnecessary injustices? Shall we push the envelope of interpretation?

As judges, we must give some thought to the administration of our calendars. I accepted the task of disposing of hundreds of state prisoner habeas corpus cases. To be sure, these matters can be tedious. The frivolous nature of so many of the claims can be frustrating. It is sometimes a challenge not to read these petitions with a hardened heart.

I believe it is our obligation to timely address these pleas to the law and, sometimes, our mercy. Prisoners who have sought our attention deserve to be acknowledged and to have their cases decided promptly: not only because our rules, read literally, require prompt dispositions, and not only because some of these prisoners are in fact unjustly confined, sometimes for years, in state prisons; but because too long a delay suggests that the court does not recognize the inherent dignity of these men and women seeking a hearing in our courts.

Judges must consider the degree to which they should use their speeches to lay and professional audiences, as well as their opinions, to weigh in on legal issues. For better or worse, judges generally have access to law reviews and lecture halls that few but distinguished

9. *See* ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICHOMACHEAN ETHICS (J.A.K. Thomson trans., rev. ed. 1976).

professors enjoy. This opportunity presents a challenge. If accepted, it is also a burden. Judges must decide how much time to devote to scholarly pursuits when caseloads are already so straining.

III. CONCLUSION

In sum, I suggest that for a federal judge independence is the lodestar and self-discipline is the compass by which we find our way. In the federal courts, I believe we can take care of ourselves without outside interference.

The important questions for me concern the affirmative obligations that judges face: To what degree and when should we step directly into the fray and interfere rather than simply referee? In what way can our limited energy and talents best achieve the goal of justice for all the people?

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