

2004

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Recommended Citation

Fried, Charles (2004) "A Meditation on the First Principles of Judicial Ethics," *Hofstra Law Review*. Vol. 32 : Iss. 4 , Article 10.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol32/iss4/10>

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A MEDITATION ON THE FIRST PRINCIPLES OF JUDICIAL ETHICS

*Charles Fried**

All kinds of people are subject to codes of ethics: lawyers and doctors, of course,¹ but also beauticians, funeral directors, sex therapists, and real estate agents.² By and large these codes codify the obvious, assuring against cheating, self-dealing, and impositions of various sorts. Judicial ethics are different—deeper, more constraining: unlike, say, the ethical constraints on real estate agents or even doctors. Judges are supposed to maintain a certain decorum even when not doing their jobs. There is an aura about judges that we do not want them to dissipate, and sustaining that expectation is an important part—perhaps the central part—of judicial ethics, whether or not it can be exhaustively expressed in any formal canon. This obligation is the reciprocal of the respect shown judges—not only in their courtrooms, but in more ordinary contexts. I remember vividly the greeting I would receive from court officers, lawyers, ordinary citizens—it was always “good morning, Judge,” the way a priest is greeted as “father.” And even now—it is five years since I have left the bench—my former law clerks, many of whom

* Beneficial Professor Law, Harvard Law School. Thanks to Andrew Kaufman for comments on an earlier draft. This essay draws on material at pages 70-77 of my forthcoming SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (Harvard University Press 2004).

1. See generally ABA, MODEL RULES OF PROF'L RESPONSIBILITY (2003); AMERICAN MEDICAL ASS'N, PRINCIPLES OF MEDICAL ETHICS (adopted June, 2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html> (last visited Mar. 8, 2004).

2. See generally AMERICAN ASS'N OF SEX EDUCATORS, COUNSELORS & THERAPISTS, CODE OF ETHICS (revised and adopted Apr. 1993) (sex therapists code of professional conduct), available at <http://www.aasect.org/codeofethics.cfm> (last visited Mar. 8, 2004); NAT'L ASS'N OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (effective Jan. 1, 2004) (describing ethical obligations and duties owed to clients and customers), available at <http://www.realtor.org/mempolweb.nsf/pages/printable2004code>; NAT'L COALITION OF ESTHETICS & RELATED ASS'NS, CODE OF ETHICS (code of professional responsibility for “all licensed skin care professionals”), available at <http://www.nceca.tv/nceca%20code%20of%20ethics.pdf>; NAT'L FUNERAL DIRECTORS ASS'N, CODE OF PROFESSIONAL CONDUCT (approved Oct. 19, 2004) (addressing “the obligations of the funeral professional”), available at <http://www.nfda.org/files/codeofconduct.pdf>.

are warm family friends, still call me judge. Once a priest, always a priest. But those manifestations of respect imply a demand, almost a threat: Don't dare to disappoint my expectations, or you will be punished with a special measure of contempt. The greeting will become a sneer. This aura needs to be explained, and in the explanation lies the key to many of the detailed injunctions of judicial ethics.

The most obvious start at an explanation would point out that unlike the doctor, lawyer or real estate broker, the judge owes a duty to two parties (or sets of parties), with opposing interests, who come before him in a professional relationship. The judge has what in these other relationships is called a duty of loyalty to both sides. Here this is called a duty of impartiality. But that is far too bland a term. After all, indifference is a perfect form of impartiality, but indifference is hardly what we expect of a judge. On the contrary she is meant to care deeply about what she does; we expect her to work hard at what she does—even to agonize about the difficult cases. But only in the right way, about the relevant aspects of the case. And what is the right way, what are the relevant aspects? Is the judge like a surgeon? The surgeon should certainly be completely involved with her patient in judging how her patient should be treated: should she operate at all, what risks should she take? These are judgments that should be taken with the fullest involvement with the patient's aspirations, life situation, emotional constitution. But tenderness, sensitivity are quite out of place once the procedure has been decided on—and even then the surgeon is meant to care deeply about the technical finesse of what she does. I often wonder how the best surgeon manages both the involvement, I might say almost the advocacy, at the first stage of the relationship and then the distance, the indifference she needs when cutting into the living flesh of her patient, who only a while ago sat in her office inviting her most human concern.

Back to the judge. The judge is also meant to adopt a complex posture of involvement and studied remoteness. But it is not the same. The surgeon operates on one person at a time; the judge judges between two contesting parties, and if he is to have humane concern, it must be for both. That is harder. The surgeon may be called on to heal some pretty rum characters and maintaining the proper level of humane concern may be a challenge. But for the judge, rooting for one party means rooting against the other. So what is humane passion where the imperative is to be dispassionate? There is another difference between the judge and the surgeon, lawyer, or broker that generates the judge's

peculiar ethical obligations. The judge has power—not the power that comes from being able to do something *for* people that they ask you to do. It is the power to do things *to* people: Transfer their property to their hated enemy, deprive them of their liberty or of their life. Others have that power too: the police officer, the jailer, the executioner. And think of the power that employers, landlords, parents wield over employees, tenants, children. But here again the difference is crucial. The judges' power is final in a way that the power of policeman, employer, parent is not. All of those other powers in an ordered and lawful community are exercised at the command of the law or with its permission. The law can free a prisoner from his jailer, prevent an eviction, remove a child from the grasp of cruel or neglectful parents. And in particular cases, it is the "province and duty" of the judge "to say what the law is."

So there is something special, something ultimate, about the power of the judge. Nowhere is this more salient than in our constitutional system. From the beginning, the judge has had the power to judge not only according to the law made by office-holders and legislators, but to judge that law itself. We are used to looking to judges as the ultimate protection of the rights of individuals, not only within the legal system, but against that system. For a time this seemed extravagant and irrational. One need only recall the icy skepticism with which as great a judge as Learned Hand, in his book, *The Spirit of Liberty*, came to look upon this function of the courts, to see how much in need of explanation is their ultimate authority.³ Yet since Learned Hand wrote, nations everywhere to whom such a role might only recently have seemed strange have turned to judges to act as ultimate guarantor not only of rights in the law, but of human rights against the law.

The ultimate power inside the law and the ultimate power to judge the law itself are what makes the role of judge distinct and generates the ethical restraints on those who inhabit that role. It might be said that I am only talking about the exalted heights of the Supreme Court or of the European Court of Human Rights or of courts like the German or South African Constitutional Courts. But I am not. People have turned to judges to perform that office because everywhere it has seemed appropriate. Everywhere people had always invested judges—ordinary judges, adjudicating contracts disputes and low level criminal cases—with a special respect (or reacted with a special outrage or despair when

3. See LEARNED HAND, *THE SPIRIT OF LIBERTY* (Irving Dillard ed., 3d ed. 1963) [hereinafter HAND, *THE SPIRIT OF LIBERTY*].

judges abused their office.) Judges were invested with a special aura not because they have been assigned this unusual role of judicial review of all laws; rather they were assigned that role because they had that aura. So I move to contemplate that aura.

What is it to be a judge? What do we expect of judges? Truth and knowledge. What is distinctive is the discipline and culture of deciding cases according to law. John Adams, in drafting the Declaration of Rights in the Massachusetts Constitution, spoke of “a government of laws and not of men,”⁴ of the rule of law, because this is the best (albeit imperfect) guarantee that people will be subject only to rules stated and known beforehand. Deciding according to law is not easy. There is a great deal to know, and the judge must be able to put out of his mind some aspects of the dispute that laymen would consider relevant. The judge must be able to listen to parties and their advocates making unattractive, even implausible, arguments with a mind open to the possibility that they contain some validity, some truth. That is the discipline. Then there is the culture: the forms of argument, the kinds of references and authorities that are or are not traditional. The details may differ, but in many civilizations there is this conception of the judge as a man apart, a kind of priest. In Islam it is said:

The just qādī [judge] will be brought on the Judgment Day, and confronted with such a harsh accounting that he will wish that he had never judged between any two, even as to a single date.⁵

.....

[Judges] are three: two in the Fire, and one in Paradise. A man who has knowledge, and judges by what he knows—he is in Paradise. A man who is ignorant, and judges according to his ignorance—he is in the Fire. A man who has knowledge and judges by something other than his knowledge—he is in the Fire.⁶

And this is what Jethro said to Moses: “Moreover thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness.”⁷

It is foreign to this conception of the judge that he be dependent on the Prince (even an elected Prince, or a whole Congress full of Princes).

4. MASS. CONST. pt. 1, art. XXX.

5. FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM* 19-20 (2000).

6. *Id.* at 20 n. 41 (quoting Al-Sadr al-Shahīd, *Adab al-qādi*, 1:163-64).

7. *Exodus* 18:21 (King James).

And it should be clear what that independence comes to: the discipline and culture to decide according to the law and only according to the law.

What we expect of the judge, then, are two things: knowledge of the law and a steady disposition to judge only in accordance with it—what the Bible calls “men of truth.” What about knowledge of the world, of human nature—what about justice? These can be seductions from the proper role of the judge and what we rightly—or have a right to—expect of him. I say seductions because they are partial—dangerously, seductively partial. Knowledge of the world and of human nature are sometimes assumed and specified by the law. Its vocabulary of intent, cause and effect, for instance, depend on that knowledge, but that knowledge is relevant only as it is specified by law. If law says that person’s responsibility depends only on his being a cause of an effect irrespective of his intention, then that is the only way in which knowledge may come into judging.

But it is justice that is the greatest seduction, because it invites deep confusion. Justice is judging according to the law and the judge who ignores (more rightly, defies) law to do what he thinks is justice, acts unjustly. I will explain why that must be so shortly, but first I will give a concrete example. You will recall the case of Louise Woodward, the au pair who was found guilty of second degree murder in the death of a young child entrusted to her care and sentenced to the statutorily mandated term of life in prison.⁸ Under Massachusetts law the trial judge is authorized to reduce such a conviction to involuntary manslaughter in the interests of justice,⁹ and the trial judge (a very intelligent and—how shall I put it?—high spirited man) did so and imposed a sentence equivalent to the confinement she had suffered during the time she was awaiting trial and disposition of post-conviction motions—279 days.¹⁰ The sentence produced general outrage.¹¹ The jury had concluded that Woodward had at least intended serious bodily harm.¹² And everyone in the system was well aware of the many husbands and boyfriends—less well represented, less notorious—sentenced to long terms of imprisonment for similar acts of exasperation.¹³ But in the opinion of the

8. See *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1281 (Mass. 1998).

9. See MASS. GEN. LAWS ch. 278, § 33E (2004).

10. See *Woodward*, 694 N.E.2d at 1281.

11. See Editorial, *Louise Woodward Goes Home*, WASH. POST, June 20, 1998, available at <http://www.juneauempire.com/Archive/June98/062298/stories/062298/edit.html> (last modified June 22, 1998).

12. See MASS. GEN. LAWS ANN. ch 265, § 1 (2004).

13. See, e.g., *Commonwealth v. O'Brien*, 645 N.E.2d 1170, 1171 (Mass. 1995) (finding

appellate court that was called upon by the prosecutor to review that sentence, the trial judge had acted within his legal authority.¹⁴ This may not have been a just sentence, but it was a lawful one, and if the courts had reversed it, that would have been an unlawful and therefore unjust act—an injustice committed under the seduction of the sense of justice.

And it would have been an offense against knowledge and truth, for only by twisting the words of the law could such a decision have been explained and justified. That is the connection to truth and knowledge—the judge should do only what he can explain and justify, explain according to a true knowledge of the law—i.e. not by ignoring what the law is, that is ignoring the knowledge he has, nor by twisting (that is not telling the truth) about how that knowledge bears on the law. The same point operates in the opposite direction in the case of the federal sentencing guidelines, which many federal trial judges mistakenly believe prevent them from being good judges, and which—under the seduction of the word “justice”—these judges sometimes are moved to ignore or twist (that is apply untruthfully). They too are “in the fire.” For what is it to give a twisted account of the law? It is an account such that if a lawyer offered it in oral argument (or a law student in an exam) she would be accused of being disingenuous—in plain English, a liar. As a final example, I think of the judges of the Ninth Circuit who in the cases of *Gomez v. United States District Court*¹⁵ and *Harris v. Vasquez*,¹⁶ four times in one night issued stays¹⁷ of what was to be California’s first execution in twenty-five years, and four times were summarily reversed by the Supreme Court.¹⁸ The subordination of a court of appeals to the Supreme Court is part of the law which those judges were bound to know and speak truly in responding to.¹⁹

In each of those examples the matter is complex because the ignorant or untruthful judgment would reverse a judgment that itself may have been ignorant, untruthful, or simply unjust. There are many who believe that the federal sentencing guidelines or the mandatory minima in some criminal statutes are unjust. Perhaps they are right. Mine is not

mother’s boyfriend guilty of involuntary manslaughter after he accidentally dropped her child; he was sentenced to nineteen to twenty years in prison).

14. See *Woodward*, 694 N.E.2d at 1288.

15. 966 F.2d 465 (9th Cir. 1992).

16. 961 F.2d 1450 (9th Cir. 1992).

17. See *Gomez*, 966 F.2d at 465; *Harris*, 961 F.2d at 1450.

18. See *Gomez v. United States Dist. Court*, 503 U.S. 653, 653-54 (1992); *Vasquez v. Harris*, 503 U.S. 1000 (1992).

19. See Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188-92 (1992).

at all the positivist argument that whatever is the law for that reason is just. There are unjust laws. We are bound to reflect on the laws, and if they are unjust, to pass judgment on them as citizens, as voters, as legislators, as government officials—but not as judges. (And if as judges they conclude they cannot conscientiously apply what they know the law to be, they must resign to work as citizens for its change.) This is the key to the judge's special role, to his special power, to his special importance, and thus to his special ethics. To put it with special emphasis: everyone else is bound to act justly—only the judge must act according to the law and only according to the law. Take the role of citizen or legislator. Of course each must obey the law as it applies to him, but in those roles they must press for, vote for just laws, the repeal of unjust laws. But that is no part of the judge's work. It is not because judges are smarter or better than other people that we give them the ultimate power—ultimate only in the sense that it is last. It is because it is their particular job to know the law and to apply it truthfully.²⁰ And only because of that peculiarly potent and impotent role did it a long time ago seem natural to give judges—all judges—the authority to hold ordinary laws unconstitutional: because the Constitution is law and it is the province and duty of the judicial branch to say what the law is—with knowledge and in truth.

This explains the peculiar respect in which we hold those who inhabit that role. It also explains the peculiar temptation to which judges are subject. The temptation to think that they have the wisdom and authority to judge the law itself (remember the Constitution is law); the temptation to think that because they are final as they sometimes are, that therefore they are not only infallible but omnipotent—rather than to a peculiar degree more impotent than any other actor in our system of law.

Before I bring the grand generalities down to earth in respect to judicial ethics, let me recall a case of judicial ethics that came before my court when I was a justice. An appellate judge during oral argument berated one of the parties—who was present in the courtroom—for greed and all manner of impropriety, before going on to rule in his favor in a matter that was tangentially related to the contents of the diatribe.²¹ This is what my court said in disciplining the judge:

20. See Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38 (1981).

21. See *In re Brown*, 691 N.E.2d 573, 574-75 (Mass. 1998).

Judges wield an awesome and final power over the liberty and property of their fellow citizens. This power is the more awesome because in this Commonwealth, as in the Federal system, we are neither elected nor subject to recall or retention elections. This power is tolerable in a democracy because judges speak only for reason and the law. As stated in *The Federalist* No. 78 (Alexander Hamilton), we have “neither force nor will, but merely judgment.” For every litigation at least one-half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day he might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well. How else are ordinary citizens to have the faith in us that we have in ourselves and Justice Brown’s colleagues testified that they have in him? An impartial manner, courtesy, and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. Surely it is arrogance for us to say to them that we may not seem impartial, but we know we are, and so they must submit. Precisely because the public cannot witness, but instead must trust, what happens when a judge retires to the privacy of his chambers, the judiciary must behave with circumspection when in the public eye.²²

If ever a judge forgets that his role is only to know the law and speak the truth according to the law, then those greetings by court officers, lawyers on the street, those who argue to him—“good morning judge,” “with all respect, your honor,” are expressions not of respect but of mockery and justified sarcasm.

Let me move to some more concrete points of judicial ethics. Even before *Marbury v. Madison*²³—which it will be remembered was a decision not to do justice, because the law did not allow it—the Justices of the Supreme Court in *Hayburn’s Case*²⁴ confronted an Act of Congress requiring federal courts to recommend to the Secretary of War what should be done in particular cases respecting pension claims by Revolutionary War veterans.²⁵ Though recognizing the “benevolent purpose” of the Act of Congress imposing this function on the federal

22. *Id.* at 576.

23. 5 U.S. (1 Cranch) 137 (1803).

24. 2 U.S. (2 Dall.) 409 (1792).

25. *See id.* at 409.

courts, the Justices said that courts should not undertake this task because it was not judicial in nature—it was not (in the words of the Constitution) a “case or controversy.”²⁶ Because the Secretary of War had the last word about the award of the pension, the courts would be acting as part of his staff, that is bureaucrats, rather than making the final decision about a concrete dispute.²⁷ Interestingly, the Justices distinguished the situation from one where judges in their individual capacities, neither acting as a court nor exercising the judicial function, were enlisted in some governmental task.²⁸ Once again this calls to mind the picture of the judge as having the last word to adjudicate concrete disputes according to law. It is my contention that both the power and the limitations on the power of judges derive from this distinct function. It is what makes judges special and from it their ethical obligations may be derived.

Let us start with the most obvious case: the judge who takes a bribe to render judgment.²⁹ The corrupt judge is not a man of truth, because he is indifferent to it. He uses his final power not to assure that there is true judgment under law, and thus that the rule of law prevail, but as a way of furthering his own interests. Not only is law not served, but the awesome power that society has confided in the judge has been literally stolen. He steals from the losing party what that party loses by the judgment; he steals from the winning party the money he has taken. But what of the judge who will only accept a bribe from the party he is convinced he would have ruled for on the merits anyway? This is said to have been the practice of Judge Martin Manton of the Second Circuit.³⁰ He too is a thief, in that he steals from all of us the power we gave him for a limited purpose and which he now turns to his own advantage. And like the liar, he risks undermining the very practice that makes his crime profitable, for he only has the power because of the trust and respect that is accorded the office.

That much is obvious. It is obvious as well that a judge must not only avoid the fact of being a thief, but the appearance. It is so obvious that it is not even interesting. Similarly, all the customs and traditions surrounding a judge’s behavior, though less obvious are indeed often

26. *See id.* at 411-13.

27. *See id.* at 410.

28. *See id.* at 413-14.

29. For the comprehensive and definitive work on this subject, see JOHN T. NOONAN, JR., *BRIBES* (1984).

30. *See* Robert H. Bork, *Foreword* to MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* at ix (1998).

quite subtle. We do not want to insist on a posture so aloof and otherworldly as to be incredible and thus for that reason alone inviting cynicism. I am much more interested in the difficult issue of the judge's extrajudicial statements. Consider the judge who gives a speech or writes a book stating how she would rule on a controversial matter that may come before her. I assume there is not a breath of suspicion that such a ruling would be corrupt in the sense I have just set out. Still, she must not do it.³¹ The reason why tells us a great deal about the role and function of the judge. Imagine you are a large corporation and must appear before a judge who has written a journal article stating that that corporation is an extortionate monopolist, whose power must be curbed for the public good. Might you not conclude that whatever arguments you make, whatever evidence you offer will have no effect on the judge's decision? But do you have a right to have such an effect? Are you entitled to anything more than the judge's best thoughtful, sincere conclusion? Certainly no more than that, but his conclusion should come as the outcome of the actual proceeding over which the judge presides. I have painted a picture of the judge as bound by the law, as bound to tell the truth according to the law. But there is more to the picture than that. The judge participates in a ritual of sorts—once more the picture of the judge as a priest. It is a ritual that includes the judge and the parties who appear before him. Just as the judge has the last word in the regime of the rule of law, the litigants expect to come before her not as before a bureaucrat or a politician but as someone apart from everything else that has happened. You marshal your arguments and evidence for a new, ultimate cry for justice. The court is a place apart—apart from the marketplace and apart from the halls of political power. Here, reason rules—or rather the law alone rules. It is a manifestation of that apartness that the judgment you will hear will only be in response to the question you ask, and according to the law. So if you have been prejudged, by what the judge already knows about your case, then what happens in court is just a charade, not a fresh and final look. And as in the case of corruption, not only must the judge judge only according to what is put before him in the controlled environment of the adjudication—she must be seen as doing so. Her mind must not only be open—it must appear to be open.³²

31. See MODEL CODE OF JUDICIAL CONDUCT Canon 1A, Canon 2A, Canon 4A(1) & cmt. (1990).

32. See Timothy D. Lytton, "Shall Not the Judge of the Earth Deal Justly": *Accountability, Compassion, and Judicial Authority in the Biblical Story of Sodom and Gomorrah*, 18 J. LAW &

But what does it mean to have an open mind? Surely it is unrealistic and undesirable to expect judges to be a blank slate, intellectual neuters, ignorant of the world, without opinions. Wisdom and ignorance are antithetical. This is not an easy dilemma to resolve. Formally the answer lies this way: the judge must rule according to the law and the evidence, and only the evidence brought before him in the particular case. Those are constraints which if scrupulously observed cabin personal leanings. Justice Thomas in his dissent in *Lawrence v. Texas*³³ took a position that would be exemplary, were it not so common and so self-understood:

I write separately to note that the law before the Court today ‘is . . . uncommonly silly.’ If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to “decide cases ‘agreeably to the Constitution and laws of the United States.’”³⁴

But it is not that simple. It might be said that even in that case Justice Thomas may have acted properly, but said too much. Was he justified even in calling the Texas law “uncommonly silly”—quoting an earlier dissent by Justice Stewart? By doing so was he not using his judicial office—indeed the pages of the *United States Reports*—to express an opinion on a legislative matter, a matter outside his role as a judge? How steady and judicious a use of the judicial power may one expect in future cases involving a law the judge has concluded is uncommonly silly? The answer on Justice Thomas’s behalf must be that his aspersions against the Texas law were indeed important to the process of reasoning by which he reached his conclusion, and that his office not only permitted but required that he display that reasoning. Only by calling the law silly could he explain his view that that law’s constitutional validity did not depend on its substantive wisdom. But perhaps even that goes beyond the occasion of the case and for that

RELIGION 31, 36 (2002) (“This reading explains how God could remain open-minded: if God wishes to model the process of judging, which is *analytically* prior to a final decision, the outcome *must* be indeterminate at the outset.”).

33. 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting).

34. *Id.*

reason beyond the proper role of the judge. Perhaps it was only the second paragraph that was called for. My point might be brought out in terms of *Hayburn's Case*.³⁵ There the Court established forcefully that the power of judges is confined to the decision of cases and controversies.³⁶ Justice Thomas's views of the wisdom of the legislation were not, in his own judgment, relevant to the decision of the case as a case—so why bring them in at all? I am not sure. First of all, this kind of thing is very common indeed: look at some of the famous Holmes dissents. But more to the point, perhaps only in this way can he fully explain the reasoning that brought him to his conclusion. But perhaps it should still be left unsaid, or at least be put in terms of “whatever I think of the wisdom of this law”

A recent Supreme Court term brought another, sharper example of this point. In *Nike v. Kasky*,³⁷ a most important case about the boundaries for purposes of the First Amendment between commercial speech and political speech, the Court, after briefing and argument, dismissed the case as “improvidently granted.”³⁸ As is well known, denial of the writ of certiorari quite explicitly and as a matter of law implies no view on the merits of the case and may not properly be cited in support of any proposition of law.³⁹ Yet four Justices wrote or joined opinions concurring in or dissenting from the dismissal. Justice Stevens, joined by Justices Souter and Ginsburg, wrote at length explaining why the case was not appropriate for review at this stage.⁴⁰ Justice Kennedy simply noted his dissent from this dismissal.⁴¹ Justice Breyer, joined by Justice O'Connor, not only wrote an opinion explaining in detail why the case was appropriate for decision, but also went on to intimate quite unmistakably his view that the California proceedings did indeed threaten a violation of the First Amendment.⁴² Dissents, sometimes with opinion, from denials of certiorari are a relatively recent, but increasingly common phenomenon.⁴³ It seems to me a troubling practice. Given that the denial of the writ has no precedential value and that the

35. 2 U.S. (2 Dall.) 409 (1792).

36. *See id.* at 412-13.

37. 123 S. Ct. 2554 (2003).

38. *See id.* at 2554, 2558-59 (Stevens, J., concurring).

39. *See* *Maggio v. Williams*, 464 U.S. 46, 62 (1983) (Brennan, J., dissenting).

40. *See Nike*, 123 S. Ct. at 2555-59 (Stevens, J., Souter, J., Ginsburg, J., concurring).

41. *See id.* at 2559 (Kennedy, J., dissenting).

42. *See id.* at 2559-69 (Breyer, J., O'Connor, J., dissenting).

43. *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1255, 1256-61 (1979).

institution exists specifically for the purpose of allowing the Court to choose the cases it will and those it will not decide, an opinion dissenting from the denial—particularly one that signals a Justice's views on the merits—seems quite close to a purely extrajudicial statement of how that Justice would vote if the case did come before him. *Nike* was a dismissal after briefing and argument,⁴⁴ but I do not see why that makes a difference, unless the Justice is bound to exercise a different judgment at that point than the one exercised at the stage of granting or denying certiorari—that is a purely prudential, pragmatic, administrative judgment, and for that reason a judgment that does not itself become part of the law. The practice of going on to address the merits of the case allows judicial commitment where by hypothesis there is no case or controversy.

Indeed I would press the point even further. In the year that I was law clerk to Justice John Harlan, he wrote a much cited dissent in the case of *Poe v. Ullman*.⁴⁵ The Court had dismissed an appeal on the grounds that it was not justiciable. Justice Harlan dissented from that conclusion and wrote at length why the Court's standards of justiciability were in his view incorrect. That much seems unexceptionable: the law of ripeness, mootness, of real and feigned controversies is after all part of the law. But Justice Harlan went on to explain in considerable detail how he would have proceeded to decide the merits of the case. I am not sure that was the right thing to do. The majority had not expressed a view on the merits. After the Court's disposition, they were not part of the case, so that what Justice Harlan did was once again to commit himself to a position that could be (and was) relevant in future cases, but in a context where it could not control the result in this case. And I would go even further, to question the propriety of dictum even in a majority opinion. Just like Harlan's dissent in *Poe*, what dictum does is to commit the Court itself to a position that the decision of the present case or controversy does not require; and it is the necessity of disposing that present controversy and only that controversy that necessitates and therefore justifies the judge's pronouncements in the full dress of the court.

This brings me to the difficult question of extrajudicial pronouncements by judges. Some of our finest judges have also made significant contributions to the literature of the law while sitting as

44. See *Nike*, 123 S. Ct. at 2560.

45. 367 U.S. 497, 522 (1961).

judges: Cardozo, Hand, Friendly and Brennan among those now dead; Posner, Noonan, Breyer, Kennedy and Scalia of those now sitting. Their writings have not been limited to questions that could not possibly relate to their work as judges—like a state court judge reflecting on international criminal tribunals, or Judge Posner reflecting on law and literature. On the contrary, these judges have often sought to explain in some detail how they go about deciding cases and what the general direction of the law should be. So as not to pick an example that might imply criticism of a particular judge, I will take myself as the subject. In 1997, while a Justice of the Supreme Judicial Court, I published an article criticizing a disposition in my court to expand advantages conferred on those suspected or accused of crime.⁴⁶ I noted that too often my court began by following, as it is obliged to do, the Supreme Court's expansion of a particular protection, say of the Fourth Amendment, noting that our state constitution's provision was virtually identical to the federal provision. However, when the tide turned against what might be called the Brennan revolution—in cases such as *United States v. Leon*⁴⁷—my court (along with a number of other state courts) discovered that the earlier rule, which they had said was forced upon them by the Supremacy Clause, had in fact been required by their state constitutions all along.⁴⁸ The most notorious example of such a maneuver was the case in which my court discovered, after the Supreme Court in *Gregg v. Georgia*⁴⁹ declined to hold that the death penalty was in all circumstances a cruel and unusual punishment, that the death penalty violated the state constitution's cruel and unusual punishment clause.⁵⁰ The voters promptly adopted a constitutional amendment repudiating that decision.⁵¹ To be sure, in my article I did not intimate how I would vote on any particular case before the court or making its way to it. Prosecutors and defense lawyers would gather more than a hint from this article about how I would be inclined to vote in a case in which just such an expansion of a state constitutional provision was in issue. And they

46. See Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK L. REV. 681, 682-83 (1997) [hereinafter Fried, *Reflections*]; see generally Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717 (1998) (exploring philosophical bases for strong protections for freedom of speech).

47. 468 U.S. 897 (1984).

48. See Fried, *Reflections*, *supra* note 46, at 706-07, 710-11.

49. 428 U.S. 153 (1976).

50. See *id.* at 168-69, 207.

51. See MASS. CONST. pt. 1, art. XXVI, amended by pt. 1, art. CXVI.

would have been right⁵²—although such an inference is by no means always secure: just recently Justice Kennedy spoke out very strongly against mandatory minimum sentences,⁵³ yet only a few months before he was one of a five-to-four majority rejecting constitutional challenges to California’s “Three Strikes and You’re Out” legislation.⁵⁴ Similar examples can be adduced for many judges. When judges speak in this way, do they tear the robe of decorum which clothes them in the aura of impartiality and open-mindedness that I have said makes their role distinct and justifies the extraordinary power they enjoy?

Such pronouncements cannot be explained away as efforts to educate the bar and the public about how the courts work or even to educate the public about the kinds of questions that come before the court and the principal stances that are taken up in respect to those questions.⁵⁵ No; these pronouncements take sides. Can this be right? To be sure anyone who paid close attention to my published opinions or to the published opinions of any of the disquisitor judges whom I have cited would be in as good a position to guess how I or they would decide particular cases as any hint gathered from extrajudicial writings. So one thing that might be said is that the loquacious judge is simply offering a context and displaying the underlying principles of the more particular decisions he has reached. Such essays offer the judge an opportunity to reflect about his work, to develop a more coherent approach than the episodic occasions of disparate decisions in disparate cases. After all, there are limits to the extent to which a judge can delve into these matters in an opinion. If the opinion is an opinion of the court it reflects not his personal approach but the collective approach of the judges included in the opinion. And an excess of such personal opinions in any case by the several judges would be tedious and hardly contribute to the intelligibility of the law. Finally, the judge is a thinking, feeling human being. Can it be right to pretend that she does not have some underlying,

52. See *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 118 (Mass. 1999) (stating that “[t]he court finds this rejection of the Supreme Court’s Fourth Amendment jurisprudence to be compelled by the similarly worded provision of article 14 of the Massachusetts Declaration of Rights, a provision we have never before cited in this context. There is no such constitutional compulsion.”) (Fried, J., dissenting).

53. See Editorial, *Justice Kennedy Speaks Out*, N.Y. TIMES, Aug. 12, 2003, at A16.

54. See *Lockyer v. Andrade*, 538 U.S. 63, 65-66, 77 (2003); *Ewing v. California*, 538 U.S. 11, 13-14, 30-31 (2003).

55. Such expositions are staples of judge’s speeches at bar association dinners and high school Law Day lectures. They are quite unexceptionable. See, e.g., *Justice Kennedy Speaks Out*, *supra* note 53.

organizing views; can it be better to pretend that she comes to each case completely fresh, a tabula rasa? And if that is not so and everyone knows it is not so, why would it be better to keep these thoughts hidden?

There is here a real dilemma. The judge with a project, an agenda, is more like a politician—in the perfectly respectable sense of the term. The judge is supposed to come to the case fresh, to be open to persuasion, and that sense is missing where we have expressed our views beforehand in extrajudicial writings. The way out of the dilemma may be pointed by what I have said about the similar prejudicial effect of a judge's prior opinions. Such opinions challenge an experienced advocate to distinguish the case at hand, to show how—surprisingly, perhaps—there is a way of looking at this case that escapes the shadow of the prior decision. So too the advocate aware of a judge's extrajudicial writings may be guided as much as stymied by such writings, guided to advocacy that shows that her particular cause fits into the scheme the judge has set out after all. And that then points the way to the indispensable, but rather minimal, ethical constraint in this regard: the judge must not comment on a specific matter that may come before her. General remarks, however, leave the opening that allows argument and fresh judgment to squeak through. But that resolution—which many distinguished judges have adopted—leaves me uncomfortable, even though I acted on it myself. It leaves me uncomfortable because it does not quite fit the picture of the judge as a person apart and risks inserting him into the fray as another participant in the political and ideological fray, especially these days when the law, the courts and judges have become the subjects of intense political debate. And the more judges are seen as such participants, the less their resolutions will be accepted as something other than political interventions in political struggle. True, as I have noted, these extrajudicial statements often give no more hint of a judge's future decisions than her own opinions. But those opinions are elicited by the necessity of the job of deciding cases—although there too the concerns I express may suggest greater discipline even in writing opinions, a greater disposition to stick just with what the case requires for its intelligent disposition.

I hope I have said enough to provoke the discussion this talk is meant to introduce. In *The Spirit of Liberty*, Learned Hand tells this story:

I remember once I was with [Holmes]; it was a Saturday when the Court was to confer. . . . When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir,

goodbye. Do justice!” He turned quite sharply and he said: “Come here. Come here.” I answered: “Oh, I know, I know.” He replied: “That is not my job. My job is to play the game according to the rules.” I have never forgotten that.⁵⁶

I am with Holmes in this meditation. I really do think there is a distinct job that judges do. They do justice, but according to law. This is not to say that that is not a species of justice; it is simply not the whole genus. The relation is a complex one. Here, I am with Ronald Dworkin in thinking that questions of morality—justice, if you will—come into the interpretation of what the law is, even when the legal texts do not explicitly invite such moral inquiry (as they do when they refer in an open-ended way to “the interests of justice”).⁵⁷ It is just that the judge’s moral inquiry in the context of law must take account of texts and other legal materials in ways that differ from that inquiry engaged in by a legislator or a voter.⁵⁸ So I do not deny the judge the ability, even the responsibility to concern herself with justice—but it is justice in the context of her particular role. It is that special context that I think entails the special ethical constraints on what judges should say and how they should behave. And if I seem to be siding with those who think it a better description of what the judge does to say that he finds rather than makes law, it is because I do think that the former is indeed the better, the less seductive, the less misleading account. I plead guilty as well—perhaps better say, therefore—to being a long time adherent to what Ronald Dworkin over the years and in many essays has called the right answer thesis: that in matters of law (as in matters of morality) there is a right answer, which is arrived at by argument and reasoning—the tools that make us human and moral beings.⁵⁹ Those commitments lead to the ethical conceptions I suggest in this talk. The contrary commitments—which take their most corrosive and degraded form in the various forms of critical theory and its adjectival epigones, as well as in realism, deconstruction and various other French diseases—seem to me, if not to imply, at least to favor quite a different ethic for judges, if ethic it be at

56. *A Personal Confession*, reprinted in HAND, THE SPIRIT OF LIBERTY, *supra* note 3 at 306-07. I am grateful to Andrew Kaufman for this reference, as well as for his comments and suggestions, and for the sound ethical advice he has given me over the years. I have known better than ever to argue with him.

57. See RONALD DWORKIN, LAW’S EMPIRE (1986).

58. See *id.*

59. For a recent vivid statement of this view, see generally Ronald Dworkin, *Pragmatism, Right Answers and True Banality* in PRAGMATISM IN LAW AND SOCIETY 359 (Michael Brint & William Weaver eds. 1991) (exploring different perspectives of legal arguments and reasoning).

all. It is the ethic of Judge Handy in Lon Fuller's famous *Case of the Speluncean Explorers*.⁶⁰ Am I right about this? If I am, does this connection argue for or against my conception of the judge's role and of a judge's peculiar ethic?

60. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 637-39 (1949).