

"Beneath the Robe: The Role of Personal Values in Judicial Ethics"

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"The qualities of a good judge are the qualities of a good man. There are additional demands on a judge, to be sure-- knowledge of the law, a willingness to suspend judgment until all the evidence is in. But at last it must be the depth and texture of his humanity that qualify and define the judge."¹

Those who come before a judge do not really know before whom they stand. The person who presides over the courtroom, cloaked in the solemn black robes of his or her office, is in that moment less an individual than a symbol of democratic values and an instrument of state power. In recognition of that power and authority, all rise as the judge enters the courtroom and takes the seat, elevated above everyone else in the room, from which justice will be pronounced. It is the hope of all, and the conviction of most, that this individual will do his or her job well, dispensing what is perhaps our most precious social good--justice. Yet, in most respects, judges remain anonymous to those who conduct their business before the court. What no one knows, what no one is even permitted to ask, is the character of the person wearing that robe and the ways in which that individual's personal qualities will affect the performance of his or her duties.

This is a study in the professional ethics of trial court judges. But my concern here is with the ethics of the practice of judging, as distinct from the ethics of malpractice. The latter, of course, is the primary subject of The Canons of Judicial Ethics,² which parallels other professional "codes of conduct" in spelling out ethical standards for the judicial profession and the sanctions to be imposed on those who violate those standards. I am concerned here rather to discuss the moral challenges that judges face when they are acting entirely within the bounds of their professional duties--a problem much less frequently discussed, but arguably of much more general significance. To do so it will be necessary to explore the moral dimensions of judging as these are experienced in the daily lives of practitioners, to uncover the moral problems

inherent in the practice of judging. In particular, it is my hope to reveal some of the ways in which personal values and experience influence the professional lives of trial court judges and so to contribute in a modest way to understanding their professional ethics.

I focus specifically on the exercise of judicial discretion, since it is here that judges have the opportunity to make independent decisions, so that the personal values of the individual judge are most likely to manifest themselves. While the exact nature and scope of judicial discretion is itself a topic of significant debate,³ the following definition provides a useful starting point: "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court."⁴ This definition highlights the moral challenge at the heart of judging, or at least of exercising judicial discretion. Where the law leaves judges certain choices about how to rule, they have the opportunity to draw upon personal (including religious) values⁵ in reaching a decision. Yet they must not compromise their professional responsibility to remain impartial and unbiased. How do judges both utilize their personal values in the exercise of their discretion, as indeed the law expects that they will, while at the same time preventing their personal values and biases from tainting their decisions, which the canons of professional responsibility expressly prohibit? How do judges themselves understand the relationship between their personal, including religious, commitments and their professional ethical responsibilities? And how do they deal with the inevitable "mistakes" that occur when, despite their own best efforts, personal prejudices influence their judicial decisions?

Description of Project

For this study, I observed four state district court judges over a period of several weeks and interviewed them extensively about their personal and professional ethics.⁶ My criteria for selection were simple. I wanted to find individuals who excelled in their profession and had a reputation for being self-reflective. Such judges, I reasoned, would more likely be open about the moral dimensions of their lives and articulate about the moral virtues required for judging. Hence, these four judges exhibit certain commonalities, a strong reputation for fairness and some previously demonstrated

interest in judicial ethics. And, because I was interested in the potential influence of religious beliefs on professional ethics, I selected individuals all of whom were raised in and continue to be members of religious communities. By the same token, I wanted their backgrounds to be sufficiently diverse that I might be able to discern differences in the ways their personal lives affected their professional conduct. Hence I selected individuals who offered some diversity with respect to race, gender, religious affiliation, geographical and family background. While the specific views that they expressed may or may not be widely shared by others in the profession, I believe their reflections provide an accurate window into the world of judging, especially some of the professional ethical issues that judges face. In order to protect their anonymity, I have changed their names, but I have related as fully and accurately as possible the other details of their lives, for it is through these that they instruct us about the moral life of the judge.

Judge Linquist is a deliberate, somewhat shy woman in her 40's from a small town in the Midwest. Her father was the county attorney for many years; to him she attributes both her initial attraction to law and her commitment to public service. She describes her family as having been "Ozzie and Harriet-like," in that her home was very stable and loving. She learned early on that "much had been given to her in terms of opportunities and much was expected of her in terms of accomplishments." She served as an assistant U.S. attorney for five years before being appointed to the municipal and then to the district court. She had been appointed as a federal magistrate shortly before I first contacted her, but remained at the district court for the duration of this study. Since her husband died unexpectedly two years ago, she has been a single parent to two children. She has also been moderately active in an Episcopal church, though she does not describe herself as a devout Christian.

Judge Raylor is a gregarious man in his 60's whose playfulness at times borders on the flippant. He grew up in an exclusive suburb at a time when restrictive covenants were in place. He attended a Catholic prep school and describes his early life as having been rather "sheltered," especially in terms of exposure to religious or racial minorities. He attended a military academy during his high school years and credits his years in the army (stationed in Germany after WWII) with broadening his

perspective on life. He was in private practice for many years before being appointed to the bench in 1982. He is near retirement, which he says he looks forward to. He describes himself now as a "liberal Catholic" who attends church regularly.

Judge Meyer, an intense, outgoing woman in her 50's, was raised in Philadelphia, the child of European Jewish immigrants many of whose relatives were lost during the Holocaust. Her parents were secularists, but staunchly Zionist and committed to providing their children with a strong Jewish education. She served in the public defender's office, worked in a private firm and taught law school before being appointed to the bench in 1978. She also served as chief district judge for a period of years and has been active on the state judicial ethics board. She is a "family person" and her office is filled with dozens of pictures of her children and grandchildren. Active in Jewish communal (especially educational) organizations, she sees herself as more culturally than religiously Jewish.

Judge Johnston, a soft-spoken, affable African-American man with a gentle sense of humor, grew up in a large extended family of sharecroppers in Louisiana in the late 40's. His grandfather was a preacher and, though he moved away from the church as a young adult, he is now a very devout Christian whose faith is central to his life. He taught junior high before attending law school and then worked for an insurance company for several years. He was a workers' compensation court judge for ten years before being appointed to the district court in 1992. He speaks openly about his religious convictions and summed up his philosophy of judging with the words, "he who seeks mercy [from God] must do mercy."

I began my investigation with a general interest in learning about how the personal beliefs and values of judges affected the way they related to their professional responsibilities. I wondered whether those with a particular background--religious, socio-economic, racial--would judge differently than those with contrasting profiles. As I began to observe and especially to interview them, however, I quickly realized that these individuals had distinctive stories to tell about who they were and how they approached judging. Clearly their idiosyncracies would preclude any broad generalizations. Yet, certain commonalities surfaced, for the moral challenges of the job are shared, as are certain strategies for responding to them. Two challenges

emerged as particularly central to the practice of judging: how to exercise one's discretion and how to deal with one's moral failings. Each of these encompasses a cluster of issues, as I will attempt to show in the first main section of the paper. In the second section, I focus attention on the ways in which personal experience, especially experience within a religious community, has shaped the values of these professionals and so too the way they respond to the challenges delineated earlier. While I make no claim that these responses are representative of the judiciary (or even of the particular groups from which these individuals come), I believe that, taken together, they enable us to see the general contours of their professional ethical lives. In particular, they testify to both a confluence and conflict between personal values and professional responsibilities in the lives of trial court judges.

I. The Ethics of Judging

A. Judicial Discretion

Discretion enters into judicial activity in a number of ways. Here I am concerned specifically with 1) how judges make decisions where they are given latitude to do so,⁷ and 2) how judges conduct themselves and utilize their authority in relation to those they judge. Examples of the first sort come most readily to mind when we think about judges exercising discretion. Setting bail for a defendant, deviating from sentencing guidelines, and rendering decisions about whether certain evidence is admissible are all examples of exercising discretion in this sense. But judges exercise discretion in a second, more subtle way as well. They may choose to talk directly and personally with those who come before them, or refrain from doing so. Similarly, they choose how to conduct their routine business and in so doing set the tone for their courtrooms, which can be quiet and gentle or demanding and harsh. In addition, they can attempt to use their influence and the power of moral persuasion to help settle a case between two litigants, or they can adopt a more *laissez faire* attitude. So, exercising discretion involves making myriad decisions every day, about how to balance justice and mercy, when to be harsh and when to be lenient, whether to be gentle and personable or perfunctory and distant.

The judges I interviewed all acknowledged both that doing their job involved elements of discretion and that exercising discretion was in some measure a reflection of one's own moral values. Yet, each responded to these challenges differently. Judge Meyer appeared most concerned about the subjectivity inherent in judging. In response to my suggestion that judging involved assessing the moral character of people in certain ways and that this entailed a good deal of ambiguity, she responded, "It's just awful. You're playing God, for God's sake." At another point, she conceded, "There's too much discretion in this job. There's an awful lot of discretion. It's scary actually." As I pressed her to articulate her own values as they influence her judging, she confessed,

"I don't want to think about those things because the answer is there are no answers and yet we're doing this stuff every day without any kind of standards really except what we ourselves bring to it and that's all there is. . . .In the end that's all there is and that's lousy."

Our conversation had been interrupted a number of times by Meyer's secretary and clerk, and each time I had been impressed by the efficient and definitive way in which Meyer had made decisions on the matters put before her. But despite the apparent ease with which she performs her duties, Judge Meyer clearly feels somewhat ill at ease with the reality of exercising discretion. Though she didn't say so explicitly, she appears to rely heavily on her intuition of what is right. She knows that much of the justice she dispenses is purely a reflection of "what she brings to it," and seems almost to wish that there were moral absolutes which could ground her decisions in some more objective realm.

Judge Linnquist similarly recognizes that instinct plays an important role in judging, yet seems more comfortable with this fact. In commenting on another judge who had served as a kind of model and mentor for her early in her career, she commented that he taught her to "follow my own gut instincts. He would ask me, 'What do you think is the right thing to do?' and then he would affirm my answer and guide me through the principles behind it." Linnquist articulated what I suspect Meyer also knows from her experience, that there are both legal and moral principles that can be invoked to support one's discretionary decisions. The difference between them may

reflect the extent to which they have consciously reflected on the relationship between their intuitions and the reasons they would offer to defend them, if called upon to do so. Indeed, more than once in our conversations, Meyer had suggested that she was not “an intellectual,” and not especially good at articulating a theory of judging.

Judge Raylor similarly acknowledged the subjective element in his exercise of discretion, but in a rather matter-of-fact way that suggested a high degree of comfort with his role as a judge.

“Well, even though I might initially be motivated by my personal attitude, my personal morality, I also feel that I can live with it in my constitutional role as a judge of the law. But. . .we’re all influenced by our life’s experiences and how you perceive things. And you couldn’t possibly not have that influence you in the exercise of your duties as a judge.”

It seemed as though, for Raylor, the position itself assured a certain degree of security in his judgments. Since the job itself demands that he exercise discretion, he appeared disinclined to fret about doing the very thing that his office requires.

Unquestionably, then, these judges recognize that their individual life experience and values influence their judging. Yet when asked to articulate how their personal experience actually affected their exercise of discretion, none of the judges could offer anything more concrete than to point to the basic values that they cherish--responsibility, helping those who are disadvantaged, hard work, and the like. In some cases, they offered small examples of the ways in which they exercise discretion. Judge Raylor noted that he tends to be especially tough on privileged people, those who do not tend to get in trouble with the law, as a way of humbling them and teaching them a lesson about respect for the law. In the context of discussing sentences for those convicted of drunk driving, he noted, “The ‘nicer’ a person is, the more inclined I am to impose a jail term.” While he didn’t explicitly make the connection, it was easy to infer that he saw in these privileged defendants the image of people like himself. In making a point of not being lenient on them, he was expressing a view that economic privilege, neither his own nor anyone else’s, should influence his exercise of discretion.

By contrast, Judge Johnston gave an example of his willingness to be lenient in sentencing, as a way of encouraging a defendant to get back on the right track.

"There are many opportunities for us to be able to affect the behavior of people. . . .Where the person says, 'Well, yea, I did commit it. I had these kinds of problems at this particular point in my life. I'm working on trying to change that behavior.' I will extend myself to the point where I'll say, 'O.K., I'm going to help you by this sentence in the same direction that you're going in.' Because if that person is admitting to themselves that they really need to work on these things, I'm going to do everything I can to help them work on them."

Again, it was difficult not to make a connection between the circumstances of Judge Johnston's own life and his attitude toward others, though he did not do so directly. He sees himself as being in a position to help those who are disadvantaged and he knows from his own experience how he benefitted from those who believed in him and opened doors for him. While he was certainly capable of issuing tough decisions, he seemed particularly inclined to give criminal defendants the benefit of the doubt if they showed a genuine desire to change their lives.

In light of this, it was striking that all of the judges except Johnston made a point of minimizing the extent of their actual discretion and/or suggesting that it made little difference in the end. Judge Linquist was the clearest in expressing this.

"A lot of law is pretty much applying what's there. . . .It's mainly a reading of the law and an application of it to the facts. Obviously, if you have a particular agenda you're trying to create, you've got some opportunity to do it. But I would say about 98% of the judges are going to read those issues the same way. . . . In terms of philosophical, moral, ethical underpinings and how you view the world, I suppose we all are a product of our backgrounds and thoughts on that. I don't know, except in a small percentage of the cases, that that really influences the way I decide things."

Judge Raylor, who acknowledged using sentencing as a way of teaching people a lesson, said ". . .as far as sentencing, you know we really don't play that great of a role. We don't have much discretion." Even Judge Meyer, who was so aware and even troubled by the extent of judicial discretion, stated that with regard to sentencing, "the reality is probably that there's very little difference among all of us."

These comments about discretion point to a tension at the core of a judge's professional life. On the one hand, they admit that how they judge is a reflection of who they are, and they cannot but concede that personality and individual moral convictions influence their behavior. On the other hand, they recognize that judging by its nature demands impartiality, and they regularly insist that there is little opportunity to exercise discretion and little difference between judges in the way they do so. Both these claims might, of course, be correct. The point is that a tension exists between their personal and professional lives, for to judge they must both exercise discretion, which entails drawing on their personal values, and at the same time insist that this does not materially affect what they do. The fact that they have difficulty talking directly about this tension, in a sense, is not surprising. To acknowledge this problem openly would threaten to undermine one of the moral foundations of their professional lives, namely their claim to be thoroughly impartial and impersonal. After all, it is a premise of our judicial system that the treatment one receives should not depend on the particular background or personal predilections of the judge assigned to our case. Justice is not just unless it is applied consistently, and that presupposes a judiciary which is unprejudiced by personal quirks. Yet, given that judges are human it is obvious that no two are identical. Their individuality and the fullness of their humanity cannot help but influence the way they perform their job. Judge Meyer said it most succinctly, "Everything we do is a reflection of who we are and where we came from."

The humanness of judges is evident, not only in the way they exercise discretion, but also in their fallibility. Every professional, of course, makes mistakes of various sorts, but seldom are the consequences as immediate, or as potentially far-reaching, as those involved in judging. In their reflections about how to avoid mistakes and how to cope with those they make, these judges revealed another very significant moral dimension of their professional lives.

B. Judicial Fallibility

All judges recognize that their judgment is invariably mistaken some of the time, that personal prejudice and character flaws may taint their judicial decisions.

How do they guard against these mistakes and how do they cope with the fact that they inevitably occur? In discussing this dimension of judicial conduct, we do well to invoke a distinction between technical errors and moral errors developed by ?? Bosk in his study of surgeons. Bosk differentiates mistakes that result from a miscalculation, or an imperfect application of a particular skill, from moral failures. For trial court judges, examples of technical errors would include certain procedural matters, such as mistakenly applying the hearsay rule during a trial, or giving a jury incomplete instructions. For the judges I interviewed, at least, there is the security of knowing that such judgments can be reviewed by an appellate court and corrected, if necessary. Moral errors, on the other hand, represent failures to live up to the ethical standards recognized by the profession itself as binding on those who practice it. Bosk discusses surgeons who abuse their power or fail to take responsibility for their actions. Moral mistakes, as distinct from mere technical errors, represent a failure to be the sort of person judges are expected to be, i.e., uncompromisingly fair.⁸

For our purposes, two sorts of moral mistakes should be distinguished-- circumstantial and prejudicial. Circumstantial mistakes result from momentary failings and hence are relatively minor. These would include failing to listen carefully to some bit of evidence at a trial, or occasionally failing to conduct oneself in the courtroom with appropriate decorum. No one, including judges, works with total attentiveness every hour of every day. The fact that judges occasionally lapse into inattentiveness or insensitivity is neither surprising nor terribly concerning (unless, of course, there is a consistent pattern of such mistakes). The second category of moral mistakes, however, reflect a basic disregard for essential canons of justice. Examples would include taking bribes, failing to recuse oneself when required to do so, and maintaining biases for or against whole groups of people. These sorts of failings are more serious because they reflect character flaws that make it impossible to judge fairly. Circumstantial mistakes are forgivable because they are more limited in scope and so do not necessarily compromise the possibility of a just result. Prejudicial mistakes, however, are unforgivable insofar as they threaten the very foundation of a judge's professional responsibility, as captured in the responsibility to render "equal

justice under law." Both types of moral mistakes were acknowledged by the judges I spoke with.

Judge Meyer, reflecting on judicial behavior and standards of conduct, commented:

"You've got to be patient and tolerant and nice and marvelous and not discriminate and not harass anybody. It [the Code of Judicial Conduct] does say all that. So when I was on the board and we get people who are judges who rant and rave, they're brought in. They violated the canon for ranting and raving basically, or for using sexist language, or whatever. . . . Sometimes it works and I do it [treat people respectfully] and sometimes I'm cranky and tired and impossible and it doesn't. And I know that. I kick myself afterwards, but it comes out."

Clearly, Meyer acknowledges that her state of mind on a given day may cause her to make circumstantial moral mistakes and also that, looking back, she can often recognize them. She obviously holds herself accountable, while at the same time accepting the fact that she cannot be perfect.

Commenting on the qualities of a good judge, Linnick acknowledged the difficulty of avoiding "circumstantial" moral mistakes.

"Patience is so important. The ability to sit there even when you've pretty much decided the case and having the patience to continue to listen. It's real hard. Sometimes I wish I had a bell behind me that would ring and say, 'O.K., I've heard enough. I've decided in your favor.' Sometimes the hardest position for me to be patient in and continue to let the lawyer talk is where I've already decided in their favor. 'You've convinced me. I've heard enough. I want to rule your way--now sit down and shut up so I can get on to the next case.' But to think you can't telegraph that yet and you have to listen."

Failing to be patient, as Linnick recognizes, is a moral mistake of the circumstantial sort that she must guard against. Neither she nor Meyer discussed specific strategies they use to minimize the possibility for making such mistakes. Clearly, self-discipline and remaining in control of one's emotions are important virtues for judges to nurture. Given the pressure and sometimes the tedium of a judge's work, as I observed it, these

virtues are also tested continuously.

Given our commitment to the principles of equal protection and due process, prejudicial moral mistakes represent a far more serious moral failing. Interestingly, the judges in this study admitted to tendencies of this sort. In perhaps the least egregious example, Judge Linqvist acknowledged that, given her background as a prosecutor, she has a pro-prosecution bias as a result of which she “bends over backward to make sure she’s fair to the defense.” Here, then, she is aware of specific ways in which she attempts to identify and correct for a tendency which, if unchecked, could seriously compromise the quality of her judging. She also acknowledges a bias against Southerners.

“. . . people with a southern accent and the southern drawl, I always tend to think that they’re stupid or slow and it takes a while for me to sort of overcome that fact. . . But the ‘y’all’--I just tend to think of this country western sort of truck stop mentality, so that I have to think, ‘wait a minute. . .’”

Having grown up in the midwest, it is not surprising that she should have absorbed certain regional biases. Her candor in revealing them seemed to reflect simultaneously an admission of her imperfections and a certain sense of assuredness that she had this tendency under control.

Discussing his self-imposed rule to sentence drunk drivers to two days in the workhouse, Judge Raylor noted,

“In fact, I found it [his application of the rule] was a little more inappropriate because I notice attractive young women. I’m not unmindful . . . I thought all of a sudden, ‘Wait a minute, . . . It seems to me it’s more than a coincidence that you choose to exercise your discretion toward attractive, nice young women that remind you of the women you went to college with that were just so nice and you’re still inclined to put women on a pedestal. . .’ But I try and ride herd on myself.”

Judge Raylor is well aware that he could be consistently more lenient to attractive young women and that, unless he monitors his own biases, there is no review process that would correct his moral failing in this regard. His statement that he “tries to ride herd on himself” implies an awareness that he may not always succeed. But the fact

that he could identify in this instance a tendency which he had recognized and corrected seemed to bolster his confidence that he was generally conscientious and fair, despite inclinations to treat some more generously than others.

Addressing the same sense of personal responsibility, Judge Linnquist said, "I think to a large extent being aware of your own predispositions and biases and trying to factor fairness back into it tends to bring the balance back the way it should be. I think we all have biases and predispositions. It's just whether you know and are aware of them and can counteract them that is the key."

Judge Linnquist here captures the essence of the moral challenge. Precisely because judges are human and so prone to making prejudicial moral mistakes, they must take responsibility to "counteract them." This is especially the case insofar as there is no peer review of the trial court judge's decisions. As the judges themselves are well aware, they could very likely favor pretty young women or deal more harshly with people who have southern accents without being called to account. The burden of moral oversight (except in cases of gross misconduct) rests with the judge him or herself. Thus, judging requires a high degree of awareness of one's own moral mistakes, or at least one's predisposition to making them.

Yet, somewhat paradoxically, judging also requires an ability to overlook one's own moral mistakes, at least to some extent. This emerges most clearly in the judges' responses to questions about whether they ever regret the decisions they have made. Without exception, they indicated that they rarely look back or second guess themselves. Judge Linnquist's comments reflect an attitude that seemed to be shared by the other judges as well.

"The only way I can live with myself is to not think, 'Was I fair in that individual case' and going back and hammering myself with it. But overall, when I look at this slice of work this last year, how do I feel about how I've done? Am I okay in the broad picture? There might be problems here and there. If I put on the broader perspective, I can feel good and think, 'That may not have been the perfect sentence but I did pretty well here.' Now, that's not much comfort to that individual that I was a little too harsh on, but I think you have to view these things as realms and that there's no perfect sentence or perfect disposition for a

particular case. You just have to do what feels right.” Judge Linquist’s recognition that “there’s no perfect sentence” seems not an excuse to be cavalier, but an open acknowledgment that she cannot hold herself to an impossible standard. The guilt that would inevitably result from a moral mistake, then, is mitigated by the way she views both herself and the process of dispensing justice. The appropriate standard for judging, in her view, is on the macro, rather than the micro, level. Ultimately, moral mistakes in individual cases are less important than whether “in the broad picture” she has served the cause of justice.

Raylor, for his part, acknowledged that there are cases that he might decide differently if given the chance to go back. Yet, as a practical matter he points out “we just don’t have the luxury, especially nowadays, there are so many numbers [of cases]. I really hardly ever look back.”

Johnston responded to the same ethical challenge in a somewhat different way. Asked about the virtues of a good judge, he responded,

“At the top for me is always humility. That’s always number one for me. That flows down and it prevents you from getting ‘robitis.’ [presumably: obsession with the power of wearing the judicial robe] It prevents you from being arrogant. It’s an understated value of a judge. I recognize for me that that comes from my faith.”

For Judge Johnston, it seems, cultivating humility is essential to judging. On the one hand, it relieves him of the expectation that he will dispense justice perfectly. On the other hand, it reminds him of his own humanness and susceptibility to the sort of mistakes which he must guard against. He recognizes, then, that judging requires those who wear the robe both to monitor diligently their own human tendency to make moral errors and to live with the consequences of making them.

What Johnston captures in his comments about the importance of humility might equally be formulated as a tension between two conflicting qualities that judges must cultivate, self-confidence and self-doubt. On the one hand, they can only fulfill their duties if they have a high degree of confidence in their own moral judgment. Especially given the excessive case load with which they regularly deal and the need to dispose of cases quickly, they must make judgments about what justice requires often

without significant opportunity to deliberate. (In fact, each of the judges in some way bemoaned this fact.) This, in turn, presupposes that they have a highly developed sense of their own moral values, of what justice requires of them in the case before them. On the other hand, they must remain aware of their own fallibility and of the need, as Raylor said, to “ride herd on themselves.” This necessitates that judges reflect periodically on the quality of their justice and monitor their own natural prejudices and predispositions. Even if they profess to “never look back,” they know that they must second-guess themselves from time to time, precisely because no one else will do it for them.

In sum, then, it appears that judges must simultaneously control and cultivate the fear of making moral mistakes. If they do not do the latter, they may inadvertently compromise the quality of the justice they are duty-bound to render. If they do not do the former, they risk becoming incapacitated, unable to render decisions at all for fear that they will make a moral mistake. Maintaining a delicate balance between moral self-confidence and self-doubt is one manifestation of the very humanness which these judges bring to their work. Aware that neither they nor the system within which they work is perfect, they know that justice is served precisely to the extent that their own best moral judgment is brought into play. It is perhaps not surprising, then, to discover that they must regularly scrutinize and question that judgment precisely because they rely on it so heavily.

To this point, I have suggested that the exercise of judicial discretion and the need to avoid moral mistakes are central moral challenges facing judges. In both these dimensions of their work, the individual moral judgments of the professional play a critical role. Because perhaps no other profession so consistently demands that one stand in judgment of others, judging requires that those who practice it have a strong personal moral foundation. In the next section, I explore the ways in which the personal morals of these judges were formed, with particular attention to the role that their religious upbringing has played.

II. Personal Values, Religious Commitments and Judicial Ethics

Each of these judges had a clear story to tell about his or her own moral development. In response to my questions about the influences on their lives which had been most important, they articulated their own core moral convictions clearly and related them closely to their upbringing.

For Johnston, moral education was an integral part of his general education. "There was no separation between your moral conduct and your education. . . At Dunbar Vocational High School, the teachers at that time were so adamant about your behavior and that attitude reflecting not only upon yourself but on your family and on your race." He related the problems in contemporary society to a failure to adhere to basic values he learned as a child.

"I grew up in a very poor community by all outward standards. I don't ever remember not having any food in my house. I remember situations where people, if I don't have, you have. You let me have because next time when you don't have and I have some, I'll let you have. That's the kind of system that is supportive of people. . . .We don't go back down to those basic things that tie us as a society together--caring for each other in times of hardship and loving and supporting one another."

Judge Raylor referred repeatedly to the work ethic that was instilled in him as a young man and his belief that "an honest day's work for an honest day's pay" promotes self-respect. He also related an incident from his childhood in which he attempted (unsuccessfully) to shoplift a glider from a cereal box in a grocery store. His father confronted him about his behavior and that lesson, he said, "made a big impression on me."

Judge Linquist attributed her values to growing up in a small town as well as being the child of a prominent citizen.

"I just saw a lot of treatment of people in a fashion that people dealt honestly and uprightly with each other. There wasn't a lot of tricksterism or getting advantages over people because we all tended to live together and you dealt with the same people over and over again."

Those values, and the importance of family, were always being reinforced at home.

Judge Meyer identified her values too as integrally related to her family and to being

part of a close-knit Jewish community. Growing up, “family was all-important” and she absorbed basic Jewish values, such as “*menschlichkeit*” which she defines as “empathy to people, not hurting people.”

It is impossible to know the extent to which these judges’ stories about their own moral development are true to life. What is clear is that each has a strong sense of personal morality, which is rooted in early experiences of family and community. Whether the specific values they embrace are reflected in the specific judgments they render or not, it seems clear that their sense of themselves as moral individuals is well developed and secure. Given the nature of their work, this would appear to reinforce their role as people who make moral judgments of others, even if they cannot articulate how it shapes those judgments. As Judge Linquist noted insightfully, “There isn’t something in the fabric of that robe that imbues us with any gifts that we don’t have before we got there.” That being the case, it is not surprising that judges have a highly developed sense of what those gifts are which their role as judges demands of them.

Given that ethical deliberation is so central to judging, and given too that religions provide (among other things) moral guidance and a metaphysical foundation for moral norms, it is hardly surprising that religion influences the ethics of some judges. Moreover, given the widely varying forms of religious involvement exhibited by these judges, we should expect to find great variation in the extent of such influence.

While religion played a role in the lives of each of these judges, it was the center of life for only one--Johnston. He openly confessed his Christian faith as the source of all his commitments and values, in his life and his work. When I asked him to reflect on the values he strives to exemplify in his life, he responded quickly and confidently,

“First of all, I’m a Christian. That is my overriding belief that determines how I relate to people. And I believe in a merciful God. I believe in a God that cares for me and will not do anything but help me in my trials and tribulations. I also believe that because that God is that merciful to me, that I should, in turn, have mercy and kindness and generosity to the people that I come in contact with. You say to me then, ‘how can you show generosity or mercy to someone who’s

been convicted of first degree criminal sexual conduct? . . . How can you have compassion for that kind of a person? Well, my objective is always to win people, not necessarily to push them away. . . I think you can try to affect people by your behavior.”

Judge Johnston’s very explicitly Christian model of loving the other may or may not materially affect the range of sanctions he imposes on defendants. But it most certainly affects how he thinks about his role as judge, especially how he understands the purpose of those sanctions. He again employs explicitly religious language in describing the goal of sanctions as “helping people be redeemed.” Quite clearly his religious belief shapes his conviction that ultimately all people can be redeemed. In his words,

“The day I stop believing that, I’ve got to get me another job Because then I have become so callous and hard-hearted that there is absolutely no way that I could do this job. Because we’re dealing with people and we’re all fallible. Some people’s fallibility breaks laws. But we’re all fallible.”

For Johnston, then, judging is infused with religious significance. It is about reflecting God’s mercy toward him in his treatment of others, and its *raison d’être* is bringing people closer to redemption. Indeed, he sees his entire mission as a judge in religious terms.

“I think that He has given all of us a ministry. We are to carry out that ministry in wherever He has placed us. I just pray that I am doing what he wants me to do. That’s what my prayer is. Because I don’t want to do anything that Frank Johnston wants. I want to do what He wants.”

For those, like Judge Johnston, who approach life with a deep religious faith, judging becomes an extension of that faith, and the values that shape one’s life also give judging a particular religious cast.

For the other judges in this study, the influence of religion is less pervasive, more subtle and harder to capture. All of them were exposed to religion in some form beginning at an early age and all continue to be active in some fashion in religious communities or organizations. Yet, none of them drew explicit connections between their religious commitments and their judicial conduct. When asked how her religious

belief might influence her judging, Meyer responded bluntly, "I don't even know what to do with that question." Yet, even if she and the others do not view their judging in religious terms, their religious background is related to basic values and commitments which they bring (in some measure) to their jobs. Judge Raylor was perhaps the clearest on this point.

"It's funny. . . I think it [religion] has influenced me. I think it's given me a set of values. . . you know, every once in a while a reading from the New or Old Testament kind of strikes you and you just wouldn't hear it--or I wouldn't--or read it if it weren't for that. It causes you to pause a little bit and do a little self-examination. I think that's healthy. So I think that does influence my perspective."

Judge Raylor's religious involvement may not directly influence his approach to judging, but it does stimulate him to reflect on himself and his values and this, in turn, seems to affect the degree to which he reflects on the ethics of his professional life. Though his ethical life as a judge is not overtly Christian, his sensitivity to ethical issues entailed in judging (and in living) may well be heightened by his attending Church regularly.

For Judge Linquist, whose religious beliefs are less clearly defined and whose connection to the church is less apparent, religion serves to support her basic moral perspective on life.

"I've had, I think, a sort of generalized abiding sense that there is some sort of supreme being. I believe in some sort of afterlife. I sure don't have a clear picture of what it is. As to specifics. . . I guess I remain kind of a skeptic. I sort of have a sense that there is some eternal being, but I really haven't filled in the blanks or have a clear definition . . . but I do have a sense that we're here for some reason and we have to treat each other appropriately and the world would be total chaos without some sense of, not only law and order, but some religious orientation."

The key word here seems to be "orientation." Religion provides Judge Linquist with a sort of orientation to life, that there is a purpose to human life and that it has something to do with treating others ethically. However vaguely defined, her religious

beliefs support this moral perspective on life. She expressed reluctance to connect her religious upbringing with her judging presumably because any connection is attenuated, at best. Still, her belief in the necessity of “a religious orientation” over and above “law and order” suggests strongly that her moral values are secure in part because they have a religious foundation. Again, it is very unlikely that such religious beliefs directly shape the way she exercises her judicial duties, but they may lend stability to the moral judgments that she must make in the course of carrying out those duties.

Finally, Judge Meyer is even less certain of her religious beliefs than Linnquist. She said simply,

“I don’t believe that anybody is in charge of my life. I think I have the absolute make of choices and I think we all do. But how did we get here? . . .What is all this? That’s my belief in God. There has to be something. I don’t understand it.” Rather than religious faith, Judge Meyer has religious questions. She does not think of herself or of judging in religious terms. And yet her experience as a Jew has had an indirect influence on her judging. Her commitment to family and to community are clearly rooted in her Jewish upbringing. She described one case involving a particularly emotional and painful custody battle between a mother and her mother (the child’s grandmother). After some deliberation, she awarded custody to the mother, but on condition that she invite her parents over for dinner once a week, in order to make peace and to create a sense of family. As she said, “I never thought in those terms, but that’s what I wanted, a Friday night Shabbat [Sabbath] dinner with all of them sitting and eating together at a table.” Though this may be an isolated and fairly insignificant example, it suggests that Judge Meyer has in mind paradigms of family, drawn from her own Jewish experience, which come into play on occasion when she deals with domestic issues. Whether these models are extensive enough, or employed often enough, to distinguish her judging as “Jewish” is doubtful. By her own admission, she wasn’t thinking in explicitly religious terms in the custody case, but she drew on a religious experience of family harmony to reach a decision, at least in this one instance. More generally, it seems likely that the values she received through her

close-knit family, and through the Jewish education she received, have continue to influence, however indirectly, her professional perceptions and judgments.

As we have seen, the role of religion in the lives of these judges varies widely. Their judging is not religious in any overt sense; even Johnston's religious devotion was in no way evident to those who stood before him in court. For these judges, it seemed on the whole that their religious commitments did not so much influence the specific decisions they made as provide a foundation (or an ongoing stimulus) for their moral development. On one end of that spectrum, religion can be a pervasive influence on the moral life of a judge transforming the entire enterprise of judging into a religious activity. For others it serves in a more limited way as a source of specific values, of the conviction that life is ultimately meaningful and demands moral commitment, and/or of personal, familial experiences. In all, then, the moral values on which these judges rely for much of their work have been influenced, to a greater or lesser extent, by religious beliefs or involvement in a religious community. Because they shape the moral lives of judges, religious influences are reflected in the ways they exercise their discretion, or understand their role as judges, or both.

Conclusion

Throughout this study, I have attempted to explore the personal and religious influences on the professional lives of judges. In doing so, I relied on their own testimony, which has been both plentiful and somewhat sketchy. On the one hand, they provide ample evidence of their own moral values, how these have developed and how they continue to shape perceptions and judgments both inside and outside of the courtroom. On the other hand, they display widespread reluctance to link their personal religious values too closely with their judicial practice or to explore the details of cases in which they feel they might have made a mistake. Given the strong cultural taboo against acknowledging the element of subjectivity within their professional roles, this is hardly surprising. In the end, what is striking is not that judges have personal lives that affect their professional conduct, but that they are willing to discuss them at all. For most, the personal element in their judging is admissible only if it is simultaneously confined within safe limits and does not threaten to undermine the

principle of judicial impartiality. Hence the consistent tendency I encountered among these judges to qualify statements about their personal values with caveats that judges do not have much discretion anyway, or that despite their differences they probably treat cases very much the same. Yet, listening to their stories, one cannot fail to be impressed by the variety and depth of their personal experience, the qualities that make each of them extraordinary individuals. I suspect that their personal experiences and professional lives are even more closely linked than they themselves may realize or feel comfortable admitting, hence more than I can document on the basis of these conversations.

The evidence which these judges do offer about the intersection of personal and professional ethics is suggestive, despite its limitations. The judiciary presents us with a group for whom the personal and professional are linked in a distinctive way. Perhaps more than any other professional group, judges are expected to be thoroughly impartial and unbiased. Indeed, one treatise on judicial ethics identifies this as the essence of a judge's professional responsibility.

"It is a fundamental principle of our legal system that judges should perform their duties impartially, free of personal interest or bias. There is perhaps no more basic precept pertaining to the judiciary than the one which holds that judges should be sufficiently detached and free from predisposition in their decision-making."⁹

As depicted in the classic image of a woman, blindfolded and holding the scales of justice before her, they must weigh conflicting interests dispassionately; see clearly, but not with their own eyes. The considerable power they wield is granted to them precisely on this condition, that they act not as individuals, but as agents of the state, dispensing that social good we call justice.¹⁰ This is part of what we mean when we repeat the time-honored dictum that "we are a government of laws, not of men." For just this reason, a "mistake" in judging has far-reaching implications. It reflects not only on the character of a particular individual, or even on the reputation of the profession, but on the place of justice as a fundamental right in a free society.¹¹

Yet, judges, unlike other professional groups, have limited training to prepare them for their work over and above their legal expertise, and this comes mostly

through periodic seminars held at the National Judicial College in Reno, Nevada. They become officers of the state, whether by appointment or election, solely on the basis of their reputation as legal practitioners and their personal qualifications. The central trait which we seek in judges and the central prerequisite for doing their work well--fairness--is not acquired through professional training, but in personal experience. As Donald Jackson states in the epigram at the head of this paper, it is the depth and texture of one's humanity which define the quality of a judge. When asked to react to this quote, each of the judges I interviewed confirmed that ultimately it is the personal, moral character of an individual which determines the sort of judge he or she becomes.

So there is a profound conflict at the very center of judges' professional lives: publicly they must act as though their personal lives were irrelevant, and yet privately they know that having a well-developed sense of personal morality is both essential to doing their job and the ultimate justification for their position of power and privilege. Nowhere is that tension more evident than when judges exercise discretion, however limited, or when they reflect on their own fallibility.

The tension and potential conflict for judges between the personal and the professional is, in one sense, a well established fact in our judicial system. The rules governing recusal are a classic illustration of this. Judges are required to disqualify or recuse themselves when they have some personal connection to the parties involved in a case. Our legal system, recognizing that judges have personal lives that might bias them in a particular case, provides a mechanism to insure that the integrity of the judicial system is not compromised. Thus, at the very point when a judge's personal life becomes relevant to a case, it must be excluded out of consideration for the judge's professional responsibility.

Yet, as we have seen, the relationship between the personal and the professional is more complex than this, for judges must both acknowledge and ignore the personal element in their professional lives. This paradoxical situation is aptly symbolized by the robe which they don before entering the courtroom and assuming their public role.¹² Its primary intent, of course, is to make all judges outwardly the same, to

reinforce their anonymity. Together with their position seated above everyone else in the courtroom, the robe symbolizes the power and authority of their office. Their garb reinforces the perception that the judge is not an individual, but an agent of the state. Yet, ironically, the robe simultaneously draws attention to the very thing being concealed-- the judge's personal distinctiveness. So cloaking the body of the judge symbolizes the need to cover up the judge's personal identity for the sake of his or her professional identity, while at the same time it emphasizes the unmistakable fact that there is a person present whose private life and personal traits need hidden. The robe is necessary precisely because the individuality of the judge is both inescapable and inadmissible.

But, of course, the robe is only partially successful in hiding the person of the judge from view. It can obscure the personal life of the judge from the perspective of the public, but not in the eyes of the judge him or herself. They know only too well who they are and struggle to ensure that their personal failings do not compromise the quality of the professional work they perform. As Judge Linquist noted above, and as all judges surely realize, there is nothing in that robe which imbues them with any special gifts which they do not already possess. So, paradoxically, the very insistence that their professional work must be insulated from their personal lives, together with the need to exercise discretion often based on nothing other than their own value-system, forces them to have a strong sense of personal morality. They must know what they believe in and why in order to stand, cloaked in the robes of their office, and pass judgment on others. And that professional power brings with it personal responsibility. Because they must guard against the danger of using that robe as a pretext for imposing their own idiosyncratic vision of the good on others, they must be diligent in scrutinizing their own actions and motives.

It is ironic, perhaps, that those who must be more circumspect about the influence of their personal values in their professional lives must also be more concerned about cultivating those values. In that sense, the judge's robe, by strictly delineating personal from professional life, powerfully symbolizes the judges's need to

insure that their own moral values are secure and their moral judgment well developed. As we have seen, in the intimacy of their private lives religion may play an important role in this respect, for it undergirds their personal ethics and prompts them to reflect seriously on their own values. Thus, the personal and professional dimensions of a judge's life, which at times appear to conflict, on deeper analysis and somewhat paradoxically, may be complementary. For the requirement that they separate overtly their private morality from their professional responsibility requires judges to cultivate that very capacity for careful judgment which constitutes the cornerstone of their professional lives.

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¹ Donald Dale Jackson, Judges, (New York: Atheneum, 1974), 300

² See Norman Redlich, compiler, Standards of Professional Conduct for Lawyers and Judges (Boston and Toronto: Little, Brown and Co., 1984). The first code of judicial conduct was promulgated by the American Bar Association in 1924. The current code was devised in 1972 and has subsequently been revised and adopted in all fifty states and the District of Columbia.

³ See J. Eric Smithburn, Judicial Discretion (Reno, Nevada: National Judicial College, 1980), 3-29.

⁴ Bouvier's Law Dictionary, 884-85 (3rd rev. 1914).

⁵ Stephen L. Carter, “The Religiously Devout Judge,” Notre Dame Law Review 64, (1989): 932-44; Scott C. Idleman, “The Role of Religious Values in Judicial Decision Making,” Indiana Law Journal 68, (1993): 433-87. Both of these articles, however, offer theoretical justifications for judges’ use of religious values in rendering judicial decisions, not descriptions of actual judicial practice in this regard.

⁶ I am sensitive to the possibility that my presence influenced the proceedings I observed, though I strongly doubt that this occurred to any significant degree. I observed these judges in the courtroom, in conversation with clerks, and during conferences with attorneys in chambers, sometimes visiting unannounced and sometimes by prior arrangement. I noticed no differences in the behavior of the judges I observed. It should be noted that judges are accustomed to conducting trials in front of reporters and observers, and also to having their clerks and secretaries coming in and out of their chambers during conferences. Interviews consisted of two or more sessions, lasting a total of 3-4 hours with each judge. I did not interview attorneys or clerks about these judges. Their perspectives, of course, might differ from those of the judges themselves. My conclusions, then, are based entirely on the judges’ self-reflections.

⁷ It should be noted that this state’s legislature recently adopted a set of sentencing guidelines for various offenses and types of offenders, which significantly restricts judicial discretion in the area of sentencing. Yet, judges are still permitted to vary up or down from the guidelines (on the basis of pre-established criteria) and choose to do so with varying degrees of frequency (itself a matter of discretion). The establishment of sentencing guidelines in the federal judicial system and in many states results, of course, from a concern to insure greater consistency in sentencing and to eliminate potential inequities, especially those based on race. For a study of such inequities in

sentencing, see Willard Gaylin, Partial Justice: A Study of Bias in Sentencing (New York: Alfred A. Knopf, 1974).

⁸ This distinction between technical errors and moral failings parallels the distinction between “‘mere’ legal error and misconduct;” see Jeffrey M. Shaman, Steven Lubet and James J. Alfini, Judicial Conduct and Ethics (Charlottesville, Virginia: Michie Company, 1990), 20-22.

⁹ *Ibid.*, 99-100.

¹⁰ Alan H. Goldman, in The Moral Foundations of Professional Ethics (Totowa, NJ: Rowman and Littlefield, 1980), describes this sharp distinction between personal and professional personae as “strong role differentiation” and argues that all professional ethics rely on such role differentiation to some degree, but none more than judges; see esp. pp. 34-62. For a contrasting view, see David Luban, Lawyers and Justice: An Ethical Study (Princeton: Princeton University Press, 1988) who suggests that lawyers (Luban does not discuss judges) ought not to separate their professional responsibilities so sharply from their moral obligations as members of society.

¹¹ Arguably, the same could be said of others who serve the state, such as police officers and elected officials. Instances of police brutality and official corruption are particularly disturbing to us precisely because they reflect on the possibility of justice in a democratic society. Yet, unlike legislators, judges are expected to remain above partisan politics and, unlike police officers, they are charged with rendering justice, not merely enforcing law and order. In that sense, moral judgment is essential to their professional duties in a way that it is not for other civil servants. Perhaps prosecutors have a kind of discretion which comes closest to that of judges, in that their role within the justice system leaves them significant latitude to make decisions based on their own

judgment about what is in the best interest of society. See Carl F. Pinkle and William C. Louthan, eds., Discretion, Justice and Democracy: A Public Policy Perspective (Ames, Iowa: Iowa State University Press, 1985), which includes essays on prosecutorial, judicial and police discretion.

¹² It is not entirely clear when the practice of wearing judicial robes began. In the middle 15th century long gowns called “houppelandes” were worn by men of learning and were regarded as a symbol of dignity. It may only have been in the 16th century, however, that academic robes were routinely worn by judges. See Jean Nunn, Fashion and Costume, 1200-1980 (New York: Schocken, 1984), 18; also, Doreen Yarwood, Encyclopedia of World Costume (New York: Charles Scribner's Sons, 1978), 201.