University of St. Thomas Law Journal

Volume 1
Issue 1 *Fall 2003*

Article 21

2003

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ARTICLE

SPEAKING IN THE NAME OF THE LAW: SOME REFLECTIONS ON PROFESSIONAL RESPONSIBILITY AND JUDICIAL ACCOUNTABILITY

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I begin by saying how delighted I am to be here to honor Judge John T. Noonan, Jr., someone whose work has profoundly influenced me. So eager was I to accept the kind invitation from my friend Thomas Berg that I had no clear idea at the time what I would actually write about. I think that I told the editors of the law review that I would write about the implications of the American judicial practice of issuing signed opinions, including, of course, concurrences and dissents. I shall in fact turn to this subject later in this essay, but I realize once again the truth of the adage, "How do I know what I think until I read what I write?" It was during the course of writing my remarks that I realized that my "true" topic, as it were, one certainly congruent with Judge Noonan's career and teaching, is professional responsibility, a subject that he taught for a quarter-century at Boalt Hall and elsewhere and about which he has written profusely. I, too, am one of those relatively rare creatures who has chosen to teach that subject. And, as I often explain to my classes, I view that course as both far more important and, alas, far more anxiety-provoking than the other course that I teach, American constitutional law.

It is, after all, the professional responsibility course that inevitably returns us to the basic Socratic question, what constitutes the living of a *good* life? Most constitutional law issues do not ultimately require grappling with this question. Bitter adversaries with regard to a given issue can, nonetheless, profess the deepest admiration for one another as human be-

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ings; it is, however, often difficult to engage in that move when one disagrees strongly with a particular approach to professional responsibility. Depending on the issue, of course, one can view the adherent of a particular view as endorsing, at worst, an unworthy and even corrupt picture of what it means to live a life worth living (and admiring), so that to act upon it would mean that one could by no means admire such a person. I take it, incidentally, that the University of St. Thomas School of Law has as part of its mission promoting a greater self-consciousness among its students of the importance of the Socratic question. Indeed, it would not surprise me if students were taught that their very souls may be at stake with regard to one or another vision of the practice of law (or judging).

PART I

Professor/Judge Noonan's writings over the years offer a rich trove of material for anyone interested in professional responsibility. I begin with his magnificent book on the legal controversy surrounding slaves on *The Antelope*,[1] which involved the disposition of slaves, captured by pirates between West Africa and their destination in Cuba and South America, and brought into American waters by the Coast Guard. Would they be recognized as ordinary chattels, similar to the law school's legendary widgets, or would they instead be recognized as human beings deprived of their most basic liberties and, therefore, freed from the claims of the ostensible Portuguese and Spanish owners? It is because of Judge Noonan (and, I suspect, Robert Cover) that *The Antelope,* though not, technically speaking, a constitutional law case, plays a key role both in the constitutional law casebook that I co-edit[2] and what I have written about the importance of including slavery in the "canon" of American constitutional law.[3] And it plays an even more prominent role in the class discussions of my course. The reason is simple, captured, in many ways, in one sentence: "Whatever may be the answer of the moralist to this question," Chief Justice John Marshall writes, referring to the justice of returning the purported slaves to their owners, "a jurist must search for the legal solution."[4] The self-conscious distinction that Marshall draws between the "jurist" and the "moralist" of course tips the reader to the outcome of the case. Can one imagine that any judge would *ever* evoke this distinction and then conclude by writing, "And I've decided that I should be a moralist"? It has also served to introduce what is

1. John T. Noonan, Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (U. of Cal. Press 1990).

2. Paul Brest, Sanford Levinson, Jack Balkin, & Akhil Reed Amar, *Processes of Constitutional Decisionmaking* 114-16 (4th ed., Aspen L. & Bus. 2000).

3. Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 Chi.-Kent L. Rev. 1087, 1096-97 (1993) (reprinted in *Slavery and the Law* 95-96 (Paul Finkelman ed., Madison H. 1997)).

4. *The Antelope*, 23 U.S. 66, 121 (1825).

now almost literally a generation of my students to the full implication of a legal positivist stance toward the law.

As I emphasize to my students when considering, for example, the question of the constitutionality of the Emancipation Proclamation,[5] surely an admirable episode in American life, the central importance of legal positivism is that one cannot determine the goodness or evil of a given outcome merely by knowing whether it is constitutional or unconstitutional. Law and morality are simply separate realms, as an analytical matter, though we may, of course, hope that they often overlap in fact. But any such overlap is contingent, not necessary. So even though there is a quite powerful argument that the Proclamation was unconstitutional, the proper response may well be, "Who cares?" An entailment of this position is that one can never simply endorse fidelity to law as an ultimate good; it is always possible that an honorable person will choose to honor the claims of morality over those of law. This is precisely what it means to reject a necessary connection between law and morality. I view myself, broadly speaking, as a legal positivist, though I think that one of the strengths of that approach, perhaps paradoxically, is precisely that it sensitizes us to the possibility that "the law" could be serving as a cover for injustice or evil, a possibility that a professional lawyer (or judge) always ought to be aware of.

It may be worth noting in this context that I began an article, "The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices," with a quotation from the great historian of the Holocaust, Istvan Deak: "Roman Catholicism represents a beautiful anachronism in our age of crazed nationalism; virtually every devout Catholic preserves in his heart some remnants of his denomination's transnational loyalty and the duty of Catholics to defy immoral laws."[6] I must say that it is important, especially in an age of increasingly "crazed nationalism," including our own, to have on the bench judges who are aware of the limits of the law, whatever our possible disagreements about the circumstances under which these limits are reached. I am not sure how important it is whether one is a classical natural lawyer who declares that that which is immoral or unjust is not law at all or a legal positivist who says that it may be no great compliment to award something the appellation of "law," for one must also go on to address whether it is indeed worthy of our respect and, ultimately, our obedience.

It is no secret that Judge Noonan was opposed, at the time of his nomination, by groups concerned that he took his Catholicism altogether too seriously, especially with regard to abortion, which he views as a great

5. Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?* 2001 U. Ill. L. Rev. 1135.

6. Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DePaul L. Rev. 1047 (1990) (reprinted in Sanford Levinson, *Wrestling with Diversity* 192 (Duke U. Press 2003)).

moral wrong. I think it fair to say that many of his most devoted admirers today come from other parts of the political spectrum as he has cast his critical eye on such issues as capital punishment and even the moral consequences of contemporary doctrines of sovereign immunity. What unites all of us who met in Minneapolis, whatever our political divisions, is that we know that John Noonan takes both law *and* morality (and their possible tension) with fitting seriousness, and this is surely important whether or not one agrees with Judge Noonan on every specific issue.

I should also mention the deep influence on me of Judge Noonan's marvelous book, *Persons and Masks of the Law.*[7] Indeed, my emphasis in my constitutional law course on Marshall's question in *The Antelope* is just another way of asking how judges differ from ordinary citizens or legislators insofar as they put on certain masks that, arguably, assure what is generally called "the rule of law" as against its opposite, which is presumably rule by identifiable men and women. I shall have more to say about this presently. I want to emphasize, though, my interest in what I call "adjectival lawyering," i.e., the importance (if any) of understanding any given lawyer (or judge) in terms of his or her religion, race or ethnicity, political identity, gender, sexual orientation, and the like. I believe that it is useful to think of the implications of what I have called the "professional project," which, not surprisingly, helps to define the fundamental mission of "professional schools" like law schools. As a way of understanding that project, I have proffered the notion of a "bleached-out self,"[8] who, if successfully socialized into her professional role, will subordinate all of these adjectival aspects of personal identity to an impersonal professional ideal.[9]

It is, I think, telling that the American Law Institute titled its recently concluded foray into professional responsibility "The Law Governing Lawyers"[10] rather than, say, "legal ethics" or even "professional responsibility." This captures very well, for better and for worse, the decided interplay between a conception of professional identity and the legal positivism referred to above. Although lawyers are encouraged, in a relatively incoherent way, to blend their moral ideals into the professional practice, it is also the case that whenever the lawyer's individual morality and the positive demands of the law conflict, it is the former that should give way.

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7. John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (Farrar, Straus and Giroux 1976).

8. *See* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1601 (1993) (reprinted in Levinson, *Wrestling with Diversity*, *supra* n. 6, at 124, 125).

9. It should be obvious that the mission of the University of St. Thomas School of Law may be in tension with this project, which is, of course, what makes the School of Law so interesting to me. The University of St. Thomas School of Law mission statement is available at http://www.stthomas.edu/lawschool/mad/mad_mis.cfm.

10. *Restatement (Third) of the Law Governing Lawyers* (official draft 2002).

Almost four decades ago, Monroe Freedman and then-Professor Noonan engaged in a classic debate about the propriety of certain adversarial legal practices. Professor Noonan had written that the lawyer should "obey his own conscience." Professor Freedman replied, I believe correctly, that from the internal perspective of the legal system, "professional ethics" always "supercede personal ethics."[11] This helps to explain why lawyers (and judges) are not simply told to "follow your conscience" when faced with excruciating dilemmas such as, for example, adjudicating the claims of slaveowners with regard to slaves seized by pirates during the voyage from Africa to the New World, not to mention more mundane issues attached to preserving confidences of one's (sometimes) quite terrible clients or arguing zealously on behalf of quite dreadful clients. Professional education, whether we look at the law, medicine, or the military (to name only three leading professions) is inevitably a process whereby individual conscience is subordinated to other values or, perhaps more generously, where the individual conscience is trained to approach issues with far greater nuance than those "civilians" with untrained consciences could ever believe possible.[12]

I have mentioned the controversy surrounding Professor Noonan's nomination to the judiciary, not least, of course, because of his strongly expressed opposition to abortion and, therefore, to *Roe v. Wade*. Then-Professor Noonan was asked by Kentucky Senator McConnell, when testifying before the Senate Judiciary Committee considering his nomination to the Ninth Circuit, "How would you resolve a conflict between your conscience and your own sense of judgment and the clear meaning of a constitutional or statutory provision?"[13] As I have written elsewhere, this is a question asked especially of Roman Catholic nominees to the bench, who must assure the dominantly Protestant (and often, at least historically, anti-Catholic) Senate that they will not simply look to the pope for orders as to how to decide certain cases.[14] "I think," responded Professor Noonan,

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11. Levinson, *Wrestling with Diversity*, *supra* n. 6, at 125. I should make clear, incidentally, that Professor Freedman does not necessarily mean to be endorsing this subordination of conscience to professional norms. *Id.* at 160-62. He is, indeed, every bit as admirable as Judge Noonan in focusing on the moral tensions involved in the practice of law.

12. I should note in this context that a stimulating and uncomfortable classroom discussion is guaranteed whenever I discuss the duty of the lawyer to inform the bar of derelictions that he or she observes of professional duty. I have no hesitation in praising the honor codes of the military academies and the concomitant willingness to deal very harshly with those whose "conscience" leads them to prefer the interests of their friends over their duty to reveal that their friends have lied or cheated. Few students have been willing to agree in front of their classmates that "nontoleration" of malfeasance—and thus a willingness to inform authorities of same—by their friends and associates is entailed by a full-blooded notion of "professional responsibility."

13. Sen. Jud. Comm., *Confirmation Hearings on Federal Appointments*, 99th Cong. 1025 (Nov. 6, 1985).

14. *See generally* Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, *supra* n. 6.

> there is no doubt at all that a Federal judge deciding a case has the obligation of following the statute, following the Constitution, following the precedent. If it were a case where there was a severe conflict, of course, I would have to recuse myself, but I don't foresee that kind of conflict arising. I think as far as I can see, my conscience and the law are going to agree.[15]

Let me confess my surprise that Professor Noonan was so optimistic about the presumed lack of any conflicts between his conscience and the law. Only one of the reasons that I certainly need not fear ever appearing before the Senate as a judicial nominee is that I can all too easily foresee many such conflicts and would be reluctant to claim otherwise to senators seeking reassurance on this score. The Draconian sentencing guidelines that have led a number of judges, from a variety of political backgrounds I might note, to resign rather than continue to serve as agents of injustice, are a perfect example.

In any event, I wonder if now-Judge Noonan has found such complete agreement between his conscience and the law in his almost two decades of judicial service involving such subjects as abortion, capital punishment, and the aforementioned sentencing guidelines, to mention only three likely sources of such conflict. Or one might well mention the conclusion to his devastating—and I believe well-founded—attack on the current Supreme Court's embrace of a truly radical doctrine of state "dignity" and "sovereign immunity."[16] Judge Noonan scathingly describes this doctrine as being intellectually incoherent. More important, perhaps, is his conclusion that "[i]t is unjust."[17] When what the Constitution terms an "inferior" judge applies this doctrine, in accordance with Supreme Court command, he or she is not only applying what Judge Noonan demonstrates is an intellectually indefensible reading of the Constitution; it is also, and more seriously, to collaborate with injustice.

Consider in this context the Foreword to Judge Noonan's co-edited casebook, tellingly titled *Professional and Personal Responsibility of the*

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15. *Confirmation Hearings on Federal Appointments*, *supra* n. 13.

16. John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 6 (U. of Cal. Press 2002). I should note the critical review of my colleague Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance,* 81 Tex. L. Rev. 1551 (2003), which argues that Judge Noonan considerably exaggerates the extent to which the Supreme Court is siding with the states. In particular, Professor Young emphasizes the failure of the Court significantly to rein in Congress's power to attach conditions to federal spending, as well as its propensity to find state regulations "preempted" by federal legislation even when the state laws do not directly contradict the legislation. I agree with Professor Young's basic analytical point. This does not contradict the point in the text, though, that the Court's references to preserving "state dignity" against suits by wronged citizens is more reminiscent of doctrines attached to King George III than to a genuinely democratic (or "republican") form of government, in which all governmental institutions are accountable to the citizens whose servants they are.

17. Noonan, *supra* n. 16, at 156.

Lawyer, which includes the reminder that "[c]onduct which is in complete accordance with rules of professional conduct and other law may still violate a lawyer's own sense of right and wrong."[18] I presume that "lawyer" in this context includes those particular lawyers who don the robes of judges. Consider also in this context a dramatic 2002 speech by Justice Scalia, tellingly titled "God's Justice and Ours."[19] In that address, Justice Scalia asserted that he "could not take part in [the process of capital punishment] if [he] believed what was being done to be immoral."[20] Even more dramatic, perhaps, was his statement that "in my view the choice for the judge who believes the death penalty to be immoral is resignation,"[21] rather than, say, systematic recusal in every case involving the death penalty. Fortunately, says Justice Scalia, the Catholic Church of which he is a devoted adherent, does not in fact condemn capital punishment. Because Justice Scalia clearly regards capital punishment as moral, so he has no compunctions about continuing to take part in what Justice Blackman notably called "the machinery of death."[22]

I have highlighted two of Judge Noonan's books that have had significant—and continuing—impact on my own work. And I have mentioned also Judge Noonan's most recent book, *Narrowing the Nation's Power*,[23] with its vigorous attack on a spate of so-called "federalism" decisions by the Supreme Court that I have recently described in *Commentary* magazine—in a symposium that asked the question, "Has the Supreme Court Gone Too Far?"—as "appal[ling]."[24] It would be disingenuous to deny that one of the factors explaining the popular impact of that book is the individual identity of its author. It is not simply that he is what the Constitution calls an "inferior" federal judge who dares to castigate his nominal superiors. Judge Noonan's colleague Stephen Reinhardt has certainly expressed himself in similar ways, and it would occasion no great surprise had he penned the book in question. But the editorial page of the *New York Times*, among others, took special notice of the fact that Judge Noonan had been

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18. John T. Noonan, Jr. & Richard W. Painter, *Professional and Personal Responsibilities of the Lawyer* VII (Found. Press 1997).

19. Antonin Scalia, *God's Justice and Ours*, First Things 17-21 (May 2002) (available at http://www.firstthings.com/ftissues/ft0205/articles/scalia.html) (accessed Jan. 21, 2004).

20. *Id.*

21. *Id.*

22. [F]rom this day forward, *I no longer shall tinker with the machinery of death.* For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed.

Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) (emphasis added).

23. Noonan, *supra* n. 16.

24. Symposium, *Has the Supreme Court Gone Too Far? A Symposium*, 116 Commentary 25, 37 (Oct. 2003) (Sanford Levinson's response).

appointed to the bench by Ronald Reagan, and this no doubt is believed to give some special credibility to arguments that, if made by others, might be subject to dismissal as special pleading by Warren Court devotees who do not recognize that that Court is a relic of the past.

So, obviously, there is much I could happily discuss—at some length—with regard to Judge Noonan's remarkable body of scholarship, not to mention the hundreds of decisions that he has penned as a member of the Ninth Circuit. I do, though, want to move on to what I had originally informed the law review editors would be my topic, even as I now realize that it is just one more iteration of the general issue of what it means to maintain one's individual integrity when adopting the role (or mask) of the professional judge. I thus turn to considering some implications of the fact that American judges (generally) sign their legal opinions.

PART II

You should not, by now, be surprised to learn that this topic—the implications of signed legal opinions—is discussed in yet another book co-edited by Judge Noonan, *The Responsible Judge: Readings in Judicial Ethics,*[25] which reprints an article by then-Circuit Judge Ruth Bader Ginsburg on the writing of judicial opinions.[26] She begins by discussing a trip that she had taken with her future colleagues Justices O'Connor and Scalia to Paris, where they "assembled to exchange views with representatives of the Conseil d'Etat."[27] The American judges, whatever their various jurisprudential views, all agreed that there were multiple "plausible" readings of the law; this was one reason, for example, for deferring to administrative interpretations even if one might have construed the underlying statutes differently. The French judges were shocked. "Both sides of the exchange," Judge Ginsburg wrote,

> immediately recognized that we had broached one of the fundamental differences in our systems and the workways of judges. Under the French practice, still followed in large measure in most civil law systems, judicial decisions typically portray the result demanded by the law as inexorable. *There is a right answer. It is expressed in a unanimous judgment, written up in a formal, impersonal, concise, stylized manner. The author of the judgment is neither named nor otherwise identifiable.*[28]

25. *The Responsible Judge: Readings in Judicial Ethics* (John T. Noonan, Jr. & Kenneth I. Winston eds., Praeger 1993).

26. *Id.* at 171 (reprinting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133 (1990)).

27. *Id.*

28. *Id.* at 172 (emphasis added).

To adopt the valuable term of the Cameroonian philosopher Ajume Wingo, this is a form of "veil politics,"[29] similar, of course, to the "masks" referred to in Judge Noonan's own work. Wingo is referring to the variety of ways in which political and judicial institutions are organized to evoke a sense of specialness, even mystery. Why, for example, do judges wear robes instead of ordinary suits (or, indeed, Hawaiian shirts)? Why do they sit on raised daises and engage in rituals that convey the sense that they are not simply a group of ordinary human beings trying to figure out the best solution, applying a version of Posnerian pragmatism, rather than pretending to be impersonal, perhaps Olympian, servants of the law?

In *Narrowing the Nation's Power,* Judge Noonan refers to those "students of politics who maintain that illusions are necessary to preserve the public order or the public's confidence. They say that no institution can be transparent."[30] One thinks of the old adage about the inadvisability of watching the process by which either sausage or law is made. However, says Judge Noonan, "I reject that unproved contention and reject it all the more vigorously when it is applied to distort discourse about something I'm familiar with."[31] Behind the rejection of opacity and embrace of transparency is a powerful vision of a democratic polity that is authorized (or believes itself authorized) to pierce various veils behind which those with power reinforce their authority.

As already indicated, the "veil" (or lack thereof) that I am most interested in is accountable authorship of judicial opinions. An analytically distinct, but obviously linked, issue is the propriety of separate opinions, whether concurrences or dissents, that almost necessarily must be signed. Although, as a matter of logical possibility, one could imagine anonymous concurrences or dissents, it is almost impossible to imagine any political system adopting such a practice. It is obviously far easier, however, to imagine anonymous "opinions of the court," not least because one finds systems around the world that have in fact adopted such a practice. As then-Judge Ginsburg suggests, though, there are important differences between the impersonal opinion purporting to speak as the impersonal voice of "the law" and the American-style opinion in which judges identify themselves and feel authorized to differ, often quite dramatically, from the views of their colleagues.

Although American judicial opinions are usually signed, this is, of course, not always the case. Consider, for example, the notorious opinion in *Bush v. Gore*,[32] which was issued as a "per curiam" opinion.[33] And perhaps proving Marx's dictum about first time tragedy, second time farce,

29. *See generally* Ajume H. Wingo, *Veil Politics in Liberal Democratic States* (Cambridge U. Press 2003).

30. Noonan, *supra* n. 16, at 10.

31. *Id.*

32. 531 U.S. 98 (2000).

Judge Noonan's colleagues on the Ninth Circuit issued a similar "per curiam" opinion in a September 2003 decision concerning the California recall election.[34] Although the more unkind among us might suggest that the vehicle of the "per curiam" was chosen in both cases because no given justice or judge (rightly) wanted to take full responsibility for the decisions in question, one suspects that the better (or at least the more charitable) explanation was the incredible speed with which the opinions were prepared. It may be, of course, that an additional factor explaining the adoption of the "per curiam" device was a French-like belief that it was indeed important to speak as "the court" in decisions that involved such important public events as the presidential election of 2000 and the chaotic California gubernatorial recall.

However, any suggestion that there *is* potential import in speaking as an impersonal Court, rather than through identified justices, returns us to our central issue. *Why* should any political system that pretends to privilege a notion of "the rule of law"—invariably contrasted with the presumptively questionable or otherwise unacceptable "rule of men" (or "women")—not require the preparation of completely impersonal opinions and, indeed, the suppression the very possibility of concurring or dissenting opinions? Consider in this context the Irish Constitution: Article 34.5.5 directs that a decision of the Supreme Court regarding constitutional challenges to legislation "shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed."[35] Similarly, a Belgian scholar points to a similar practice in that country. "[W]e have no such thing as separate opinions."[36] No one should infer from this that there are in fact never differences of opinion among the judges. It is simply that "even the fact that there were disagreements among the members of the bench is not revealed."[37] Belgium might, of course, simply be reflecting its status as a civil law system with a relatively old, i.e., pre-World War II, Constitution.

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33. *Id.* (holding that foreseeable discrepancies in the likelihood that given votes would be counted equally violated the Fourteenth Amendment).

34. *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (holding that California's recall procedures, with its foreseeable discrepancies in the likelihood that votes from given localities would be counted at the same rate, did not violate the Fourteenth Amendment).

35. Ir. Const. (1937) art. 34.5.5 (available at http://www.taoiseach.gov.ie/upload/static/256.pdf) (accessed Jan. 21, 2004).

36. E-mail from Jeroen Van Nieuwenhove, Researcher in constitutional law at the Katholieke Universiteit Leuven, Belgium, to Sanford Levinson, *Signed Opinions* (Aug. 18, 2003, 3:51 p.m. CST) (copy on file with St. Thomas Law Journal).

37. *Id.*

Or consider the practices of the European Court of Justice,[38] which operates under a rule that "the conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court."[39] These "conclusions" (with supporting reasons) are set out as an impersonal opinion. In explaining this practice, University of Southampton (England) Law Professor Takis Tridimas suggests that the "ECJ was modelled on the French Conseil d'Etat and was set up in the 1950s when there was no common law representation in the Community. A court which delivers a collective judgment was the natural choice. Anything else would be an oddity."[40] In addition, though, Professor Tridimas offers another more context-specific rationale. "[I]n a court where judges are appointed by the member states for renewable six year periods, collegiality [i.e., the swallowing up of individual identity in the collective institution of the Court] acts as a guarantee of judicial independence."[41] Otherwise, judges might feel under distinct political pressures from their home countries to register dissents—or even the partial disapproval that is a concurrence—from the collective opinion of the Court.[42]

The post-war practice of the German Constitutional Court is quite interesting in this regard. Although it began with a practice of suppressing dissent, signed dissenting opinions have been accepted as proper at least since 1971.[43] The German example may well explain the fact that most of the post-1989 structures established in Eastern Europe appear to allow public dissent. I personally applaud such rejection of traditional civil-law "masks" of anonymity, but it should be clear that nothing comes without a cost.

In the remainder of my remarks, I focus on some implications of such decision rules. To allow individual judges to speak in their own name, at the very least, seems to highlight the importance of individualized factors in

38. As distinguished from the European Court of Human Rights, meeting in Strausbourg, which allows dissenting opinions. R. European Ct. Human Rights 74.2 ("[a]ny judge who has taken part in the consideration of the case shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent") (available at http://www.echr.coe.int/Eng/EDocs/RULES%20OF%20COURTNOV2003.htm.) (accessed Jan. 21, 2004).

39. R. Proc. European Ct. Just. art. 27(5) (available at http//:curia.eu.int/en/instit/txtdocfr/txtsenvigueur/txt5.pdf) (accessed Jan. 21, 2004). I am grateful to Professor Takis Tridimas for providing me with this reference. E-mail from Takis Tridimas to Sanford Levinson (Nov. 13, 2003, 5:43 p.m. CST) (copy on file with St. Thomas Law Journal).

40. E-mail, *supra* n. 39. Professor Tridimas offers a third, more "practical reason. The ECJ is a multilingual court whose judgments are currently translated in 11 languages and will be translated into 21 languages post-accession. If individual judgments were allowed, the strain on resources might prove too much." Even if this is true for the European Court, it is seemingly irrelevant for most national courts (though South Africa does have eleven official languages!).

41. *Id.*

42. *Id.*

43. *See* Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 26 (2d ed., Duke U. Press 1997).

explaining the actual outcome of legal decisions, especially when they are controversial. First, even if one credits the utter sincerity of all judges in believing that they are indeed the vessels through whom the law speaks, it remains the case that the statement of conflicting—*especially* if they are sincere—messages almost inevitably *must* lead the ordinary listener to conclude that the law is remarkably unclear. Among other things, this has interesting implications for those who claim that "ignorance of the law" cannot serve as an excuse. For this to be a genuinely convincing claim, "the law" must speak with sufficient clarity so that a person of ordinary intelligence could indeed figure out his or her legal duties. Perhaps this was possible in a simpler world where a legal *malum prohibitum* conveniently coincided with a moral *malum in se.* That is, one did not have to be a rocket scientist—or engage in fancy interpretive pyrotechnics—in order to figure out that one ought not rape, murder, or steal. In the age of the modern regulatory state, one must often have exceptional abilities in order to discern one's legal duties, and even then one is likely to find equally talented people proclaiming dissenting views.

I note that one might believe that the law is in fact clear but that one group of judges (which is, of course, always a group that one disagrees with) must be self-consciously subordinating their fidelity to the law to the achievement of other, crassly political, ends. In spite of occasional urges to make just such arguments, I do not find this a generally productive mode of argument. I take the liberty of quoting myself from a recent contribution to a symposium in *Commentary* magazine that asked a number of legal scholars to address the following question: "Have recent rulings by the Supreme Court subverted fundamental elements of our constitutional order?" My response was as follows:

> I am appalled by a number of recent Supreme Court decisions that adopt an almost antebellum view of "state sovereignty" and limit congressional power to protect vulnerable minorities (such as the disabled). And, of course, there is *Bush v. Gore*. . . . Nonetheless, I am unwilling to accuse the current Court majority of "subverting" the Constitution. I was outraged during the 1980s by the savagery of some of the criticisms directed at Justice William Brennan. Going well beyond disagreement, some critics implied that he self-consciously subordinated his obligation of constitutional fidelity to his desire to promote his liberal views. This was scandalously unfair. It is equally unfair to level similar accusations at conservative justices with whom I often disagree. (*Bush v. Gore* may be an exception.)
>
> There are various legitimate approaches to constitutional interpretation, especially if legitimacy is defined by the actual performance practices of well-trained lawyers and judges, and the current majority's arguments certainly meet this standard. Honorable people can in good faith disagree, even vehemently, on what

> the Constitution means. One can oppose a point of view—and, indeed, advocate that the Senate refuse to confirm nominees with objectionable points of view—without suggesting that adherents of such views are "subversive."[44]

In any event, once one becomes aware of the individual votes in cases, then it is an almost irresistible temptation to begin asking what it is that accounts for the differences in voting behavior that one can inevitably discern in multimember panels. Among law professors, this leads to articles focusing on the jurisprudential approaches of individual justices or judges.[45] Among political scientists, in whose community I am also professionally trained, this can lead to what has come to be called "attitudinalism," an approach that, at an extreme, leads to the argument that it is *only* policy preferences of individual judges that explain their votes.[46] From this perspective, any reference to "the rule of law" is just the kind of illusion (or veil) that should be subjected to sometimes savage critique.

There is a third implication of the formal freedom to write concurrences and dissents, perhaps of a more ethical nature and, therefore, most appropriate for discussion in a symposium honoring Judge Noonan. It is one thing, after all, to participate in a legal system where dissent or concurrence is disallowed, where, indeed, the submission of a dissent would be to engage in a form of civil disobedience given the formal rule barring such an opinion. One might chafe under the existence of such a rule and advocate its repeal, but a judge would nonetheless be obligated to adhere to it and accept the silence that it imposes on the dissenter. But if one is operating within a system that permits such additional opinions, then doesn't the individual judge, in some sense, become *obligated* to issue such opinions? Even if this is not true for each and every case, might the imperative to write separately operate at least when the judge believes strongly that the majority's opinion is not truly faithful to "the law" and is instead simply the "more-or-less arbitrary rule of the judges/justices who happen to have majority power on a given day"?

I think of an analogous problem with regard to the professional responsibility of lawyers. Certainly the most extended debates at the American Law Institute concerning "the law governing lawyers," in which I personally participated, involved the lawyer's duty to preserve the confidentialities of one's clients. There are, of course, two polar possibilities concerning such classic chestnuts as the duty to disclose the possibility of future misconduct: a duty of nondisclosure, which has been, with some very few ex-

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44. Symposium, *supra* n. 24, at 37-38.

45. *See e.g. Rehnquist Justice: Understanding the Court Dynamic* (Earl Maltz ed., U. Press of Kan. 2003) (essays on individual members of the Rehnquist Court).

46. *See e.g.* Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge U. Press 1993); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge U. Press 2002).

ceptions, the general rule, or a duty of disclosure. The formal feature that both share is precisely the lack of discretion. Both the discloser and nondiscloser can legitimately claim that they "had no choice," that they were merely following their duty as lawyers sworn to uphold the law governing lawyers.

The organized bar has, however, generally adopted a discretionary approach with regard to the possibility of disclosure of client confidences when future harms appear possible. Consider the current text of Rule 1.6 of the ABA Model Rules of Professional Conduct: "A lawyer *may* reveal [confidential information] relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm."[47] In contrast, I am happy to say, is the Texas rule:

> When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer *shall reveal* confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.[48]

The Texas lawyer, at least as a formal matter, has no discretion; the lawyers of many other states *do* have discretion. The obvious question is what justifies the exercise of discretion one way or the other, whether it is preserving client confidences or holding one's tongue while signing an opinion with which that one does not agree. Is it really legitimate for judges in effect to pretend to the public that they accept the legitimacy of legal views with which they in fact disagree?

One might, in this context, ponder the fascinating debate that occurred in the aftermath of *Bush v. Gore* between Geoffrey Stone, former dean of the University of Chicago Law School, and Richard Posner, a distinguished member (and former chief judge) of the United States Court of Appeals for the Seventh Circuit. Stone described the ruling as "a partisan political decision, not a decision about the meaning of the United States Constitution,"[49] basing his allegation at least in part on the patent fact, given the general tenor of their constitutional jurisprudence, that three of the justices—Chief Justice Rehnquist and Justices Scalia and Thomas—could not plausibly have agreed with the equal protection analysis set out in the per curiam

47. Model R. Prof. Conduct 1.6(b) (ABA 2002) (available in WL, ABA-MRPC database) (emphasis added).

48. Tex. Disc. R. Prof. Conduct 1.05(e) (available in WL, TX-ST-ANN database) (emphasis added).

49. Patricia Manson, *Provost Stone and Judge Posner Discuss Judicial Decisionmaking*, Chicago Daily Law Bulletin, http://www.law.uchicago.edu/news/posner-stone-debate.html (accessed Jan. 21, 2004). At the time of the debate, Stone was still provost of the University of Chicago. He has subsequently stepped down from this position.

opinion that they signed.[50] As it happens, Posner agreed, blithely stating that the three justices "don't believe in that equal protection stuff."[51] Instead, he suggested, they signed the opinion because of the unseemliness that would have attended a shutdown of the election based on simply adding up the votes from one opinion (by Kennedy and O'Connor) rejected by seven justices and another by Rehnquist, Scalia, and Thomas rejected by six Justices.[52] "It's very difficult to argue constitutional law," said Stone in response, "with someone who defines himself as so cynical about constitutional law that he thinks it's legitimate for three justices of the Supreme Court to endorse an opinion that they believe to be false and unacceptable and not persuasive in order to avoid having an illegitimate result."[53]

Lest we sign on too quickly to Professor Stone's critique, perhaps because one shares my own continuing sense of outrage at *Bush v. Gore*, one might note the fact that Justice Stanley Reed signed the Court's opinion in *Brown v. Board of Education* in spite of the fact that he almost certainly disagreed with the majority's reading of the law.[54] Describing this incident, three scholars have recently written, "Chief Justice Warren approached Reed, displayed a concern with the sensitivities of the South, and wondered aloud whether the country's interests were better served by unanimity in the face of predictable opposition."[55] Reed then agreed to sign the opinion rather than to issue the dissent that he almost certainly would have written in other circumstances. This decision drew from his colleague, Felix Frankfurter, a note thanking Reed: "As a citizen of the republic, even more than as a colleague, I feel deep gratitude for your share in what I believe to be a great good for our nation."[56] If one joins Frankfurter in commending Reed rather than condemning him for what some might describe as betraying his oath of fidelity to the Constitution, then we should recognize that the issue of the judge's "professional responsibility," as it were, may be a very complex one indeed.

I offer a final reflection on what might be called individualized judicial opinions in an age of (post-realist) transparency. Judge Noonan in his most recent book rejects as "crude" the habit of "predict[ing] outcomes of cases in terms of the presidents who appoint the judges."[57] I am in substantial agreement with him, especially when one adds the sentence that follows the quoted language: "Far more important is the life experience of each

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *See* Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 655-56, 691-93 (Alfred A. Knopf, Inc. 1976).
55. Robert J. Cottrol, Raymond T. Diamond & Leland B. Ware, Brown v. Board of Education: *Caste, Culture and the Constitution* 176 (U. Press of Kan. 2003).
56. *Id.*
57. Noonan, *supra* n. 16, at 8.

judge."[58] Surely this is correct, but, just as surely, it warns us against any facile notion of the "bleached-out" judge who agrees in effect to forget his or her particular experiences and submit him or herself to an experience-independent conception of the law.

So what kinds of opinions do we want our judges to write? I have publicly identified Justice Jackson's opinion in *The Steel Seizure Case* as the greatest opinion in our 215-year history of constitutional opinions,[59] and nothing has led me to reconsider that assessment. Whenever I teach it, I feel myself in the presence of a truly great judge. But there is a paradox in choosing Jackson's opinion as the greatest in our history: it received only his own vote. Not a single one of his colleagues, at a formal level, appeared to share my assessment.

A number of things might explain this, but one factor, surely, is the fact that Jackson so unabashedly refers to his own "life experience" as a high official in Franklin D. Roosevelt's administration. Similar, in its own way, is Felix Frankfurter's beginning his own similarly individualized dissent in *West Virginia v. Barnette* with a reference to his own status as a member of "the most vilified and persecuted minority in history,"[60] a self-description that could, of course, not have been joined in by any other member of the Court on which Frankfurter served. But there is a vital difference between Jackson's and Frankfurter's evocation of their own *personae*. For Frankfurter immediately followed his famous statement with the reminder that "as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations."[61] It is as if Frankfurter evoked his experience only to deny its relevance—to endorse the importance of his having "bleached out" these contingent aspects of his personal identity—whereas Jackson was unafraid to acknowledge that he had in fact learned some very powerful lessons, which indeed shaped his very understanding of the Constitution, from his own experience as a member of a notably energetic and active presidential administration.

One might say, of course, that there is no difference at all. Jackson surely never denied, even for an instant, that he owed an "attachment to the Constitution" and was "bound" by his judicial obligation. However, the point of his *Steel Seizure* opinion, at least as I read it, is that it was facile to believe that "the Constitution" spoke with any great clarity, that one would inevitably construct one's meaning of the Constitution at least in part out of the shards of one's own experiences. The question is not so much the accu-

58. *Id.*

59. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592-655 (1952) (Jackson, J., concurring). *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *Law's Stories: Narrative and Rhetoric in the Law* 187, 202 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996).

60. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

61. *Id.* at 647.

racy of Jackson's view, which I believe is beyond argument, but the extent to which judges should acknowledge the relevance of their experiences in the opinions that they write.

There is one obvious problem with such "candor" in judicial opinions, even if one does not regard such candor as a rejection of the tenets of "the rule of law." That problem, of course, is the added difficulty that would be posed to achieving what we call "opinions of the Court" instead of the *seriatim* opinions that characterize British practice in the House of Lords or the pre-Marshall era of the United States Supreme Court. More than one judge or scholar has been heard berating the contemporary Supreme Court for its fragmentation and has pleaded for the diminution of individual ego in favor of recognizing the institutional responsibility of issuing collective opinions in the name of "the Court." That is an important consideration, but, inevitably, cases will arise that raise the kinds of ethical dilemmas hinted at in these remarks.

The editors of the University of St. Thomas Law Journal are to be congratulated for recognizing that the career of Professor and Judge John Noonan necessarily invites endless reflection on the deepest issues involved in the enterprise of living an honorable and ethically satisfying life as a person of the law. I am delighted and honored to have been part of their symposium.