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WORDS AND SENTENCES: PENALTY ENHANCEMENT FOR HATE CRIMES¹

Shirley S. Abrahamson,² Susan Craighead,³ and Daniel N. Abrahamson⁴

Every speech writer yearns for the perfect turn of phrase, the clever pun, the fresh metaphor, the telling double-entendre. I thought for sure I had hit upon one when a former law clerk, known in my chambers as my "Title Man," came up with the phrase "Words and Sentences" for this speech about penalty enhancements for hate crimes. According to my original plan, I would tell you about the words spoken by a young Wisconsin man named Todd Mitchell and the sentence those words earned him under the state's penalty enhancement statute.⁵ Mitchell's words doubled his prison term because he chose his victim on the basis of race.

But as I started to fill in the pages beneath the title, its multiplicity of meanings occurred to me. Todd Mitchell's words, his

1. This article is an edited, annotated, and slightly expanded version of the Ben J. Alzheimer Lecture delivered by Justice Abrahamson at the University of Arkansas at Little Rock School of Law on November 5, 1993.

The authors wish to thank Susan M. Fieber for her assistance in editing the manuscript and preparing it for publication; Wisconsin State Law Librarian Marcia Koslov and the library staff for their assistance and patience; and the University of Iowa College of Law faculty for their helpful discussion of a draft of this essay presented at a faculty colloquium on February 25, 1994. This essay will be presented to the Madison (Wisconsin) Literary Society in November 1994.

2. Justice, Wisconsin Supreme Court. B.A.; New York University 1953; J.D. Indiana University 1956; S.J.D. University of Wisconsin 1962.

The article speaks in the first person, referring to Justice Abrahamson, as did the speech. Susan Craighead and Daniel N. Abrahamson join her as authors of this article in recognition of their significant efforts in developing this topic and in the writing and editing of the article.

3. B.A. Princeton University 1986; M. Phil. Oxford University 1988; J.D. Harvard Law School 1993. Law Clerk to Justice Shirley S. Abrahamson, Supreme Court of Wisconsin (1993-94). Ms. Craighead is presently a staff attorney at the Seattle Public Defender Association, Seattle, Washington.

4. B.A. Yale University 1986; M.A. Oxford University 1988; J.D. New York University 1991. Law Clerk to Chief Judge Gilbert Merritt, United States Court of Appeals for the Sixth Circuit, Nashville, Tennessee (1991-92); Law Clerk to Judge William Dwyer, United States District Court for the Western District of Seattle, Washington (1992-93). Mr. Abrahamson is presently a staff attorney at the California Appellate Project, San Francisco, California.

5. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

prosecution, and his sentence began a new chapter in the evolving story of the First Amendment and hate crimes.⁶

This chapter opened one night with an assault in the small, rust belt city of Kenosha, Wisconsin and closed with an opinion written by the Chief Justice of the United States Supreme Court. No doubt subsequent chapters are unfolding even as we speak, perhaps right here in Arkansas.

My own contribution to this chapter of First Amendment law will probably not merit even a footnote in a law review article. But each time I re-read my opinion, I am reminded of the tortuous process of finding the words to express my conclusions. I recall the discussions in the conference room and, yes, the arguments that took place in my chambers, as I deliberated on Todd Mitchell's challenge to the constitutionality of his sentence. And so, I come here today to tell you about Mitchell's words and his sentence. But I also want to tell you about my words and sentences, about how I and other judges deal with cases that are agonizing to us, and about what our words and sentences reveal about the law and judicial decision-making.

Let's go back to the beginning, to the Renault apartment complex in Kenosha, Wisconsin.⁷ Gregory Riddick, a fourteen-year-old white male, was walking by the complex where some young male African Americans, including Todd Mitchell, were gathered. Without provocation, about ten members of the group ran across the street towards Riddick, knocked him to the ground, beat him severely, and stole his British Knights sneakers. The police found Riddick

6. Before *Mitchell*, many academic writings about hate speech focused on hate speech on college campuses and on university codes subjecting students to discipline if they engaged in hate speech. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. J.L. & PUB. POL'Y 339 (1992); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991).

For discussions of racist speech and critical race theory, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Henry L. Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, THE NEW REPUBLIC, Sept. 20, 1993, at 37.

7. The facts are taken from the opinion of the Wisconsin Supreme Court in *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), and the briefs filed in the Wisconsin Supreme Court and the United States Supreme Court.

unconscious a short time later. He suffered extensive physical injuries, spent four days in a coma, and may have sustained permanent brain damage.

According to witnesses, sometime before the assault the group of attackers had been discussing the movie "Mississippi Burning." Specifically, they had talked about a scene in which a white man came upon a young African American child at prayer and beat the child severely.

Before Gregory Riddick appeared, Todd Mitchell, then nineteen and one of the older members of the group, reportedly asked the others: "Do you all feel hyped up to move on some white people?" Seeing Riddick approach a short time later, he told the group, "There goes a white boy; go get him." Although he then counted to three and pointed to indicate that the group should surround Riddick, Mitchell apparently did not join the attack. Mitchell was charged with aggravated battery and theft. He was the only adult charged and tried; his co-actors were juveniles. Mitchell testified that he had not been part of the movie discussion and that his statement was not intended to provoke the beating. In December 1990, a jury found him guilty of battery⁸ and theft,⁹ and party to a crime.¹⁰ The jury also returned a separate verdict under the penalty enhancement statute finding that Mitchell had intentionally selected Riddick as a victim because of his race.¹¹

Under the penalty enhancement statute, a Wisconsin judge is authorized to increase the penalty for any crime in the state criminal code if the perpetrator "intentionally selects" the victim "because

8. WIS. STAT. ANN. § 940.19 (West 1982). Mitchell was found guilty of violating § 940.19(1m), a class E felony.

9. WIS. STAT. ANN. § 943.20(1)(a), (3)(d)(2) (West 1982).

10. WIS. STAT. ANN. § 939.05 (West 1982).

11. The jury rendered a special verdict that the prosecution had proved beyond a reasonable doubt the "intentional selection" of the crime victim "because of" the status of the victim. *Mitchell*, 485 N.W.2d at 809.

Some would argue that a defendant's bigoted statement does not necessarily prove racial motivation beyond a reasonable doubt. *Mitchell*, according to one commentator, has ambiguous facts:

It appears quite possible from the facts that the victim was, in fact, chosen because of his race. On the other hand, it is not inconceivable that he was actually chosen because he had nice shoes, or because the group felt like beating someone and he was an easy target, and the racial remarks were only incidental.

Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 269 (1992).

Mitchell did not challenge the jury findings on appeal; he attacked only the constitutionality of the statute. *Mitchell*, 485 N.W.2d at 809-10.

of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim.¹² The statute creates no new crime; it simply increases the possible penalty for an existing offense. Mitchell's battery conviction carried a maximum sentence of two years, but because the jury found that Mitchell had selected Riddick on the basis of the victim's race, the trial judge had the option of increasing the maximum period of imprisonment by up to five years.

12. The "hate crime" statute originally provided as follows:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

WIS. STAT. ANN. § 939.645 (West Supp. 1993-94).

The statute was amended after Mitchell's offense to read in relevant part as follows:

(1)(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) *in whole or in part* because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, *whether or not the actor's belief or perception was correct*. . . .

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry *or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry* is required for a conviction for that crime.

Act 291 of 1991, §§ 1, 2 (codified as amended at WIS. STAT. ANN. § 939.645(1)(b), (4) (West Supp. 1993-94)) (emphasis added to show changes).

The trial court chose to double Mitchell's sentence to four years.¹³

Mitchell appealed.¹⁴ He focused his appeal on the constitutionality of the Wisconsin hate crimes statute under the First Amendment to the federal constitution.

As far as I can tell, the *Mitchell* case was the first prosecution under Wisconsin's hate crime law.¹⁵ One can only speculate about why the Kenosha County prosecutor chose to seek the enhanced penalty. If his goal was to have Mitchell incarcerated for a long time, other means were available. The prosecutor could have asked for the maximum sentence on battery and a consecutive prison sentence on the theft charge, arguing that the defendant's words evidencing racial hatred would warrant imposing sentences at the maximum range.¹⁶

Instead, the prosecutor chose the riskier course. Perhaps he sought the enhanced penalty deliberately to raise the constitutional issue and test the law. As Chief Judge Abner Mikva of the Court of Appeals for the District of Columbia Circuit has written, lawyers

13. The trial court further stayed a four-year sentence for the theft and imposed a four-year period of consecutive probation for the theft conviction. *Mitchell*, 485 N.W.2d at 809.

14. The Wisconsin Court of Appeals held the statute constitutional. *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991), *rev'd*, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

15. As of 1990, Milwaukee, the largest community in the state, had not prosecuted anyone under the statute. The Milwaukee County deputy district attorney was quoted as stating that his office "just hasn't had many cases where the heavier penalties could have been charged." CONNECTICUT OFFICE OF LEGISLATIVE RESEARCH, *Penalties for Crimes Motivated by Bigotry or Bias Followup*, Mar. 7, 1990, at 4.

There have been few criminal convictions or civil actions under hate crime laws across the country. Hate crimes are difficult to detect and to prove. See Marc L. Fleischauer, *Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697, 701 (1990); James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 664 (1991).

16. Wisconsin precedent supported a trial court's consideration of hate speech in sentencing. The state might have relied on *State v. J.E.B.*, 469 N.W.2d 192 (Wis. Ct. App. 1991). In *J.E.B.* the defendant sexually molested his own children. The defendant also possessed books describing sexual acts between adults and children. The Wisconsin Court of Appeals concluded that the trial court could consider the defendant's presumptively protected reading materials in imposing the sentence if there was a reliable showing of a sufficient relationship between the protected use of the books and the assaults committed by the defendant. See *Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (concluding that introduction at penalty phase of capital case that defendant was a member of a racist organization violated the First Amendment where offense had nothing to do with defendant's racist beliefs). A defendant's motive for committing a crime has traditionally played a part in sentencing while a defendant's abstract beliefs have not. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199-200 (1993).

and judges have an "uncontrollable itch . . . to be involved in and decide seminal constitutional issues. . . . And so that nice, comfortable law-school precept to avoid constitutional questions if at all possible has become as obsolete as the Rule in *Shelley's* case."¹⁷

More important and interesting than the decision to prosecute under this statute were the reasons for its adoption. Despite the many criminal laws proscribing conduct such as Mitchell's, legislators have in recent years felt a need to pass laws specifically aimed at conduct motivated by hatred of the victim's race, religion, or other characteristics.

During the mid-1980s, the media in many states, and indeed in many countries, were reporting increased incidents of so-called hate crime, bias-motivated crime, ethnic intimidation, or ethnoviolence.¹⁸ Hate crimes were making the news in Wisconsin too. Racial incidents were reported on the University of Wisconsin campuses and in communities large and small.

In October 1987, a Wisconsin Democratic state representative introduced a penalty enhancement bill, explaining that "there has been an alarming increase in crimes that seem to be motivated by bigotry—even in progressive Madison."¹⁹ About five months later, the bill passed the state assembly by a unanimous vote and the senate by a vote of twenty-seven to three. Democratic Senator Lynn Adelman opposed the bill, asserting that it came perilously close to penalizing thought. Senator Adelman, a practicing attorney, would later file an amicus brief in the *Mitchell* case in our court and appear before the United States Supreme Court arguing that the law was unconstitutional.²⁰

17. Abner J. Mikva, *How Do We Manage the Right to Hate*, 19 J.C. & U.L. 35, 35 (1992).

18. For reports of increasing "hate crimes," see, e.g., Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1.

The Anti-Defamation League of B'nai B'rith monitors hate crimes motivated by antisemitism and reported a marked increase in antisemitic incidents. See, e.g., Anti-Defamation League of B'nai B'rith, *Hate Crime Statutes: A 1991 Status Report* (1991); Anti-Defamation League of B'nai B'rith, *1992 Audit of Anti-Semitic Incidents* (1992).

For discussions of the Federal Hate Crime Statistics Act of 1990, see James B. Jacobs & Barry Eisler, *The Hate Crime Statistics Act of 1990*, CRIM. L. BULL., Mar.-Apr. 1993, at 99; Joseph M. Fernandez, *Bringing Hate Crime into Focus: The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 261 (1991).

19. State Representative David E. Clarenbach quoted in the BADGER HERALD, Oct. 28, 1987.

20. Senator Adelman was characterized by one columnist as "that rarest of living creatures: a politician willing to stick out his neck for an unpopular cause." Bill Lueders, *The Folly of Outlawing Hate*, MILWAUKEE MAG., Aug. 1993, at 102.

In many other states, hate crime laws were passed with a similar lack of controversy. Civil rights groups lobbied for the laws. The rise of hate groups in the 1980s made the legislation seem timely.²¹ By 1991, 46 states had enacted some form of hate crime legislation.²²

21. Eugene H. Czajkoski, *Criminalizing Hate: An Empirical Assessment*, FED. PROBATION, Sept. 1992, at 36, 36; Kenneth Jost, *Hate Crimes*, 3 CONG. Q. RESEARCHER, 1, 12 (Jan. 8, 1993).

22. Kenneth Jost, *Hate Crimes*, 3 CONG. Q. RESEARCHER, 1, 13 (Jan. 8, 1993); Marion Z. Goldberg, *Statutes Combat Hate Crimes in 46 States*, ADL Reports, TRIAL, Feb. 1992, at 88; Anti-Defamation League of B'nai B'rith, *Hate Crime Statutes: A 1991 Status Report* (1991).

Hate crime statutes take several forms. Some proscribe particular hate conduct such as damaging places of worship; some increase the penalties for substantive criminal offenses motivated by hate, either by making the hate motivation a separate crime or through a penalty enhancement; some make it unlawful to willfully injure, intimidate, or interfere with enjoyment of any right or privilege secured by the Constitution or laws because of bias; and some provide injunctive relief. For a discussion of the various legislative efforts, see, e.g., Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 168-69 (1992-93).

For discussions of state statutes, see, e.g., Abraham Abramovksy, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 888-95 (1992) (discussing New York laws); Edward Comitz, *Extinguishing the Burning Crosses: Washington's Malicious Harassment Statute in Light of the Issues of Overbreadth and Vagueness*, 16 U. PUGET SOUND L. REV. 373 (1992) (discussing Washington laws); Eugene H. Czajkoski, *Criminalizing Hate: An Empirical Assessment*, FED. PROBATION, Sept. 1992, at 36, 37-40 (discussing Florida laws); Marc L. Fleischauer, *Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697 (1990) (discussing Florida laws); Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259 (1992) (discussing Oregon laws); Virginia N. Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287 (1990) (discussing Massachusetts laws); Helen L. Mazur-Hart, *Racial and Religious Intimidation: An Analysis of Oregon's 1981 Law*, 18 WILLAMETTE L. REV. 197 (1982) (discussing Oregon laws).

The St. Paul Ordinance at issue in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), which the United States Supreme Court struck down, provided:

Whoever places on public or private property a symbol, object . . . or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 2541. For discussions of the *R.A.V.* case, see, e.g., Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After R.A.V.*, 72 OR. L. REV. 157 (1993); Joseph E. Starkey, Jr., *R.A.V. v. St. Paul: The Debate over the Constitutionality of Hate Crime Laws Ends; or Is This Just the Beginning?*, 95 W. VA. L. REV. 561 (1992-93); Anthony S. Winer, *The R.A.V. Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 WM. MITCHELL L. REV. 971 (1992).

By 1992, a federal penalty enhancement provision was pending before Congress.²³

All of the state hate crime statutes protect those victimized on the basis of race or religion.²⁴ Some cover additional categories including national origin, sex or gender, sexual orientation, disability, and age.²⁵ And apparently other groups are also seeking protection. After violent physical attacks on lawyers in California this year,²⁶ California State Bar president Harvey Saferstein urged that crimes motivated by hatred of lawyers should be classed as hate crimes and subject to additional punishment.²⁷ I would not want to put this issue to a vote.

About one-half of the hate crime statutes contain sentence enhancement provisions, similar to the statute involved in the *Mitchell* case. Arkansas took a slightly different tack. In 1993, the Arkansas legislature furnished a civil remedy for bias-motivated conduct. An aggrieved party may be entitled to damages, including punitive damages, injunctive relief, an award of the costs of litigation, and reasonable attorney's fees.²⁸

23. The proposed federal law instructs the Sentencing Commission to establish guidelines for imposing enhanced penalties on persons committing bias-motivated crimes. *Hate Crimes Sentencing Enhancement Act: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 64 (1992); *Bias Crimes: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 80 (1992).

24. Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 273 (1992).

25. Anti-Defamation League of B'nai B'rith, *Hate Crime Statutes: A 1991 Status Report* 22 (1991) (charting the characteristics included in each state); Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 273 (1992); Rorie Sherman, *Hate Crimes Statutes Abound*, NAT'L L.J., May 21, 1990, at 3.

26. On July 1, 1993, a former client fired round after round of ammunition into the San Francisco law office of Pettit & Martin, killing eight and wounding six before killing himself.

The massacre was, rather hyperbolically, called the ultimate in lawyer-bashing. But it was only one of a series of murders and assaults on lawyers. And it came at a time when the public opinion of attorneys had reached an all-time low. . . . And the public's poor view of attorneys—as well as assaults on lawyers by disgruntled clients—seems likely to continue in the coming years.

Auger Against Lawyer Left Mercy Dead, NAT'L L.J., Dec. 27-Jan. 3, 1994, at S5.

27. Saferstein's position was reported in *On Slurs . . . Weep Not for Lawyers*, L.A. DAILY J., July 15, 1993, at 6 (editorial from the *Fresno Bee*). The *Fresno Bee* agreed with Saferstein that lawyer jokes have become offensive, stupid, and sometimes ugly, but opposed having hate speech codes augmented to include lawyers.

28. ARK. CODE ANN. § 16-123-104 (Michie Supp. 1993).

In the *Mitchell* case, the Wisconsin Court of Appeals upheld the constitutionality of the penalty enhancement statute.²⁹ The Wisconsin Supreme Court, on a vote of five to two, struck it down.³⁰ The majority held that the statute violated the First Amendment directly by punishing what the legislature deemed to be offensive thought. The court held further that the statute was unconstitutionally overbroad; the state would be likely to show bigoted motive by introducing evidence of the defendant's prior speech, thus chilling expression.

This case is proof positive of the influence of law review articles on judicial decision-making. The majority opinion relied heavily on a *UCLA Law Review* article authored by Susan Gellman,³¹ an Ohio public defender who opposed Ohio's hate crime law and represented defendants charged under hate laws in Ohio and Florida. Her lengthy article analyzed hate crime laws and found them to be unconstitutional. Although the Gellman article later became the focal point of scholarly commentary, it stood virtually alone when the *Mitchell* case was being considered. It had great influence on both the Wisconsin and Ohio supreme courts in striking down their states' statutes.³² Ms. Gellman sat alongside Wisconsin's state Senator Adelman during the oral argument of the *Mitchell* case before the United States Supreme Court.

A majority of the Wisconsin Supreme Court struck down the hate crime statute. Two justices dissented, concluding that the penalty enhancement statute punished conduct, not speech, and therefore survives a First Amendment challenge. In short, the dissenters argued, the Constitution allows bigoted thoughts, but it does not allow a person to act on them. The United States Supreme Court agreed and on a unanimous vote upheld the statute.

I was one of the Wisconsin dissenters.

I opened my dissent in *Mitchell* with the following words:

The Constitution teaches mistrust of any government regulation of speech or expression. Had I been in the legislature, I do not

29. *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991), *rev'd*, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* 113 S. Ct. 2194 (1993).

30. *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* 113 S. Ct. 2194 (1993).

31. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333 (1991). For a subsequent article, see Susan Gellman, "Brother, You Can't Go to Jail for What You're Thinking": *Motives, Effects, and "Hate Crime" Laws*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 24.

32. See *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992).

believe I would have supported this statute because *I do not think this statute will accomplish its goal* As a judge, however, *after much vacillation*, I conclude that this law should be construed narrowly and should be held constitutional.³³

You will note that in launching my dissent I could be accused of committing not one but *two* infractions of judicial convention. First, I reach out and comment upon the wisdom of a law; I insert my personal views in personal terms. Second, I confess my doubts and indecision about the constitutionality of the law.³⁴

We all know that the role of a judge is not to express personal opinions about particular statutes. A judge's job is to interpret and apply statutes, not support or oppose them. In a case like *Mitchell*, my role is to determine whether the statute at issue passes constitutional muster. Whether the law is wise social policy is a question for the public and the legislature. In commenting on the wisdom of a statute, then, some might say I am guilty of overstepping my institutional boundaries. How can an appellate judge, removed as she is from the political arena, suggest that the legislature has enacted a bad law?

By the time the *Mitchell* case reached the state supreme court, the wisdom of hate crime laws was being questioned. The debate continues. A Nexis search revealed 755 stories nationwide about hate speech since 1991. In the same time period, Nexis stopped counting at 1000 in a search for the topic "hate crime." Those who support hate crime laws argue that they deter hate motivated behavior; that they reinforce the community belief in the injustice of hate; that they reassure hate victims of their value as members of our polity. Most important, proponents say, punishment for hate crimes symbolically heals the wounds in the social fabric that are created by hate-motivated acts.³⁵

33. 485 N.W.2d 807, 818 (Wis. 1992) (Abrahamson, J., dissenting) (emphasis added).

34. Professor David Shapiro defends judicial candor, writing that "wide respect [is] accorded to those twentieth-century judges whose opinions are especially notable for their candid recognition of the difficulties of decision and the strength of competing arguments." David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 740 (1987). For "a harmonious counterpoint to Professor Shapiro," see Charles Fried, *Imprudence*, 1992 SUP. CT. REV. 155.

Lawrence Solan asserts that the principle of neutrality exerts "a force on judges that increases the temptation to report the reasons behind their decisions less than fully and openly." LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 2-3 (1993).

35. Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 266-68 (1992);

Those like Wisconsin Senator Adelman, who oppose hate crime statutes, believe them to be unnecessary and downright pernicious.³⁶ The conduct punished is already illegal. Although it may be strongly counter-intuitive, social science theories suggest that hate crime statutes may actually increase bigotry at the level of the individual offender and in the community as a whole.³⁷ Many persons also fear that hate crime laws will ultimately be used against the very groups they are designed to protect, and this case illustrates that phenomenon.³⁸ It appears that hate crime statutes may be dispro-

Kenneth Jost, *Hate Crimes*, 3 CONG. Q. RESEARCHER 1, 7 (Jan. 8, 1993); Nadine Strossen, *Hate Crimes: Should They Carry Enhanced Penalties?*, A.B.A. J., May 1993, at 44; Brian S. Westenberg, *Michigan's Ethnic Intimidation Act: The Shortcomings of the Law's Moral Imperative*, 4 DET. C.L. REV. 1127, 1155-58 (1992); Henry L. Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, THE NEW REPUBLIC, Sept. 20 & 27, 1993, at 37.

Social scientists have not provided empirical evidence that the deterrent, educational, retributive, and symbolic purposes of hate crime laws are realized.

36. Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 280-82 (1992); Nat Hentoff, *Hate Crimes: Should They Carry Enhanced Penalties?*, A.B.A. J., May 1993, at 44, 45; James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 55, 59-60; Kenneth Jost, *Hate Crimes*, 3 CONG. Q. RESEARCHER 1, 5-7 (Jan. 8, 1993); Diana M. Torres, *Bias Crime Legislation: A Constitutional Rebuttal to Sticks and Stones . . .*, 26 AKRON L. REV. 99, 106-07 (1992); Brian S. Westenberg, *Michigan's Ethnic Intimidation Act: The Shortcomings of the Law's Moral Imperative*, 4 DET. C.L. REV. 1127, 1158-60 (1992); Comment, *Bad Motives*, THE NEW YORKER, June 21, 1993, at 4, 5.

37. Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 280-82 (1992).

A further danger of hate crime laws, opponents say, is that they distract us from taking action that would be more than merely symbolic; they present the illusion that society is responding to bias-motivated violence when it is not. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333, 389 (1991).

A *New Yorker* article concludes that hate crime laws tempt politicians with the promise of something for nothing—meaningful benefits at no cost. The promise is deceptive on both counts: there are no benefits, apart from some fleeting good feelings, and it is alarming that what people think becomes an object of the attention of the criminal justice system. Comment, *Bad Motives*, THE NEW YORKER, June 21, 1993, at 4, 5.

Professor James Weinstein contends that enhancing punishment "is part of a larger American syndrome of adopting harsh punishment as an expedient response that deals only with the most superficial manifestations of complex, deep-seated problems." James B. Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 6, 16.

38. James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 55, 60.

portionately enforced against minority group members such as Todd Mitchell.³⁹

With such sharp disagreement on the wisdom of hate crime laws, why do I as a judge stray across my institutional boundaries? After all, judges cannot declare void those laws with which we disagree or to which we are opposed. Our personal views of the soundness of legislation are, in fact, irrelevant. And in the *Mitchell* case, articulating my personal views was certainly avoidable. Indeed, I argue vigorously in my dissent that the Wisconsin statute should be saved, not struck down. Why then do I begin the dissent by calling the statute unwise?

This brings me to my second infraction of judicial convention: the reference to my personal indecision and doubts about the constitutionality of the statute.⁴⁰ Constitutionality is a difficult question because the lines between speech, expressive conduct, and nonexpressive conduct are fuzzy in First Amendment analysis. Burning a flag is protected speech, while burning a draft card is unprotected conduct.⁴¹

My personal views as expressed in the dissent take two forms—the “had I been in the legislature” refrain, and my confession that

39. Comment, *Bad Motives*, THE NEW YORKER, June 21, 1993, at 4, 5.

40. Lawrence Solan writes as follows:

[B]ecause judges wield such enormous power, there is pressure on them to speak decisively. It would be very difficult for an appellate judge to say, ‘I hereby affirm your death sentence, although this was a very close question. . . .’ Any lawyer who has been on the losing side of a close question will recall the shock of reading how easily the judge rejects the losing arguments out of hand, as if they could not have been made by a thinking person. The pressure to speak with a definitive voice works as a wedge, driving apart decision making on the one hand and presentation on the other. Rarely do judges, in their written opinions, discuss the degree of difficulty of the decision.

LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 2 (1993).

41. *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *United States v. O’Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

In other countries different analyses prevail. See, e.g., John Gibson and David Allen, *The Issue of Racial Vilification*, LAW INST. J., Aug. 1990, at 709 (Australia); Arthur Fish, *Hate Promotion and Freedom of Expression: Truth and Consequences*, 2 CANADIAN J. L. & JURISPRUDENCE 111 (1989) (Canada); Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1992) (Canada); Evelyn Kallen, *Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation*, 11 WINDSOR Y.B. ACCESS TO JUST. 46 (1991) (Canada); David Partlett, *From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech*, 22 VAND. J. TRANSNAT’L L. 431 (1989) (Australia); Colloquium, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1989).

as a judge I vacillated about the statute's validity. These personal comments stand apart—textually and analytically—from the judicial reasoning that makes up the rest of the dissenting opinion. And like my comment on the wisdom of the statute, my confession about my vacillation seems at odds with what follows. Indeed, if you read the rest of my dissent—and I encourage you to do so—you will be hard put to find even a hint of vacillation. I proclaim with assurance that the statute punishes acts, not beliefs. I argue with confidence that “[t]he statute does nothing more than *assign consequences* to invidiously discriminatory acts.” And I maintain—again, without hesitation—that “[t]he only chilling effect” [of the statute] is not on speech but on “lawless conduct.”⁴²

So why do I begin the dissent by calling the statute unwise? And why do I draw attention to my personal vacillation? These questions can be stated more generally: Why do judges sometimes feel compelled to provide personal commentary about the cases they decide?

I would like to explore with you today some of the reasons a judge may choose to insert her personal views in a legal opinion, and some of the consequences of such an action.⁴³ Now, let us be

42. *Mitchell*, 485 N.W.2d at 819 (emphasis added). The United States Supreme Court in a brief unanimous opinion made short shrift of all arguments of facial invalidity. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993). For a discussion of the issues involved in *Mitchell* and a critique of the United States Supreme Court's decision, see James Weinstein, *Hate Crime and Punishment: A Comment on Wisconsin v. Mitchell*, 73 OR. L. REV. (forthcoming 1994).

43. Judge Cardozo understood the opinion as a form of cogent writing. “The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way.” BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 9 (1931).

For analyses of judicial strategies to persuade the numerous audiences of judicial decisions, see HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* (1992); RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* CH. 6 (1988); David E. Anderson, *Reflections on the Supreme Court, Constitutionalism, and the Rhetoric of Law*, 8 ST. LOUIS U. PUB. L. REV. 75 (1989); J.G. Deutsch & M.H. Hoeflich, *Legal Duty and Judicial Style: The Meaning of Precedent*, 25 ST. LOUIS U. L.J. 87 (1981); Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U.L. REV. 915 (1961); Marc E. Gold, *The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada*, 7 SUP. CT. L. REV. 455 (1985); Robert A. Prentice, *Supreme Court Rhetoric*, 25 ARIZ. L. REV. 85 (1983); Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1560-66 (1990); Ron Moss, *Rhetorical Stratagems in Judicial Opinions*, 2 SCRIBES J. LEGAL WRITING 103 (1991).

For analyses of the literary qualities of the writings of selected judges and cases, see Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric*

clear. Judges tell us what they think with regularity. A dissenting judge may tell her colleagues: "I believe X is the case"; "I believe the majority errs"; "I believe the constitution requires Y result"; "I think the standard of review should be Z"; "I think it unwise for the court to do Q." It is common for judges to speak their minds in these standard phrases. What is less common, I would suggest, is for a judge to speak in the first person about what is in her heart. While the state and federal reporters contain examples of judges stating in unmistakable terms their personal views about the matter at hand, when you look at the totality of cases, and the opinions authored by an individual judge, personal beliefs are rarely made known in the context of legal argument.

As we begin to consider how, when, and why a judge decides to express personal views publicly, I would turn your attention to the anguished words of Justice Kennedy's concurrence in the flag desecration case, *Texas v. Johnson*. The United States Supreme Court overturned Johnson's conviction for burning the American flag. Johnson's act was held to be expressive conduct permitting him to invoke the First Amendment. Justice Kennedy concurred, writing:

[T]his case, like others before us from time to time, exacts its personal toll. . . . The case before us illustrates better than most that the judicial power is often difficult in its exercise The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.⁴⁴

in the Writing of Constitutional Law, 71 IOWA L. REV. 833 (1986); L.H. LaRue, *The Rhetoric of Powell's Bakke*, 38 WASH. & LEE L. REV. 43 (1981); Raymond S. Rodgers, *Generic Tendencies in Majority and Non-Majority Supreme Court Opinions: The Case of Justice Douglas*, 30 COMM. Q. 232 (1982); Kenneth L. Schneyer, *Talking about Judges, Talking about Women: Constitutive Rhetoric in the Johnson Controls Case*, 31 AM. BUS. L.J. 117 (1993); Daniel G. Stroup, *Law and Language: Cardozo's Jurisprudence and Wittgenstein's Philosophy*, 18 VAL. U. L. REV. 331 (1984); Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979); Jan Deutsch, *A Comment on "The Rhetoric of Powell's Bakke,"* 38 WASH. & LEE L. REV. 63 (1981); James B. White, *A Response to "The Rhetoric of Powell's Bakke,"* 38 WASH. & LEE L. REV. 73 (1981).

44. *Texas v. Johnson*, 491 U.S. 397, 420-21, 109 S. Ct. 2533, 2548, 105 L. Ed. 2d 342, 364 (1989) (Kennedy, J., concurring).

What might Justice Kennedy have been doing with these words? Why would a judge want to share in print his private anxiety or personal anguish? Perhaps it was Justice Kennedy's way of coming to terms with his position as a judge sworn to uphold the law, and as a person with deeply patriotic feelings about his flag and country.

In expressing personal beliefs, a judge may be making peace with himself. Acknowledging his personal beliefs before applying the law in a way that contradicts those same beliefs may do less damage to those beliefs and to his sense of self. The disclosure reassures him that his moral sense remains intact, that his values have not been defeated by the demands of the bench. Perhaps when I drafted my dissent in *Mitchell* I was speaking to myself in this way.

What else might Justice Kennedy have been doing with his emotional appeal? Perhaps he was appropriating the pain and suffering of the public. He was thus making peace with the public and allowing the public to be at peace with itself. You will recall that in the flag burning case⁴⁵ the justices were presented with a challenge to the constitutionality of a Texas statute criminalizing the desecration of the American flag. Public opinion strongly favored the Texas statute, but, by a vote of 5-4, the Court invalidated the statute.⁴⁶ In giving voice to his own anguish, perhaps Justice Kennedy was telling the public, "I share your beliefs, but on the bench I'm not allowed to act on my personal feelings. Please respect that I have a job to do." This is a natural response when one's actions fly in the face of one's own personal feeling or a strong public sentiment.⁴⁷

45. *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

46. Justice Brennan, in striking down Johnson's conviction for burning the American flag in protest of the policies of the Reagan administration, said:

[T]he flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects. . . . Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience . . . that we reassert today. . . . We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Johnson, 491 U.S. at 419-20, 109 S. Ct. at 2547-48, 105 L. Ed. 2d at 363-64.

47. For an oft-quoted statement of the divergence of the personal and the judicial view, see Justice Frankfurter's dissent in *Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). The Court struck down a state statute requiring school children to salute the flag. Justice Frankfurter dissented, saying:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.

In *Mitchell*, the Wisconsin Supreme Court was dealing with a similarly volatile issue. Although the statute had passed the state legislature overwhelmingly, debate raged about the wisdom and constitutionality of hate crime laws. Those who believe these laws violate the right to free speech are passionate, thoughtful individuals who fear the First Amendment is in jeopardy. As a private citizen, I share their concerns. But as a judge I am compelled to consider whether the First Amendment does prohibit the enhancement of criminal penalties for hate crimes. Perhaps in articulating my personal views about the statute, even as I argued forcefully for the law's constitutionality, I was reaching out to say that I considered the views of those committed individuals who believed otherwise.⁴⁸

Why else might Justice Kennedy have voiced his anguish? Perhaps to affirm, with added vigor, his and the Court's "commitment to the process." In expressing distaste for the result, he allows the reader to disagree with the Court's holding, but not to question the Court's commitment to the rule of law. After all, he tells us, that commitment has been tested through the justices' personal suffering in reaching a result they find distasteful.

Thus Kennedy's words, personal and emotional though they may sound, can be seen from another perspective: they suggest their counterpoints, the impersonal and the dispassionate. While pur-

Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. . . . As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

Barnette, 319 U.S. at 646-47, 63 S. Ct. at 1189, 87 L. Ed. at 1642 (Frankfurter, J., dissenting).

48. Professor James Boyd White describes the judge working her way through her own attitudes and confronting the arguments of each side as follows:

The ideal would be a judge who puts his (or her) fundamental attitudes and methods to the test of sincere engagement with arguments the other way. We could ask, does this judge see the case before him as the occasion for printing out an ideology, for displaying technical skill, or as presenting a real difficulty, calling for real thought? The ideal judge would show that he had listened to the side he voted against and that he had felt the pull of the arguments both ways. The law that was made that way would compromise two opposing voices, those of the parties, in a work made by another, by the judge who had listened to both and had faced the conflict between them in an honest way. In this sense the judge's most important work is the definition of his own voice, the character he makes for himself as he works through a case.

JAMES B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 47 (1985).

porting to expose the heart-felt sentiments of the justice, they tell the reader that the justice is putting passion aside. Just as the process of identifying and articulating passion enables the justice to reach a dispassionate result, it prompts readers to follow the same path—to recognize their own passions so that they, too, can put them aside. In that way, the justice hopes to persuade the opinion's many audiences—the litigants, lawyers, judges, scholars, law students, journalists, and the public—of the rightness of the result despite their initial gut reaction that the result is wrong. If the justice has endured personal pain so that the "right result" can be reached, the reader also must tolerate the pain and accept the outcome.

Such an appeal to emotions has an ironic effect. When a judge moves from personal statement to legal argument, the law rises above the fray of passions. The detachment of the legal analysis is enhanced. The legal conclusion appears more reasonable, more authoritative, precisely because the judge has wrestled with, and overcome, the personal passions. The overall effect is a heightened sense of objectivity that befits the weighty task at hand.⁴⁹

Though I had no such intention, I suppose my words in *Mitchell* had a similar effect. By characterizing the hate crime statute as unwise, but proceeding to argue that it is constitutional, I distinguished the court from the legislature and reaffirmed their respective roles. By confessing my vacillation over the outcome of the case, but proceeding to argue that the statute should be construed narrowly and held constitutional, I made a special case for the constitutionality of this statute.

But I am perhaps giving myself, Justice Kennedy, and the judiciary in general more credit than we deserve. I recently asked a young lawyer why judges sometimes bare their souls in opinions. He thought for a moment, shrugged his shoulders, and responded that "the law clerks probably slip it in when the judge isn't looking." This attorney obviously does not hold judges in high regard, and clearly he has not clerked in *my* chambers.

His impertinence or joshing aside, this young attorney was expressing the cynicism often voiced on law school campuses around the country. I am sure Little Rock is no exception. The cynics question judges who profess to be following the law regardless of personal inclination. The law does not move along some clearly defined course, they argue; it all depends on who is navigating. So,

49. For a discussion of the importance of disinterestedness to legitimate the judicial role, see M.H. Hoefflich & Jan G. Deutsch, *Judicial Legitimacy and the Disinterested Judge*, 6 HOFSTRA L. REV. 749 (1978).

according to the cynics, when we judges painstakingly chart our course in terms of formal legal reasoning, we do so because we are unwilling to acknowledge that we do nothing more than navigate according to our own polestars.

Scholars often criticize the notion that the law forces judges to forsake their deeply held beliefs of what is right and wrong. The law is not rigid. An issue can be stated in many ways and the way the issue is phrased often determines the answer. It is rare, they say, that a judge is unable to invoke a strand of law, no matter how slender, to support what the judge believes is the better result. When a judge claims that her hands are tied and the result mandated, the judge is using what one law clerk I know calls the "wimp rationale."⁵⁰ Robert Cover, in his famous book *Justice Accused*, calls it "The Judicial Can't."⁵¹

Call me a victim of false consciousness if you wish, but I believe that most judges embark on an honest search for what the Constitution means, for what the precedents dictate, and for what the legislature intended. Judges feel constrained by our oath to decide cases according to the law even though we are sometimes unhappy with the results imposed upon litigants. Decisions not supported by strong arguments are more likely to expose us to reversal by a higher court. Poor decisions attract valid criticism by scholars, law reviews, legislators, and the media.

Whether you believe that judges are constrained is perhaps not as important as the fact that the judges I know perceive themselves as subject to constraints. Indeed the perception that curbs exist may be the most powerful factor constraining the individual judge.⁵²

Nevertheless, judges acknowledge that the scholars' point about the elasticity of the law has validity and that judges do have choices in deciding some cases. When judges analyze the range of cases before them, they estimate that in only about 5-10% of cases are

50. One commentator refers to this judicial plea as "the profession of helplessness" or the rhetoric of judicial helplessness. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1510 (1991); see also ROBERT M. COVER, *JUSTICE ACCUSED* 199 (1975).

51. ROBERT M. COVER, *JUSTICE ACCUSED* 119-23 (1975). Justice William J. Brennan, Jr., was once asked what he did when the law seemed to suggest one answer and justice another. Thinking for a moment, he responded, "I don't recall ever having such a case." Seminar, Georgetown University Law Center (Fall, 1993). Quoted with permission.

52. For a discussion of the restraints judges feel, see Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965 (1993).

the competing arguments and precedents equally strong. To decide these cases, judges must exercise a measure of discretion.⁵³

In such difficult cases, judges are critical—especially in dissent—of majority opinions that purport to be “the dispassionate oracle of the law.” To the judge who perceives the complexity of a case, the certainty of her colleagues may appear but a pretense. Perhaps to throw their sterile formalism into sharp relief, she might focus a dissent on the facts and appeal to the readers’ emotions by arguing that if the result contravenes good common sense, it must be wrong. This second form of judicial argument from the heart is reminiscent of Justice Holmes’s famous aphorism: “The life of the law has not been logic: it has been experience.”⁵⁴

It was to our human experience that Justice Blackmun appealed in his passionate dissent in *DeShaney v. Winnebago County Department of Social Services*.⁵⁵ He asserted that the question presented was open, not closed as the majority declared, and that the precedents could be read narrowly or broadly depending on how one chose to read them. In *DeShaney* a child—Joshua—was beaten by his father to the point of severe permanent brain damage. The mother brought a civil rights action on the child’s behalf against Wisconsin social workers and local officials for failing to remove him from his father’s custody even after they had become aware of the abusive treatment.

53. See, e.g., BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 857; Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 222 (1961); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 827-28 (1988).

Furthermore, the elasticity probably increases with the level of the court. The state and the federal supreme courts have more room to interpret the law and change its direction than do trial courts or intermediate courts of appeal.

54. Justice Holmes stated:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

For discussions of the roles of reason and human values in decision making, see William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 42 REC. ASS’N B. CITY OF N.Y. 948 (1987); A. Morgan Cloud III, *Introduction: Compassion and Judging*, 22 ARIZ. ST. L.J. 13 (1980); Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004 (1988); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

55. 489 U.S. 189, 212-13, 109 S. Ct. 998, 1012-13, 103 L. Ed. 2d 249, 269-70 (1989) (Blackmun, J., dissenting).

The majority held that a state had no constitutional duty to protect the child against his father's violence. The Due Process clause, said the majority, ordinarily confers no affirmative right to government aid, even when necessary to secure life. Even though "[j]udges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them," wrote Chief Justice Rehnquist, he and the majority would not recognize Joshua's cause of action.⁵⁶

Justice Blackmun eschewed the majority's formalistic, syllogistic reasoning and called for a sympathetic reading of the Fourteenth Amendment. "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [officials] who placed him in a dangerous predicament and who knew or learned what was going on, and yet essentially did nothing, except, as the Court revealingly observes . . . 'dutifully recorded these incidents in [their] files'." ⁵⁷ Blackmun's words sting. "Poor Joshua!" The words leave the reader ashamed, as if complicit in delivering the blows and in withholding aid to Joshua.⁵⁸

Justice Brennan also dissented in *DeShaney*, but in a very different style. Justice Brennan relied on legal authority—case citations and historical analysis.⁵⁹ Justice Blackmun joined in Justice Brennan's dissent but also wrote separately. Why wasn't Brennan's legal analysis enough? In *DeShaney* the majority opinion was based on the formalistic distinction between action and inaction. Justice Blackmun's stress on the facts and his expression of outrage illustrate the superficiality of the majority's reliance on an abstract legal principle, while striking a moral blow. His rhetorical device strengthened Brennan's more traditional analysis and showed how far re-

56. *DeShaney*, 489 U.S. at 202-03, 109 S. Ct. 998, 1007, 103 L. Ed. 2d 249, 263.

57. *DeShaney*, 489 U.S. at 213, 109 S. Ct. at 1012, 103 L. Ed. 2d at 270 (Blackmun, J., dissenting).

58. Justice Blackmun elaborated as follows:

It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all,' that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. 1983 is meant to provide.

DeShaney, 489 U.S. at 213, 109 S. Ct. at 1012-13, 103 L. Ed. 2d at 170 (Blackmun, J., dissenting).

59. *DeShaney*, 489 U.S. at 203-12, 109 S. Ct. at 1007-12, 103 L. Ed. 2d at 264-69 (Brennan, J., dissenting).

moved was the majority's rarified discussion from life and death realities in Joshua's home town of Neenah, Wisconsin.⁶⁰

Justice Blackmun portrayed the *DeShaney* majority and dissenting opinions as presenting the age-old conflict between legal formalism and conscience. To whisk you back to your American literature classes, it was this clash between the formal and the moral that Herman Melville explored in his masterwork *Billy Budd*. As you may recall, Billy Budd is an angelic innocent charged with fomenting mutiny and killing a fellow sailor aboard the *Belliponte*. The ship's captain, Vere, considers Billy's moral innocence, but concludes that he is bound by his imperial duty to enforce the Mutiny Act. Consequently, Billy Budd hangs.⁶¹

Melville's father-in-law was Lemuel Shaw, the antebellum Chief Justice of the Massachusetts Supreme Judicial Court. Chief Justice Shaw was an ardent abolitionist who "came down hard for an unflinching application of the harsh and summary" Fugitive Slave Act.⁶² The late Professor Robert Cover suggests in his history of slavery and the judicial process that Melville had Chief Justice Shaw in mind when he created Captain Vere, who pleaded helplessness before the law.⁶³

The judges of Melville's era grappled in the slave cases with the "moral-formal dilemma," "the demands of role and the voice

60. For a critical analysis of the rhetoric of Justice Blackmun's dissent and its reasoning as a "jurisprudence of compassion," see Benjamin Zipursky, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990).

61. For analyses of *Billy Budd*, see, e.g., William Domnarski, *Law-Literature Criticism: Charting a Desirable Course with Billy Budd*, 34 J. LEGAL EDUC. 702 (1984); Christopher J. Sterritt, *Ode to "Billy Budd": Judicial Professionalism in Modern American Military Justice*, 38 FED. B. NEWS & J. 208 (1991); Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982); Symposium, *Billy Budd, Sailor*, 1 CARDOZO STUD. L. & LITERATURE 1 (1989).

62. ROBERT M. COVER, *JUSTICE ACCUSED* 4-5 (1975).

63. Indeed, Justice Blackmun refers to Professor Cover's book, saying: [F]ormalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence, which the late Professor Robert Cover analyzed so effectively in his significant work entitled *Justice Accused* (1975).

DeShaney, 489 U.S. at 212, 109 S. Ct. at 1012, 103 L. Ed. 2d at 270 (Blackmun, J., dissenting).

Justice Blackmun analogizes the majority who claim that their decision, "however harsh, is compelled by existing legal doctrine" to the "antebellum judges who denied relief to fugitive slaves." *DeShaney*, 489 U.S. at 212, 109 S. Ct. at 1012, 103 L. Ed. 2d at 270 (Blackmun, J., dissenting).

of conscience."⁶⁴ It should come as no surprise that modern judges are likewise struggling with the conflict between legal formalism and conscience in capital punishment cases. The stakes are high, the issues complex, the time for decision often short. For example, Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit objected strenuously to the perception that some Ninth Circuit judges are "vigilante judges who oppose capital punishment and follow their personal predilections instead of the law. . . ."⁶⁵ Judge Reinhardt objected to this characterization, writing:

Nothing could be further from the truth. In capital cases no less than in other cases, the judges of this court act not on the basis of their personal views but on the basis of their understanding of their oath of office and of the requirements of due process of law. . . . [A]ll of the members of this court will follow the clearly expressed directives of the Supreme Court, no matter how offensive they may be to the sensibilities or constitutional understandings of individual judges.⁶⁶

Let us examine one judge's writing in two death penalty cases. The first case is *Maxwell v. Bishop*,⁶⁷ the second *McCleskey v. Kemp*.⁶⁸

In 1962, William Maxwell, an African American, was convicted of raping Stella Spoon, a Caucasian, in Hot Springs, Arkansas. Sentenced to death by the trial court of Garland County, Maxwell appealed.⁶⁹ On direct appeal and in his two subsequent petitions for federal habeas corpus relief, Maxwell challenged the constitutionality of Arkansas's rape statute. Among the arguments he advanced was the contention that the statute was discriminatorily enforced against African Americans and in favor of whites. Specifically, Maxwell argued that Arkansas juries customarily applied the state's rape statute in a racially discriminatory and unconstitutional manner, such that a disproportionate number of African American males convicted of raping white women received the death penalty. At three separate hearings in three separate courts Maxwell presented increasingly

64. ROBERT M. COVER, *JUSTICE ACCUSED* 6-7 (1975).

65. *Brewer v. Lewis*, 997 F.2d 550, 563 (9th Cir. 1993) (Reinhardt, J., dissenting).

66. *Id.*

67. 398 F.2d 138 (8th Cir. 1968), *vacated*, 398 U.S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221 (1970) (case vacated on other grounds).

68. 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

69. The Supreme Court later held that the sentence of death for the crime of rape violates the Eighth Amendment to the United States Constitution. *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

sophisticated statistical evidence in support of his equal protection claim.⁷⁰

The Arkansas Supreme Court rejected Maxwell's argument on direct appeal.⁷¹ Federal district judges rejected both of Maxwell's petitions for habeas corpus,⁷² as did the panels of the United States Court of Appeals for the Eighth Circuit.⁷³ The courts found the statistical evidence presented by Maxwell incomplete, not directly relevant to his individual claim, and statistically insufficient.⁷⁴

In denying Maxwell's second habeas corpus petition, the Eighth Circuit had this to say about Maxwell's evidence:

Whatever value [the statistical] argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial.⁷⁵

The Court's words are authoritative in tone and final in their implication. But at the very end of the three judge opinion the following statement appears:

[T]he fact that it is the death penalty, rather than life imprisonment . . . makes the decisional process in a case of this kind particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved

70. See *Maxwell v. Bishop*, 257 F. Supp. 710, 717-21 (E.D. Ark. 1966); *Maxwell v. Stephens*, 229 F. Supp. 205, 216-17 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965); *Maxwell v. State*, 236 Ark. 694, 699-701, 370 S.W.2d 113, 117-18 (1963). The Supreme Court of Arkansas framed the issue thus: Was the Arkansas penalty statute for rape "unconstitutional [in its application to African Americans] for the reason that in Arkansas it is the practice and custom of juries to impose the death penalty upon Negro men who rape white women, without inflicting the same punishment upon other offenders." *Maxwell*, 236 Ark. at 701, 370 S.W.2d at 117.

71. *Maxwell v. State*, 236 Ark. 694, 699-701, 370 S.W.2d 113, 117-18 (1963).

72. See *Maxwell v. Bishop*, 257 F. Supp. 710 (E.D. Ark. 1966); *Maxwell v. Stephens*, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965).

73. *Maxwell v. Stephens*, 348 F.2d 325, 330-31 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965); *Maxwell v. Bishop*, 398 F.2d 138, 147-48 (8th Cir. 1968), *vacated*, 398 U.S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221 (1970) (case vacated on other grounds).

74. "We are not certain that, for Maxwell, statistics will ever be his redemption." *Maxwell*, 398 F.2d at 148.

75. *Id.* at 147.

by the legislature or through executive clemency and not by the judiciary.⁷⁶

That's quite a confession. The decisional process, exclaims the judge, is not merely painful—it is *excruciating*. And the judge does not merely express distaste for the result reached through the law—he comes close to condemning an entire area of law, the jurisprudence of capital punishment. The judge's personal outpouring is all the more noteworthy for the footnote that is included in the disclosure: The footnote states that the other two judges on the appellate panel "do not join in this comment."⁷⁷ This express disavowal isolates the author from his brethren; he stands alone in the confession of conscience.

What drove this judge to speak what was in his heart? Was it that Maxwell's life was in the court's hands? Perhaps, but that is not a complete answer, for federal courts frequently decide habeas corpus petitions from death row. Instead, I would suggest that the discomfort arose because Maxwell's statistical evidence was challenging the core of the legal system. It was saying that there was no equal justice under law. Although this judge respected the legal proof upon which Maxwell was convicted, he was unable to dismiss Maxwell's charge of race discrimination from his consciousness. No wonder the judge was moved to express publicly the pain of drafting the opinion that brought Maxwell one step closer to execution.

In *Maxwell* the judge echoed Captain Vere as he resolutely condemned Billy Budd to the hangman's noose. Like Massachusetts's Lemuel Shaw, the judge wrestled with his principles as he tried to reach conclusions based in law. The other two judges on the Eighth Circuit panel expressly turned away from the voice of their colleague's conscience. Whether the judge's brethren in the *Maxwell* case merely disapproved of the injection of personal views in the majority opinion or fundamentally disagreed with the sentiments, we will never know.

Eighteen years later, the judge who penned those words in *Maxwell* sat on the United States Supreme Court as another condemned man presented a hauntingly similar set of facts. The judge, Justice Blackmun, listened to Warren McCleskey's statistical evidence purporting to demonstrate a disparity in the imposition of the death penalty based on the race of the murder victim.⁷⁸

76. *Id.* at 153-54 (footnote omitted).

77. *Id.* at 154 n.11.

78. *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). *McCleskey* proffered what the majority characterized as "two sophisticated

Dividing 5-4, the Court rejected McCleskey's position for reasons similar to those Judge Blackmun had expressed in *Maxwell*. This time, however, Justice Blackmun dissented. As he explained, McCleskey's statistical evidence was stronger than Maxwell's.⁷⁹ Justice Blackmun proceeded to write, however, that "[d]isparate enforcement of criminal sanctions 'destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.'"⁸⁰ He challenged the majority's fear that if McCleskey's claim were taken to its logical conclusion, it would lead to further constitutional challenges and would throw into serious question the principles underlying our entire criminal justice system. If granting relief to McCleskey "were to lead to a closer examination of the effects of racial considerations throughout the criminal justice system, the system, and hence society, might benefit."⁸¹

Any judge who voices personal views risks the reprobation of his colleagues. In making a personal statement a judge exposes himself to criticism of the type leveled by Justice Scalia at the

statistical studies" examining over 2,000 murder cases in Georgia during the 1970s, but the majority held that the studies were not sufficient to support the claim that the Georgia capital punishment statute violated the Equal Protection Clause of the Fourteenth Amendment or the Eighth Amendment.

79. *Id.* at 354 n.7, 107 S. Ct. at 1799 n.7, 95 L. Ed. 2d at 318 n.7 (Blackmun, J., dissenting).

80. *Id.* at 346, 107 S. Ct. at 1795, 95 L. Ed. 2d at 313 (citation omitted).

81. *Id.* at 365, 107 S. Ct. at 1805, 95 L. Ed. 2d at 325.

Justice Blackmun's views on the constitutionality of capital punishment came full circle after this speech was delivered in November, 1993. He dissented from the denial of certiorari in *Callins v. Collins*, 114 S. Ct. 1127 (1994), stating:

I have explained at length on numerous occasions that my willingness to enforce the capital punishment statutes enacted by the States and the Federal Government, 'notwithstanding my own deep moral reservations . . . has always rested on an understanding that certain procedural safeguards . . . would ensure that death sentences are fairly imposed.' . . . Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional. . . . I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness 'in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.' *Godfrey v. Georgia*, 446 U.S. 420, 442, 100 S. Ct. 1759, 1772, 64 L. Ed. 2d 398, 415 (1980) (Marshall, J., concurring in the judgment). I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all.

Callins, 114 S. Ct. at 1137-38 (italics omitted).

dissenters in *Herrera v. Collins*, another death penalty case.⁸² Justice Scalia concluded that the dissenters were "apply[ing] nothing but their personal opinions" and urged the dissenters to "doubt the calibration of their consciences . . ."⁸³ when the dissent opined that "[n]othing could be . . . more shocking to the conscience . . . than to execute a person who is actually innocent."⁸⁴ Such attacks can be leveled, fairly or unfairly, whenever a judge reveals, or is characterized as revealing, personal views.

Not surprisingly, judges are selective in their use of personal disclosures and emotional appeals in their opinions. Sometimes the emotional appeal is nothing more than a rhetorical device, employed sparingly to preserve its power. Or it may serve as a blunt instrument of argument, wielded only when a sharper approach eludes the writer. But I suspect that there is more to it. Argument of this type diverges too much from the reasoned, cerebral decision-making of our Anglo-American legal tradition to be used without strong emotional motivation.

For Justice Kennedy, it was a litigant who asserted his right to burn the American flag to protest government policy. For Justice

82. *Herrera v. Collins*, 113 S. Ct. 853, 874, 122 L. Ed. 2d 203, 234 (1993) (Scalia, J., concurring).

83. Justice Scalia wrote:

There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for 200 years (and remains widely approved) 'shocks' the dissenters' consciences, . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience-shocking' as a legal test.

Herrera, 113 S. Ct. at 874-75, 122 L. Ed. 2d at 234 (Scalia, J., concurring).

For another opinion by Justice Scalia accusing a Justice of voting on the basis of personal views, see *Callins v. Collins*, 114 S. Ct. 1127 (1994), a death penalty case. Justice Scalia, choosing to respond to Justice Blackmun's dissent on "personal grounds," concurred specially in the denial of certiorari, stating: The dissent "refers to 'intellectual, moral and personal' perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control." *Callins*, 114 S. Ct. at 1127 (Scalia, J., concurring).

84. "Nothing could be more contrary to contemporary standards of decency, see *Ford v. Wainwright*, 477 U.S. 399, 406, 106 S. Ct. 2595, 2600, 91 L. Ed. 2d 335, 344 (1986), or more shocking to the conscience, see *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L. Ed. 183 (1952), than to execute a person who is actually innocent." *Herrera*, 113 S. Ct. at 876, 122 L. Ed. 2d at 235 (Blackmun, J., dissenting) (italics omitted).

Blackmun, it was the state's failure to help a suffering child. For me, it was Todd Mitchell. Mitchell asked me to uphold the primacy of freedom of speech, which I called "the most treasured right in a free, democratic society." The State of Wisconsin asked me to appreciate the state's compelling interest in punishing hate crime. After much vacillation, I decided that a statute I found personally troubling was permitted by the Constitution. And so, for the first time in my seventeen years on the bench, I said so—in very personal terms.⁸⁵

Justice Blackmun was in his late seventies when he revisited the issue over which he had agonized as a younger judge. That leaves me roughly another two decades to think about hate crimes. One thing is certain: the United States Supreme Court's opinion in *Mitchell* is not the last word on the subject. It merely concludes one chapter in the evolving story of hate speech and the First Amendment.

When I wrote my dissent in *Mitchell*, expressing my personal views seemed a little like letting my judicial hair down. Looking back with some perspective, I can see new dimensions to the decision to express my personal views in print. Words and sentences from

85. Professor Wetlauffer gives the following examples of judges writing with passion:

Chief Justice Rehnquist's dissent in *Johnson*, 109 S. Ct. at 2548 (in which the court held flag burning to be protected by the first amendment); Justice Marshall's dissent in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 739 (1989) (in which the majority held an affirmative action plan to be unconstitutional); Justice Marshall's dissent in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (same); and Justice Jackson's dissent in *Korematsu v. United States*, 323 U.S. 215, 242 (1944) (in which the majority approved the wartime detention of U.S. citizens of Japanese descent); see also Justice Blackmun's dissent in *Webster v. Reproductive Servs.*, 109 S. Ct. 3040, 3067 (1989) (in which the majority upheld the constitutionality of a statute limiting the availability of abortions); Justice Blackmun's and Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199, 214 (1986) (in which the majority held that a state statute criminalizing sodomy was constitutional); Justice Jackson's majority opinion in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (in which the majority held that a mandatory pledge of allegiance was unconstitutional); Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (in which the majority held that defendants' conviction under the Espionage Act did not violate their first amendment rights); Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (in which the majority approved a state statute requiring racially segregated railway accommodations); and Justice Harlan's dissent in *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (in which the majority held that Congress lacked power to prohibit private discrimination in public accommodations).

Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1563 n.47 (1990).

the conscience play essential roles in the language of the law. The voice of a judge's conscience can enable us to believe more ardently in the principle of the law. Yet the judge's passionate words and emotive sentences can also force us to question the fairness and humanity underlying our legal system. Whether they serve to exalt or to challenge the law, words and sentences from the judge's heart most assuredly serve justice.