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***In Good Conscience:
Expressions of Judicial Conscience in Federal Appellate Opinions***
Sarah M.R. Cravens*

Abstract

This article explores judicial references to what judges may or may not do, in their own words, “in good conscience.” It assesses the most common situations in which federal appellate judges use this term and it discusses the propriety of different uses and placements of those expressions of conscientious commitments that play into judicial decisionmaking. It distinguishes between expressions of primarily institutional conscience (that is, the commitment to certain institutional values, responsibilities, or limitations on what the judge may do) and expressions of primarily personal conscience (that is, the commitment to the individual values or beliefs of the judge who expresses the matter of conscience). Having explored these categories of expressions, and the muddy middle ground between them, the article discusses questions of the legitimacy of conscience as an input to judicial decisionmaking and as a matter for open expression.

Table of Contents

I.	Introduction.....	2
	A. Looking at Judicial Conscience	2
	B. Lack of Consensus or Clarity.....	3
	C. Limiting the Field.....	5
	D. Background Theory of the Judicial Role	8
II.	Law and Conscience	9
	A. Consonance and Dissonance	9
	B. ‘Conscience’ in Judges’ Own Term.....	11
	C. The Special Problem of Discretion.....	16
	D. Differentiating Personal and Institutional Conscience	17
	E. Roadmap	19
III.	Expressions of Institutional Conscience	19

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A. <i>Basic Themes</i>	19
B. <i>Adherence to Precedent</i>	20
C. <i>Separation of Powers</i>	27
D. <i>Due Process</i>	32
E. <i>Burdens on Courts and Their Resources</i>	37
F. <i>Credibility and Reputation</i>	39
G. <i>Dissents From Denials of Rehearing En Banc</i>	42
H. <i>Conclusions on Expressions of Institutional Conscience</i>	47
IV. <i>Expressions of Personal Conscience</i>	47
A. <i>Basic Themes</i>	47
B. <i>Concurrences as Outlets for Expression Alone</i>	48
C. <i>Dissenting to Express and Follow Personal Conscience</i>	51
D. <i>Conclusions on Personal Conscience</i>	53
V. <i>The Middle Ground: Intertwined Personal and Institutional Conscience</i>	54
A. <i>Intertwined Usage</i>	54
B. <i>Lack of Specific Authority or Limits</i>	59
VI. <i>Legitimacy of Various Uses and Placements</i>	60
A. <i>Conscience in the Context of Core Commitments of Judicial Role</i>	60
B. <i>Problems with Expressions of Personal Conscience</i>	61
VII. <i>Conclusion</i>	66

I. *Introduction*

A. *Looking at Judicial Conscience*

Justice Holmes, an icon of both the theory and the practice of the appellate judicial role, once famously said that the job of the judge is not to “do justice” but simply to apply the law.¹ Along similar lines, law professors are forever reminding our students that when referring to judicial opinions, they ought to say that courts “hold” or “state” or “reason,” but not that they “feel” or “believe.” But, of course, judges are human, so we know that they *do* feel and believe things. They have convictions and commitments that are important to them, both personally and in their official capacities, both on and off the bench. While it is not commonplace, one does find statements of commitment to judicial conscience in judicial opinions. The research for this article, which focuses on the opinions

¹ See Michael Herz, *Do Justice! Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996) (recounting the uncertainty and debate over the second half of this famous saying). See also, H. Jefferson Powell, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 38 (2008) (quoting a different version of the anecdote, citing Learned Hand, THE SPIRIT OF LIBERTY 306-07 (1960)).

of federal appellate judges, has yielded many examples of courts or individual judges who do feel compelled to “do justice” with reference to their conscientious commitments. They express openly and often act on these conscientious commitments, both professional and personal, in the decisionmaking process, whether or not the “just” outcome is actually available to them as a matter of law. This means that at times, as a matter of conscience, judges do speak out, in official written opinions, against the apparently straightforward application of established law. As might be expected, there are also opinions in which judges speak out specifically *against* such expressions of conscience, either as a matter of explaining what restrains that judge from saying more, or as a matter of questioning the propriety of a competing opinion in the same case. In practice, there is little clarity, and certainly less than perfect consensus, about this aspect of the appellate judicial role.

This article explores the propriety of the use of federal appellate opinions – especially concurring and dissenting opinions – as platforms for explicit statements of conscience. The discussion here is less about the *use* of those conscientious commitments in reaching a decision, and more about what judges actually *say* about their own conscience in their opinions, and where and how they say it. It assesses normative questions about whether these expressions are generally a good or a bad thing in the larger context of the judicial role. Judicial writings are, after all, called “opinions,” but there are substantial questions about whether these opinions are supposed to include anything more or other than strict legal interpretation. This article explores the contexts and ends of expression of judicial conscience in order to determine the limits of its legitimacy. The article does not catalog the psychological or sociological literature on conscience. Nor does it attempt to define conscience as distinct from any other kind of moral commitment.² Instead it will be limited to an exploration of what judges themselves actually say on the record in their official opinions that indicates some resort to what those judges themselves refer to specifically as their “conscience.”

B. Lack of Consensus or Clarity

The lack of clarity, in both theory and practice, as to where these expressions of conscience belong (if anywhere), and what they may or should include, is revealed in the lack of a consistent practice and in the varying reactions of individual judges to the choices made by their colleagues. One example of a hesitant uncertainty about what the judicial conscience is, and how it ought to be

² There are other discussions of attempts to differentiate between conscience, religious beliefs, morality, and so on. See, e.g., Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901 (2010); Martha C. Nussbaum, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY (2008).

used in the decisionmaking process, appears in an old case from the Seventh Circuit. Judge Grosscup, in a dissenting opinion in a case about gambling, wrote:

Gambling and gambling devices are condemned by the laws of every state and territory, except perhaps New Mexico. Upon this it can be safely predicated that *the conscience of the people* of the state in which this court sits; of the people of the three states that constitute this circuit; indeed, of the people of every state and territory, except a little territory bordering on Mexico, condemns the practice of gambling. Gambling and gambling devices are condemned, also, by the enactments of congress, in the statutes forbidding the use of the mails in aid of lotteries and other gambling purposes. Thus the *national conscience* is seen to be outspoken against the practice. Nothing could be conceived more conclusively showing *a general conscience*, and a general conception of policy. *Unless a moral sense, thus widespread and unanimous, may be accepted as the conscience, not simply of the chancellor, but the judicial conscience, I am at a loss to know where to look for any authority for judicial conscience.*³

Despite the rhetorical uncertainty of Judge Grosscup's position here, his position may be contrasted with the more recently stated view of Judge Gould of the Ninth Circuit, who wrote as follows: "...I pen this dissent to explain my views, because a dissent is a matter of individual judicial statement and *individual judicial conscience.*"⁴ Notably, neither of these judges made an effort to provide any authority for their understanding of, or authority to make reference to, "judicial conscience." In this, they are by no means alone. There is great variety in the apparent meaning and scope given to the idea of judicial conscience as expressed in judicial opinions, and very little, if any, support offered for any of those positions. Thus only an examination of the practical usage of the term can hope to yield a better understanding of the legitimacy of these expressions.⁵

As to more specific questions of placement, there is a similar lack of clarity and consistency. Indeed, one may find cases in which the three judges on a single panel agree about an underlying substantive point of right or wrong, justice or injustice, but apparently disagree about the propriety of whether to

³ Fuller v. Berger, 120 F. 274 (7th Cir. 1903) (Grosscup, J., dissenting) (emphasis added).

⁴ Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1038 n.1 (9th Cir. 2010) (Gould, J., dissenting) (emphasis added).

⁵ See Kent Greenawalt, *The Perceived Authority of Law in Judging Constitutional Cases*, 61 U. COLO. L. REV. 783, 786 (1990) (making similar commentary on the need to look at actual practice to understand judicial conduct).

mention their conscientious concerns and about where to make that mention. They may make their points in separate opinions and give differing kinds and degrees of explanation for the approaches they have taken.⁶ For instance, a majority might apply the law as it stands, but as a matter of conscience note its harshness; a concurrence in the same matter might particularly note the fact of binding precedent in the face of both personal and institutional conscientious objections; and a dissent might state without further explanation a level of conscientious discomfort rising to an inability to follow the established law.⁷ This last is perhaps most clearly an abdication of the judicial obligation to apply the law, but the fact that it happens at all demonstrates some practical need for such an opportunity for expression on the part of those who occupy the judicial role.

This is also a topic on which many judges have spoken in their off-the-bench capacities, in speeches or essays intended either for those in the legal academy or for the general public. In those off-the-bench contexts, judges are all over the map in their assessments of what is appropriate to the judicial role, and why, on what course of action is appropriate, and which are the proper motivations for the judge.⁸ They are in substantial agreement, however, about the fact that these are not purely academic questions, but rather, real and painful dilemmas they must face in the fulfillment of their basic role obligations.

C. *Limiting the Field*

The field for this paper is limited to opinions written by intermediate federal appellate judges. In addition to simply narrowing the field to a more manageable number of opinions, this limitation eliminates a variety of complications. First, by eliminating the state-court-specific issue of the potential impact of the opinions on retention by re-election or reappointment, it considers only the work of those who have the comparative security of life tenure, which might factor into judicial decisions about what to express in written opinions. In this way, any (to my mind improper) *representative* notions of the judicial role and accountability in that role, are largely eliminated.⁹

Second, it excludes the opinions of courts of last resort, which have more commonly been the focus of attention in discussions of the proper uses of

⁶ See, e.g., Rico v. Terhune, 63 Fed. Appx. 394 (9th Cir. 2003); Wallace v. Castro, 65 Fed. Appx. 618 (9th Cir. 2003); Turner v. Candelaria, 64 Fed. Appx. 647 (9th Cir. 2003).

⁷ *Id.*

⁸ In the absence of clear law or openly established norms of practice, these tend to be very individualized notions. Informally, for example, one federal appellate judge of long experience once explained to me that one dissents only “when one’s indignation outstrips one’s inertia.”

⁹ To my mind, such representative notions of the judicial role are entirely improper. Cf. Republican Party of Minnesota v. White, 536 U.S. 765, 803-806 (2002) (Ginsburg, J., dissenting).

concurrences and dissents.¹⁰ The current Model Code of Judicial Conduct does not speak to the issue of concurring or dissenting as presenting any questions, ethical or otherwise,¹¹ but the 1924 ABA Canons of Judicial Ethics did have one paragraph on the subject. Former Canon 19 (on Judicial Opinions) said, in pertinent part:

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusions and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. *Except in case of conscientious difference of opinion on fundamental principle*, dissenting opinions should be discouraged in courts of last resort.¹²

There is no such special consideration of separate opinions at the intermediate appellate level, though of course the second sentence of the passage may be applied with equal meaning for courts of all levels. Despite the lack of official attention or instruction, at least one of the rationales supporting the worth of concurring and dissenting opinions – that is, signaling to a higher court an argument for a change in the law – is irrelevant to a court of last resort. But more importantly, thinking in terms of differentiated understandings of the judicial role at different levels, a court of last resort – particularly the United States Supreme Court – may be more readily accepted as one that more naturally has to make

¹⁰ In 1952, the American Bar Association sponsored an essay contest on the subject of “The Functions of Concurring and Dissenting Opinions in Courts of Last Resort,” which prompted several contributions on the subject. *See, e.g.*, R. Dean Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821 (1952) (winner of the competition); Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952) (another entry). Several others, in addressing the issue of special opinions, have focused on issues specific to courts of last resort. *See, e.g.*, Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 180-83 (2002) (articulating differences between collaborative and oppositional dissents at the United States Supreme Court); Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794 (1953) (mainly written to criticize one California Supreme Court justice’s dissents).

¹¹ American Bar Association, Model Code of Judicial Conduct (2011 ed.) (hereinafter “ABA MCJC”).

¹² American Bar Association, Canons of Judicial Ethics (1924) (emphasis added).

more ultimate political or value judgments,¹³ and thus, the central question of this paper might be answered differently in the context of courts of last resort.¹⁴

Third, by taking district court judges out of the analysis, the article contemplates collegial judging in which there is more obviously room for one judge to disagree with colleagues on a panel without practical disruption of the status quo in the law. Fourth, it significantly limits the number of questions of fact, as opposed to questions of law. The questions of fact remain to some extent in the appellate review of findings of sufficiency of evidence, harmful error, and abuse of discretion, and these are situations that do tend to provoke personal views in appellate opinions, but again, the sheer number of these is reduced at the appellate level, and the focus is thus more clearly on developing and clarifying the law and its practical application with regard to these fact questions, as opposed to the broader ranging task of actually making the basic factual findings at the district court level.

Ultimately, this limitation to the opinions of federal appellate courts presents the question in its most distilled form, considering the perspective of non-elected, life-tenured, and (at least theoretically) non-last-resort judges,¹⁵ who deal primarily in questions of law rather than fact. Moving from conclusions about expressions of conscience in this limited context, one might then be able to go further with regard to assessment of the propriety of the practice by judges in other courts. This article thus only tackles a small piece of the bigger question about the extent to which judges are meant to consider or use their own views or consciences in their judicial decisionmaking, or how they might operate without them wherever practical judgment is required. The answers to these questions will of course have implications for their fit into a broader theoretical and practical theorization about the fulfillment of the core commitments essential to the integrity of the judicial role.

¹³ See, e.g., Chris W. Bonneau and Melinda Gann Hall, IN DEFENSE OF JUDICIAL ELECTIONS 11 (2009).; James L. Gibson, *The Effects of Electoral Campaigns on the Legitimacy of Courts*, 59 SYRACUSE L. REV. 397, 413 (2009) (referring to courts of last resort as “policy makers”).

¹⁴ This is not to say, of course, that many of the arguments presented in the paper might not be relevant as well to courts of last resort, but for purposes of a purer focus, the issues peculiar to courts of last resort are eliminated here.

¹⁵ Due to the very small number of cases taken by Supreme Court, there are ways in which intermediate appellate courts in the federal system are *de facto* courts of last resort, but the cases that may be most likely to call for separate opinions may at the same time be those most likely to have a chance at being further reviewed, so the *de facto* reality does not end the inquiry into the particularities of intermediate appellate role.

D. Background Theory of the Judicial Role

The understanding of the judicial role that lies at the heart of this paper is one of institutional trusteeship of judges. In this model, judges act as trustees of the corpus of the common law, maintaining its integrity through fidelity to past decisions and continuing consideration of fit and consistency between and among various areas of the law as they develop.¹⁶ Intermediate appellate judges, as trustees of the law, are accountable to the public for their management of the corpus, which accountability they provide primarily in the body of their opinions. These judges are in a position to develop and maintain a special perspective on the law, one that is both practical and theoretical, both specific and overarching, both immediate and long term.

Furthermore, along with all of the many legal decisions judges must make in the execution of their responsibilities, they must always be making decisions about allocation of court resources. Trusteeship implicates a broad array of institutional responsibilities – core commitments such as fidelity to legal (especially constitutional) authority, impartiality, independence, accountability, and practical wisdom – to which judges must be committed.¹⁷ They must have good judgment about these matters of resources just as they do in their application of the law. Such good judgment and practical wisdom is, for many if not all judges, and whether they mention it or not, likely a matter of conscience at some level.

¹⁶ Though compliance with the law is arguably the most basic aspect of common law judicial decisionmaking, (*see, e.g.* ABA MCJC, *supra* note 11, Rule 1.1), even on this point, some disagree. Jerome Frank, for instance, argued that there was no hard and fast obligation to follow the law, but wrote instead: “But the power to individualise and to legislate judicially is of the very essence of their function. To treat judicial free adaptation and lawmaking as if they were bootlegging operations, renders the product unnecessarily impure and harmful.” Jerome Frank, *LAW AND THE MODERN MIND* 121 (1930). Pointing especially to what he called the “leeways of precedent,” Karl Llewellyn advocated a quite flexible view of appellate judicial interpretation as a matter of craft and “situation-sense.” *See* Karl N. Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). A rather more recent view defending outright judicial deviation from the law suggests that at times, judges “have the moral right, and moral reasons, to disregard clear legal mandates, and not only when the law is extremely unjust.” Jeffrey Brand-Ballard, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* 13 (2010). Prof. Brand-Ballard does not direct specific attention to the particular question of judicial “conscience” as that term is used by judges themselves, so does not reach the precise issue addressed in this article.

¹⁷ These commitments lead one scholar to refer to judges as the “most constrained” of officials when it comes to the bases for their decisions. *See* Kent Greenawalt, *Religious Liberty and Democratic Politics*, 23 N. KY. L. REV. 629, 637 (1996).

II. Law and Conscience

A. Consonance and Dissonance

Law and conscience will of course often be perfectly consonant.¹⁸ Most of the time, this should be fairly unremarkable, and thus it will not be mentioned in the mine run of opinions. In those situations where no judge on the panel disagrees on any material matter in the case, so that only a majority opinion will be published, there is often little to be gained by adding considerations of conscience or morality to support what is already established law.¹⁹ It does happen, though, most commonly in instances in which the opinion underscores the judicial obligation of faithful adherence to precedent as a matter of institutional conscience.²⁰ Other common circumstances for references to conscience as further support for an otherwise already legally tenable position include matters implicating issues of judicial resources and burdens on the courts²¹ other players in the justice system,²² issues of substantive or procedural fairness,²³ and others still.²⁴

¹⁸ See, e.g., H.L.A. Hart, *THE CONCEPT OF LAW* (2d ed. 1994); Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1977); Lon L. Fuller, *THE MORALITY OF LAW* (1964).

¹⁹ Some would not even support the expression of personal reasons to bolster legal determinations. See, e.g., Kent Greenawalt, *Religious Liberty and Democratic Politics*, 23 N. KY. L. REV. 629, 637 (1996).

²⁰ See, e.g., *Carnival Leisure Indus. v. Aubin*, 53 F.3d 716, 719 (5th Cir. 1995); *Prudential Ins. Co. v. U.S. Gypsum Co.*, 991 F.2d 1080, 1088 (3d Cir. 1993); *Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir. 1985). The term ‘institutional conscience’ is further elaborated *infra* at Sections II.D. and III.

²¹ See, e.g., *Johnson v. Rodriguez*, 943 F.2d 104, 110 (1st Cir. 1991) (concern about condoning litigation that is unmeritorious); *Brown v. United States*, 890 F.2d 1329, 1347 (5th Cir. 1989) (concern about allowing litigation to go on with no definite end point).

²² See, e.g., *United States v. Corona*, 661 F.2d 805, 809 (9th Cir. 1981) (Sneed, J., dissenting) (acknowledging it is a difficult case, and majority’s position is defensible, but cannot in good conscience ask police officers to subject themselves to the risks that the majority’s rule would create for them).

²³ See, e.g., *Morelite Construction Co. v. NYC District Council*, 748 F.2d 79, 84 (2d Cir. 1984); *Hatch v. FERC*, 654 F.2d 825, 836 (9th Cir. 1981); *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 996 (9th Cir. 1980)

²⁴ See, e.g., *Stanley v. Schriro*, 598 F.3d 612, 615 (9th Cir. 2010) (on appeal of denial of habeas petition in multiple murder case with both life and death sentences, court remanded on grounds relating to adequacy of counsel, noting that “We simply cannot *in good conscience* continue to send men to their deaths without ensuring that their cases were not prejudiced...” (emphasis added)).

Such positions do not only appear in unanimous majority opinions, but also in dissents in those cases in which at least one judge believes that he is correct both on the law and on the morality, but is compelled to write in a dissenting opinion due to a difference of legal interpretation between the dissenter and others on the court.²⁵ It is the expressions of the consonance of law and conscience that appear in the concurring and dissenting opinions, though, that turn out to be more worthy of note for the purposes of this discussion. Where the consonance appears in a majority opinion, it simply has that much less force or weight, in the light of the clarity of the established law. However, this article does not limit its discussion to cases in which conscience differs from law. Any resort or reference to conscience is ripe for discussion in the effort to develop a fuller and clearer understanding of what judicial conscience is and how it fits into the shape of the judicial role.²⁶

While there is perhaps an interesting academic question about the propriety of judicial reference to conscience in further support of an uncontroverted legal interpretation, the more difficult question is what ought to happen when a judge's considerations of conscience are in *conflict* with established law, or at any rate with the interpretation of the law accepted by a majority of the relevant panel. Any judge who feels faced with a serious dissonance between law and conscience has an array of options at least apparently open to him. To state them roughly and in relatively short order, a judge could: (1) keep silent about the conflict and simply follow the law;²⁷ (2) follow the law,

²⁵ See, e.g., *Joyce v. Town of Tewksbury, Mass.*, 112 F.3d 19, 25(1st Cir. 1997) (Selya, J., dissenting) (asserting that majority's result condones an unconstitutional and intolerable result, which he cannot in good conscience join). The *Joyce* case drew two other concurrences as well, one of which was sympathetic to the dissenting position, but found the very fact of strong disagreement of the judges to be evidence that the law wasn't clear enough to show conclusively that the actions in question were objectively unreasonable, *id.* at 24 (Lynch, J., concurring), and the other of which took issue with the dissent for having lost sight of the reasonableness standard, *id.* at 23-24 (Torruella, J., concurring). See also *Ferguson v. Knight*, 809 F.2d 1239, 1247 (Jones, J., dissenting) (asserting that court can only rely on evidence properly before it: "I cannot in good conscience or consistent with my oath, agree to affirm the judgment below. Justice is being mocked here."); *Hatfield, by Hatfield v. Bishop Clarkson Memorial Hosp.*, 701 F.2d 1266, 1269 (8th Cir. 1983) (Lay, J., dissenting).

²⁶ It is only the judicial references to the conscience of the court or of the individual judge that are covered here. References to the conscientious responsibilities or the conscientious beliefs of others – whether made in passing or in the application of legal standards implicating the language of conscience – are thus left out of the discussion. So, for example, Judge McKee, of the Third Circuit, notes the "human cost" and the "unconscionable delay" attributable to the government in the long term process of a particular immigration case, but he is not talking about the good conscience of the court, but rather about the conscientious responsibility of the government. See *Alvarado v. Atty. Gen. of the United States*, 401 Fed. Appx. 673, 675 (3d Cir. 2010) (McKee, J., concurring).

²⁷ By their very nature, such cases cannot be found for citation.

but state the conflict (whether in majority, concurrence, or dissent);²⁸ (3) comply with the law and keep silent about the conflict from the bench, but work off the bench on law reform efforts in the area of concern;²⁹ (4) find a way (whether honest or disingenuous) to get to the conscientious-but-not-legal result without mentioning the conflict;³⁰ (5) state the conflict and follow conscience rather than law (again, whether in majority, concurrence, or dissent);³¹ (6) dissent without giving a reason;³² (7) recuse from the case;³³ or (8) resign from the bench;³⁴ It is a broader question, for a separate article, as to how a judge ought to make the decision about which option to choose from this full array. This article is limited, as far as possible, to the question of the proper uses of separate opinions for the expression of personal convictions by judges of the federal appellate courts.

B. 'Conscience' in Judges' Own Terms

When judges use words and phrases like “in good conscience” or “unconscionable,” they do so in many contexts and with a broad range of ideas apparently in mind.³⁵ Though some scholarship in this area tends to be focused

²⁸ See discussion *infra* at Section III.

²⁹ See, e.g., ABA MCJC, *supra* note 11, Rule 3.2 cmt [1], Rule 3.1 cmt [1, 2], Rule 1.2 cmt [4] (2011 ed.).

³⁰ See, e.g., Greenawalt, *supra* note 17 at 637.

³¹ See, e.g., Rico v. Terhune, 63 Fed. Appx. 394, *1 (9th Cir. 2003); Wallace v. Castro, 65 Fed. Appx. 618, 619 (9th Cir. 2003) (Pregerson, J., dissenting); Turner v. Candelaria, 64 Fed. Appx. 647, 648 (9th Cir. 2003) (Pregerson, J., dissenting); Trailer Train Co. v. State Tax Commission, 929 F.2d 1300, 1304 (8th Cir. 1991) (Gibson, J., dissenting) (“I do not fault the majority for following the precedents of this and other courts of appeal, but I simply cannot in good conscience participate in the judicial extension of legislation to an absurd end.”).

³² These “silent” dissents are a subject of some debate. Arguments can be found on both sides. Compare, e.g., Hon. Francis P. O’Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 93 (1998) (essential to give reasoning for a dissent); and Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957) (suggesting that in some instances it is best for the judge to “record his dissent in two words”).

³³ Like the cases in which judges remain silent as to the conflict or the issue of conscience, because judges typically do not give their reasons for recusing in written form, such cases cannot be provided for citation.

³⁴ See, e.g., Gene E. Franchini, *Conscience, Judging, and Conscientious Judging*, 2 J. APP. PRAC. & PROCESS 19 (2000) (recounting resignation in face of what he saw as a conflict between his oath of office and his conscience).

³⁵ Sometimes the phrases are used when there is no obvious matter of conscience independent from the proper interpretation and application of the law. See, e.g., Clephas v. Fagelson, Shonberger, Payne & Arthur, 719 F.2d 92, 95 (4th Cir. 1983) (Hall, J., concurring) (disagreement stated as a matter of conscience appears to be simply an argument that the majority got the law wrong, and did so by “cavalierly disregard[ing]” precedent); Harris v. Sentry Title Co, Inc., 715 F.2d 941, 961 (5th Cir. 1983) (Will, J., dissenting). (After a rehearing before the same panel, Judge

specifically on the role or expression of a judge's religious faith,³⁶ it can be hard to distinguish – and it is probably pointless to try to divine any distinction, for purposes of this paper – between religiously-based convictions and any other personal commitments that underlie actual judicial usage of the word 'conscience.'³⁷ It is difficult to pin down a particular consensus definition of conscience or the unconscionable, either in the actual usage by judges or in the legal academic literature that has built up around this concept. Much might be included, but some usages are clearly of more import than others for this topic. *Black's Law Dictionary* defines conscience as "1. The moral sense of right or wrong; esp., a moral sense applied to one's own judgment and actions. 2. In law, the moral rule that requires justice and honest dealings between people."³⁸ This underscores the overlap and thus the lack of specific distinction, among the terms 'conscience,' 'morality' and 'justice.'³⁹

These terms must, to a certain extent, be left a bit muddy, because one must take them as the courts use them. Judges are not necessarily philosophers or

Will again dissented, but made no further specific reference to conscience. *Harris v. Sentry Title Co.*, 727 F.2d 1368 (5th Cir. 1984.) Along similar lines, the concurrence/dissent in *United States v. Holmes* uses language about conscience and 'miscarriage of justice,' but does so in the context of what looks like an argument about the validity of the majority's interpretation of precedent. The opinion uses conscience on both sides, talking both about "conscientious" deference to precedent and about a potential miscarriage of justice in following that precedent as interpreted. *United States v. Holmes*, 822 F.2d 481, 506 (5th Cir. 1987) (Brown, J., concurring in part and dissenting in part).

³⁶ See, e.g., Diarmuid O'Scannlain, *Must a Faithful Judge be a Faithless Judge?*, 4 U. ST. THOMAS L. J. 157 (2006); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347 (2006); William H. Pryor, Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1, 8 (2003); Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513 (1998); Ori Lev, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J. L. & RELIG. 637 (1995).

³⁷ Greenawalt, *supra* note 2, at 909-16.

³⁸ BLACK'S LAW DICTIONARY (9th ed. 2009). Further definitions of terms such as "conscience of the court" and "shocks the conscience" reiterate concepts of "fairness" and "justice" as the basis for conscience. "Conscionable" is defined as "conforming with good conscience; just and reasonable." "Shock the conscience" goes somewhat further, in its meaning: "to cause intense ethical or humanitarian discomfort." "Unconscionability" is defined as "extreme unfairness" and "unconscionable" is defined as "(of a person) having no conscience; unscrupulous" and as "(of an act or transaction) showing no regard for conscience; affronting the sense of justice, decency, or reasonableness."

³⁹ Acknowledging that definitions of conscience may vary according to context, Prof. Greenawalt has suggested that matters of conscience are those that involve "judgments believed by those making them to be of considerable moral importance." Greenawalt, *supra* note 2, at 901, 903-04. Martha Nussbaum somewhat more broadly suggests that conscience is a matter of the "search for life's ultimate meaning." Nussbaum, *supra* note 3, at 19. Prof. Powell, writing about conscience in Supreme Court decisions in Constitutional cases, speaks of making decisions "in good faith" and "according to the rules." Powell, *supra* note 1, *passim*.

linguists, and they are not typically concerned with precision about distinctions among these particular terms.⁴⁰ Furthermore, to get too technical about the verbal or semantic distinctions here might even encourage an unwarranted and unhelpful formalism by judges. Examination of the variety of uses of these terms by judges does however reveal some broad categories of apparent meaning. Sometimes it is a matter of a judge's core personal conviction about right and wrong; sometimes it is a matter of responsibility for the integrity of the institution (for the proper role of the court, for its reputation, or for proper use of its resources, for example);⁴¹ sometimes it is an attempt to speak for something like a 'common conscience' or a common public notion of justice or other values;⁴² sometimes it is simply a matter of personal honesty about a particular view of the facts or the law in a given case.⁴³

Very often, phrases like "in good conscience" or "unconscionable" or other variants on these, come up in cases having to do in one way or another with liberty interests, and of those very often the cases are before the court on appeals of denials of habeas petitions.⁴⁴ These are decisions in which a panel's collective decision may effectively be the end of the road on life and death issues. Another common context for these expressions of conscience is in dissents from denials of petitions for rehearing en banc – again, an end of the road determination, which may introduce frustration about the full court not taking up a matter a judge

⁴⁰ Judge Merritt, for example, at one point roughly equates the idea of 'judicial conscience' with 'equity,' but the terms of that equation are themselves quite flexible and open. *United States v. Phinazee*, 515 F.3d 511, 522 (6th Cir. 2008) (Merritt, J., dissenting).

⁴¹ *See, e.g.*, *Campbell v. Wood*, 18 F.3d 662, 717 (9th Cir. 1994) (en banc) (Reinhardt, concurring in part and dissenting in part) (on how majority opinion, which is inconsistent with dignity of man, will harm reputation of court); *Doherty v. Thornburgh*, 943 F.2d 204, 214 (2d Cir. 1991) (Altimari, J., dissenting) ("cannot in good conscience sit idly by and allow the Due Process clause to become mere words). An historical perspective adds the idea of a meaning of honesty with special reference to judicial knowledge of facts not otherwise admissible/provable. *See* Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659 (2007).

⁴² *See, e.g.*, *Fuller v. Berger*, 120 F. 274 (7th Cir. 1903) (Grosscup, J., dissenting).

⁴³ *See, e.g.*, *United States v. Silva-Arzeta*, 602 F.3d 1208, 1220 (10th Cir. 2010) (Holloway, J., dissenting) (stating that though he cannot find fault with the majority opinion, he nonetheless cannot sign on to an opinion that affirms such a troubling accumulations of police errors); *Byrd v. Collins*, 209 F.3d 486, 548 (6th Cir. 2000) (Jones, J., dissenting); *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 616 (1st Cir. 1996) (Cyr, J., dissenting) (citing "fundamental disagreement" with treatment of this case under Supreme Court precedent). In this last case, a concurrence called it a close case under precedent, noted the muddled nature of Supreme Court precedent, and noted that it was only a matter of the binding nature of that precedent that permitted him to sign onto the opinion in good conscience. *Id.* at 616 (Selya, J., concurring).

⁴⁴ *See, e.g.*, *Ferguson v. Knight*, 809 F.2d 1239, 1247 (Jones, J., dissenting); *Campbell v. Wood*, 20 F.3d 1050, 1051-54 (1994) (Reinhardt, J., concurring in part and dissenting in part); *Campbell v. Wood*, 18 F.3d 662, 717 (9th Cir. 1994) (Reinhardt, J., concurring in part and dissenting in part); *Harris v. Vasquez*, 949 F.2d 1497, 1540 (9th Cir. 1990)

believes to be a moral imperative for further attention.⁴⁵ Although judges certainly do use other related terms such as morality, injustice, and unfairness as well in these kinds of scenarios, this article limits the discussion to those specifically using ‘conscience’ and its cognates, in an attempt to get a clearer picture of what judges themselves see as the proper role for their conscientious commitments in their decisionmaking and what that may reveal to help us better understand the larger shape of the judicial role.⁴⁶

⁴⁵ See discussion *infra* at Section III.G.

⁴⁶ Though this paper is limited to judicial references to “conscience” in particular, similar themes emerge in cases using other terms, so the observations here may be more broadly true of judicial use of other terms as well. For example, without referencing “conscience” specifically, Judge Hill wrote in a dissenting opinion about the responsibility to follow the law even where the judge’s own view may differ (i.e. a point similar to what will be discussed below on matters of separation of powers):

As I have previously asserted, the adage “Hard cases make bad law” ought to be taken as a warning and not as a mandate. *In re Southwestern Bell Tel. Co.*, 542 F.2d 297, 298 (5th Cir. 1976) (Hill, J., dissenting), *rev’d*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977). This is a hard case. The court, today, makes bad law. Though tempted, I cannot join. The court faces a “hard” case “whenever the judge of the court has the power to order that which he believes to be right and, yet, he does not have the authority to issue the order.” *Id.* This case qualifies as a “hard” case. The district court found that McGinnis “suffered many more racial indignities at the hands of the Company than any one citizen should be called upon to bear in a lifetime.” . . . Although we yearn for McGinnis to be compensated for those indignities and though the federal courts have power to order compensation, I submit that we unfortunately may not have the authority to do so.

McGinnis v. Ingram Equip. Co., Inc. 918 F.2d 1491, 1498 (Hill, J., dissenting) (citations omitted.) Along similar lines, Judge Bork dissented, speaking to the temptation judges face with regard to doing justice, again without specific reference to conscience, but illuminating similar themes:

This case illustrates the costs to the legal system when compassion displaces law. The panel majority says it is not too late for justice to be done. But we administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law. The wartime internment around which this case revolves is undeniably a very troublesome part of our history. It is within the authority of the political branches to make whatever reparations they deem appropriate, and it is my understanding that such legislation is presently under consideration. The issue of whether an additional remedy is available from a court, and, if so, which court, should only be resolved on the basis of a sober and fair assessment of the legal claims presented. When a court relies instead on a plainly deficient analysis, it fails to do justice to the parties before it, and inevitably establishes those deficiencies as precedent. The temptation to do so, in service of an attractive outcome, is often strong. The panel opinion in this case, which completely disrupts a carefully crafted jurisdictional scheme while

Some instances of these words and phrases relating to conscience should be bracketed off from the central inquiry here – most notably those in which the word or phrase is itself a part of a legal standard being applied. So, for example: “unconscionable” where it is used as a standard in the substantive law of contract;⁴⁷ “in equity and good conscience” where it is used as a substantive standard under FRCP 19(b) with reference to joinder;⁴⁸ and “shocks the conscience” with regard to judicial review of damages awards.⁴⁹ In these instances (among others), because judges are explicitly employing the terms themselves as legal standards, the words come with more established meanings in case law – they are terms of art with definitions already built up in the law. Thus in these instances, there is less (if indeed any) idea of potential dissonance between law and conscience on the part of the individual judge. The deployment of the legal standard may require some application of the individual judge’s own conscientious commitment, but that standard in which conscience is explicitly called for will be imbued with and guided by the implications of past decisions under the standard. In these situations, there is no controversy or conflict over the propriety of the expression of what might be thought of as a personal view of conscience, because here the personal has been, to a limited extent, expressly imported into the legal analysis. In short, the law itself calls for the judge’s consideration of conscience. These are situations in which the law explicitly calls for the application of the “practical wisdom” of the judge. This article for the most part leaves aside discussion of these situations in order to focus on those in which the judge decides, independent of any explicit legal permission or requirement, to express a view as to conscience.

Some federal appellate judges seem more inclined than others to give open written expression to their appeals to conscience in their decisionmaking.⁵⁰

establishing several unfounded and undesirable precedents as law, demonstrates why such temptations ought to be resisted.⁴⁶

Hohri v. United States, 793 F.2d 304, 313 (D.C. Cir. 1986) (Bork, J., dissenting). The emphasis here on “costs to the legal system” and “a carefully crafted jurisdictional scheme” underscores the institutional or public perspective here, as opposed to the personal, and sets up a direct contrast between that perspective - “law” - and “compassion” which it sets up as a temptation to incorporate the more personal. The explanation given here regarding context does not shy away from resorting to common sense, but still notes the impropriety of succumbing to the temptations to do justice apart from the law.

⁴⁷ UNIFORM COMMERCIAL CODE §2-302.

⁴⁸ Federal Rule of Civil Procedure 19(b).

⁴⁹ See 11 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §2815, at 162 n.7 (2d ed. 1995).

⁵⁰ On the Ninth Circuit, Judges Pregerson and Reinhardt easily top the list. Following behind them are, on the First Circuit, Judge Selya; on the Second Circuit, Judge Feinberg; on the Sixth Circuit, Judge Keith, and on the Eighth Circuit, Judge Lay.

However, it is hard to say for certain why this might be so. No particularly reliable patterns emerge in looking at the work of any given judge, as to justification, placement, or any other aspect of the expression. The best one can do is assess the broad sweep of the circumstances in which these expressions of conscience appear across the board, looking at the content, the tone, the contextual placement in majorities, concurrences, or dissents, and try to get a picture of what judges on these particular courts are doing. Whatever one may gather from that effort may then provide a jumping-off point for assessment of the propriety of these expressions as an aspect of the judicial role more broadly, considering other types of courts with different tasks, different selection and retention methods, and so on.

C. The Special Problem of Discretion

A murky and therefore problematic area for this question is that of review of discretionary decisions, where a real lack of clarity or consensus about the bounds on proper inputs or the forthrightness of explanation clouds the field of appellate review.⁵¹ The appellate standard of “abuse of discretion,” if it is to mean something distinct from clear legal error must, to a certain extent, be in the eye of the beholder – a matter of individual judgment.⁵² Where discretion exists, there is a range of options properly available to the decisionmaker at a lower level, any of which must be permissible.⁵³ The substance and process of such discretionary decisionmaking is more guided, more circumscribed or curtailed, in some bodies of law than in others.⁵⁴ The more guidance is given, the more these discretionary decisions are tied to an established concept of “the law.” The less guided they are, the more the implication for the reviewing judge is one that allows (or even requires) a degree of second-guessing the original decisionmaker based on how the reviewing judge would have made the original decision.⁵⁵

⁵¹ See Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947 (2010).

⁵² Black’s Law Dictionary defines “discretion” variously as “wise conduct and management; cautious discernment; prudence;” “individual judgment; the power of free decision-making;” “a public official’s power or right to act in certain circumstances according to personal judgment and conscience.” BLACK’S LAW DICTIONARY (9th ed. 2009).

⁵³ Abuse of discretion is defined in *Black’s* as “1. An adjudicator’s failure to exercise sound, reasonable, and legal decision-making. . . . 2. An appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.”

⁵⁴ See Cravens, *supra* note 51, *passim*.

⁵⁵ *Id.* One assessment of the propriety of rule-departures by public officials suggests that discretionary decisions may be the only proper ground for judicial departures from the rule of law in deference to the judge’s own preferences. See Mortimer R. Kadish & Sanford H. Kadish, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 91 (1973)

Plenty of language in case law and in secondary materials insists that decisions about abuse of discretion ought not to be about second-guessing, or about the application of a different (and not necessarily better) judicial instinct, but without other content to fill the standard, these may well be further instances that explicitly invite the judge's personal views into the mix.⁵⁶ If that is so, those personal views ought to be as freely expressed as those noted above in response to the standards like "unconscionable" and "shocks the conscience," not just for purposes of transparency and understanding of what goes on in the process of judicial decisionmaking,⁵⁷ but to provide better guidance to the lower court decisionmakers about what lies inside and outside the bounds of the standards that apply to their work.

D. Differentiating Personal and Institutional Conscience

Though this article specifically excepts certain types of decisions for purposes of its discussion, there is really nothing to limit the subject matter of the cases in which these statements of judicial conscience may be found. They crop up in a multitude of matters from the most dramatic issues of personal dignity and liberty, to those of discrimination, to personal injury cases, will contests, and even seemingly mundane matters of statutory interpretation implicating significant issues about the role of the courts, or the doing of justice. There is, however, one significant line that can be drawn, cutting across the divisions of subject matter. It is not a perfectly clear or exact line, but it is an important one nonetheless. It is the line between expressions of *personal* conscience and expressions of the *institutional* conscience of the judiciary.

When we look at what judges actually say, in the cases in which they note either a conflict or a consonance between the law and the judicial conscience, the categories are not hermetically sealed from one another. They do bleed over into

⁵⁶ Or as one panel from the Eighth Circuit put the issue, using the term "judicial 'grace'":

An exercise of the power to require the Government to furnish the defendant with a copy of his confession would of course, be wholly a matter of judicial grace. There could hardly be any need to exercise it, where the attempt to obtain a copy manifestly was simply a part of a blunderbuss-roving, so that the privilege thereby would tend to reach the stature of an absolute right. But there may be cases where the circumstances are such that the judicial conscience properly feels that the interest of justice will be best served by allowing the defendant before trial to have a copy of his confession.

Shores v. United States, 174 F.2d 838, 845 (8th Cir. 1949).

⁵⁷ See, e.g., Harris v. Vasquez, 949 F.2d 1497, 1540 (9th Cir. 1990) (Reinhardt, J., dissenting) (concerned, as matter of belief and conscience, about transparency to public about what goes on in death penalty cases). A separate dissent in the same case ended with the dissenter's statement that he "decline[d] to participate further in the unconscionable delays that have occurred in reaching a final determination in this matter." *Id.* at 1546 (Alarcon, J., dissenting).

one another, and of course this makes sense. The judge inhabits the judicial role. The judge is both person and professional at the same time. And of course, as is often stated in response to arguments promoting an ideal of completely impartial and impersonal judging, judges are human.⁵⁸ Their humanity and their profession can meet and mix in perfectly acceptable and even desirable ways, such that the personal conscience itself may independently require a strict adherence to the institutionally-loyal judicial conscience. There is also a substantial patch of grey, where conscience of an undefined nature is muddled into an argument that the other judges on the case actually do have the law itself wrong. But there is still something quite useful in the division of these two categories, to the extent that it can be achieved.

One of the first and most basic observations one can make about any expression of conscience in an opinion is that of the pronoun used in conjunction with the statement of conscience, specifically whether it is singular or plural. There is usually a difference between saying, on the one hand “*I* cannot in good conscience...” or on the other hand, “*We* cannot in good conscience...”. While the plural “*we*” is more often used when the reference appears in a majority (and typically that is in a unanimous panel), the plural may also be found in a concurrence or dissent when the judge means to emphasize the perspective of the institution of the judiciary, rather than his or her own individual perspective. By contrast, when the singular “*I*” is used, it often makes explicit the specific intention to make reference to the individual perspective. That first person perspective might be tempered by language that underscores an individual understanding of an institutional perspective or responsibility,⁵⁹ or it might be left as a purely personal conviction being brought to bear on the case.⁶⁰ In any case, the pronoun or referent may be a helpful (though certainly not dispositive) starting point in understanding the motivation and the intended perspective of the one expressing the conscientious view.

⁵⁸ Or to use Prof. Fiss’ terms, judges are “thoroughly socialized member[s] of a profession.” Owen Fiss, *THE LAW AS IT COULD BE* 173 (2003).

⁵⁹ *See, e.g.*, *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) (Coleman, J., concurring) (acknowledging correct statement of law by majority, but stating personal opposition, based on personal experience in the system, to that established law).

⁶⁰ *See, e.g.*, *Rico v. Terhune*, 63 Fed. Appx. 394, *1 (9th Cir. 2003) (Pregerson, J., dissenting).

E. Roadmap

With all this as background, this article will go on to explore first judicial expressions of institutional conscience,⁶¹ then judicial expressions of predominantly personal conscience,⁶² and the muddy middle ground in which the two are most closely intertwined.⁶³ It will then go on to assess the legitimacy of these expressions, particularly with regard to the placement of the expressions in concurring and dissenting opinions.⁶⁴ Finally, it will suggest areas for further exploration of these and related questions.⁶⁵

III. Expressions of Institutional Conscience

A. Basic Themes

One major theme that emerges from the exploration of federal appellate statements of conscientious decisionmaking is, unsurprisingly, a theme of responsibility for the integrity of the institution of the courts. Of course, this commitment to the integrity of the institution may be personal or professional or both, but the focus in these cases is on speaking *for the institution*. Any opinion, but particularly separate opinions, either concurrences or dissents, may note concern for the reputation (sometimes stated in terms of morality) of the institution, lest the particular court or the broader institution of the judiciary, be implicated in doing injustice.⁶⁶ These expressions of institutional conscience cover a wide array of topics, but they are united in their commitment to ideals of professional responsibility of the role. There is often an explicit statement of commitment to the law and to the role of the judge as one separate from the other branches, specifically restrained from the law-making function. An opinion may note the conflict between the commitment to that role and a personal commitment to conscience, justice, etc., but explicitly leave the problem to the other (law-making) branches to resolve. Of course, there is not always a conflict in these cases. Opinions can and do include references to acting in good conscience in following the law, in a way wholly consistent with an idea of integrity in the judicial role, but the lack of a conflict to resolve or a stand to be taken means that these cases do not add much to this discussion.

⁶¹ See discussion *infra* at Section III.

⁶² See discussion *infra* at Section IV.

⁶³ See discussion *infra* at Section V.

⁶⁴ See discussion *infra* at Section VI.

⁶⁵ See discussion *infra* at Section VII.

⁶⁶ See, e.g., *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (on how majority opinion, which is inconsistent with dignity of man, will harm reputation of court).

Ultimately the importance of this category of cases is in the legitimate added value attached to the role of the speaker as a judge, as an applier of laws, as a part of the institution in practice, day by day, case by case, and over a long stretch of time. The emphasis that is useful here is the emphasis on the worth of informed institutional conscience, built up over time from this special perspective on the operation of the law in practice. Judges in these instances are not speaking from personal, but institutional perspectives. They are not expressing their individual or personal commitments. Instead, they are expressing what can (or should) be expected of the institution of our system of law, justice, courts, and so on, and the ways in which a special perspective from the bench shows that the result in the case does or does not meet these expectations.

Judges are uniquely situated to see the practical application of the law across a variety of circumstances. They see the law in practice with a breadth and a specificity of application that legislators, for example, may not have the full capacity to anticipate, and in a trusteeship model, they bear special responsibility for bringing that perspective to bear in the best interests of the institution of the courts and the corpus of the law. This is not to say that all expressions of judicial conscience relating to institutional responsibility are a matter of unanimous conviction. Judges' perspectives from this special vantage point differ. Judges disagree on these matters just as surely as they do on matters of direct interpretation and application of substantive law.

There are several common categories or subject matter areas into which expressions of institutional conscience may be divided for discussion. Major issues that tend to provoke these expressions, and therefore the subsections to be addressed below, include adherence to precedent, separation of powers, due process, burdens on court resources, credibility or reputation of the courts, and denials of rehearings en banc.

B. Adherence to Precedent

Perhaps one of the most obvious and apparently straightforward matters of conscientious institutional judicial responsibility is that of adherence to precedent. It is a basic commitment and expectation at every level of judging that these trustees of the law will not simply make up the law as they go along, but will respect the rule of law and the doctrine of *stare decisis*.⁶⁷ *Stare decisis* is not an entirely inflexible doctrine, of course. There are appropriate times and places for

⁶⁷ A straightforward example of this commitment, in which there is also a reference to conscience, appears in a Tenth Circuit panel's opinion as follows: "Although defendants present a provocative argument, we cannot agree with it without forsaking the rule of law. . . . In good conscience, therefore, we cannot conclude the defendants' double jeopardy argument has validity." *United States v. Dominguez-Carmona*, 202 F.3d 283, *2 (10th Cir. 1999).

breaking with precedent, but those are generally taken to be the province of highest courts, rather than intermediate appellate courts. Adherence to precedent, therefore, is an interesting testing ground for ideas about institutional conscience, especially as expressed in separate opinions.

It is not unusual to find expressions in majority opinions that note the weighty obligation to follow precedent, but drop a hint or more of dissatisfaction with that precedent. A simple example might look something like this:

Although the *Blanset* and *Tooahnippah* cases require us to affirm the judgment in the Secretary's favor, we cannot *in good conscience* do so without expressing our dissatisfaction with this state of the law.⁶⁸

This keeps the model of restrained judging intact, and demonstrates a fundamental respect for this central obligation of the judiciary to respect the doctrine of stare decisis, but it does still claim (without directly claiming any authority to do so) a role for judicial conscience, to look beyond the question of whether the precedent is *binding*, to the question of whether it is *right*.

Other opinions take a somewhat more clearly articulated approach, such as the following:

Were the question of parole ineligibility before this Court for the first time, the considerable appeal of these recent decisions might persuade us to a like position. However, in *Trujillo v. United States*, . . . this Court rejected the argument that parole ineligibility is a consequence of a guilty plea within the meaning of Rule 11. We are bound by that result. We therefore conclude, as we did in *Trujillo*, that the trial judge was not required to inform defendant of his ineligibility for parole. . . . *We cannot in good conscience find any meaningful difference for purposes of Rule 11 between ineligibility for probation and ineligibility for parole.* We therefore conclude that *Trujillo* is equally binding on both questions. . . . *This panel being impotent to overrule Trujillo we abide and apply its edict.*⁶⁹

This excerpt points specifically to core judicial role obligations and key judicial skills as matters of conscientious fulfillment of institutional responsibility. In the course of the reasoning, the panel (unanimously and thus expressing its views

⁶⁸ *Akers v. Morton*, 499 F.2d 44, 47 (9th Cir. 1974) (unanimous panel opinion) (emphasis added).

⁶⁹ *Sanchez v. United States*, 417 F.2d 494, 496-97 (5th Cir. 1969) (unanimous panel opinion) (citations omitted) (emphasis added).

with the word “we”) looks to binding authority at the outset, explores other case law and rules, and tests for meaningful distinctions as to the application of the law to the circumstances before the court. This is appellate judicial work at its most basic and straightforward, but expressed specifically as a matter of *conscientious* judicial responsibility when the court is faced with the fact that it has no power to reach a result it would prefer. The court makes a special effort to emphasize the weight of the institutional responsibility that constrains its judgment.

A majority opinion might, on the other hand, express dissatisfaction with the established law by pointing to a separate opinion in the same case to emphasize the point, as here:

Despite our conclusion, we agree with the sentiments expressed in the dissent. This is an unfortunate outcome in a sympathetic case. To remove a single mother of three who has lawfully lived and worked in the United States for two decades, despite the family upheaval and separation that it will entail, is “*unconscionable*,” see Dissent at 62; that this pro se petitioner has been unable to obtain review of the BIA’s decision to deny relief because of procedural errors is also *unfair*. However, the result we reach is dictated by existing law and does not, as a matter of law, violate the Due Process Clause. See Dissent at 62.⁷⁰

The propriety of such expressions of discontent or disagreement with the precedent that must be applied as a matter of conscientious fulfillment of judicial obligation depends somewhat on the manner of the expression. In each of the examples offered so far, the tone is measured and respectful and underscores the obligation without questioning its validity or importance. On the one hand, one might argue that any expression beyond the mechanical application of the relevant precedent is out of bounds, as tending to reveal the individual perspective of those on a particular panel. Some might find any such expression undesirable for the fact that it raises genuine concerns about whether legal results may differ based on judicial assignments in a given case. These may, however, be desirable expressions of disagreement, couched as they are in respect for a restrained role at the intermediate appellate level, simply raising an issue here or there, either for consideration by another body (be it a higher court or a legislature), or as a signal to the broader public to show an awareness of and concern for the broader issues implicated by a matter before them, along with a sensibility of their inability to act on those issues. This kind of special perspective from the bench, properly restrained in light of recognition of the superseding obligation to follow

⁷⁰ Carranza v. Holder, 356 Fed. Appx. 61, 62 (9th Cir. 2009) (majority opinion) (emphasis added).

precedent, is in the end an added value, and one which may well underscore consistency across judges and panels in light of deference to precedent, in such a way as to bolster public confidence in the judiciary.

One step further along the expressive line, a judge might acknowledge the obligation to follow precedent, but at the same time emphasize a disagreement with that precedent by placing the expression in a separate concurring opinion. Without any concrete rules to guide the purpose or content of concurring opinions, one must look to the broader underlying theory of the judicial role to assess what is and is not appropriate here. Sometimes these expressions are quite brief and simple. In three separate cases, for example, Judge Reinhardt used nearly identical language to express his position on various applications of the three-strikes law.⁷¹ In these cases, his concurrence reads: “I concur only under the compulsion of the Supreme Court’s decision in *Andrade*. I believe the sentence is both unconscionable and unconstitutional.”⁷² Sometimes such straightforward expressions are followed by a fuller elaboration, as in the case of a concurring opinion by Judge Kozinski, which begins: “I reluctantly join the court’s opinion because I believe it faithfully applies the law of this circuit. The result we reach is difficult to reconcile, however, with good sense, good conscience or good law.”⁷³ He continues for a few pages to explain this position, as opposed to leaving it at the distilled expression found in the three-strikes concurrences by Judge Reinhardt.⁷⁴

Sometimes the expressions of disagreement are a bit more involved than the former simple and straightforward samples, as in this excerpt from one of Judge Selya’s concurrences:

Under existing Supreme Court precedent, this is a close and vexing case. . . . *In my view*, this self-induced schizophrenia muddies the law and disrupts the balance that Congress labored to strike. . . . This reasoning leads me to conclude, with all respect, either that Congress inadvertently muddied the waters in phrasing LHWCA §905(b), or, alternatively, that *Jones & Laughlin* was wrongly decided. *Still, I recognize that the Supreme Court’s opinion is binding on this court*, and that we therefore must undertake what Judge Campbell charitably terms “an elusive quest.” . . . Once

⁷¹ See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding California’s three-strikes law).

⁷² *Turner v. Candelaria*, 64 Fed. Appx. 647, 648 (9th Cir. 2003) (Reinhardt, J., concurring). Cf. *Rico v. Terhune*, 63 Fed. Appx. 394, *1 (9th Cir. 2003) (Reinhardt, J., concurring). See also *Wallace v. Castro*, 65 Fed. Appx. 618, 619 (9th Cir. 2003) (Reinhardt, J., concurring) (adding specification of the crime – petty theft – for which the sentence was being imposed).

⁷³ *Operating Engineers Pension Trust v. Giorgi*, 788 F.2d 620, 623 (9th Cir. 1986) (Kozinski, J., concurring).

⁷⁴ *Id.* at 623-35.

reconciled to that necessity, I can in good conscience join this court's cogent opinion. I write separately, however, to urge the Supreme Court and Congress to reflect upon the mind games that *Jones & Laughlin*-particularly as applied to harbor workers-compels us to play, and, hopefully, to revisit the question of whether “dual capacity” employers should be liable at all in negligence actions brought by their employees.⁷⁵

This example shows how such a concurrence can demonstrate by its own terms its focus on institutional responsibility, emphasizing as it does not just the individual views of its authors, but an institutional concern for clarity, consistency, and reason in the law. A dissent in the same case takes the same perspective, but goes so far as to say that these institutional concerns for legitimacy compel that judge to dissent.⁷⁶

Another possibility is that a majority opinion itself might, without explicit comment, fail to follow precedent because, as a matter of conscience, the judges on the panel do not wish to follow it, but cases actually expressing this position as such are unlikely to be found. A majority opinion must present its reasoning, or at any rate justify it, as well founded in legal argument, which may reveal a weakness in the majority position without giving an idea of conscientious objection underlying the decision. However, one may more readily find *dissenting* opinions that claim to *unveil* such behavior on the part of the majority. Examples of such dissenting expressions of a conscientious need to more closely conform to institutional obligations take forms like the following:

*Although I applaud the withdrawal of the panel opinion, I cannot in good conscience join the opinion of the en banc court; that opinion admittedly edges closer to the holding demanded by clearly established law, but stops short of adhering to it and, thus, perpetuates a constitutionally intolerable result. Respectfully and regretfully, I dissent.*⁷⁷

Or: “Thus, although I might personally prefer the rule espoused by the majority, I cannot in good conscience reconcile it with ERISA's exceptionally broad

⁷⁵ *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 616 (1st Cir. 1996) (Selya, J., concurring) (emphasis added).

⁷⁶ *Id.* at 616-24 (Cyr, J., dissenting). Judge Cyr does not specifically refer to conscience in his own words, but implicitly responds to Judge Selya's remark.

⁷⁷ *Joyce v. Town of Tewksbury, Mass.*, 112 F.3d 19, 25 (1st Cir. 1997) (Selya, J., dissenting) (emphasis added).

preemptive language, nor with the Supreme Court's and our construction of it.”⁷⁸ These examples show that although the judge recognizes and is personally sympathetic to what might be a preferable outcome according to the judge’s own view, that sympathy is overridden by conscientious commitment to the role and responsibility of the judge in following established law. It is only in a dissent because the others on the panel saw things otherwise. Some, however, take more issue with such departures by a majority opinion:

*I strongly oppose the filing of this opinion. In my view, it cavalierly disregards both Supreme Court guidelines and our own case precedent and cannot be sanctioned in good conscience. The merits of appellant's case should not be addressed.*⁷⁹

Or:

At a time like the present when the federal courts are overburdened with cases of national import and when the right to remove causes on grounds of diversity has become of more than doubtful utility, . . . it seems strange that this court should *cavalierly turn its back on so much thoughtful precedent and lay down rules subversive of the statute, merely because it feels that in this particular case ‘justice and good conscience’ require that a ‘manifest error’ be corrected.*⁸⁰

Examples like these last two underscore the conscientious institutional responsibility to respect the rule of adherence to precedent, and do not express their disagreement with the majority primarily as a personal matter, but rather as an institutional matter, taking their colleagues to task as remiss in their obligations.

That said, some dissents may present similar arguments, taking their colleagues to task for *following* precedent when a value such as “justice” (according to the dissent) compels otherwise. These examples present particularly close cases when the majority explicitly considers itself to be compelled to follow precedent. So, for example, a part-concurrence, part-dissent explains:

⁷⁸ Campbell v. Aerospace Corp., 123 F.3d 1308, 1317 (9th Cir. 1997) (Thomas, J., dissenting).

⁷⁹ Clephas v. Fagelson, Shonberger, Payne & Arthur, 719 F.2d 92, 95 (4th Cir. 1983) (Hall, J., concurring) (writing in concurrence because he did agree with the conclusion of the majority opinion, but did not agree with the decision to address the merits of the appeal in the first place).

⁸⁰ Bucy v. Nevada Construction Co., 125 F.2d 213, 221 (9th Cir. 1942) (Healy, J., dissenting) (citation omitted) (emphasis added).

It is *unconscionable* that we do not afford Thompson the opportunity to test such crucial evidence before a district court judge. As some of my colleagues in the majority surely recognize, the fact that it now appears inevitable that Thompson's execution will go forward is truly a travesty of justice. Although I respect the majority's belief that it is bound by precedent and statute to reach the decision it does, I simply do not agree that the law requires that result.⁸¹

Or yet more starkly, as Judge Martin wrote in a dissenting opinion in a capital case:

This state of affairs I find *unconscionable*, even as I remain bound to apply the laws of this court and of the Supreme Court. . . . “[It] is not justice. It is caprice.” . . . Jason Getsy and John Santine are not hypothetical players in a criminal law final exam. They are real people who committed real crimes, indeed, the *same* crimes. That Getsy will be put to death while Santine will be spared, and that the law (at least according to the majority) actually sanctions this result, makes it virtually impossible for me to answer in the affirmative what Justice Blackmun viewed as the fundamental question . . . -namely, does our system of capital punishment “accurately and consistently determine” which defendants “deserve” to die and which do not?⁸²

A middle road position on conscience and adherence to precedent is that of following precedent, but, as a matter of fulfillment of conscientious obligation, explicitly signaling to the legislature, as the proper authority, to change the problematic precedent.⁸³ This indicates a conscientious commitment not just to carrying out the role of the judge, but a broader commitment (appropriate to the trusteeship model) to work by appropriate means for the betterment of the law itself. So, for example, one majority opinion following a relevant precedent further states that: “We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is

⁸¹ Thompson v. Calderon, 151 F.3d 918, 937 (9th Cir. 1998) (Reinhardt, concurring in part and dissenting in part) (emphasis added).

⁸² Getsy v. Mitchell, 495 F.3d 295, 327 (6th Cir. 2007) (Martin, J., dissenting) (citations omitted).

⁸³ See, e.g., Ill. Dept. of Rev. v. Phillips, 771 F.2d 312, 317 (7th Cir. 1985) (unanimous panel opinion); United States v. Robinson, 110 F.3d 1320, 1329 (8th Cir. 1997) (Heaney, J., concurring); Gonzales v. Keisler, 251 Fed. Appx. 435, *1 (9th Cir. 2007) (Pregerson, J., dissenting).

empowered to, the statute's application to cases such as the one before us now.”⁸⁴ A concurring opinion along similar substantive lines uses different and more vivid language, laying out the charge of Congressional responsibility for the current state of the law, concluding: “Unfortunately, Congress has taken away the court's ability to use its informed discretion in these matters, placing any discretion instead in the prosecution. Under existing law, one can only hope that prosecutors will use that discretion wisely.”⁸⁵ Finally, one example of a dissent in this same vein involves a much more direct plea: “As I have said before, ‘I pray that soon the good men and women in our Congress will ameliorate the plight of families like the [petitioners] and give us humane laws that will not cause the disintegration of such families.’”⁸⁶ All of these examples, whether in majority, concurrence, or dissent, underscore a desire for the system to get the law right, even if it is beyond the scope of the judge’s own authority to achieve that directly.

Some might question even the relatively mild and restrained approach of incorporating and expressing conscientious views into opinions as being beyond the proper scope of the judicial role. However, where it is a matter of the special perspective from the bench that reveals unanticipated problems or inconsistent results in the application of established law, this is a valuable contribution that a judge may make, and a written opinion is an appropriate place to do it. While placement of such an expression in a majority opinion is unobjectionable, the best approach, perhaps, is placement in a concurrence, where it marks an attitude of compliance and restraint, while using the rhetorical device of a separate opinion to draw special attention to the issue. Where a judge genuinely believes that faithfulness to institutional conscience requires a different result than that reached by the majority, a dissent may well be appropriate, despite any signals it sends to the public about potential instability of the law.

C. Separation of Powers

Turning to issues of separation of powers, there is of course general consensus on the basic role and responsibilities of the court with regard to separation of powers, but there is inconsistency in how judges view the specific boundaries of the separation in any given case, and thus there is inconsistency in the expression of institutional conscience in this area. There are distinctions, for instance, among those cases in which the “conscientious” view indicates some measure of regret that the court must restrain itself from further action, those that assert separation of powers more neutrally as a factor that leaves only a limited

⁸⁴ *Ill. Dept. of Rev. v. Phillips*, 771 F.2d 312, 317 (7th Cir. 1985).

⁸⁵ *United States v. Robinson*, 110 F.3d 1320, 1329 (8th Cir. 1997) (Heaney, J., concurring).

⁸⁶ *Gonzales v. Keisler*, 251 Fed. Appx. 435, *1 (9th Cir. 2007) (Pregerson, J., dissenting) (citation omitted).

role for judicial conscience, and those that deny that restraint is required, asserting instead that an aspect of conscientious judging is to take on whatever is even arguably within the judicial province, in order to do justice, rather than ceding too easily whatever control another branch might take an interest in.

Straightforward (even unanimous) opinions in the first category might make reference to separation of powers as a matter of conscience along these lines:

Using estoppel as a shield implies nothing less than frustrating the government's authority to enforce valid laws. *We cannot in good conscience accept a broad rule that prevents the sovereign from enforcing valid laws* for no better reason than that a government official has performed his enforcement duties negligently. It does not overstate the case to say that *such a rule would risk embroiling the judiciary in the Executive Branch's duty* faithfully to execute the law and thereby would raise separation of powers concerns.⁸⁷

The same sort of statements may be found where the concern about overstepping bounds relates to the legislative branch:

We can only conclude, as did the trial court, that the Congress intended to permit the taxpayer to obtain the benefit, taxwise, only of so much of the cost of construction of, or improvements to, a new house as the taxpayer had constructed and used within the eighteen month period herein applicable. *We cannot in good conscience rewrite the statute* as though it include the words 'contractual liabilities incurred during the 18 months period.' *The desire of the Congress* to provide finality to the deferment provisions of Section 112(n) *must regrettably be respected. Any relief to taxpayers must lie with the legislative rather than the judicial branch of the government.*⁸⁸

In this talk of rewriting statutes, one can see the desire on the part of the court to achieve the "right" result, as well as the fact that the desire is overridden by the conscientious institutional responsibility to leave the lawmaking function to the

⁸⁷ *Dantran, Inc. v. United States Dept. of Labor*, 171 F.3d 58, at 66 (1st Cir. 1999) (unanimous panel opinion) (emphasis added) (citations omitted). Along similar lines, *see, e.g., Rodos v. Michaelson*, 527 F.2d 582, 585 (1st Cir. 1975) (unanimous panel opinion) ("In sum, we do not reach the question whether the legislature has disregarded the mandate of the Supreme Court, for we cannot, in good conscience, say that the Attorney General cannot stand on his rights.")

⁸⁸ *Kern v. Granquist*, 291 F.2d 29, 33 (9th Cir. 1961) (emphasis added) (majority opinion).

legislative branch. The very fact that the struggle shows up in a majority opinion, though, shows just how strongly both forces pull on the judges who want to do the best within the bounds of their role.

When a dissenting judge actually sees the applicable law as less constraining as a *substantive* matter, though, a separate opinion may suggest that the majority actually *can* follow the values they desired to fulfill in the first place:

I respectfully dissent. While my brothers agree that the result to the taxpayer is 'an example of inequities' in income tax laws, they do not feel able to reverse the case. The statute and the regulations all use the word 'made' as the critical word. In the context in which this word is used, it is ambiguous.⁸⁹

There is thus no difference between the judges here about what institutional conscience requires. All of the judges on the panel here would surely agree that it is the conscientious obligation of the court to follow the law, whether they approve of it or not. There is simply a difference of interpretation of the substantive law involved, so that where the law *does permit* the result that the judges prefer with reference to other institutional commitments, there may even be an institutional conscientious *obligation* to retain authority and not to defer to another branch.

Some judges may write separately in cases where institutional responsibility must trump personal preference as an outlet to achieve a heightened expression of that conscientious constraint, but the institutional norms compel them to stay in their proper roles. Thus Judge Van Graafeiland wrote, in a concurring opinion:

*I concur in this case with great reluctance and wish that I could do otherwise. It seems unconscionable to me that this seventy-four year old widow who lived with Joseph Thomas for forty-seven years and bore ten of his children is now to be branded an adulteress, with whatever ramifications to her and her children that may result from this adjudication. See Grey v. Heckler, 721 F.2d 41, 49 (2d Cir. 1983) (Van Graafeiland, J., dissenting). However, we must apply the law as Congress wrote it, not as we would like to have had it written.*⁹⁰

⁸⁹ Kern v. Granquist, 291 F.2d 29, 33 (9th Cir. 1961) (Hamlin, J., dissenting) (emphasis added) .

⁹⁰ Thomas v. Sullivan, 922 F.2d 132, 139 (2d Cir. 1990) (Van Graafeiland, J., concurring) (emphasis added). It is notable that in expressing this disagreement with the law, the judge cited one of his own prior dissenting opinions. Repeated conscientious dissents are discussed further *infra* at Section III.G.

Here we can see the judge's personal views on the issue before the court in the transparent language about reluctance and wishing that the law could be otherwise. The fact that these views are not hidden may even add to the judge's credibility; and certainly in light of the accompanying explanation of why the result cannot be otherwise in light of the controlling law, the opinion will support a better understanding of the decisionmaking process.

In a concurrence in a case involving sentencing, there was a further reference, not just to Congressional control over the law, but to the fact that Congress had acted specifically to remove the relevant power of the judiciary that had existed before:

The contrast between that punishment and Robinson's, in light of the relative culpability, is *unconscionable*. Unfortunately, Congress has taken away the court's ability to use its informed discretion in these matters, placing any discretion instead in the prosecution. Under existing law, one can only hope that prosecutors will use that discretion wisely.⁹¹

This example demonstrates the use of conscientious expression of institutional responsibility to defend judicial territory, but it remains restrained in that it implicates no action in trying to take that territory by force – this remains, placed as it is in a concurring opinion, merely a matter of expression, not action. Along quite similar lines, a unanimous panel opinion from the Eleventh Circuit includes the following statement:

Congress, in a proper exercise of its legislative power, has decided that murder, like thefts from interstate commerce and the counterfeiting of securities, qualifies as racketeering activity. This, of course, ups the ante for RICO violators who personally would not contemplate taking a human life. *Whether there is a moral imbalance in the equation of thieves and counterfeiters with murderers is a question whose answer lies in the halls of Congress, not in the judicial conscience.*⁹²

There are times, though, when that regret about the practical limitations imposed by the doctrine of separation of powers, is apparently insufficient as an

⁹¹ United States v. Robinson, 110 F.3d 1320, 1329 (8th Cir. 1997) (Heaney, J., concurring) (emphasis added).

⁹² United States v. Elliott, 571 F.2d 880, 905 (11th Cir. 1978) (unanimous panel opinion) (emphasis added).

expression of the judicial conscience, and a judge feels compelled to dissent.⁹³ Taking on directly the issues presented by the role of empathy in the potential desire of a court to resolve a question of law differently from the legislature, Judge Moore wrote:

The proponents of the ‘fraudulent concealment’ doctrine have overwhelming arguments in their favor- *mostly emotional*. To reward ‘wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices’ and then ‘when their machinations are discovered’ to give to them ‘the shield of the statute of limitations to bar redress by those whom they have victimized’ would appear to be *unconscionable*. . . . Another court *chose to believe* that ‘Congress did not intend that co-conspirators could spin and weave an impenetrable shroud of fraudulent concealment to cloak their illegal acts and then fraudulently render themselves immune with the shield of the statute of limitations to bar redress by those who are the victims of their conspiratorial machinations.’ . . . But *equally unconscionable, however*, would be the case of the poor widow who, left penniless upon the death of her spouse caused by the gross negligence of some malefactor, has failed to bring an action within the prescribed statutory period. . . . It may well be that a ‘discovery’ or ‘fraudulent concealment’ amendment should be added to § 4B *but the public policy and the morals issues which are involved in such legislation should be for the Congress to resolve- not the courts. Otherwise the courts in addition to their other endeavors assume a veto power over Congressional enactments whenever their views on such issues differ with those of Congress.*⁹⁴

This kind of straightforward attempt to put the issue on the table and explain where the law stands and what can and cannot happen to change it is of tremendous value. Acknowledgment of difficult issues and transparency of reasoning are themselves the fulfillment of the conscientious obligations imposed by the judicial role for the integrity and proper functioning of the institution.

It is not just the questions of substantive law that raise institutional conscientious concerns – courts may also raise conscientious institutional

⁹³ Such expressions, in which the personal conscience contends closely with the institutional conscience, are discussed further *infra* at Section IV.C.

⁹⁴ *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236, 241-42, 244 (2d Cir. 1962) (Moore, J., dissenting) (emphasis added).

concerns about pragmatic questions of judicial resources as they implicate separation of powers issues, as in this excerpt from a unanimous panel opinion:

However, the vindication of almost every legal right has an impact on the allocation of scarce resources. *And the courts, while mindful of the impact of remedies upon persons not before them, can hardly permit* the legal rights of litigants to turn upon the alleged inability of the defendant fully to meet his obligations to others. . . . We agree with the Second Circuit that the existence of similar orders in other jurisdictions supports the relief granted here, but also that *it is likely that an ultimate, comprehensive solution to the problem of hearing delays may well require congressional action.* . . . *We cannot in good conscience, however, deny relief to the plaintiffs pending such action.* We conclude that this case presents a justiciable controversy and turn accordingly to the question of whether the delays complained of have denied plaintiffs their right to a “reasonable . . . opportunity for a hearing.”⁹⁵

Here, once again, there is an acknowledgment of the difficulty facing the court in making a decision in the case before it, set in the context of broader institutional commitments to various entities, with the judge acting as trustee of the law, but still having limited authority within which to fulfill its trusteeship obligations. Talking about the mindfulness and the conscience of the court in the context of the proper allocation of its resources underscores for readers of the opinion the level of concern on the part of the court, and at the same time demonstrates its conscientious commitment to acting within its authority to do whatever it can to achieve the right outcome, both of which are helpful for public confidence.

D. Due Process

Turning next to issues of due process, one sees at the most basic level of conscientious concern for the institution of the judicial system, a concern for staying within the bounds of certain bedrock procedural constraints. So, for example, a per curiam opinion states plainly: “We cannot *in good conscience* affirm a summary judgment if we are not satisfied that the appellant had been given an opportunity upon notice to oppose the grant below.”⁹⁶ But even seemingly basic or fundamental matters of due process can be fodder for judicial

⁹⁵ Caswell v. Califano, 583 F.2d 9, 18 (1st Cir. 1978) (unanimous panel opinion) (citations omitted) (emphasis added).

⁹⁶ Hispanics for Fair and Equitable Reapportionment (H-FERA) v. Griffin, 958 F.2d 24, 25 (10th Cir. 1992) (per curiam) (emphasis added).

disagreement as when, for example, a dissenting opinion states: “It is just that I cannot *in good conscience* join in reversing a decision in which I see no error.”⁹⁷ Or, still straightforward, but with a bit more elaboration: “The government removed Tomas Mendez-Alcaraz . . . from this country based on a criminal conviction that violated his procedural due process rights under the Fourteenth Amendment to the U.S. Constitution. Because such an *unconscionable* result cannot be affirmed, I dissent.”⁹⁸

Adding the extra component of prejudice (as a matter of practical unfairness), a panel opinion from the District of Columbia Circuit includes the following explanation of the role played by conscience:

Yet our reading of the transcript is such as to convince us that the prosecutor stepped out of bounds, that the impact of this plain error, in the context of a close case, was *probably so prejudicial that our judicial conscience calls upon us* to reverse and remand for a new trial that can be conducted free of similar error.⁹⁹

Along similar lines, augmenting straightforward legal conclusions about due process with practical fairness concerns, Judge Clay wrote: “Allowing defendants to be tried and convicted under a knowingly unfair jury selection system in the Eastern District of Michigan is *unconscionable*; allowing Mr. Blair to be twice subjected to an unfair jury selection system would be even worse.”¹⁰⁰ This example shows an expression of conscience that is still relatively matter-of-fact and straightforward. In other examples, by contrast, there is a more deeply heartfelt plea directed at the important role played by the conscience of the court, as seen here in a dissenting opinion by Judge Altimari:

It is a bitter irony that in this era in which totalitarian regimes are adopting the language of freedom and looking to the United States as a model of liberty and justice, we today find it acceptable that a man who has not been charged with a crime in this country may remain incarcerated here indefinitely. *I have always believed that a major difference between our Constitution and those that speak of justice in bold terms, but fail to provide it in reality, is that our*

⁹⁷ NRDC, Inc. v. Train, 519 F.2d 287, 293 (D.C. Cir. 1975) (Nichols, J., dissenting) (emphasis added).

⁹⁸ Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 845 (9th Cir. 2006) (Ferguson, J., dissenting) (emphasis added).

⁹⁹ King v. United States, 372 F.2d 383, 390 (D.C. Cir. 1966) (emphasis added).

¹⁰⁰ United States v. Blair, 214 F.3d 690, 703 (6th Cir. 2000) (Clay, J., concurring in part and dissenting in part) (emphasis added).

*Constitution provides for a judicial branch that is charged with the task of safeguarding individuals' rights, be they citizens or not. Concededly, there is a difference between the rights of citizens as compared to those of non-citizens. The facts of this case, however, clearly transcend these differences. Ultimately, it is judges who must give substantive content to the meaning of the Constitution. Thus, I cannot in good conscience sit idly by and allow the Due Process Clause to become mere words. Because I believe that the Due Process Clause will not permit an indefinite confinement, or even the confinement for eight years, of an individual who has not been criminally charged and is merely awaiting deportation, I would reverse the judgment of the district court and remand with instructions to the court to set appropriate bail.*¹⁰¹

The mixture of use of both singular pronouns and collective references to judges here shows a heightened personal aspect to what is, in substantive terms, clearly an appeal to institutional conscience, demonstrating that these are not wholly objective matters, but ones well within the bounds of the role that concern individual occupants of the judicial role quite deeply.

Still other examples from various contexts show that some judges see it as clearly within the court's province to consider questions of morality in the assessment of due process. Judge Lay, on the Eighth Circuit, put this in vivid terms, and expressed it in terms of judicial conscience:

*The most degrading, humiliating experience any human being, white or red, rich or poor, intelligent or not, can endure is a deprivation of one's personal liberty. To permit this under the circumstances existing here without any legal representation whatsoever is a mockery of the law itself. Before anyone forfeits his life or liberty, he should at least be given a meaningful opportunity to resort to the law which abhors forfeiture without proof of factual guilt and without positive indication of the existence of power of the committing authority. This to me is the essence of due process. I cannot in good conscience subscribe to the proposition that Nelson Miner has been afforded this protection.*¹⁰²

¹⁰¹ Doherty v. Thornburgh, 943 F.2d 204, 214 (2d Cir. 1991) (Altimari, J., dissenting) (emphasis added).

¹⁰² United States ex rel. Miner v. Erickson, 428 F.2d 623, 639 (8th Cir. 1970) (Lay, J., dissenting) (emphasis added).

Here the blending of the objective assertions with the ultimate resort to the personal perspective shows room for conscientious disagreement on matters of legal interpretation at the same time that it shows the deep importance of these issues to the judges who deal with them.¹⁰³

There can be somewhat muddled and therefore potentially confusing language in the due process context that seems to suggest resort to one aspect of conscientious concern when the content of the expression betrays it really addresses another. One example in this category states specifically as an “individual opinion” what is most certainly also (if not *instead*) a view about institutional responsibility with regard to fairness and justice in the predictability of the application of the law. Judge Boreman, in part concurrence, part dissent, explains this matter of conscience as follows:

*It is my individual opinion that changing the established rules in the middle of the game is unjust, unfair, and inconsistent with the operation of a viable system of legal precedents, particularly to a taxpayer such as this one with a relatively small amount at stake. The controlling law of this Circuit, as it existed at the time of taxpayer's transaction, should be applied and taxpayer should have the right to any tax benefit available to it under Pridemark. It is unconscionable to hold otherwise. In all fairness and justice I cannot be persuaded to join in placing the taxpayer in such an unfavorable and unreasonable position by a denial of prospective application of our decision which definitely changes the rules of the game.*¹⁰⁴

The identification of this expression as an “individual opinion” is trumped by the judge’s resort to principles of basic operation of the legal system. The insistence on applying the controlling law of the jurisdiction, though it may be a principle to

¹⁰³ Some seventy years earlier, another judge on the same circuit made similar substantive statements about the role of the courts, not using terms of ‘conscience,’ but rather of morality, justice, and fair dealing. *See* Evans-Snider-Buel v. McFadden, 105 F. 293, 301-02 (8th Cir. 1900) (Sanborn, J., dissenting) (“When called upon to resolve questions like the one in hand, the courts have never deemed it necessary to close their eyes to the equities of the case, but have frequently permitted their judgments to be influenced by the consideration that that which the legislature has done in the way of disturbing rights acquired under existing laws was *morally right*, and in accordance with *justice and fair dealing*. . . . It is our privilege and duty, therefore, in determining whether a vested right has been violated and whether congress exceeded its just power in validating the interpleader's mortgage, to consider whether its action was dictated by a sense of justice, and was right when viewed from a purely moral standpoint.”) (emphasis added).

¹⁰⁴ *Of Course, Inc. v. C.I.R.*, 499 F.2d 754, 761 (4th Cir. 1974) (Boreman, J., concurring in part and dissenting in part) (emphasis added).

which the judge does feel personally committed, is clearly not a predominantly personal commitment, but rather an institutional one to which the judge, as a matter of the role, has bought in. One must consider, however, the extra rhetorical force given in such a situation by resort to expression of this matter as a personal rather than a purely institutional conscientious commitment.¹⁰⁵

This takes us back to the bottom-line principle in the due process cases, which is ultimately about fidelity to the law, and particularly on the part of judges, fidelity to Constitutional principles of due process, which lies at the core of their trusteeship responsibilities. So, in a case containing discussion by the majority about the propriety of an appeal to jurors to play the role of community conscience,¹⁰⁶ Judge Jones expressed a conscientious view along these quite straightforwardly institutional lines, focusing on the judicial obligation of fidelity to the Constitution:

This dissent is compelled by the majority's validation of the *unpardonable constitutional improprieties* present in this record. The effect of this validation is an intolerable abandonment of substantive and procedural principles deeply rooted in Anglo Saxon and American constitutional jurisprudence. Stated in its most simple form, these principles are designed to protect individual rights from constitutional shortcuts. *I dissent here because rather than upholding these principles, as courts are sworn to do, a grievous breakdown has occurred. . . . In this context, confidence in the outcome of Byrd's trial must be, and is, seriously undermined. One cannot, in good conscience, blink at such substantial constitutional impropriety with full comprehension of its deadly effects. In these circumstances, judicial neglect transforms the justice system into an accomplice to constitutional transgression.*¹⁰⁷

This is the most basic of conscientious institutional commitments. As Justice Holmes and so many others have said, the job of the judge is to apply the law. Compliance with constitutional principles must be foremost in the judge's fulfillment of the trusteeship obligations of the law. Certainly there will be disagreements about the particular shape and application of those constitutional principles, but as long as the judge's conscientious commitment is to follow constitutional principles, where judicial conscience is concerned, the obligation is fulfilled.

¹⁰⁵ See discussion *infra* at Section VI.B.

¹⁰⁶ *Byrd v. Collins*, 209 F.3d 486, 541, 538-39 (6th Cir. 2000).

¹⁰⁷ *Byrd v. Collins*, 209 F.3d 486, 548 (6th Cir. 2000) (Jones, J., dissenting) (emphasis added).

It is noteworthy that all of the examples in this section were from dissents, or partial dissents, rather than from concurrences. This is significant in that it demonstrates the difference between those cases that are about the restraint required, for example, by adherence to precedent or separation of powers principles. Due process cases are more clearly about perspective within the bounds of the judicial role, where there is less internal argument about constraint by the law, and more about judgment in the application of the law as it is clearly established. There is more room for perfectly proper disagreement among a panel of judges as to what institutional conscience requires, and thus more range for dissenting opinions.

E. Burdens on Courts and Their Resources

As trustees not just of the law, but also of the institution of the courts, judges are ideally situated to observe how their resources of both time and money are consumed and what strains those resources. Often judges agree on how these matters play into the law of the case,¹⁰⁸ but there are a number of concurrences, part concurrences and part dissents, and pure dissents that make reference to, or even rely on concerns about conscientious responsibility for the resources of the institution. In the pure concurrences, the idea is often there to add an indicator of the broader implications or ramifications of the majority's (correct) application of law. For example, in a recent case regarding prescription drug benefits, Judge Fletcher wrote in concurrence:

I concur in the opinion, which carefully and painstakingly analyzes the claims. I add this concurrence simply to vent my frustration. What have Uhms' counsel accomplished for the Uhms, for justice, or for the law? . . . Today the Uhms receive the prescription drug benefits to which they are entitled. But not as a result of this lawsuit. The cost to the court system and to the Uhms is unconscionable. A bit of common sense and attention to the available administrative remedies should have been applied. Instead we have an opinion with endless pages of legal analysis,

¹⁰⁸ See, e.g., *Johnson v. Rodriguez*, 943 F.2d 104, 110 (1st Cir. 1991) (“We cannot *in good conscience* burden the courts with litigation that is plainly unmeritorious.”) (emphasis added); *Brown v. United States*, 890 F.2d 1329, 1347 (5th Cir. 1989) (“We cannot *in good conscience* remand this case to the district court for further fact finding. This litigation, which has already consumed countless hours of judicial resources over its seven year life, at some point must end. That point has been reached.”) (emphasis added).

months of study and delay, and a determination that no benefit can be awarded to the Uhms.¹⁰⁹

Along similar lines, but with perhaps an even broader perspective about the institution of the judiciary and those bearing its costs, Judge Garth wrote a concurring opinion in a case about a denial of disability benefits, at least in part so that he could note how an additional burden on administrative law judges would put an “unconscionable” burden on the taxpayers.¹¹⁰ In a case about attorney’s fees, Judge Bright concurred in part, but noting attorney abuse of court resources, found that the problem of unconscionable delay in getting to a resolution of the case in hand and the attendant waste of resources rose to the level of requiring a dissent.¹¹¹ And there are yet more examples.¹¹²

There are, of course, pure dissents on such matters as well. One notable example comes from an en banc case from the Eleventh Circuit, which drew multiple separate opinions, including a dissent which noted that the burden of considering the writ at issue was a moral one, and could not be left to concerns

¹⁰⁹ *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1158 (9th Cir. 2010) (Fletcher, B., J., concurring) (emphasis added).

¹¹⁰ *Williams v. Sullivan*, 970 F.2d 1178, 1189 (3d Cir. 1992) (Garth, J., concurring) (“... if we require administrative law judges to give weight or credence to such unprofessional reports, it cannot help but impose an unconscionable strain on the taxpaying public—a public which is already burdened with enormous social costs arising from health care needs, disability benefits and the like.”)

¹¹¹ *Jaquette v. Black Hawk*, 710 F.2d 455, 464 (8th Cir. 1983) (Bright, J., concurring in part and dissenting in part):

I concur in the court's affirmance of the district court's award of Jaquette's attorneys fees. I would not, however, remand the case to the district court. This case has already consumed an inordinate amount of judicial, as well as lawyers', time and effort. Simply stated, it is time to lay this case to rest. . . . After reviewing the record, it is evident that this case did not require such enormous expenditures of time and money. I do not denigrate in any way the importance of the relief Jaquette obtained. However, it is unconscionable that this case dragged on for nearly three years before the parties reached an agreement which, according to Jaquette, would have been acceptable at the very beginning of the litigation. . . . Although I share the majority's outrage regarding the inexcusable amounts of time and money expended on this case, I dissent from that portion of the majority's opinion remanding the case to the district court. After what is now nearly four years of the litigants exchanging charges and countercharges, I can see no possible benefit of further prolonging this case.

¹¹² *See United States v. Whitson*, 587 F.2d 948, 956 (9th Cir. 1978) (Kilkenny, J., concurring in part and dissenting in part) (“I am in complete disagreement with what is said in footnote 6, page 525, of the majority's opinion [regarding trial court’s obligation to carefully control the scope of cross-examination by prosecutor]. This language places an unconscionable burden on the shoulders of a trial judge.”)

about judicial efficiency or economy.¹¹³ Finally, there are some expressions of judicial conscience that indicate an institutional concern or responsibility for the practical enforceability of a burden they place on other players in the justice system.¹¹⁴ For example, even though the judge in one case acknowledged that the majority had a defensible position on the law, he could not “in good conscience” join the opinion and in so doing subject police officers to the risks the majority’s rule would create for them.¹¹⁵ This is a good example of a case in which there is an individual expression that *underscores* institutional responsibility.

F. Credibility and Reputation

Courts also express conscientious responsibility for the maintenance of the credibility and reputation of the judicial system itself, and many take advantage of separate opinions to do so. For example, there are cases in which concerns about strong public feeling about a particular area of substantive law (such as the death penalty) raises conscientious concern for institutional legitimacy, and thus counsels particularly careful explanation of the decisionmaking process and institutional insistence on pursuing whatever process will best ensure that the court gets the law right and applies it in a non-arbitrary manner. These are expressions of institutional conscience that are centrally and openly concerned with ultimate justice, and in order to preserve the credibility and reputation of the court, the judges who write these opinions are willing to take their fellow panelists to task for any perceived shortcomings in the fulfillment of the obligations of the role. So, for example, Judge Jones wrote:

In this context, confidence in the outcome of Byrd's trial must be, and is, seriously undermined. One cannot, in good conscience, blink at such substantial constitutional impropriety with full comprehension of its deadly effects. In these circumstances,

¹¹³ *Galtieri v. Wainwright*, 582 F.2d 348, 375 (11th Cir. 1978) (Goldberg, J., dissenting): This is the moral burden we bear when we defer consideration of a petition for the Great Writ. This burden cannot possibly be supported by considerations of judicial economy and efficiency; an Atlas, not an Anchises, of a justification is needed to shoulder the burdens of the rule of complete exhaustion. A judge's time is precious, to be sure, but precious only in relation to the tasks the judge performs. In a habeas corpus case, we are dealing with human life and human liberty, precious commodities even in today's world of depreciated traditional values. I will not participate in the process of depreciating further human life and liberty by accepting the proposition that saving an hour or two of a judge's time justifies keeping a man locked behind the bars of a state penitentiary for a year or more.

¹¹⁴ *United States v. Corona*, 661 F.2d 805, 809 (9th Cir. 1981) (Sneed, J., dissenting).

¹¹⁵ *Id.*

judicial neglect transforms the justice system into an accomplice to constitutional transgression.¹¹⁶

Along similar lines of underscoring the reality of the final significance of these decisions, but adding a particular concern for keeping within proper bounds, giving deference to the proper decisionmaker on a given issue, Judge Heaney wrote in dissent:

Had the jury been apprised of Lingar's life circumstances, there exists a reasonable probability that it would have found mitigating circumstances to outweigh aggravating circumstances and therefore would have voted for life imprisonment. *Because I cannot in good conscience join in the majority's certainty that this information would have made no difference to the question of whether Stanley David Lingar should be put to death by the state, I respectfully dissent.*¹¹⁷

Along similar lines, a number of judges take opportunities to speak directly to the importance of full review or full process that ought to be (or ought to have been) afforded on a particular question, and the reality of the circumstances that can make it important to get it right in the first instance. Often they speak of these concerns in terms of institutional conscience, especially in the context of dissents from denials of rehearing en banc, further discussed below.¹¹⁸

On the theme of potentially unjust outcomes, and the matters of judicial conscience that can play into them, some cases display judicial efforts to underscore the need for open acknowledgment that those before the court are real people suffering real consequences. The *Getsy* case quoted above offers an example of a judicial reminder that these are real people facing real (and final) effects.¹¹⁹ The dissenting opinion there urged judges to be careful to remember and carefully consider the practical effects of their rulings, rather than seeing them in the abstract or as “hypothetical players in a criminal law final exam.”¹²⁰ Along similar lines, there are times when a judge will, as a matter of institutional conscience note either what that judge believes to be a lack of credibility in the majority’s interpretation or specific application of the law – that the court is

¹¹⁶ *Byrd v. Collins*, 209 F.3d 486, 548 (6th Cir. 2000) (Jones, J., dissenting) (emphasis added).

¹¹⁷ *Lingar v. Bowersox*, 176 F.3d 453, 466 (8th Cir. 1999) (Heaney, J., dissenting).

¹¹⁸ See discussion *infra* at Section III.G.

¹¹⁹ *Getsy v. Mitchell*, 495 F.3d 295, 327 (6th Cir. 2007) (Martin, J., dissenting).

¹²⁰ *Id.*

imposing a meaning that does not make sense as a practical matter,¹²¹ or imposing a burden that is unrealistic.¹²² Such references to judicial conscience again may be intended to speak to concerns about the development and maintenance of public confidence essential to the legitimacy of judicial decisions.

It is not always in dissents that these expressions of institutional conscience occur with regard to the effort to maintain the credibility and reputation of the court. Majority opinions on issues of due process, for instance, often afford opportunities for matters of conscience to come into the analysis for the benefit of the court's credibility. Writing for the majority in one death penalty case, Judge Rawlinson concluded: "We simply cannot *in good conscience* continue to send men to their deaths without ensuring that their cases were not prejudiced by inadequate legal representation at any phase of the proceedings."¹²³ It is noteworthy that this statement appeared in the context of a case that drew separate opinions from each of the three judges on the panel.¹²⁴ Judge Kleinfeld took a relatively detached and pragmatic view in his part-concurrence, part-dissent in the case. Emphasizing the limited and discretionary nature of federal

¹²¹ See *In re Ruffalo*, 370 F.2d 447 (6th Cir. 1966). 370 F.2d 447, 461 (Edwards, J., dissenting) ("I cannot in good conscience agree that the making of such small loans as these to two admittedly impoverished widows represented purchasing an interest in litigation"), reversed by *In re Ruffalo*, 390 U.S. 544 (1968) (on grounds of lack of notice to attorney of potential ramifications of disbarment for offense).

¹²² See *United States v. Corona*, 661 F.2d 805, 809 (9th Cir. 1981) (Sneed, J., dissenting):
This decision, however, will not deter officers who find themselves in a position similar to that in which Officer Wolfe found himself in this case. Nor should it. *Officers so situated will not risk being slain on a back street because of this decision nor can I in good conscience ask them to assume such risks.* The incidence of murdered policemen is too high to dismiss the risk lightly. *The depth of my feeling can be evidenced by my affirmation that had I been Officer Wolfe I too would have stopped and conducted a pat-down search of the appellant.*

(emphasis added). Courts may show a similar conscientious concern for others within their own branch, but playing different roles. So, for example, one appellate judge dissented in conscientious objection to the unhelpful standard the court would impose on the lower courts. See *Radovich v. Cunard S.S. Co.*, 364 F.2d 149, 153 (2d Cir. 1966) (Kaufman, J., dissenting):

Since my brothers agree that it is difficult to see any real distinctions between cases where the stevedore lost and those where he won ..., I cannot, in good conscience, become a party to simply an exercise in skillful rhetoric- and inflict on the district court the impossible task of dealing with words and phrases that are like beads of quicksilver.

(citations omitted).

¹²³ *Stanley v. Schriro*, 598 F.3d 612, 615 (9th Cir. 2010) (Rawlinson, J., majority opinion) (emphasis added).

¹²⁴ In concurrence, Judge Fletcher did not speak to any issues of conscience, but rather took up other issues of legal interpretation relating to the claims that were affirmed. *Id.* at 626-28 (Fletcher, J., concurring).

evidentiary hearings on state habeas petitions, he walked carefully through a very practical assessment of why, on the facts of the case, it makes *sense* that their review should be limited and discretionary.¹²⁵ Responding to the dissent, however, despite the dissent's lack of any reference to conscience, morality, or any other personal response to the case before the panel, the majority further explained its position:

*There is no doubt that the facts of this case are repulsive. But that is true for every case where the death penalty is imposed. If the resolution of this case rested on the relative heinousness of the offense, we would have no quarrel with our colleague in dissent. However, our charge is to look at the merits of the legal issues raised rather than to focus on the degree to which we are repulsed by the inevitably grisly details of the case.*¹²⁶

Here the judge writing for the majority is careful to indicate an understanding of the realities of the situation, the significance of the majority's decision, and how it may look in ordinary human terms. However, the greater weight goes, as the majority opinion shows, to the legal requirements that must constrain the court's decisionmaking. The acknowledgement and the transparency of the reasoning in all three opinions in this case may well be quite helpful to readers seeking to understand the law, the outcome, and the reasoning process used by the judges, such that it may improve confidence in that decisionmaking process and in its results.

The examples in this section demonstrate a basic matter of conscientious judicial concern for the credibility and reputation of the courts. These are expressions of conscience that make clear the judicial commitment to be honest and transparent in their decisionmaking process, to be clear-sighted about (and not too detached from) from the 'real-life' significance of the decisions they make, and to have a properly restrained understanding and practice with regard to their own power and authority. These conscientious efforts should bolster public confidence in the judiciary as trustees of the law.

G. Dissents From Denials of Rehearing En Banc

One last category of expressions of specifically institutional conscience, with an eye firmly fixed on the judicial role itself, and the role of the judiciary

¹²⁵ *Id.* at 628 (Kleinfeld, J., concurring in part and dissenting in part). Underscoring the *fairness* issue, Judge Kleinfeld further emphasized the fact that so much time passed before anyone asked for a hearing.

¹²⁶ *Id.* at 616 (Rawlinson, J., majority opinion) (emphasis added).

more broadly as an important player in the legal system, is that of dissents from denials of rehearing en banc. These are often focused on matters not necessarily tied to a specific case, but tied instead to what a rule made or applied in a certain case may mean more broadly for future obligations of the courts at various levels. The concerns in this category of institutional concern range from resource allocation and timing issues, to the practical workings of procedures, to concern for the reputation of the law or the justice system as a whole, to concern for the legitimacy of the judiciary in recognizing evolving standards over time, and so on. It is true that sometimes these opinions simply reflect a different view of the law and do so in a relatively straightforward manner,¹²⁷ and some though straightforward take perhaps a more urgent tone,¹²⁸ but still others do speak directly to the larger issue of the conscientious obligation owed by a whole court in providing review of decisions by panels of its members and the attendant stability and finality of that kind of review. So, for example, Judge Reinhardt, joined by Judge Pregerson, wrote in dissent (excerpted here at length due to the depth of relevant analysis) in a death penalty case, explaining the many layers of conscientious responsibility of the judiciary:

Preliminarily, I think it important to discuss briefly one aspect of our en banc process and its relationship to the public's right to be fully informed on the subject of capital punishment. The en banc process allows the full court the opportunity to decide whether a three-judge decision upholding a death sentence correctly construes the Constitution and correctly applies controlling legal precedent. Yet, under our court rules, when a suggestion that the court hear a case en banc is rejected we do not announce the division. All we say is that a majority of the non-recused active judges failed to vote in favor of such a hearing. That tells the public little. We do not reveal whether the vote was close or even whether a majority of the eligible judges voted against en banc review. Whatever the wisdom of that rule in general-and *I believe* the answer is that the rule is wrong under all circumstances-it

¹²⁷ See, e.g., *Cammack v. Waihee*, 944 F.2d 466 (9th Cir. 1991) (Reinhardt, J., dissenting from denial of petition for rehearing en banc) (on issue of whether good Friday can be considered a secular holiday).

¹²⁸ *Hohri v. United States*, 793 F.2d 304, 304-313 (D.C. Cir. 1986) (Bork, J., dissenting from denial of petition for rehearing en banc):

This case illustrates the costs to the legal system when compassion displaces law. The panel majority says it is not too late for justice to be done. But we administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law.

clearly does not serve the public interest in death penalty cases. *I believe* the people have a right to know if an individual is being executed notwithstanding the fact that a substantial number of judges who have examined the constitutionality of the state's proposed action believe further judicial review is necessary-and *I believe* that there is no justification for concealing the actual division in the court. There are good reasons why history should fully record the judicial votes in death penalty cases.

One of the continuing questions regarding both the propriety and constitutionality of the death penalty is whether it is arbitrary. Can the death penalty be applied in a manner that clearly and objectively separates those who should be put to death from those who are allowed to live? *Is the law so clearly discernible that men and women of good will can in good conscience say-yes, a fair-minded individual would necessarily determine that the law classifies this case as one in which the taking of the defendant's life is proper?* If such an objective classification cannot be made, should we not continue to *question seriously the fairness and legitimacy of the process, and its application* in particular cases? ... Arbitrariness in the application of the death penalty is neither an abstract nor a closed subject. ... *Many jurists and other persons sensitive to individual rights believe that McCleskey's execution was legally indefensible and morally unconscionable.* Others simply argue that the determination that McCleskey should die was based on so uncertain and questionable a legal foundation that, at the very least, serious questions are raised as to whether the death penalty is being enforced in an arbitrary manner.... En banc review is a critical safeguard in the capital punishment process. *Ordinary concerns regarding judicial administration should not influence our judgment whether to grant further review to death penalty decisions that may be flawed by substantial errors of law. We have a special responsibility* in death penalty cases to see that the Constitution and applicable statutes are fully complied with. There is no margin for error. In capital punishment appeals, *neither judicial or administrative convenience nor any other reason can justify* our deferring to the views of a three-judge panel if the majority of the court might, after further study, conclude that the conviction or sentence is unlawful. *When a human life is at stake*, we should provide en banc review in all cases in which legitimate questions exist concerning a panel's decision in favor of the state. Harris most certainly qualifies under that standard, as he

would under any reasonable test. *Common decency and fairness-as well as due process-require that we rehear his case en banc. ... I deeply regret that we have decided otherwise.*¹²⁹

In this case, as in other examples that will follow, there is a persistent and direct attention given to conscientious institutional responsibility as a matter of the very procedure at issue. Petitions for rehearing en banc get most basically at the question of whether a panel has properly adhered to the law, has exercised its authority properly, fulfilled its obligations – in short whether, in their role of exercising judgment, they have gotten the result right. This is the kind of question that lies at the true core of the appellate judicial role, and thus the reasoning courts engage in when deciding whether to grant a rehearing very often explicitly draws on institutional conscience, as exemplified in Judge Reinhardt’s opinion here. That conscientious commitment runs both to the larger picture of the place of rehearings en banc in the shape of the judicial task and to the particular procedure and outcome in this case. The judge shows significant concern for both.

Furthermore, one sees here a judge conscientiously committed to ensuring that the right process is used in getting to a just result, a judge committed to consideration of public appearance and perspective on issues involving significant moral questions relevant to society as a whole, to value issues of life and death over administrative or resource-based concerns of the institution, *and* one sees all of this expressed as something that is felt deeply by the Judge Reinhardt as an individual occupant of the role (along with Judge Pregerson, who joined the opinion). Here we see both plural and singular pronouns, both references to core commitments of the institution (such as the need for due process) and references to the judge’s personal views on common decency and fairness, references to his own beliefs and regrets.¹³⁰ He takes this matter personally, as well as professionally.¹³¹

Furthermore, to show the variety of perspectives on institutional conscience and how it may play into the decisionmaking, Judge Alarcon wrote a shorter dissent in the same case, also making reference to conscience, but focused on a different institutional commitment:

¹²⁹ Harris v. Vasquez, 949 F.2d 1497, 1539-45 (9th Cir. 1990) (Reinhardt, J., dissenting from denial of petition for rehearing en banc).

¹³⁰ See also, along similar lines, Novak v. Beto, 456 F.2d 1303, 1304, 1308 (5th Cir. 1972) (Wisdom, J., dissenting from denial of petition for rehearing en banc) (“With deep distress and profound regret I note the refusal of a majority of the members of this Court to give en banc consideration to this case. . .”).

¹³¹ For further discussion of intertwined expressions of institutional and personal conscience, see *infra* Section V.

*I decline to participate further in the unconscionable delays that have occurred in reaching a final determination in this matter. It is no wonder that Congress is presently reexamining the rules that permit state prisoners to seek federal habeas corpus relief. The Harris case is a textbook example of how the Great Writ can be abused.*¹³²

Along similar lines, challenging the majority of the court as to the institutional responsibility of the court with regard to finding the right balance on matters of timing, in another case Judge Reinhardt launched another part-concurrence-part-dissent by saying:

I dissent from this court's refusal to stay Campbell's execution by hanging pending his filing of a petition for a writ of certiorari with the United States Supreme Court. Our denial of Campbell's request for a stay is in direct violation of the rules that govern the operation of this court. By our decision we pronounce our willingness to hang Campbell first and submit the serious constitutional issue he raises to the Supreme Court for decision later. So the Ninth Circuit returns, at least for now, to the rough Western justice of frontier days: Hang 'em first, ask questions later.¹³³

Similar concerns of judicial conscience with regard to timing issues, as well as issues about the need for full process and thus full review of death penalty cases in an en banc context were expressed in a concurrence and a dissent in a Sixth Circuit case. Judge Moore, in concurrence, reiterated the unconscionability of the application of controlling law on timing grounds, because it had the effect of permitting the appellant's execution to go forward "without ever having the opportunity to have a court consider the merits of his Eighth Amendment challenge to his method of execution, a method that a court may well find unconstitutional just a few short months following his death by lethal injection."¹³⁴ Judge Merritt, in dissent from the denial of rehearing en banc, also called the holding unconscionable in its expansion of the law, but explained in different terms: "The court's deceptive attempt to say that some unknown,

¹³² Harris v. Vasquez, 949 F.2d 1497, 1546 (9th Cir. 1990) (Alarcon, J., dissenting from denial of petition for rehearing en banc) (emphasis added).

¹³³ Campbell v. Wood, 20 F.3d 1050, 1051-52 (9th Cir. 1994) (Reinhardt, J., concurring in part and dissenting in part). The specific reference to judicial conscience in this opinion is discussed *infra* at Section V.A.

¹³⁴ Getsy v. Strickland, 577 F.3d 320, 321 (2009) (Moore, J., concurring).

undescribed future case might not be time barred, if the challenged alterations are sufficiently egregious, improperly conflates the merits of the case with the statute of limitations, and is not even consistent with the *Cooey II* case or any other case in the legal canon.”¹³⁵ These examples of both pragmatic concerns and more technical concerns about proper compliance with governing law show the variety of ways in which judicial conscience may come into play even within the same opinion, especially when rehearing en banc, and thus the clarification and settlement of a difficult issue of law, is at stake.

H. Conclusions on Expressions of Institutional Conscience

Expressions of true institutional conscience provide important added value to the readers of appellate judicial opinions, wherever they are placed. Coming as they do from a uniquely informed perspective, and providing as they do a glimpse of the deeply felt concern for the responsibility embodied in the judicial role, they afford both useful input into the decisionmaking process and also a transparency that can enhance public confidence in the careful, thoughtful work of the judiciary. This value is only added, however, in situations in which there really *is* a matter worthy of conscientious concern, rather than routine practice. If conscience were to be overplayed as a matter of institutional responsibility, it would lose its force for purposes of promoting public confidence. Given the relative rarity with which federal appellate judges make these explicit references to conscientious concerns, however, overuse does not appear to be a problem.

IV. Expressions of Personal Conscience

A. Basic Themes

Turning to cases in which the focus of the expression of judicial conscience is a personal, rather than an institutional commitment, things look somewhat different. As noted earlier, the use of the pronoun “I” or “we” is not dispositive in the determination of whether a judge’s expression is primarily personal or institutional. One must look to the context, content, and tone of a statement of conscience in order to assess whether it fits into the personal or institutional category.¹³⁶ Judges and commentators have weighed in on both sides

¹³⁵ *Getsy v. Strickland*, 577 F.3d 320, 321-22 (2009) (Merritt, J., dissenting).

¹³⁶ See., e.g., *Doherty v. Thornburgh*, 943 F.2d 204, 214 (2d Cir. 1991) (Altamari, J., dissenting) (using “I” in conscientious statements about judicial responsibility with regard to substantive content of Due Process clause); *United States v. Scruggs*, 583 F.2d 238, 242-43 (5th Cir. 1978) (Coleman, J., concurring) (stating disagreement with decision about responsibility of courts in terms of personal experience with how they work); *United States ex rel. Miner v. Erickson*, 428

of the propriety question in this arena. Given that it *happens*, however, that judges *do* sometimes resort to personal conscientious commitments and at times openly express those commitments in their written opinions, either in support of or against the relevant legal consideration, it is important to examine the concerns that are at issue in these instances.

Where the expressions are about truly personal matters of conscience, as opposed to mixed matters of personal and institutional commitments, there is usually an accompanying expression of the judge's straightforward opposition to the policy behind a given law. Statements expressing personal conscientious commitments do occur in other contexts, but they often walk a fine line between the truly personal and what may just as easily be understood as a deeply-felt commitment to institutional responsibility that comes across as personal due to a basic disagreement, or difference in perspective, from those in the majority.¹³⁷ That muddy middle ground will be discussed further in the next section.¹³⁸

B. Concurrences as Outlets for Expression Alone

Examples of truly personal conscience coming into play to express an individual judge's opposition to the state of the law, or its application in a given case, appear in both concurrences and dissents. They do not always indicate an intention to subvert the law – they are often simply outlets for a judge to state the disagreement, while still acting within the bounds of the law, and of the judicial role. In such instances, the effect is much like what was seen in the institutional conscience cases relating to adherence to precedent that a judge found undesirable. The difference is that the expression is more clearly a matter of personal judgment as opposed to institutional responsibility. So, for example, Judge Craven wrote in a concurrence on a sentencing matter:

F.2d 623, 639 (8th Cir. 1970) (Lay, J., dissenting) (acknowledging personal perspective on what the law contemplates or is meant to afford).

¹³⁷ One example here is that of the judge who sees the majority improperly extending a doctrine beyond the extent warranted. *See United States v. Weikert*, 504 F.3d 1, 19-20 (1st Cir. 2007) (Stahl, J., dissenting) (It was said by Edmund Burke, “The true danger is when liberty is nibbled away, for expedients, and by parts.” I cannot, in good conscience, sign on to a decision that I believe provides the legal rationale for an enormous expansion of state intrusion into the most private of realms, without warrant, probable cause, or even suspicion.”) Here the first person pronoun is used, and the conscientious commitment is clearly strongly felt by the judge as an individual, but the basis for the conscientious commitment is arguably institutional rather than truly personal. Along similar lines, see *Schlueter v. Varner*, 384 F.3d 69, 79 (3d Cir. 2004) (Ambro, J., dissenting) (“I cannot in good conscience bury *Schlueter's* case before it sees the light of day. AEDPA confers on federal courts the authority equitably to toll its limitations period in the interest of justice. If any case is ripe for exercise of that power, this one is. Accordingly, I respectfully dissent.”)

¹³⁸ *See* discussion *infra* at Section V.

I would dissent . . . but for *Peterson*. . . . I think this outmoded decision, *decided wrongly before I was born*, is binding upon a panel of our court. I would en banc the case, overrule *Peterson*, vacate the sentence, and remand for resentencing. I am very strongly of the opinion that a trial judge may not properly impose a harsher sentence upon a defendant because he thinks the defendant lied on the witness stand. Such a practice will inevitably chill and hamper, if not ultimately destroy, the right to testify in one's own defense. *It seems to me unconscionable* that a defendant must run the risk of conviction of the offense charged and at the same time run the gauntlet of disbelief.¹³⁹

This shows us a judge who insists on preserving propriety in playing the judicial role, recognizing the binding authority of existing case law that will not permit a dissent in good faith, adhering to the responsibility of the role, but who takes the opportunity of writing separately to point out what he sees as being wrong with the substance and operation of that law.

Judge Coleman, along similar lines, concurred in a Fifth Circuit case, *United States v. Scruggs*,¹⁴⁰ to state his conscientious objection to the giving of *Allen* charges,¹⁴¹ recognizing that although they are firmly established in the law, his own experience as a trial judge taught him that they are not a good idea in practice.¹⁴² He wrote: “At the risk, however, of being accused of an attempt to fight lost battles all over again, I must, in good conscience, again state my long-held opposition to the use of the *Allen* charge. . . .”¹⁴³ That said, to be clear about the relationship between his own conscience and the force of the actual state of the law, Judge Coleman concluded, “Nothing I have said is to be construed as a criticism of the trial judge. He acted well within the law as it presently stands in this Circuit.”¹⁴⁴

Judge Coleman does not stand alone in feeling compelled by personal conscience to speak up, despite well-entrenched legal authority that may stand against the legal issue in question. Like the personal experience that drove Judge Coleman in *Scruggs*, quite often what seems to drive these types of statements of

¹³⁹ *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J., concurring) (citations omitted) (emphasis added).

¹⁴⁰ 583 F.2d 238 (5th Cir. 1978).

¹⁴¹ An “*Allen* charge,” named after the case of *Allen v. United States*, 164 U.S. 492 (1896), is effectively a direction from the trial judge to a jury to continue deliberations to avoid a mistrial.

¹⁴² *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) (Coleman, J., concurring).

¹⁴³ *Id.* The judge went on to point of the particular circumstances in the instant case that amplified the problems he saw with the *Allen* charge more generally. *Id.* at 243.

¹⁴⁴ *Id.* at 243.

personal conscience are matters that hit close to home with judges as matters of personal experience or individual understandings of morality, credibility, or justice. A few examples will demonstrate the pull of personal conscientious commitment or responsibility to speak up for what they see as right. For instance, Judge Van Graafeiland wrote in a concurring opinion:

I concur in this case with great reluctance and wish that I could do otherwise. It *seems unconscionable to me* that this seventy-four year old widow who lived with Joseph Thomas for forty-seven years and bore ten of his children is now to be branded an adulteress, with whatever ramifications to her and her children that may result from this adjudication. *See Grey v. Heckler*, 721 F.2d 41, 49 (2d Cir. 1983) (Van Graafeiland, J., dissenting). However, we must apply the law as Congress wrote it, not as we would like to have had it written.¹⁴⁵

In this instance, the judge shows a respectful restraint in playing the judicial role, writing in concurrence to draw attention to the issue, but not trying to change the outcome or abdicate the judicial responsibility of applying the law as written. Along similar lines, underscoring considerations of practical fairness, Judge Will dissented in a trust law case, writing:

Given the uncontested facts found by the District Court, my reading of Texas trust law and my understanding of the role of a federal appellate court, I would affirm, remanding only to permit appellees to be reimbursed for any out-of-pocket expenses they incurred with respect to the Dyckman property. I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than \$270,000, an amount which, even in Texas, must be substantial.¹⁴⁶

This demonstrates the way in which real life effects on the people before them can become matters of personal conscientious concern and commitment for individual judges who may, in rare instances, simply not be able to reconcile themselves to the practical outcomes dictated by the law. A remedies case showing similar concerns addresses it in terms of “judicial conscience,” “human conscience,” and “considerable grief” (the last of which must surely mark it out as fitting clearly in

¹⁴⁵ *Thomas v. Sullivan*, 922 F.2d 132, 139 (2d Cir. 1990) (Van Graafeiland, J., concurring) (emphasis added).

¹⁴⁶ *Harris v. Sentry Title Co., Inc.*, 715 F.2d 941, 961 (5th Cir. 1983) (Will, J., dissenting).

the personal conscience category). This was a matter the judge truly took to heart. Judge Goldberg wrote in concurrence:

It is *with considerable grief* that I write to specially concur in the result denying punitive damages against the City of Houston. I fully concur in the majority opinion on all other issues, but must specially concur on the issue of punitive damages because the majority suggests that *City of Newport v. Fact Concerts, Inc.* might allow punitive damages against a municipality in a section 1983 suit if the facts were particularly egregious. *Would that it were so, for then I could, with clear judicial conscience*, urge taxing the City of Houston with punitive damages. If there were any narrow gap around *Newport* for an egregious case, this one would slip through; I am aghast at the thought that any violation of constitutional rights more appalling, more threatening than the one that occurred here might actually exist. *Sadly*, I view *Newport* as presenting an impenetrable barrier to punitive damages. *Would that it were not so, for now I must, with troubled human conscience, concur in this unfortunate result.*¹⁴⁷

Here again, the human conscience may be troubled and grieved at a level that requires the judge to express that conscientious disagreement with the law, but the judicial conscience restrains the judge from dissenting without legal grounds to do so.¹⁴⁸

C. Dissenting to Express and Follow Personal Conscience

Another few cases will add to this picture the contrast between expressions of personal conscience placed in concurrences and those in dissents. For example, in a case about negligence liability under the Longshore and Harbor Worker's Compensation Act ("LHWCA"), Judge Selya (who called it a "close and vexing case") wrote in a concurring opinion:

This reasoning leads me to conclude, with all respect, either that Congress inadvertently muddied the waters in phrasing LHWCA § 905(b), or, alternatively, that *Jones & Laughlin* was wrongly

¹⁴⁷ Webster v. City of Houston, 689 F.2d 1220, 1230-31 (5th Cir. 1982) (Goldberg, J., concurring) (citation omitted) (emphasis added).

¹⁴⁸ See, e.g., Ronald Dworkin, A MATTER OF PRINCIPLE 3 (1985) ("Even in hard cases, though judges enforce their own convictions about matters of principle, they need not and characteristically do not enforce their own opinions about wise policy.")

decided. Still, I recognize that the Supreme Court's opinion is binding on this court, and that we therefore must undertake what Judge Campbell charitably terms “an elusive quest.” *Ante* at note 11. *Once reconciled to that necessity, I can in good conscience join this court's cogent opinion.* I write separately, however, to urge the Supreme Court and Congress to reflect upon the mind games that *Jones & Laughlin*-particularly as applied to harbor workers-compels us to play, and, hopefully, to revisit the question of whether “dual capacity” employers should be liable at all in negligence actions brought by their employees.¹⁴⁹

Strong feeling like this is something that often prompts dissents, which brings us back once more to the examples noted at the outset of the paper, perhaps some of the clearest and most direct statements of purely personal conscientious objection to the application of pertinent law. In the three cases of *Rico v. Terhune*,¹⁵⁰ *Wallace v. Castro*,¹⁵¹ and *Turner v. Candelaria*,¹⁵² all of which came before the same three-judge panel on the Ninth Circuit, the three-strikes law was at issue. In each case, the majority opinion was denoted a memorandum opinion. In each case there was a very brief concurrence by Judge Reinhardt, who wrote only: “I concur only under compulsion of the Supreme Court decision in *Andrade*. I believe the sentence is both unconscionable and unconstitutional.” This demonstrates quite simply and straightforwardly both Judge Reinhardt’s conscientious commitment to stay within the bounds of the role in deciding cases according to controlling law and also his personal conscientious view that the substance of the law is wrong.¹⁵³ Furthermore, in each case there was an even briefer dissent by Judge Pregerson, who wrote only: “In good conscience, I can’t vote to go along with the sentence imposed in this case.”¹⁵⁴ Without further legal reasoning, this comes across as a purely personal aversion to the content and the effect of the applicable law.

¹⁴⁹ *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 616 (1st Cir. 1996) (Selya, J., concurring). Judge Cyr, in his dissenting opinion in the same case, did not himself use the word ‘conscience’, but implicitly contrasted his own view, using instead the term of “fundamental disagreement” to express the basis for his dissent from the court’s following of the applicable Supreme Court precedent. *Id.* at 616 (Cyr, J., dissenting) (“As I am in fundamental disagreement with the treatment given the duties of care incumbent upon dual capacity LHWCA employers by the en banc court under the Supreme Court decision in *Scindia*, I respectfully dissent.”). This shows an equally strong feeling, albeit without choosing to pick up on ‘conscience’ as a specific term.

¹⁵⁰ *Rico v. Terhune*, 63 Fed. Appx. 394 (9th Cir. 2003).

¹⁵¹ *Wallace v. Castro*, 65 Fed. Appx. 618 (9th Cir. 2003).

¹⁵² *Turner v. Candelaria*, 64 Fed. Appx. 647 (9th Cir. 2003).

¹⁵³ *Rico*, 63 Fed. Appx. at *1; *Wallace*, 65 Fed. Appx. at 619; *Turner*, 64 Fed. Appx. at 648.

¹⁵⁴ *Rico*, 63 Fed. Appx. at *1; *Wallace*, 65 Fed. Appx. at 619; *Turner*, 64 Fed. Appx. at 648.

What makes these separate opinions in the three-strikes cases all the more intriguing is that they were written in cases that were all unanimously determined by the panel to be fit for decision without oral argument, and they were not selected for official publication. This raises some significant questions about the point or the rhetorical force of the statements of conscience, and at the same time offers a scenario in which the statements of conscience might be shown to be (as a purely practical matter) harmless and therefore less problematic. If nothing else, it underscores the reality that the judges involved accepted that the law was well-settled, and that they knew they were not adding anything new to the conversation (such that publication would be required), and yet the pull of personal conscience was so strong that they did feel compelled to express that conscientious objection on the record.

As these last few examples have demonstrated, personal conscientious objection to the substance of the law can sometimes form the basis for the practice of repeated dissents.¹⁵⁵ In fact, several examples have already come up in this discussion.¹⁵⁶ The added weight of repeated dissents, and the overt reference to them by the judges writing them, especially where they are based on adherence to personal opposition to established law, is open to question. On the one hand, they serve purposes that may be of value to the institution as whole, as signals to other courts, to litigants, to the other branches, and so on, about issues on which there is deeply felt concern from one with the benefit of the judicial perspective, which may gain added weight for the fact that they have persisted over time. On the other hand, they may be harmful to the perception of the judiciary as less than fully open-minded on a given point, or as insufficiently committed to the application of the law as it is, rather than the law as that individual judge would prefer it to be. It is beyond the scope of this paper to address these issues specific to repeated dissents, but whatever the answers to these questions, it is certain that judicial conscience must play into them.

D. Conclusions on Personal Conscience

Expressions of personal conscience may have some legitimate role to play, especially in concurring opinions, but one might still argue that no judicial opinion can ever be purely an expression of personal conscience, simply by virtue

¹⁵⁵ Allison Orr Larsen, *Perpetual Dissents*, 15 *GEO. MASON L. REV.* 447 (2008).

¹⁵⁶For example, Judge Van Graafeiland, in *Thomas v. Sullivan*, 922 F.2d 132, 139 (2d Cir. 1990) (Van Graafeiland, J., dissenting) noted his own prior dissent in *Grey v. Heckler*, 721 F.2d 41, 49 (2d Cir. 1983) (Van Graafeiland, J., dissenting). Along similar lines, but repeating a concurrence rather than a dissent, Judge Coleman, as he noted in his concurrence in *United States v. Scruggs*, had previously expressed the same position in concurrences in both *United States v. Bailey*, 480 F.2d 518, 519 (5th Cir. 1973) (Coleman, J., concurring) and *Thaggard v. United States*, 354 F.2d 735, 739 (5th Cir. 1965) (Coleman, J., concurring).

of the fact that it occurs in a judicial opinion. There is something about the mere fact of remaining in the role, rather than recusing or resigning, that might be taken as an indication that the individual judge sees the expression of personal conscientious commitment to be itself an appropriate fulfillment of at least certain aspects of the responsibilities of the judicial role. This idea of overlap and interplay is brought to the fore in a rather muddy middle ground in which judicial opinions show intertwined references to both institutional and personal conscience.

V. *The Middle Ground: Intertwined Personal and Institutional Conscience*

A. *Intertwined Usage*

One might argue that no judge ever writes anything in an official opinion without some comment, express or implied, about the institutional responsibility of the judge, and no judge can write anything as an individual without there being some aspect of personal conscientious commitment to what he or she writes. Even so, as the last two sections of this article have explored, there are some expressions of conscience that are more dominated by institutional concerns, and other expressions that appeal more to personal than institutional conscience. However, there is also a middle category in which the personal and the institutional conscience are put forward with roughly equal force. Very often, for reasons that will be explored as we go along, these examples come up in cases having to do with liberty issues, and matters of life and death – to be more precise, in death penalty cases. A few excerpts will reveal the complexities of the overlap of conscientious concerns in several such cases.

A death penalty case in the Ninth Circuit brought before a three judge panel a question (among others) of the constitutionality of hanging as a method of execution. In the initial panel opinion, Judge Reinhardt, writing in part-concurrence, part-dissent, expressed a closely intertwined combination of personal and institutional conscientious commitments, as follows:

In the absence of a judicial stay, the State of Washington is likely to hang Campbell before the Supreme Court even has an opportunity to decide whether hanging is constitutional. *Today's order, refusing to exercise the authority and responsibility that is vested in us by our rules, demonstrates the majority's willingness to allow this unconscionable course of events to unfold. . . .* I recognize that our refusal to act in accordance with law does not mean that Campbell will necessarily be executed before he can file his petition for writ of certiorari in the Supreme Court or before

that Court can fully consider his constitutional claim. Justice O'Connor, our Circuit Justice, can issue a stay if she is so inclined, or the full Court can do so if five Justices vote to grant a stay. *However, that should not ease the conscience of any member of this court* or serve as an excuse for anyone's failure to perform his or her duty properly. We could say in any case that comes before us: "What difference does it make whether we follow the law? The Supreme Court can undo whatever we do or fail to do." *No self-respecting jurist would take that position in the ordinary case. It would be even less acceptable to do so here. A court that respects the rule of law must adhere to its obligation and do its duty.*¹⁵⁷

When there was later a proposal for the court to rehear the case en banc, again Judge Reinhardt dissented, this time at great length, including arguments such as these:

Hanging is, without the slightest doubt, "cruel and unusual"-*in layman's terms and in the constitutional sense. No other answer is consistent with our claim to be an enlightened and civilized nation. In Anno Domini 1994, when almost every state and most other nations have rejected such a savage and barbaric method of killing its citizens, no court could in good conscience say that hanging comports with our "evolving standards of decency." It is inconceivable to me that in one corner of our vast and proud country, a single judicial circuit is willing to violate its constitutional obligations and permit this unconscionable and long outmoded practice to exist. In a time when public fear of crime and violence is high, it may be understandable that some judges will on occasion close their eyes to the dictates of the Constitution, and employ whatever form of rationalization or self-deception will lead them to the result they deem expedient. . . . [T]he majority's decision to disregard all relevant Supreme Court precedent is simply inexplicable. Still, democracy has proved resilient and our Constitution has grown stronger as time has passed, notwithstanding temporary setbacks at the hands of courts motivated on occasion by political objectives. It has grown stronger in part because the judiciary on the whole has proved to be courageous, independent, and fair minded. The courts have usually corrected their own sins and errors long before they*

¹⁵⁷ Campbell v. Wood, 20 F.3d 1050, 1052-53 (9th Cir. 1994) (Reinhardt, J., concurring in part and dissenting in part) (emphasis added).

became irremediable. In this case, as in others, the Constitution will ultimately emerge unscathed. *It is only this court that will be diminished by what the majority does today.* Until we reverse today's decision, *our circuit will have a blotch on its reputation that will be a constant embarrassment to us all.* I hope that before long we will be able to comprehend what has for some time been apparent to most of the rest of the civilized world. ... Without question, and despite the decision of my colleagues, hanging violates the Constitution. I dissent.¹⁵⁸

There is a great deal going on in this excerpt – much of it self-explanatory – but there are several points to be drawn out in particular to add to the understanding of how judges themselves view the role of their conscientious commitments to both the institution and their personal integrity in their decisionmaking. There is concern for the reputation of the institution,¹⁵⁹ concern for fidelity to constitutional obligations, and concern for getting the law right over time, and concern for restraint from acting politically (i.e. beyond the proper scope of the role), all of which are most clearly matters of conscientious commitment to the institution. There is also concern for courage, and for deference to an ordinary sense of what is right, and for the practical realities of human concerns (in the use of words like ‘savage’ and ‘barbaric’), all of which might fit more naturally into the category of personal conscience.¹⁶⁰

With equal feeling albeit at somewhat lesser length, in two part-concurrence part-dissents (using identical language in each), Judge Pregerson of the Ninth Circuit spoke to institutional conscience with regard to due process problems, emphasizing the unfortunate practical result of the majority approach, but also added a reference to personal prayer, surely the most personal of references or resorts to conscience:

This *unconscionable* result violates due process by forcing children either to suffer de facto expulsion from the country of their birth or forego their constitutionally-protected right to remain in this country with their family intact. . . . As I have said before, “*I pray that soon the good men and women in our Congress will*

¹⁵⁸ Campbell v. Wood, 18 F.3d 662, 716-17 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting) (emphasis added).

¹⁵⁹ See discussion *supra* at Section III.F.

¹⁶⁰ There is also a depth of potential implied meaning in the use of the phrase “Anno Domini” where one might have simply used the word “year.” Whether this is intended to conjure up specifically the judge’s own conscientious commitment to Christian dogma must remain purely conjectural, but it is an intriguing reference.

ameliorate the plight of families like the [petitioner's] and give us humane laws that will not cause the disintegration of such families.”¹⁶¹

The judge is perfectly transparent, first about basing his opinion firmly on due process grounds, and second about the depth of his personal concern about getting the law right in this particular area due to what he sees as its inhumane effects. He even uses the arguably heightened language of prayer to make his point about the importance of getting it right, which points beyond merely institutional to deeply-felt personal ideals of justice.

In another case on the same immigration issue, Judge Pregerson omitted the reference to prayer, but retained the statement about the unconscionability of the result.¹⁶² Intriguingly, the majority opinion in that case responded to Judge Pregerson’s position as follows:

*Despite our conclusion, we agree with the sentiments expressed in the dissent. This is an unfortunate outcome in a sympathetic case. To remove a single mother of three who has lawfully lived and worked in the United States for two decades, despite the family upheaval and separation that it will entail, is “unconscionable,” see Dissent at 62; that this pro se petitioner has been unable to obtain review of the BIA's decision to deny relief because of procedural errors is also unfair. However, the result we reach is dictated by existing law and does not, as a matter of law, violate the Due Process Clause.*¹⁶³

This suggests that the conscience that is offended here is purely personal, and that institutional conscience (if such a thing exists at all in the view of the majority – that is not clear here) is entirely a matter of following the dictates of existing law. To further complicate the picture about what messages may have been intended in all of these statements, all three of these immigration cases were decided without oral argument, and none of the three were selected for official publication, indicating both that the court does not see them as making a new or notable contribution to the corpus of the law, and restricting their citation back to the court as authority in later matters. For all this expression of conscientious feeling about getting the law right, there is also an aspect of keeping these expressions

¹⁶¹ Benitez v. Mukasey, 270 Fed. Appx. 523, 525-26 (9th Cir. 2008) (Pregerson, J., concurring in part and dissenting in part) (citations omitted) (emphasis added). Gonzalez v. Keisler, 251 Fed. Appx. 435, 436 (9th Cir. 2007) (Pregerson, J., dissenting).

¹⁶² Carranza v. Holder, 356 Fed. Appx. 61, 63 (9th Cir. 2009) (Pregerson, J., dissenting).

¹⁶³ Carranza v. Holder, 356 Fed. Appx. 61, 62 (9th Cir. 2009) (emphasis added).

under certain wraps which may suggest even more strongly that the judges ultimately view these as personal, and even perhaps futile, matters of disagreement, not really intended for public use or consumption.

Often these cases of intertwined conscientious commitments appear in cases whose facts, like those in the deportation and death penalty examples, pull especially strongly on human emotions. Judge Torruella, in a dissenting opinion drawing on both his personal conscientious reaction to the facts of the case and also his commitment to the conscientious responsibility of the institution, wrote as follows:

The specter of an adult, particularly one in a position of trust such as a stepfather, sexually abusing his minor stepchildren is enough to incense even the most equanimous person and to wish upon such a miscreant the full retributive weight of the law. But there lies the catch: *the law*. *We live in an ordered society, and to keep it ordered for the benefit of the whole of society, we are bound to apply the law, not just to do what we believe the abominable person charged may justly deserve. . . .* Because I cannot *in good conscience* find that the trial court's ruling in this case reasonably applied established federal law when considering the petitioner's Sixth Amendment rights and because the court engaged in no perceptible balancing of the considerations required under *White*, I am forced to conclude that the petitioner in this case is entitled to the habeas relief he seeks.¹⁶⁴

Similarly, in a Sixth Circuit case approving the lower court's requirement of a GPS tracking device for a sex offender, Judge Keith dissented, with what appears to be a combination of personal and institutional conscience. He wrote:

Because our Circuit has foreclosed Does' argument with respect to the Registration Act, . . . I concur with the majority's dismissal of this claim. However, as to the Surveillance Act, *I strongly disagree* with the majority's decision to affirm the district court's dismissal of this claim. *I cannot, in good conscience, join* my colleagues' opinion which finds no constitutional violation in requiring Doe to wear a relatively large box as a symbol of his crime for all to see. The Surveillance Act, particularly the satellite-based monitoring program, as applied to Doe, *is punishment*,

¹⁶⁴ *Abram v. Gerry*, 672 F.3d 45, 53-54 (1st Cir. 2012) (Torruella, J., dissenting) (citations omitted) (emphasis added).

*excessive, and indeed, the modern day “scarlet letter.” I vigorously dissent.*¹⁶⁵

There is a combination here of strong personal feeling about what is being imposed, along with an ordinary judicial concern for legal error in the application of punitive measures in a scenario in which punitive measures are not permitted.¹⁶⁶ This is all the more noteworthy given the fact that there were some grounds on which the judge did agree with the majority. This shows a very strong commitment to the institutional conscientious obligation to get the law right, which works in combination with a personal conscientious view of the reality of the requirement in question here.

B. Lack of Specific Authority or Limits

It makes common sense that institutional and personal conscience can become intertwined in this way, and yet in all these examples, there is still little indication of any specific authority for resort to personal conscience, or any official idea of the limitations on the role it may play in judicial reasoning. Judge Gould addressed one view on this question in commenting on the purpose of writing dissenting opinions, in a case about the Foreign Sovereign Immunities Act.¹⁶⁷ Spurred on by his misgiving about the interpretation and application of the law in light of a quite sympathetic plaintiff, writing in dissent, he explained:

One might ask, when there is such a firm supermajority for a position, what is the value of a dissent? *The answer is that I pen this dissent to explain my views, because a dissent is a matter of individual judicial statement and individual judicial conscience.* The majority's opinion is reasonable, even persuasive, but only within the limits it sets by invoking the plain-meaning rule. If the language was as plain to me as the majority perceives it to be, I would adopt a similar view and shrug off a concern that Congress has blundered. However, I view the language as ambiguous and I view traditional modes of statutory interpretation as pointing in a different direction, for the reasons that follow. These views may be

¹⁶⁵ Doe v. Bredesen, 507 F.3d 998, 1008-09 (6th Cir. 2007) (Keith, J., concurring in part and dissenting in part) (citations omitted) (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1038n.1 (9th Cir. 2010) (Gould, J., dissenting)

considered by the bench of another court, by the interested bar, or by other interested persons.¹⁶⁸

There are no easy answers to questions about the exact definition of judicial conscience, or the propriety of its use or placement in opinions of federal appellate judges, but at this point we have seen the broad span of positions taken in practice. We turn next to a more overarching assessment of what the actual practice of judges shows about the value and the legitimacy of references to judicial conscience, either institutional or personal, and how that fits into the ethics of the judicial role.

VI. Legitimacy of Various Uses and Placements

A. Conscience in the Context of Core Commitments of Judicial Role

This examination of expressions of judicial conscience in federal appellate opinions as they occur in actual judicial practice shows that most such expressions refer to some idea of the conscience of the court as an institution. The special perspective of the bench allows judges to bring into the decisionmaking process certain considerations that draw on the broader practical and ethical responsibilities of the role. The core commitments of the judicial role as a trusteeship of the law – fidelity to legal (especially constitutional) authority, impartiality, independence, accountability, and practical wisdom – are expressed in these instances as matters of ‘conscience,’ in the judges’ own terms. The use of the word ‘conscience’ seems to be intended in these instances to underscore the seriousness or weight of the consideration, the feeling of professional responsibility that compels the judge to make a particular decision. There is added value here in the potential for better understanding of both the judicial role and the law itself, so these expressions should be encouraged. They may be perfectly appropriate in any type of opinion, whether majority, concurrence, or dissent. The best placement will be dependent on the context of each case.

While expressions of institutional conscience are appropriate and valuable in any type of opinion, there is different rhetorical force and effect to be achieved in different placements. Reference to the influence of institutional conscience in a majority opinion has the advantages of showing a consensus view of the judicial role and showing concern for fulfillment of the obligations of the role. That is, properly expressed it should enhance both understanding of and confidence in the professional integrity of the judiciary.

¹⁶⁸ *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1038n.1 (9th Cir. 2010) (Gould, J., dissenting) (emphasis added).

In a concurring opinion, there is still a certain amount of consensus with the majority, and the expression of conscience is still a demonstration of concern for and commitment to the institution itself. The main difference is that writing separately may be an effective way to draw more attention to the conscientious aspect of the decision the court is making. What might have been buried or might have seemed less remarkable in the context of other reasoning in a majority opinion can be especially highlighted in a separate opinion, which will likely get a reader's attention at least to see what it concerns.

A dissent can be effective, like a concurrence, simply in getting attention on the issue, by virtue of being separate and indicating some disagreement with the majority. A reader will not likely skip it. However, a dissent shows a deeper level of disagreement than a concurrence, and thus while they may be perfectly correct, they may come at some cost to a unified appearance of the judiciary, which may bring with it further costs for public confidence.¹⁶⁹ That said, disagreement that is openly discussed in opinions should be a good thing, insofar as it indicates robust argument. It enhances (or at least should do so) the quality of the reasoning relied on in the decisionmaking process. The transparency about the disagreement, especially to the extent that it reveals something about the meaning and the role of the institutional conscience of the judiciary, is valuable.¹⁷⁰ If there is some mention of judicial conscience in a separate opinion, especially if it is in a dissent, it is exceedingly helpful if the writers of majority opinions respond to that in some way to indicate their own view of the conscientious fulfillment of institutional obligations in the analysis of the case, or to say how personal conscience should or should not play in. Such dialogue is most helpful in getting to the bottom of judicial perspectives on the meaning and the role of judicial conscience.

B. Problems with Expressions of Personal Conscience

When it comes to expressions of personal conscience, things are somewhat more complex. Where expressions of personal conscience are intertwined with institutional conscience, it may be a perfectly good thing, insofar as it shows a significant level of personal devotion to the role. However, it remains fairly unclear where the line is drawn between the personal and the institutional in some cases, and it is certainly unclear what if any limits there are

¹⁶⁹ See, e.g., William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690, 696 (1905) (“Of the many injurious aspects of the Dissenting Opinion, one of the most destructive is that by emphasizing the personal composition of courts it is subversive of their great anonymous authority. The more impersonal their character, the more willing is the respect they earning.”)

¹⁷⁰ See, e.g., Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 926-27 (1962) (arguing that dissent is preferable to false unanimity).

on how personal conscience may play in. Some judges do mention it, and there is no clear indication from the opinions about any legal prohibition on it, so we have to take these expressions to be a part of picture of the judicial role, albeit an unsettled. Where a judge allows the personal commitments to come in, but recognizes that the personal is trumped by the obligation to follow the law, there may be a happy balance of sorts. This may not be a balance that falls assuredly within the proper bounds of the role, but the balance is arguably a no-harm, no-foul resolution that may be helpful to public confidence in and understanding of the role, to allow these sorts of escape valve for serious clashes between personal and professional integrity.¹⁷¹

However, expression of personal conscience to trump the conscientious obligations to the institution in a dissenting opinion is definitely problematic. There the personal is permitted to trump the professional obligation not just as a matter of expression, but as a matter of action. The judge in these situations declines to follow the law. It is not a no-harm, no-foul scenario just because the others on the panel followed the law. Even the rhetoric of dissent is enough to convey the idea that it is proper for judges to subvert the law, to prefer their own idea of ‘right’ or ‘justice’ rather than the law as it stands. This undermines the judicial ideal of impartiality.¹⁷² More practically, it suggests that if another judge on the panel had happened to take the same view of adherence to his or her own personal conscientious commitments, the result would have been different, and blatantly extra-legal. This would be an abdication of the role, despite other available approaches that might help a judge resolve the dissonance without harm to the corpus of the law.¹⁷³ The escape valve idea that may be appropriate in a concurrence will not withstand scrutiny here, even for rhetorical effect in the most dramatic case. It says “I will not follow the law” which is only proper for someone who is not charged specifically with applying the law. It says “I will (or at any rate, I would if I could) use my power as a judge to impose the law as I

¹⁷¹ Though he does not provide any authority for the proposition, one author specifically suggests the use of concurring and dissenting opinions as appropriate platforms for expression of a judge’s convictions. R. Dean Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 822 (1952) (“[A]s a matter of morals and good conscience, such opinions enable their authors to express their convictions in lieu of silently assenting to a majority opinion in which they do not believe.”).

¹⁷² Another word that might be used in place of ‘impartiality’ in this sense might be ‘objectivity.’ The dimensions of the meaning of that word, though, are well beyond the scope of this article. For an extensive account of the relationship between objectivity and legal decisionmaking, see Matthew H. Kramer, *OBJECTIVITY AND THE RULE OF LAW* (2007). See also Fiss, *supra* note 58, at 149-171 (on objectivity and interpretation).

¹⁷³ Here Prof. Brand-Ballard, for instance, would disagree, though using the specific language of morality, rather than ‘conscience’ specifically. See Brand-Ballard, *supra* note 16, *passim*.

wish it were.” Such partiality for the judge’s own view of what is right will only undermine confidence in the impartiality of judicial decisionmaking.¹⁷⁴

Judges must be mindful about the extent to which their expression of personal commitments may suggest to the public that the outcome of a given case may be different according to the personal commitments of the judge assigned. Such individualism does not exemplify the kind of independence that ought to be upheld as the judicial ideal. There may be power (in practice) to rely on personal conscientious commitments over against legal or other institutional commitments, but there is no proper authority to do so.¹⁷⁵

Dissenting on grounds of personal conscience without officially publishing the opinion does not solve or avoid the problem. The reality of unpublished opinions is that they are still readily available, and even if they cannot be officially cited back to the court with the weight of authority, they indicate arguments that could be made to the court and might well be persuasive, even if the case itself is not cited. Nor is the solution to dissent on the basis of commitment to personal conscience without writing that in an opinion at all. Judges, as trustees, are obliged to account for their management of the corpus of the law by explaining the reasoning that stands behind a decision to dissent.

So often, the truest clashes of personal and professional conscience come about as a result of a judge’s deep-seated desire to see justice done. Where it seems to a judge that the law produces unjust results, judicial conscience (both institutional and personal) may prompt the judge to draw attention to problems that may not have been seen or anticipated by lawmakers in the first instance. This can be a quite proper fulfillment of the judge’s professional trusteeship obligations. Whether it is legitimate as such will depend on the circumstances and explanation of that matter of conscience and the role the judge is playing in expressing it. The more the judge raises the issue to make sure it is clearly

¹⁷⁴ Writing about Supreme Court justices making decisions on matters of Constitutional Law, Prof. Powell emphasized that the legitimacy of these decisions depend on the perception that the justices are playing by the rules. Powell, *supra* note 1, at 43. That said, he also asserts that in such cases there is always a correct (i.e. yes or no) answer, no matter how close the case. *Id.* This second point may be less true in the broad sweep of decisions covered by the judges who are the focus of this article. In any event, the idea that judges can unilaterally exempt themselves from the rules of the game (i.e. following established law) when it offends their individual consciences is at the very least problematic for public confidence. For further discussion of the jurisprudence of following the rules, *see, e.g.*, Frederick Schauer, *PLAYING BY THE RULES, A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Dworkin, *supra* note 148, *passim*.

¹⁷⁵ It is worth remembering at this point, however, that there are other practical options for a judge who feels truly stuck, as a matter of personal and professional integrity, between an obligation to a faithfully apply law and fidelity to his personal conscience. A judge may recuse, may mention the difficulty in a concurring opinion (thus showing deference, within the role, to the legal authority), or if the situation is more extreme and the judge feels so compelled, the judge may even resign his position in order to give free rein to his own conscience and preserve his own sense of integrity.

understood and thus can be properly considered by those with legislative or interpretive authority, without the judge acting beyond the scope of the role by diverging from the application of the law, the more likely it is to be safely within the proper bounds of the judicial role. By contrast, the more the judge not only raises the issue but feels compelled to act on the conscientious disagreement by refusing to apply the law as it stands, the further the expression lies outside the bounds of judicial propriety, elevating adherence to personal conscience above institutional conscience.

While one would never define the judicial role as one in which personal commitments of the role occupants are intended explicitly to take precedence over professional commitments, there may be a certain tolerance in actual practice for an occasional release of personal steam by judges, in recognition that the role is a demanding and difficult one, and an escape valve is sometimes necessary where it does not impede or interfere with the ultimate application of the law. There are advantages to a certain flexibility along these lines. First, these occasional, and often very human, responses to what the judge perceives as an injustice worked by the law as interpreted and applied by the majority, may allow the public to see that that judges consider cases very carefully, and that while their role is not ordinarily one that resorts to personal considerations, they are human beings, and cannot always turn a blind eye to their personal commitments, which may well be personal commitments of members of the public, and which in any event have not (by virtue of being placed in a concurrence) interfered with the application of the law. Second, these expressions may indicate to potential future occupants of the judicial role that there may be in rare instances a way out of a spot that creates difficulties for personal integrity, which may encourage some to pursue a judicial career who would otherwise have been deterred by the prospect of being absolutely stuck in a situation in which they might feel compelled to speak up as to personal commitments. Third, they signal to the legislature what may be unintended consequences of a particular law, and open the possibility of further legislative consideration of making a change to the law.¹⁷⁶

For any of these good effects to arise, transparency about what is going on is of course essential. The judge must be straightforward about the role played by the personal commitments in the consideration of the case. And for these good effects to provide the underpinnings of the legitimacy of the practice, the practice

¹⁷⁶ Alerting a higher court of legislative body to the need to amend or change the law, whether that is aimed at a simple correction of language or a wholesale changing of the legislative mind to “get the law right,” is more legitimate the more it arises from an institutional perspective and concern, and less legitimate the more it arises from a purely personal commitment. But acting without authority to make the correction, despite accompanying expressions of a desire to “do justice,” only undermines the authority and legitimacy of the judicial role. Whatever rhetorical emphasis is gained by doing this sort of thing in a dissenting opinion is just as surely lost in terms of respect for credibility and restraint expected of the judiciary.

must be truly rare for any given judge. The incorporation of, and indeed the reliance on, personal commitments, as opposed to straightforward application of the law alone, may well remain unexpressed in many cases. However, in those cases, the other reasons actually expressed in a given opinion, will be able to be judged as legitimate or not on their own terms, so that the personal commitment will not in those instances have overridden a legitimate basis for a decision.

The line between institutional conscience and personal conscience is not always easy to draw, and there is even less clarity about the authority of judges openly to incorporate personal conscience into the decisionmaking process. However, as long as judges do resort to personal conscience (and the expressions we can identify indicate that it does happen, and the lack of explicit authority to do so suggests that it may happen more often than it is openly expressed), the transparency offered by open expression of personal conscience is better than hiding it. One might argue that the public will have more confidence in the judiciary if judicial personalities do not show. But hiding certain aspects of judicial decisionmaking, whether because they are not allowed or because it is unclear whether they are allowed, holds us back from a full understanding of what goes on in the judicial role, and thus prevents us from engaging in the best regulation of that role.

Wherever conscience is expressed as a matter of fulfillment of the responsibilities of the role, value is added to our understanding. Evading questions about the responsibilities of the role with regard to personal conscientious commitments, by contrast, comes at a cost. Judges, as trustees of the law, are accountable for the reasoning underlying their decisions. Omitting *expression* of personal conscience, without first clarifying explicitly what counts as personal (as opposed to institutional) conscience, what the limits are on its legitimate use in the decisionmaking process, and what the authority is for all of that, does not resolve the issues. Instead it keeps observers of the judiciary from understanding what role personal conscience might properly play. If, with transparency and with time, it becomes clear that personal conscience has no role to play, that will work itself out. As Judge Cardozo wisely said:

The flaws are there as in every human institution. Because they are not only there but visible, we have faith that they will be corrected. There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. We ought not to expect more of it when embodied in the judgments of the courts. The tide rises and falls, but the sands of error crumble. ... Ever in the making, as law develops through the centuries, is this new faith which silently and steadily effaces our mistakes and eccentricities. I sometimes think that we worry

ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.¹⁷⁷

We can only aspire to this perfection of the law over time, though, if we persist in asking the hard questions and carefully examining what really goes on in judicial practice and why.

VII. Conclusion

Despite a lack of perfect clarity or consistency among federal appellate judicial views on the meaning of or the propriety of reference to or reliance on judicial conscience, these expressions do come into play. Most of the expressions of conscience examined in this article, even when expressed in terms of a first-person perspective, and even though they may be a matter of personal commitment (to the role), are nonetheless expressions of institutional responsibility, and are therefore perfectly appropriate in any opinion – majority, concurrence, or dissent. These can be useful expressions in that they demonstrate to the public the careful consideration of judges not only of the cases and questions before them, but of the special role they play, and the seriousness with which they play the role. This can legitimately boost a proper and meaningful public confidence in the judiciary. Where expressions of personal conscience are concerned, as discussed in the previous section, many significant questions about the legitimacy of the use and expression of individual conscientious commitment remain unanswered. These are questions that must be more deeply and openly explored by those who occupy the judicial role, on order that we may reach a better understanding of that role in all its fullness.

This article has looked only at federal appellate judges, who have arguably less at stake than judges in their opinions when it comes to public approval or job security, and who have arguably more room for the expression of conscience in the context of judging in panels, when compared with those who judge alone. There are significant questions that would be all the more complex when it comes to judges who must seek re-election or re-appointment, who must make more factual determinations, and so on.¹⁷⁸ This article has merely laid some of the

¹⁷⁷ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 177, 179 (1921).

¹⁷⁸ For example, should the public or the executive branch choose judges on the basis of their personal commitments, or should or could those personal commitments remain irrelevant in the selection and retention processes? These questions are well beyond the scope of this article, but

groundwork by establishing rough categories for analysis and acknowledging the lack of definition and authority on any aspect of the questions at stake when it comes to judicial conscience. In short, it opens a conversation about judicial conscience. Many more issues must be explored, both in the federal appellate context and in other judicial contexts.¹⁷⁹ Judges and scholars alike must continue to contribute to the effort to reach a better understanding of these issues, and thus a fuller understanding of the judicial role.

are essential questions to resolve for the better understanding and better practice of the selection and retention processes currently employed.

¹⁷⁹ For example, if expressions of personal conscience are *not* legitimate, but are tolerated in the appellate context for the occasional release of steam without actual disruption of the application of law, in separate opinions, will this act as the thin end of the wedge, encouraging a view that personal views are legitimate, and changing practice over time? By contrast, if expressions of personal conscience *are* legitimate, what efforts ought lawyers to devote to making explicit appeals to judicial conscience in order to subvert the substantive law?