DePaul Law Review

Volume 45
Issue 3 *Spring 1996*

Article 3

Commentary on Jeffrey M. Shaman's the Impartial Judge: Detachment or Passion?

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COMMENTARY ON JEFFREY M. SHAMAN'S *THE IMPARTIAL JUDGE: DETACHMENT OR PASSION?**

*Shirley S. Abrahamson***

I am honored to participate in the Wicklander Colloquium and to be given the opportunity to comment on Professor Shaman's thought-provoking paper entitled *The Impartial Judge: Detachment or Passion?* Professor Shaman, in this piece and in his academic research career, gives scholarly attention to the important subjects of judicial ethics and judicial conduct.[1] The knotty problems of recusal and disqualification faced daily by judges sorely need disinterested yet concerned analysis and insight. On behalf of my colleagues in the judiciary I thank Professor Shaman for his work and assistance.

The ideal judge, Professor Shaman says, is an impartial one.[2] Indeed, the American Bar Association Code of Judicial Conduct adopts

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* This is a slightly revised and annotated version of the oral commentary.

** Justice, Wisconsin Supreme Court. I want to thank Michael J. Fischer, my law clerk, and Sue Fieber, my assistant, for their work in editing the manuscript and preparing the commentary for publication. Special thanks also to Marcia Koslov, Wisconsin State Law Librarian, and the staff for their aid and patience.

1. *See, e.g.*, JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (1990) (examining and discussing the tremendous change in the field of judicial ethics over the past 25 years); JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 45 (1995) (documenting judges' attitudes towards and practices regarding disqualification); Jeffrey M. Shaman, *Bias on the Bench: Judicial Conflict of Interest*, 3 GEO. J. LEGAL ETHICS 245 (1989) (expounding on the fundamental principle of our legal system based on the idea that judges must perform their duties free from personal bias); Jeffrey M. Shaman, *The Illinois Code of Judicial Conduct and the Appearance of Impropriety*, 22 LOY. U. CHI. L.J. 581 (1991) (documenting misuse of the prestige of judicial office to advance private interests in contravention of Canon 2 of the Illinois Code); Jeffrey M. Shaman et al., *The 1990 Code of Judicial Conduct: An Overview*, 74 JUDICATURE 21 (1990) (arguing that it appears that judges are now free to serve as officers of non-profit "political" organizations); Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1 (1988) (stressing the importance of the role of the judiciary in society and the need for impartiality and competence); Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811 (1988) (explaining the system of regulating judicial conduct).

2. For an historical overview of the issue of judicial impartiality see John T. Noonan, Jr., *Judicial Impartiality and the Judiciary Act of 1789*, 14 NOVA L. REV. 123 (1989). "No one interested in the system doubts for a minute that we wish our judges to be impartial . . . ." William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N B. CITY N.Y. 694, 695 (1973).

impartiality as a standard for judges.[3] But what exactly is an impartial judge?

Professor Shaman discusses three key attributes of the impartial judge. First, he says, an impartial judge is faithful to the law. I agree. When a case is governed by established law, the judge should adhere to that law, unless there is a good reason to depart from precedent.[4]

Professor Shaman next asserts that an impartial judge is open-minded and does not prejudge a lawsuit. Again, I agree. At the Wisconsin Supreme Court's post-argument decision conferences I have frequently observed that a justice who was leaning toward one side's position before oral argument has been persuaded during the course of argument to support the other side.[5] Thus, although any judge may form an early impression about a case, an impartial judge will listen until the parties have finished their presentations and will form and modify her views on the basis of compelling facts and well-reasoned argument.[6]

Finally, Professor Shaman says the impartial judge is free of personal bias or prejudice and has no self-interest in the matters she is asked to decide. I agree.[7] Indeed, the United States Supreme Court

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3. MODEL CODE OF JUDICIAL CONDUCT Canons 2, 3 (1990). These Canons state that "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary" and that "[a] judge shall perform the duties of judicial office impartially and diligently."

4. Fidelity to precedent, the doctrine of *stare decisis* which means literally, "stand by things decided," is fundamental to "a society governed by the rule of law." Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 419-420 (1983). Alongside the doctrine of *stare decisis* is a second generally accepted principle, namely that the common law must accommodate to changing circumstances. Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982). "The doctrine of *stare decisis* and the dynamic aspect of the common law are harmonized by a third generally accepted principle: A court's decision to depart from precedent is not to be made casually;" the justification must be articulated. State v. Stevens, 511 N.W.2d 591 (Wis. 1994).

For a discussion of the dilemma of a judge who must apply a law that is contrary to the judge's conscience, see Charles Fried, *Impudence*, 5 SUP. CT. REV. 155 (1992).

5. Oral argument can change a judge's predisposition towards a case. Myron H. Bright & Richard S. Arnold, *Oral Argument? It May be Crucial!*, 70 A.B.A. J. 68 (1984).

6. " '[A] judge is supposed to have an open mind, or at least a mind reachable by reasoned briefs and arguments.' " William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 613 (1989) (quoting *Nonjudicial Activities of Supreme Court Judges and Other Federal Judges: Hearing Before the Subcomm. on Separation of Powers*, 91st Cong., 1st Sess., 142 (1969) (statement of Alexander Bickel)). Professor Ross discusses the proper scope of judges' extrajudicial statements considering the need to assure an impartial, nonpolitical and independent judiciary. *Id.*

7. "Fair" is probably the single adjective most people would select to describe their notion of a good judge. An impartial judge—one who is faithful to the law, approaches cases with an open mind and is free of bias or self-interest—conjures up the vision of a fair judge. The popular notion of fairness squares better with the idea that a judge should be faithful to the law, approach cases with an open mind and remain free of bias or self-interest than does the concept of

recently struck down an Alabama Supreme Court decision because one of the justices had a direct, substantial and pecuniary interest in the outcome.[8] The case before the Alabama Supreme Court was similar to one the justice had filed on his own behalf. To the United States Supreme Court, this justice's participation in the case violated the losing party's right to due process.[9]

In the title to his lecture, Professor Shaman juxtaposes two superficially competing attributes of an impartial judge—detachment and passion. In comparing these attributes, he juxtaposes two judicial giants: Justice Oliver Wendell Holmes,[10] representing judicial detachment, and Justice Benjamin Cardozo,[11] representing judicial passion.

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impartiality. Fairness also implies a sense of engagement with humanity that impartiality does not.

If the dictionary definition of "impartiality" is used to mean freedom from bias or favoritism, Chief Justice Rehnquist has concluded that all judges are biased because they favor or are inclined towards certain views. Chief Justice Rehnquist has suggested "that the true distinction is between the concept of attitude or outlook, which is not disqualifying, and the concept of 'favoritism,' which is disqualifying. Favoritism means a tendency or inclination to treat a particular litigant more or less generously than a different litigant raising the identical legal issue." Rehnquist, *supra* note 2, at 709.

8. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

9. *Id.*

10. For commentary on Justice Holmes, see, e.g., Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986) (comparing judicial restraint with judicial activism); M.H. Hoeflich & Jan G. Deutsch, *Judicial Legitimacy and the Disinterested Judge*, 6 HOFSTRA L. REV. 749 (1978) (stressing that disinterestedness is essential to legitimate the judicial role); Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1962-63 (1988) (discussing Holmes' lack of sympathetic connection); Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. U. L.J. 427 (1990) (analyzing Holmes' utilitarian traits); Saul Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 437 (1965) (documenting Holmes' Civil War experience); Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343 (1984) (exploring the contested nature of Holmes' reputation); G. Edward White, *Would You Like to do Lunch with Holmes?*, 61 U. COLO. L. REV. 737 (1990) (documenting Holmes' personal and professional life); Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964) (discussing Holmes as a detached judge); David E. Van Zandt, Book Review, 104 ETHICS 643 (1994) (reviewing THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., 1992)).

11. For analyses of Justice Cardozo's philosophy of judging, see, e.g., RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990) (evaluating Cardozo's life and reputation as a pragmatic legal philosopher); Edgar Bodenheimer, *Cardozo's Views on Law and Adjudication Revisited*, 22 U.C. DAVIS L. REV. 1095 (1989); Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195 (1961); John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324 (1990) (giving insight as to how Cardozo decided cases and explaining that he hesitated to make broad theoretical arguments about the function of the law); Andrew Zellermyer, *Benjamin N. Cardozo: A Directive Force in Legal Science*, 69 B.U. L. REV. 213 (1989) (describing how Cardozo broke new ground in many areas of law and provided guidance for other judges); David A. Logan, *The Man in the Mirror*, 90 MICH. L. REV. 1739 (1992) (reviewing RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990)).

Professor Shaman then poses two questions about the ideal of the impartial judge. First, he asks whether the ideal of the detached judge is possible. Second, he asks us whether this ideal, even if attainable, is desirable.

I will undertake to answer Professor Shaman's questions today, but before I do so, I'd like to clarify some terms. Professor Shaman's use of the word "detachment" conforms to its common dictionary definition: indifference to worldly concerns, absence of emotional attachment to issues and people, aloofness. Defined in this way detachment describes well a certain idea of what it means to be a judge: reasonable, logical and clear, but also removed, reserved, cold.

The word "passion," conversely, is commonly used to describe everything detachment is not. Passion is intense, fervent, ardent. But it is also overwhelming, irrational, out of control. And dangerous. Used and defined this way, passion is the antithesis of the impartiality judges aspire to attain. Professor Shaman's stories make amply clear why such passion has no role to play in the decisional process of the ideal judge.

But in employing the word passion, Professor Shaman departs from common usage of the word.[12] He speaks of Justice Cardozo's "careful passion," of Cardozo's conviction that in some judicial decisions a judge must consider the consequences of a decision to the litigants and to the welfare of society as a whole.[13]

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12. Justice William J. Brennan described passion in decision-making as follows:

> [Q]ualities other than reason must play [a role] in the judicial process .... I shall refer to these qualities under the rubric of 'passion,' a word I choose because it is general and conveys much of what seems at first blush to be the very enemy of reason. By 'passion' I mean the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason .... It is, of course, one thing for a judge to recognize the value that awareness of passion may bring to reason, and quite another to give way altogether to impassioned judgment .... It is often the highest calling of a judge to resist the tug of such sentiments.

William J. Brennan, Jr., *Reason, Passion, and "the Progress of the Law,"* 42 REC. ASSOC. BAR CITY OF N.Y. 948, 958-961 (1987).

Professors Minow and Spelman are concerned that Justice Brennan will be misunderstood. They explain that for Justice Brennan, "passion is any mental faculty which is not reason, narrowly defined" and explain that Justice Brennan views passion as necessary for good thinking and good thinking necessary for passion. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 39-40 (1988).

Because the word passion can be misunderstood, others use words such as connected, pragmatic, compassionate, sympathetic and empathetic to set forth a contrast with the ideal of detachment. These words seem to have more favorable connotations than passion in the judicial setting. *See infra* note 19.

13. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65-97 (1921); *see also* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind*

Careful passion. That's a curious phrase, almost an oxymoron. But Professor Shaman's choice of the phrase "careful passion" for his discussion of judicial decision-making is significant. It suggests that our immediate and instinctive rejection of passion as a part of the judicial process might be a bit quick on the draw. For careful passion, as Professor Shaman uses the phrase, requires that a judge be engaged. Further, the phrase invites a closer examination of what we mean when we conjure up the generally accepted picture of the impartial judge—the impersonal, disinterested and detached judge—as our ideal.

What about this ideal? Our symbol of justice is blindfolded. Our judges hide their individual characteristics beneath black robes while they sit, physically apart, from the other participants in the drama of the courtroom.[14] All this reminds us that judging draws much of its meaning and validity from separation. The judge's non-involvement with the parties and issues, the judge's disinterested state of mind and heart, the sense that a decision is foredoomed by the law—or at least that the judge's discretion is significantly limited—all give the judicial decision an authoritative, definitive quality.[15]

Detachment also serves as an important psychological aid, reducing the judge's own pain and conflict in decision-making. Although behind every case number there are real people, with deep feelings

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Judges, 75 COLUM. L. REV. 359, 391-94 (1975) (describing judicial reliance on public policy as not only important but practical); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1975 (1988) (demonstrating that judges are not free to interpret ambiguous statutes according to their own views but rather must take into account the social background against which the statutes were enacted).

For discussions of the role of political pressure on judicial decision-making, see Lea Brilmayer, *Do We Really All Believe that Judges Should Be Influenced by Political Pressure?*, 61 U. COLO. L. REV. 703 (1990); Richard Delgado, *Judicial Influences and the Inside-Outside Dichotomy: A Comment on Professor Nagel*, 61 U. COLO. L. REV. 711 (1990); Ruth Bader Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 U. COLO. L. REV. 715 (1990); Hans A. Linde, *On Inviting an Echo: Comments on Nagel, Political Pressure and Judicial Integrity*, 61 U. COLO. L. REV. 721 (1990); Robert R. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685 (1990); Patricia M. Wald, *Constitutional Conundrums*, 61 U. COLO. L. REV. 727 (1990).

14. *See* Hoeflich & Deutsch, *supra* note 10, at 749-50 (explaining that when a judge relies on legal, rather than personal, arguments, the law becomes more objective and reasonable).

15. Hoeflich and Deutsch state:

> It is our contention that the role of the disinterested judge, blind and to that extent impartial with respect to differences that distinguish persons from each other, is a crucial component of our societal stock of myths, and that it is social acceptance of this notion of blind judging that legitimates and therefore maintains the judicial process . . . . What this argument is based on is that the instrument of judicial power is the opinion deciding the case before the court. It is that opinion, and not the individual personality of the author, that must be perceived as successful in having imposed justice upon the controversy being adjudicated.

Id.

about the dispute before the court, the judge must remain acutely and constantly aware that the court's decision will govern others with similar disputes and must fit within the body of law. Although the people in each case are important, the law and the judicial system are too. Thus, a judge frequently reaches decisions mandated by the law, although she may not personally favor the results.

It is a familiar image: the judge who, reluctantly and in opposition to some of her most settled convictions, does her duty by reaching a decision she perceives as required by the law.[16] This image speaks powerfully to our ideal of detachment, an ideal we are right to demand of judges, who have immense power over people's lives.

But our ideal image of judicial detachment is easily confounded. It is one thing to ask that judges be detached in the sense that they must place their allegiance to the rule of law and the judicial institution above their personal considerations or predilections. However, if by calling the ideal judge "detached" we mean that such a judge is both disengaged and disinterested, without interests or points of view, without preferences or biases, we are not only speaking of a different sort of detachment, but we are also erecting an ideal which is clearly unattainable.[17]

Fortunately—or unfortunately, depending on your view—we judges are humans, not gods or even demi-gods. We were born into and live in this world, not on some fictive Olympus. To borrow from Judge Posner, we are not potted plants, but people.[18] Even if we were to agree that judges should aspire to rule from above, they are inevitably pulled back to earth by the particular histories, relationships and places that have made them who they are. Searching for that illusive

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16. *See* Grodin, *supra* note 13, at 1974-75 (explaining that judges must make rulings that sometimes go against their own personal views).

For discussions of decision-making and a judge's moral or religious beliefs, see Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989) (stating that it is proper for a judge to rely on personal religious convictions); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990) (exploring the role of religion in public life).

17. Judge John T. Noonan, Jr., suggests that we keep the ideal of impartiality but "recognize that there is a lot of relatedness":

> [T]he best statement of the whole thing . . . [is] in the Declaration of Rights of the Commonwealth of Massachusetts, that every citizen is entitled to a judge who is 'as free, independent and impartial as the lot of humanity will admit.' That second clause builds in the relativity that does go with different cultures in changing circumstances.

Conference of Association of American Law Schools, *Panel on Compassion and Judging: Comments and Questions*, 22 ARIZ. ST. L.J. 53, 56-57 (1990) [hereinafter *Panel on Compassion*].

18. RICHARD A. POSNER, OVERCOMING LAW 229-55 (1995); *see also* Richard A. Posner, *What Am I? A Potted Plant?*, NEW REPUBLIC, Sept. 28, 1987, at 23 (stating the case against strict constructionism).

Archimedean point from which to preside, judges inevitably find themselves within the world rather than apart from it. If the ideal of judicial impartiality cannot accommodate the inescapable humanity of judges, then the ideal is problematic and must be re-examined.

Surely the problem cannot be with the ideal itself. For while judges may inevitably be connected to their world, not all connections are created equal: the impartiality we expect and demand from our judicial system renders some ties considerably more problematic for judges than others. Certain kinds of connectedness threaten a judge's independence, cast doubt on her capacity for fairness, and are therefore easily dismissed as both inappropriate and improper.

When, for example, a judge prejudges a case because of a personal bias or a pronounced self-interest, she is far too connected to the case. A judge should not be allowed to use her awesome powers to attain personal financial rewards or advance her personal goals. This type of connectedness corrupts decision-making and assuredly undermines confidence in the judicial system. It smacks of the kind of passion—willful, impatient of reason and inattentive to distinction—that indeed has no role to play in the judicial process.

On the other hand, judges should in some sense be interested, engaged and connected. Judges and scholars consistently envision the ideal judge as detached, but also sympathetic. Reserved, but also empathetic. Distant, but also concerned. Dispassionate, but also compassionate.[19]

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19. The dictionary definition of compassion is "deep feeling for and understanding of misery and suffering and the concomitant desire to promote its alleviation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 462 (1961).

Professor Resnik writes that "[a] modification of the official dogma of judging would be required to add the traits of compassion, care, concern, nurturance, identification, and sympathetic attention to the list of aspirations for our judges." Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877, 1922-23 (1988) [hereinafter Resnik, *On the Bias*]; *see also* Judith Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31 (1980) (suggesting that aspirations for judges include judicial independence and compassion).

Justice Anthony Kennedy of the United State Supreme Court catalogued the qualities of a "good judge" as including "compassion, warmth, sensitivity and an unyielding insistence on justice." Resnik, *On the Bias, supra*, at 1923 n.188.

Judge John Noonan writes "I think empathy is an important quality of a judge which will lead to a better rule." John T. Noonan, Jr., *Heritage of Tension*, 22 ARIZ. ST. L.J. 39, 42 (1990).

Professor Cain comments, "Presumably we do not mean that they should judge as robots, with no particular point of view .... [W]hat we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment." Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1949, 1954 (1988); *see also* Richard D. Cudahy, *Justice Brennan: The Heart Has Its Reasons*, 10 CARDOZO L. REV. 93 (1988) (stating that the humanity of a decision-maker does not mean the irrational application of rules without restraint); Lynne Henderson, *The Dialogue of Heart and*

To be engaged or connected, or as Professor Shaman says to exercise careful passion, a judge must do two things. First and most obviously, the judge must be interested in and concerned about the lives of the litigants who appear before her. A judge who is disengaged from the real world cannot fully grasp how her courtroom decisions will play out in that world. Second, to be engaged the judge must seek to draw out the litigants in her court. Just as by engaging a shy person in conversation one allows that person to speak, by engaging a litigant the judge gives voice to that litigant's cares and concerns. Similarly, a judge who understands and draws out the people insures that their voices will echo in the decisions she makes and the opinions she writes.[20] Like it or not, a judge's holdings reverberate far beyond the stately halls from which they are issued.

Reverting to Professor Shaman's second question, then, while the ideal of a detached judge is desirable, detachment must not—cannot—come at the expense of humanity, either the judge's own or that of those being judged. When the judicial process transforms either judges or those who appear before them into abstractions rather than individuals, the rule of law becomes a mindless law of rules—an amal-

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Head, 10 CARDOZO L. REV. 123 (1988) (discussing that emotions and empathy should be officially recognized as influences on judges); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that the assumption that law and empathy are mutually exclusive concepts should be rejected); Laurence H. Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726 (1989) (explaining that no ultimate conflict exists between rule of love and rule of law); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TULANE L. REV. 775 (1991) (noting that common sense plays a central role in the judicial process); Patricia M. Wald, *The Conscience of a Judge*, 25 SUFFOLK U. L. REV. 619 (1991) (stating that judges should avoid flight into abstractions that mask the human consequences of decisions); Patricia M. Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, 4 LAW & INEQ. J. 3 (1986) (acknowledging that individual experiences play a role in moral reasoning and decision-making); Richard Weisberg, *Judicial Discretion, or the Self on the Shelf*, 10 CARDOZO L. REV. 105 (1988) (asserting that the personal side of judging must be recognized).

20. Professor Karst concludes that concern and connection do not destroy impartiality. He writes as follows:

> If we ask the judge for concern and connection, can we also demand impartiality? The impartiality we can fairly demand is . . . an effort to decide the case from an independent standpoint, as opposed to the point of view of one of the parties, and to approach all parties' contending positions with sympathetic regard . . . . Is empathy the enemy of objectivity?
>
> On the contrary, a capacity for empathy is implicit in the idea of principled behavior . . . . The same empathy that permits the judge to imagine that parties' experiences and thoughts and feelings also underlies his or her capacity for principled detachment—that is, a capacity for the only kind of objectivity we can properly expect. Empathy and objectivity are two names for a disposition that is essential to the successful practice of the judicial art. When judges are doing their job properly, judging and belonging are inseparable.

Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1966 (1988).

gam of regulations without rhyme, reason or relation to the people whose aspirations the law should reflect.

Judging requires more than such a mechanical application of pure reason to legal problems. To be sure, legal principles and logic necessarily influence the outcome of every case. But though they alone will determine many cases, in other cases they will not suffice. Principles may admit of more than one interpretation, conflicting principles may apply, or the application of principles to the facts may be unclear.[21] In cases such as these, the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision.

But how do we reconcile our positive image of blindfolded justice with this negative image of the blindfolded judge? How can we craft an ideal which demands, simultaneously, that judges be detached and yet engaged, neutral and yet connected? When is it appropriate for a judge to take the blindfold off, or at least to peek from beneath its folds?

For starters, judges must learn to understand that although detachment is a good and an admirable judicial trait, one can have too much of a good thing. As Dean Aviam Soifer of the Boston College of Law writes in his recent book *Law and the Company We Keep*, "[j]udges fail when they are inadequately committed to detached judgment. They also fail when they are so detached that they think they can fly high above the communities that encumber them as well as the rest of us."[22]

Oliver Sacks, the neurologist whose experiences in a Brooklyn hospital became the basis of the movie *Awakenings* and whose book *An Anthropologist on Mars* was a bestseller for much of this past year, describes the case of a judge deprived of emotion by frontal-lobe dam-

21. For discussions of discretion in decision-making, see, e.g., BENJAMIN M. CARDOZO, THE GROWTH OF THE LAW 60 (1924); Henry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 857; Harry T. Edwards, *The Role of A Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 395-403 (1983-84); Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 222-23 (1961); Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decisionmaking*, 43 CONSUMER FIN. L.Q. REP. 254 (1989); Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 896-908 (1987); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990).

22. AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 163 (1995). "[It is] problematic . . . to proclaim disengagement, impartiality, and independence as central judicial virtues. Yet the dangers of abandoning these ideals are painfully obvious. There can be too much empathy, too much willingness to understand and then to embrace one party and to punish another." *Id.*; *see also* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 18 (1976) ("Abandonment of the rules produces monsters; so does neglect of persons.").

age from shell fragments in the brain. Though in a basic sense the judge was impartial, free of emotion and the biases that go with emotion, the judge resigned his judgeship, "saying that he could no longer enter sympathetically into the motives of anyone concerned, and that since justice involved feeling, and not merely thinking, he felt that his injury totally disqualified him."[23]

Despite their judicial oath to "administer justice without respect to persons," and to "faithfully and impartially discharge" the duties of the office,[24] judges must remember that individuals are not fungible and that the legal system cannot treat them as such. We laugh when we say that rich and poor are equal because both are free to sleep under the bridge. But the laughter—invariably nervous—reminds us that a judge must judge different people differently. A just and equitable jurisprudence is based on consideration of individuals.[25] A judge who cultivates a sense of connectedness with the parties, witnesses, jurors and staff with whom she interacts will come to understand their experiences. She will thereby come to show tolerance and empathy for those who appear before her, respecting their differences to ensure consistency in her application of the law.

Recalling *Goldberg v. Kelly*,[26] the opinion of which he is reportedly most proud, Justice Brennan has explained this connectedness well. In *Kelly*, the Court interpreted the Due Process Clause as requiring extended procedural protections for welfare recipients before welfare was cut off rather than after payments had stopped. This interpretation resulted in large part from the Court's understanding of the plight of welfare recipients in danger of losing their checks.[27] In the same way, because Justice Blackmun understood the plight of "poor Joshua" DeShaney, an abused child whom social services did not save from his father's fists, his dissent probably reflects a better under-

23. Oliver Sacks, *An Anthropologist on Mars*, NEW YORKER, Dec. 27, 1993, at 106, 123 (*noted in* SOIFER, *supra* note 22, at 278 n.62).

24. The Wisconsin judge's oath states as follows:

> I, [insert name], . . . do solemnly swear that I will support the constitution of the United States and the constitution of the state of Wisconsin; that I will administer justice without respect to persons and will faithfully and impartially discharge the duties of said office to the best of my ability. So help me God.

WIS. STAT. § 757.02(1) (1993-94).

25. *See* NOONAN, *supra* note 22, at 152-67 (concluding that the history of law is composed of human influences).

26. 397 U.S. 254 (1970).

27. *See* Brennan, *supra* note 12, at 937 ("*Goldberg* thus demonstrated that the Due Process Clause is not simply the blueprint for an empire of reason. It built upon Cardozo's insights by declaring that sterile rationality is no more appropriate for our administrative officials than for our judges.").

standing of the word liberty in the Fourteenth Amendment than does the majority opinion.[28]

Professor Shaman uses Holmes and Cardozo to elucidate the distinction between detachment and connectedness. He presents Holmes as a judge without emotion, and he is not the first to criticize Holmes for being too detached. But while Holmes is often portrayed as the embodiment of detachment, his detachment was neither consistent nor total. He too was engaged by and connected with the issues of his day. It was Holmes, after all, who in his 1881 masterpiece *The Common Law* argued that law should be conceptualized as a means to attain human ends and that policy rather than abstract concepts should guide judges' decisions. It was Holmes who insisted that judicial precedent must be scrutinized and revised, lest it become meaningless and antiquated. And as Professor Shaman himself reminds us, it was Holmes who gave us perhaps the most widely quoted aphorism about law: that the life of the law has not been logic but experience.

Cardozo was in many respects Holmes's pupil and derived some of his ideas about "careful passion," about understanding the consequences of a decision, from Holmes's writings. Although Professor Shaman chooses Cardozo to embody the image of the judge with passion, Cardozo's judicial opinions rarely reflect the vision of the engaged judge articulated in his extra-judicial writings. The application of social and economic values to the decision-making process appears in Cardozo's books, not ordinarily in his opinions.[29]

Cardozo's opinions tend to follow the traditional mode of formal opinion writing; they are carefully grounded on legal arguments and precedent rather than invoking considerations of policy or morality. *Palsgraf*[30] provides the most famous example: it is Cardozo who, in his majority opinion, upholds an abstract and longstanding legal standard regarding duty and proximate cause while Judge Andrews, in his

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28. *See* DeShaney v. Winnebago County Dept. of Social Servs., 109 S. Ct. 998 (1989). For discussions of *DeShaney* and the need for compassion as part of the process of objective understanding, see, e.g., Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514 (1989) (finding the *DeShaney* majority opinion's formalistic approach an "abomination" and devoid of "moral sensitivity"); Tribe, *supra* note 19, at 729-30 (stating that "sympathy and compassion" are vital components to the "Rule of Law"); Benjamin Zipursky, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1102 (1990) (interpreting Justice Blackmun's emphasis on compassion in his *DeShaney* dissent as "a *part* of the proper interpretation of the law," rather than distinct from it).

For judges' and scholars' views on the role of compassion in judicial decision-making, see *Panel on Compassion, supra* note 17.

29. *See* Goldberg, *supra* note 11, at 1325.

30. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

equally famous dissent, crafts a duty of care arguably more sensitive to both the facts and policy considerations informing our tort law.[31]

Holmes's opinions, conversely, are imbued with considerations of policy. They are acutely aware of the dramatic socioeconomic transformations taking place in turn-of-the-century American society, what Holmes referred to as the "felt necessities of the time" and which, he made clear enough, judges ignored at their peril.[32]

None of which casts doubt on Professor Shaman's portrait of the detached Holmes and the "passionate" Cardozo. But rather than asking whether the real Oliver Wendell Holmes and the real Benjamin Cardozo would please stand up, perhaps we might take these two distinct sides of Holmes and Cardozo to express the prospect—and promise—of a judicial ideal requiring that judges be both detached and yet paradoxically engaged. To paraphrase Professor Shaman, perhaps we must demand that judges be both *passionate* in their attention to and concern with the affairs of the everyday life to which they are inevitably bound and yet *careful* to insure that such involvement does not compromise the integrity, impartiality and fairness with which judges must judge if they are to judge well.

Engagement then, need not compromise either a judge's necessary detachment or impartiality. Engagement does not confer license to impose personal beliefs on the result of a particular case. To acknowledge that some judicial outcomes are not logically predestined in no way suggests that they need be or even can be the product of a judge's uncontrolled will.[33]

When we relegate the judicial process and the judge herself to hermetically sealed and mutually exclusive spheres, we not only dehumanize both, but we make it impossible to imagine their possible integration. We would do better to leave behind such a stark and simplistic view of warring absolutes, recognizing that a person does not cease to be a person when she puts on her black robe, any more than a judge who acknowledges her humanity thereby ceases to be a judge. The best judges are those who can be both judge and human at once.[34]

Chief Judge Judith S. Kaye of the New York Court of Appeals has written that "the danger is not that judges will bring the full measure

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31. *Id.*

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

33. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4-5 (1960) (recognizing that people mistakenly assume that because the outcome of an appeal is not foredoomed in logic, it is the product of uncontrolled will).

34. *See* Karst, *supra* note 20, at 1966 ("Empathy and objectivity are two names for a disposition that is essential to the successful practice of the judicial art. When judges are doing their job properly, judging and belonging are inseparable.").

of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them. It seems to me that a far greater danger exists if they do not."[35]

Thus, an awareness of both the legal arguments and human emotions driving and justifying each of the interests in a case can actually *help* a judge to achieve a hard-won impartiality, one informed rather than blind. Moreover, a judge who is aware of the inevitable interaction between reason and engagement, and who consciously weighs and evaluates the two, thereby guards against self-deception. As Judge Jerome Frank once warned, those judges gullible enough to imagine that they might transcend their human condition are all the more susceptible to their own prejudices, which grow stronger because they are unacknowledged and therefore unrecognized.[36]

An alternative vision of the judicial role would encourage judges to exercise Cardozo's "careful passion" by learning to be comfortable with, rather than debilitated by, its inherent paradox. In confronting that paradox, a judge must learn to differentiate between the connectedness that should disqualify her from sitting on a case and the connectedness that can enhance her decision-making ability.

When to disqualify a judge who has failed to obey the law, has a personal bias or self-interest, or has prejudged a matter is one of the most complex areas of judicial conduct and ethics, because "[t]o decide when a judge may not sit is to define what a judge is."[37] For all the precedent available in a multitude of issues, there is precious little to guide some of the most difficult decisions judges make, namely when to disqualify themselves. Disqualification rules and standards are complicated because, as we have seen, the ideal judge must be both impartial and engaged, both blind and all-seeing. Because our aspirations for judges are themselves paradoxical, judicial disqualification rules are general and ambiguous. It should therefore come as no surprise that in Professor Shaman's empirical study of judicial practices and attitudes about disqualification, he concludes that judicial disqualification standards are not uniformly understood and that self-disqualification appears to be subjective, random and arbitrary.[38]

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35. Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1015 (1988); *see* Brennan, *supra* note 12, at 951 ("It is my thesis that this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality.").

36. *In re* Linahan, 138 F.2d 650, 652-53 (2d Cir. 1943).

37. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 237 (1987).

38. SHAMAN & GOLDSCHMIDT, *supra* note 1, at 4-5.

In urging that appellate courts carefully examine a judge's avowals of impartiality by using an objective rather than subjective standard of impartiality, Professor Shaman is asking appellate judges to hold their peers to the same legal standard applied to everyone else. Doctors, lawyers and defendants in negligence cases are ordinarily held to the objective, reasonable person standard. Shouldn't judges' decisions about disqualification be subject to review under a similar standard, Shaman asks? Would not such a review promote public confidence in the integrity of the judicial system?[39]

As I see it, the key questions are these: How can we help judges to be both detached and yet engaged? How can we help judges, lawyers and the public to better decide when a judge should be disqualified from sitting? I have several suggestions.

First, of course, we should devise and use judicial selection processes favoring people who understand the paradox embodied by the phrase "careful passion"—people, that is, who can bridge the chasm between detachment and engagement. Good judging requires women and men with enough courage not only to accept their human frailties, but also to use them to advantage.

Second, our judicial education systems must explore not only substantive legal rules but also the art and craft of judging. Education programs must incorporate a philosophical and historical approach to the law, enabling judges to rise above the quotidian problems of judging to think about what they are doing and why. Alongside these programs, judges should discuss grounds for disqualification with lawyers and the public. Professor Shaman's empirical study is an important

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39. Professor Leubsdorf analyzes the subjective and objective standards for appearance of impropriety as follows:

> Disqualifying judges for the reasonable appearance of injustice looks like a tempting way to resolve the tension between introspection and objective standards and may be constitutionally required. This standard makes it clear to the challenged judge that belief in her own purity will not suffice; she must consider how others will view her conduct. But an appearance [of justice] standard makes it unnecessary to probe deeply the facts concerning the challenged judge, reach conclusions about the likelihood of actual injustice, or describe the judges as biased. A court merely considers how a citizen might reasonably view the challenged judge. This appearance standard seems particularly appropriate in disqualification cases, because one reason for disqualifying judges is to promote public confidence in the integrity of the judicial system.
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> The reasonable-appearance-of-injustice test, however, distracts judges, legislators, and commentators from clarifying what is and is not unjust .... But an appearance test shifts attention away from what objections are valid to what objections might appear valid to a reasonable observer who has not wrestled with the problem. The reasonable person may be a better guide for driving a car than the thinking judge, but not for deciding whether it is unjust for a judge to hear a case. The appearance test invites judges to rest on appearances, instead of looking deeper.

Leubsdorf, *supra* note 37, at 278.

step toward fostering such programs and such discussion. Likewise, a judicial mentoring system, pairing experienced and rookie judges, might encourage sorely lacking communication about these issues. In such pairs a new judge's inevitable questioning of longstanding practices will push both judges into reconsideration of the judicial function.

Third, to better understand how their role is perceived, how the court system operates and how we might improve it, judges should come down from the bench and engage the world of litigants and the public. A judge need only sit in the back of a courtroom where she is not recognized to experience first hand how court proceedings appear to someone who is not wrapped in a black robe and whose name is not "Your Honor." How the courtroom appears depends on your vantage point—on whether your view is from the bench, from the counsel table, from the jury box, from the witness stand or from behind the bar. Judges must be reminded that an environment eminently comfortable and workable for them might well be perceived and experienced quite differently by others.[40]

To the extent compatible with the judicial function, judges should participate in community activities. They should visit prisons and immigration centers, soup kitchens and domestic violence shelters. Judges who do this will remain connected with their communities and at the same time learn about community resources that may assist them in their tasks.

Judges should speak to the public about judging and listen hard to their audiences' perceptions and reactions. Judges should engage public support to improve the courts. Judges should view themselves, along with lawyers and the public, as part of a coalition for justice.

Fourth, self-education and self-evaluation are important. Some states use peer evaluations for judges' self-improvement.[41] Judges

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40. One commentator has noted:

> I am sure what happens with long-term justices is not isolation so much as it is complacency. Judges are in very pleasant situations in a system that more or less works for them, and that is the problem. The longer they are there the more they see the system as satisfying because it satisfies them.

Noonan, Jr., *supra* note 2, at 154.

41. For discussions of judicial evaluation programs, see Alaska Judicial Council, *Seventeenth Report to the Legislature and Supreme Court, Appendix F, Retention Evaluation Program* (1993-94); State [Colorado] Commission on Judicial Performance, *Report of the 1994 Judicial Performance Evaluation Program* (1995); Judicial Performance Program Oversight Standing Committee, Administrative Office of the [Utah] Courts, *Annual Report to the Utah Judicial Council* (1989-90); Administrative Office of the [Utah] Courts, *Judicial Performance Evaluation: The Utah Experience* (1990); Cynthia Owen Philip, *How Bar Associations Evaluate Sitting Judges*, 1976 Inst. of Jud. Admin.; Special Committee on Evaluation of Judicial Performance, American Bar

may also evaluate themselves by watching videotapes of their courtrooms and by asking lawyers, litigants, witnesses, jurors and the public to complete anonymous questionnaires about judges' performance.

Fifth, judges should have assistance in evaluating the need for disqualification. Talking through potential disqualification scenarios with an advisory person or committee would help both the questioning judge and the advisors. Advisory opinions regarding various disqualification issues might also be published and distributed to assist judges, lawyers and litigants.

Sixth, to build a body of judicial practice, judges should record their grounds for disqualifying themselves. Although some judges do not seem to disqualify themselves frequently enough, others are thought to do so with such regularity that their colleagues suspect they are ducking hard cases. Explaining why they have disqualified themselves not only will insure that judges ask themselves the requisite hard questions but also will aid other judges confronting similar situations.

The suggestions I have made here are no more than that—suggestions. They come without guarantees that they will help judges to be both detached and engaged, both neutral and connected, both above and yet paradoxically a part of the complicated human condition which judges must not only observe and evaluate, but also live.

Nor, for that matter, do these suggestions come without risks. It is always risky to attempt crossing what can seem like a yawning chasm separating the detachment, impartiality, neutrality and fairness which we rightly expect of judges from the engagement and emotions intrinsic to our humanity.

But cross that chasm we must. For as Professor Shaman's paper makes painfully clear, those judges who repress the empathy and the "careful passion" of their humanity thereby lose the ability to judge as well. Such judges become either caricatures of Pound's mechanical jurisprude or men and women whose unexamined and unacknowledged emotions and biases resurface suddenly and unexpectedly, at

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Association, *Guidelines for the Evaluation of Judicial Performance* (1985); Richard L. Aynes, *Evaluation of Judicial Performance: A Tool for Self-Improvement*, 8 PEPP. L. REV. 255 (1981); Diana Farthing-Capowich, *Developing Court-Sponsored Programs*, STATE CT. J., Summer 1984, at 27; Diana Farthing-Capowich & Judith White McBride, *Obtaining Reliable Information: A Guide to Questionnaire Development for Judicial Performance Evaluation Programs*, STATE CT. J., Winter 1987, at 4; Alan B. Handler, *A New Approach to Judicial Evaluation to Achieve Better Judicial Performance*, STATE CT. J., Summer 1979, at 3; Daniel B. Horwitch, *Judicial Performance Evaluation: Implementing the Process*, STATE CT. J., Summer 1986, at 16; C. Theodore Koebel, *The Problem of Bias in Judicial Evaluation Surveys*, 67 JUDICATURE 225 (1983); Editorial, *The Need for Judicial Performance Evaluations for Retention Elections*, 75 JUDICATURE 124 (1991).

inopportune times and in inappropriate places, thereby rendering justice farcical rather than fair.

In conclusion, I turn again to the title of Professor Shaman's paper. The answer to his question of whether an impartial judge should be detached or passionate is two-fold. First, we must recognize that a judge is inevitably and always both detached and engaged. Second, a judge both detached and engaged is, paradoxically, better positioned to render impartial and fair justice. Having crossed the great divide separating law's logic from life's passion, a judge can evoke not only the detachment but also the empathy integral to the fairness and justice the law aspires to deliver.