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Eighteen years ago, while I was serving as a New Mexico trial judge, I found myself in an uncomfortable position. The New Mexico legislature had recently passed a mandatory sentencing law for certain crimes committed while using a gun. A defendant convicted of aggravated assault with a gun was before me for sentencing. The jury had recommended leniency and the pre-sentence report I had ordered showed this to be the defendant's only offense of any kind.

His counsel moved for an order declaring the new act unconstitutional on several grounds. After briefs and oral arguments, I held the act unconstitutional on the basis that it violated the doctrine of the separation of powers. Clearly the legislature had the duty, power, and responsibility to establish the penalties for the violation of criminal statutes. However, it was my judgment that sentencing was and always had been a purely judicial function. Therefore I held that the legislature had overstepped its legitimate function to establish penalties and had, by enacting this mandatory sentencing act, unconstitutionally infringed upon the judicial function to impose sentences. I then sentenced the defendant to the prescribed term and suspended it all, putting him on probation for a year. The state appealed my ruling.

The New Mexico Court of Appeals, based on the holding and direction of *New Mexico v. Mabry*,[1] upheld the constitutionality of mandatory sentencing under the New Mexico Constitution.[2] In *Mabry*, the New Mexico Supreme

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1. 630 P.2d 269 (N.M. 1981).

2. New Mexico v. Aguilar, No. 5082 (N.M. Ct. App. Aug. 11, 1981). For a published explanation of *Aguilar*'s lengthy procedural history, see *New Mexico v. Aguilar*, 624 P.2d

Court held that mandatory sentencing does not violate the separation of powers under the New Mexico Constitution.[3] The Court of Appeals ordered me to sentence the defendant to the term prescribed. The mandate also prevented me from entering any order of probation. The defendant was returned to my court for sentencing, and, finding myself with a conflict between my oath of office on one hand and my conscience on the other, I resigned.

At the time, I stated from the bench:

> My oath as a district judge is to uphold the Constitution and laws of this nation and this state. The Constitution of this state means what the Supreme Court of this state says that it means—for it is their unique duty and responsibility to interpret the New Mexico Constitution. Any citizen, even a judge, may disagree with such an interpretation, but there can be no disagreement that, once interpreted by the Supreme Court, such interpretation is the law. My specific oath of office is to uphold and apply the law.
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> My conscience and sense of justice on the other hand will not allow me to sentence to the New Mexico State Penitentiary, a 26-year-old man who has no prior record, has been honorably discharged from the U.S. Navy after three years active duty and three more years Naval Reserve duty, and at the time of this offense was supporting his 41-year-old widowed mother, and who acted on the spur of the moment. To do that is to fly in the face of every thought I have had about justice and the right thing to do.
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> Therefore, I personally and as this Court refuse to be a party to this injustice. That injustice has now been encircled and encased in concrete by the recent holdings of our appellate courts upholding the constitutionality of various mandatory provisions of the Sentencing Act.
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> Life and liberty are two basic and inalienable rights guaranteed to us all by our Constitution. That Constitution and history itself place the function of imposing sentences, and thus depriving a person of that liberty, solely on the trial courts and its judges. It does not salve my conscience one bit to learn that after 200 years the legislature has now

520, 521 (N.M. 1981), and *New Mexico v. Aguilar*, 650 P.2d 32, 33 (N.M. Ct. App. 1982).

3. *See Mabry*, 630 P.2d at 273.

> constitutionally taken upon itself—and away from the courts—this awesome power and responsibility, without ever seeing a defendant and without hearing or considering any evidence for or against him. An act, declared to be criminal if committed, is now enough. All other considerations are irrelevant, immaterial, and of no consequence as a matter of law.
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> So much for the concept of due process. So much for the duty to consider all circumstances surrounding the offense and all circumstances surrounding the offender before imposing a prison sentence. So much, finally, for a judge's duty, obligation, and responsibility to judge.
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> The law and administration of justice has always been one of the great loves of my life. I cannot and therefore will not now prostitute it or myself.

The governor appointed a replacement in due course and the defendant was sentenced to the prescribed term by the new judge.

With my resignation I was not attempting to impose on any other person—judicial officer or not—my personal beliefs of what justice is, or my ideas as to its administration. Nor did I mean it as a guide to others on how to solve strong personal, philosophical, or moral conflicts while sitting as a trial judge. It was my personal solution to a vexing personal problem and nothing more.

However, the question remains: What are the duties of judges, at any level of the judiciary, when the civil and criminal law they are interpreting and applying conflicts with their personal, philosophical, or moral beliefs? The answer is clear. They must interpret and apply the law as they know or believe it to be. We are judges of the law and not judges of the morals, philosophy, or policy of the community. We have no authority or jurisdiction to do otherwise.

Certainly a judge can hold an act unconstitutional on its face or as applied to a set of facts. But, a judge cannot so hold if the only basis for that judgment is his or her personal, philosophical, or moral leaning. So too, a judge's strong belief that the legislature has made a grave error of public policy is not a valid legal reason for declaring an act unconstitutional. Public policy is a legislative function, not a judicial one, and if courts

infringe upon this legislative function by judicial fiat, decision, or opinion, it is just as surely a violation of the separation of powers.

This basic respect for the separation of powers extends across a wide range of legal issues that are constantly before the courts—the right to die, abortion rights, and the death penalty being the most obvious. To uphold the law—any law—when the opinion of the majority of the citizens within a jurisdiction may be against it, is extremely difficult. The situation is often made more difficult by other factors that may influence a judge, including his or her education, background, experience, race, creed, color, and gender. As if moral and philosophical leanings are not enough, many state judges have political considerations added to the mix. Clearly political considerations like these have no better place in the decisionmaking process than philosophical leanings or moral beliefs. They need to be set aside, if not disregarded entirely.[4] For a judge to react by holding laws unconstitutional on moral, personal, or political grounds, rather than for legal reasons based on the rule of law, is wrong precisely because it violates the basic premise of that rule.

However, because of the myriad ways judges get their jobs and stay there, they can easily lose sight of where their duties and obligations lie. Are we representatives of the people or of the law? If we are the people's representatives, does that mean we must rule according to beliefs and opinions of the majority at any given time, or do we rule according to the law as it has been established, enforced, and interpreted by the legislative, executive, and judicial branches? I believe that most would say, and correctly, the latter.

But why? Surely judges are part of the government as well as the society in which they live, and, as such, must show some accountability to those over whom they exercise judgment. That is true enough, but once a judge rules on personal beliefs or a community's belief on what the law should be or what the Constitution means, the collapse of the entire system is a real possibility. Assumption of the functions of one branch of

4. In any event, when considering the political implications of judging, one thing seems clear, at least to me: Whenever getting or keeping a job, any job, becomes more important than doing it, the job is not worth having in the first place, even the job of being a judge.

government by another branch of that same government is a recipe for that collapse. There are no more checks and balances. One of the branches becomes most powerful, and it does not take long for that branch to assume the entire function of government, including the justice system. In my opinion, the fact that we have an independent and separate judiciary is the principal reason this republic has lasted over 200 years. No other democracy in history before us has accomplished that. Some have argued that dividing the government into separate branches with separate but overlapping functions cannot work, but miraculously it has and it does.

The independence of the judiciary, the power and authority to make judgments independently of outside forces, is most precious. The ability to make those judgments independently of inside forces is just as precious. Once a judiciary succumbs to the noise from without or within, the validity, character, and integrity of the judiciary changes. Those judgments are no longer based on the rule of law established over a long period of time by legislative, executive, and judicial decisions, but on who or what is the loudest at the time.

Clearly, judges have the duty and responsibility to make rulings, decisions, or write opinions that reverse, amend, modify, or eliminate as unconstitutional any law that may be lawfully challenged in the courts. It is just as clear, though, that they must make that decision based on the substantive and procedural law, and on nothing else. If a judge cannot find a precedent, or simply cannot in good conscience apply a law, that judge can always resign—in fact, that may be the only alternative.

Is there a difference in this principle depending upon the level of court upon which a judge sits? At the trial level, intermediate appellate, or supreme court level, the basic principle remains the same: Judges must interpret and apply the law pursuant to the applicable substantive and procedural rules as the judge or justice believes them to be.

However, there are some differences in the principle's practical application. If a trial judge faces a problem of conscience, he or she must remove himself or herself from the problem by resignation or recusal. At the appellate level, the judge or justice can dissent or specially concur in the opinion.

For example, in *Weber v. Kaiser Aluminum & Chemical Corp.*,[5] Judge Gee of the United States Court of Appeals for the Fifth Circuit followed the mandate of the Supreme Court of the United States when they reversed a judgment the Fifth Circuit had previously affirmed. He said the following: "Subordinate magistrates such as I must either obey the orders of higher authority or yield up their posts to those who will. I obey, since in my view the action required of me by the Court's mandate is only to follow a mistaken course and not an evil one."[6] Had he deemed the Supreme Court's course "evil," meaning an immoral order or holding he could not follow in good conscience, I presume his only course of action would have been resignation.

In addition, because they are more removed physically and practically from the case and its participants, it is generally easier for an appellate judge to affirm or reverse a sentence or a judgment from a lower court. The trial judge acts directly—ordering, ruling, finding facts, making conclusions of law, entering judgments, sentencing defendants convicted of crime. Appellate courts either affirm, reverse, or modify. They make no findings of fact, but rule only upon the propriety or legality of what was done before. The old analogy is that the trial judge is the general of the battlefield; he or she moves the troops, directs the parties, charges the jury, and conducts the trial. The appellate judges are those people who remain hidden in the bushes while the battle rages only to show themselves after the smoke has cleared to systematically "shoot the wounded." Appellate judges never have to look the trial participants in the eye when an opinion is rendered. More importantly, it takes three votes on my five-member court to have a decision, not just one. There is a real and practical comfort in numbers and in a sharing of responsibility for the decision. The decision is much less personal and much less onerous. If an appellate judge or justice disagrees, he or she can dissent. If he or she agrees with the result, but differs on the reasons and analysis of the majority, or for any other reason, then a special concurrence is appropriate and should be filed.[7]

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5. 611 F.2d 132 (5th Cir. 1980).

6. *Id.* at 133.

7. For example, I specially concurred in a recent death penalty case before our court:

There is no doubt that the business of judging in this constitutional system, in which the rule of law prevails, is difficult at best. It has never been easy to apply the law free from any personal, religious, or philosophical beliefs. Some have argued it cannot be done because it is a contradiction at its worst or a paradox at its best. However, a judge in our system must be able to set aside any and all of these factors in the decisionmaking process. If the judge cannot do this and, most importantly, knows that he or she cannot, resignation may be the only remaining option.

> I concur in both the analysis and result reached in this opinion because it is legally correct. It is also solidly based on the precedents of this court as well as other federal and states courts.
>
> I write specially to state that I am opposed philosophically and practically to the death penalty. I personally believe it to be a bad public policy. However, public policy is solely within the legislature's domain and this court is powerless to change it unless the statutory law underlying the policy is declared unconstitutional.
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> For the reasons set out in the opinion, the arguments advanced by the defendant do not convince me or the court that the death penalty statute in New Mexico is unconstitutional. However, those same arguments firmly convince me personally how truly flawed such a public policy is.
>
> Since it is the duty and responsibility of a judge to interpret and apply the law to the facts of a case free of any personal or philosophical leanings or beliefs, I specially concur.

New Mexico v. Clark, 990 P.2d 793, 821 (N.M. 1990) (Franchini, J., concurring). If I had believed the death penalty to be immoral or evil, I probably would have recused myself from the case. I would not have been able to dissent because if the reasons for a dissent are purely moral and philosophical rather than legal in nature, they would not constitute a valid basis for a dissenting opinion that proposes a different rule of law.