THE FOXBORO REFEREE, THE BOSTON JUDGE, THE COUNTY JUROR, AND THE CONSCIENCE OF THE COURT†

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You may recall the play if you were watching the end of the NFL season, January 20, 2002. I happened to be looking at the television on a sunny California day at the Berkeley Yacht Club; but the television screen was filled with white dots that I assumed were snowflakes. It was a desperate fight to the finish between the Patriots and the Raiders, and, although I am a transplant from Boston, my sympathy was with Oakland. Leading 13–10 with one minute and forty-seven seconds remaining, the Raiders recovered a Patriot fumble; the Patriots were finished. But the referee ruled that the quarterback's fumble was an incomplete forward pass; the Patriots retained possession, they tied the game with a field goal, and won in overtime. "It just seems like they (the officials) would have more of a conscience with what they do," said Raiders wide receiver Tim Brown. "What do those guys say to their wives, their friends, their families? How do they justify some of the calls they made. To not have a conscience is something players can't fathom."[1]

The complaint, the cry, is one lawyers (and judges) can understand. You must realize that our system of justice cannot function unless lawyers and judges have consciences, and maybe one way of verifying their having them is whether they are able to justify their decisions to their spouses, families, and friends. I would like to illustrate how judges have consciences with two more stories.

First, the Boston judge. He had before him in federal court a young electrician who had convinced himself by reading at the Quincy, Massachusetts Public Library that the government violated both the Fourth and Fifth Amendments by requiring citizens to file an income tax return. He did not object to paying taxes, just to filing; most of his taxes were

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1. Kevin Lynch, *Conspiracy, or Just Confusion? Raiders Differ on Reasons Why, but All Say It Was a Bad Call*, S.F. CHRON., Jan. 21, 2002, at C1.

withheld anyway, so he was not avoiding the payment of much tax; but the government indicted him for the felony of failing to file. Despite the passionate sincerity with which he testified to his beliefs, the jury convicted him of the lesser included misdemeanor of failing to file—the jury could not quite believe he was ignorant of his civic obligations. The Boston judge sentenced him to complete many hours of electrical work for a charity and to do a book report on Tocqueville's *Democracy in America*, so he would understand how our system of government worked. The judge also put him on probation, a standard condition of which is not to violate the law while on it.[2]

The electrician carefully carried out his tasks for a nonprofit, he wrote a decent book report, but he refused to file his tax return for the coming year. A hearing concerning the revocation of probation was held. The Probation Officer advised the judge that the electrician was adamant; he could not be swayed by the officer or by the probable plight of his own wife and two small children if he went to jail. The judge then addressed him in open court, exhorting him much as an inquisitor might have exhorted a heretic in 1300. The judge reminded him that millions of his fellow citizens, hundreds of thousands of lawyers, and thousands of judges filed income tax returns. Who was he, lone heretic, to say that he alone understood the Constitution correctly? The judge reminded him that his wife and children would miss him and that prison would not be a pleasant experience. In effect, the judge pointed to the stake and the waiting torch, if he proved pertinacious. Finally, the judge, before pronouncing sentence, gave him a week to reconsider. At the end of the week, the electrician filed his return. The judge was satisfied. The law had been upheld without the necessity of imprisoning a misguided man.[3]

I am inclined to argue that the court had acted conscientiously, using the threat of legal force to compel compliance of another person's conscience with the law. No doubt there is room for argument. Suppose that death had been the penalty for violation of the tax law. Would the judge have been right to impose it or to threaten it? What proportion is required between the crime and the penalty the law says the judge must impose? Only conscience, I suggest, can answer that question.

A second story is that of the county juror. On trial was a young Hispanic man accused of striking a police officer—a felony. That he had struck a police officer was undisputed. How it came about was presented by the defense. Jose, as I shall call him, had recently married a seductive beauty who, before their marriage, had had a habit of frequenting nightclubs and, in particular, one of poor repute. When Jose married her, she agreed not to go there again. But this night there had been a family birthday party she had attended. When, late in the evening, she had not

2. United States v. Campbell, No. CR-88-00104-01 (D. Mass. Oct. 3, 1988) (docket sheet on file with the University of Illinois Law Review).

3. *Id.*

returned home, Jose guessed that she had gone on to the club she had forsworn, as indeed she had. He found her there, drunk. He suggested that they leave and guided her to the door. Outside, she abruptly sat down on the sidewalk. He reached down to help her rise. At this point a police cruiser came by and cast its beam on a man apparently pulling a woman by the hair. The police officer jumped out and, without listening to Jose's explanations, hit him repeatedly with a sap, a kind of police baton. Jose, a big man, pushed the officer away. The officer, who was a small woman, fell to the pavement, hitting her head and suffering injury. Other police later arrested Jose and beat him up badly, and the district attorney sought his imprisonment. After conscientiously following the instructions of the judge, the jury had no option but to convict. Yet one member of the jury—a woman and the only college graduate on the jury—wrote the judge asking him not to send Jose to jail. She pointed out that Jose had not been abusing his wife but was trying to help her from the ground and that the police officer had intervened officiously in events she had misread. The juror further noted that Jose's wife was the one whose conduct had put him in this situation. She ventured the thought that Jose was like the Jose in *Carmen*, something of an innocent led into trouble by his attachment to a difficult woman. The judge did not answer the juror's letter.

Three years later, at a Christmas party, the judge and the juror were both guests. As the juror approached the judge across the crowded room, the judge began to hum the Toreador Song from *Carmen*. Then he told her that he had read her letter, that the police and the prosecutor were mad at him, but that he had not sent Jose to jail. The juror, I think, had a conscience, and so did the judge, responsive to the conscientious concern of the juror and still mindful of her letter three years after the trial.[4]

I am reasonably confident that you could match these tales with others where you have seen conscience in action, and I now tell these stories so that we may be reminded that without consciences our rules are rigid and will not work to perform justice.

But what is conscience? The answer begins with history. The word is unknown to Hebrew scripture, but the idea of it is recognized. For example, in the *Book of Kings*, Solomon says to Shimei, "You know all the evil that your heart knows that you did to my father David."[5] You know, your heart knows—the doubling is not a mere pleonasm but locates the interior where moral judgment is formed and active. "Heart" is one of the enduring metaphors for this internal process. The term "conscience" itself is traceable to legal practice in the Roman Republic. "Your mind's conscience," Cicero tells the senators judging Cluentius, "you receive

4. The details of this story have been supplied to me by the juror participant, who remains anonymous.

5. 1 *Kings* 2:44; *see also* DAVID DAUBE, ANCIENT JEWISH LAW 123–29 (1981).

from the immortal gods. It cannot be torn from you. You will live without fear and with the height of decency if this will be for you, for your whole life, the witness of your best counsels and deeds."[6] For some Christians, conscience was understood as the voice of their God, speaking directly to them. For other, more rationalist Christians, including Thomas Aquinas, conscience was "the dictate of reason" and what it dictated was "derived from God, from whom is every truth."[7] At the time of the Reformation, Protestant and Catholic martyrs went to their deaths for their beliefs because they would not betray their consciences. The foundation of religious liberty in our own Constitution was, as developed by James Madison, the right of each person to determine in his own conscience the duty he owed to the Creator. Madison summarized in six words his plan for the Bill of Rights as he brought it to the floor of the House in 1789: "*natural rights*, retained—as Speech, Con."[8]

After being bathed in the popular Freudianism of the twentieth century, I am not sure how many would speak of conscience as the gift of the gods or the voice of God or even as the dictate of reason. Is it not the remembered exhortation of a parent or a complex of the conventions of childhood and assumptions too deeply ingrained to be questioned? I raise these questions not to debate them but to acknowledge them and the relative fragility of the contemporary concept of conscience in comparison with its robust recognition by our ancestors. I merely maintain that we cannot dismiss as chimerical a concept embedded in our religious, moral, and political history, a concept that I suggest is essential to the operation of our system of justice and the professional work of lawyers.

Call it the heart or the spirit or the inner person, there are in each of us perceptions and convictions that cannot be reduced to rules external to us. It is that internal core of the judge that a good advocate seeks to reach. "I represent an innocent man," declared Diane Marie Amann in a criminal appeal I heard argued six years ago.[9] I had never before heard such a claim. It spoke to something in me more tellingly than a reference to due process of law would have done. It set in motion thought and action, just as I believe the county juror's reference to *Carmen* caught the judge's heart or conscience and set off in him a chain reaction.

All of the above is intended to suggest that neither law nor responsible conduct in the profession of law is a science or a game, and we should not pretend that they are. To reduce Professional Responsibility to a set of rules is to trivialize it. To test lawyers on it—as the Depart-

6. MARCUS TULLIUS CICERO, *PRO SEX: ROSCIO AMERINO ORATIOS*, *in* ORATIONES 67 (Albert C. Clark ed., 1901).

7. THOMAS AQUINAS, SUMMA THEOLOGINE 1–2, Q.19, art. 5 (Pietro Carmello ed., 1952).

8. JAMES MADISON, *Notes for Speech in Congress*, *in* 12 THE PAPERS OF JAMES MADISON 194 (1979).

9. *See* United States v. Marsh, 26 F.3d 1496, 1504 (9th Cir. 1994) (Noonan, J., concurring and dissenting).

ment of Motor Vehicles test drivers on the Rules of the Road—distorts reality. Professional Responsibility has to do with the heartfelt interaction of persons.

By way of analogy, consider the United States Sentencing Guidelines (U.S.S.G.). We might add another S. to them and call them the United States Scientific Sentencing Guidelines. With their elaborate definitions and tables, they are a kind of parody of the scientific method. With their system of points and a massive rule book, they appear to be a giant board game. Yet they are not a science, for their tables predict nothing as to the future. They are not a game, for they bite into human lives in a way no game is allowed to do.

The U.S.S.G. do confer a false objectivity onto a subjective decision. Kate Stith and Jose Cabranes have effectively analyzed their weaknesses.[10] After fifteen years of operation and over half a million cases applying them, they still offer grounds for appeal in criminal cases because, in fact, they cannot be mechanically applied as though they were rules to run a machine. Sentencing another human being to loss of property, to probation, to confinement, or to death still requires an interaction between the judge and the person whose life is being affected. In an analogous way, Professional Responsibility depends on the conscientious interaction of persons.

All judges, I believe, seek to a degree to depersonalize their job, as do all lawyers. We are like surgeons, who cannot enter into the emotions of their patients as they perform upon them, but instead must concentrate their attention on a particular procedure and the organ, not the person, that the procedure affects. Hence, we stick to our discourse of the rules. Rules give certainty. Rules depersonalize and let us operate. But we cannot avoid noticing that our actions affect people. In affecting people, the inner part of us knows that our responsibility goes beyond a calculus of rules.

Imagine two kinds of ideal types, let us call them Judge *A* and Judge *Z*. Judge *A* is convinced that only by the most exact adherence to the words of relevant statutes will he be doing his job faithfully. Judge *Z* is convinced that only by championing the underdog—the convicted criminal, the habeas petitioner, the civil rights plaintiff—can the bias of the system for the powerful be overcome, so Judge *Z* reads statutes and precedents and the Constitution to help the oppressed. I would not deny that both Judge *A* and Judge *Z* are conscientious judges. Yet I think that each has an erroneous conscience (for conscience, while it must be followed, is not infallible). I would prefer a third judge—let us call him *M*, since he is in the middle—who believes that statutes must always be read in terms of their purposes not merely their words. Statutes must be read

10. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78–142 (1998).

in terms of purposes because statutes are meant to serve persons. The powerful, as much as the poor, are persons not to be discriminated against. Judge *M*, looking at the mountain of legal materials he must keep in mind, will also look at the persons whose property, liberty, or life his decision will affect.

As you teach Professional Responsibility, you have some share in turning out Judges *A*, *M*, or *Z*. Our judges do not form a special cadre as they do on the continent of Europe. They are former lawyers, who once were law students. Their ideas of what law is, of what justice is, have been formed not just by their practice, but even earlier, by what they have seen about lawyers in the media, read about them in novels, and heard about them from their own families, friends, and teachers. You can help turn out the rule-bound judge, the judge who is an advocate, or the judge who takes into account the person, as you can also help shape the lawyer who will speak to one of these types.

Hamlet says

> The play's the thing
> Wherein I'll catch the conscience of the king.[11]

I say that how you teach the purposes of the profession will determine part of that inner consciousness which, in the course of time, will manifest itself in the consciences of those of your students who become lawyers and judges. Your words, your attitudes, and your mentorship will contribute to catching the consciences of those who follow us in the finest of professions.

11. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2, 608–09 (John Dover Wilson ed., Cambridge Univ. Press 1936).