ESSAY: THE PERSONAL PRICE OF JUSTICE

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The image of justice blindfolded conveys the idea that no favor is given to any person coming before the courts; that justice is blind to the position and standing of the individual. It is also an apt image of how, as a society, we often fail to acknowledge that we look blindly on the human spectacle of the law and the justice it is supposed to guarantee. In particular, we simply fail to see the human effect that judging, and the business of judging, can have on judges. For the last decade, the Michigan Supreme Court has made plain that sometimes all-too-painful effect. Those who watch Michigan's highest court have witnessed an ongoing struggle that will likely continue to have an effect on the court, and therefore on the public, for years to come.

Like all human endeavors, the law is itself an ideal. Like all ideals, it exists less than ideally among the sodden mess that human beings have made out of life. It exists because in its own stunning way civil society agrees to abide by the word of law. Human culture could exist by solving problems by dropping heavy rocks on one another instead of filing lawsuits. That it chooses and has chosen the latter is, in no small measure, a reason human beings have advanced. Still, the law is every bit as much a human activity as it is an ideal, and judges play a human role in helping the ideal be realized.

Given the ongoing controversy at the Michigan Supreme Court—specifically between former Justice Elizabeth Weaver and, well, most of the rest of the court—it is a little surprising that judges rarely merit much attention in the literature and art of the law. When they do, it is generally in a small role. The law, in all its aspects, from cops on the street to courtroom dramas, has been a staple of public entertainment and interest for several centuries. But from Honoré Daumier's drawings to "Law and Order," the focus has generally been on the lawyers and those they question, rather than the chap in a robe behind the bench. Aside from Judge Hardy, who did most of his judging to keep his boy Andy under control, and Judge Roy Bean, who was more of an outlaw than a jurist, there have been few judges who have played any major role in the literature of the law.

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Perhaps with time, the conflict of the Michigan Supreme Court will work its way into literary lore. For now, it is not just too raw a situation; it is still ongoing. Consider that on November 17, 2010, the justices issued a letter of censure to their former colleague.[1] The entire court signed the letter, except for Justice Diane Hathaway (who said she thought the letter inappropriate and disregarding of Ms. Weaver's due process rights) and then-Justice Alton Davis.[2] Justice Weaver's revelation during the late campaign that she had taped internal proceedings of the court prompted the censure. Those proceedings revealed Justice Robert Young, Jr. used what would be considered inappropriate language.[3] Not that he was running a riff to juice the proceedings, mind you, but to make a specific point. Nonetheless, the issue became part of the campaign,[4] though in the end it did nothing to hurt Justice Young's re-election.[5]

"It is truly a sad day when this court is forced to censure a former colleague. Your actions in recording and then in making public discussions that were part of the court's deliberative process, as well as internal court memoranda, compel us to do so," the justices wrote in their letter to their former colleague.[6] However, behind that spare, dry language, one senses both the anger and exhaustion of a court that has been through this fight for a long time.

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1. Letter from Marilyn Kelly, Chief Justice, and Michael F. Cavanaugh, Maura D. Corrigan, Robert P. Young, Jr., and Stephen J. Markman, Justices, Mich. Sup. Ct., to Elizabeth A. Weaver, retired Justice, Mich. Sup. Ct. (Nov. 17, 2010), http://download.gannett.edgesuite.net/detroitnews/2010/pdf/1122weaver.pdf [hereinafter *Letter of Censure*].

2. *Id.* Justice Davis joined the court in August in dramatic fashion when Justice Weaver abruptly resigned, allowing Governor Jennifer Granholm to fill her seat on the court. Kathy Barks Hoffman, *Gov. Granholm Officially Names Alton Davis to Michigan Supreme Court*, MICH. LIVE (Aug. 26, 2010), http://www.mlive.com/politics/index.ssf/2010/08/gov_granholm_officially_names.html. The press reported that Justice Weaver conditioned her resignation upon the governor's agreement to appoint a replacement who, like Justice Weaver, hails from Northern Michigan. *Id.*

3. Ed White, *Michigan Justice Facing Re-election Admits Using N-word*, DETROIT FREE PRESS (Oct. 23, 2010), http://www.freep.com/article/20101023/NEWS06/101023031/Michigan-justice-facing-re-election-admits-using-N-word.

4. *Id.*

5. The Associated Press, *Republican[] Mary Beth Kelly ousts Democrat Justice Alton Davis from Michigan Supreme Court*, MICH. LIVE (Nov. 3, 2010), http://www.mlive.com/politics/index.ssf/2010/11/republicans_mary_beth_kelly_ou.html. In addition to re-electing Justice Young, Republicans successfully ousted Justice Davis. *Id.*

6. *Letter of Censure*, *supra* note 1, at 1.

The years of growing tension and discord between the justices, played out so often in the decisions that dripped with bitter acid, have had the positive effect of exposing to the greater public the basic truth of judgeship already noted: that judging is an active profession. So, should we as a public thank the court and its battling barristers for knocking the ugly sense into us? In a larger sense, does this situation play a role in legal education? In helping future lawyers and judges understand the impact of stress, of personality, of simple human feelings on the law and the impact these can have on a larger society?

Central, frankly, to those concerns, at least as they affect judges, let us accept that like unicorns, there ain't no such animal as a strict constructionist. No jurist can be a good jurist without actively interpreting the law, and that means the idea of a strict constructionist is simply a fantasy. Laws have to be applied given particular circumstances, and it is impossible for any congress or legislature or city council to anticipate all circumstances. The essential law may be simple (look at the Ten Commandments, for example), but its application is anything but simple (look at the Talmud, for example).

For all the political squawk about activist judges, a mature recognition is needed that whether conservative or liberal, a good judge has to be an active judge. The act of discerning what the governing body meant while interpreting and applying the law is an activist . . . pick your adjective . . . act, action, activity, activation. It's active, kids, it's alive, very alive and kicking. Members of the Supreme Court have at times insisted to this reporter that they were not activist, but no fair reading of their rulings, of any judicial ruling, can lead one to conclude otherwise. Frankly, the only judge who is not an activist judge has passed on to playing a harp with the eternal judge.

Acrimony between the justices was not invented by Justices Weaver, Young, or the rest of the court. In the 1980s, for example, following the controversy of the appointment of then-Justice Dorothy Comstock Riley, bitterness boiled in the campaign between she and then-Justice Thomas Giles Kavanagh.[7] Rumors of other disputes would be heard occasionally. The overtly partisan manner in which the non-partisan justices are selected certainly generated anger at times. And all through the 1990s anyone reading Michigan Supreme Court decisions could not help but be astonished at the growing acrimony that was clear, often in the footnotes, often coming close to the justices calling each other nitwits.

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7. *GOP's Taylor loses high court bid*, TRAVERSE CITY RECORD-EAGLE, Nov. 4, 2008, http://record-eagle.com/2008election/x75062984/GOPs-Taylor-loses-high-court-bid.

But the decade-long dispute within the court is nearly unprecedented, and it has a clear genesis: the court's decision to deny Justice Weaver a second term as chief justice.[8] She had been elected the chief justice in 1999, but ongoing administrative problems led to her colleagues all deciding to reject her bid for a second full term, which has been typical.[9] One cannot help but think it hurt her in a way few things have in her life.

Unless some memoir of those years is written soon we may never truly know the full extent of what the problems were that led all the other members of the court—those who would become her friends and allies as well as those who would become her implacable enemies—to vote to reject her bid for a second term as chief justice. The public will not know there were attempts at intervention, at conciliation, at counseling, at an altar call, at whatever it may have taken either for Justice Weaver to get the second term or to recognize the fight for that second term was lost.

Justice Weaver has said repeatedly that her motto has been "do right and fear not,"[10] but the furnace of conflict that burned afterwards does make one question if that really was her sole motivation. Her public argument asserted that she was leading the effort to make the judicial system more accountable and open.[11] One has the sense that it was a late, far too late, strategy move and that had her election been held in the public in 2001 she would have been re-elected.

As the years went on, the sniping and biting in the decisions became ever more evident, and finally it spilled out in *People v. Parsons*[12] in 2007.

What was that order actually intended to be about? Who knows? Who cares? What it ended up being was the public revelation that an eighth justice was sitting on the court: anger. The most astonishing comments in the order came from then-Justice Maura Corrigan,[13] who

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8. *Corrigan pledges to improve civility, limit politics*, GONGWER NEWS SERV. (Jan. 4, 2001), http://www.gongwer.com/programming/news.cfm?date=1-4-2001.

9. *Id.*

10. It is a feature of her webpage. JUSTICE ELIZABETH WEAVER, http//justiceweaver.com (last visited April 10, 2011).

11. *See, e.g.*, Deliberative Privilege and Case Discussions in the Supreme Court, Admin. Order 2006-8 (Weaver, J., dissenting) ("The majority's adoption of AO 2006-08 during an unrelated court conference, without public notice or opportunity for public comment, illustrates the majority of four's increasing advancement of a policy of greater secrecy and less accountability-a policy that wrongly casts 'a cloak of secrecy around the operations' of the Michigan Supreme Court.") (quoting Scott v. Flowers, 910 F.2d 201, 213 (5th Cir. 1990)).

12. 728 N.W.2d 62 (Mich. 2007).

13. Justice Corrigan resigned in January 2011 to join Gov. Rick Snyder's cabinet. Peter Luke, *Gov. Snyder keeps conservative Supreme Court majority intact*, MICH. LIVE

had succeeded Justice Weaver as chief justice and who called her a former friend.[14] Justice Corrigan had taken herself out of the actual decision because her son was a law student and involved with one of the firms participating in the specific case.[15] But that left her free to make these comments and a plea:

> [Justice Weaver,] are you determined to continue these theatrics, hoping the public opinion will somehow support your desire to abolish our elective system for justices and judges? Whatever your goal, this low comedy of your making can only end in tragedy: the public's loss of respect for this Court and for our state's judicial branch . . . . As I have told Justice Weaver, I am praying—as are many others of our fellow citizens—for her personally and for her to put an end to this sad and low-comic chapter in our Court's history. We should do what mere mortals do—forgive our trespasses against one another so we can execute our sworn duty and deliberate together.[16]

Ah, but still they could not. Through the remarkable campaign of 2008 in which, against all odds, and helped by an openly vicious campaign, Chief Justice Clifford Taylor lost re-election, through Justice Weaver's sudden resignation last August, and Governor Granholm's naming of Justice Davis to the court (which Republicans claimed was the result of a backroom deal[17]) and his defeat the following November, one could be excused if she thought the main purpose of the court was less the execution of justice and more exercising personal enmity.

The anger and the hurt and the sense of wronged injustice on both sides played a part in altering the interpretation and application of justice in Michigan. Was it spite or a better sense of justice that led to some of the decisions, on either side? In any of the decisions were there subtle calls to come home, or to give up the dispute? We may not fully be able to tell. All we know is that it did not seem that the legal decisions made were based solely and wholly just on the question of law. Perhaps a cooler analysis years from now will show that personalities played no part in the justice rendered, but such a judgment awaits the future.

(Jan. 10, 2011), http://www.mlive.com/politics/index.ssf/2011/01/post_41.html. The governor appointed Michigan Court of Appeals Judge Brian Zahra to fill the vacancy. *Id.*

14. *Id.* at 67.

15. *Id.* at 66-67.

16. *Id.* at 67.

17. *Hoffman*, *supra* note 2, at 2.

The overlay of this bitter personal dispute colored the impression of decisions where clearly the specific individual dispute was not a factor, but personal feelings still were. Again Justice Corrigan was the one who accused Justice Stephen Markman of being full of "sound and fury" (and recall what Shakespeare's Macbeth said of "sound and fury": that it signified nothing) in his dissent to her 2005 majority opinion in *Glass v. Goeckel*,[18] which held that the public can take walks on the beaches of the Great Lakes.[19] In that case, it was Justice Young who attempted to play the peacemaker, though he concurred with Justice Markman.[20]

It is too early in the term with new Justices Mary Beth Kelly and Brian Zahra to say in what manner this fight will continue, as well as whatever effect it may have long term. It is not, however, too early to tell that because of the dispute, the image of the act of judging may be forever modified.

That is not altogether bad. The law must deal with humans, and those humans want assurance that the person judging them is in fact human, and not a law-spouting automaton.

A legal concept exists, once often quoted, but now less so, that a judge may rule outside the bounds of what the law dictates if the judge is convinced that an injustice will occur if the law is followed.[21] Such a ruling would have to be wholly personal and not logical, because justice is applied more by feel than logic. There also remains the issue of whether we should deal more publicly with how to accept the humanness of jurists, even as we recognize the human toll of judging, thanks to the disputes of Justice Weaver and her former colleagues on the court. Turning a blind eye to the issue might not be a just solution.

18. 473 Mich. 667, 698-99 (2005).

19. *Id.* at 694.

20. *Id.* at 704-09.

21. *See, e.g.*, McAuley v. Gen. Motors Corp., 578 Mich. 282, 285 (1998) ("Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest.").