

CONSCIENCE AND THE CONSTITUTION



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We all have to live with the reality of unjust laws, both as citizens and as voters. But the judge is in a special position, for his office and role may require him to support something he regards as deeply wrong. What is the judge to do about the tensions that arise between his conscience and the Constitution under which he acts?

This is the question Judge John Noonan addresses in this essay, focusing on three especially difficult and repeated situations.

What is it right for a judge to do when confronted with a criminal conviction that was valid when obtained but would be invalid under constitutional principles more recently announced and said by the Supreme Court to be prospective only? Surely in one sense it is unjust to affirm the prior conviction.

What attitude should the judge, or the courts more generally, take towards congressional efforts not only to determine the jurisdiction of the courts, and to establish rules of decision for them, but to tell the courts what precedents they are to take as authorities in making the judgment required of them? (Congress did this in the Anti-terrorist and Effective Death Penalty Act.)

What is a judge to do who believes that the death penalty itself is a deep moral wrong, or, worse, that it is an assumption by the state of what belongs to God alone, for in inflicting death the state becomes the lord of life?

In elaborating the elements of the conflicts that these situations present Judge Noonan is exploring a crucial question at the heart of all legal responsibility: When and how do I demonstrate that I understand the empire of force and know how not to respect it? When am I acting as its servant or agent?

We know we have a constitution, although what that means, as we shall see, becomes a matter of dispute. We also have consciences, whose character and source of authority are clearly matters of dispute. I do not understand the authority attributed to conscience unless in some way it is re-

sponsive to God; but obviously there are persons who would identify themselves at least as agnostic who do not disavow the special place of conscience as interior guide, different from law or from animal instinct, in enjoining a moral goal or moral obligation.

I do not believe that we could have either democracy or law without the guidance of conscience. We would be lost in the field of force. As a witness, let me quote Winston Churchill, speaking in tribute to a man he had often opposed but recognized as a man of conscience:

The only guide to a man is his conscience, the only shield to his memory is the rectitude and sincerity of his actions. It is very imprudent to walk through life without this shield. . . .¹

How do conscience and the Constitution relate to each other? I propose to examine three main areas of particular importance to a judge: (1) The unfairnesses created by constitutional change; (2) Trespass by Congress affecting the mental process by which a judge decides a case; and (3) The effect of role on responsibility in the unique context created by the death penalty.

The first two matters are also affected or controlled by the role of role. Granted that an opinion, like a poem, should be a communication from a person to other persons, unlike a poem, an opinion brings force to bear upon the persons who are the parties to the case. Restricted by his or her role, the judge cannot fully respond to these persons as persons. Does role put the judge in the empire of force or in the countervailing world of words by which humanity rises above brute force?

CONSTITUTIONAL CHANGE AND ITS POSSIBLE UNFAIRNESSES

Justices have referred to “our unchanging constitution.”² This position, prominently advocated by Justice Scalia, was recently adopted by seven justices in *Danforth v. Minnesota*. Operatively, they all act with awareness that change is possible and even likely. Chief Justice Roberts, dissenting, has noted the “ebbing and flowing decisions” of the Supreme Court on the death penalty. A minority becomes a majority and so alters the Supreme Court’s reading of the Constitution, so the chief justice concludes that his

present minority will become the majority. He is “encouraged by [today’s] majority’s determinations that the future can change the past.”³ That encouragement exists for everyone unsatisfied with a constitutional ruling. Reinterpretation of constitutional doctrine means that what was once said to be the Constitution is abandoned. The ancient document now means what the majority says it means.

Suppose a man is accused of sexually abusing a six-year-old girl. At his trial the girl’s mother testifies to what the girl reported to her. After the mother’s words are heard, the man is not allowed to examine or cross-examine the child. The man is convicted. He is sentenced to forty-five years in prison.⁴ Two years later the Supreme Court of the United States rules that the Constitution guarantees every accused person the right to confront his accuser, child though she may be. Under this rule the man was tried and convicted in violation of the Constitution. But the Supreme Court’s interpretation of the confrontation clause is new. The court’s reading is not retroactive unless the new interpretation can be called a “watershed.” The Supreme Court declines to call the change in the meaning of the Constitution a watershed.⁵ The prisoner remains in prison, convicted under a form of trial now recognized to be unconstitutional.

Or take the multitude of cases of unconstitutional sentencing created by the Supreme Court in 2005 ruling that the Sentencing Guidelines, which had controlled federal judges since 1987, violated a defendant’s right to have a jury determine every fact increasing his punishment beyond the statutory range.⁶ At a time when the Guidelines were thought to be constitutional, a man is convicted of drug dealing, and the judge determines that the amount the man sold was in excess of five hundred grams of cocaine. According to the Guidelines, the judge must sentence him to thirty-seven years of imprisonment. The judge thinks that the Guidelines if treated as mandatory are unconstitutional and the sentence that they prescribe too heavy, but he believes he must follow them and does. Fifteen years later, the Supreme Court takes another look at the Constitution and reaches the conclusion that the Guidelines, if treated as mandatory, are unconstitutional. The judge is petitioned by the prisoner to follow the new reading of the Constitution and the judge’s own conscience and reduce the sentence. The judge reads in the Supreme Court opinion that the new reading is not retroactive. The sentence stands.⁷