

When the Law and a Judge's Personal Opinions Collide

Hon. Raymond J. McKoski

Judge (ret.), Illinois, and author of Judges in Street Clothes Acting Ethically Off-the-Bench

Every day, in every courthouse, judges honor their oaths by scrupulously following the law even when they disagree with the law or the law conflicts with the judge's personal belief. It is time that the public understands this essential component of judicial impartiality.

When the public is asked what qualities make a good judge, impartiality and fairness usually top the list. To help ensure these legitimate public expectations, every judge takes an oath that courtroom decisions will not be influenced by friendships, public clamor, powerful litigants, or politicians. The oath further requires that judges disregard their personal opinions on social, political, and legal issues and scrupulously follow the law. Judicial impartiality demands that the rule of law prevail no matter how strongly a judge holds a personal view or how vehemently a judge disagrees with the law.

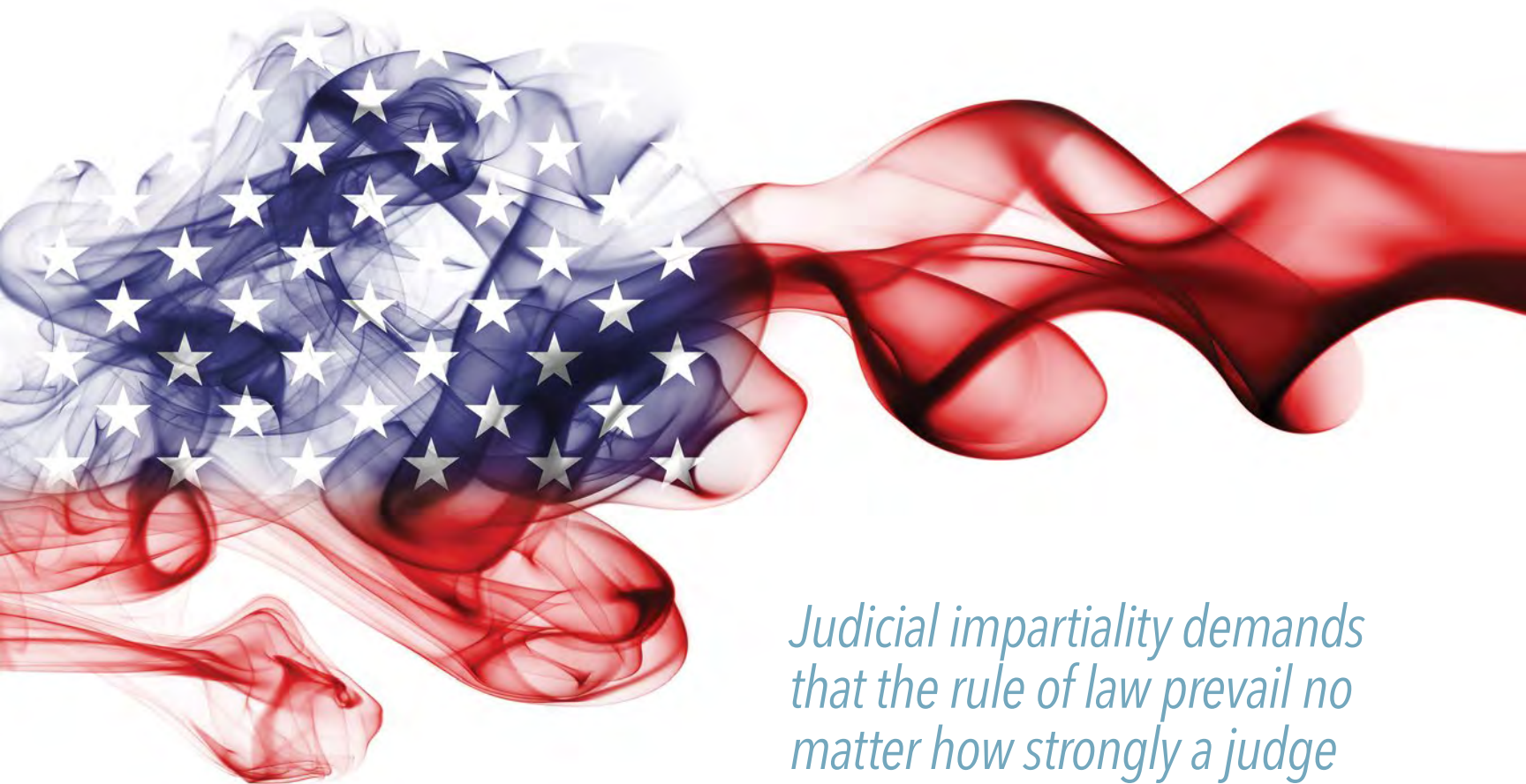
Supreme Court Justice Antonin Scalia's vote in *Texas v. Johnson* (1989) vividly demonstrates the commitment of judges to set aside individual preferences and adhere to the law. In *Johnson*, the court considered the constitutionality of a Texas statute that criminalized the burning of the American flag. Justice Scalia's personal opinion on the issue was well known.

He made no bones about telling a reporter that he disliked people who burn the flag, and if king, he would jail all flag burners (Barnes, 2008). Disregarding his personal conviction that flag burning should be a crime, Justice Scalia voted with the majority to reverse Johnson's conviction for the very conduct Scalia found so abhorrent. And Justice Scalia was not alone in placing the law above personal preferences. Justice Anthony Kennedy concurred in the majority opinion in *Johnson* even though the case outcome was "painful" to him.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases (Texas v. Johnson, 1989: 420-21).

In *Republican Party of Minnesota v. White* (2002: 798; Stevens, J., dissenting), Justice John Paul Stevens acknowledged that all judges, not only Supreme Court Justices, recognize their duty to follow the law. Justice Stevens commended "countless judges in countless cases" for making unpopular decisions and "enforc[ing] rules that they think unwise, or that are contrary to their personal predilections."

Although members of the judiciary and most lawyers appreciate that judges routinely follow laws or rules with which they disagree, the public sometimes finds it difficult to accept that judges possess this essential hallmark of impartiality. So, permit me to present two cases in which it was necessary for me to set aside my personal sense of justice and render a decision mandated by the law. In the first case, the law mandated the acquittal of a defendant who had undoubtedly committed the offense of sexual abuse. In the second matter, the law required a ruling against a plaintiff in a property-damage lawsuit.



Judicial impartiality demands that the rule of law prevail no matter how strongly a judge holds a personal view or how vehemently a judge disagrees with the law.

Sexual Abuse Acquittal

To prove that a defendant committed a crime, the state must prove beyond a reasonable doubt that 1) a crime in fact occurred and 2) the defendant committed the crime. The first element, that a crime occurred, is known as the *corpus delicti*. It is a long-standing rule “that proof of the *corpus delicti* may not rest exclusively on a defendant’s extrajudicial confession, admission, or other statement” (*People v. Sargent*, 2010: 1055). The law requires evidence, independent of the accused’s confession, that a crime occurred. Historical mistrust of out-of-court confessions formed the basis for this common-law evidentiary rule (*People v. Sargent*, 2010: 1055). Distrust arose from coercive interrogation techniques and the tendency of some to confess to crimes they did not commit or to crimes that never occurred. Ordinarily, presenting evidence that sexual abuse occurred is not a problem because the victim is available to testify.

In the case before me, the state charged the defendant with criminal sexual abuse. The charge was consistent with the acts that the defendant admitted performing on the victim in his extrajudicial confession. However, the victim of the abuse was ten months old and, therefore, unable to testify. A pediatrician specializing in sexual and other forms of physical abuse examined the child but was unable to find any indication of trauma or abuse. There was simply no evidence other than the defendant’s detailed and convincing confession to establish that a crime occurred. Thus, a bench trial resulted in a finding of not guilty.

Proving Damages in an Automobile Accident

Civil lawsuits involving vehicular collisions are heard every day in courthouses across the nation. As first-year law students learn, to recover money from a defendant in an automobile-accident case, the plaintiff must establish that the defendant drove in a negligent manner, that the defendant’s negligence damaged the plaintiff, and the amount of the damage in monetary terms sustained by the plaintiff. The means and methods of proving the elements of a tort action pose no special problem for lawyers. The matter is not so simple, however, when a *pro se* plaintiff, unschooled in the law, faces an insurance-company lawyer representing the defendant.



In my case, the plaintiff appeared on the trial date ready to prove the defendant’s negligence with her testimony. She planned to testify that while stopped at a traffic signal, the defendant’s automobile struck her vehicle from behind. She was ready to prove her damages with the automobile repair shop’s written estimate of \$1,500 for repairs necessitated by the defendant’s negligence. What the plaintiff did not know was that in Illinois an unpaid repair estimate is by itself insufficient to prove the amount of damages. The law required a repair bill marked “paid,” the plaintiff to testify that the bill had been paid, or the repairperson’s in-court testimony establishing the necessity and reasonable cost of repairs (see *Saunders v. Wilson*, 1969: 90; *Schaefer v. State*, 1984: 268).

Of course, the plaintiff was surprised to learn about this evidentiary rule when it was interposed by defense counsel. I suggested that the plaintiff consider requesting a trial continuance to bring the repairperson to court to testify. The plaintiff declined, stating she could not miss another day of work. No explanation by me could remove the plaintiff's feeling that the system cheated her and that justice was perverted to unjustly reward the insurance company. She was correct. The "paid bill" rule prohibited a fair result in the case. If my oath permitted me to substitute my subjective sense of fairness for the rule of law, the unpaid repair bill would have been admitted into evidence and the plaintiff would have recovered the cost of repairs. And I cannot say the thought of ignoring the evidentiary rule did not cross my mind. But judges resist the urge to substitute their own sense of justice for the rule of law. In many situations, such as the one before me, the only legitimate remedial action is to change the law.

How can courts and judges promote the public's understanding and appreciation that the rule of law requires judges to set aside their personal views and follow the law even when the result offends the judge's personal sense of justice? In his "2019 Year-End Report on the Federal Judiciary," Chief Justice Roberts provided at least a partial answer when he implored his "judicial colleagues to continue their efforts to promote public confidence in the judiciary, both through their rulings and through civic outreach."

Chief Justice Roberts... implored his "judicial colleagues to continue their efforts to promote public confidence in the judiciary, both through their rulings and through civic outreach."

Civic Outreach

Judges and other court staff traditionally have used speaking engagements to educate the public about the judicial system. Judges and staff could easily structure speeches around historical and personal examples of judicial officers disregarding strongly held personal opinions to comply with the law. Historical illustrations are easy to come by; for example, see *Texas v. Johnson* (1989), regarding Justice Scalia's views on flag burning, and Duin (2005), describing how a judge's ruling resulted in the picketing of his home, death threats, and the judge's resignation from his church. So are examples from the court calls of judges who, like me, find themselves bound by a law or rule with which they disagree. Op-ed pieces and posts on a court's social-media pages could likewise explain the restrictions placed on judges.

Even more fundamentally, every court's webpage should emphasize a judge's sworn duty to disregard personal opinions and follow established law. Some states have taken steps in this direction. For example, the "Voters' Guide to Nebraska's Judicial Retention Elections," found on the Nebraska Judicial Branch's website, informs the public, "Judges must be neutral and follow the rule of law. It is inappropriate for a judge to consider his or her personal views, political pressure, or public opinion when deciding cases." The Nebraska website further explains that obeying the law sometimes leads to unpopular results that can only be remedied if the legislature changes the law. The Iowa Bar Association provides similar information in its *Judicial Performance Review* publications to assist voters in intelligently exercising their franchise in judicial retention elections (Iowa State Bar Association, 2018: 3-4). While these efforts are laudable, there is no reason to limit the explanation of a judge's duty to follow the law and disregard personal preferences to election guides. Courts need to brand the judiciary as impartial arbiters prominently on court webpages and in social media. Because of their often superior knowledge concerning means of electronic communication, this is where court administrators, public information officers, and other court staff can play an instrumental role in branding the judiciary as impartial decision makers scrupulously following the law, rather than their personal opinions.

Judicial Decisions

Sometimes, judges view the purpose of judicial rulings too narrowly as merely a means of resolving a dispute between litigants. An equally important purpose of a judicial decision, however, is to help the litigants and public understand the role of judges, courts, and laws in our system of justice (Chemerinsky, 2009: 1783). This explanatory component of judicial decision making is especially important when a judge's decision seems to confound common sense or deviate from public expectations.

Authoring opinions clearly and deliberately explaining the rules controlling the decisions in the two cases described previously presents little difficulty. The rule that a criminal defendant cannot be convicted without evidence independent of a confession can be explained in simple terms. The public would also understand the reason for the rule, especially in light of recent disclosures of coerced and other false confessions. Similarly, a written opinion in the automobile-accident case could explain that only paid repair bills are admissible in evidence to prevent litigants from securing inflated cost estimates. Such explanations would not only help the public and media understand the relationship between the rule of law and the role of judges but also help foster changes in the law thought necessary by the public.

Educating Judges

Every state requires judicial education and training. Courses for judges usually focus on procedural and substantive law and mandated instruction on codes of judicial ethics. If not yet a part of the curriculum, programs should be added to educate judges and judicial candidates about the essential components of impartiality, including that personal beliefs cannot influence judicial decisions. Education regarding this essential trait of judging is vital in states that permit non-lawyers to become judges. Judges who are lawyers better understand the judicial role but would still benefit from course work on the importance of the rule of law and from training on how to prevent personal opinions and other implicit biases from subconsciously influencing rulings. Most importantly, impartiality training would allow the courts to advertise to the public that judges not only understand the importance of divorcing personal beliefs from court decisions but also receive training how to accomplish that goal; for example, *State v. Plain* (2017: 841) explicitly states that all Iowa judges are required to undergo implicit bias training and testing.

Courts need to brand the judiciary as impartial arbiters prominently on court webpages and in social media.



Conclusion

Building public confidence in the legal system falls squarely on the shoulders of judges, court administrative and support staff, and lawyers. The single most effective means of enhancing public trust in the judiciary is to confirm that judges act impartially; ignore outside influences, including their own personal views; and decide cases only on the facts and the law. That judges meet this rigorous impartiality standard is demonstrable through the words and actions of famous judges sitting on the country's highest court and less famous judges hearing cases at the local level. We can no longer simply rely on repetition of the mantra "judges must be impartial" and, instead, must prove to the public that every day, judges in every court, and in every kind of case, do, in fact, remain impartial.

References

- Barnes, R. (2008). "With a Book Coming Out, Scalia Is All Talk—Even with the Media." *Washington Post*, April 10.
- Chemerinsky, E. (2009). "Judicial Opinions as Public Rhetoric." 97 *California Law Review* 1763.
- Duin, J. (2005). "Judge in Schiavo Case Faces Death Threats." *Washington Times*, March 30, p. A1.
- Iowa State Bar Association (2018). 2018 *Judicial Performance Review*. Des Moines: Iowa State Bar Association. Online at <https://tinyurl.com/yb9ymot>.
- Roberts, J. (2019). "2019 Year-End Report on the Federal Judiciary." U.S. Supreme Court, Washington, D.C., December 31. Online at <https://tinyurl.com/yj4gyx6v>.
- State of Nebraska Judicial Branch (2020). "Voters' Guide to Nebraska's Judicial Retention Elections." Nebraska Supreme Court, Lincoln. Online at <https://tinyurl.com/srk37va>.

Cases Cited

- Republican Party of Minnesota v. White*. 536 U.S. 765 (2002).
- People v. Sargent*. 940 N.E.2d 1045 (Ill. 2010).
- Saunders v. Wilson*. 253 N.E.2d 89 (Ill. App. Ct. 1969).
- Schaefer v. State*. 37 Ill. Ct. Cl. 267 (1984).
- State v. Plain*. 898 N.W.2d 801 (Iowa 2017).
- Texas v. Johnson*. 491 U.S. 397 (1989).

We can no longer simply rely on repetition of the mantra "judges must be impartial" and, instead, must prove to the public that every day, judges in every court, and in every kind of case, do, in fact, remain impartial.

