



March 2015

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Hon. Kermit V. Lipez

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Recommended Citation

Lipez, Hon. Kermit V. (2015) "Is There a Place for Religion in Judicial Decision-Making?," *Touro Law Review*. Vol. 31 : No. 1 , Article 11.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol31/iss1/11>

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IS THERE A PLACE FOR RELIGION IN JUDICIAL DECISION-MAKING?

*Honorable Kermit V. Lipez**

I first encountered the tension between judging and religion in a church, not a courtroom. Shortly after I joined the Court of Appeals in July 1998,¹ I received an invitation to the “Red Mass for the Jurisdiction of Maine”² from a committee of prominent Maine lawyers and state judges, chaired by the Bishop of Portland. The invitation explained that the Red Mass ceremony dated back to the 13th century in Rome, Paris and London, where it was celebrated annually in October. Judges, lawyers, government officials, and people of all faiths attend the Mass to invoke God’s blessing and guidance in the administration of justice.³ The invitation further explained that:

[T]he traditional name of the Red Mass derives from the red vestments worn by the celebrants of the Mass. These red vestments symbolize the tongues of fire which indicate the presence of the Holy Spirit, as well as recalling the traditional bright scarlet robes worn by

* Judge Kermit V. Lipez graduated from Haverford College in 1963 and Yale Law School in 1967. He earned his LL.M. from the University of Virginia School of Law in 1990. Judge Lipez participated in the U.S. Department of Justice Honors Program as a Staff Attorney in the Civil Rights Division from 1967 to 1968. He then served as Special Assistant and Legal Counsel to Maine Governor Kenneth M. Curtis from 1968 to 1971 and as a Legislative Aide for United States Senator Edmund S. Muskie from 1971 to 1972. Judge Lipez worked in private practice in Portland, Maine from 1973 to 1985, before he was appointed Justice of the Maine Superior Court, where he served from 1985 to 1994. In 1994, he was elevated to the Maine Supreme Judicial Court, where he served until he was appointed to the First Circuit Court of Appeals in 1998.

¹ “Judge Lipez was appointed to the First Circuit Court of Appeals in April 1998 and assumed senior status on December 31, 2011.” See *Kermit V. Lipez*, USCOURTS.GOV, <http://www.ca1.uscourts.gov/kermit-v-lipez> (last visited Dec. 9, 2014).

² See Invitation from the Red Mass Comm. to Hon. Kermit V. Lipez (Aug. 1998) (on file with author).

³ Judy Harrison, *Bishop invokes God’s blessing for legal community at Red Mass in Portland*, BANGOR DAILY NEWS (Oct. 2, 2011), <http://bangordailynews.com/2011/09/30/religion/bishop-invokes-god’s-blessing-for-legal-community-at-red-mass-in-portland/>.

the attending royal judges many centuries ago.⁴

The last Red Mass in Maine had been held in 1957.⁵ The Red Mass Committee had decided to revive the tradition.⁶

I had an immediate Establishment Clause reaction to this invitation. How could it be appropriate, I thought, for a federal judge to go to a Catholic Mass intended to invoke God's guidance for my work? How would a Muslim or a Baptist or a Jew feel about my participation? Could they reasonably see an endorsement of Catholic theology in my participation? Yet I learned from the invitation, and confirmed by my own research, that justices of the Supreme Court had been participating in a Red Mass in Washington, D.C. for years.⁷ Surely they had thought through the Establishment Clause issue. So, with some misgivings, I went to the Red Mass.

I had worried needlessly. In a homily offered at the Mass, the Bishop spoke thoughtfully about the relationship between law and justice, describing the "inalienable rights" language of the Declaration of Independence⁸ as consistent with the Catholic teaching that "[R]ights have their origin with a God who is creator of heaven and earth and all that is within them."⁹

Thus reassured, I returned for a second Red Mass in the fall of 1999. Justice Scalia was the Guest of Honor that year,¹⁰ and I had the privilege of sitting next to him in the front pew of the church. That proximity created some awkwardness, however. When Justice Scalia kneeled to pray, I felt that I was intruding on a private moment. When the Bishop urged us to turn to our seatmates, wish them peace, and embrace in an act of fellowship, I had a moment of panic. Was I really supposed to embrace Justice Scalia? What should I do? Fortunately, Justice Scalia was no more eager for an embrace than I was. Looking me in the eye with the hint of a smile, he said that shaking

⁴ See *supra* note 2.

⁵ *Id.*

⁶ Harrison, *supra* note 3 (stating that the Red Mass was reinstated in 1998).

⁷ Dan Merica, *Record number of justices attends Red Mass*, CNN POLITICS (Sept. 30, 2012), <http://www.cnn.com/2012/09/30/politics/fea-scotus-red-mass/>.

⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

⁹ Bishop Joseph Gerry, *Homily at the Red Mass Celebrated at Holy Martyrs Church in Falmouth* (Oct. 2, 1998), in CHURCH WORLD, Oct. 8, 1998, at 4.

¹⁰ Steven G. Vegh, *Scalia to Attend Annual 'Red Mass,'* PORTLAND PRESS HERALD (Aug. 28, 1999), <http://www.highbeam.com/doc/1P1-22950908.html>.

hands would be just fine. So we shook hands.

Then the Bishop delivered his homily. This time it was different. There was a partial birth abortion ban on the November ballot in Maine.¹¹ In his homily,¹² the Bishop addressed that controversy directly by elaborating on the inalienable rights language in the Declaration of Independence:

The truth about the human person is that it possesses fundamental and inalienable rights. The truth about the human person is that its fundamental rights were inscribed in human nature itself, they are willed by God and therefore call for universal observance and acceptance. No human authority can infringe upon them by appealing to majority opinion or political consensus, or in the pretext of respect for pluralism in democracy. . . . Those fundamental rights deserve to be protected and in your work with the law you are called upon, as well as privileged, to dedicate yourselves to that task.¹³

There was no mistaking the Bishop's message. He was telling his audience how they should vote in November, and the judges in particular how they should handle any abortion issues that came before them.

I have not returned for a Red Mass celebration since that 1999 event. Although the Bishop had spoken eloquently about an issue of deep concern to him and nobody had forced me to attend the Red Mass, I could no longer avoid answering affirmatively the establishment question that I had posed for myself when I was first invited to the Mass. There was an appearance issue. Maine citizens of other religious persuasions reading about the participation of their judges in the Red Mass, could reasonably worry that this participation was an endorsement of the religious views that they were hearing.

Interestingly, 1999 was also the year that the annual Red Mass ceremony in Washington, D.C. sparked controversy. With six Supreme Court Justices in attendance, and a case on the Supreme

¹¹ See *Maine rejects ban on certain abortions*, USA TODAY, Nov. 3, 1999, <http://usatoday30.usatoday.com/news/vote99/v019.htm>.

¹² Bishop Joseph Gerry, Homily at the Red Mass Celebrated at St. Patrick's Church in Portland (Sept. 24, 1999), in CHURCH WORLD, Sept. 30, 1999, at 4.

¹³ *Id.* at 5.

Court docket in December involving a challenge to the use of federal dollars to pay for school equipment used by parochial schools,¹⁴ Bishop Raymond Boland of Kansas City delivered a homily lamenting the high level of separation between church and state and “calling on the audience to find new ways of legally facilitating those who work with Caesar and walk with God.”¹⁵ Rev. Barry Lynn of Americans United for Separation of Church and State criticized the sermon as “a blatant effort to lobby Supreme Court justices on [the Church’s] view of the Constitution.”¹⁶ Justice Ginsberg was one of the three justices not in attendance at that 1999 Red Mass.¹⁷ She refuses to go to any Red Mass because of what she described as an “outrageously anti-abortion” sermon on a prior occasion.¹⁸

This Red Mass controversy highlights some of the complexities of the relationship between judging and religion. Surely we cannot fault Catholic judges on appearance grounds for participating in a religious service of their own church. They are simply exercising their First Amendment right to worship as they choose. But what about the explicit appeal from the pulpit at Red Mass services that judges use religious doctrine to decide a controversial issue like abortion? Under the Establishment Clause of our Constitution, that appeal is as problematic for Catholic judges as it would be for any judges asked to decide controversial issues on the basis of religious doctrine.¹⁹ Indeed, when confronted with a divisive issue like abortion, we are quick to declare that religion has no place in judicial decision-making.

I think that generality is suspect. An issue like abortion clouds our view of the place of religion in judicial decision-making. The reality is that most judges have a religious identity, and it is unrealistic to expect them to create a “wall of separation” between that identity and their decision-making.²⁰ Indeed, I believe that religion

¹⁴ *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

¹⁵ Tony Mauro, *Sunday School: Captive Audience for Washington's Red Mass*, *LEGAL TIMES*, Oct. 18, 1999, at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Bill Mears, *Red Mass: lobbying high court or simple prayer service?*, CNN (Oct. 1, 2009), <http://www.cnn.com/2009/POLITICS/10/01/dc.red.mass/> (last visited Dec. 9, 2014).

¹⁹ *Id.*

²⁰ This famous metaphor comes from the Supreme Court's decision in *Everson v. Bd. of Educ. of Ewing TP*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

already plays an unacknowledged part in judicial decision-making. Rather than pretending otherwise, we should acknowledge that fact and explore its implications.

Some judges have written thoughtfully on this issue. Judge Wendell Griffen, an Arkansas Court of Appeals judge who is also a Baptist pastor, rejects the notion that religious values have no place in judicial decision making.²¹ He writes:

Instead of treating religious values as inherently suspect when held by judges, or as automatically impermissible factors for influencing judicial decision-making, we ought to honestly consider the way that religious values can operate within the decision-making process consistent with our views of pluralism and religious tolerance, tempered by our concern for the Establishment Clause²²

Judge Griffen's challenge is an important one. Judging is not always a search through familiar material for an answer just beneath the surface. Judges must often make decisions in the face of uncertainty, without the help of familiar guideposts. Criminal and civil laws defining acceptable conduct cannot anticipate every variety of human behavior. By design or inadvertence, many statutes are ambiguous. If legislative history is unhelpful or non-existent, judges must infer legislative intent from multiple sources. Science challenges legal norms defining the beginning and end of life. Technology tests constitutional generalities designed to protect our privacy against government encroachment.

Judges must also make discretionary decisions in cases where the relevant factors are not tightly circumscribed. Sentencing is a prime example. There, the competing demands for mercy and retribution, and the societal stake in protection from violent conduct and financial plunder, can try a judge's soul.

What are the proper sources of decisions for judges in such cases? Does it make sense to say that only secular sources—economic, political, philosophical, psychological, historical, and scientific—can play a role in such cases, but religion cannot?²³

²¹ See generally Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513 (1998).

²² *Id.* at 514.

²³ Judge Griffen raises a similar question. See *id.*

I suggest that religion can appropriately play a role in such decision-making, so long as we are clear about some basic points. We all have life and educational experiences because of our religious identity. These experiences impart values that influence our conduct and inform our judgments about the conduct of others.²⁴ Religion makes us think about ultimate meanings and, in light of those meanings, right and wrong, good and bad, fair and unfair. If these religious experiences and values are widely shared across religious denominations, they might be useful for judges looking for guidance in areas of legal uncertainty. To the extent that these experiences and values are not widely shared, they will be a problematic source for judges trying to make decisions compatible with their judicial role.

Thus, judges should not reject outright the usefulness or appropriateness of their religious identity in their judicial decision-making. Instead, they should accept that their religious identity is part of who they are, and they should try to understand how that identity influences their decision-making. If they try to distance themselves from their religious roots, they may disserve, even distort, their decision-making. To make these generalities more concrete, I would like to draw on two decisions of a Jewish Supreme Court Justice and my own personal history as a Jew.

In 1940, on the eve of World War II, Justice Felix Frankfurter, the third Jew to serve on the United States Supreme Court, having been preceded by Louis Brandeis and Benjamin Cardozo, wrote a decision for the Court in the case of *Minersville School District v. Gobitis*.²⁵ “Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the [American] national flag as part of a daily school exercise” mandated by the local Board of Education, pursuant to state law.²⁶ The Gobitis children, who were Jehovah’s Witnesses, had been taught that “the Bible, as the Word of God, is the supreme authority.”²⁷ Thus, the salute, “a gesture of respect for the flag was forbidden by the command of Scripture.”²⁸

²⁴ The *Oxford English Dictionary* defines “values” as, *inter alia*, “principles or standards of a person or society, the personal or societal judgment of what is valuable and important in life.” OXFORD ENGLISH DICTIONARY (2d ed. 1989).

²⁵ 310 U.S. 586 (1940).

²⁶ *Id.* at 591.

²⁷ *Id.*

²⁸ *Id.* at 591-92.

With only one of the nine justices on the Supreme Court dissenting, Justice Frankfurter affirmed the authority of the school to expel the *Gobitis* children.²⁹ Emphasizing that the flag was an important symbol of national unity, and that the Pennsylvania legislature had reasonably decided that a daily pledge of allegiance to the flag by school children would promote that unity, Justice Frankfurter wrote that judges should not, as he put it, “exercise censorship” over that legislative judgment.³⁰ He saw the case primarily in institutional terms, writing at great length about the proper roles of the legislature and the judiciary in our system of government.³¹ He did not defend the wisdom of the Pennsylvania law.³² But, he wrote:

[E]ducation in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.³³

Justice Frankfurter’s *Gobitis* decision was widely condemned by legal scholars and editorial writers as an affront to civil liberties.³⁴ Three years later, in what is breathtaking speed for the Supreme Court, the Justices explicitly overruled the *Gobitis* decision in the case of *West Virginia State Board of Education v. Barnette*.³⁵ Taking its cue from the *Gobitis* decision, the West Virginia Board of Education had adopted a resolution requiring all teachers and pupils in West Virginia’s schools to participate in a salute “honoring the Nation” as represented by the flag.³⁶ Again, the children of Jehovah’s Witnesses in West Virginia faced expulsion from school because they refused to salute the flag.³⁷ This time, the Supreme Court sided with the Jehovah’s Witnesses by declaring the West Virginia resolution

²⁹ *Id.* at 600-01.

³⁰ *Minersville Sch. Dist.*, 310 U.S. at 596-97, 599.

³¹ *Id.* at 599-600.

³² *See id.* at 600 (holding that wise legislation is the best way to serve free peoples’ interests).

³³ *Id.*

³⁴ *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 n.15 (1943) (stating that peoples’ civil liberties may be violated when courts make decisions based on religious beliefs).

³⁵ *Id.* at 642.

³⁶ *Id.* at 626.

³⁷ *Id.* at 629-30.

unconstitutional in a six to three decision.³⁸ Justice Robert Jackson wrote, “[T]he action of the local [school] authorities in compelling the flag salute and pledge transcends constitutional limitations on their powers and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”³⁹

Justice Frankfurter was furious at this turnabout, accusing his six colleagues in a long, angry dissent of writing their “private notions of policy into the Constitution.”⁴⁰ He began his dissent with these now-famous words:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.⁴¹

Justice Frankfurter’s statement about his Jewish identity was an unusually personal one for a Supreme Court Justice. He acknowledged that identity in his dissent only to assert its irrelevance to his work as a judge.⁴²

In one sense, that assertion of irrelevance is unassailable. A judge cannot be faithful to the oath of office and ignore the law of the state in favor of religious doctrine. For example, the Halacha, or Jewish law, has a more expansive concept of the Good Samaritan than our civil law, based on a passage from Leviticus 19:16: “You shall not stand idly by the blood of your neighbor.”⁴³ The failure to rescue a drowning stranger is punishable by God if the rescue poses

³⁸ *Id.* at 642-44.

³⁹ *Barnette*, 319 U.S. at 642.

⁴⁰ *Id.* at 646-47 (Frankfurter, J., dissenting).

⁴¹ *Id.* at 646-47.

⁴² *Id.* at 647.

⁴³ MOSES MAIMONIDES, MISHNEH TORAH—THE BOOK OF TORTS, *Laws of Murder and the Preservation of Life 1:14* (Hyman Klein trans., 1954) (citing *Leviticus* 19:16).

no substantial risk of serious harm to you.⁴⁴ There is no similar legal duty to rescue under American law even if there is no such risk.⁴⁵ If I as a judge had to decide a lawsuit against an indifferent stranger who failed to rescue a drowning child, I could not allow the Halacha's treatment of the Good Samaritan to influence my view of the facts in the case or my judgment on the responsibility of the stranger.

But the flag salute cases did not involve a rule of law with settled content like the Good Samaritan law. Justice Frankfurter and his colleagues had to give content to one of the great generalities of the Constitution—the protection in the First Amendment for the free exercise of religion.⁴⁶ Confronted with the task of balancing that free exercise by Jehovah's Witnesses and the demand of the government for a uniform expression of loyalty, Justice Frankfurter said that he could not allow his Jewish identity, or, as he put it, his membership in “the most vilified and persecuted minority in history,” to influence his decision in the case.⁴⁷

Justice Frankfurter's position in his *Barnette* dissent raises troubling questions for Jewish judges who almost certainly share his awareness of this history of Jewish oppression. In varying degrees, from our earliest awareness of our Jewish identity, we carry with us a sense of a tragic history. Justice Frankfurter's position becomes even more troubling for Jewish judges whose families have experienced persecution and discrimination.

Believe it or not, I found recently a handwritten draft of my Bar Mitzvah speech, with my mother's marginal notation, “Remember to thank your sister.” But my mother did not have to remind me to thank my grandmothers, both escapees from religious persecution in Russia. I wrote these words:

As I look down into the always encouraging and hopeful eyes of my grandmothers, I see the one thing that I cherish most, love. Their eyes have seen many more years than mine and they have seen all the terrible oppression and persecution that the Jews have had to suffer in foreign lands. Yes, they can appreciate this moment better than I ever could, but I know that they

⁴⁴ Sheldon Nahmod, *The Duty to Rescue and the Exodus Meta-Narrative of Jewish Law*, 16 ARIZ. J. OF INT'L & COMP. L. 751, 758 (1999).

⁴⁵ *Id.* at 760.

⁴⁶ U.S. CONST. amend I.

⁴⁷ *Barnette*, 319 U.S. at 646-47 (Frankfurter, J., dissenting).

hope and pray that I will never have to see and experience what they have had to go through.

For me, the long suffering of the Jewish people was embodied in the lives of my grandmothers, who both lived with us throughout my childhood.

My father also told me about his experiences with anti-Semitism. He graduated from Penn Law School in 1929. Unable to find work as a lawyer in Philadelphia in the wake of the Depression, he returned to his home in Lock Haven, Pennsylvania. To his delight, he was soon offered a position as an associate in the office of an elderly attorney in nearby Williamsport. Then, about a week later, the attorney called my father and said that he had to see him right away. When they met, the attorney told my father that a number of the leading lawyers in Williamsport had warned the attorney that they never had a Jewish lawyer there, and they did not want one now. Although the attorney did not withdraw his offer to my father, he said that my father would have to fight for admission to the Lycoming County Bar Association, probably through a lawsuit. Unable to afford a protracted legal battle, my father decided to start his own law practice in Lock Haven.⁴⁸

About twenty-three years later, my father had another experience with anti-Semitism that I witnessed. Appointed to fill the judgeship in Clinton County after the incumbent judge died, my father was running for a full term of his own in 1953. He had been born in Russia, coming to the United States with his mother when he was two years old. I had always enjoyed telling friends of that exotic fact—my father's Russian origins. But the country was in the midst of McCarthyism in 1953.⁴⁹ Soon my father heard that his opponent for the judgeship was spreading stories about the Jewish judge who might be a communist since he was born in Russia and, besides, everybody knows that Jews are communists.⁵⁰ Fortunately, this campaign of hate and innuendo badly backfired, and my father easily won election to the judgeship.

These experiences with anti-Semitism prompted my parents and my grandmothers to give me some advice: "Always be your own boss. Don't be at the mercy of others for your work." As they saw it,

⁴⁸ ABRAHAM H. LIPEZ, RECOLLECTIONS OF A COUNTRY JUDGE 81-2 (Nuttall ed. 1993).

⁴⁹ See generally Irving Louis Horowitz, *Culture, Politics and McCarthyism: A Retrospective from the Trenches*, 22 WM. MITCHELL L. REV. 357, 357 (1996).

⁵⁰ LIPEZ, *supra* note 48, at 158.

being Jewish made one vulnerable to whim and prejudice. It was wise to make choices that minimized those vulnerabilities. I am sure that this advice influenced my decision to go to law school. Law, unlike some careers, offered possibilities for independence. Law is also central to the exercise of power in our society and the response to it, offering protection against governmental excess and discrimination, such as the discrimination experienced by my father in Williamsport. I remembered that my father, if his financial circumstances had allowed it, could have sued the Lycoming County Bar Association for its outrageous anti-Semitism.

I made other choices that I believe were influenced by my Judaism. I spent the summer after graduating from college in 1963 working with minority children at settlement houses in New York City. That same summer I went to the March on Washington for Jobs and Freedom, where Dr. King made his historic “I Have a Dream” speech. After my first year of law school, I spent the summer at Dillard College in New Orleans teaching English composition courses to young African-Americans who needed academic enrichment to improve their chances of getting into college. For my first job after law school, I worked in the Civil Rights Division of the Department of Justice, enforcing in the South the newly enacted Civil Rights Act of 1964.

These choices were more organic than calculated. I just felt that I should do these things. Also, there was nothing unusual about these choices. Many Jews were drawn to civil rights activism, seeing in the experiences of African-Americans in this country echoes of the Jewish experience throughout history.

So is Justice Frankfurter right? Are my Jewish identity and the values it instilled problematic for me as a judge? Should I insist on their irrelevance to my judicial decision-making, as Justice Frankfurter did, lest I violate the spirit of the Establishment Clause?

To answer that question, I cite the controversy surrounding the nomination of Sonia Sotomayor, the first Hispanic on the Supreme Court.⁵¹ Justice Sotomayor had been a judge on the lower federal courts before being nominated to the Supreme Court.⁵² In a speech about her work as a judge, she had expressed the hope that “a wise Latina with the richness of her experiences would more often

⁵¹ Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 265 (2010).

⁵² *Id.*

than not reach a better conclusion than a white male judge who hasn't lived that life."⁵³ Without using the word, Justice Sotomayor described the empathy that the "wise Latina" judge might feel for some of the parties before her.⁵⁴ Empathy has been defined as "a feeling of affinity, whether based on experience or imagination, that permits one a full, sometimes visceral understanding of what another is going through."⁵⁵ In nominating Justice Sotomayor, President Obama stated that "among [her] virtues was a set of life experiences that would permit her to empathize with parties who had experienced disadvantage."⁵⁶

This focus on empathy generated some sharp criticism of Justice Sotomayor and President Obama. As one critic put it: "[W]hen a judge shows empathy toward one party in a courtroom, do they not show prejudice against the other?"⁵⁷

That is an important question. Whatever their life experiences might have been, judges cannot use them to disregard statutory commands, clear precedents and the probative force of evidence. But, as I have suggested, many judicial decisions are interstitial—that is, they fill in gaps where the statutory or constitutional law is so general, or the common law doctrine is so dated, that the judges must give the law content by deciding specific cases. Some of these cases, like the flag salute cases, require the application of the protections of the Bill of Rights to the conduct of the government. Judges decide these cases through a process that is a mix of logic, analysis, intuition and common sense, all informed by the judge's education, work history and, yes, a religious identity that instills certain values. If those values prompt a judge to be more forgiving of human frailty, or more alert to abuses of governmental authority, or more generous in fashioning relief, or more tolerant of inarticulate claims of discrimination, that is not a demonstration of prejudice. It is a demonstration of the inescapable reality of judging.

I have no doubt that my experiences as a Jew have influenced my judicial decision-making. My concerns about racial injustice

⁵³ *Id.* at 263.

⁵⁴ Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

⁵⁵ *Abrams*, *supra* note 51, at 268.

⁵⁶ *Id.* at 263.

⁵⁷ Sen. Jeff Sessions, *Guest Commentary: 'Empathy' no basis for judicial rulings*, THE GRAND RAPIDS PRESS, July 13, 2009, http://www.mlive.com/opinion/grand-rapids/index.ssf/2009/07/guest_commentary_empathy_no_ba.html.

translate readily to concerns about the treatment of other vulnerable individuals or groups. I recognize that the courts allow challenges to power, public or private, that are unavailable elsewhere. I believe that undue deference to governmental authority is unwise.

Let me be clear, however. I make no claim for Jewish exceptionalism. Obviously, one does not have to be Jewish to care about minority rights or abuse of government power. Indeed, that is my basic point. These concerns, though traceable to my history as a Jew, are widely shared. Empathy can have many sources, including the teachings of most religions. My point is that a judge should not resist experiences and values traceable to a religious identity when those experiences and values might legitimately enhance the quality of the judge's work.

This was Justice Frankfurter's great failing in the flag salute cases—his rejection of the relevance of his experiences as a Jew to the plight of the Jehovah's Witnesses. Note this unfeeling description in his *Barnette* dissent of the stakes in these cases for the children expelled from school for refusing to salute the flag. The dissent states, "We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the state to compel participation in this exercise by those who choose to attend the public schools."⁵⁸ By contrast, Justice Jackson, writing for the Court in *Barnette*, quoted a scholar's tart observation about Justice Frankfurter's earlier decision in the *Gobitis* case: "All of the eloquence by which the majority [in *Gobitis*] extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public."⁵⁹ Justice Jackson saw the stakes in the flag salute cases that Justice Frankfurter missed—the plight of a young Jehovah's Witness child forced to make a public choice between conformity and religious conviction.

Although Justice Frankfurter's career was admirable in many respects, his insistence on the irrelevance of his experience as a Jew to the plight of the Jehovah's Witness children in the flag salute cases led to a serious misjudgment.⁶⁰ There was no incompatibility be-

⁵⁸ *Barnette*, 319 U.S. at 650 (Frankfurter, J., dissenting).

⁵⁹ *Id.* at 634-35 n.15 (quoting Robert E. Cushman, *Constitutional Law in 1939-40*, 35 AM. POLIT. SCIENCE REV. 250, 271 (1941)).

⁶⁰ ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISE LAND 45 (1988).

tween Justice Frankfurter's Judaism and his judicial oath to uphold the Constitution if, sensitized by his experience as a Jew to the plight of minorities, he had ruled that the school authorities in Pennsylvania could not compel the children of Jehovah's Witnesses to salute the American flag. Indeed, there was an appropriate convergence between his experience as a Jew and the protection of minority rights in the Bill of Rights. As one commentator has noted, by guarding against an empathy borne of his experience as a Jew, Justice Frankfurter pushed himself into "an alliance with the vilifiers and persecutors."⁶¹

There is a cautionary tale here for judges who must give content to the generalities of a constitutional provision or statute, fashion remedies for which there are few guides, or apply multi-factor tests that maximize a judge's discretion. Although there are traditional sources of guidance available to judges struggling with these difficult cases, there is no reason to exclude from the mix a judge's religious experiences or values. Indeed, judges who attempt to erect a wall between their judicial decision making and their religious identity risk depriving themselves of sensitivities that may be important to the quality of their work.

However, I add an important caveat. As I suggested earlier, any reliance on religion in judicial decision-making must only involve values that are both protective of minority rights under the Constitution and widely shared in the society. Any use of religious doctrine to resolve controversial social or cultural issues that find their way into the courts would be incompatible with our pluralistic society and contrary to the Establishment Clause.

I also must acknowledge a complication that I have thus far avoided. How public should judges be in explaining the influence of religious experiences or education in their decision-making? As a practical matter, this question would arise only for trial judges explaining their decisions, or for appellate judges writing a concurrence or a dissent. An appellate judge writing a decision on behalf of a court could not offer such insight into individual decision-making. Still, even with that limitation, the question is an important one.

Interestingly, when Justice Frankfurter circulated his dissent in *Barnette* to colleagues, Justice Murphy urged him to delete the reference to his religion because he worried about the repercussions of

⁶¹ *Id.*

such an unusual personal statement.⁶² Justice Frankfurter, as he explained in his diary, told Justice Murphy that he was not worried:

I said I could understand that a reference to the fact that I am a Jew would be deemed to be personal if I drew on that fact as a reason for enforcing some minority rights. . . . But I do not see what is “personal” about referring to the fact that although a Jew, and therefore naturally eager for the protection of minorities, on the Court it is not my business to yield to such considerations⁶³

Despite his belief that it was appropriate to explain why his religion did not affect his decision-making, Justice Frankfurter’s personal statement was seen as odd, and it intensified the criticism of his dissent. Judges acknowledging that religion influenced their decision-making might suffer even greater criticism. We are in unfamiliar territory here.

I suggest that the question of transparency about the role of religion in judicial decision-making turns on the centrality of any religious consideration to the judge’s decision. If I was a trial judge considering the employer’s motion for summary judgment in an employment discrimination case involving claims of religious prejudice, and those claims resonated with me, in part, because of my father’s experience with anti-Semitism, I would see no need to acknowledge that fact in any decision that I wrote, so long as that history did nothing more than impel a scrupulous examination of the record for genuine issues of material fact. After all, that is what a trial judge should do anyhow. Also, there would be many other factors at work in such a decision, including the traditional legal ones applicable to a motion for summary judgment. What would matter would be my self-awareness about the role of my personal history in my decision-making, the discipline to preserve my impartiality, and the interplay of my history with the craft skills of judicial analysis and reasoning that should ultimately control the decision. In short, the religious history would only be background that heightened my awareness of the stakes in the case.

On the other hand, if I faced a difficult sentencing decision—

⁶² *Id.* at 44.

⁶³ *Id.* (quoting Justice Frankfurter in J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 254 (1975)).

say a vehicular manslaughter case where an alcoholic mother had killed her own child, and I realized that prescriptions of mercy from my religious education were overcoming in my mind the demands for deterrence and punishment, I would owe the public an acknowledgment of that influence in the explanation of my sentencing decision. Mercy is a legitimate part of the sentencing process. Religious values could reasonably inform its application. However, if the transparency revealed undue reliance on those values, there would be correctives available in our system of judicial review and checks and balances.

In closing, and in summary, I must take issue one last time with Justice Frankfurter. He wrote in his *Barnette* dissent that “as judges we are neither Jew nor Gentile, neither Catholic nor agnostic.”⁶⁴ He was wrong. Judges do not lose their religious identity when they become judges, any more than Justice Sotomayor lost her identity as a Latina woman when she became a judge. We remain the sum of all our parts. Those parts inescapably influence our work as judges. What matters is our awareness of those influences, how we use them, and, at times, explain them. We should accept the truth that a judge’s religion affects judicial decision-making and engage in an ongoing discussion about it.

⁶⁴ *Barnette*, 319 U.S. at 647 (Frankfurter, J., dissenting).