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The Myth of the Impartial Judge

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The Myth of the Impartial Judge

March 29, 1993 | By JANE C. MURPHY

President Clinton is about to select his first nominee to the U.S. Supreme Court. In the next few months, Governor Schaefer will get an opportunity to fill key vacancies in Maryland's two highest courts. It's a good time to rethink the criteria for selecting judges.

The traditional vision of the ideal judge, long embraced by both the legal establishment and the public, is one who is "detached" and "impartial." The model jurist renders decisions without regard to personal values, beliefs or experiences. For many, the most important test of judicial nominees from Robert Bork to John Arnick is whether, given prior statements and acts, the nominee can be "impartial." The assumption is that only impartial judges can be fair.

This assumption has resulted in a process for selecting judges that excludes large numbers of qualified people whose records of commitment to issues and people render them suspect. At the same time, it does little to promote a compassionate, caring judiciary committed to justice for all segments of the community.

On the surface, the search for impartiality makes sense. Certainly judges should be independent from the governments they serve and should not have a personal or financial interest in the conflicts before them. There are codes of judicial conduct to cover this. But how far do we take this principle of impartiality?

First, does the "impartial judge" really exist? Can judges shed their life experiences and values at the courtroom door? We need only remember the universal skepticism recent Supreme Court nominees have met when assuring Senate hearings that they had no preconceived ideas about any issue that may come before the court. Judges are human beings, not robots. They assume the bench with a world view shaped by a lifetime of experiences that will be inextricably woven into each decision they render.

Even if the "neutral" judge could be found, is this what we want? Is the connection between impartiality and fairness so clear? As a lawyer who for 15 years has represented clients ranging from the U.S. government to welfare recipients, I have thought about what qualities make a good judge.

While the qualifications may vary depending upon whether the judge will sit in small-claims court or the U.S. Supreme Court, some desirable qualities are universal. Impartiality is less important than its opposite -- experiences that connect the judge to all segments of the community.

The ability to decide cases fairly stems from an ability to empathize rather than detach oneself from the individuals and organizations that appear daily in the courts. I do not mean a judge should identify with one litigant's story over another; that certainly can result in unfairness. Empathy is an ability, based on one's experiences, to see all litigants as human beings. It is an ability to connect in some way to all the stories told in the courtroom before engaging in the necessary separation that accompanies judgment.

We should ask, then, if the traditional routes to a judicial nomination -- a career as a prosecutor, legislator or law-firm practitioner -- are good predictors of the empathic, compassionate judge. I don't think so.

In Maryland, lawyers elected by the bar association and lay citizens selected by the governor compose the judicial nominating committee that proposes a list of "qualified candidates." The governor then chooses a name from the list and a Senate committee confirms.

Four years ago, a Court of Appeals committee, reporting that gender bias existed in all areas of Maryland's courts, recommended substantial reform in the judicial-selection process. The committee found that the overwhelmingly white, male nominating commissions applied criteria to the judicial-selection process that put women at a disadvantage.

The criteria may also discourage selection of judges who have experience that facilitates compassion and empathy. For example, the committee found that private-practice experience was given more weight than legal-aid experience. Further, despite the fact that there are more civil cases in the state's trial courts than criminal cases, criminal-law trial experience -- a traditionally male province -- was valued more than family-law experience.

The process has resulted in a judiciary in which 164 of the 215 sitting judges in the state's trial courts are white men. There are only two African-American female judges in Maryland's trial courts and none in the appellate courts. Only one woman and one African-American male serve in Maryland's 20-judge appellate court system.

These numbers, of course, do not tell us everything about the quality of justice or individual judges in Maryland's courts. The vast majority of judges I appear before are well informed and strive for the ideals of fairness and compassion.

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But the lack of diversity in gender, race and background does affect the quality of justice in this state. The predominance of **JANE C. MURPHY** sends a message to women and people of color who appear before the court. The message -- one that I have heard from clients -- is that the decision makers they see may not understand or value their experiences. The quality of justice is diminished when the judiciary does not have benefit of the richness and variety of perspectives of the people it serves.

Perhaps those evaluating judicial nominees need to rethink the criteria they have relied on for so many years. Wouldn't we be better served if they looked for evidence of connection to the community rather than detachment? Those entrusted with the task of selecting our judges should look for candidates who have had legal careers representing a wide variety of individuals and organizations, including some service to the poor and disadvantaged. Volunteer work in local soup kitchens, shelters or battered women's programs should be considered as valuable as service to the local or state bar associations.

President Clinton's approach to the task of selecting judicial nominees may produce the kind of judges I describe. The qualifications most important in a future Supreme Court justice, he said, include "wide experience in the law and in problems of real people and . . . a big heart." This is a good sign. Let's hope Governor Schaefer considers some of the same qualities when selecting a new judge for Maryland's all-male Court of Appeals.

The Clarence Thomas and John Arnick nominations taught us, most painfully, a lot about what's wrong with the judicial-nomination process. A judgeship should not be a reward for being a good conservative or an uncooperative legislator. The ideal judge is one whose life and work demonstrate an ethic of caring, responsibility and compassion that will be reflected in the process of judging. The citizens served by our courts would reap the benefits.

Jane C. Murphy is an assistant professor and director of the Family Law Clinical Program at the University of Baltimore School of Law.

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