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By Ellen Borgersen*

Justice Stewart's decision to retire in 1981 took most of us by surprise at first, but his characteristically quotable explanation—that it was "better to go too soon than to stay too long"[1]—captured the great wisdom of his choice. It was, as Vice President Bush observes, such a "well balanced" decision,[2] rooted in his deep commitment to both Court and family. What he taught us, I think, is that only a sane, whole human being can serve the Constitution and the law[3] really well. Such a being has other fish to catch at age 66;[4] and so he went.

His retirement was the occasion for an outpouring of tributes and reflections on his work as a judge,[5] in all of which one hears a remarkably consistent theme: he was "a lawyer's lawyer, a judge's judge,"[6] a "principled pragmatist"[7] who defied stereotyping of any kind,[8] particularly along the "liberal/conservative" or "activist/passivist" axes that he both considered and demonstrated to be simply incoherent as applied to the

* Associate Professor, Stanford Law School. I had the privilege of clerking for Justice Stewart in 1977-78, along with my co-clerks Barbara Hauser, Bob Litt, and Jay Spears. I am grateful to the editors of the *Hastings Constitutional Law Quarterly* for giving me this opportunity to offer some personal reflections on that year, and on the work of a man whose contributions will, I believe, be appreciated all the more with the passage of time. Thanks also to my colleague Paul Brest for his helpful comments on an earlier draft.

1. Transcript of the Press Conference on the Retirement of Justice Potter Stewart 1 (June 19, 1981) (available in Public Information Office, United States Supreme Court) [hereinafter cited as *Retirement Transcript*].

2. Bush, *In Memory of Justice Potter Stewart,* 13 HASTINGS CONST. L.Q. 171, 172 (1986).

3. Justice Stewart said that "the Constitution and the law" were a judge's only bosses: "But they can—and should be—very, very strict bosses." *Retirement Transcript, supra* note 1, at 16.

4. The Justice was, among many other things, an avid salmon fisherman.

5. *See, e.g.,* Barnett, Goldman & Morris, *A Lawyer's Lawyer, A Judge's Judge: Justice Potter Stewart and the Fourth Amendment,* 51 U. CIN. L. REV. 509 (1982) [hereinafter cited as *A Lawyer's Lawyer*], which is particularly illuminating since it is based in part on several interviews with Justice Stewart. *Id.* at 509 n.1. *See also* articles cited therein at 515 n.26.

6. *Id.* at 509.

7. *Id.* at 541.

8. *Id.* at 514-15; Cutler, *Mr. Justice Stewart: A Personal Reminiscence,* 95 HARV. L. REV. 11, 15 (1981).

best judicial work.[9] His opinions were bold and sweeping when the occasion demanded it,[10] but he was never more impassioned than in defense of principles of restraint.[11] Restraint, though, like many other things, had subtle shades of meaning for him that were often not readily perceptible to others.[12]

For example, his position in the well known battle over incorporation of the Bill of Rights into the Fourteenth Amendment involved a subtle interplay of several distinct faces of restraint. On the merits, he was among those who understood that incorporation was not simply synonymous with "judicial activism." In the context of the Fourth Amendment, for example, he believed that a principal vice of incorporation was its tendency to *undermine* constitutional constraints on federal power by applying them to state and "big city" police forces, whose difficult law enforcement problems provided persuasive arguments for limiting constitutional protections.[13] The position cannot be characterized as either "activist" or "passivist" since it is both: restraint in reviewing state action is necessary in the interests of preserving strong judicial review of federal action.

But once the battle against incorporation was lost, Justice Stewart turned the second face of restraint, which demanded faithful adherence to the precedents of the Court absent the most compelling reasons for change.[14] Rather than insist on his position in separate opinions, he accepted incorporation of the Fourth Amendment as the authoritative ruling of the Court and became one of the leaders in insisting upon its complete and vigorous enforcement.[15]

Indeed, Justice Stewart considered it a "primary duty" of the Court to produce a clear majority opinion to "guide other courts, lawyers, and

9. *See* Israel, *Potter Stewart* in 4 THE JUSTICES OF THE SUPREME COURT 1789-1969 2921 (L. Friedman & F. Israel, eds. 1969).

10. *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967). Justice Stewart's opinion for the Court flatly rejected the discredited trespass theory of the Fourth Amendment and overruled two leading Supreme Court cases on its way to articulating "the cardinal principle the Court continues to apply to fourth amendment jurisprudence," *A Lawyer's Lawyer, supra* note 5, at 519-20, that "the Fourth Amendment protects people, not places." 389 U.S. at 351.

11. *See A Lawyer's Lawyer, supra* note 5, at 512, 539 n.159.

12. *See* Sandalow, *Potter Stewart,* 95 HARV. L. REV. 6, 9 (1981).

13. *A Lawyer's Lawyer, supra* note 5, at 539 n.159. *Cf.* G. GUNTHER, CONSTITUIONAL LAW 437 (11th ed. 1985) (noting that Justice Frankfurter had warned as early as Adamson v. California, 322 U.S. 46 (1947) that "warped" or diluted interpretations would be a consequence of incorporation).

14. Justice Stewart was so committed to the principle of stare decisis that he often wrote "impassioned dissents from what he deemed improper overruling of precedents, regardless of how he had voted in the earlier decision." *A Lawyer's Lawyer, supra* note 5, at 512 & n.14.

15. *See id.* at 539.

the American people,"[16] and in pursuit of that goal he was the leading (and sometimes it seemed the only) defender of what might be termed collegial restraint: he willingly accommodated others when he was the author of the majority opinion, and resolutely refrained from requesting changes in the opinions of his brethren. But there was one exception: all of his clerks learned quickly that whenever the Court struck down a *state* law on (for example) Fourth Amendment grounds, the Justice would insist that the opinion read throughout that the Court's action rested on "the Fourth *and the Fourteenth* Amendments." The battle against incorporation was lost, but it would not be forgotten. At the end of our clerkship year we gave the Justice a few small and slightly insolent gifts. I think his favorite was a rubber stamp that read:

"AND THE FOURTEENTH."

This story illustrates, I think, Justice Stewart's complex and subtle conception of judicial "restraint." It was not an end in itself and not at all the same as "passivity,"[17] but rather a part of the dynamic interaction between the branches of government that is an essential component of the American liberal tradition.[18] This delicate balance[19] required flexibility, a light hand in applying both force and restraint, and a sure sense of when to yield and when to insist on matters of principle.

Justice Stewart was often asked to describe the judicial philosophy that united a body of work that eluded the standard categories, and he always replied in the same vein: that the role of a judge was not to be a "philosopher king," but simply to *decide cases*.[20] By his own description, that is all he did for his twenty-three years on the Court. What is remarkable is that, in the course of simply "doing his best" to decide cases,[21] guided only by an unshakeable inner compass that pointed in each case to the proper role for a *judge* to play in delicate and dynamic balance of governance, he won the deep respect and profound admiration of people from all across the political spectrum. Justice Stewart's inner

16. *Id.* at 511-12.

17. For example, Justice Stewart was by no means timid about overruling outdated precedents, so long as it was done responsibly. *See id.* at 513. Indeed, notwithstanding his preference for clear majority opinions, *see supra* note 16 and accompanying text, one thing that would consistently elicit a separate concurrence from him was a Court opinion that dishonestly distinguished cases that should have been overruled. *A Lawyer's Lawyer*, *supra* note 5, at 513 n.17. *See also* California v. Texas, 437 U.S. 601 (1978) (Stewart, J., concurring).

18. *See* Sandalow, *supra* note 12, at 9 (1981). *See also* Israel, *supra* note 9, at 2921.

19. It is not surprising that one of the projects Justice Stewart undertook upon his retirement was the television series entitled "The Constitution: That Delicate Balance," produced by Fred W. Friendly and the Columbia School of Journalism, on which he provided commentary on issues of freedom of speech and of the press.

20. *A Lawyer's Lawyer*, *supra* note 5, at 510 n.4, 513-14 n.19.

21. *Retirement Transcript*, *supra* note 1, at 22.

compass, it seems, pointed almost unerringly toward true judicial North.[22]

At a time when the timeless debate over what it means to be a "good judge" is unusually lively on several fronts[23] it seems particularly appropriate to reflect again upon the work of a man so widely regarded as "one of the great ones"[24] to see what lessons we can learn. The first, if we take him at his word, is that we should look at how he decided one particular case rather than at a developed body of doctrine.[25] A small, very sad case entitled *Stump v. Sparkman*[26] seems to be a suitable text, for in it he spoke directly and with the deepest conviction on what it means to be and to act like a judge.

The issue in the case, as stated in the opening line of the majority opinion, was "the scope of a judge's immunity from damages liability when sued under 42 U.S.C. § 1983."[27] But behind those sterile words was a tragic human story. According to the respondents' complaint,[28] a fifteen year old girl, alleged by her mother to be "somewhat retarded" although she had been regularly promoted at school, had been sterilized without her consent or even knowledge. She was told by her mother and the doctor who performed the surgery that she had undergone an appendectomy, and she did not learn the truth until two years later when she married and tried without success to become pregnant.[29] The doctor, being no fool, had apparently insisted that the mother not only sign an

22. I mean by this not that his decisions always were, or were universally thought to be, correct, but rather that even those who disagreed strongly with his decisions had complete confidence that they were the product of sound *judicial* reasoning, not ideology.

23. *See, e.g.,* Kurtz, *Reagan Transforms the Federal Judiciary; Conservatives Wield Powerful Gavel in Judging Candidates for the Bench,* Wash. Post, March 31, 1985, at A4, col. 1; Turner, *Attacks on Chief Justice Pressage Hot '86 Contest,* N.Y. Times, March 20, 1985, at A16, col. 1.

24. Bush, *supra* note 2, at 172. But Justice Stewart would have had no quarrel with those who disagree with this assessment, since their standard of judicial greatness is fundamentally at odds with what he perceived his role to be. As Professor Gunther put it, "He's not going to be remembered as a great Justice, but that's part of his strength in a way. He was not an ideologue, not an extremist. They only remember the ones who stake out positions." *Surprise from the Swing Man,* Time, June 29, 1981, at 48.

25. His doctrinal contributions have been noted elsewhere. *See, e.g., A Lawyer's Lawyer, supra* note 5; White, *The Protection of the Individual and the Free Exchange of Ideas: Justice Potter Stewart's Role in First and Fourth Amendment Cases,* 54 U. CIN. L. REV. 87 (1985).

26. 435 U.S. 349 (1978).

27. *Id.* at 351.

28. The plaintiffs respondents were Linda Kay Spitler McFarlin, who had been sterilized, and her husband Leo Sparkman, who sued separately for loss of potential fatherhood. 435 U.S. at 349-51. Because the case reached the Supreme Court on review of a dismissal on the pleadings, *see infra* note 34, the Court was required to assume for purposes of the decision that the allegations were true.

29. *Id.* at 353.

indemnity agreement but also secure judicial approval for the surgery, and so she presented to Judge Harold D. Stump of the DeKalb Circuit Court a document entitled "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement."[30] Judge Stump, being either a fool or worse,[31] approved the petition on the day it was presented, without notice or a hearing of any kind, or "even the pretext of principled decision-making."[32] He was sued, along with the doctors, the mother, and the attorney who had drafted the petition, but he alone was able to proffer the defense of absolute judicial immunity.[33]

To the five members of the majority (and at least one twenty-eight year old law clerk) the governing precedents left little or no room for discussion: " 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' "[34] A harsh rule to be sure, and one bound to produce unpleasant results in cases such as this, but a rule long thought necessary "in the best interests of 'the proper administration of justice . . . .' "[35]

For Justice Stewart that language was empty of anything but the cruelest irony if it exonerated Judge Stump in this case. In an opinion drafted entirely in his own hand,[36] and later read aloud from the bench,[37]

30. *Id.* at 351.

31. The decision to sterilize another human being, even if done in full accord with law and due process, may require a streak of hubris, the sin of mortals who pretend to be gods. Given the scope of their power it is not surprising that this is an all-too-common failing of American judges. *Cf.* J. VINING, LEGAL IDENTITY 52 (1978) (judges are among the last repositories in our society of the "priestly tradition" of looking "continuously at the whole"); P. CARRINGTON, CIVIL PROCEDURE: CASES & COMMENTS ON THE PROCESS OF ADJUDICATION 99 (1969) ("megalomania is an occupational hazard for judges").

32. 435 U.S. at 369 (Stewart, J., dissenting).

33. The District Court had dismissed the suit against all the defendants, holding that Judge Stump, the only state agent, was absolutely immune from suit. The Seventh Circuit reversed on the ground that Judge Stump was not immune because he had not acted within his jurisdiction. Sparkman v. McFarlin, 552 F.2d 172, 174-76 (7th Cir. 1977). The Supreme Court reversed the decision as to Judge Stump without deciding whether this required that the federal claims against the other defendants also be dismissed. 435 U.S. at 362-64 & n.13.

34. *Id.* at 354-55, *quoting* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872).

35. *Id.* at 363, *quoting* Bradley v. Fisher, 80 U.S. (13 Wall.) at 347.

36. Those who have expressed concern about the impact of "the rise of the law clerk" on the quality of the judicial product, *see, e.g.*, R. POSNER, THE FEDERAL COURTS 102 (1985), could find no fault with Justice Stewart's work habits throughout his years on the bench. Twenty years after he first described his clerks as "a backboard, against which he could bounce ideas" (and was immediately concerned that they not be offended at the description), *see* Sandalow, *supra* note 12, at 7 n.7, things were very much the same. We drafted opinions, to be sure, but no one familiar with Justice Stewart's distinctive, pungent and journalistic style could doubt that each final opinion bore his personal mark. He well understood that young, adept technicians can make useful but limited contributions to the work of a judge: they can manipulate precedent in a skillful but often mechanical way, and they can operate word processors in

he said:

> . . . . I think that what Judge Stump did on July 9, 1971, was beyond the pale of anything that could sensibly be called a judicial act. . . .
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> . . . . [T]he conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.
>
> . . . .
>
> The petitioner's brief speaks of "an aura of deism which surrounds the bench . . . essential to the maintenance of respect for the judicial institution." Though the rhetoric may be overblown, I do not quarrel with it. But if aura there be, it is hardly protected by exonerating from liability such lawless conduct as took place here. And if intimidation would serve to deter its recurrence, that surely would be in the public interest.[38]

On one level the disagreement between the majority and the dissenters[39] could be seen as just another round in the endless rules/standards debate, and Justice Stewart's opinion could be criticized for failing to articulate a test with sufficient content to serve the central purposes of judicial immunity.[40] But the standard critique ignores the very special nature of the issue here: trying to define the essence of the "judicial act" is an exercise in mind-bending introspection of the sort that almost always renders courts "understandably inarticulate."[41] As Professor Vining explains, when courts confront issues of jurisdiction and standing, the

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much the same fashion (which the Justice found far more impressive—they were then new to the Court). Since his dissent in *Stump* required neither of these skills, but rather mature judicial *judgment*, he drafted it entirely himself—in longhand.

37. Although once a common practice, by 1978 it was very unusual for dissenting opinions to be read aloud from the bench. That Justice Stewart did so in *Stump* was an indication of how strongly he felt about the case.

38. 435 U.S. at 365, 367-69 (Stewart, J., dissenting) (footnotes omitted).

39. Justice Stewart's dissent was joined by Justices Marshall and Powell; Justice Powell also wrote a separate concurrence emphasizing petitioner's "preclusion of any possibility for the vindication of respondents' rights elsewhere in the judicial system." *Id.* at 369. Justice Brennan did not participate.

40. Justice Stewart wrote that "the concept of what is a judicial act must take its content from a consideration of the factors that support immunity . . ." i.e., the public interest in allowing judges to decide controversial cases without fear that unsatisfied litigants might hound them with litigation, consigning the litigants to correction of any error on appeal. He found "[n]ot one of the[se] considerations . . . present here:

> There was no "case," controversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of principled decision-making. The total absence of *any* of these normal attributes of a judicial proceeding convinces me that the conduct complained of in this case was not a judicial act.

Id. at 368-69 (emphasis in orginal).

41. J. VINING, *supra* note 31, at 85. Justice Stewart, whose crisp and elegant writing style has been often and justly praised, demonstrated what Professor Vining meant when he wrote

safe, self-constructed home that we recognize as a "case," "is not yet formed and the legal mind has no home."[42] Without the protection of the "case," which defines and therefore limits reality to manageable proportions, the judicial mind is left at sea:

> Fear may make it too difficult to admit, except by allusion, that one is swimming in the sea and that one's behavior is a reaction to it. Denial is a normal defense of the human mind against great fear; the legal mind is not peculiar in this regard.[43]

The majority opinion in *Stump* is the product of this fear and denial—denial of justice in this case out of fear that the genie will not go back into the bottle in future cases—but it is so much the expected result that one is led to ask not why the Court exonerated Judge Stump, but rather why Justice Stewart was able to rise above the fear and struggle to say, even if "inarticulately," why Judge Stump's conduct was "beyond the pale of anything that might sensibly be called a judicial act."[44]

It would be neither sufficient nor accurate to say that he was simply "deciding this case" and unconcerned about future cases: Justice Stewart understood better than anyone that the Supreme Court was not in the business of meting out individual justice, and he was if anything uniquely concerned about the Court's responsibilty to provide meaningful guidance for future cases.[45] This, indeed, was his special genius: balancing the need for doctrinal clarity against the reality that doctrine must be applied in a richly complicated world that will not yield up all its secrets to even the most determined and exhaustive analysis.[46] His decision in *Stump*, I think, offers the glimmer of a clue as to how he was able to strike this balance so truly and consistently for twenty-three years.

Professor Noonan[47] has said in his book *Persons and Masks of the*

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in *Stump* that " 'jurisdiction' is a coat of many colors." 435 U.S. at 367 n.5 (Stewart, J., dissenting).

42. J. VINING, *supra* note 31, at 94.

43. *Id.*

44. 435 U.S. at 365 (Stewart, J., dissenting).

45. *See, e.g., supra* note 16 and accompanying text.

46. As Justice Stewart put it in *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 COLUM. L. REV. 1365, 1393 (1983):

> The art of being a judge, if there is such an art, is in announcing clear rules in the context of . . . infinitely varied cases, rules that can be understood and observed by conscientious government officials. If the outcome of fourth amendment cases has come to be regarded as turning on "technicalities," it is in part because of the inevitable human shortcomings of judges faced with the task of articulating fourth amendment principles applicable in a broad range of situations while doing justice in a particular case. Most judges do their best, but that is not always good enough.

In Justice Stewart's case, it generally was.

47. Now Judge Noonan of the Ninth Circuit Court of Appeals.

Law that the first important insight he gleaned from studying "the alliance of law and history" is "the central place of the human person in any account of law." The second was the persistent "neglect of the person by legal casebooks, legal histories, and treatises of jurisprudence." The two combined led to this conclusion: "Neglect of persons, it appeared, had led to the worst sins for which American lawyers were accountable."[48] That is a sin that Justice Stewart never committed, and that, I think, was the magnet that kept his inner compass fixed on "true judicial North:" he was always able to see the persons behind the masks of the law.

The majority in *Stump* saw only the masks. Not only Judge Stump, who wore the iron mask of judicial power, but all the other players as well appear only as roles, two-dimensional characters frozen in a tragic play: Doctor, Mother, Difficult Teenage Daughter. The law provided numerous categories within which the conduct of these characters could easily be labelled "normal."[49]

But for Justice Stewart this was pure nonsense. He, unlike the majority, was able to see the persons behind the legal masks. The titles of "judge" and "mother" could not by their own force make "normal" conduct that any sane person would see as outrageous. The analogy he chose to illustrate the point is graphic:

> It can safely be assumed that the Court is correct in concluding that Mrs. McFarlin came to Judge Stump with her petition because he was a County Circuit Court Judge. But false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act. In short, a judge's approval of a mother's petition to lock her daughter in the attic would hardly be a judicial act simply because the mother had submitted her petition to the judge in his official capacity.[50]

Very pithy, you may say, but what about the attic that happens to belong to a state-approved home care provider for mildly disturbed teenagers? What about that old Pandora's box of "next cases" waiting out there, threatening to engulf the courts and hamstring judicial independence? Always a fair question, I think the Justice might have replied, but if your decision in *this* case rests on nothing other than fear of the *next* case, you are no longer manipulating doctrine, you are being manipulated by it. If you allow yourself to be ruled by fear of the unknown and unknowable future, you will either become completely paralyzed[51] or,

48. J. NOONAN, PERSONS AND MASKS OF THE LAW vii (1976).

49. 435 U.S. at 362, 365.

50. 435 U.S. at 367 (Stewart, J., dissenting).

51. Justice Stewart often said that the most destructive disability a judge can suffer is the inability to *decide*. He had seen a number of judges become simply paralyzed by the magnitude of the responsibility they felt they had to carry. *Cf.* P. CARRINGTON, *supra* note 31, at 99

worse yet, dominated by doctrine so divorced from humanity that it becomes a source of evil rather than of justice. If you cannot see that Judge Stump's conduct does not deserve the protection of judicial immunity, in short, you have lost sight of the people whose pain is the only basis on which a court may act.[52]

Does it all boil down then, to the "byzantine beauty of . . . the common law method, [a process] of reaching what instinctively seem the right results in a series of cases, and only later . . . enunciating the principle that explains the pattern—a sort of connect-the-dots exercise?"[53] There was certainly a strong element of that approach in Justice Stewart's work,[54] but only, I think, when he was convinced that all good-faith efforts to reconcile "neutral principles" with messy reality had failed. When that point was reached, the Court's paramount duty was to decide the case before it correctly: the mistaken notion that neatness counts more than justice can lead only to disaster.[55]

A well-worn cliche might come to mind at this point: "hard cases make bad law." But what allowed Justice Stewart to rise above both cliche and fear was his insistence that both the individual result and the broad doctrine announced in any case must make sense in terms of the

("a judge exercising sole responsibility for all decisions would soon come to find the office unbearable"). He himself was no stranger to the "agonizing tensions" of the decision process, *see A Lawyer's Lawyer*, *supra* note 5, at 541 n.167, but he had learned in the highly charged atmosphere of his first term on the Court, during which he cast the "deciding vote" in many significant cases, *id.* at 510, never to view himself as the "deciding" vote: after all, it took four other votes to put him in that position.

52. For those who think that the focus on personal harm is an anachronism in the context of modern "public law" adjudication, *see generally* J. VINING, *supra* note 31, perhaps *Stump* illustrates that the "conceptual shift" in our thinking about the proper role of courts has come at a very high price if it causes courts to lose touch with individual justice, which they alone are charged to protect. *Cf. id.* at 36.

53. J. ELY, DEMOCRACY AND DISTRUST 54 (1980).

54. *See id.* at 122-24 (discussing Justice Stewart's proposed "in-between" standard for reapportionment cases); Israel, *supra* note 9, at 2929-34. I deliberately omit another famous reference of which the Justice had grown well weary. *See* Powell, *Justice Stewart,* 95 HARV. L. REV. 1, 2 & n.4. (1981).

55. His opinion for the Court in Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971), provides one of the clearest applications of this principle:

> Of course, it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent. But it is no less nonsense to suggest . . . that we have "abandoned any attempt" to find reasoned distinctions in this area. The time is long past when men believed that development of the law must always proceed by the smooth incorporation of new situations into a single coherent analytical framework. We need accept neither the "clarity and certainty" of a Fourth Amendment without a warrant requirement nor the facile consistency obtained by wholesale overruling of recently decided cases.

people whose lives it would govern. It is no accident that one of his most important and sweeping doctrinal contributions shifted the entire focus of fourth amendment inquiry to "*people*, not places."[56]

It is worth asking how it was that Justice Stewart was able to maintain his consistent focus on the persons behind the masks and to resist the rigid rule-mindedness that seems to afflict so many judges. The answer, I think, may lie in the sense of sanity and balance I noted at the outset, which was reflected in his decision to retire.

Judges, more than most of us, engage in a daily creative process of defining the world in which they function, and in so doing they define themselves. In Professor Vining's terms, a judge "personifies" both himself and the litigants every time he decides that there is a justiciable "case" before him.[57] It seems to me that, in order to see the persons behind the masks before him, the judge must first be able to see the person inside the role of judge: to see that there *is* a person separate from the role, and to know where one begins and the other ends. The role of "judge" has no content other than raw power, and a judge who has submerged his or her inner self in that professional identity is in danger of becoming a caricature, a stick figure devoid of the inner spirit needed to infuse that power with wisdom and, worse yet, incapable of separating personal predilections from the public values he is charged with enforcing:[58] in Justice Stewart's words, a "loose cannon" inflicting "indiscriminate damage" with every empty "judicial act."[59]

In short, if there is no person separate from the identity imparted by the judge's robes—no fisherman, father, poet, or mother—then all the players will wear masks as false as the judge's, and the law will be a false and lifeless thing. It takes a complete person to fill the role without being consumed by it, and to understand that one who serves the law does not

56. Katz v. United States, 389 U.S. 347, 351 (1967). *See supra* note 10.

57. J. VINING, *supra* note 31, at 2.

58. The designedly vague terminology is intended to bypass the question of where the judge is to find "public values," which poses different problems in different contexts. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 43-72 (1980) (on the futility of attempting to discover "fundamental values" in constitutional law); J. VINING, *supra* note 31, at 171-72 (on the difficult necessity of recognizing emergent "public values" in administrative law); Yeazell, *From Group Litigation to Class Action Part II: Interest, Class and Representation*, 27 UCLA L. REV. 1067, 1109 (1980) (on the ability of judges to determine, as "part of the ideological baggage of every member of a society," when "group interests" exist and are adequately represented in a class action). My concern here is the different and perhaps prior question of the judges's tempermental capacity for separating personal from public values, and deferring to the latter, at least when they are fairly discernable. I am suggesting, in short, that it is far easier for a judge to *say* that this is what he must do than to deliver on it, as Justice Stewart consistently did. *See A Lawyer's Lawyer*, *supra* note 5, at 514.

59. Stump v. Sparkman, 435 U.S. at 367 (Stewart, J., dissenting).

become it. Justice Stewart was such a man, and for his entire career, including and following his retirement from the Court, he served the "very strict bosses" of the Constitution and the law very well indeed. He will be missed.