

**RODRIGO'S COMMITTEE ASSIGNMENT:
A SKEPTICAL LOOK AT JUDICIAL INDEPENDENCE**

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Introduction: In Which Rodrigo Encounters Me in an Embarrassing Situation and I Learn about His Unusual Committee Assignment

I had been sitting glumly on the cold, hard bench in the long marble hall of the city courthouse, when a familiar voice shook me from my reverie:

“Professor! What are you doing here?”

“Rodrigo,” I stammered, rising and awkwardly shaking the hand of my young friend and protege.¹ “I might say the same. You’re the last person I

¹ See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter CHRONICLE], introducing my interlocutor and alter ego, Rodrigo. The son of an African-American serviceman and Italian mother, Rodrigo was born in the States but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from the base high school, then attended an Italian university and law school on government scholarships, graduating second in his class. When the reader meets him, he has returned to the U.S. to investigate graduate law (L.L.M.) programs. At the suggestion of his sister, veteran U.S. civil rights lawyer Geneva Crenshaw (see Derrick Bell, *AND WE ARE NOT SAVED* (1992)), he seeks out “the professor” for advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (see CHRONICLE, *supra*); law and economics (*Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)); love (*Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993)); legal rules (*Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993)); the critique of normativity (*Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)); relations between men and women of color (*Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993)); enlightenment political theory (*Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) [hereinafter RACE]); black crime (*Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) [hereinafter BLACK CRIME]); narrative jurisprudence (*Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (final chronicle in first cycle and final chapter of THE RODRIGO CHRONICLES (NYU Press 1995)); the rule of law (*Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)); affirmative action (*Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995)); clinical theory (*Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter EMPATHY]); the problem of desperately poor border settlements, (*Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997)); formalism (*Rodrigo's Thirteenth Chronicle: Legal Formalism*, 95 MICH. L. REV. 1105 (1997) [hereinafter FORMALISM]); the recent right-wing surge (*Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997)); racial mixture and assimilation (*Rodrigo's Fifteenth Chronicle: Latino Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997)); alternative dispute resolution (*Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (unnumbered tribute to the late Professor Grillo)); and human cloning,

expected to see here. I'm waiting for my lawyer. What about you? Are you here to represent someone?"

Rodrigo laughed, then said, "No, I'm here for a meeting in the chambers of the chief judge. It's for a state bar committee that the dean volunteered me for." Looking up at the sign overhead that said CRIMINAL DIVISION, Rodrigo added incredulously, "You aren't being charged with something, are you?"

"I'm sorry to say I am," I said, hanging my head. "For the first time in my life. I haven't even had a parking ticket in twenty years, and now this."²

"What did you do — I mean, allegedly?" Rodrigo asked.

I sighed. "It's a long story." Rodrigo gestured that he wanted to hear, so I went on. "I was crossing the street in front of the law school in the company of a brilliant student named Raul, who was having a crisis of conscience. A Puerto Rican, he had come to my office to talk about dropping out of school in order to fight shoulder to shoulder, as he put it, with his brothers and sisters in the *barrio*.

Fabricated Fatherhood: Race, Reproduction, and the End of Equality, ____ L. REV. ____ (forthcoming, 1999) [hereinafter FATHERHOOD] over the next five years. During this period, the brash, talented Rodrigo earns his L.L.M. degree and embarks on his first teaching position. The professor meets his friend and soul-mate "Giannina," and learns that Rodrigo's family immigrated to America via the Caribbean. His father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

² Like Giannina and Rodrigo, the Professor is an imaginary character and not to be confused with any person, living or dead. As I have created him, the Professor is a civil rights scholar of color in the late stages of his career. See CHRONICLE, *supra* note 1 (introducing the Professor).

He said he couldn't see spending two more years studying cases about giant corporations and insurance companies when his people needed him now."³

Rodrigo nodded sympathetically. "I had a student with a similar lament just last week. And then what happened?"

"Everything happened so fast I'm not really sure. We stepped into the street, I heard a screech, and a bicyclist from a messenger service went flying. He suffered nothing worse than a cut knee and a torn pant leg, but a police officer, who must have been practically on the spot, cited us for reckless endangerment."

"That's a class three felony," Rodrigo said, suddenly serious. "Was the light in your favor?"

"I honestly can't recall, although I've crossed that street hundreds of times, and always look. I assume the Walk sign was on. But the messenger swears it wasn't and that we cut him off."

"They're really throwing the book at you," Rodrigo said. "I would have thought that for a first offense they'd let someone like you off with a jaywalking ticket and a warning. Maybe make you pay for the messenger's pants and Band-Aid."

³ On the advisability of modifying legal pedagogy and the law school environment so as to make them more accessible and relevant to students of color, women, and those interested in pursuing public interest careers, see, e.g., Deborah Waire Post & Louise Harmon, *CULTIVATING INTELLIGENCE* (1996); *CRITICAL RACE THEORY: THE CUTTING EDGE* 389-430 (R. Delgado ed.,

“I would have thought so, too,” I said. “I forgot to tell you Raul has long hair, and was wearing a red bandanna around his forehead and carrying a boom box.”

“I can’t believe it,” Rodrigo said, clapping his hand to his forehead.

“Professor, they’re charging you with TNB.”

“That’s what my lawyer thinks, too,” I said. “Typical nigger behavior, in the cynical police phrase.⁴ The mayor’s been on a campaign to crack down, not just against jaywalking and loud radios, but any manifestation of black disorderliness or cultural self-assertion. It’s a misguided application of James Q. Wilson’s broken-windows theory.”⁵

“What were you wearing?”

1995) [hereinafter CUTTING EDGE] (Part IX: *Legal Institutions, Critical Pedagogy, and Minorities in the Law*); FORMALISM, *supra* note 1 (on law’s discontents in general).

⁴ On this and similar code words and epithets used in police communications, see Interview with Anonymous Police Officer in a Major U.S. City (“TNB”); Report of the Independent Commissioners on the Los Angeles Police Department (“Warren Christopher Commission”), 71 (“Guerillas in the Mist”), 72 (“the natives,” “monkeys slapping time,” “huntin’ wabbits”), 73 (“Don’t cry Buckwheat,” “cholo,” “don’t transfer me any orientals”); Marvin Zalman & Larry J. Siegel, CRIMINAL PROCEDURE: CONSTITUTION AND SOCIETY 332 (group of officers in an Ohio department had designated themselves a “special nigger arrest team” — SNAT). See also John P. Crank, UNDERSTANDING PUBLIC CULTURE 123 (animal), 206 (beater), 207 (racial epithets in general), 211 (nigger), 213-215 (we-they attitude) (1997); Paul Chevigny, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS (1995) (on police violence in general); Jerome Skolnick, *A Sketch of the Policeman’s Working Personality*, in JUSTICE WITHOUT TRIAL, 41 (3d ed. 1994) (on racism and prejudice in police work). On race profiling, in which police use an individual’s race to decide whether to stop and question him, see Harvey A. Silverglate, ‘Race Profiling’ Inflicts Injustice on Individuals, NAT. L.J., June 22, 1998, at A-20. On stereotyping, rude treatment, and police harassment of black males, see D. Marvin Jones, “We’re All Stuck Here for a While: Law and the Social Construction of the Black Male,” 24 J. CONTEMP. L. 35 (1998). See also BLACK CRIME, *supra* note 1 (on social construction of black crime as threat).

⁵ See James Q. Wilson & George L. Keiling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MO., Mar. 1982, at 29.

“A business suit. But I’d taken off my tie and left it in my office, probably out of a misguided subconscious desire to show solidarity with Raul.”

“And now they’re charging you, who have led an exemplary life and are a model of civic responsibility,” Rodrigo said. “I still can’t believe it. What are you facing?”

“Oh, maybe a week in the city jail, followed by community service of some sort — probably a traffic guard in front of a school. The community service I don’t mind. The jail time I could do without. The law school would have to get someone to teach my classes.”

“Has the dean done anything?”

“She wrote a strong letter to the prosecutor and the chief judge, all to no avail. And, can you believe it, the district attorney assigned to prosecute me turns out to be one of my own ex-students. She seemed a little sheepish at the plea bargaining conference, but refused to drop or lower the charge. My lawyer thinks her whole office is on a tough-on-crime binge and wants to make an example of me.”⁶

“What do you know about the judge?” Rodrigo asked.

⁶ Compare the professor’s plight with John Kifner, *Thousands Call on City Hall to Confront Police Brutality*, NY TIMES, August 30, 1997, at A-1 (detailing New York City mayor Rudolph

“We drew Judge Ingersol.”

“Oh, no! Isn’t he the one who . . . ?”

“The very one,” I said. “Last year he let a burglar with an otherwise clean record off on bail, and he committed a double rape. The right wing got up a petition to have the judge impeached, and when that failed, launched a campaign to recall him.”⁷

“And ever since then, I bet, he’s been tough on crime and criminals,” Rodrigo said, completing my thought.

“Maximum sentences on everything, and no bail, ever. Oh, here’s my lawyer.”

Rodrigo stood while I introduced him to Jerome Steinglass, another ex-student and former prosecutor who knew the court system well. After a few pleasantries, my lawyer said, “We’ve been continued, I’m afraid. Until the afternoon session. The court clerk just told me.” When I must have grimaced, he added, “But she promised to get us on first thing. Why don’t we meet right here at quarter of one?”

Giuliani’s crackdown on crime and some of its unintended consequences, including an increase in police harassment and brutality).

⁷ See John C. Yoo, *Criticizing Judges*, 1 Green Bag 2d, 277-81 (Spring 1998), on various recent efforts to impeach and chastise judges [hereinafter YOO]. See also text and note 10 *infra* on

I looked at my watch. “I guess it can’t be helped. Would either of you like to join me for lunch in the cafeteria downstairs?”

My lawyer demurred, but Rodrigo said, “Sure. My meeting’s not for an hour. I was just going to take in a session or two — of your judge’s court, actually. But I’d much rather talk with you.”

Steinglass disappeared with a wave, and minutes later Rodrigo and I were walking through the line of the cavernous cafeteria in the basement of the court building, examining the food. “What are you having?” I asked.

“These scallops look good,” Rodrigo said, helping himself to a big ladle full. “How about you?”

“A club sandwich, I think. I don’t usually eat meat, but I feel a need to gear myself up for my ordeal.”

“I’m sure it won’t be as bad as you think,” Rodrigo said, as the cashier punched in the numbers for his food. “The mayor’s office would look pretty silly if his get-tough policy locked up a famous, elderly law professor for jaywalking.” He handed the cashier his credit card, then said, “I’ll be glad to serve as a character witness, if you like. It’d be my privilege, and I’ll be just down the hall if you need me.”

efforts to recall judges, such as Penny White of Tennessee, who angered conservatives by her rulings in cases of unpopular litigants.

“Thanks,” I said. “I’ll tell my lawyer. Although it’s sort of a role reversal.”

“Right,” Rodrigo said with a quick smile. “It wasn’t too long ago that you were writing letters of recommendation for me.⁸ Life is funny.”

“That it is,” I admitted, following him out the line. “Now tell me about that committee of yours.”

I.

In Which Rodrigo Tries to Persuade me that the Controversy over Judicial Independence Contains More than Meets the Eye

“Is this table okay?” Rodrigo asked. When I nodded, he set down his tray, then pulled out the chair for me to sit. I remarked once again his courtesy toward my aging frailties — I hadn’t had someone pull out my chair for some time. His European background came out at the oddest times, I thought. After setting down my own plates and handing my tray to a passing waiter, I settled back while Rodrigo began as follows:

“The association just set up this committee, which consists of several lawyers, me and one other law professor, and the chief judge of this court.⁹ It had

⁸ See CHRONICLE, *supra* note 1, at 1379 (Professor recommends Rodrigo to various L.L.M. programs on the young man’s return to the States).

⁹ Compare Rodrigo’s committee with the national version, which issued a major report only last year. AMER. BAR ASS’N, *Commission on Separation of Powers and Judicial Independence, An Independent Judiciary* (1997) [hereinafter ABA].

been considering doing so for some time, because of the hue and cry over judicial activism and soft-on-crime, liberal judges, mainly by conservative pressure groups,¹⁰ and corresponding concerns by progressives and mainstream lawyers and citizens about the judiciary's independence.¹¹ Hmm," said Rodrigo, taking a bite full of his steaming food. "Not bad for a cafeteria. I guess I'm hungry. I walked all the way over from the hotel. How's your club?"

"Great," I said, swallowing and putting the sandwich down on my plate. "I must confess I miss meat, even after more than a year. Oh, what we do on doctors' orders. But go on."

"As you might have guessed, the culminating event was the write-in campaign to get rid of Judge Ingersol."

"Whom I'll be meeting in" — I looked at my watch — "fifty-five minutes. But I gather things were building even before that."

"They were," Rodrigo replied. "Everyone remembers what happened when Roosevelt threatened to pack the Supreme Court, which was bent on invalidating New Deal legislation, and those early efforts to impeach judges, often

¹⁰ See *id.* at 46; Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 172 N.Y.U. L. REV. 308, 313 (1997) [hereinafter BRIGHT]. On judicial independence generally, see Federal Judicial Independence Symposium, 46 Mercer L. Rev. 637 (1995); *A Symposium on Judicial Independence: Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703 (1997) [hereinafter SAFEGUARDING]. See also *House Passes "Judicial Activism" Bill*, THE THIRD BRANCH, May, 1998, at 1 (describing measure backed by "the right wing" to curb judicial initiative and discourage prisoner suits) [hereinafter ACTIVISM].

initiated by politicians eager to discredit a judicial appointee of the opposing party. The first impeachment of a federal judge took place in 1804 when the Federalists brought charges against the ‘alcoholic and deranged’ John Pickering. The very next year, the Jeffersonians responded by unsuccessfully attempting to impeach Supreme Court Justice Samuel Chase in highly publicized hearings.¹²

“But that kind of politics went on years ago. Surely, judges today cannot be impeached purely for political reasons,” I responded.

“That’s debatable,” Rodrigo replied. “Seven federal judges have been impeached and convicted in U.S. history, three as recently as the 1980’s. Three of those trials featured flimsy evidence and dubious circumstances.”¹³

“I remember hearing something about a judge in Nevada who was impeached even though the state bar association found he was a victim of a federal vendetta,”¹⁴ I said, checking my watch.

¹¹ See note 10; ABA, *supra* note 9, at 5-6, 19, 22-23, 49. The main concern today comes from moderate left or progressive observers who fear that the well-organized political right is getting the upper hand by browbeating judges and whipping up the public.

¹² Mary L. Volcansek, JUDICIAL IMPEACHMENT 5 (1993) [hereinafter IMPEACHMENT]. While Chase was indicted by the House on charges that he treated defendants who violated the Alien and Sedition Acts leniently, the Senate acquitted him and Chase continued to serve on the highest court until his death in 1811. The Constitution mentions impeachment six times. Article 1, section 2 provides that the House bring impeachment charges, while the next section gives the Senate the power actually to try the case.

¹³ The three federal judges impeached and convicted by the Senate during the 1980’s were Judge Harry Eugene Claiborne (U.S. District Judge, Nevada), Judge Alcee Lamar Hastings (U.S. District Judge, Florida), and Judge Walter L. Nixon (U.S. District Judge, Southern Mississippi). *Id.* See ABA, *supra* note 9, at 47-48. On state impeachment, see Jerome B. Meites & Steven F. Pflaum, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, LOYOLA U. CHI. L. J. 741 (1998).

¹⁴ Claiborne, a maverick judge who mistrusted government, had jostled with the federal government and various agencies several times in the past. Claiborne claimed he was targeted by government officials and that the ensuing bribery charges were entirely founded upon the word of a convicted felon protecting his own interests. Even after his impeachment by the Senate, the

“Judges face immense pressure to appear tough on crime — or low on activism.¹⁵ When they stray, they feel the heat,” Rodrigo said. “Even lawyers with immaculate records, who have dedicated their professional lives to fighting racism and discrimination, face an uphill battle for positions in government. Look at the example of Bill Lann Lee — just last year, Republicans blocked his appointment as Assistant Attorney General.¹⁶ Don’t worry. I can see the clock,” Rodrigo indicated. “I won’t let you be late.”

“I’m sure Steinglass would come get me in the unlikely event we lost track of the time,” I said. “Go on.”

“Well, much of the concern today stems from pressure groups, as I mentioned. But others worry about lawyers who criticize judges for the way they rule or handle a case. They think it’s undignified and demeans the judiciary in the public’s eyes.¹⁷ A few deplore mandatory sentencing or urge that we get away from requiring judges to stand for re-election, as some states do.¹⁸ They think the

Nevada Bar Association found that Claiborne was a victim of a “federal vendetta.” IMPEACHMENT, *supra* note 12, at 24, 63.

¹⁵ Mario Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. Rev. 295, 299-302 (1997) [hereinafter CUOMO]; ABA, *supra* note 9, at 22-23, 49; YOO, *supra* note 7, at 279-82. On a campaign to punish federal judge Harold Baer for suppressing illegally seized evidence in a drug case, see BRIGHT, *supra* note 10, at 324, 326-27; ABA, *supra* note 9, at 5-6, 15-18 (describing this and similar cases of judges hounded because of unpopular decisions); ACTIVISM, *supra* note 10.

¹⁶ John M. Broder, *Clinton, Softening Slap at Senate, Names ‘Acting’ Civil Rights Chief*. NY TIMES, December 16, 1997, at A-1 [hereinafter BRODER].

¹⁷ See Monroe Freedman, *The Threat to Judicial Independence by Criticism of Judges: A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729 (1997) [hereinafter THREAT]; Hal Liebman, *Should Lawyers be Free to Publicly Excoriate Judges?* 25 HOFSTRA L. REV. 785, 791-95 (1997).

¹⁸ BRIGHT, *supra* note 10, at 338; ABA, *supra* note 9, at 38-39, 63; CUOMO, *supra* note 7, at 302-03; Leslie Abrahamson, *The Judge’s Ethical Duty to Report Misconduct by Other Judges*,

process is too politicized and causes judges to decide cases with an eye on how they will look to the electorate. Recently, the national association got up in arms when President Clinton threatened to call for the dismissal of a federal judge who freed a defendant charged with drug-running because of an illegal search and seizure.”¹⁹

“I’ve seen editorials in the ABA journal deploring that sort of thing,”²⁰ I said, then added, squaring my shoulders, “As well they should.”

“And you probably know that the Association commissioned a study group to look into the issue. It released its report, reiterating the value of judicial independence, just last year.”²¹

When Rodrigo paused, I said, “And what’s your role in all this? I hope you’re not against judicial independence.”

“Well, as I mentioned, the dean nominated me. And I’m afraid I *am* supposed to present the critical, or skeptical view, whatever that is.”

“A daunting assignment!” I exclaimed. “On two counts. First, I can’t remember a single article by a leading crit on the subject. It’s like writing against

Lawyers, and Its Effects on Judicial Independence, 25 HOFSTRA L. REV. 751, 791-95 (1997) (running for re-election becoming increasingly demanding and costly).

¹⁹ ABA, *supra* note 9, at 15.

²⁰ Jerome J. Shestack, *The Risks to Judicial Independence* (editorial), A.B.A. J., June 1998, at 8; *What is Judicial Independence*, 80 JUDICATURE 73 (Sept.-Oct. 1996). See also Archibald Cox, *The Independence of the Judiciary: History and Purpose*, 21 U. DAYTON L. REV. 566 (1996).

motherhood or apple pie. But more fundamentally, I don't see how anyone can be against judicial independence,. Even a race-crit like you. Need I remind you that I'm facing jail, merely because of one those right-wing campaigns that the judicial-independence movement is aimed at countering? I'm afraid I'm going to be a very hard sell. But go on — what's your flaky, out-of-touch, radical critique of this liberal legalism?"

II

In Which Rodrigo Presents Eight Doubts about Judicial Independence

"I decided there's not just one perspective," Rodrigo began, pushing his plate away to give himself more room. "Ranging from the neoliberal view which would highlight a few reservations, to the deeply distrustful . . ."

"All the way to the legitimizing myth, I imagine," I added.

"Exactly," Rodrigo seconded. "I've actually made a list." Looking down at a piece of paper he pulled from his pocket, he said, "I've identified eight separate critiques."

When Rodrigo looked up, I said, "This better be good. Especially as I'm likely to end up an unwitting victim of the whole hysterical right-wing surge. My own protege, trying to put me in jail," I groused, then smiled to let Rodrigo know I was joking.

²¹ ABA, *supra* note 9 (decrying politicization and harsh criticism of judges and the judging functions and suggesting measures to cope with them.

“Oh, Professor, nothing’s going to happen to you,” Rodrigo replied. “I’d bet a fine, at worst, and a few weekends of community service. You’d look dashing in a school crossing guard uniform.”

“My students will be highly amused.”

“You can use the experience in class,” Rodrigo smiled. “Maybe in a hypothetical about the reasonably prudent crossing guard.”

“Cold comfort,” I said. “Maybe I’ll let you take my place. But let’s hear your arguments.”

A. Judicial Independence as a Deflection

Rodrigo glanced down again at his list. “I didn’t mean to make light of your predicament. The first way to look at judicial independence is as a deflection.”

“Do you mean from other issues that really matter — or from other, more valid ways of looking at the judicial function?” I asked.

“Both. Consider the way the debate obscures how a host of forces constrain judicial decisionmaking. Most judges are white, male, middle-class,

able-bodied, and moderate in their social and political views.²² No one considers this an affront to judicial independence, although it has a tremendous influence on how cases are decided. Judicial independence enthusiasts take the judiciary, as currently constituted, and then spend a great deal of time and indignation clearing the way for them to act as freely as possible. It's a little like planting your garden with only one kind of seed and then suing the supplier when the flowers come up slightly different heights because of variations in the soil or sunlight. Giannina thought of the metaphor.”

“I hope you're not saying that judicial independence is unimportant,” I said. “I'm on trial before a basically good, honest judge. I know him slightly — he was on our board of visitors. To use Giannina's metaphor, he represents a good seed. If left alone, I'm confident he'd do justice. But I'm worried precisely because in trying me he might be looking over his shoulder at special interest groups that want to see me behind bars.”

“I see your point,” Rodrigo conceded. “Maybe we can say that judicial independence, like all liberal legalisms, both advances and retards the cause of justice.²³ A mixed blessing, it can operate for good or for ill. The good part is easily stated: when things work the way they're supposed to, a fearless, wise judge exercises an independent mind in rendering justice. And this, of course,

²² On the racial composition of the U.S. judiciary, see Sherrilyn A. Ifill, *Judging the Judges: Diversity, Impartiality, and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) [hereinafter JUDGING].

²³ See Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) [hereinafter RETRENCHMENT]; DEMOCRACY, *supra* note 1.

actually happens on occasion. *Brown v. Board of Education*²⁴ comes to mind. But, that said, one immediately thinks of the many cases when judges, completely without pressure, handed down cruel, racist rulings, simply because they didn't see them that way at the time.²⁵ Their class situation and range of experiences allowed them to do business as usual. And 'as usual' meant radically unjust."

"Robert Cover wrote about that," I mused.²⁶ "Some crits, too.²⁷ But you mustn't overstate. Sometimes judicial independence can take your eye off the ball. But other times, it keeps you focused on it exactly. What's your next criticism?"

B. Judges as Peculiar Objects of Mercy

"I'll try not to. Overstate, I mean," Rodrigo said. "My next one isn't so much a criticism as an observation. It's just that judges are, by and large, anything but an oppressed class. Highly paid and educated, they enjoy some of the highest occupational prestige of any profession.²⁸ Most of them live in nice homes, send their children to good schools, and retire millionaires. They have

²⁴ 347 U.S. 483 (1954).

²⁵ See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?* 69 TEX. L. REV. 1929 (1991) [hereinafter NORMS]. See also Robert Cover, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) [hereinafter ACCUSED]; EMPATHY, *supra* note 1.

²⁶ ACCUSED, *supra* note 26.

²⁷ E.g., NORMS, *supra* note 26.

²⁸ YOO, *supra* note 7, at 277, 281.

good fringe benefits, medical coverage, and a solvent pension system. Some of them have lifetime security.”²⁹

“Like tenure in our line of work,” I replied dryly.³⁰

“Better,” said Rodrigo. “They can’t be removed, except for blatant misconduct.³¹ And their salaries cannot be reduced while in office, as ours can under some systems of post-tenure review.³² No one is threatening to burn down their churches or set crosses on fire on their lawns. The police do not routinely harass them if they are caught walking or jogging in the wrong neighborhood.”³³

“And your point, Rodrigo, is . . . ?”

“Oh, it’s that dashing around, making a fetish of defending judges against unkind words or the occasional removal from office is an odd allocation of resources. No one speaks of the need to protect the independence of dentists or accountants, for example, even though they do valuable work, too, or waxes indignant over devices to control the jury — such as voir dire,³⁴ judgment n.o.v.,³⁵

²⁹ *Viz.*, federal judges, whose compensation may not be reduced while they are in office. U.S. CONST. ART. III, § 1.

³⁰ Tenure brings job security, but no guarantee of further promotion or salary advance.

³¹ U.S. CONST. ART. III, § 1.

³² *See supra* note 30.

³³ *See* Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN L. REV. 781 (1994) (on “statistical racism” and hassling black men because of their color); BLACK CRIME, *supra* note 1 (construction of blacks as dangerous).

³⁴ On voir dire, see Jack H. Friedenthal, Mary Kay Kane, and Arthur R. Miller, CRIMINAL PROCEDURE 522 (2d ed. 1993).

³⁵ On judgment n.o.v., see *id.* at 553.

sequestration,³⁶ gag orders,³⁷ or jury instructions that run on dozens of pages and spell out in minute detail what they are to do³⁸ — or ones that control lawyers. I’m thinking of judicial chastisement, sarcasm, injunctions to ‘move things along, counsel,’ and even contempt citations when a lawyer has done something a judge finds offensive or obstructionist, even if the lawyer did it on principle.³⁹ Nor does anyone see an affront to judicial independence when a higher court exercises *its* independence to slap down a lower one.”⁴⁰

“So, you think we’re guilty of selective sympathy,” I said.

“Something like that,” Rodrigo replied. “I’m sure this argument alone won’t persuade you, especially because you want Judge Ingersol to be independent when he hears your case. I just point it out to show how it’s easy to get caught up in a crusade on behalf of judges, when other actors may be equally deserving. Do you want to hear my next point?”

C. Judicial Independence, like Many Liberal Rallying Cries, is a Paired Platitude

³⁶ On jury sequestration, see Wayne R. LaFave and Gerald H. Israel, 3 CRIMINAL PROCEDURE 41 (1984).

³⁷ On gag orders, issued to avert jury contamination, see *id.* at 185.

³⁸ On the role of jury instructions in limiting that body’s options, see *id.* at 464.

³⁹ See Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994) [hereinafter SCORN].

⁴⁰ See Jerome Farris, *Judges on Judging: The Ninth Circuit — Most Maligned Circuit in the Country — Fact or Fiction?* 58 OHIO ST. L.J. 1465 (1977) (describing recent pattern of reversals of Ninth Circuit decisions); Editorial, *Decency and the Arts*, DENVER POST, June 27, 1998, at B-9; David G. Savage, *9th Circuit Rebuked Again*, A.B.A.J., July, 1998, at 40. See also Bob Egelko, *Judge Accused of Misconduct for Writing Dissenting Opinion*, BOULDER DAILY CAMERA, July 8, 1995, at B-3 (liberal judge J. Anthony Kline accused of judicial misconduct by state commission for dissenting, on grounds of conscience, from a 2-1 ruling concerning the erasure of past rulings in a case).

“I do,” I replied. “I hope it’s more impressive than your last one.”

Rodrigo winced, then said, “I’ll let you decide. Do you recall the cls position on indeterminacy?”

“Of course,” I replied. “It holds that legal reasoning, especially of the case-law variety, never, or almost never, dictates a single conclusion.⁴¹ By picking one argument or line of authority, the lawgiver can make one outcome appear inevitable and just. By picking another, he or she can rationalize the opposite result. This open-textured quality, first pointed out by the legal realists in the early part of the century, allows a wide scope for politics and disguised personal predilection on the part of the decisionmaker. Cls refined this critique and applied it to a host of areas, including torts,⁴² contracts,⁴³ constitutional,⁴⁴ and labor law.”⁴⁵

“And have you considered how the same thing may apply to policy arguments?” Rodrigo asked.

“I suppose it could,” I said. “There’s the old joke about how you can almost always find an opposite proverb for any situation. Look before you leap.

⁴¹ See David Kairys, *Legal Reasoning*, in THE POLITICS OF LAW [hereinafter POLITICS] 11 (D. Kairys ed., 1982).

⁴² E.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 MD. L. REV. 563 (1982).

⁴³ Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, in POLITICS, *supra* note 42, at 172.

⁴⁴ Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

⁴⁵ Karl E. Klare, *Critical Theory and Labor Relations Law*, in POLITICS, *supra* note 41, at 65.

He who hesitates is lost. Birds of a feather flock together. Opposites attract. And so on.”

“Well, consider how the rallying cry of judicial independence is set off against other maxims that we also subscribe to and trot out from time to time: Judicial responsibility or accountability.⁴⁶ Judicial restraint.⁴⁷ Law as the least dangerous branch.⁴⁸ Strict construction.⁴⁹ Checks and balances.⁵⁰ The will of the people should not be lightly set aside.”⁵¹

“So you’re saying that judicial independence is part of a matrix of values that surround the judiciary and its functioning. When we want to limit a judge’s prerogative, we pick one of the narrowing kind. But when we like what they’re doing — such as when they intervene on behalf of discrete and insular minorities⁵² — we forget these other maxims and genuflect toward judicial independence. We praise judges for their courage in interceding on behalf of weak, impotent, voiceless groups.”⁵³

⁴⁶ Judge J. Clifford Wallace, *Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT’L L.J. 341, 341 (pointing out that criticism of judges and demands for accountability are world-wide).

⁴⁷ Alexander Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) [hereinafter BICKEL] (praising judicial self-restraint); *ACTIVISM*, *supra* note 10.

⁴⁸ BICKEL, *supra* note 47.

⁴⁹ See Stanley C. Brubaker, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?* 47 MD. L. REV. 162 (1987).

⁵⁰ See FEDERALIST NO. 10 (Alexander Hamilton) articulating theory of tripartite government, with each branch limiting the other. See also FEDERALIST NO. 78, at 465-66 (C. Rossiter ed. 1961) (courts the institution best able to enforce limitations on government); *ACTIVISM*, *supra* note 10.

⁵¹ See *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J. dissenting).

⁵² See Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* 14 (2nd ed. 1988) [hereinafter *CONSTITUTIONAL LAW*]; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵³ See ABA, *supra* note 9, at 6, 23; *ACTIVISM*, *supra* note 10 (courts must fearlessly defend constitutional rights). *But see* Derrick Bell, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1993) (pointing out that when the celebration stops, hard won gains are apt quietly to slip away); Richard Delgado & Jean Stefancic, *The Social Construction of Brown v.*

“You put it better than I could have myself,” Rodrigo said. “And in that respect, judicial independence is like other vague, mushy, but noble-sounding liberal legalisms, such as free speech. They conceal what is happening in the real world, diverting discussion of the content of what the speaker is saying — whether progressive or regressive — into a *procedural*, free-speech controversy: ‘I’ve got my rights.’⁵⁴ By the same token, we sometimes need to look at what judges are *doing* with their independence, or what those advocating restraint are promoting. Chanting over and over that judges should be free — or accountable, for that matter — obscures what they are actually doing.”

“Which can often be good,” I pointed out.⁵⁵

“Or bad,” Rodrigo countered. “As when the Supreme Court backtracked from *Brown v. Board of Education*⁵⁶ or cut back on affirmative action,⁵⁷ search and seizure law,⁵⁸ liability of police who engage in high-speed chases,⁵⁹ and the right to abortion.⁶⁰ Not to mention your own case.”

Board of Education: *Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995) [hereinafter SOCIAL CONSTRUCTION] (same).

⁵⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (discussing a case of cross-burning almost exclusively in procedural and free speech terms).

⁵⁵ I thought of cases in which the Court has expanded the rights of school children, *Goss v. Lopez*, 419 U.S. 565 (1975); gays, see note 51 *supra*; African-Americans, *supra* note 24; and women, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁵⁶ See 349 U.S. 294 (1955) (“*Brown II*,” ordering desegregation of Southern schools “at all deliberate speed”); *Milliken v. Bradley*, 433 U.S. 267 (1977) (rejecting metropolitan-wide remedy for segregated schools).

⁵⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵⁸ *Illinois v. Krull*, 480 U.S. 340 (1987); *United States v. Leon*, 468 U.S. 897 (1984) (good faith a defense to an otherwise illegal, warrantless search).

⁵⁹ *County of Sacramento v. Lewis*, 118 S.Ct. 1708 (1998).

⁶⁰ *Planned Parenthood v. Casey*, 504 U.S. 833 (1992).

“Which would have come out fine, without those pressure groups looking over the shoulders of good judges. No, Rodrigo, I’m afraid you haven’t converted me, at least yet. Let’s hear your other arguments.”

D. Judicial independence as a Check and Balance

“My next one,” Rodrigo said, looking down at his list, “is not so much an argument against judicial independence as an observation about its place in our political system. Do you remember how we were saying that platitudes come in pairs?”⁶¹ (I nodded yes — after all, it had been only ten minutes ago — these youngsters must think we old-timers have no faculty of memory left at all, I thought!). “Well,” Rodrigo went on, “at least one of those platitudes has a broad, political dimension. I’m sure you’ve heard how our system is one of checks and balances?”⁶²

“Of course,” I said. “Federalist 10 sets out the theory.⁶³ To reduce the risk of tyranny, the three branches are created coequal, each limiting the power of the other. And, to me at least, this is not only a very good thing, but an excellent reason for an independent judiciary. Who else could rein in an out-of-control

⁶¹ Text and notes 41-54, *supra*.

⁶² CONSTITUTIONAL LAW, *supra* note 52, at 18; ABA, *supra* note 9, at 5.

⁶³ *Supra* note 50.

Congress or curb a president bent on skullduggery, as with Nixon during the Watergate crisis?”⁶⁴

“But notice two things,” Rodrigo said. “First, that both sides invoke checks and balances with equal conviction. Conservatives say we need to be able to vote judges out of office, precisely because they consider this a vital check on an out-of-control judiciary that is unresponsive to the will of the people.”⁶⁵

“While liberals say the opposite, namely that these pressure groups are diminishing the ability of judges to serve as an independent check on the behavior of other branches, such as the police.”⁶⁶

“A perfect stand-off,” Rodrigo said. “Both sides invoke the same value, certain the other is wrong in highjacking it to support its position.”

I paused, then said, “On this one, Rodrigo, I agree with you. The checks-and-balances notion is too abstract to yield much in the way of concrete results. I don’t think judicial independence is a mere rhetorical flourish. After all, I’m facing some uncomfortable results of its failure. But I do agree that one can’t

⁶⁴ On this sorry chapter in recent United States history, see Bob Woodward & Carl Bernstein, *ALL THE PRESIDENT’S MEN* (1974). See also Stephen Breyer, *Judicial Independence in the United States*, 40 *St. Louis U. L. J.* 989, 996 (1996) (attributing a similar view to early theorists of U.S. government, including George Washington).

⁶⁵ Text and notes 10, 15, 19, 46-51, *supra*; Dan Carney, *Striking Controversial Provisions, House Waters Down B.11 Limiting Federal Judges’ Powers*, *CQ WEEKLY*, Apr. 25, 1998 at 10-14 [hereinafter *CARNEY*]. See also Robert Bork, *SLOUCHING TOWARD GOMORRAH* 117 (1996) (criticizing activist judges and urging amendment to allow Congressional override of federal court decisions with which that body disagrees) [hereinafter *SLOUCHING*]; ABA, *supra* note 9, at 44 (opposing this proposal).

⁶⁶ Text and notes 17-20 *supra*; *CARNEY*, *supra* note 65, at 1074.

decide particular cases by reciting a broad political maxim laid down two hundred years ago.”

“As we said earlier, you have to get down to cases. Are you ready for my next argument?”

“I’m waiting.”

E. The Role of Structure

“Consider how structure plays a role in judging, aspirationally and as a limitation.”

“I’m intrigued,” I said. “I love structural arguments. Unlike ones based on rhetoric or high-flown abstractions, they sometimes actually get somewhere.”

“I think you’ll agree this one does,” Rodrigo said. “Notice how judges can’t actually be independent. If they are, they’ll get reversed.⁶⁷ Even before that, if too independent, they won’t get confirmed.⁶⁸ In this age, that doesn’t take much independence at all.”

⁶⁷ Note 41 *supra*.

⁶⁸ Text and notes 11, 17-18 *supra*; 70-71 *infra*. On the process of judicial selection, see generally Sheldon Goldman, PICKING FEDERAL JUDGES (1997).

“I can certainly think of examples,” I said. “One Supreme Court nominee got thrown out because he smoked marijuana decades earlier.⁶⁹ And you know what happened to Lani Guiner⁷⁰ and Bill Lann Lee.⁷¹ Too leftist for the Republicans in Congress, they saw Clinton abandon them or, in Lee’s case, beat a strategic retreat and name him only to an interim position.”

“Real renegades don’t even make it that far,” Rodrigo went on. “It turns out that the independence we tout means only a narrow thing: in no particular person’s thrall, while leading an average life and doing ordinary, bureaucratic ‘normal science.’ ”⁷²

“The demography of the federal bench, at least, bears you out,” I conceded.⁷³ “I certainly wish they were more diverse. I wouldn’t mind having a minority judge this afternoon,” I added wistfully.

“As we mentioned, the bench contains very few disabled people, Marxists, labor organizers, minorities, or gay and lesbian people. Real independence would mean judges with a wide range of life experience. It would mean upholding draft resisters, at least on occasion, affording a sympathetic hearing to against-the-grain

⁶⁹ On the rejection of Supreme Court nominee Douglas Ginsburg for this very reason, see Editorial, *Behind the Ginsburg Smoke*, N.Y. TIMES, Nov. 10, 1987, at A-34.

⁷⁰ For a step-by-step account of her confirmation struggles, written by the candidate herself, see Lani Guiner, *LIFT EVERY VOICE* (1998)

⁷¹ On Mr. Lee’s difficulties, see BRODER, *supra* note 16, at A-1.

⁷² Coined by Thomas Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962), the term refers to inquiry conducted within the reigning paradigm — safe, incrementalist, and familiar.

⁷³ Text and note 23 *supra*.

groups; giving careful consideration to Ruth Colker's antistatutory interpretation of Equal Protection jurisprudence."⁷⁴

"Is this your other kind of structural independence?" I asked.

"It shades into it," Rodrigo answered. "Do you remember when we were discussing on another occasion the idea of structural due process?"⁷⁵

"In connection with cloning and human procreative technologies?"

"Exactly," Rodrigo replied. "Proposed in modern times, at least, by Laurence Tribe,⁷⁶ but foreshadowed in Continental philosophy, structural due process means that in contentious cases falling in a zone of moral flux, courts should afford the most complete, open hearing.⁷⁷ Later, when society has decided where it stands on an issue, say women's or gay rights, they may afford more streamlined treatment under codified rules.⁷⁸ Until that time, we ought to give those cases the broadest scope, allowing every point of view to be heard. Liberal rules of evidence, intervention, and burdens of proof ought to be applied. At this early stage, we don't know where we stand on the issue. We thus do ourselves a

⁷⁴ See Ruth Colker, *Antistatutory Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

⁷⁵ See FATHERHOOD, *supra* note 1.

⁷⁶ See CONSTITUTIONAL LAW, *supra* note 52, at 1673-87; Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) [hereinafter STRUCTURAL].

⁷⁷ STRUCTURAL, *supra* note 76, at 283.

⁷⁸ *Id.* at 290.

favor by forcing the most open treatment. Later, when we know the geography of the area, we can give litigants more cursory, standardized treatment.”⁷⁹

“Not a bad idea,” I said, “at least in theory.”

“But my point is that this is exactly what we do not do,” Rodrigo said. “It would require a kind of meta-knowledge on the part of judges, something most lack as narrow specialists. Consider, for example, their disappointingly wooden, mechanistic dismissal of hate speech cases brought under campus speech codes.”⁸⁰

“Or the cross-burning case,” I interjected.⁸¹ “Scalia’s opinion sounds like a Gilbert’s outline of 1950s free speech law. It gives scant attention to the interests of the black family on whose lawn the cross was burned. The same is true of the two district court decisions striking down campus speech codes.”⁸²

“Although those were cases presenting novel, emerging issues of great social importance, the judges treated them as though someone proposed a rule limiting bookshops to 100 square feet. Touting the independence of judges, when they now demonstrate so little of it, is a little like praising the independence of notaries, car mechanics, or accountants.”

⁷⁹ *Id.* at 314. See FATHERHOOD, *supra* note 1 (making similar proposal).

⁸⁰ *E.g.*, U.M.W. Post v. Regents of University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich., 1989). See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

⁸¹ Text and note 54, *supra*.

⁸² Note 80, *supra*.

“Professor, you’re more of a crit than you may realize. Independence is a cry judges raise only when they are doing something that others question. Most of their work is routinized, bureaucratized butchery. Cover was right — they do operate against a field of pain and death.”⁸³

“Yet act blithely ignorant of that,” I said. “Otherwise, they would slow down when operating in the zone of moral flux, when doing something novel and socially important.”

“Instead they seem to hurry up,” Rodrigo said. “Or throw up their hands and say, ‘We can do no other. Our hands are tied. The mighty First Amendment decrees . . .’ ”

“Sometimes, people and groups participate legitimately in constitutional value-making,” I commented.

“Robert Cover wrote about that, too,” Rodrigo said. “Norms come from many sources, including the work of small groups, even individuals. We all participate in norm-making, in our daily lives, in what we do.”⁸⁴

“And your point, I suppose, is that none of this is illegitimate or an affront to political principle.”

⁸³ Robert Cover, *Violence and the Word*, 95 *YALE L. J.* 1601, 1601 (1986).

⁸⁴ Robert Cover, *Foreword, Nomos & Narrative*, 97 *HARV. L. REV.* 1, 11 (1983).

“Not at all,” Rodrigo said. “You have to look at what the pressure group is doing. The Freemen, I think, are going too far when they declare that the government is totally illegitimate and try to set up their own court system.⁸⁵ But patriot groups are perfectly within their rights to insist that we have too much taxation, or that this or that judge exceeds his or her mandate in requiring them to pledge allegiance in school or at the commencement of a civic proceeding.”⁸⁶

“You crits do make common cause with the strangest people,” I said, shaking my head. “What’s your next argument?”

F. The Cash Value of Judicial Independence

“Historically, judicial independence simply has not been worth that much,” Rodrigo began. “In the hundred years between *Dred Scott*⁸⁷ and *Brown v. Board of Education*⁸⁸, very few judges exercised their independence to rule against Jim Crow or official segregation in schools, beaches, and public facilities.⁸⁹ They blandly did ‘ordinary science,’ which meant ruling against integration.”

⁸⁵ On this group of Montana-based radical libertarians, see Jon C. Blue, *One Nation, Divisible, with Liberty for None*, N.Y. TIMES, September 2, 1988, at A-27.

⁸⁶ Patriot groups and some in the religious right object to these requirements. See Marguerite A. Driessen, *Private Organizations and the Militia Status: They Don’t Make Militias Like They Used To*, 1998 BYU L. REV. 1. On white supremacist movements, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 546-604 (R. Delgado & J. Stefancic eds., 1997).

⁸⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁸⁸ 347 U.S. 483 (1954).

“The same happened during other times of stress,” I added. “Few judges stood up against McCarthyism or the Salem witch trials,⁹⁰ even fewer against slavery.⁹¹ And everyone knows that the German judiciary and bar meekly went along with the excesses of Nazism and the Holocaust.⁹² Cases like *Buck v. Bell*⁹³ and *Dred Scott*⁹⁴ mar the careers of some of our most eminent judges, who seem to have gone right along with the spirit of the times.⁹⁵ If they had independence, they chose not to exercise it.”

“A black or gay judge would not have handed down *Plessy v. Ferguson*⁹⁶ or *Bowers v. Hardwick*,”⁹⁷ Rodrigo said. “Or been less likely to,” he added.

“I can certainly think of a prominent one today who might,” I added mildly, not wanting to make too much of it.⁹⁸

“Still, people make a big thing of the occasional case where a judge stood up for principle . . .”

⁸⁹ Leon Higginbotham, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996); *NORMS*, *supra* note 26 (weakness of judges in general).

⁹⁰ *See, e.g.*, Peter Charles Hoffer, *THE DEVIL’S DISCIPLES: MAKERS OF THE SALEM WITCH TRIALS* (1996); William F. Buckley, *MCCARTHY AND HIS ENEMIES* (1954).

⁹¹ Leon Higginbotham, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL YEARS* (1978).

⁹² *See* Michael Steloeis, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (1998).

⁹³ 274 U.S. 200 (1927).

⁹⁴ 60 U.S. (19 How.) 393 (1857).

⁹⁵ *See* *NORMS*, *supra* note 25, at 1929-31, 1934-52.

⁹⁶ 163 U.S. 537 (1896).

⁹⁷ 478 U.S. 186 (1986).

“Like Harlan’s dissent in *Plessy v. Ferguson*,”⁹⁹ I interjected.

“Right! Rodrigo exclaimed. “Neglecting the hundred cases where they uphold the unjust, brutal law. Or, in Harlan’s case, upholding anti-Asian laws.¹⁰⁰ His liberality toward blacks evidently did not generalize. His Asian jurisprudence was just as jingoistic and racist as that of the rest of the justices.¹⁰¹ I was just reading an article on this.”

“I think I saw it, too. It was by a young Asian scholar, if I recall, and won some sort of prize.”

“That’s the one,” Rodrigo said. “The Thurgood Marshall Prize, if I remember correctly.”¹⁰²

“Right. But I hope you’re not saying that Harlan’s remarkably humane opinion was dimmed in some way by his failure to reach the highest degree of sainthood when writing other ones?”

“No, not dimmed,” Rodrigo said. “It does show, however, that we need to beware of a certain celebratory tendency. Some judges’ countermajoritarian

⁹⁸ I was thinking of Justice Clarence Thomas, author of numerous opinions that have set back the fortunes of minorities and the poor. For an analysis of Thomas’s jurisprudence, see Stuart Taylor, Jr., *The Problem with Clarence Thomas*, 19 LEG. TIMES, June 1996, at 21.

⁹⁹ 163 U.S. 537, 552 (1895) (Harlan, J., dissenting).

¹⁰⁰ Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996). See Pat Chew, *Asian Americans: The ‘Reticent’ Minority and Their Paradoxes*, 36 WM & MARY L. REV. 1 (1984) (on law’s neglect of the Asian minority).

¹⁰¹ *Id.* at 181.

¹⁰² *Id.* at author’s footnote.

rulings may not be as brave as we like to think. I'm sure you know of Derrick Bell's analysis of *Brown v. Board of Education* as a majoritarian exercise."¹⁰³ (When I nodded yes, Rodrigo continued:) "And another scholar speculated that Justice Harlan may have written as he did in *Plessy* because he had a black brother.¹⁰⁴ Not having an Asian brother, he lapsed back into business as usual when the Chinese Exclusion cases came before him."

"So you're saying that true judicial independence is rare, and often explained on simple material terms."

"Rather than ideal ones," Rodrigo added. "Or may serve to promote stasis, to assure that the gap between our ideals and current reality doesn't get too great."

"Contradiction-closing cases, Bell calls them."¹⁰⁵

"Which allow business as usual to go on even more smoothly than before, because now we can point to the exceptional case and say, 'See, our system is really fair and just. See what we just did for minorities or the poor.' "

"Overlooking that the rest of the time, we support a system that excludes them from jobs, schools, friendship networks, homes in the suburbs, and many of

¹⁰³ *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹⁰⁴ James Gordon, *Did the First Justice Harlan Have a Black Brother?* 15 U. NEW ENG. L. REV. 159 (1993), reprinted in CUTTING EDGE, *supra* note 3, at 122.

the good things of life.”¹⁰⁶ But I still believe in judicial independence. Judges aren’t perfect, and Harlan or Holmes may have suffered a black eye now and then. But I’d rather have a judiciary that can act fearlessly at least every now and then than one that is constantly looking over its shoulder at what the demagogues, letter-writers, newspaper editors and right-wing fanatics are saying. In fact, in about” (I looked at my watch) “fifteen minutes, I hope my judge is willing to exercise a little independence. Otherwise this absurdly severe charge could actually stick, and I might do time for jay-walking, if you can believe it.”

“I have nothing against judicial *courage*,” Rodrigo replied. “That’s always a good thing. It’s just characterizing the virtue as judicial *independence* that I think is misleading.”

Just then, the waiter arrived to tell us that the desert line now contained their specialty, carrot cake with pistachio frosting. We looked at each other. Rodrigo seemed interested, so I said, “What the heck. If I’m going to jail, I might as well have a good last meal.” Rodrigo picked up his tray, and I followed him to the line. After we returned to our tables, Rodrigo continued as follows:

G. The Ordinary and the Extraordinary: The Example of Race

“On the subject of courage, consider courts’ race jurisprudence. I know you may feel differently in light of your own experience, but history shows that

¹⁰⁵ Derrick Bell, *The Supreme Court, 1984 Term: Foreword — The Civil Rights Chronicles*, 99 HARV. L.REV. 4, 32 (1985).

¹⁰⁶ *Id.* at 35.

judicial independence has not been of great help to minorities. Courts sometimes hand down helpful opinions, to be sure. But some of the worst — *Plessy*,¹⁰⁷ *Dred Scott*,¹⁰⁸ *McCleskey v. Kemp*,¹⁰⁹ *Bowers v. Harwick*¹¹⁰ — came down when the Court was not under great pressure. And some of the best decisions — *Brown*,¹¹¹ *Hernandez*,¹¹² and in Australia, *Mabo*¹¹³ — were handed down when it was. Pressure can, of course, make courts rule even more regressively than they ordinarily would — consider how right-wing pressure or Southern resistance brought about the *Adarand*¹¹⁴ decision, the reversal of *Metro Broadcasting*,¹¹⁵ or *Brown II*¹¹⁶. Liberals who worry about judicial independence seem to assume that without pressure, courts will do the right thing. But unpressured, business-as-usual judging is the real problem, not the pressured kind.”

“You and I once discussed how systemic evils, like racism, that are deeply imbedded in the fabric of society, are very hard to see and correct.¹¹⁷ We called it the empathic fallacy, if I recall.”¹¹⁸

¹⁰⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁰⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁰⁹ 481 U.S. 279 (1987).

¹¹⁰ 476 U.S. 186 (1986).

¹¹¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹¹² *Hernandez v. Texas*, 347 U.S. 475 (1954).

¹¹³ *Mabo v. Queensland (No. 2)* (1992) 175 CLR1 (upholding aborigines’ land claims against doctrine of *terra nullus* — that at the time of settlers’ arrival, Australian land was essentially un-owned and ripe for taking).

¹¹⁴ *Adarand Contractors Inc. v. Peña*, 515 U.S. 200 (1995).

¹¹⁵ *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990) (upholding minority preference in issuance of broadcast licenses).

¹¹⁶ *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (“*Brown II*” — implementation decision, permitting desegregation to proceed at “all deliberate speed”).

¹¹⁷ EMPATHY, *supra* note 1, at 68, 74. On the related “reconstructive paradox,” see SOCIAL CONSTRUCTION, *supra* note 53.

¹¹⁸ *Id.*; see also Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?* 77 CORNELL L. REV. 1258 (1992) [hereinafter IMAGES].

“We did,” Rodrigo said. “It consists of believing that we can easily and quickly rid ourselves of error and injustice by merely naming and calling attention to it.¹¹⁹ Experience shows that this does not happen. The voice of the reformer is simply not heard or dismissed as incoherent or absurd.¹²⁰ It’s only when ten thousand voices are shouting in the streets that we begin to pay attention.”

“And that’s what people call ‘pressure,’ ” I said ironically.

“When a black judge gets a black case, this looks like bias, so that white attorneys almost invariably call for the judge to recuse himself. In one case, Leon Higginbotham decided to stick it out and remain on the bench.¹²¹ A big furor ensued, with few riding to his rescue. With business as usual — white judges hearing white cases — hardly anyone raises such a stink. But the mere possibility that a black judge might give sympathetic treatment to one of his race raises hackles. And the furor in Higginbotham’s case — no one called *that* an affront to judicial independence, which it was. The famous African-American judge’s critics thought it stood to reason that he should step down, and were upset when he refused.”¹²²

¹¹⁹ IMAGES, *supra* note 118, at 1259-60, 1281.

¹²⁰ *Id.* at 1281. But see Frank B. Cross & Emerson L. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L. J. 2155 (1998) (a maverick judge can sometimes shame the others into obeying precedent).

¹²¹ On Higginbotham’s ordeal, see JUDGING, *supra* note 23, at 114.

¹²² *Id.* at 114-15.

“And as we mentioned before, when black jurors decline to convict a black defendant, law and order types are outraged and demand reforms so that this cannot happen again.¹²³ No one speaks of *jury* independence, even though the jury’s role in our scheme of justice is as ancient and vital as that of the judge.”

“Judicial independence is really a misnomer. Our paradigm does not allow for it. A high majority of cases brought by prosecutors result in conviction. Few cases are overturned on appeal . . .”

“Unless they’re from a maverick judge or liberal Circuit, like the Ninth,” I cracked.¹²⁴

“Right. The real aim of those seeking Constitutional amendments allowing for Congressional overturning of court judgments¹²⁵ is to constrain judges who display any sort of legal thought other than the normative or traditional. They want to make judges toe the line, act in predictable ways.”

“But, wait a minute,” I said. “Doesn’t that cut the other way? If you are a social reformer, would you not welcome judicial independence? That way, judges would be free to act in non-normative ways, as you call them.”

¹²³ *E.g.*, Jeffrey Rosen, *The Bloods and the Critics*, NEW REPUB., Dec. 9, 1996, at 27 (decrying O.J. Simpson’s acquittal and laying blame on critical race theorists who devised notions of law as storytelling). On legal storytelling, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

¹²⁴ Text and note 40 *supra*.

¹²⁵ See SLOUCHING, *supra* note 65, at 117 (setting forth this proposal); CUOMO, *supra* note 7, at 300 (criticizing it).

“In theory, yes,” Rodrigo conceded. “While liberals and the ABA rightly stand up for the concept of judicial independence,¹²⁶ they are not defending it in any real sense, because judges have almost never acted independently. The entire structure of the legal system, from *stare decisis* to judicial demography to judicial ethics and socialization, assures this.”

“So, the whole thing is a legitimating myth?”

“Yes and no,” Rodrigo answered. “It’s better to have it than not. But having these little side skirmishes from time to time, even if the right side wins, sets us back. They enable us to pat ourselves on the back and relax, overlooking the other 99 out of 100 cases when the judge does the predictable thing.”

“Given his or her background, ethnicity, social status, and role.”

“Exactly,” Rodrigo said. “If the ABA report had addressed the way the culture of law, for lack of a better word, determines the outcome of particular cases, it would have reached a more disheartening conclusion.”

“But, what’s wrong with that?” I asked, beginning to be aware of a looming shape that had approached our table.

“Hello again,” said Rodrigo, looking up at the figure who had materialized at our table. It was my lawyer.

¹²⁶ Text and notes 9-11 *supra*.

“Hi,” said Steinglass. Then, to me: “We’re on, but not ‘til two o’clock. And, you’ll be glad to know, the prosecutor wants to meet with us fifteen minutes before. She may be ready to deal. Sanity may have returned.”

“That would be a relief,” I said. Then after a pause: “Won’t you join us? You remember Rodrigo from this morning. He teaches at the public school upstate and is in town for a committee meeting. In the chambers of the chief judge, in fact.”

“Welcome back,” Rodrigo said shaking hands. “Congratulations on that plea bargain.”

“I won’t start celebrating until it’s signed and delivered,” said my lawyer. “Maybe I’ll get a cup of coffee and join you in a minute.”

H. Judicial Independence as Civility: A One-Way Street

While waiting for my lawyer to return, I turned to Rodrigo. “We may not have very long. By my count, you’ve got one more argument left.”

“Actually, your friend might have something to say on it. It’s that in one of its aspects, the call for judicial independence is hypocritical. Maybe that’s too harsh — I should say one-sided.”

“One sided?”

“I mean that one of the complaints the judicial independence crowd make is that harsh criticism, especially from lawyers, tarnishes the image of the legal system,¹²⁷ detracting from the majesty and dignity of the courts.”

“Well, that of judges, anyway. They’re not the courts. I mean, there are other players as well, including the lawyers, the parties, the juries, the reviewing court . . .”

“I know. The complaints are a little selective. But they are also one-sided. Had you noticed how judges frequently feel free to belittle or admonish a lawyer who is presenting a novel claim, or taking too long to present an established one?”¹²⁸

“Rule 11 cases present some notorious examples,” I said.¹²⁹ “In fact, I was reading an article just the other day entitled ‘Scorn,’ in which the authors point out how freely some judges belittle, dismiss, or ridicule lawyers who do something out of the ordinary, such as bring a novel case, say for comparable worth.”¹³⁰

¹²⁷ *E.g.*, THREAT, *supra* note 17 (discussing but not subscribing to this view).

¹²⁸ *See* text and notes 38-39 *supra*; Threat, *supra* note 17, at 730; SAFEGUARDING, *supra* note 10, at 703, 715-20.

¹²⁹ Fed. R. Civ. Pro. 11, permitting courts to punish parties and attorneys who file frivolous lawsuits.

¹³⁰ SCORN, *supra* note 10.

“I think I saw it, too,” Rodrigo said. “If I’m not mistaken, the authors argued that scorn and satire are never warranted out of the mouths of judges.”

“Sounds like you two have been having a good time.” It was Steinglass, a smile on his face and a huge plastic cup of coffee in his hand.

“Have a seat,” I said. “How much time have we got?”

When Steinglass said, “About 30 minutes, don’t worry — I’ve set my wrist alarm,” I summarized our discussion, explaining Rodrigo’s task on the committee and his overall thesis that judicial independence serves as a legitimating myth. I repeated, in summary form, Rodrigo’s eight observations, including that judicial independence can serve as a deflection, and that judges are a peculiar object of mercy. I reiterated his point that the judicial-independence norm, like many, is a paired platitude and, as such, perfectly indeterminate; and, as a further example of it, that one can argue judicial independence either as an aspect of, or a danger to a system of checks and balances. I mentioned his argument that real judicial independence would lead to judges’ applying some variant of structural due process, but that they rarely do so. Rather, they afford cutting-edge cases irritable, cursory treatment. Finally, I outlined Rodrigo’s example of race jurisprudence and what it showed about the low cash value of judicial review and independence, and concluded with his argument that civility — one component of the judicial-independence rallying cry — seldom cuts both ways, as judges feel free to be as uncivil as they like, rebuking lawyers and parties

in scathing terms when they do something that raises their ire. “He ties it to a whole theory of humor,” I said. “I know this from a previous discussion.”

When Steinglass looked interested, Rodrigo said, “Yes, satire and scorn are never justified, except against the high and mighty, those who abuse power and authority.¹³¹ The powerful, such as judges, may never rightly wield those tools against those of lesser power and station. One root of humor is *humus*, bringing low, down to earth.¹³² The classic satirists, like Swift, Voltaire, and Mark Twain, realized this, reserving their barbs and slings for the pompous and self-important. They never made fun at the expense of the lowly, such as beggars or the blind.”¹³³

“So, you’re saying that judges can dish it out, but can’t take it,” Steinglass said. Rodrigo nodded (“something like that”), so the lawyer went on: “I’ve certainly seen cases like that, including one I argued just last week, a DUI. The judge was as sarcastic as a human being can be, merely because my client, a physician who was on medication, refused to take a breathalyzer test.”

“Judges like to affect false modesty,” Rodrigo interjected. “We’re the least powerful branch.¹³⁴ We defer to political questions.¹³⁵ In diversity cases, we

¹³¹ *Id.* at 1062-63.

¹³² *Id.* at 1063.

¹³³ *Id.* at 1063-65.

¹³⁴ Text and notes 47-48 *supra*.

¹³⁵ CONSTITUTIONAL LAW, *supra* note 52, at 96-107.

are oh-so-careful not to overstep on state sovereignty.¹³⁶ We are bound by precedent. All we do is read and apply the statute. But try attacking or criticizing a judge, and the iron fist comes out of the velvet glove. The false modesty disappears. You can get thrown in jail for contempt or condemned by your bar association for unseemly expression.”

“Thanks for the summary,” Steinglass said. Then, looking over at me: “I gather that you, Professor, have your doubts about what this young fellow is saying. I do, too. If you’d like to hear what a practicing lawyer thinks . . .”

When Rodrigo and I both nodded eagerly, he continued as follows: “I actually taught trial practice at the Professor’s school for several years. So, although I’m not as well versed in critical thought as you are, Rodrigo, I’ve read a little in political theory and the new clinical jurisprudence. And if you’ll allow me, I’d like to make a case for judicial independence that goes beyond the liberal pieties you usually hear.”

“Please do,” we said in unison. Taking a deep draught of his coffee and a quick glance at his watch, Steinglass began as follows:

Conclusion: Steinglass Makes the Case for an Independent Judiciary *and* an Independent Bar, and We Conclude on a Note of Reconciliation

¹³⁶ *Erie Ry. Co. v. Tompkins*, 304 U.S. 69 (1938) (federal courts required to apply state substantive law in diversity of citizenship cases).

“Do you two know about the host of books that have come out recently on the role of the professions in Nazi Germany and the Third Reich?” (We both nodded a little uncertainly, so Steinglass continued:) “Books by Robert Jay Lifton,¹³⁷ George Annas,¹³⁸ and Michael Stelloeis¹³⁹ highlight how Nazi doctors and the German bench and bar did little to stop the atrocities that were occurring with increasing frequency in the years leading up to World War II.”

“I’ve read some of them,” Rodrigo said. “I’ve even heard it theorized that concern over the excesses of statism in Germany underlay the Supreme Court’s decision in *Hickman v. Taylor*,¹⁴⁰ the work-product privilege case.”

When Steinglass looked a little uncertain, I chimed in, “I’ve heard that, too. The idea is that Justice Jackson and at least one of the court clerks who participated in that landmark 1946 decision had just returned from taking part in the trials at Nuremberg of Nazi war criminals. One of the impressions they brought back with them was the craven behavior of the German bar and judiciary, which, unlike ours, follow a non-adversarial, or inquiry-based, model in which the lawyers and judge cooperate in trying to reach the truth. Unlike here, where the lawyers are the zealous advocates of their clients’ cause and try to vanquish the other side, German lawyers, at least in that period, considered themselves arms of government and allies of each other and of the judges.”¹⁴¹

¹³⁷ Robert J. Lifton, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1988).

¹³⁸ See George J. Annas, *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* (1992).

¹³⁹ See *supra* note 92.

¹⁴⁰ 329 U.S. 497 (1947).

¹⁴¹ Arthur Miller first pointed out this connection to me.

“Oh, now I see the connection,” Steinglass said, his face lighting up.

“And it illustrates my point perfectly. Without a work-product privilege in our recently adopted rules of civil discovery, lawyers would be able to pry secrets out of each other. Mental impressions, legal theories, and office memoranda would be required to be shared with the other side.¹⁴² That degree of cooperation would be suffocating, would start us on the road to groupthink, and would be incompatible with the sort of feisty, combative adversarial system we now have. With all its bumps, warts, and inefficiencies, it’s still best system in the world. Certainly it’s the best guarantor against statism and Big Brother yet invented. And that’s why judges must be independent.”

We both started as Steinglass’s wristwatch alarm went off suddenly. “I have it set loud,” he explained. “I have to be able to hear it even in a noisy corridor. We’ve got a few more minutes.”

All three of us were silent for a moment. Then Rodrigo said: “A powerful example. And I agree that judicial independence can serve as a vital bulwark against excesses of statism and atrocities like those we saw in Germany. Even though once or twice in our history, it didn’t work as intended. For, I think I see a way of reconciling my own critique and Mr. Steinglass’s insight. Do we have a minute to sort of pull things together?”

“I’d be most interested,” I said, looking over at my lawyer, who nodded.

“It just occurred to me that judicial independence has a double aspect,” Rodrigo began.

“Both advancing and retarding the search for basic justice?” I said, hearkening back to something we had said earlier.¹⁴³

“Yes. It’s one of those mechanisms whose value is hard to pin down because it is capable of doing great good in individual cases, while the opposite in the large run of them.”

“Hmmm,” I said. “That makes sense of cases like mine, where one might well wish for the judge to be able to work free from outside pressure. But insisting that the judiciary be always and forever insulated from criticism can paralyze political instincts, and allow atrocities. Criticism — at least of the kind directed upward, toward authority — is the best guarantor of liberty.”

“I’ll buy that,” Steinglass said. “Even though I’m up for a judicial appointment myself, the idea of rules against criticizing judges strikes me as a dangerous precedent.”

“As for myself,” I said, sensing that we were about to conclude, “I like your idea of judicial *courage*, Rodrigo. Maybe the best guarantor of liberty is to

¹⁴² Hickman v. Taylor, 329 U.S. at 509.

¹⁴³ Text and notes 23-26 *supra* (liberal legalisms simultaneously advance and retard the search for social justice).

pick judges who believe in something and then train them to stand their ground when unfair criticism comes their way.”

Just then, a slender, uniformed young man approached our table. “Mister Steinglass, Professor. Excuse me. The court is now in session. But the District Attorney decided to accept your plea bargain. Ten hours of community service, plus the biker’s medicals. You can all go home. Just mail these papers in. Just among the three of us, the judge thought the whole thing pretty silly. In fact, his precise words were, ‘I’ll be glad to take the heat on this one.’ ”