

**Preliminary Draft; Please Do Not  
Cite or Quote Without Permission**

**TWO CONCEPTS OF JUDICIAL INDEPENDENCE**

Pamela S. Karlan\*

Forty years ago, Isaiah Berlin delivered an extraordinarily influential lecture called *Two Concepts of Liberty*.<sup>1</sup> As the title suggests, Berlin identified two different kinds of freedom. "Negative liberty" is "liberty *from*; absence of interference beyond the shifting, but always recognizable, frontier."<sup>2</sup> It involves "warding off interference"<sup>3</sup> from external forces or other individuals. "Positive liberty," by contrast, consists in freedom *to*; it refers to the ability to be "a doer -- deciding, not being decided for, self-directed ... [and capable] of playing a human role, that is of conceiving goals and policies of my own and realizing them."<sup>4</sup> *Two Concepts of Liberty* offered a rich and complex argument, but several of its central points can be stated relatively simply. First, liberty is but one of a constellation of important, and distinct, values. There are others -- for example, "equality or fairness or justice or culture, or human happiness or a quiet conscience"<sup>5</sup> -- to which it must sometimes give way. Second, the positive conception of freedom can become quite illiberal when it turns from the question of "a man's inner life ... to his relations with other members of his society."<sup>6</sup> The equation of liberty with "*rational self-direction*"<sup>7</sup> tends toward the assumption that there are political truths, that these truths can be discovered by reason, and that those in possession of them are entitled to employ a striking amount of coercion in order to turn other people into truly free individuals. Negative conceptions of freedom, by contrast, tend to be more modest and pluralistic, since they carve out spaces within which each individual governs herself without delving too deeply into what choice she makes within this protected sphere.

*Two Concepts of Liberty* is quite useful in thinking about judicial independence. It reminds us that, like other forms of liberty, judicial independence has both negative and positive aspects. Judges must be free *from* certain kinds of pressures or influences and free *to* envision and realize certain goals. Berlin's analysis also suggests why it is easier to develop a strong consensus for the negative conception of judicial independence than for the positive one. It explains why a positive conception of judicial independence ultimately cannot escape substantive judgments. Finally, Berlin's work cautions us about having too unconditional a commitment to judicial independence, particularly in its most positive forms, at the expense of other values. Sometimes, factors that look like structural threats to judicial independence from the positive perspective can be equally explicable as structural *protections* for other values that

---

\* Professor of Law, Stanford Law School. I thank Tom Grey, Eben Moglen, Deborah Rhode, and Kathleen Sullivan for a variety of helpful comments and suggestions.

<sup>1</sup> The lecture is reprinted in ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1970).

<sup>2</sup> BERLIN, *supra* note \_\_\_\_, at 127.

<sup>3</sup> BERLIN, *supra* note \_\_\_\_, at 127.

<sup>4</sup> BERLIN, *supra* note \_\_\_\_, at 131.

<sup>5</sup> BERLIN, *supra*, note \_\_\_\_, at 125.

<sup>6</sup> BERLIN, *supra* note \_\_\_\_, at 145.

<sup>7</sup> BERLIN, *supra* note \_\_\_\_, at 154.

an unqualified embrace of judicial independence undervalues. Just as "judicial independence" may be too loaded a term to refer to all the ways in which judges may "war[d] off interference,"<sup>8</sup> so too "threats" may be too loaded a term to describe all the constraints on that freedom. Judicial independence is not an end in itself.

This essay offers a tentative taxonomy of judicial independence. We might align the various potential constraints judges face on their freedom to make a particular decision along a continuum. At one end, the conception of judicial independence is entirely negative: it consists of the ability to avoid a distinct source of coercion. At the other end, the conception may be categorically positive: judicial independence consists of a judge's freedom to pursue her own conception of some desideratum (the truth, the good, the just, the law) wherever it goes. Sometimes, as Berlin suggests, it may be difficult to categorize a particular exercise of freedom as negative or positive; I also found that sometimes it is difficult to distinguish the boundaries between different claims or to decide which claim is the more expansive. Nonetheless, the effort to catalog the forms of judicial independence is worthwhile because it allows us to think more clearly about the inevitable conflict between some forms of judicial independence and other values we hold.

## I. FREEDOMS FROM

Some of the pressures that might prevent a judge from ruling the way she would in an ideal world can be characterized in purely negative terms. As the discussion in this part suggests, to the extent that a threat is conceived of this way, not only do we enjoy a consensus that independence is a paramount goal, but all the structural elements of the socio-legal system tend towards protecting, rather than threatening, judicial freedom of action. We start to see potential structural threats to judicial independence roughly at the point where judicial independence begins to conflict with other important goals of the legal and political systems.

### A. *Physical Compulsion*

The simplest case involves the danger that a judge's independence might be compromised by fears for her physical safety. If judges were subject to pressures like the ancient writ of attain<sup>9</sup> or physically coerced into reaching particular results,<sup>10</sup> they would lack the minimal safe space within which to perform their judicial role.

I certainly don't want to dismiss the dangers that some judges have faced as a result of their decisions: Justice Blackmun, for whom I clerked, was subject to repeated death threats for having written the Court's opinion in *Roe v. Wade*,<sup>11</sup> and once actually had a bullet fired into the

---

<sup>8</sup> BERLIN, *supra* note \_\_\_, at 127.

<sup>9</sup> "At early English law, if a judge or other royal authority disagreed with a jury verdict, he could seek a writ of attain. Under attain proceedings, a second jury of twenty-four jurors was empaneled to hear the original dispute again. If their verdict differed from the verdict of the first jury, the twelve original jurors were immediately arrested and imprisoned, their lands and property were forfeited to the king, their wives and children were thrown out of their homes, their houses were torn down, their trees were rooted up, and their meadows were ploughed." Elizabeth I. Haynes, Note, *United States v. Thomas: Pulling the Jury Apart*, 30 CONN. L. REV. 731, 742 (1998).

<sup>10</sup> *Cf.* Bushell's Case, 124 Eng. Rep. 1006 (P.C. 1607) (jurors were imprisoned for refusing to convict).

<sup>11</sup> 410 U.S. 113 (1973).

room where his wife was sitting.<sup>12</sup> The assassinations of federal judges Robert S. Vance, Richard J. Daronco, and John H. Wood, Jr. were case-related.<sup>13</sup> But whatever the frequency of these dangers, they cannot really be described as "structural." If anything, the structures of our legal system seem to fall entirely on the side of protecting judicial independence: consider the Marshal's Service, courtroom deputies, metal detectors, and secure courthouses.

But the way in which judges respond to such threats illustrates one key point. When they discuss such threats at all, judges strongly deny that their judgment can be affected. Put somewhat differently, one "structure" that protects this form of judicial independence is the social organization of the judicial community, which promotes a shared understanding of the judicial role. As we shall see, constraints on various forms of judicial independence -- both desirable and undesirable -- often are internal, rather than external.

## B. *Pecuniary Consequences*

One of the most fundamental precepts of due process is that no man can be a judge in his own case, that is, that a judge should not stand to benefit directly from his decisions.<sup>14</sup> Like freedom from physical coercion, freedom from economic factors embodies a purely negative conception of judicial independence. Judges must be free from having their financial well-being depend on the outcome of cases before them.

While there may be arguments about whether the federal or state governments pay judges what they are "worth," it would be ludicrous to suggest that current judicial salaries pose any sort of structural threat to judicial independence. The salaries judges receive do not impose the sort of economic hardship that could even begin to explain, let alone justify, a judge's decision to shade her rulings for economic gain.

Here, as with the question of physical coercion, the structural aspects of the legal system all fall on the protective, rather than the threatening, side of the line. Bribery statutes make the outright sale of judicial decisions a crime.<sup>15</sup> Disqualification standards require judges to recuse themselves whenever they have even a possible pecuniary outcome in a particular case.<sup>16</sup> And provisions such as the Constitution's guarantee that judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office,"<sup>17</sup> seem calculated to protect against a more indirect fear that a judge's decisions might prompt the legislature to cut her pay. Finally, the doctrine of absolute judicial immunity from damages under federal civil rights statutes offers structural protection to judicial independence. As the Supreme Court reiterated in *Stump v. Sparkman*,<sup>18</sup> "a judicial officer, in exercising the authority

---

<sup>12</sup> See Michael Specter, *Shot Fired Through Blackmun's Window; Authorities Probing Possible Link to Antiabortion Group*, Washington Post, Mar. 5, 1985, at A1. Ultimately, the FBI concluded that the bullet probably represented a random shot. The death threats, by contrast, were quite clearly intended to intimidate the Justice.

<sup>13</sup> See Kate McKenna, *Judge's Killing Prompts a Challenge*, N.Y. Times, July 22, 1990, § 12, at 8 (Westchester edition).

<sup>14</sup> See, e.g., *Ward v. Monroeville*, 409 U.S. 57, 62 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>15</sup> See, e.g., 18 U.S.C. §§ 1951(b)(2), 1952(b)(2) (1994).

<sup>16</sup> 28 U.S.C. §§ 144, 455 (1994).

<sup>17</sup> U.S. CONST., art. III, § 1; see also, e.g., CAL. CONST. art. III, § 4(b) providing that "The Legislature ... shall not reduce the salary of a judge during a term of office below the highest level paid during that term of office.").

<sup>18</sup> 435 U.S. 349 (1978).

vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."<sup>19</sup> Even a judge who acts maliciously or corruptly cannot be sued by the parties he has injured.

Of course, judges are not the only public officials who are immune from damages actions. Legislators too enjoy absolute immunity from damages liability for actions performed within their official function.<sup>20</sup> Thus, the justification for judicial immunity -- freedom to act on one's own convictions -- does not necessarily give much content to how those convictions themselves ought to be arrived at. One might, for example, both support the doctrine of absolute legislative immunity and believe that legislators ought to represent their constituents' wishes. Rather, support for judicial immunity from suit seems to rest on the position that the proper remedies for judicial error or misbehavior are more structural: reversal of erroneous decisions<sup>21</sup> and, in egregious cases, removal of malfeasant judges.<sup>22</sup> Put concretely, one might condemn Judge Stump and believe that he was not "free to" approve Sparkman's mother's petition to have her sterilized, while still believing that he should be "free from" personal financial liability for his error. More broadly, the general explanation for official immunities -- that we protect even mistaken official acts in order to avoid overdeterrence of officials with discretionary authority<sup>23</sup> - supports the negative conception of judicial independence. We must allow judges to be free to make some mistakes in order to avoid chilling the forms of bold action we really support.

### C. *Personal Ambition*

Lots of lawyers want to become judges; most judges want to keep their jobs; many sitting judges have aspirations for elevation to higher courts. Much of the discussion of judicial independence focuses on the threats posed by career considerations. In particular, many observers identify judicial elections as a major structural threat to judicial independence. The standard analysis identifies two mechanisms by which elections influence judicial outcomes. First, it takes substantial money to run an effective campaign and the major contributors tend to be lawyers; judges may therefore be beholden to the economic interests that supported them or loath to offend groups who might bankroll their opponents in their next election. Second, the electorate may retaliate against judges who render unpopular decisions; judges will therefore temper justice with self-preservation.

I want to press on those assumptions, not because I think judicial elections are necessarily a good thing -- I have strong doubts about them -- but because they so often seem to involve argument from anecdote rather than either logic or experience.

---

<sup>19</sup> *Id.* at 355 (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1872)) (interpolations in original).

<sup>20</sup> See U.S. CONST. art. I, § 6 (providing absolute immunity for members of Congress); see *Bogan v. Scott-Harris*, 118 S.Ct. 966 (1998) (accorded absolute immunity from damages suits under 42 U.S.C. § 1983 (1994) to members of local legislative bodies); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (accorded absolute immunity from damages suits to members of state legislatures).

<sup>21</sup> See *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (stating that a judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation.").

<sup>22</sup> See U.S. CONST. art. I, § 3, cl. 6; see also, e.g., *Nixon v. United States* 506 U.S. 224, 226-28 (1993) (recounting the impeachment of federal judge Walter Nixon after he was convicted of accepting a bribe and refused to resign).

<sup>23</sup> See PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* 51-54 (2d ed. 1994).

The idea that campaign contributions may influence official behavior is hardly unique to the judiciary; the same claim is made with regard to legislative and executive races as well. To the extent this claim simply collapses into a straightforward allegation of bribery, it is quite troubling, but there is little empirical evidence that outright corruption is widespread;<sup>24</sup> indeed, bribery in which a judge pockets the money seems far more plausible than "bribery" in which the money is spent to persuade voters to support the judge's election bid.<sup>25</sup> For reasons that I have explored in detail elsewhere, the corruption rationale is strikingly incomplete.<sup>26</sup> The essential "currency" in any electoral system is votes. When it comes to judicial elections, the real problem is more likely how judicial candidates persuade voters to give them those votes rather than how judicial campaigns are financed. Judicial elections are usually deracinated, low-salience affairs: few voters know anything important about any of the candidates<sup>27</sup> and the rules governing campaigns for judicial office usually keep the candidates from providing the information that might lead to really informed decisions.<sup>28</sup> The restriction of information means that voters are likely to cast their ballots in ignorance; they often seem to support (or oppose) every incumbent, or vote a straight ticket without any knowledge of the relationship between party and judicial philosophy (if there is one), or simply not vote at all. If all elections do is introduce random volatility and noise into the selection or retention of judges, they are certainly a bad thing, but it's not clear that they threaten judicial independence, rather than judicial quality.

The second claim -- which we might refer to as electoral retaliation -- poses a different set of questions. Again, there is the empirical question: does the fear of being thrown out of office actually affect judicial behavior? Judges are as loath to admit this as to admit physical intimidation. But there is a more important question, and this begins to move us from purely negative to more mixed conceptions of judicial independence. Asking the question "Should judges be free from the fear they will be tossed out of office for making a correct but unpopular decision?" suggests one answer. But asking the question "Does judicial independence require the conscientious voter to disregard a judge's decisions?" suggests a different one.

The strong claim in favor of judicial independence rests on the case in which there is a clear legal rule, but either the rule or one of the litigants is unpopular. I think most people would agree that judges ought not to deviate from that rule because of the popularity or unpopularity of a particular litigant, and voters ought not to "punish" a judge for her decision. So, for example,

---

<sup>24</sup> See Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 847 (1998) (summarizing political science studies on the subject and stating that "none have found anything but the most tenuous cause and effect relationship between contributions and legislative activity.").

<sup>25</sup> For discussions of the relationship between classical bribery and campaign contributions, see David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL. FOR. 141; Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL. FOR. 111.

<sup>26</sup> Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, \_\_\_ TEX. L. REV. \_\_\_ (1999).

<sup>27</sup> For a thorough summary of the evidence regarding judicial elections, see Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C.L. REV. 1305, 1315-18 (1997).

<sup>28</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990). For one recent discussion on judicial advertising, see Robert M. Brode, Note, *Buckley v. Illinois Judicial Inquiry Board and Stretton v. Disciplinary Board of the Supreme Court: First Amendment Limits on Ethnical Restrictions of Judicial Candidates' Speech*, 51 WASH. & LEE L. REV. 1085 (1994).

in the case of Tennessee Supreme Court Justice Penny White, if binding law required that she vote to reverse the conviction in a particular capital case, she should have been free from the fear that her vote would cost her her seat, and the voters were wrong if they based their decisions on hers.<sup>29</sup> But suppose that there *isn't* a clear legal rule or that a voter believes that a judge's exercise of his discretion was evil. Shouldn't voters be free to turn that judge out at the next election even if this does involve "retaliation" for the judge's decision to do what he thought was right? If Penny White is a poster child for judicial independence, then Jack Hampton, a Texas District Court, is the poster child for electoral retaliation. Hampton gave an unusually light (for him) sentence to a defendant convicted of killing two gay men. His explanation: "These homosexuals, by running around on weekends picking up teen-age boys, they're asking for trouble .... I don't care much for queers cruising the streets picking up teen-age boys.... I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute."<sup>30</sup> Although Hampton was censured by the State Commission on Judicial Conduct for his remarks, he was not removed from office.<sup>31</sup> He was defeated, however, in his 1992 bid for a seat on the Texas Court of Appeals.<sup>32</sup> Roughly twenty percent of his opponents' campaign contributions came from homosexuals and his decision in that case was a major campaign issue.<sup>33</sup> My own view is that voters were right to throw him out of office for this one ruling. If judges who honestly believe that gay people's lives are not worthy of equal respect and protection are deterred from expressing or acting on their sincere beliefs, that's a good thing. The point is this: without looking at the substance of a judge's ruling, even in a particular case, it is difficult to say that electoral retaliation is inherently bad.

Moreover, once we move away from decisions in particular cases and toward the pronouncement of general legal rules, it is even less clear that individuals ought to be selected or retained without regard for their viewpoints. In constitutional law, for example, the meaning of the Eighth Amendment reflects "evolving standards of decency that mark the progress of a maturing society."<sup>34</sup> The idea of a constitutional right to privacy, and the contours of that right, similarly reflect contemporary understandings. And the meaning of the equal protection clause has changed dramatically since the ratification of the Fourteenth Amendment. Today, *Brown v. Board of Education*,<sup>35</sup> which was a controversial decision in 1954 (and perhaps an unthinkable one in 1896), is the third rail of judicial nomination: touch it and you die.<sup>36</sup> Must judicial independence shield a judge from the consequences of resisting the popular consensus on these

---

<sup>29</sup> It is worth noting, however, that former Justice White believes that judges will continue to apply the law regardless of the political consequences. *See Campaign Opens Wounds for Ex-Justice*, Chattanooga Times, Aug. 12, 1998, at C3 ("Ms. White said she believes almost all judges will continue to apply the law "without fear or favor," as their oath requires, despite growing public political pressure." *See also supra* tan \_\_\_ (making the point about judicial internalization of standards of independence).

<sup>30</sup> Lisa Belkin, *Report Clears Judge Of Bias in Remarks About Homosexuals*, N.Y. Times, Nov. 2, 1989, at A25.

<sup>31</sup> *See Judge Is Censured Over Remark on Homosexuals*, N.Y. Times, Nov. 29, 1989, at A28.

<sup>32</sup> *See Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. Times, Dec. 4, 1992, at B20.

<sup>33</sup> *Id.*

<sup>34</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>35</sup> 347 U.S. 483 (1954).

<sup>36</sup> The ill-fated nomination of Bernard Siegan to the Ninth Circuit -- one of only two Reagan Administration nominations to be rejected by the Senate Judiciary Committee -- is a pointed illustration of this fact. *See Linda Greenhouse, Panel Rejects Court Nominee, Ending Bitter Battle*, N.Y. Times, July 15, 1988, at A12. Siegan had argued that *Brown v. Board of Education* could not be defended on an equality rationale; the only basis for the decision in his mind was that school segregation somehow interfered with the right to travel. *See* BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY* 106 (1987).

sorts of questions? I don't think so. Similarly, when it comes to the common-law method, the recognition of new causes of action or the abrogation of old ones often depends on social or cultural changes. To some extent, then, we *want* judges to pay attention to popular views, at least popular views writ large.

Thus, it is not categorically true that we want judges to ignore popular opinion and rely on their own consciences, or that we want to protect judges who ignore politically settled interpretations and rely on their own views of the law. Sometimes we do and sometimes we don't.

#### D. *The Political Branches*

For the most part, of course, there is very little electoral interference with judicial independence. Most decisions remain unknown except to the litigants. Most judicial terms are so long that many potentially controversial decisions will be long past by the time of the election. Most incumbent judges face little or no real electoral opposition. Probably the only jurists in America with substantial name recognition are Judge Wapner and Judge Ito. But elections do affect the judiciary; as Mr. Dooley long ago noted, "no matter whether th' constitution follows th' flag or not, th' supreme court" -- whose members, of course, enjoy lifetime tenure -- "follows th' iliction returns."<sup>37</sup> In particular, the judiciary's position as one of three coordinate branches can circumscribe its freedom of action. This raises the question to what extent ought judges be free from legislative or executive control?

When it comes to statutory cases, our general answer is that we want very little if any independence. Assuming that a statute is constitutional, the job of the courts is to vindicate the statutory scheme enacted by the legislature. Pure textualists think judges should be bound by the properly enacted statutes before them, while more nuanced interpretivists think judges should seek to implement the legislative intent. Similarly, principles like the *Chevron* doctrine<sup>38</sup> give authority to the executive to constrain judicial statutory interpretations.

At the same time, there are some threats from the political branches that merit judicial resistance. Everyone agrees, for example, that it is perfectly proper for the legislature to prospectively overrule judicial statutory interpretations (or common law decisions) it dislikes. At the same time, Article III forbids Congress from overruling a judicial decision in a particular case.<sup>39</sup> The Ex Post Facto and Bill of Attainder Clause<sup>40</sup> serves a similar function.

In another vein, the line-item veto could conceivably pose a threat to judicial independence. Presidents have been deeply disappointed with judicial decisions in the past and one could imagine a President so enraged by a court's decision that he simply deleted its funding from the federal budget. Even if the actual judges' salaries were preserved,<sup>41</sup> they would be crippled from performing their jobs by a denial of courthouse personnel, electricity, libraries, and

---

<sup>37</sup> FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

<sup>38</sup> See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>39</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

<sup>40</sup> U.S. CONST. art. I, § 9.

<sup>41</sup> See U.S. CONST., art. III, § 1.

Such a risk seems quite remote, however, perhaps because the political response to earlier attempts at executive retaliation, such as Roosevelt's Court-packing plan, were so vehement. That is not to say that the political branches' power of the purse does not affect the judiciary's ability to perform its job; of course it does: ever-increasing dockets have a variety of adverse consequences for the administration of justice. But those problems are not exactly problems of judicial "independence," at least not in the negative sense. Moreover, the line-item veto -- as opposed to a congressional decision simply to starve the courts of the resources they need -- will occur only when the Congress and the President disagree, and under such circumstances, we should expect that Congress will have a strong incentive to circumvent the President's veto.

Ironically, given the pervasive focus on judicial elections as a threat to judicial independence, it may be that the political branches' control of the judicial *appointments* process poses every bit as much of a threat to judicial independence. Of course, once individuals obtain federal judgeships, they can be removed only through the impeachment process -- the stringency of which provides a substantial space within which judges are free to act. But the nomination and confirmation processes seem increasingly to focus on whether candidates for judgeships have committed themselves to particular positions on politically salient issues. More pointedly, judges who want to be "promoted" -- to the Court of Appeals or the Supreme Court -- have to toe the popular line<sup>43</sup> or at least a line acceptable to the Senate Judiciary Committee. Thus, a judge's personal ambitions may interact with political control to constrain him. Here, of course, the structural threat to judicial independence -- the ability of a judge to do the right thing -- is as much an internal, as an external, constraint: once again, it lies in large part within the mind of the judge.

### E. *The Judge's Own Background*

But what is the alternative to nominating, confirming, or electing judges on the basis of how they will decide cases? Even if we agree that judges shouldn't be selected on the basis of how they will rule in a particular case, surely we should be asking what their general approach to legal issues will be. Figuring this out logically involves looking at an aspirant's background and prior experience as indicators of his intellectual and personal qualities and his general judicial philosophy.

This then poses the question of to what extent a judge should seek to transcend the background and prior experiences that got him his job in the first place. How much ought judges to be free from their own experiences? Jerome Frank, an extraordinarily self-consciously psychological judge,<sup>44</sup> recognized the central tension and sought to parse it in this way:

---

<sup>42</sup> For a discussion of the threat to judicial operations posed by the line-item veto, see, e.g., Michael Kirkland, *Justice Rap Line-Item Veto*, U.P.I., Mar. 8, 1995 (available in NEXIS, Arcnws File); Testimony of Gilbert Merritt, Jan. 12, 1995 (available in LEXIS).

<sup>43</sup> Cf. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62, 87 (1985) (discussing the "bench climber": "Her fantasy is to sit on the Supreme Court. Realistically, she thinks there might be a spot for her on the intermediate appellate court if she plays her cards right. The trick, she has decided, is somehow to rise above the crowd without alienating anyone; to make few mistakes while doing a few things really well. She calculates constantly but adds little; she sees all but lacks vision.").

<sup>44</sup> See JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930).

[T]here can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired "slants," preconceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference.... More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals.... The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

Frank contrasted these permissible background influences with a very different set of preconceptions:

In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic "learnings of the mind," uniquely personal prejudices, which may interfere with his fairness at a trial. He may be stimulated by unconscious sympathies for, or antipathies to, some of the witnesses, lawyers or parties in a case before him.... Frankly to recognize the existence of such prejudices is the part of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases.<sup>45</sup>

Putting Frank's point in structural terms, the very architecture of the human mind poses a substantial threat to judicial independence, as judges find themselves in unconscious thrall to their past experiences.

---

<sup>45</sup> In re J.P. Linehan, Inc., 138 F.2d 650, 651-53 (2d Cir. 1943).

Clearly, judges should strive to overcome their irrational and unconscious prejudices against certain sorts of cases or litigants. But what about an intermediate set of value judgments, ones that are neither universally shared nor reflexive and idiosyncratic? Ought judges seek to overcome these? For example, one need not be any kind of essentialist to believe that the views of both Justice Thurgood Marshall and Justice Clarence Thomas were powerfully shaped by a lifetime of experience as African American men. Anyone with even a shred of candor would acknowledge that both men were chosen for the Supreme Court at least in part precisely because they were black. So why would judicial independence require either man to be "stripped down like a runner"?<sup>46</sup> Does judicial independence really require "methodically ridding [oneself] not only of old ideas and even the desire to form new ones, but also of traits and attitudes that have formed the essence of [one's] adult personality"?<sup>47</sup> My own view is that it does not. For me, the question is not whether Justice Marshall or Justice Thomas -- or Justice Scalia, the Catholic Italian-American former law professor, or Justice Powell, the patrician southern WASP -- was "free from" his past experiences. In a host of overt and subtle ways, the answer is that none was fully free. Nor has any other judge, good, bad, or indifference, ever been. The real question is how each man applied those past experiences to the issues that came before the Court. And that question requires us to make substantive judgments, rather than to rest on invocations of an ideal of judicial independence.

In fact, if we think of judicial independence as a *systemic* attribute, rather than simply a character trait of individual judges, it may be that impartiality is better achieved by ensuring diverse perspectives on the bench, rather than by striving for the selection of Chauncey Gardeners and stealth candidates.<sup>48</sup> The judicial *process* may be more "free from" the backgrounds of individual judges when the judiciary is more truly representative. Certainly, this is true of collegial courts.

## II. FREEDOM FROM OR FREEDOM TO?

Until this point, I have been discussing judicial independence from constraints that exist outside the judicial process. But the process itself constrains judges in a variety of ways. Subject-matter and personal jurisdiction rules, venue provisions, and doctrines like ripeness, mootness, and the case or controversy requirement all limit what judges can do. Most obviously, precedent exercises a constraining force. Precedent takes some potential outcomes completely off the table: when the law is clear, parties may not even litigate and this denies judges even a ready opportunity to consider particular issues. In other cases, the press of judicial business means that following precedent is the path of least resistance; it may be easier to claim that the instant case is "controlled" by some prior decision than to figure out from scratch what the right answer should be. Finally, the doctrine of *stare decisis* "compels" judges to follow precedents absent weighty justification; *stare decisis* really only matters when it constrains judges who affirmatively disagree with prior decisions.

And yet there is little argument that Article III or *stare decisis* threaten judicial

---

<sup>46</sup> David Broder, *Thomas Backs Democrats into a Corner*, Chi. Trib. Sept. 15, 1991, at 3.

<sup>47</sup> Linda Greenhouse, *The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Question of What He Is*, N.Y. Times, Sept. 13, 1991, at A19 (describing Thomas).

<sup>48</sup> See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. REV. 95 (1997); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992).

independence. Why? In part, perhaps, we take the most formal "structure" of all -- the allocation of judicial power under Article III or state constitutions -- as an exogenous definition of the sphere within which judicial action and judicial independence can operate. In this light "judicial" serves as a restrictive modifier of independence. Another possible answer is definitional. As I have already suggested, if one thinks of judicial independence as involving the autonomy of the *judiciary* from external control, rather than as consisting in the ability of individual *judges* to "conceiv[e] goals and policies of [their] own and realiz[e] them,"<sup>49</sup> then *stare decisis* is no threat at all. The judiciary as a corporate entity creates the precedents that then constrain its individual members. Indeed, Berlin's characterization of positive liberty as self-governance and adherence to "law" consisting of "the rules which reason prescribes"<sup>50</sup> may mean that an orderly judicial process is *more* "free" than a non-hierarchical one.

### A. *Higher Courts*

While the constraints imposed by jurisdictional doctrines and precedent seem to have occasioned little apprehension about judicial independence, the constraints imposed on lower-court judges by higher courts sometimes do. I want to focus on one recent, and ongoing example, because it nicely illustrates both the ambiguity of the concept of judicial independence and the utility of the negative/positive distinction.

J. Anthony Kline is a justice on the California Court of Appeal. In 1992, in *Neary v. Board of Regents*,<sup>51</sup> the California Supreme Court approved the practice of "stipulated reversal." Parties who settle a case while the case is on appeal may obtain the reversal of the trial court's judgment as part of their settlement.<sup>52</sup> The *Neary* Court's rationale was a mix of empirical argument regarding the efficiencies to be gained from stipulated reversals and a particular normative account of the judicial role. The Court of Appeal had refused the request to reverse the trial court's judgment because it felt that automatic reversal at the parties' bidding would "trivialize the work of the trial courts and undermine the integrity of the entire judicial process."<sup>53</sup> The Supreme Court disagreed:

This conclusion is based on the Court of Appeal's faulty premise that litigation is a search for "legal truth," not "simply a dispositional act." This puts the abstract cart before the practical horse. The primary purpose of the public judiciary is "to afford a forum for the settlement of litigable matters between disputing parties."

....

[A] stipulated reversal does not trivialize or render meaningless a trial court's work. As explained above, the paramount purpose of litigation is to resolve disputes. If that goal is achieved, even after judgment, the trial court's essential function has been fulfilled.<sup>54</sup>

---

<sup>49</sup> BERLIN, *supra* note \_\_\_, at 131.

<sup>50</sup> BERLIN, *supra* note \_\_\_, at 147.

<sup>51</sup> 834 P.2d 119, 119 (Cal. 1992).

<sup>52</sup> *See id.* at 119.

<sup>53</sup> *Id.* at 124 (quoting the Court of Appeal's opinion).

<sup>54</sup> *Id.*

Justice Kennard's dissent,<sup>55</sup> a subsequent United States Supreme Court decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,<sup>56</sup> and a variety of scholarly commentary show that the California Supreme Court's vision has been widely rejected.<sup>57</sup> Those who put greater weight on the courts' role in developing and articulating public values<sup>58</sup> than on the courts' simply providing a forum for resolving private disputes see stipulated reversals as a threat to the core judicial function.

Whatever the merits of the California Supreme Court's position, however, it did adopt a clear rule in favor of stipulated reversals. Five years later, in *Morrow v. Hood Communications, Inc.*,<sup>59</sup> the California Court of Appeal was asked to enter a stipulated reversal in what seems to have been a relatively routine piece of commercial litigation. Two of the Justices on the three-member panel felt, "[u]nder the principles of stare decisis ... bound by *Neary* and, accordingly, grant[ed] the motion."<sup>60</sup> They did, however, ask the Supreme Court to "reconsider and repudiate the doctrine adopted in *Neary*."<sup>61</sup>

The third judge, Presiding Justice Kline, took a different tack. He dissented from the panel's entry of a judgment of reversal because he could not "as a matter of conscience apply the rule announced in *Neary*."<sup>62</sup> His refusal was based on his "deeply felt opinion" that *Neary* was "destructive of judicial institutions":<sup>63</sup>

The judicial responsibility is fundamentally public. "Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."<sup>64</sup>

Kline then turned to the appropriate role for a lower court judge convinced that a higher court had made a fundamental error:

My conscientious refusal to acquiesce is not designed to offend our Supreme Court, for which I have the most profound respect. It is constitutionally justified

---

<sup>55</sup> See *id.* at 127-33.

<sup>56</sup> 513 U.S. 18 (1994).

<sup>57</sup> See also, e.g., Jill Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur* 76 CORNELL L. REV. 589 (1991); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 U.C.A.L. REV. 1471 (1994).

<sup>58</sup> See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1084, 1089 (1984).

<sup>59</sup> 59 Cal. App. 4th 924 (1997).

<sup>60</sup> *Morrow*, 59 Cal. App. 4th at 926.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 927 (Kline, J., dissenting).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 928 (quoting Fiss, *supra* note \_\_\_\_).

and, I hope, constructive. As has been stated, "[s]o long as the lower court may still be reversed by the higher court, there is no interference with either the 'supremacy' of the Supreme Court or with the idea of the rule of law. While lower courts may be 'inferior' in the hierarchy -- i.e., their decisions can be countermanded by a higher tribunal -- they are not constitutionally subordinate in terms of either their duties under the Constitution or their relationship to higher courts. . . ." <sup>65</sup>

Justice Kline's dissent prompted the California Commission on Judicial Performance to file judicial misconduct charges against him. The possible consequences if the Commission finds him guilty range from censure to removal from the bench. <sup>66</sup>

The *Morrow* affair raises a host of questions about judicial independence. At one end of the spectrum lies the merits of the disagreement between Justice Kline and the California Supreme Court over the propriety of stipulated dismissals. To what extent should courts be bound by the wishes of litigating parties regarding the disposition of appeals? Justice Kline thinks judges should be free to disregard the desire of the parties to have unwelcome precedents wiped from the books, that judicial independence requires judicial fidelity to the public interest rather than the litigants'. The California Supreme Court, by contrast, took a position that seems to maximize the positive liberty of the litigants instead.

The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will...; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. <sup>67</sup>

What *Neary* shows is that we cannot always maximize the positive liberty of both the courts and the parties; something must give.

Most of the commentary about the *Morrow* affair, however, has focused at the other end of the spectrum, on the relatively narrow question whether Kline should be punished in some way. The public consensus seems to be that the Commission's proceedings are a terrible idea: judges should not face discipline for expressing their view of the law. Note that one can embrace this position purely as a matter of negative judicial independence. To say that Justice Kline should be free from investigation and possible punishment for expressing disagreement with *Neary* does not necessarily require that one address the correctness of either *Neary* or Kline's nonacquiescence.

But the really interesting question for me is the intermediate one: should Justice Kline be free to disregard *Neary* in the service of his own vision of the judicial role? And what does that mean?

---

<sup>65</sup> *Id.* at 930.

<sup>66</sup> See Henry Weinstein, *Panel Contends Judge's Dissent Was Misconduct*, L.A. Times, July 6, 1998, at A3.

<sup>67</sup> BERLIN, *supra* note \_\_\_\_, at 131.

When I read the accounts in the popular and legal press about the *Morrow* affair, I wondered what it would mean for Justice Kline to refuse to acquiesce. I found myself quite disconcerted when I read his actual dissent: it seems as if the practical consequence of Justice Kline's position -- assuming that the California Supreme Court does not repudiate *Neary* -- is little more than an annoying speed bump. While Kline will refuse to apply the *Neary* rule at litigants' request -- that is, he plans to deny motions for stipulated reversal of a trial court's judgment -- he will "of course comply with an order of the California Supreme Court to grant a particular request for stipulated reversal, a purely ministerial act."<sup>68</sup> In other words, if he manages to persuade another judge to join his position, he will require parties who want a stipulated reversal to appeal to the Supreme Court, which will presumably reverse him and order him to grant the motion and dismiss the appeal, which he will then do. As long as he is just following orders, his conscience is clear.

So Justice Kline isn't exactly claiming to be free from compulsion by a higher court. He is simply requiring that court to make its deprivation of his independence of action more explicit.

But suppose Justice Kline were actually asserting the entitlement of judges to follow their consciences rather than the dictates of binding precedent from a superior court. Ought judges to enjoy this positive liberty?

Stipulated reversals are a sufficiently abstruse, albeit controversial, practice that it is hard for academics and lawyers, let alone lay people, to get really worked up about them. But there are nonacquiescent jurists with radically different lists of conscientious scruples. Let me describe one whose defenders (I suspect) are unlikely to overlap significantly with Justice Kline's. Judge Roy S. Moore of the Etowah County Circuit Court begins his court sessions with a prayer and displays a personally carved tablet of the Ten Commandments on the wall of his courtroom.<sup>69</sup> Moore "believes it impossible to sit in judgment of others without the guidance of God, and ... that the display of the Ten Commandments and the use of prayer to open Court is a logical necessity and a reasonable acknowledgment of the presuppositions upon which the American government and civilized society are based."<sup>70</sup> Judge Moore has also announced that an injunction issued by a federal district court against a school prayer statute<sup>71</sup> "was not the law of Etowah County, and was an 'unconstitutional abuse of power' by the Federal judiciary."<sup>72</sup> Leaving aside the intricacies of *Rooker-Feldman*,<sup>73</sup> ought we to defend Moore's freedom to ignore adverse precedent simply because he really believes it is wrong? It seems to me that we cannot escape making a substantive judgment about the uses to which a judge's conscience is put. If Judge Moore is wrong about what binding precedent about the First Amendment commands and forbids, then why should he be free, in his position as a judge, to follow his own

---

<sup>68</sup> *Morrow*, 59 Cal. App. 4th at 930 (Kline, P.J., dissenting).

<sup>69</sup> See, e.g., Bruce Fein, *Judge Not*, N.Y. Times, May 8, 1997, at A31.

<sup>70</sup> Ex parte State ex rel. James v. American Civil Liberties Union of Alabama, 711 So. 2d 952, \_\_\_ (Ala. 1998).

<sup>71</sup> See Chandler v. James, 998 F. Supp. 1255, \_\_\_ (M.D. Ala. 1997) (describing the injunction).

<sup>72</sup> Kevin Sack, *In South, Prayer Is a Form of Protest*, N.Y. Times, Nov. 8, 1997, at A9.

<sup>73</sup> Under the famously abstruse *Rooker-Feldman* doctrine, see *District of Columbia Court of Appeal v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), lower district courts "possess no power whatsoever to sit in direct review of state court decisions." *Feldman*, 462 U.S. at 483 (quoting *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 296 (1970)). Authority to review state court decisions "is vested solely in [the United States Supreme] Court." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 622 (1989).

One of the few really skeptical discussions of the Kline case<sup>74</sup> points to another example of judicial conscientious objection. Justice Kline relied heavily on Michael Stokes Paulsen's article, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*,<sup>75</sup> to articulate his theory that lower court judges can "underrule," that is, refuse to obey, higher-court precedent.<sup>76</sup> A key premise of Paulsen's article is that abortion is the moral equivalent of antebellum slavery or the Holocaust.<sup>77</sup> Judges should therefore do everything they can, within their role as judges, to resist *Roe v. Wade*.<sup>78</sup>

The example of judicial conscience that Paulsen celebrates seems far removed from the controversy over stipulated reversals. Randall Hekman, a probate court judge in Kent County, Michigan, refused to give court approval for a thirteen year-old seeking an abortion. Hekman found it "impossible ... not to give regard for this totally innocent and defenseless creature that is within the womb of this lady." Thus, he announced that he would not permit the girl to have an abortion even if the Supreme Court ordered him to do it.<sup>79</sup> Paulsen's take? "Hekman's course of conduct seems *exactly* what is called for."<sup>80</sup> Only if you agree with the judge's view on the substantive question. For me, to defend Hekman's independence is to deny the thirteen year-old girl's hers. Paulsen and Hekman's position depends entirely on denying that the girl has a positive liberty interest in making decisions about the course of her own life. If they are wrong about abortion -- and I think they are -- then the cost of the independence they demand is too high.

It seems to me that a conception of judicial independence that insists that each judge be free to follow his own conception of what the law demands threatens a constellation of interests that are ultimately more important than a judge's freedom. Moreover, precisely to the extent that society comes to see the claim for judicial independence as embracing claims like Judge Hekman's, and perhaps Justice Kline's, it is likely to clamp down on judicial independence even in its more modest, negative sense.

## B. *The Law*

Of course, Judge Hekman did not claim to be free. Rather, he claimed that his course of action was compelled by "[t]he law with the capital L... certainly God and the natural concepts."<sup>81</sup> This raises the question at the far end of the continuum of judicial independence: when should judges be free to go beyond the authority provided by positive law? When Kent

---

<sup>74</sup> George M. Kraw, *Judging the Refusenik Judge*, *The Recorder*, July 15, 1998, at 4.

<sup>75</sup> 7 J.L. & RELIGION 33 (1989),

<sup>76</sup> *See Morrow*, 59 Cal. App. 4th at 930.

<sup>77</sup> *See Paulsen, supra* note \_\_\_\_, at 49 ("the moral stakes of the abortion controversy are at least as high as they were with respect to slavery, and perhaps higher. Abortion is literally a matter of life and death); *id.* at 76-77 ("The analogy of abortion to the Holocaust is ... clear. (Estimates as of January 1990 range as high as twenty-five million deaths from the post-*Roe* abortion holocaust, a result as monstrous as the killing of more than six million Jews in Nazi concentration camps.")).

<sup>78</sup> 410 U.S. 113 (1973).

<sup>79</sup> Reuters News Service, *Domestic News*, Oct. 26, 1982 (available in *NEXIS*).

<sup>80</sup> Paulsen, *supra* note \_\_\_\_, at 81 (emphasis in the original).

<sup>81</sup> Reuters News Service, *supra* note \_\_\_\_.

County Circuit Judge Robert A. Benson reversed Judge Hekman's decision and returned the case to another judge for reconsideration, he stated that "Judges are not really free, under oath, to follow what we think the law should be outside of what the law is."<sup>82</sup> Should they be? Another recent abortion-related decision, *United States v. Lynch*,<sup>83</sup> poses this question.

In February 1996, Federal District Judge John E. Sprizzo entered a permanent injunction against George Lynch and Christopher Moscinski pursuant to the Freedom of Access to Clinic Entrances Act of 1994.<sup>84</sup> The two men were enjoined from impeding or obstructing access to the Women's Medical Pavilion in Dobbs Ferry, New York. Despite the injunction, Lynch and Moscinsky blocked access to the clinic and were arrested.

They were charged with criminal contempt. In a bench trial, Judge Sprizzo dismissed the charges. He gave three grounds for his decision. First, he found that the defendants lacked the requisite willfulness because they acted on the basis of sincerely held religious beliefs. While this part of the opinion is intellectually disingenuous,<sup>85</sup> it involves a quite conventional judicial role of factfinder. Indeed, here Sprizzo's claim is essentially that the positive law binds him: the law forbids a conviction without willfulness and the facts would not support such a finding.

But a second part of the opinion is quite "independent" of existing positive law. Judge Sprizzo hints, but never actually holds, that the defendants might be entitled to a necessity or justification defense. He acknowledged that the precedent (none of it squarely binding) was almost entirely against recognizing such defenses. But he rejected the government's argument that the defenses were unavailable "because the conduct at issue i.e. abortion, is legal as a matter of positive law":<sup>86</sup>

Were a person to have violated a court order directing the return of a runaway slave when Dred Scott was the law, would a genuinely held belief that a slave was a human person and not an article of property be a matter the Court could not consider in deciding whether that person was guilty of a criminal contempt charge. And if so, what moral justification could be offered for trying government officials, including judges, for implementing the positive laws of Nazi Germany.

These considerations are made even more relevant because of recent events in Bosnia and because of present United States commitments to international treaties on human rights, which could conceivably, at some time, put United States positive laws relating to abortion and the judges who implement

---

<sup>82</sup> Ron Koehler, *Pregnant 13-Year-Old To Get Another Abortion Hearing*, U.P.I., Oct. 29, 1982, PM Cycle (available in NEXIS).

<sup>83</sup> 952 F. Supp. 167 (S.D.N.Y. 1997).

<sup>84</sup> 18 U.S.C. § 248 (1994).

<sup>85</sup> Judge Sprizzo purports to rely on the Supreme Court's decision in *United States v. Sisson*, 399 U.S. 267 (1970), for the proposition that sincere religious belief can negate a finding of willfulness. See *Lynch*, 952 F. Supp. at 170. But the Court's decision in *Sisson* said no such thing. The *district judge* presiding over Sisson's prosecution for willful failure to report for induction during the Vietnam War set aside his conviction on the ground that his interest in not serving in a war to which he sincerely objected outweighed the government's "need for him to be so employed." What the Supreme Court held was that the district court's ruling was in fact an acquittal after judgment and thus the government could not appeal. The Supreme Court never held that the district court had acted properly in refusing to find willfulness.

<sup>86</sup> 952 F. Supp. at 170 n.3.

them at variance with and in violation of a future international consensus on that issue.<sup>87</sup>

In this view, fidelity to positive law is a threat to justice, and judges must be free -- indeed, may be compelled -- to disregard the law when it conflicts with higher moral truths. But note that this independence cannot be content-free. It is easy to say that the judges who enforced the Fugitive Slave Acts or who presided over the legal apparatus of the Third Reich made pacts with the devil. But what about the judges who refused to enforce child labor laws because they thought them dangerous intrusions on that most fundamental human liberty, freedom of contract?

The final part of Judge Sprizzo's opinion is more explicit yet in its rejection of "law" as a constraint on a judge's pursuit of justice. Judge Sprizzo advanced a notion of judicial nullification:

However, even assuming arguendo that the Court were satisfied that the Government's proof established the requisite willfulness, the Court would still find the defendants not guilty. The facts presented here both by sworn testimony and a videotape depicting an elderly bishop and a young monk quietly praying with rosary beads in the Clinic's driveway, clearly call for what Judge Friendly once referred to, in *United States v. Barash*, 365 F.2d 395, 403 (2d Cir. 1966), as that exercise of the prerogative of leniency which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict. But cf. *Sparf and Hansen v. United States*, 156 U.S. 51, 39 L. Ed. 343, 15 S. Ct. 273 (1895) (outlawing practice of permitting counsel to argue to jury that it could return a verdict contrary to law).<sup>88</sup>

*But cf.* indeed. The citation of the iconic Judge Friendly goes beyond disingenuousness. Judge Friendly's opinion cannot honestly be read to endorse an idea of judge nullification. *Barash* involved a jury trial. Judge Friendly's reference to leniency was made in the context of explaining how legal errors in the defendants' trial might have spilled over leading to convictions on counts as to which they might otherwise have given the defendants the benefit of the doubt. *Barash* says precisely nothing about whether a *judge* can acquit against the weight of the evidence. Indeed, all the examples Sprizzo cites are examples of *jury* nullification. I would guess that the reason why "[t]he Court has been cited to no authority by the parties that the Court, when it sits as a fact-finder, does not have that same prerogative of leniency"<sup>89</sup> is that

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 171.

<sup>89</sup> *Id.* In fact, the United States Court of Appeals for the Second Circuit, the appellate court that reviews Judge Sprizzo's decisions -- when they are reviewable at all, which is doubtful in the *Lynch* case -- recently emphasized that "the power of juries to 'nullify' or exercise a power of lenity is just that -- a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997). As the Second Circuit pointed out:

[A]lthough the early history of our country includes the occasional Zenger trial or acquittals in fugitive slave cases, more recent history presents numerous and notorious examples of jurors nullifying -- cases that reveal the destructive potential of a practice Professor Randall Kennedy of the Harvard Law School has rightly termed a "sabotage of justice." Consider, for example, the two hung juries in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till -- shameful examples of how "nullification" has been used to sanction murder and

there is none. Judge nullification would completely undermine the idea of the judge as champion of the rule of law. Judge Sprizzo is essentially arguing that even positive law should not constrain the judge in pursuit of his personal vision of justice. This is judicial independence run wild.

## CONCLUSION

The real problem with antebellum America or Nazi Germany -- the societies that supporter of the most expansive arguments for judicial independence invoke -- lay not in the crude legal positivism of their judiciaries, but in the profound non-democracy of their political regimes. If blacks had been full and equal citizens of the United States at the time of the Founding or in the 1800's, I see no reason to suppose that the judiciary acting on its own would have done a better job of protecting them than the political branches. After all, during Reconstruction, Congress showed blacks far more solicitude than the courts, and today the independent federal judiciary seems to be leading a frontal assault on black political and educational aspirations. Our current image takes as the exemplars of judicial independence the Supreme Court of *Brown v. Board of Education* and the courageous federal judges who enforced it in the South. Those judges, however, *did* follow positive law -- the Fourteenth Amendment. And it is perhaps cautionary to recognize that today it is other independent federal judges in the Fifth and Eleventh Circuits and on the Supreme Court who also invoke the Fourteenth Amendment, this time to dismantle affirmative action and the progress achieved by the Voting Rights Act.<sup>90</sup>

Put more generally, judicial independence is not a single concept, but a constellation of different freedoms *from* and freedoms *to*. And once we get beyond relatively modest, negative conceptions of judicial independence -- freedom from physical coercion, economic interest, and some forms of popular pressure and case-specific retaliation -- we must measure the claims for judicial freedom against the results judges produce.

---

lynching.

*Thomas*, 116 F.3d at 615.

<sup>90</sup> See Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING LEGACY 207 (E. Joshua Rosenkranz & Bernard Schwartz eds. 1997); Pamela S. Karlan, *Undoing the Right Thing*, 77 VA. L. REV. 1 (1991).