



Alabama Law Scholarly Commons

Articles

Faculty Scholarship

1998

Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence Judicial Independence and Accountability Symposium

Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_articles

Recommended Citation

Richard Delgado, *Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence Judicial Independence and Accountability Symposium*, 72 S. Cal. L. Rev. 425 (1998).

Available at: https://scholarship.law.ua.edu/fac_articles/371

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

ARTICLE

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

RICHARD DELGADO*

INTRODUCTION: IN WHICH RODRIGO ENCOUNTERS ME
IN AN EMBARRASSING SITUATION AND I LEARN
ABOUT HIS UNUSUAL COMMITTEE ASSIGNMENT

I was 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 protégé.¹ "I might say the same. You're the last per-

* Jean Lindsley Professor of Law, University of Colorado School of Law. J.D., 1974, Boalt Hall School of Law, University of California, Berkeley.

1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter Delgado, *Chronicle*] (introducing my interlocutor and alter ego, Rodrigo). The son of an African-American serviceman and Italian mother, Rodrigo was born in the United 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 United States to investigate graduate law (LL.M.) programs. At the suggestion of his sister, veteran U.S. civil rights lawyer Geneva Crenshaw, he seeks out "the professor" for advice, see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987). Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West, see Delgado, *Chronicle*, *supra*; law and economics, see Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993); love, see Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993); legal rules, see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993); the critique of normativity, see Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas*,

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

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 drop-

Civil Wrongs, and the Politics of Denial, 45 STAN. L. REV. 1581 (1993); relations between men and women of color, see Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993); enlightenment political theory, see Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); black crime, see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) [hereinafter Delgado, *Black Crime*]; narrative jurisprudence, see Richard Delgado, *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 the first cycle and final chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995)); the rule of law, see Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) [hereinafter Delgado, *Race, Instrumentalism*]; affirmative action, see Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995); clinical theory, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter Delgado, *Empathy*]; the problem of desperately poor border settlements, see Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997); formalism, see Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) [hereinafter Delgado, *Formalism*]; the recent right-wing surge, see Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997); racial mixture and assimilation, see Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); alternative dispute resolution, see Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (unnumbered tribute to the late Professor Grillo); and human cloning, see RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE*, ch. 6, "Rodrigo's Chromosomes" (forthcoming 1999) [hereinafter DELGADO, *CHROMOSOMES*]. During this period, the brash, talented Rodrigo earns his LL.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 Delgado, *Chronicle*, *supra* note 1 (introducing the professor).

ping out of school in order to fight shoulder to shoulder, as he put it, with his brothers and sisters in the *barrio*. 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."

"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

3. For a discussion 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., LOUISE HARMON & DEBORAH WAIRE POST, *CULTIVATING INTELLIGENCE* (1996); *CRITICAL RACE THEORY: THE CUTTING EDGE* 389-430 (Richard Delgado ed., 1995) [hereinafter *CUTTING EDGE*]; Delgado, *Formalism, supra* note 1 (discussing the law's discontents in general).

4. This and similar code words and epithets have been used in police communications. See Interview with "B," Anonymous Police Officer in a Major U.S. City (1998) (on file with author); REPORT OF THE INDEPENDENT COMMISSIONERS ON THE LOS ANGELES POLICE DEPARTMENT 71-73 (1991) ("Warren Christopher Commission") (discussing the use of such terms as "Guerillas in the Mist," "the natives," "monkeys slapping time," "huntin' wabbits," "Don't cry Buckwheat," "cholo," and "don't transfer me any orientals"); MARVIN ZALMAN & LARRY J. SIEGEL, *CRIMINAL PROCEDURE: CONSTITUTION AND SOCIETY* 332 (1984) (noting that a group of officers in an Ohio department had

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?"

"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 has led an exemplary life and is 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 cover 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.

"We drew Judge Ingersol."

designated themselves a "special nigger arrest team"—SNAT). See also PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* (1995) (discussing police violence in general); JOHN P. CRANK, *UNDERSTANDING PUBLIC CULTURE* 123, 206-15 (1998); JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL* 41-68 (3d ed. 1994) (discussing 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 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 Delgado, *Black Crime*, *supra* note 1 (on social construction of black crime as threat).

5. See James Q. Wilson & George L. Keilling, *Broken Windows: The Police and Neighborhood Safety*, *ATLANTIC MONTHLY*, Mar. 1982, at 29 (hypothesizing that blight encourages criminals to move in).

6. Compare the professor's plight with John Kifner, *Thousands Call on City Hall to Confront Police Brutality*, *N.Y. TIMES*, Aug. 30, 1997, at A-1 (detailing New York City Mayor Rudolph Giuliani's crackdown on crime and some of its unintended consequences, including an increase in police harassment and brutality).

"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 the burglar 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?"

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

7. See John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2d, 277, 277-81 (1998) (discussing various recent efforts to impeach and chastise judges). See also *infra* note 10 and accompanying text (discussing efforts to recall judges, such as Penny White of Tennessee, who angered conservatives by her rulings in cases of unpopular litigants).

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."

"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 telling me about the committee.

"The association just set up this committee, which consists of several lawyers, myself and one other law professor, and the chief judge of this court.⁹ The association had 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, mainstream lawyers, and citizens about the judiciary's independence."¹¹

8. See Delgado, *Chronicle*, *supra* note 1 (Professor discusses the pros and cons of various LL.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 recently. See AMERICAN BAR ASS'N, COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997) [hereinafter ABA].

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?*, 72 N.Y.U. L. REV. 308, 313 (1997). For a discussion on judicial independence generally, see *Federal Judicial Independence Symposium*, 46 MERCER L. REV. 637 (1995); Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703 (1997). See also House Passes "Judicial Activism" Bill, THE THIRD BRANCH, May 1998, at 1 [hereinafter *Activism*] (describing measure backed by "the right wing" to curb judicial initiative and discourage prisoner suits).

11. See ABA, *supra* note 9, at 5-6, 19, 22-23, 49; Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985) [hereinafter Bell, *Civil*].

"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 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 1980s. Several of those trials featured flimsy evidence and dubious circumstances."¹³

Rights Chronicles]. 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. See MARY L. VOLCANSEK, *JUDICIAL IMPEACHMENT* 6 (1993). 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. See *id.* 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. See *id.* at 5.

13. The three federal judges impeached and convicted by the Senate during the 1980s 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). See *id.* at 8. See also ABA, *supra* note 9, at 47-48. For a discussion of state impeachment, see Jerome B. Meites & Steven F. Pflaum, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 *LOY. U. CHI. L.J.* 741 (1998).

"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.

"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 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

14. Harry Eugene Claiborne, a maverick judge who mistrusted government, had jostled with the federal government and various agencies several times in the past. Claiborne maintained 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 Nevada Bar Association found that Claiborne was a victim of a "federal vendetta." See VOLCANSEK, *supra* note 12, at 24, 63.

15. See Mario Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. REV. 298, 299-302 (1997); ABA, *supra* note 9, at 22-23, 49; Yoo, *supra* note 7, at 279-82. For a discussion of 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. See John M. Broder, *Clinton, Softening Slap at Senate, Names 'Acting' Civil Rights Chief*, N.Y. TIMES, Dec. 16, 1997, at A-1.

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); Hal R. Liebman, *Should Lawyers be Free to Publicly Excoriate Judges?*, 25 HOFSTRA L. REV. 785, 791-95 (1997).

18. See Bright, *supra* note 10, at 308; ABA, *supra* note 9, at 38-39, 63; Cuomo, *supra* note 15, at 302-03; Leslie W. Abrahamson, *The Judge's Ethical Duty to Report Misconduct by Other Judges, Lawyers, and Its Effects on Judicial Independence*, 25 HOFSTRA L. REV. 751, 791-95 (1997) (noting that running for re-election is becoming increasingly demanding and costly).

19. See ABA, *supra* note 9, at 15.

"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 year before last."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 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 of 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 isn't 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

20. See Jerome J. Shestack, *The Risks to Judicial Independence*, A.B.A. J., June 1998, at 8; *What Is Judicial Independence?: Views from the Public, the Press, the Profession, and the Politicians - An Edited Transcript of a Panel Discussion at the American Judicature Society's 1996 Annual Meeting*, 80 JUDICATURE 73 (1996). See also Archibald Cox, *The Independence of the Judiciary: History and Purpose*, 21 U. DAYTON L. REV. 565 (1996).

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

surge. My own protégé, trying to put me in jail," I groused, then smiled to let Rodrigo know I was joking.

"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 as a deflection 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 constrains 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 in height 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."

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

"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, 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 as millionaires. They have 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

23. See Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *Race, Instrumentalism*, *supra* note 1.

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 Delgado & Stefancic, *Norms*]. See also ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); Delgado, *Empathy*, *supra* note 1.

26. See COVER, *supra* note 25.

27. See, e.g., Delgado & Stefancic, *Norms*, *supra* note 25.

28. See Yoo, *supra* note 7, at 277, 281.

29. For example, federal judges' compensation may not be reduced while they are in office. See U.S. CONST. art. III, § 1.

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

31. See U.S. CONST. art. III, § 1.

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 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

32. See *supra* note 29.

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

34. For a discussion of voir dire, see JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* 522 (2d ed. 1993).

35. See *id.* at 553 (discussing judgment n.o.v.).

36. See WAYNE R. LAFAVE & GERALD H. ISRAEL, 3 *CRIMINAL PROCEDURE* 41 (1984) (discussing jury sequestration).

37. See *id.* at 185 (discussing gag orders issued to avert jury contamination).

38. See *id.* at 464 (discussing the role of jury instructions in limiting that body's options).

39. See Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994) [hereinafter Delgado & Stefancic, *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 (1997) (describing the recent pattern of reversals of Ninth Circuit decisions); Editorial, *Decency and the Arts*, DENVER POST, June 27, 1998, at B9; 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 B3 (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).

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 PLATTITUDE

"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 cls⁴¹ 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.⁴² 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 decision-maker. CIs refined this critique and applied it to a host of areas, including torts,⁴³ contracts,⁴⁴ constitutional,⁴⁵ and labor law."⁴⁶

"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. 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,⁴⁷ judicial restraint,⁴⁸ law

41. Critical Legal Studies.

42. See David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW* 11 (David Kairys ed., 1982).

43. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563 (1982).

44. See Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, in *THE POLITICS OF LAW*, *supra* note 42, at 172.

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

46. See Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW*, *supra* note 42, at 65.

47. See Judge J. Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 *CAL. W. INT'L L.J.* 341, 341 (1998) (pointing out that criticism of judges and demands for accountability are worldwide).

as the least dangerous branch,⁴⁹ strict construction,⁵⁰ checks and balances,⁵¹ and the will of the people should not be lightly set aside."⁵²

"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 minorities⁵³—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."⁵⁴

"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.'⁵⁵ 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.⁵⁶

"Or bad," Rodrigo countered. "As when the Supreme Court backtracked from *Brown v. Board of Education*⁵⁷ or cut back on affirmative

48. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (praising judicial self-restraint); *Activism*, *supra* note 10.

49. See BICKEL, *supra* note 48.

50. See Stanley C. Brubaker, *Comment to Cox*, 47 MD. L. REV. 162 (1987).

51. See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (articulating the theory of tripartite government in which each branch limits the other). See also THE FEDERALIST NO. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating courts are the institution best able to enforce limitations on government); *Activism*, *supra* note 10.

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

53. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 14 (2d ed. 1988).

54. See ABA, *supra* note 9, at 6, 23; *Activism*, *supra* note 10 (suggesting that courts must fearlessly defend constitutional rights). *But see* BELL, *supra* note 1 (pointing out that when the celebration stops, hard won gains are apt to quietly slip away); Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995) [hereinafter Delgado & Stefancic, *Social Construction*].

55. 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).

56. I thought of cases in which the Court has expanded the rights of school children, see *Goss v. Lopez*, 419 U.S. 565 (1975); gays, see *Romer*, 517 U.S. 620; African Americans, see *Brown v. Board of Educ.*, 347 U.S. 483 (1954); and women, see *Frontiero v. Richardson*, 411 U.S. 677 (1973).

action,⁵⁸ search and seizure law,⁵⁹ liability of police who engage in high-speed chases,⁶⁰ and the right to abortion.⁶¹ Not to mention your own case.”

“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 not 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?”⁶² 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?”⁶³

“Of course,” I said. “Federalist Ten sets out the theory.⁶⁴ 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 Congress or curb a president bent on skull-duggery, as with Nixon during the Watergate crisis?”⁶⁵

“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

57. 349 U.S. 294, 301 (1955) (“*Brown II*,” ordering desegregation of Southern schools “with all deliberate speed”). See also *Milliken v. Bradley*, 433 U.S. 267 (1977) (rejecting metropolitan-wide remedy for segregated schools).

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

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

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

61. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

62. See *supra* notes 42-55 and accompanying text.

63. See *TRIBE*, *supra* note 53, at 18-19; *ABA*, *supra* note 9, at 5.

64. See *supra* note 51.

65. See generally *CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN* (1974) (discussing this sorry chapter in recent U.S. history). 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).

vital check on an out-of-control judiciary that is unresponsive to the will of the people.”⁶⁶

“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,” I added.⁶⁷

“A perfect stand-off,” Rodrigo said. “Both sides invoke the same value, certain the other is wrong in hijacking 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 because of its failure. But I do agree that one can’t 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, both 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.⁶⁸ Even before that, if too independent, they won’t get confirmed.⁶⁹ In this age, that doesn’t take much independence at all.”

66. See *supra* notes 10, 15, 19, 47-52, and accompanying text; Dan Carney, *Striking Controversial Provisions, House Waters Down Bill Limiting Federal Judges’ Powers*, CQ WEEKLY, Apr. 25, 1998, at 1074-75. 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); ABA, *supra* note 9, at 44 (opposing this proposal).

67. See *supra* notes 17-20 and accompanying text; Carney, *supra* note 66, at 1074.

68. See Kairys, *supra* note 42.

69. See *supra* notes 11, 17-18, and accompanying text; *infra* notes 71-72. See generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* (1997) (discussing the process of judicial selection).

"I can certainly think of examples," I said. "One Supreme Court nominee got thrown out because he smoked marijuana decades earlier.⁷⁰ And you know what happened to Lani Guinier⁷¹ and Bill Lann Lee.⁷² 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: One should be in no particular person's thrall, while leading an average life and doing ordinary, bureaucratic 'normal science.'"⁷³

"The demography of the federal bench, at least, bears you out," I conceded.⁷⁴ "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 groups, and giving careful consideration to Ruth Colker's antisubordination interpretation of Equal Protection jurisprudence."⁷⁵

"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?"⁷⁶

"In connection with cloning and human procreative technologies?"

"Exactly," Rodrigo replied. "Proposed in modern times, at least, by Laurence Tribe,⁷⁷ but foreshadowed in Continental philosophy, structural

70. See Editorial, *Behind the Ginsburg Smoke*, N.Y. TIMES, Nov. 10, 1987, at A34 (discussing the rejection of Supreme Court nominee Douglas Ginsburg).

71. For a step-by-step account of her confirmation struggles written by the candidate herself, see LANI GUINIER, *LIFT EVERY VOICE* (1998).

72. See Broder, *supra* note 16, at A1 (discussing Mr. Lee's difficulties).

73. The term "normal science" was coined by Thomas Kuhn. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). "Normal science" refers to inquiry conducted within the reigning paradigm—safe, incrementalist, and familiar.

74. See *supra* note 22 and accompanying text.

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

76. See DELGADO, *CHROMOSOMES*, *supra* note 1.

77. See TRIBE, *supra* note 53, at 1673-87; Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

due process means that in contentious cases falling in a zone of moral flux, courts should afford the most complete, open hearing.⁷⁸ 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.⁷⁹ 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 favor by forcing the most open treatment. Later, when we know the geography of the area, we can give litigants more cursory, standardized treatment."⁸⁰

"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."⁸¹

"Or the cross-burning case," I interjected.⁸² "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."⁸³

"Although those were cases presenting novel, emerging issues of great social importance," I concluded, "the judges treated them as though someone proposed a rule limiting bookshops to one hundred 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."

"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."⁸⁴

78. See Tribe, *supra* note 77, at 283.

79. See *id.* at 290.

80. See *id.* at 314. See also DELGADO, CHROMOSOMES, *supra* note 1 (making similar proposal).

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

82. See *supra* note 55 and accompanying text.

83. See *supra* note 81.

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

"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."⁸⁵

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

"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.⁸⁶ 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."⁸⁷

"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*⁸⁸ and *Brown v. Board of Education*,⁸⁹ very few judges exercised their independence to rule against Jim Crow or official segregation in schools, beaches,

85. See Robert Cover, *Foreword: Nomos & Narrative*, 97 HARV. L. REV. 4, 11 (1983).

86. On this group of Montana-based radical libertarians, see Jon C. Blue, *One Nation, Divisible, with Liberty for None*, N.Y. TIMES, Sept. 2, 1988, at A27.

87. 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, 19 n.91. See also CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 547-604 (Richard Delgado & Jean Stefancic eds., 1997) (discussing white supremacist movements).

88. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

89. 347 U.S. 483 (1954).

and public facilities.⁹⁰ They blandly did 'ordinary science,' which meant ruling against integration."

"The same happened during other times of stress," I added. "Few judges stood up against McCarthyism or the Salem witch trials,⁹¹ even fewer against slavery.⁹² And everyone knows that the German judiciary and bar meekly went along with the excesses of Nazism and the Holocaust.⁹³ Cases like *Buck v. Bell*⁹⁴ and *Dred Scott* 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"

"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.

90. See, e.g., LEON HIGGINBOTHAM, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996). Cf. Delgado & Stefancic, *Norms*, *supra* note 25 (discussing weakness of judges in general).

91. See, e.g., WILLIAM F. BUCKLEY, JR. & L. BRENT BOZELL, *MCCARTHY AND HIS ENEMIES* (1954); PETER CHARLES HOFFER, *THE DEVIL'S DISCIPLES: MAKERS OF THE SALEM WITCH TRIALS* 154-78 (1996).

92. See LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL YEARS* (1978).

93. See MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* 2-3 (1998).

94. 274 U.S. 200 (1927).

95. See Delgado & Stefancic, *Norms*, *supra* note 25, at 1929-31, 1934-52.

96. 163 U.S. 537 (1896).

97. 478 U.S. 186 (1986).

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' jurisprudence, see Stuart Taylor, Jr., *The Problem with Clarence Thomas*, 19 LEG. TIMES, June 1996, at 21.

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

100. See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996). Cf. 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).

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’ counter-majoritarian 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 become 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,

101. See Chin, *supra* note 100, at 157-66.

102. See *id.* at 151, n.*.

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

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

105. See Bell, *Civil Rights Chronicles*, *supra* note 11, at 32.

and many of 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 jaywalking, 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."

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 the conversation.

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 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*, *Dred Scott*, *McClesky v. Kemp*,¹⁰⁷ *Bowers v. Harwick*¹⁰⁸—came down when the Court was not under great pressure. And some of the best decisions—*Brown*,¹⁰⁹ *Hernandez*,¹¹⁰ and in Australia, *Mabo*¹¹¹—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*¹¹² decision, the

106. *See id.*

107. 481 U.S. 279 (1987).

108. 478 U.S. 186 (1986).

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

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

111. *Mabo v. Queensland* (1992) 175 C.L.R. 1 (upholding aborigines' land claims against doctrine of *terra nullus*—that at the time of settlers' arrival, Australian land was essentially unowned and ripe for taking).

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

reversal of *Metro Broadcasting*,¹¹³ or *Brown II*.¹¹⁴ 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.¹¹⁵ We called it the empathic fallacy, if I recall.”¹¹⁶

“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 them.¹¹⁷ Experience shows that this does not happen. The voice of the reformer is simply not heard, or dismissed as incoherent or absurd.¹¹⁸ 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.¹¹⁹ 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.”¹²⁰

“And as we mentioned before, when black jurors decline to convict a black defendant, law and order types are outraged and demand reforms so

113. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding minority preference in issuance of broadcast licenses).

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

115. See Delgado, *Empathy*, *supra* note 1, at 68-74. On the related “reconstructive paradox,” see generally Delgado & Stefancic, *Social Construction*, *supra* note 54.

116. See Delgado, *Empathy*, *supra* note 1, at 69-73. 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, 1281 (1992) [hereinafter Delgado & Stefancic, *Images*].

117. See Delgado & Stefancic, *Images*, *supra* note 116, at 1259-61, 1281.

118. See *id.* at 1281.

119. See *Idill*, *supra* note 22, at 114-15 (discussing Higginbotham’s ordeal).

120. See *id.*

that this cannot happen again.¹²¹ 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.¹²²

"Right. The real aim of those seeking Constitutional amendments allowing for congressional overturning of court judgments¹²³ 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 nonnormative ways, as you call them."

"In theory, yes," Rodrigo conceded. "While liberals and the ABA rightly stand up for the concept of judicial independence,¹²⁴ 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 ninety-nine out of a hundred cases when the judge does the predictable thing."

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

121. See, e.g., Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, 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). See also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (discussing legal storytelling).

122. See *supra* note 40 and accompanying text.

123. See BORK, *supra* note 66, at 117 (setting forth this proposal). But see Cuomo, *supra* note 15, at 300 (criticizing Judge Bork's proposal).

124. See *supra* notes 9-11 and accompanying text.

"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.

"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 lawyer friend might have something to say on it. The idea is 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 makes is that harsh criticism, especially from lawyers, tarnishes the image of the legal system,¹²⁵ 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 . . ."

125. See, e.g., Freedman, *supra* note 17 (discussing but not subscribing to this view).

"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?"¹²⁶

"Rule 11 cases present some notorious examples," I said.¹²⁷ "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."¹²⁸

"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 thirty 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

126. See *supra* notes 38-39 and accompanying text. See also Freedman, *supra* note 17, at 730; Kaye, *supra* note 10, at 715-20.

127. See FED. R. CIV. P. 11(c) (permitting courts to punish parties and attorneys who file frivolous lawsuits).

128. See Delgado & Stefancic, *Scorn*, *supra* note 39.

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.¹²⁹ 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.¹³⁰ The classic satirists, like Swift, Voltarie, 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."¹³¹

"So, you're saying that judges can dish it out, but can't take it," Steinglass said. Rodrigo gave a "something like that" nod, 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.¹³² We defer to political questions.¹³³ In diversity cases, we are oh-so-careful not to overstep on state sovereignty.¹³⁴ 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, "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."

129. See *id.* at 1062-63.

130. See *id.* at 1063.

131. See *id.* at 1063-65.

132. See *supra* notes 48-49 and accompanying text.

133. See *TRIBE*, *supra* note 53, §3-13, at 96-107.

134. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts are required to apply state substantive law in diversity of citizenship cases).

"Please do," we said in unison. Taking a deep draught of his coffee and a quick glance at his watch, Steinglass began.

CONCLUSION: STEINGLASS MAKES THE CASE FOR
AN INDEPENDENT JUDICIARY AND AN INDEPENDENT BAR, AND
WE CONCLUDE ON A NOTE OF RECONCILIATION

"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,¹³⁵ George Annas,¹³⁶ and Michael Stolleis¹³⁷ 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*,¹³⁸ 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 nonadversarial, 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."¹³⁹

"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

135. See ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1986).

136. See *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* (George J. Annas & Michael A. Grodin eds., 1992).

137. See STOLLEIS, *supra* note 93.

138. 329 U.S. 495 (1947).

139. Arthur Miller first pointed out this connection to me.

memoranda would be required to be shared with the other side.¹⁴⁰ 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 the 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' 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' 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.¹⁴¹

"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."

"Hmm," 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."

140. See *Hickman*, 329 U.S. at 509.

141. See *supra* notes 23-26 and accompanying text (discussing how liberal legalisms simultaneously advance and retard the search for social justice).

“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 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.’”