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Judicial Influences and the Inside-Outside Dichotomy: A Comment on Professor Nagel Ira C. Rothgerber Jr. Conference on Constitutional Law: Constitutional Law and the Experience of Judging

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JUDICIAL INFLUENCES AND THE INSIDE-OUTSIDE DICHOTOMY: A COMMENT ON PROFESSOR NAGEL

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Professor Nagel and Professor Brilmayer are both correct. It *is* troubling that judges sometimes are pressured, influenced by outside forces, and sometimes even respond to those pressures. At one extreme end of the spectrum you have mail bombs aimed at instilling terror in judges who might rule a certain way in civil rights cases. All of us find those unacceptable. Plebiscites and lynchings, Robert's examples, repulse us as well. Strident marches that culminate outside the Supreme Court building and coordinated, mass mailings to Supreme Court justices orchestrated by special-interest groups fall in a middle region. Some of us might think these are okay, others not. Material appearing in law reviews or discussions overheard by a justice while visiting in the Harvard Law School faculty lounge are acceptable—although we might note self-interest operating here. These are the types of things law professors do, so what harm could they possibly cause?

Outside influences are troubling because, depending on the various views of judging that Robert reviews, we want judges to be "insulated," faithful to constitutional text, neutral, concerned about process or the development of coherent moral concepts—functions that seem incompatible with listening to clamor outside the court building or worrying that if you rule or write the wrong way, some extremist will send you a mail bomb.

But, these extreme examples aside, what distinguishes between the bad and good types of clamor, between the types of outside influence that are tolerable, maybe desirable, and those that are not? Robert evaluates three ways of drawing those distinctions based either on the type of opinion expressed or the speaker's formal or informal authority. None stands up under scrutiny.

Consequently, Robert's excellent paper concludes that we must tolerate, even welcome, a range of outside influences on the courts. I agree with much that he says. I do have, however, a slightly different

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"take" from his or Professor Brilmayer's on the nature of the problem. And because the way one characterizes a problem like the one of outside judicial influence affects one's outcome, he and I come to different conclusions.

I want to raise a slightly heretical question. I wonder whether pressure and influence on judges trouble us not so much because they are inconsistent with classic liberal theories of judicial review, as because they reveal something we prefer to keep from ourselves about the ordinary, daily business of judging—namely, that legal reasoning is often radically open-textured and indeterminate and that every opinion contains somewhere a non-legal leap, often a value judgement.[1] We want the public—and we ourselves also want—to believe that law is exact, fair, neutral, dispassionate, a science. We want to believe that every case has one right answer, that trained practitioners and judges can find that answer by applying precedent, authority, and well-known canons of judicial reasoning, statutory interpretation, and the like.

If the public knew that a trained lawyer can read any opinion and put his or her finger on the point where the judge makes a value judgment, selects this rather than that line of authority, this precedent, this formulaic legal maxim rather than that—the point, in short, where the judge is saying I want this party to win—then we would all be in trouble. So, this side of legal reasoning must be kept well hidden.

Outside influences, then, disturb us because they are these things writ large. They imply that law and judging contain more elements of will, habit, and simple preference than we would like.[2] So, Robert is right: we *do* have a mythology opposing outside influences, one that cannot be grounded in theories of judicial review. But his solution, which is to admit—even to welcome—outside sociocultural factors leaves us little better off. At the end of his paper, Robert urges that judges "pay attention to virtually our whole political and social history . . . not only what has been desired and said but also what has been accepted and left unspoken."[3]

This is a much more sophisticated view of judging than that em-

1. For a discussion of the indeterminacy thesis, see generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) (collection of essays on critical legal studies).

2. For more complete discussions of this general thesis, see Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990); Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 766 VA. L. REV. 95 (1990) [hereinafter *Just a Story*]; Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter *Legal Storytelling*]; Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) [hereinafter *Ever Saved?*].

3. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 700-01 (1990).

braced by legal formalism, the view the public holds of law. In Nagel's broader view, judges make policy, and they make it by reference to our entire cultural history. But I wonder if this doesn't still exemplify—at a higher level—yearning for one answer, for certainty. To make "wise and moral public policy," as Robert puts it, judges will consult a range of cultural and historic narratives and expressions.

The trouble, as I've been urging in a series of law review articles with the words "story" or "storytelling" in their titles, is that we do not, and probably cannot, do that.[4] Instead we attend to stories—to explanations of culture and experience—that are familiar, that are safe, that validate our own experiences. Law professors are not exceptions to this generalization, and I would bet most judges are not either. So, stories and interpretations that deviate from our own seem strange and foreign, unattractive, coercive, "political." They carry little authority. We dismiss them, give them little weight. This may explain why dissenters often seem to be playing to the crowd, being political. Let me give you an example. During the Constitution's Bicentennial, every hamlet, every city, every professional association celebrated the signing of our founding document. Lawyers and law professors gave speeches extolling that paper. Law reviews devoted pages and entire issues to the Constitution and its wondrous history. The year passed in a sort of rosy glow. But for many people of color, and for some feminists, there was little rosy glow. The celebrations rang hollow, for we were well aware that the original document co-existed with slavery and female subjugation, indeed implicitly or explicitly protected the former institution in no fewer than ten passages.[5] Our voices were distinctly absent from the songs of praise.

To us, the celebrations sounded coercive, with overtones of cultural supremacy. It took Justice Thurgood Marshall, writing in the Harvard Law Review, to give voice to some of these misgivings.[6] The point is not whether Marshall or the celebrants were right. The point is in the contrast. One interpretation of constitutional history—of the interpretation to be given our most basic document—struck one group as self-evident and obvious, another as dangerously wrong.

We *could*, of course, seek out narratives and points of view other than our own, thereby enriching ourselves in the process. But the tragedy is that we won't, except to a very limited extent. Cultural

4. *See Just a Story*, *supra* note 2; Delgado & Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989); *Legal Storytelling*, *supra* note 2.

5. The clauses are reprinted and discussed in *Ever Saved?*, *supra* note 2, at 933 n.42.

6. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

narratives and understandings other than the ones we are used to will always strike us as political, coercive, false, one-sided, irresponsible, not worthy of our consideration, and certainly not worth incorporating into law. We construct social reality. This construction is the greatest act of power we can carry out. And we're not about to share that power lightly with persons not of our kind or social class.[7]

And so, Robert's observation that we need to attend to more than mere doctrine and precedent, while true, helps only a little. We escape from one form of prison—legal formalism—to a larger one, but no less a prison. And it is no safer, no more secure, no more defensible in the one-true-answer sense than the other one.

A parting word about silences, eloquent and otherwise. Silences may, as Robert points out, indicate acquiescence and satisfaction. But they, too, are indeterminate. Silence may indicate consent, but may just as easily signal that the silenced group has just plain given up or been browbeaten into silence. Feminists write about silencing of viewpoints and voices.[8] Men complete sentences for women and co-opt their arguments. Many worry why women and minorities do not speak up in the classroom; surely it cannot be anything that *we* are saying or doing, can it?

The interpretation one puts on silence is everything, as it is with cultural expressions of a positive sort, like a political speech or a cultural symbol. And so, we are no closer to what it all means for judges. And our dilemma is just as troubling as before.

7. *See* Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990), making this point.

8. Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 MIAMI L. REV. 29, 42 (1987).