THE INDEPENDENCE OF JUDGES

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I. INTRODUCTION

One might begin by asking why we are having this symposium. "Judicial independence" arises infrequently in litigation, so there are few snarling doctrinal knots to loosen and even fewer precedents to ponder. The truth is that our legislative and executive branches of government rarely attempt to interfere with the decisions of the federal judiciary. Of the few cases that have been decided, most seem surprisingly minor in their importance and insight.[1] It seems to us immensely difficult to make many judgments about judicial independence in the abstract that are likely to win widespread agreement, and in this area abstraction abounds. Even lawyers, for all their willingness to take sides on any issue, prefer to have some good precedent or doctrine on which to rely, much as cowpunchers prefer trained horses. The notion of judicial independence—what it is and what it requires—remains largely undefined because few important battles have been fought over it. Ever since Chief Justice John Marshall's vigorous defense of judicial review,[2] there has evolved a general consensus in America that judicial independence is a good thing, even if none of us know precisely what it is. When independence is neither challenged nor threatened there is little incentive to make clear and distinct the core concepts; war forces you to

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1. *See, e.g.*, United States v. Klein, 80 U.S. 128 (1871) (holding unconstitutional a congressional limitation on Supreme Court jurisdiction); Hanna v. Plumer, 380 U.S. 460 (1965) (holding Congress can prescribe rules of procedure for federal courts); Mistretta v. United States, 488 U.S. 361 (1989) (holding federal sentencing guidelines constitutional).

2. *See* Marbury v. Madison, 5 U.S. 137 (1803).

consider exactly what you wish to defend. In such an environment, scholars can nary afford to believe that their wisdom and thoughtfulness will actually influence the shape of the law. Inactive doctrine is also impenetrable doctrine.

Ultimately, scholars have symposia such as this because they are intellectually interested, and not because they hope to influence doctrine. Judicial independence is a sacred idea in American constitutionalism, and scholars think about it because it is an interesting problem on the level of theory. As a theoretical matter, judicial independence has been approached from few different angles. Almost all discussions of judicial independence—including those of this symposium—focus on the undeniably important dilemma of executive or legislative interference with the decisions of the judiciary. The common concern of these discussions is the entangling of the three separate branches of government in a way that the judiciary's decisions are pressured or influenced.[3] Commentators emphasize the Constitution's salary and tenure provisions,[4] and the problem of congressional limitations on the jurisdiction of the federal courts.[5] This is essentially a *structural*

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3. *See, e.g.*, Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995).

Chief Judge of the Sixth Circuit Gilbert Merritt's objection to Congress enacting a presidential line-item veto over, among other things, the budget of the judiciary reflects a structurally-defined version of judicial independence. The Chief Judge's concern is that the President might be able to interfere with adjudication by exercising the veto power over appropriations for the judiciary. The executive branch is the most active litigant in the federal courts and presidents might use or threaten the use of the line-item veto to punish adverse rulings (something that Congress, which traditionally authorizes all appropriations, will have little chance to do because Congress, as a body, rarely has cases pending in the federal courts). According to the Chief Judge, "[T]he balance would be titled dangerously toward executive dominance and control over the judiciary if the president had line-item veto authority over the judicial branch." *See* John Flynn Rooney, *Federal Judiciary Should Be Exempt From Line-Item Veto, Congress Told*, CHI. DAILY LAWYER, Jan 13, 1995, at 1.

4. U.S. CONST. art. III, § 1.

5. *See, e.g.*, Lawrence Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). For further examples, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205 (1985); Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819 (1983). This debate is not new. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 823-27, 892-98 (1987) (1833).

approach, in that judicial independence is conceived of as something arising out of various provisions of the Constitution pertaining to the structure of government.

There are, however, other possible ways to think about judicial independence. We want to engage one such possibility to see if it might be profitable. We want to consider what judicial independence means from an *introspective* angle—from the inside-out as it were, seen through the judges' eyes. An introspective approach seeks to understand judicial independence not by reference to the structural organization of the three branches of government, but by reference to the judge's own perception of her ability to adjudicate cases. Our model is a self-reflective judge, sitting alone in chambers, pondering the ways in which she is independent. Grappling with what judicial independence looks like from an introspective angle may teach something new about judicial independence and what it requires.

More specifically, an introspective understanding of judicial independence reveals that judges occupy a place of high tension, located at the intersection of numerous different restraints and liberties. An introspective understanding indicates that structural arguments are incomplete because they focus solely on the threat posed to the judiciary by the other two branches of government, ignoring what is made clear by introspection, the threat to independent adjudication posed by and within the judiciary itself. An introspective approach also shows that many forms of constraint felt by judges that interfere with independent adjudication exist beyond the realm of law and legal doctrine, partaking of the realm of culture. Finally, it shows that the structure of the Constitution, while sometimes important to the perspective of a single judge deciding a single case, is simply one part of the foundation of independence. Some of this may seem to have little relevance for how to interpret the Constitution or how to decide controversies involving interferences with independent adjudication. It is nevertheless significant if we want to come to a better theoretical understanding of what it means to have "independent" judges and of what constraints bind judges from asserting that independence throughout the exercise of the judicial power.

Part II of this Article presents the argument for moving beyond structural analyses of independence. This Part defines what it means to understand judicial independence "introspectively" and describes the problems with a purely structural approach. Part III undertakes one interpretation of what judicial independence means from an introspective vantage point. It considers the types of restraints imposed on judges that although hindering the exercise of independent adjudication, evade detection by a purely structural argument.

One note before we continue. In keeping with the theme of this symposium, our analysis centers on judges sitting on the federal bench. This generally means the federal trial judges in the district courts because they make up the majority of the federal judges. The arguments made and insights offered may or may not apply to other judges, depending upon where they sit and their duties.

II. WHY GO BEYOND STRUCTURE?

A. *Structure: A Partial Picture of Independence*

Structural definitions of judicial independence are mainly negative. They tell us what judicial independence is not, rather than what it is. By looking at what members of the executive or legislative branches of government cannot do, a structural approach indicates what is inconsistent with independence. A judge is independent in this view because the President cannot fire her and members of Congress cannot cut her salary nor transfer her to East Glockenspiel, Illinois solely to hear foreclosure cases. Structural understandings inform us of those things that impinge on judicial independence without revealing just what is being impinged upon.

That may be the best we can do; some things perhaps can only be defined by what they are not. Still, a judge might say, "One of the things I am paid to do as a judge is be independent, so it would be nice to know what that is." She might want to know what independence consists of, not only what it prevents others from doing. But those who write about the structural protection of independence seldom write about the independence of a single judge, they write instead about the independence of the judiciary. The title of this symposium is indicative: "Federal Judicial Independence" rather than, say, "Federal Judges' Independence."

We do not propose to advance understanding of independence by concluding that the key to knowledge lies in the distinction between "judicial independence" and "judge's independence," only the latter of which counts. It would be wonderful to find such a simple key, but the key does not work by itself. Nevertheless, the independence of a judge, as an individual adjudicator, is both an important and neglected concept that differs from the concept of the independence of the judiciary, as an institution. Nor are the two concepts entirely complementary. The institution of the judiciary imposes constraints on and directs the decisions of individual judges. An "independent judiciary" restrains the "independence of the judge." Unscrutinized when we look at the structural provisions of the Constitution are those interferences with a judge's independent adjudication that arise out of, for example, the

actor's membership in the judiciary. This oversight is problematic in that, ultimately, all judicial acts are those of a single judge, even in a court where it takes the votes of five single justices to enter judgment. Defining independence by way of structure causes one to ignore a host of constraints on individual judges that stem from, among other things, the judiciary itself, legal culture, and the social environment of judges.

Even if structural analysis is not the only way to understand judicial independence, obviously structure always counts in this country. The text of the Constitution invites structural arguments, and all constitutional analysis must begin, everyone agrees, with the words of the text—though where it ends is subject to much debate. You read the document and though the Constitution does not use the words "judicial independence," Article III contains provisions assuring the tenure and salary of judges and you infer that this must be the root of judicial independence.

A structural approach is, however, likely to include only bits and pieces of what it is to be independent to a judge because it is inherently concerned only with the relationships between the branches of government. Consequently, it obscures the constraints on independence imposed on judges from within the judiciary. Even if the other branches of government cannot remove a judge from a case or mandate a certain decision's outcome, other judges may be able to do just that, either through disqualification or normal appellate proceedings. Some might say, well, that's a different story. But is it really? It doesn't much matter to the judge who restrains him, he is restrained. Who imposes these restraints and controls him may present a difference with regard to how the judge feels about the legitimacy of our governmental system, but there is little difference with regard to his independence in adjudicating cases. In either instance he is constrained, often against his will, to a particular outcome or course of behavior.

A purely structural analysis of judicial independence might be defended by the claim that structural independence is the sort of independence most important to the litigants whose cases are decided in federal courthouses. Litigants, particularly the politically unpopular, want to know that the other (majoritarian-influenced) branches of government will not interfere with their cases. But this ignores the real world context of litigation. Most citizens who come in contact with the courts are not politically unpopular and, much more importantly, would not insist on judges being independent of the other branches of government if the litigants thought "dependence" was more likely to affirm their vision of justice in the particular case. Perhaps this is why few litigants refuse to have the government join their side as amicus in a case. Most probably hope the backing of the government will itself

prove weighty with the judge. Litigants welcome the government's arguments, but they really want the stature of the government to impress the judge and perhaps gain a little edge in the litigation. If this view of litigant preferences is correct, then it is in tension with our aspirational ideals for the administration of justice. But litigants are not expected to tend to these aspirations; they are only expected to abide by the rules. Judges (and the rest of the disinterested society) are the stewards of ideals of justice and are supposed to give equal attention to the arguments of a carnival bozo as to those of the Attorney General if the two go head-to-head in a case. According to principle, it is the arguments that ought to count, not who makes them, but one can hardly condemn a litigant who thought, no matter how cynically, that having the Attorney General, not a carnival bozo, on her side would bode well for her pursuit of "justice."

Most people (not just litigants) are probably less concerned with structurally-defined judicial independence than most legal commentators because the general public may not perceive the powers to be really all that separate to begin with. Much of the citizenry may unself-consciously accept the legal realist views of judicial decision-making that law students still fight so hard against.[6] If the pageant of the Supreme Court confirmation process does not sufficiently communicate the message that judges are indeed political and that law is chosen and made, not discovered and found, then it surely gets across in the mass media through the daily reporting of the news. It is now the rule rather than the exception that news coverage of major court decisions include a run down of the presumed political leanings of the judges.[7] When the United States Court of Appeals for the D.C. Circuit ruled in the fall of 1993 that the military's policy of removing avowed homosexuals from service was unconstitutional on due process grounds,[8] *The New York Times* made a point of remarking on the supposed political biases of the judges. "Today's opinion was by the three most liberal members of the Federal appeals court here . . . . The three, who were randomly selected

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6. Two of the foremost legal realists were Karl Llewellyn and Jerome Frank. *See* Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); JEROME FRANK, LAW AND THE MODERN MIND (1930). For a history of legal realism, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 169-246 (1992).

The influence of practical experience "doing" law, rather than just studying it, may dispel lawyers from their idealism and teach them the personal (and political) idiosyncrasies of judicial decision-making. *Cf.* Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989).

7. The example we provide in the text could be supplemented with those cited in Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y. U. L. REV. 1185, 1192 n.37 (1992).

8. *See* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993).

for the case, were all appointed by President Jimmy Carter and are the only members [of the circuit] . . . appointed by a Democrat."[9] When the en banc panel eventually overturned the ruling a year later,[10] *The Washington Post* chimed in: "[Judge] Silberman[, the author of the ruling,] was joined by six judges, all of whom were appointees of presidents Ronald Reagan and George Bush. A dissent was filed by two appointees of President Jimmy Carter and a judge selected by President Clinton."[11] And this is from America's paper of record and one of the main aspirants to this title; what do they say in the *New York Post* or the *Modesto Morning Star*?

The public perception of structural judicial independence—or the lack of it—is influenced as well by mass market fiction and film. Judges seldom approve completely of the image of their work found in popular entertainment. There is a certain inevitability about this; dramatic necessity often requires that a story about a trial present the distinct prospect, indeed likelihood, that justice will not be done. Otherwise, the audience loses interest. Although many portrayals of judges show them to be principled individuals, fully capable of objective impartiality, dramatic tension is often created by portraying the possibility of political corruption of the judge. For example, in the widely popular film *Miracle on 34th Street*,[12] a judge presides over the trial of Santa Claus to determine if the jolly old fellow really exists. The judge's political sponsor tells him to decide the case in favor of the defendant Kris Kringle if he wants to retain his judgeship. And it works. But no one who watches the film rises in protest at the portrayal of this direct assault on structual judicial independence and anyone who did would be laughed into silence. Yet any competent judge who watches the film could imagine more than a few ways by which the judge could have avoided his dilemma or reached the verdict everyone wanted without the intervention of the political boss.[13] Why did screenwriter George Seaton pick the political boss to pressure the judge? Presumably because it would resonate in the minds of the general public. The process is self-reinforcing. *Miracle on 34th Street* has become a film watched ritually by large portions of the population each year on

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9. Stephen Labaton, *Military Rebuffed by Appeals Court Over Homosexuals*, N.Y. TIMES, Nov. 17, 1993, at A1.

10. *See* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

11. Toni Locy, *Appeals Court Backs Expulsion of Homosexual Midshipman*, WASHINGTON POST, Nov. 23, 1994, at A2.

12. MIRACLE ON 34TH STREET (Twentieth Century-Fox 1947).

13. In the recent remake of the film, John Hughes wrote the political boss and his pressure tactics out of the script. It is safe to say, however, that Hughes' version will not replace the original nor equal its cultural status.

Christmas Day, and like any worthwhile ritual exerts a formative influence on each generation's understandings and comprehensions of the world. As children mature into adults and learn from their experiences, they are unfortunately likely to discover more reasons to doubt the existence of Santa Claus than to doubt the existence of political influences on adjudication.

Public perception is not the be-all or end-all, nor are structural analyses of independence flawed simply because they do not sell well in the marketplace. Public perceptions are sometimes more nuanced than we know. The modern news media identifies judges by the names of the Presidents who nominated them, but the general public may understand this as shorthand for supposed political ideology and not indication of the judges owing personal loyalty to their nominators. But a political ideology shared by judge and President may entail entangling common commitments nonetheless, offering at least a kind of influence on the adjudication of individual cases.

Another reason to move away from purely structure-oriented discussions of judicial independence is that they promote a false picture of the relationship between the branches of government, replacing the dominant theme of cooperation with one of antagonism. The branches are far more likely to be interlocked than separated. For all of Chief Justice Marshall's persuasive power in *Marbury v. Madison*[14] (and for all the process-based theories articulated since *United States v. Carolene Products Co.*[15]),[16] judicial review, in the sense of reversing acts of the majoritarian legislature or the politically popular executive, is an infrequent occurrence. Most often, judges affirm the acts of legislatures and the exercises of authority by executives. It may be, as Professor Alexander Bickel thought, that judges do not overturn legislatures and executives because they want to conserve political capital.[17] It is hard to imagine *anyone* intended or intends the "separation of powers" to mean the "war of powers." It may also be that, in most instances, the Congress, the President, and the judiciary are all reading from the same page (the Constitution) and all read the page in pretty much the same way. Questions of role and power are easily obliterated by consensus. Or it may be that the principle of democratic decision-making, of majority rules, is deeply entrenched in the American psyche, a thing shared by just about everyone who has ever sat on the federal bench.

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14. 5 U.S. 137 (1803).

15. 304 U.S. 144 (1938). Of course, we are talking about Justice Harlan Fiske Stone's theory of judicial review suggested in footnote four. *See id.* at 153 n.4.

16. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

17. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

We will give a winking benefit of the doubt that this is what satirist Finley Peter Dunne meant when his Mr. Dooley said, "No matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."[18]

Moreover, judges tend to bestow additional legitimacy onto the actions of the other branches by affirming their legal validity, reinforcing their moral weight among the citizens and advancing the interests of the other branches. The political benefits of being legitimized by the court are significant. Congress and the Executive may refrain from challenging judicial independence because it is worth something to them; it is something they can appropriate. The other branches often gain from the judicial imprimatur of validity because it comes from a body we commonly perceive as "independent." And the legislative and executive branches can depend more or less on the appointment and confirmation process to weed out from the pool of judicial aspirants anyone believed to be a *real* radical.

Even if a few radicals slip through the cracks, the risk of being overturned in the name of independence remains minimal. Judges are more likely to say "wait" than "stop," or "go ahead on the condition that" than "never." When judges do say "no," elected officials are often the first to use the judiciary's independence for political cover. Since the exercise of judicial independence in *West Virginia Board of Education v. Barnette*,[19] any candidate for public office can easily take a forceful stand in favor of public school children reciting the pledge of allegiance at the dawn of each day "but, alas, my hands are tied." More than a few candidates for public office are pleased they do not have to stump on the pro-life platform in the post-*Planned Parenthood v. Casey*[20] world of politics, and those who do so have no reason to believe that their policies will ever take effect and truly anger pro-choice voters. Note that, in an age where we often talk seriously about constitutional amendments, such as the Balanced Budget Amendment[21] or the Flag Desecration Amendment,[22] only a handful of high-profile politicians have called (and none have pushed) for amending the Constitution to eliminate the right to terminate pregnancy. The decisions of independent judges spare

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18. Finley Peter Dunne, *The Supreme Court's Decisions*, *in* MR. DOOLEY'S OPINIONS 21, 26 (1906) (1901).

19. 319 U.S. 624 (1943) (holding mandatory flag salute and pledge of allegiance in public schools unconstitutional).

20. 112 S. Ct. 2791 (1992).

21. *See* Robin Toner, *Risking Everything For Amendment*, N.Y. TIMES, Mar. 2, 1995, at B9.

22. *See* Steven A. Holmes, *Flag Amendment Sent to House Floor*, N.Y. TIMES, June 20, 1990, at A14.

the elected officials of our government the difficulty of voting meaningfully on issues which stringently divide their electoral constituents. This may be bad for self-government, but it is one reason why judicial independence is popular with professional politicians.

All this is not to say that the structural bases of independence, such as tenure and salary protections, are irrelevant to judges—far from it. Without structural protections, independent adjudication would not likely occur very frequently. Nevertheless, the structual issues remain more or less in the background; few judges ever feel that their salary or their tenure are in doubt and subject to congressional or executive overreaching. American judges, knowing the infrequency of structural infringements of their independence and depending on our legislators and executives to share that aspect of the American political ethos calling for an independent judiciary, may come to see the structural questions as settled. They may eventually focus attention on other fault lines that appear more active. Looking away from structure, they will inevitably discover a host of different sorts of threats, impingements, and restraints to their ability to adjudicate cases independently.

B. A Short Interlocution on Appeal Judges

A different kind of structure certainly comes into play within the institution of the judiciary. We might call this sort of structure "vertical," and the traditional structure—that regarding the different branches of government—"horizontal." Independence may have different contours to a trial judge than to an appellate judge, and to an intermediate appellate judge than to a judge in a court of last resort. A trial judge has considerable independence in finding factual issues; structurally, such rulings are not generally reviewable on appeal and hence the trial judge's ruling will be final. This is not at all insignificant. What Chief Justice Charles Evans Hughes said in reference to the rise of administrative bureaucracies and their emerging legal powers holds true for the trial judge: "An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'"[23] A court of last resort may feel unique independence on findings of law for similar reasons arising out of absence of oversight. Intermediate courts may find constraints from both ends, bound from below by findings of fact and from above by precedents of law. Also as a matter of vertical structure, a trial court judge may feel more independent because she makes her own decisions

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23. *See* Charles Evans Hughes, *Important Work of Uncle Sam's Lawyers, Address Before the Federal Bar Association*, 17 A.B.A. J. 237, 238 (1931).

and they hold the day—though appellate oversight remains a distant threat. An appellate judge must be concerned with building majorities and coalitions in order to have her vision of the law made real. Building majorities often means sacrifice and compromise, two characteristics not commonly associated with those we understand to be independent.

III. AN INTROSPECTIVE VIEW OF INDEPENDENCE

Structural arguments, while helpful, may be sorely incomplete if judges understand their adjudication to be tightly constrained by forces other than the legislative and executive branches. Hence, an introspective analysis, such as that offered here, attempts to understand judicial independence from the perspective of those who think they exercise it. An introspective examination of the meaning of independence to the federal judge might be helpful to somebody's cause (we do not care whose) for it indicates what it is that the possessors of independence think they have. One of the authors, as a federal judge, is in a privileged position to answer this question, but the privilege is not absolute. Most of us, like the other author, can succeed in putting ourselves in the place of a judge. Certainly judges reverse the process often enough; part of the enterprise of judging is to put oneself thoroughly in another's place.

The introspective approach neither ignores nor deems irrelevant the structural provisions of the Constitution, but it does not begin with structure. It begins instead with the sense that there is independence to be exercised and then searches the self and experience to discover what it is. If there is any school of philosophical thought from which we draw in undertaking this analysis, it is phenomenology. We seek to understand the phenomenon of judicial independence by interpreting how it presents itself in the experience of everyday life.[24] There is no

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24. Phenomenology has many versions and guises, but they all accept the method of investigation represented by access to everyday experience. Edmund Husserl is often described as one of founders of the philosophy of phenomenology. *See generally* EDMUND HUSSERL, LOGICAL INVESTIGATIONS (J.N. Findlay trans., 1970) (1900); IDEAS (W.R. Boyce Gibson trans., 1962) (1931); THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY (David Carr trans., 1970) (1938). In a less philosophical, more sociological vein, see ALFRED SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD (1932). In some respects we take cues from versions of phenomenology other than Husserl's, for instance recognizing the situated character of social phenomena. *Cf.* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1961).

We do not contend, as Husserl did, that one can reach a universal, objective reality by using the phenomenological method of investigation; that would be solipsism. We agree with Gilbert Ryle that introspection does not even yield a complete form of self-knowledge. *See* GILBERT RYLE, THE CONCEPT OF MIND 165 (1949). Phenomenology, like other methods

guarantee that the search will not end with the conclusion that independence means nothing and our sense that judges have it is false. But this remains to be seen.

A. Freedom

Our model judge will find that independence is not easy to define. She will quickly conclude that it does not mean "freedom" in the sense of being able to decide cases autonomously as she sees fit or as justice, however perceived, requires. Such a notion of independence has no place in our law, where judges are always constrained in some degree, in some form or another. In law, there are always boundaries delineating the outside possibilities of judicial decision-making, but within those outer boundaries there is more or less room to maneuver. Think about driving late at night on an empty eight-lane highway. One can choose to change lanes, veering to the left or to the right, or one can decide to change speeds, using second gear instead of fifth. One can even choose to turn around and change directions. Yet the car has to stay on the road or risk accident and severe damage. The same holds true for the judge. Judicial independence may only be the ability to change lanes within clearly demarcated boundaries—and then sometimes only if there is nobody around to notice.

Such boundaries to judicial decision-making may not be necessary in the philosophical sense. A people could choose to subject themselves to judges who decide each case entirely according to their own lights, guided only by inner compasses pointing to the right decisions. Judges would pay no regard to precedent and by their decisions create no precedent. One might expect any such judiciary to have some limits; cases could not be decided on the basis of which litigant gave the judge the most money, perhaps, or the tenure of judges would be of short duration. But in our legal system, we want judges to decide cases not according to what they think is right but by what "the law" is and by the weight of the evidence.[25] Indeed, any judge trained as an American

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of understanding the world—such as structuralism, *see* CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (1958), and behaviorism, *see* B.F. SKINNER, THE BEHAVIOR OF ORGANISMS (1938); RYLE, *supra*—renders only partial explanations of reality. Because no method persuasively explains everything, the pursuit of the partial is not only justifiable, it is necessary.

Phenomenological introspection also requires infinite regress because one must always introspect each act of introspection. Nevertheless, judicial independence is a cool state, unlike panic or fury which some believe to be immune from introspection. *Cf.* RYLE, *supra* at 166 (on introspectible states).

25. This is not always easy to do. One of the authors is a federal district court judge and in his first year on the bench, he held a bench trial concerning what a very nice young

lawyer expects this of himself, and yet still ordinarily feels independent in adjudicating cases.

In *The Problems of Jurisprudence*,[26] Richard Posner writes that "[i]ndependence is something judges want the way academics want tenure."[27] On the level of sheer desire, Chief Judge Posner may be correct. But the freedom of a tenured scholar is not a particularly apt comparison to the judge's independence. Independence is supposed to attach to the judge instantly by the nature of her office, it is not something she must earn. More substantively, the freedom of expression associated with tenure is unavailing to the judge. An untenured academic limits his expression, if not thought, by attempting to avoid offending a tenure committee. This can be doubly constraining since he can give offense not only by opposing the view of his elders (and being "naive"), but also by supporting them (and being a "toad"). After gaining the grant of tenure, the scholar can agree or disagree without fear of losing his house because of his controversial or offensive ideas. Of course, the university may not be very nice to him if he writes that the sun circles the earth,[28] Montezuma was a Martian,[29] or the Holocaust never occurred,[30] but he will not be fired.

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man (to keep things simple and anonymous) did to preserve his livelihood against what he reasonably believed were the dangers posed by a feckless and mean-spirited man. What the nice man did was, in the eyes of the law, as clear as a breach of duty (which he clearly owed) as anyone could conceive. Despite what seemed "right", the law required a decision against the nice man—a decision that forced the nice man to sell his home to satisfy the judgment. When this author presented the case to a judicial colleague known to ignore law when it interfered with his personal sense of equity (to keep things simple and anonymous), the colleague opined, "Well, the only thing you can do there is cut the damages to the bare minimum."

26. RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

27. *Id.* at 6.

28. Although the scholar might defend himself by insisting he is really at the forefront of a paradigm shift. *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

29. Pulitzer Prize-winning psychiatrist and professor at Harvard, John Mack has openly embraced the claims of some that they have been abducted by space aliens in UFOs. *See* Jill Neimark, *The Harvard Professor & The UFOs*, PSYCHOLOGY TODAY, Mar. 1994, at 46.

30. What is perceived as anti-semitism may well cost the tenured scholar the chairmanship of his department. *See* Susan Chira, *CUNY Ousts Chief of Black Studies*, N.Y. TIMES, Mar. 24, 1992, at A1 (reporting the removal of outspoken Professor Leonard Jeffries from chair of City College's black studies department). Or, then again, maybe not. *See* Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994) (ordering the reinstatement of Jeffries on First Amendment grounds). Of course, one can never be too sure of anything. *See* Harleston v. Jeffries, 115 S. Ct. 502 (1994) (vacating appeals court judgment and remanding case for reconsideration).

If the independence of tenure is the ability to spout freely controversial and fringe ideas, then it really has very little in common with judicial independence.[31] The judge does not have the tenured scholar's freedom to speak and write on topics of her choice. Every judge is limited to the issues that arise out of the litigation before her, as spun by the litigants and their strategic objectives. Indeed, the case itself only comes before the judge thanks to the random selection of a judicial assignment procedure in the jurisdiction or the courthouse. A judge wishing to rewrite the constitutional doctrine of commercial speech will have no opportunity to do so in a maritime slip-and-fall case. Principles of jurisdiction may be so ingrained that judges would not attempt to be too adventuresome in their choice of topics for legal pronouncements. Consider Ambrose Beirce's fable:

> An Associate Justice of the Supreme Court was sitting by a river when a Traveler approached and said:
>
> "I wish to cross. Will it be lawful to use this boat?"
>
> "It will," was the reply; "it is my boat."
>
> The Traveler thanked him, and pushing the boat into the water embarked and rowed away. But the boat sank and the Traveler was drowned.
>
> "Heartless man!" said an Indignant Spectator. "Why did you not tell him that your boat had a hole in it?"
>
> "The matter of the boat's condition," said the great jurist, "was not brought before me."[32]

While ingrained notions of jurisdiction may not be quite as vicious as Beirce imagined, the fact that they are ingrained suggests that judges will rarely go searching for any issue or topic that suits their fancy. The tenured academic, by contrast, gets paid to do just that.

Outside of issuing opinions on legal issues, a judge faces an array of limitations on what she can say and where she can say it. The Code of Judicial Conduct[33] prohibits a judge from making political speeches,[34]

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31. Perhaps the professor comes closest to the role of the judge when the professor grades the work of his students. Though a judge and a professor must each determine winners and losers, at least the judge is spared the dreadful realization that if the right information is lacking in the written work of those who come before her, it's partially her own fault.

32. AMBROSE BIERCE, FANTASTIC FABLES *in* 6 COLLECTED WORKS OF AMBROSE BIERCE 294 (1911).

33. CODE OF JUDICIAL CONDUCT (1972). For a series of articles concerning the ability of judges to speak freely both within and without the courtroom, see *Symposium: The Sound of the Gavel; Perspectives on Judicial Speech*, 28 LOYOLA L.A. L. REV. 795 (1995).

34. CODE OF JUDICIAL CONDUCT Canon 7A(2) (1972).

making any statements that detract from the dignity of the office,[35] commenting publicly on the merits of a pending or impending action,[36] making any statements that cast reasonable doubt on the judge's impartiality,[37] and testifying voluntarily as a character witness (even on behalf of those with exceptional character).[38] Few of these things are denied tenured professors, giving strong indication that the independence associated with the freedom of tenure differs greatly from the independence associated with the judicial office.

The confluence of limitations on what judges can say in public and in the context of a case is a real restraint on the ability of judges to influence the general shape of the law. Judges are generally limited to their particular cases and controversies, though clearly their influence is felt there. Imagine if an academic could only write on those issues and topics raised by his students in class. Now imagine the same scenario, only now the students and professor are joined up randomly, the professor having no particular expertise and the students being in class more or less unwillingly. That may approximate the environment of judicial independence as we know it.

When judges want to take a controversial stand on important public issues, they often have to remove their robes and put aside their gavels to do so.[39] Consider the federal sentencing guidelines and the mandatory minimum sentences required in criminal cases. Judge Jack Weinstein of the Eastern District of New York has become a leading advocate for repealing the mandatory minimums.[40] But Judge Weinstein felt that to be so forceful an advocate required him to recuse himself from considering any minor drug cases, lest his personal opinions on a controversial issue cause him to deviate from the unambigous rule of law. If tenure gives an academic the freedom to speak his mind, such a freedom is available only to the judge if he is willing to forsake being a judge.[41]

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35. *Id.* at Canon 5A.

36. *Id.* at Canon 3A(6).

37. *Id.* at Canon 4.

38. *Id.* at Canon 2B.

39. Yes, we know that virtually no federal judge ever personally wields a gavel. But we admire the image of the judge laying it aside, a more graceful gesture than ripping off the robe.

40. *See* Jack B. Weinstein, *The War on Drugs is Self-Defeating*, N.Y. TIMES, July 8, 1993, at A19.

41. Few judges would understand this as well as Judge Weinstein, who was a tenured professor at Columbia Law School before being appointed to the bench. *See* Arnold H. Lubasch, *Creative U.S. Judge who Disdains Robe and High Bench*, N.Y. TIMES, May 28, 1991, at B5.

One of the most significant differences between the independence of academics and that of judges is that, while academics speak and write, judges do something far more coercive in pursuing the judicial function. Judges issue orders to be enforced, if necessary, at the point of a gun. In the words of Robert Cover, "Legal interpretation takes place in a field of pain and death . . . signal[ing] and occasion[ing] the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[42] Even if his rhetoric is overheated, Cover is right that judges do not operate merely in the world of ideas, they operate the mechanisms of government that involve themselves and often control the lives of citizens.[43]

Within the multi-lane highway that marks the boundaries of judicial discretion, whatever independence judges have is tempered by their awareness that their choices are often quite risky and dangerous. If there can be little doubt that the decisions judges make affect people in direct and powerful ways, we can be equally certain that judges remain fallible in the exercise of their power. Just like the rest of us, they will make mistakes. A temperance to their independence is the understanding that some of those mistakes may be immeasurably costly to our nation; is there a better example than *Dred Scott*?[44] Indeed, the outer boundaries of discretion are themselves established to limit the frequency and impact of serious judicial error. The vast majority of mistakes made by judges will be considerably more routine and less costly—a misread precedent, an exclusion of a probative piece of evidence, or a bad ruling occasioned by miscommunication with counsel. In addition to such inadvertent error, judges take actions that they know may be erroneous because the right answer is not always clear and they have to rule one way or another. Precedents are often hazy, and lines of cases often lead in conflicting directions. Yet judges must choose between competing alternatives, often with full awareness of the fact

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

43. *Cf.* Harris v. Alabama, 115 S. Ct. 1031 (1995) (upholding constitutionality of Alabama law allowing judges to override juries' recommendations against death sentences in capital cases).

44. *See* Dred Scott v. Sandford, 60 U.S. 393 (1856) (arguably occasioning the Civil War). For discussion of a few other contenders, *see* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991). Then again, if the studies of some are accurate, then there is reason to believe that judges cannot really do that much to affect society, and when they try they simply lead us down the path of costly, painful, and pointless struggle. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).

that no one option stands out as "right," and that every option has an impact on someone's life.

If there is anything like a component of "freedom" in the idea of judicial independence, it is reminiscent of the freedom most of us tried to claim as teenagers vis-à-vis our parents. "Let me make my own mistakes," we insisted. Judges depend on the same ability to make choices in a world of alternatives, choices that they know may prove wrong over the course of time. For most mistaken rulings, judges escape any sort of punishment. Probably most minor mistakes in the daily operation of the courthouse go completely undetected. Even with those discovered through the appellate process, there are few if any adverse consequences to the offending judge. There is no real threat of impeachment (unless, of course, the error involved a measure of illegality). Unlike the lawyers that practice before them, judges do not lose clients for doing a bad job. Hypothetically the judiciary as a whole could devise some sort of system that would inflict penalties on judges for making mistakes, say automatic salary reductions for every ruling directly reversed.[45] Such a system might well provide for more consistent, error-free adjudication and make the judiciary as an institution more effective and efficient in achieving its operational mission. But yet we allow our judges considerable leeway and they know they will not be punished for having erred. They know that so long as they make their choices in good faith, they will not be punished for having erred, unless one regards a harsh editorial in the local newspaper or a critical case comment in a law review as punishment.[46]

Why are we so forgiving of these mistakes? Somehow we comprehend the inevitability of judicial error, particularly in the pursuit of that ever-elusive "justice." Perhaps we recognize that just law, like self-government, is best achieved out of dialogue and deliberation, a process that must be tolerant of mistakes. The marketplace of ideas envisioned by Justice Holmes was premised on the unenviable reality that "[e]very year if not every day we have to wager our salvation upon some

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45. This hypothetical indicates some of the larger constraints that are felt by judges which are not captured by a structural analysis of judicial independence. Imagine the Constitution provided that neither the Congress nor the President could reduce the salary of judges, but the judicial branch could do so. There would still be an independent judiciary in the structural sense, but there may no longer be independent judges.

46. One might wonder if an introspective analysis would consider damage to one's historical reputation as punishment. But the fact of the matter is that few of us ever get to enjoy the fruits of earning a reputation in history, and it is far from clear how many judges really feel constrained by a desire to be well regarded in the history books (or at least on the obituary page of the New York Times). For those judges who worry about such things, we concede that this would constitute an additional punishment.

prophecy based upon imperfect knowledge."[47] Holmes understood that we must make room for mistakes: "[The Constitution] is an experiment, as all life is an experiment."[48] Few of us lawyers have not been influenced by Holmes' words. While we desire the "Truth"—or justice, or harmony, or whatever—we know from the dynamic nature of human life and thought that law will be in eternal pursuit. The only difference between the greyhound and us is that we are not running in circles after a false rabbit, though perhaps a deconstructionist would disagree. The mistakes of the past—and no one can deny that the past is full of them—offer many valuable lessons, but not a full set of reliable rules to live by. Mistakes are many and our model judge will find a glimmer of independence in the fact that she is allowed a certain amount of room to make them.[49]

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47. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

48. *Id.*

49. One of the truly fine 20th century Italian writers, Leonardo Sciascia, often wrote novels set in and around court proceedings. In one of his most well known, *Open Doors*, he dramatically evoked how, in the perspective of the judge, it is essential that mistakes go unpunished. In the climate of Mussolini's fascism, Sciascia's judge, with the concurrence of jurors, returns a politically incorrect verdict, refusing to impose the death penalty in a case where the State thought it appropriate. One of the jurors later engages the judge in conversation telling that he, the juror, refrained from evading jury service just to make a gesture against the death penalty. The judge remarks:

> "I must admit I could have got out of this trial too; in fact, I was advised to do so by someone in authority. But I saw it as a point of honor—of my whole life—of living."
>
> "So we did it[," the juror replies.] "But how will it end?"
>
> "Badly," sa[ys] the judge.

Later still the judge talks to the prosecutor, who says:

> "I want to understand. That's why I wanted to talk to you this morning, to understand what's happening to you now, what you feel, what you fear. Not about your career, which you have gambled away and you knew from the first; but about your conscience, about life . . . ."

The prosecutor continues:

> "I can tell you exactly what will happen: the court of cessation will annul your verdict and assign the trial to the superior court at Agrigento, where, I'm sorry to say, there's a president who has a weakness for the death penalty. There's also an old Socialist lawyer at Agrigento; I think he was once a deputy; a good lawyer and, needless to say, marked down as anti-fascist. This lawyer will certainly take on the defense, which is all that's required to present this trial as a clash between fascism, which comes down inexorably upon crimes of violence, and anti-fascism, with its squalid defense of them; which will no doubt have a secondary, retroactive effect on you and on your verdict. It will end with the death sentence; the defendant will be shot. So what will your verdict have achieved, except to prolong the agony?"

The judge explains:

B. *Neutrality*

Is independence reducible to "neutrality"? By neutrality, we mean no preference for one party or another, no bias, shall influence judicial decision-making. Between the parties before the court, the judge should have no leanings towards one over the other. There is some evidence that federal judges think independence can be defined as neutrality. These judges write and approve their own Code of Judicial Conduct[50] and the first words of that Code are "A Judge Should Uphold the Integrity and Independence of the Judiciary."[51] The second sentence of the Code says "An independent and honorable judiciary is indispensable to justice in our society."[52] Invoking the import of independence, on the one hand and integrity and honor on the other, is quite a bit easier than spelling out what those concepts mean. The Code defines integrity and honor at least implicitly. A reader of the Code can infer that integrity and honor are what a judge has when she personally observes high standards of conduct,[53] obeys the law,[54] does not lend the prestige of her office to advance the private interests of others,[55] does not belong to organizations that discriminate on the basis of race, sex, religion, or national origin,[56] maintains her dignity,[57] discloses her financial interests,[58] and stays out of politics.[59]

"It's true that for me the defense of principle counted for more than the life of the man. But it's a problem, not an alibi. I saved my soul, the jurors saved theirs, which may all sound very convenient. But just think if every judge, one after another, were concerned to save his."

"It won't happen [," responds the prosecutor.] "[Y]ou know that as well as I do." LEONARDO SCIASCIA, OPEN DOORS 73-79 (Marie Evans trans., 1992). Sciascia's judge was not from any viewpoint "independent." He did not even speak as an independent judge speaks, his judgment was an act of defiance and protest, a defense of a principle to which he was committed. There is no common language between this courageous Italian judge and an American federal judge because the latter would never have to sacrifice his job, perhaps even his life to the government, in pursuit of deeply held principle. This is how important it is to know that you cannot be fired for what someone—what perhaps everyone—believes is a wrong decision.

A reader interested in Sciascia might consult Gore Vidal, *Sciascia's Italy*, *in* UNITED STATES 461 (1993).

50. CODE OF JUDICIAL CONDUCT (1972).
51. *Id.* at Canon 1.
52. *Id.*
53. *Id.*
54. *Id.* at Canon 2A.
55. *Id.* at Canon 2B.
56. *Id.* at Canon 2C.
57. *Id.* at Canon 5A.
58. *Id.* at Canon 6.

What about independence? The rest of the Code's provisions are largely designed to insure neutrality and the appearance of neutrality. The judge must act at all times in a manner that promotes public confidence in his impartiality,[60] should not allow family, social or other relationships to influence his judgment,[61] should accord all interested persons a full right to be heard in proceedings that are orderly and decorous,[62] should not publicly comment on the merits of pending or impending actions,[63] should make appointments only on the basis of merit,[64] should never hear cases in which he or his family has an interest,[65] and should never do or say anything that would cast reasonable doubt on his capacity to decide impartially any issue that may arise in the judge's court.[66] The Code contains little about "independence" apart from neutrality, strong evidence that impartiality is part of the core of what judges consider "independence" to be.

Judges communicate their neutrality to litigants and the larger public in a variety of ways. One method by which such messages are conveyed is through the exclusive wearing of the simple, stark black robe by our federal judges. It is a colorless garb, signifying, it would seem, the impartiality of the judicial actor with regard to the parties before her. There is a mild paradox in the fact of a judicial uniform. While we never talk about "congressional independence" or "executive independence," we often talk about "judicial independence," even though judges are the only ones who all have to dress alike. Federal judges, at least in modern times, all have to wear the same black robes.

The judicial uniform may nonetheless hold some keys to understanding judicial independence. If the colorless robe signifies impartiality and freedom from taint, then its shade seems inappropriate. Traditionally, white is the shade of purity, the non-color that connotes lack of taint. The blackness of the judicial robe sends another sort of message, it seems, and one that indicates some of the limits to a judge's independence.

Consider the nature of judicial robes in England. There, the signifying messages of judicial robes are of a different sort than here. In England, judges wear a variety of different robes, ranging from full bright red

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59. *Id.* at Canon 7.
60. *Id.* at Canon 2A.
61. *Id.* at Canon 2B.
62. *Id.* at Canon 3A(2) and (4).
63. *Id.* at Canon 3A(6).
64. *Id.* at Canon 3C.
65. *Id.* at Canon 3C.
66. *Id.* at Canon 4.

ones (worn with long white wigs) to skimpy black ones (worn with small wigs) to ordinary business suits (with no wig at all but occasionally with a toupé). The nature of the robe corresponds to the individual judge's position in the institutional hierarchy of the judiciary. The robes communicate not merely neutrality, but institutional office and rank.

If the uniformity of blackness of American federal judicial robes[67] is incapable of marking different institutional ranks, there is a different institutional message signified: that each judge partakes of membership in a class of judges, that each belongs to the judiciary and has responsibilities to that institution. All our judges are marked as members of the same defined class of judges. The black robe signifies a larger community of judges to which the particular adjudicating individual belongs; it signifies membership and the attendant duties and obligations of this institutionally-defined group. The judge is not really neutral. Rather she adopts the perspectives, standards, and beliefs mandated by her institutional office. The judge is emphatically indoctrinated—tainted, if you will—distinguished from the rest of us by her membership in a unique group.

Independence and the wearing of uniforms do not ordinarily go hand-in-hand. If we think of other uniformed people, such as, for example, priests and military service personnel, independence seems decidedly out of place. Yet, military personnel and priests each share important things with judges. On the one hand, we want judges to be a bit like Catholic priests; no matter which one you go to, you should get the same answers on matters of doctrine (if not on the gravity of the sins and the degree of penance that must be served). The uniform ought to overtake and subsume the individual who wears it. If the law were some objective reality "out there," each judge should be able to discern the law equally well and come to essentially similar results. Though experience may lead us to believe that this does not in fact occur, our desire for constancy and predictability in adjudication leads us to this hope. By contrast, we recognize the vast differences among military personnel and their capabilities. We know that there are great commanders; Patton, Lee, and Washington were quite unlike the others who wore their uniforms. And in any battle, who the commander is makes all the difference in the world. The individual in this case can outshine his bars

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67. Chief Justice William Rehnquist's recent decision to wear a black robe lightly adorned by four simple gold stripes on each arm challenges the heretofore uniformity. *See* Linda Greenhouse, *The Chief Justice Has New Clothes*, N.Y. TIMES, Jan. 22, 1995, § 4, at 4. Because the Chief Justice reportedly intended to pay homage to a character in Gilbert and Sullivan's comic opera "Iolanthe," and not to distinguish his robe to suit his institutional office, *see id.*, we think the adornment has little relevant semiotic importance.

so long as his creativity and imagination do not go against orders. Ironically, we want the same of our judges, hoping that they can achieve greatness and make the law the best it can be. Judges thus occupy a troublesome place between anonymity and personality, open to criticism for any form of independence they assert, even if they were encouraged to exercise it.

One other uniformed group bears a close resemblance to judges, sport referees and umpires. Their often striped vestements distinguish them from the (also uniformed) competitors. Like judges, they make findings of fact (e.g., whether the tennis ball struck the net on the service), and nuanced judgment calls (e.g., whether the conduct was "unsportsmanlike").[68] Yet with regard to independence, it is fair to say that referees and umpires have more of it than do judges. We tolerate, even respect those referees who exercise their discretion to call a game "tight" or "loose." Most fans want the referees to let the players decide the outcome, condemning those referees who call close penalties late in a game. Some referees have been fondly praised for never allowing important players to foul out of basketball games. Note, however, that independence for referees is not protected by the types of structural guarantees that supposedly assure judicial independence. Tenure and salary protections are not provided by law (though, for reasons other than independence, they may be guaranteed by contract). If a referee's exercise of independence is encouraged, a particularly aggregious mistake may well cost the referee his job. For instance, the official who put three seconds back on the clock in the 1972 USA-USSR Gold Medal basketball game and gave the Soviets a second chance to score a final, game-winning basket (which they did) has reportedly never again been allowed to officiate in international competition. It is ironic that one bad call in a sporting event can cost a referee his job for life but a federal

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68. Consider this instance, involving famous N.B.A. referee Earl Strom:

> [Pat] Kennedy [, the N.B.A.'s first famous referee,] was gone by the time Strom reached the pros, but his spirit pervaded an elite corps of eleven referees, including the choleric Sid Borgia; the patrician Mendy Rudolph; Norm Drucker, known for his soothing manner toward outraged partisans; and Arnold Heft, also known as the Growler, who could out yell any coach alive. At the first officials' meeting that fall, Strom was excited but not overawed. He thought he had found his proper level and he felt at home. He heard [Jocko] Collins, the head of all officials, and the rest echo his own evolving viewpoint: that a referee must weigh a rule's intent, and not merely its language, before making a call.

Jeff Coplon, *The Right Call*, THE NEW YORKER (Oct. 1990). We know of no one who has called for referees to consider what judges have often been called to consider, voluminous legislative history. This analogy to referees was noticed by Mark Falcone, Esq., who provided good insights but did not do enough work on the article so that we can blame him for any shortcomings.

judge who repeatedly errs at the expense of people cannot be put out of office.

The judge's membership in the institution of the judiciary leaves the judge with a sense of constraint by the very group to which she belongs, bound, in a sense, to the blackness of her robe. But the extent to which a judge is constrained from her peer group is not fully captured by examining the judicial uniform. In any community, members will often feel themselves limited in their independence because they must conform to the social or peer group expectations, lest they be considered deviants and subsequently excluded from communal life. In other words, reputation among your peers counts and constrains.

Within the rank of judges, reputation and community standing limit the exercise of independence.[69] A judge is less likely to rule in a different, non-conformist way if she believes the community of judges she inhabits will be hostile to her novelty. If she feels she is likely to lose status, she may well choose a more conventional route to avoid making waves. This phenomenon is not uncommon in the professions, of which we can say judging is a particular sprout growing out of the branch called "lawyers." But with the large expansion of the professions over the course of this century, professional standing is not the force it once was for most professions.[70] There are too many lawyers now for the profession as a whole to rely on social status, enforced by a closely attentive body of professionals, to maintain community standards. But judges remain relatively few in number, and within jurisdictional boundaries, they tend to keep up their sense of community. This is achieved through judicial conferences and, most importantly, through an implicit system of communication created by the judges talking to and about one another, trading stories and information about other members of the club. Sit down with a federal judge and you will be amazed at how much she knows about the district court judge in Kalamazoo who runs the court calendar in such-and-such a manner. The levels of community to which the judge will respond may vary. It is the entire class of judges that is marked by the blackness of the judicial uniform. But it may be even more common for a judge to feel constrained by a

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69. Judicial independence may also suffer from the "Greenhouse Effect." No, judges are not adversely effected by global warming due to diminution of atmospheric ozone; rather, this terminology was popularized by D.C. Circuit Court of Appeals Judge Laurence Silberman to refer to federal judges whose rulings are guided not by accepted tenets of judicial philosophy, but by a desire for good press coverage from legal reporters such as Linda Greenhouse of the *New York Times*. *See* Martin Tolchin, *Press Is Condemned By a Federal Judge For Court Coverage*, N.Y. TIMES, June 15, 1992, at A13.

70. *See* Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 74 JUDICATURE 77, 80-81 (1990).

more immediate group of judges, such as those within her circuit or, better yet, within her building. Not even judges want to be frowned upon when they get into the judges' elevator at lunch time.

This phenomenon is not without its irony, at least when it comes to judges sitting in courts of last resort. If we look back at the famous jurists of American history we find that a willingness to try the novel, to lead the way, is a characteristic that distinguishes them. What this means is that the judges we most admire tended to challenge the accepted standards of the law—and ultimately reinvent those standards and establish new ones. When one thinks of a Marshall, Holmes, or Cardozo, one conjures up an image of a leader among judges, men who were independent not merely vis-à-vis the other branches of government or the litigants they faced, but also vis-à-vis the judiciary and its prevailing rules and standards. The norms of the judicial community may permit this of a judge in a court of last resort, but neither easily nor often. A challenge to established doctrine often requires disregard of the rule that judicial opinions ought to be candid and accurate; new law is often created by misrepresenting it as old law or law that is only a little bit new.[71] And this is the dilemma the creative, independent-minded judge must confront: lacking the status of a Cardozo or a Holmes, her innovations are not likely to be welcomed with open arms. Consequently, she will likely restrain her creativity to maintain her standing in the community and therefore prevent herself from ever achieving the exalted standing that attaches to the great jurists. Judicial independence is, thus, similar to credit. An individual cannot exercise certain forms of judicial independence unless she has already established herself as independent. Lacking the social standing of the "great ones," the judge is unable to assert her independence.

C. Jurisdiction and Power

One of the frequent subjects of scholarly debate over structurally-defined judicial independence in recent years has been whether or to what extent Congress can constitutionally limit the jurisdiction of the federal courts.[72] Article III, section 1 of the Constitution[73] vests the

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71. One notable instance of this was Justice (then-Judge) Cardozo's "creation" of the doctrine of promissory estoppel as an alternative to consideration in De Cicco v. Schweizer, 117 N.E. 807 (N.Y. 1917). *See* Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777 (1993) (analyzing Cardozo's opinion in *De Cicco*). We put "creation" in quotes because Cardozo was not promissory estoppel's sole inventor. He built on burgening understandings of the law shared by some members of the professional community. *See id.*

72. *See, e.g.*, Sager, *supra* note 5.

"judicial power" in "one supreme court" but neither creates nor mandates the creation of any other federal courts, leaving that to the discretion of Congress which "may from time to time ordain" to be so creative.[74] Even the appellate jurisdiction of the Supreme Court can be limited by "such Exceptions, and . . . such Regulations as the Congress shall make."[75] Many have wondered whether Congress could constitutionally limit the jurisdiction of the federal courts so to keep judges from ruling on some important and controversial constitutional issue if legislators perceived the judiciary to support a legal rule that the legislators disapproved.

This is an interesting question, but one with considerably less relevance to judicial independence when considered through introspective lenses. Congressional limitations on jurisdiction, as a general matter, do not affect significantly the way judges feel about their independence. Independence to the judge turns on the amount of discretion she has in deciding a particular issue before her and not on whether she can hear the issue in the first place. This is due to the fact that judges inhabit an environment with manifold limitations on their jurisdictional authority. Judges are not allowed to entertain issues brought into court after the applicable statute of limitations, no matter what their sentiments of justice require. They are not allowed to decide disputes that properly belong in another forum. They cannot issue advisory opinions. Federal judges can rule in diversity cases only if there is indeed diversity of citizenship among the parties—and then only when the amount in controversy is sufficiently high. All of these are important jurisdictional limitations that simply deprive judges of the ability to rule. Because of familiarity with these limitations, judges are not likely to conclude that withdrawal of the basic ability to rule on a specific issue is much of an infringement on their independence.

The core problem that sparks the debate over congressional limitations on federal jurisdiction seems more about back-door constitutional amendment than about judicial independence. If the Congress were to limit the judiciary's ability to hear, say, First Amendment cases, what would be most disturbing is that such a jurisdictional limitation would effectively amend the text of the Constitution. Without judicial review, Congress could indeed abridge freedom of speech and be unconcerned about being overturned. For all intents and purposes, the Constitution

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73. U.S. CONST. art. III, § 1.

74. U.S. CONST. art. III, § 1. *See also* Lockerty v. Phillips, 319 U.S. 182 (1943) (Congress' constitutional discretion with regard to establishing inferior courts presumes power to limit their jurisdiction).

75. U.S. CONST. art. III, § 2, cl. 2.

would have been amended. And though the fact of amendment is hardly disconcerting on its own, Congress would here have managed to effectuate the amendment without going through the proper constitutional procedures. It would be anomalous to interpret congressional power under Article III, section 2's "Exceptions" power to include the ability to amend the Constitution by nothing more than majority vote in light of the intricate and burdensome amendment procedures of Article V.[76] Then again, maybe Chief Justice Marshall was wrong. Maybe it is *not* a Constitution we are interpreting.[77]

The Framers had considerably more faith than most modern lawyers in the ability of the individual states to preserve constitutional rights. They did not believe it was necessary to create inferior courts because they presumed the states would exercise their plenary jurisdictional authority. In the post-*Brown* era, lawyers became wary of the ability of state courts to protect competently our constitutional rights. The fear is that, left to the state judiciaries, our constitutional rights would be subject to various, inconsistent treatment. But this precise problem points out why we ought to worry less about Congressional efforts to limit the jurisdiction of the federal courts. Congressional attempts to amend the Constitution underhandedly by limiting federal jurisdiction would surely be stymied by the variety of independent state court interpretations that would be beyond the control or influence of Congress. Attempting to impose order here would only lead to unpredictable (and from Congress' view undesirable) consequences. State courts would still hear the First Amendment cases the federal courts no longer could and their legal pronouncements may be more radical or more conservative than Congress intended. Certainly, they would be more varied and inconsistent. Moreover, so long as the federal courts retained jurisdiction in other areas, they would find a way to exercise judicial power. Traditional First Amendment controversies might become privacy cases. Or perhaps federal courts would hold that the right to express one's self freely is a "fundamental right" under equal protection. To be safe against federal judicial review, Congress would nearly have to abolish the federal courts, a move so revolutionary that any political environment in which it occurred is difficult to conceive

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76. Some legal scholars have argued that there may be room for constitutional amendment outside of the procedures established in Article V. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

77. Chief Justice Marshall wrote his famous line in McCulloch v. Maryland, 17 U.S. 316, 415 (1819): "We must never forget it is a *Constitution* we are expounding." The line has been repeated too often to count in judicial decisions ever since.

from our present perspective, so difficult that we could not say where judicial independence would stand in the mind of a judge of that era. We might then be able to say against Chief Justice Marshall, there is nothing at all left to interpret.

An introspective understanding of judicial independence teaches that independence may be perceived by the judge as the freedom to issue final judgments in cases, judgments which cannot be reversed by anyone other than another independent judge. In other words, judges have power to conclude cases that is theirs and theirs alone. In April 1995, the Supreme Court adopted this principle for final judgments in *Plaut v. Spendthrift Farms, Inc.*,[78] and though it did so on avowedly structural grounds, a close examination reveals the introspective sense of independence that grounds the Court's decision.

In *Plaut*, the Court found unconstitutional a federal statute which directed federal courts to reinstate (on motion by plaintiff) certain securities law claims that had been dismissed with prejudice for failure to file within the applicable limitations period. The Court held that the dismissals were "final judgments" and as such Congress could not require that the courts reopen them without invading upon the courts' constitutional province of "judicial power."

The Court's reasoning was not based on precedent; the majority noted that this was a case of first impression, even though the practice of legislative reversal of court judgments had been common prior to the American revolution[79]—highlighting how few infringements of judicial independence have occurred in the past two hundred years. Indeed, it was the colonial practice and the Framer's response to it that proved dispositive for the majority. In pre-revolutionary times, legislatures regularly required the re-opening of individual cases.[80] The Framers, most notably Madison, Hamilton, and Jay in *The Federalist*, were critical of these legislative endeavors, finding them to be an infringement of what they perceived to be the judiciary's proper authority.[81] Accepting the Framers' argument, the Court in *Plaut* insisted that it made no difference if Congress mandated the re-opening of a class of cases as opposed to individual adjudication.

> To be sure, a general statute such as this one [compared to one devised to re-open an individual case] may reduce the perception that legislative interference with judicial judgment was prompted by individual favoritism; but it is legislative interference with judicial

78. No. 93-1121, 1995 U.S. LEXIS 2843 (Apr. 18, 1995).
79. *Id.* at *15-27.
80. *Id.* at *15-17.
81. *Id.* at *19-22 (citing THE FEDERALIST No. 48, 78, 81).

> judgments nonetheless. Not favoritism, not even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.[82]

The heavy reliance of the Court on the intent of the Framers, inferred from the historical context of colonial life and a few brief passages in *The Federalist* and other publications of the period, indicates the influence of introspective understandings of the judicial function and of the nature of judicial power. The Framers' ideas and justifications are by definition pre-constitutional and pre-structural. When one asks what it is they meant, or as in *Plaut* what it is they meant to change, one answers at least implicitly with the Framers' introspective sense of judicial independence. Though it may be difficult to discern with clarity, the Framers had some substantive understandings about what judicial independence was, based not on structure but on insight and reflection. They adopted structural rules, such as those of the Constitution, to protect and guard those understandings from infringement. In other words, an introspective sense of judicial independence under-girds the structural arrangements with which we are now so concerned. To refer back to the Framers' intent is to realize the importance of introspection in defining the mandate of judicial power.

D. Removing the Ties that Bind: The Place of Loyalties

Part of what it means to be independent is to be able to adjudicate cases without being unduly bound by personal or sociopolitical loyalties. We do not pause to define exactly what we mean by "unduly bound," partly because it would take more than a pause and partly because if we took the time we would still come to the conclusion that the question is one of judgment, not definition. For our purposes, it is enough to say that a judge is unduly bound if she cannot decide the case in light of the law and the evidence because to do so causes too much emotional pain. Or put another way, a judge is unduly bound if the judge cannot decide a case in a particular way because the judge is a man or a woman, a Jew or a Christian, a black or a white, or a Democrat or a Republican. This is distinct from the concept of neutrality discussed earlier, which was the lack of loyalty to one side or another on a personal basis. Here, we are concerned with the loyalties one has to one's group—sexual, ethnic,

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82. *Id.* at *31 (emphasis added).

religious, etc. Such loyalties, the model judge will discover, also threaten to impede the independent adjudication of cases.

The Code of Judicial Conduct[83] mandates disqualification of a judge from hearing a wide variety of cases in which the judge has (or is likely to have) some personal bias. These usually involve personal or financial relationships;[84] few things sway one as forcefully as nepotism and cold cash.[85] Canon 2B states, "A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment."[86] By its terms, this might cover relationships based purely on racial or ethnic identity, gender, political party, religion and so forth under the rubric of "social or other," but this seems a strained reading. Indeed, nothing in the Commentary suggests that Canon 2A is explicitly directed to larger group loyalties.[87]

If judicial independence is partly the ability to decide cases regardless of political loyalties, consider the example of Judge John Sirica, a longtime Republican who played an active and substantial role in forcing out the truth in the Watergate case. He did so by the close questioning of witnesses and by raising the very real threat of very long prison sentences for defendants whom he saw as uncooperative.[88] Eventually one defendant involved in the break-in at Democratic party headquarters delivered a letter to the judge in which he admitted that the whole truth had not come out; it was the first large crack in the dam. The Watergate case did substantial damage to the Republican party, as the judge suspected it might. Judge Sirica described his own ties to the Republican party as long and deep and not merely philosophical. He was an elected party official who campaigned for its candidates and rounded up

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83. CODE OF JUDICIAL CONDUCT (1972).

84. *Id.* at Canon 3C.

85. We are reminded of former Philadelphia Mayor Frank Rizzo, who, when questioned about the propriety of his naming his brother Joe city commissioner, is reputed to have responded angrily, "Nepotism my ass. He's my *brother*."

86. CODE OF JUDICIAL CONDUCT Canon 2B.

87. *Id.* at Commentary to Canon 2A.

88. Judge Sirica was widely criticized for assuming the role of prosecutor and the court of appeals agreed with some of those criticisms, though ultimately concluding:

> The public interest in safeguarding a record from taint [of perjury] is particularly keen when the case involves the integrity of the nation's political system—as can fairly be said when persons in the campaign of one major political party used clandestine contributions to penetrate the internal process of the other—and is consequently of moment in both the daily press and history. Judge Sirica's palpable search for truth in such a trial is not only permissible, it was in the highest tradition of his office as a federal judge.

United States v. Liddy, 509 F.2d 428, 442 (D.C. Cir. 1974).

votes in national conventions. He was a friend of Senator Joseph McCarthy. Judge Sirica wrote:

> [I]f it had not been for the Republican party, I might never have done much better than my father, who died at sixty of a heart attack after years of trying desperately to build a secure life . . . . I traveled to various parts of the country in 1940 and 1948 for Republican presidential candidates . . . . I had no money to speak of, and one of the best ways that I knew to make something of myself was through politics. I stuck with the party long enough to see Dwight Eisenhower and . . . Richard Nixon, elected in 1952. Without the backing of President Eisenhower and his attorney general, Herbert Brownell, I would never have realized my dream of becoming a federal judge.[89]

Yet Judge Sirica did not even hesitate about pushing the outside of the envelope to get at the truth. He believed the United States had "a totally independent judiciary"[90] and that the "judiciary, standing above politics as the enforcer and arbiter of our laws, was the critical branch of government in the resolution of the Watergate crisis."[91] The judge did not give his political loyalty a second's thought, despite the debt he felt he owed to the Republican party.

There is reason to suspect that, when some people talk about being free from socio-political loyalties, they only mean free from those loyalties that they, as commentators or spectators, do not approve. The current state of the appointment and confirmation process gives some support to this view. In recent decades, activists have sought to secure the appointment of judges who were thought to be "dependable" on some series of issues. Some administrations have claimed a desire to appoint judges to the federal bench who would be opposed to *Roe v. Wade*.[92] Others vowed to appoint only judges who would support *Roe*. If all presidents and senators respond fully to the will of activists, an electoral change is not a positive for judicial independence because new administrations will not value the trait of independence any more than did the old. Maybe from time to time there is a new manager of the ball club, but the game being played is the pretty much the same.

From the view of a judge, it is ironic that independence may come not from disregarding loyalties, but from maintaining them. A judge is to exalt one form of cultural loyalty, a loyalty to a judicial ethos, over all else. To understand why this is, it is necessary to grasp the cultural dimensions of judicial life. Law, like any significant realm of social and

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89. JOHN J. SIRICA, TO SET THE RECORD STRAIGHT 297 (1979).
90. *Id.* at 300.
91. *Id.* at 300-01.
92. 410 U.S. 113 (1973).

political activity, has a specific culture. Culture is the assignment of meanings to behavior;[93] as Clifford Geertz writes, it is an "acted document."[94] When we "assign meanings" we provide ourselves with ways to make sense of the events and emotions that occur around us. A batted eyelash evolves from a physical movement to a "wink" due to the cultural meanings we project onto the behavior.

Culture has a few basic functions: it explains, justifies, and orders. When a social group attaches meaning to situations and events, it serves to explain what has happened, the relationship between the actors and their environment, and the consequences of what has occurred. And in the social realm, as opposed to chemistry, explanations also serve to justify, adding normative weight to the meanings we have assigned. Due to the normative force of the justifications offered by culture, participants in the milieu will tend to order their own behavior to fit in. Hence culture orders, directs, and shapes how people behave and act. Because they come to associate some behavior as "bad" or "worthless" and do not want themselves identified with the same negative labels, people will try to behave in a manner deemed acceptable by their particular culture. Whatever the mechanism—or the terminology of the social scientist—people try to play by the cultural rules.

Law, as an identifiable culture, manifests these characteristics. So cultural norms like stare decisis govern, requiring judges to adhere to precedent for the sheer reason that our culture—and not our constitutions nor our statutes—demands it. Stare decisis illustrates the kinds of commitments that judges take on due to their cultural environment. It constitutes a loyalty, an imposed fidelity that is to constrain the judge, who will come to believe that following precedent is the right thing to do and the proper way to adjudicate cases. In American legal culture, loyalty to stare decisis is matched by loyalty to "The Constitution," a sense of higher commitment to the principles (articulated or not) in our foundational text and from which no judge is ever to stray.[95]

It is precisely when a judge is adhering to one of these cultural loyalties that she may feel the most independent. If Judge Sirica was

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93. *See generally* EDWARD T. HALL, THE SILENT LANGUAGE (1959).

94. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 10 (1973).

95. On the cultural dimensions of "The Constitution," *see* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). It may be that we want judges to forsake obligation to abstract principles in certain instances. Former Mayor of New York Edward Koch tells the story of a judge who was mugged, and then called a press conference to announce that the mugging would in no way affect his judicial decisions in matters of that kind. An elderly lady stood up in the back of the room and shouted, "Then mug him again!" *See* JAY M. HAFRITZ, THE HARPERCOLLINS DICTIONARY OF AMERICAN GOVERNMENT AND POLITICS 312 (1992).

independent, it was because he was bound to the right loyalty, not because he was in any sense free to conclude the case in any way he wished. He was loyal to his "responsibilities"—read cultural norms—as a judge, instead of being loyal to his political party. Another example might be how the justices of the Supreme Court might have felt upon deciding *Planned Parenthood v. Casey*,[96] where the Court upheld the right of women to terminate pregnancy (affirming, at least in some senses, *Roe v. Wade*).[97] After years of pressure on the Court to reverse *Roe*, the Court asserted independence by citing a forceful allegiance to the Constitution,[98] public legitimacy,[99] and the legal-cultural norm of stare decisis,[100] among others. "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."[101] Judicial independence is, to the judge, the exaltation of the right obligation.[102]

For most of American history, judges have managed successfully to avoid sacrificing their fidelities to the cultural norms of law by not giving in to outside pressure. Certainly there are episodes, but overall judges have been remarkably successful in preserving their independence from such influences even when their decisions were highly unpopular.[103] But many of those who would congratulate judges for being politically independent are less certain about whether judges should be free of gender, ethnic, or other social group loyalties. To decide against the interests of one's own group risks the penalty of exclusion. A judge who decides a case "as she sees it" rather than how

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96. 112 S. Ct. 2791 (1992).

97. The joint opinion would prefer that we say "*essentially* affirming." *See id.* at 2817 ("[W]e have concluded that the essential holding of *Roe* should be reaffirmed."). *Id.*

98. *Casey*, 112 S. Ct. at 2813 ("In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty."). *Id.*

99. 112 S. Ct. at 2814.

100. *Id.* at 2808 (describing "[t]he obligation to follow precedent"). *Id.*

101. *Id.* at 2806.

102. *Casey* also highlights one of the difficulties posed by the intersection of independence and cultural loyalties: because culture is always open to interpretation, there will often be disputes about what loyalty to it requires. Hence, the dissenters asserted that they were more loyal to "The Constitution" than the majority; they implicitly claimed to be more independent. *Id.* at 2810 (Rehnquist, C.J., dissenting).

103. Adherence to prevailing norms in law does not immunize the judge from morally-questionable results, as legal norms may reflect morally indefensible norms existing in the broader society. *See* ROBERT COVER, JUSTICE ACCUSED (1975) (on ante-bellum judges in South).

the members of her group see it may be castigated in the community for being a "traitor." The judge will lose status as a "true" Christian, Jew, man, woman, Latino, black, white, etc. Group membership leads some to believe group loyalties should be the most profound. A Jewish judge who votes to affirm the First Amendment rights of Nazis is in this uncomfortable boat. Justice Clarence Thomas may be there as well in light of the *Open Letter*[104] sent to him by a fine jurist now retired, A. Leon Higginbotham. On the eve of Thomas' appointment to the bench, Judge Higginbotham called on the new justice to take up group loyalties:

> But to be your own man the first in the series of questions you must ask yourself is this: Beyond your own admirable personal drive, what were the primary forces or acts of good fortune that made your major achievements possible? . . . Even though you had the good fortune to move to Savannah, Georgia, in 1955, would you have been able to get out of Savannah and get a responsible job if decades earlier the NAACP had not been challenging racial injustice throughout America? If the NAACP had not been lobbying, picketing, protesting, and politicking for a 1964 Civil Rights Act, would Monsanto Chemical Company have opened their doors to you in 1977? . . . If you and I had not gotten many of the positive reinforcements that these organizations fought for and that the post-*Brown* era made possible, probably neither you nor I would be federal judges today . . . . While there are many other equally important issues that you must consider and on which I have not commented, none will determine your place in history as much as your defense of the weak, the poor, minorities, women, the disabled and the powerless.[105]

If Judge Higginbotham's letter had simply emphasized the last point—that judges ought to be committed to protecting the powerless and under-represented—it would be a different matter. As it is, however, one cannot read Judge Higginbotham's letter without concluding that Justice Thomas is being instructed to be loyal to the NAACP and other civil rights organizations. A frequent litigant before the Supreme Court, the NAACP may purport to represent the interests of minorities, but simply because the NAACP takes a stand on some issue does not unambiguously mean that stand is best for anyone[106] or that its position is the best constitutional result. Judge Higginbotham

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104. A. Leon Higginbotham, *An Open Letter of Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1991).

105. *Id.* at 1014, 1015, 1018, & 1025.

106. According to some in the black community, mainstream civil rights organizations like the NAACP have lost touch with many blacks, particularly the working class and the young. *See* Michael Eric Dyson, *Ben Chavis Wasn't The Problem*, N.Y. TIMES, Sept. 1, 1994, at A27.

seems to be calling for Justice Thomas to favor a particular litigant when it appears before the Court in disputes. Why? Because, according to the tone of Judge Higginbotham's letter, "the NAACP got you here; you owe it." Would the Watergate case have been decided differently if Judge Sirica had followed Judge Higginbotham's advice?

To some extent, judges have always faced the possibility of losing status within one's group for not acting, or deciding cases, as the group demands. Many of the judges who enforced desegregation laws in the South lost status as "true" whites or "real" southerners. (Perhaps most wrenching, their families were also subjected to the same ridicule.) Will the pursuit of diversity in the federal bench make matters worse? Diversity is a popular word lately but to the extent it means that a judiciary ought to be "representative" of the nation in some way, the concept is not new. For many years, presidents had to consider geographical diversity in nominating judges, particularly justices to the Supreme Court. When Oliver Wendell Holmes, Jr. was under consideration for appointment to the Court, it was understood that he was competing for the Massachusetts seat vacated by Justice Horace Gray;[107] no one from California or New York need apply. Indeed, when President Herbert Hoover replaced Holmes with Benjamin Cardozo, it was explicitly noted that only Cardozo's widely acknowledged eminence allowed his appointment as the third sitting justice from New York.[108] Geography was a good proxy for culture, and it was important to our ancestors that the bench have the requisite percentage of yankees to southerners. There has been at times a seat on the high court reserved for justices steeped in the federal specialties—admiralty, patent, bankruptcy—to bring their special perspectives to the body. Few think this "diversity" brought much harm to the Court.

The newer diversity, courts filled with judges representative of various ethnic, racial, and gender groups, should do no harm either. In fact, it may not even be all that new. With Cardozo, the Massachusetts seat was transformed into the Jewish seat, subsequently filled by Jewish Justices Felix Frankfurter, Arthur Goldberg, Abe Fortas, and—after a two decade interruption by the Protestant Harry Blackmun—now Steven Breyer.[109] Today, the phenomenon is even more pronounced, due to the increased involvement of women and minorities in political life. There are risks that a judge might take seriously the call to "represent"

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107. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 299 (1993).

108. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 204-06 (1992).

109. The Jewish Louis Brandeis sat on the Court before Cardozo, but was not part of the line of Jewish justices that directly succeeded one another. The same can be said of current Jewish justice Ruth Bader Ginsburg.

some groups in society more than others, that is to represent that group in some way other than by excellent performance on the bench. The threat is that the judge will trade fidelity to the cultural norms of law for those of a social group. There is no reason to believe that judges of any race, ethnicity, gender, or sexual orientation would inherently be any more likely to demonstrate bias toward their own than do white male judges toward their own. The risks may be exacerbated though by making group membership the explicit basis for appointment. Here the notion that one should "represent" that group may weigh heavily on the judge because it is group membership that led to the judge's position. The intensity of pressure upon the judge is increased by the justification that some offer for diversity: that if an X type judge is appointed, more X type parties will win cases and hence will finally find justice in the courts. Diversity among judges ought to be justified as a demonstration of an open society, in which equality of opportunity is real, not imagined. If it is proven that gender, race, ethnicity, sexual orientation, etc. are inherent causes of different perspectives important to law, then diversity can be justified on that ground as well. When diversity is justified on the premise that the judge will have socio-political group loyalties that replace our constitutional and cultural ones, we will not have advanced the cause of judicial independence.

E. Being at Ease; Or, the Tight Fit Between Complacency and Independence

Our model judge will discover upon reflecting on her experience that judicial independence is only possible if she is self-satisfied in at least one very important way; she has to be content in her position as a judge with no driving ambitions to be anything else. A judge in pursuit of something other than adjudicatory excellence, say fame, fortune, or prestige, may subordinate her institutional role as a judge to her personal, non-judicial desires and wants. A judge may want, more than anything else, to write a great novel, to top Beethoven's Ninth Symphony, or to run a three minute mile. Canon 5[110] permits judges to try to do these things so long as the judge's time needed to do judicial work is not interfered with. Ambition in the arts, or sports, or science is unlikely to be helped or hindered by whatever a judge decides in the cases she hears. Of all the controversies surrounding *People v. O.J. Simpson*, a memorable one occurred when Los Angeles Superior Court Judge Lance Ito gave a lengthy interview to a local television station

110. CODE OF JUDICIAL CONDUCT Canon 5.

that aired over several nights and sparked criticism of the jurist.[111] While it was clear that Judge Ito had not violated any established ethical rules, some criticized him for nothing more than hypocrisy, in light of the fact that Ito had previously castigated the press for its coverage of the case. A more serious concern was that the interview seemed to some an indication that Judge Ito was seeking the spotlight and the personal fame that accompanies it. Perhaps, questioned some, Judge Ito was interested in making a name for himself or looking for appointment to a higher court.[112] A quest for media attention, the public favor, or a better job threatens to divert a judge by tempting him with goals other than doing justice in the individual case. Would Judge Ito rule to suppress the DNA evidence not because its prejudicial effect outweighed its probative value, but because such a decision would result in higher book sales of his eventual memoir? We are of the opinion that this concern was unfounded in Judge Ito's case, but the underlying point remains valid: slavishness to fame, fortune, or career ambition is still slavishness, and it can destroy whatever independence the judge has.

We characterize the lack of desires for public fame as one element to a larger necessity for judicial independence, being at ease. Two underrated requirements for our model judge to be at ease include good prisons and short memories. Judging is often about deciding winners and losers. Two parties come into the courtroom and generally only one goes home happy—and then only if that party's attorneys have not yet delivered an itemized bill for services rendered. Many of the cases federal trial court judges decide involve violations of the criminal law, bringing the violent, the rebellious, and the insane into federal courthouses.[113] Among the criminal defendants, there are plenty of unforgiving types who would love to get their hands around a sentencing judge's neck. The threat of being attacked might be enough to steer any sane human being away from independence and toward self-preservation. It thus may be that the most notorious threats to judicial independence in recent memory have not been from any efforts by the executive or legislative branches to interfere with adjudication but the spate of violent attacks on federal judges. In the past two decades, two federal judges have been targets of mail bombs (one, Eleventh Circuit Judge Robert Vance, was indeed killed), one was murdered in his home

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111. Kenneth B. Noble, *Simpson Judge Under Fire for TV Interview*, N.Y. TIMES, Nov. 16, 1994, at B7.

112. *See* Tim Rutten & Henry Weinstein, *Jurists Give Mixed Scores to Judge Ito's Performance*, L.A. TIMES, Jan. 26, 1995, at A1, A22.

113. And, yes, sometimes the innocent. But even the innocent may be driven to aggression by the fear of an incorrect verdict and a substantial prison term.

by the angry father of a litigant (District Judge Richard Daronco), and another was shot to death by a sniper carrying out a contract "hit" (District Judge John Wood, Jr.).[114] Some physical courage (or at least blindness to danger) is requisite to being a judge capable of independent adjudication. Most judges know that a very angry and skilled person can, with some luck, end the judges' lives because of something they do as judges. Perhaps, in light of the numbers, it is only a small risk but small is not the same thing as insignificant. When judges do not feel a reasonable degree of personal security, any independence they have can succumb to fear.

In order to maintain an independent stance, the judge thus relies on strong prisons. The judge rests easy in adjudication and sentencing because she knows that those convicted will not be able to get at her. She need not fear that an accused will pull a handgun out at sentencing because the jail procedures are relatively strong when it comes to guns. A convicted felon will be locked up behind bars, far from the courthouse.

Of course, few prison terms last forever and convicts do eventually get out of jail. And many of the losers in the judge's courtroom will be civil litigants who lose bundles of money but never find themselves behind bars. To insure her personal safety, and hence her independence, the judge has to rely on something other than good prisons. Most judges have to rely on the losers having short memories. Perhaps the losers will forget my name, the judge tells herself. More likely, the losers will eventually forget the anger and thirst for vengeance that might have driven them to violence in the short term. Whichever, forgetfulness is undoubtedly a key to judicial independence. There are few things scarier for a judge than being recognized on the street by someone who stops and says, "Hey, you were the judge in my case way back in . . . ." It reminds her of the ever-present possibility of less friendly encounters. Fortunately, they are rare, and judges can generally operate in an environment of personal security and hence afford to exercise whatever independence they have freely.

IV. CONCLUSION

We have seen that judicial independence exists in a web of overlapping constraints and obligations which arise not out of the other branches of government, but out of the judiciary itself and the social and cultural environment judges inhabit. Judges may consciously sense each of these constraints holding them back or directing their adjudication forcefully,

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114. *See* Lee May & Ronald Ostrow, *Federal Judges Warned About Postal Bombs*, L.A. TIMES, Dec. 18, 1989, at A1.

and feel, as a result, that they are not truly independent. But if the myriad of constraints is inevitable (and they seem to be), when does a judge ever feel independent? Could the answer be never? Well, yes and no.

A judge may feel truly independent, paradoxically enough, only when she has fully digested and internalized the relevant social, cultural, and judicial norms, rules, and preferences. When the judge knows where the boundaries to her discretion are—and comes to understand and largely agree with them—then she will feel the comfort necessary to sense independence. For example, if a trial court judge knows precisely what the rules of evidence require with regard to a question of admissibility then she will be able to rule without thinking about where the boundaries lie. When she accepts the propriety of those boundaries, she will not fight against them but instead will work within them naturally and without much thought. To return to our earlier metaphor of the vehicle on the empty, multi-lane freeway, the judge will believe herself liberated once she is familiar with the road and stops crashing into the guard rails.

In our understanding, judicial independence is not complete independence in the sense that its possessor may do whatever she wishes. Indeed life offers no such independence under any meaningful circumstances. Everyone must understand their boundaries, the person of independent means is never a person of unlimited means. The need for boundaries is so profound that a judge who is confronted with a legal issue that is utterly without precedent will likely not sense an exhilarating independence in her free reign, but rather the same feeling as a sailor might have in a borrowed boat lost in the mid-Atlantic in the moments after opening a sealed mapcase and discovering that she has no maps. Independence is the ability to choose, but no one wants to choose without some idea of the consequences of that choice. Even the man in the famous short story knew there was a lady behind one door and a tiger behind the other.

The sense that there is some power that belongs to judges and not to anyone else corresponds to structural arguments based on the Constitution's specification of "judicial power." But the introspective sense of this power may be as vague as the term "judicial power." If scholars disagree on what the power is and where its existence is a barrier to legislative control of courts, they will get no clearer rule by consulting the introspection of judges. The sensibility of judges shifts with time and circumstance. An example is the belief of many judges today that an essential—not to mention painful and difficult—act of judging is passing sentence on a convicted criminal. Judges have often believed that the selection of one sentence out of an enormous range was part of the core

of judging. By the middle decades of this century, this belief was an article of faith, even though most judges thought the task was inhumanely difficult. When Congress took much of that discretion away with the federal sentencing guidelines, the protests of judges were anguished, sincere, and widespread, even among those who recognized that discretionary sentencing was a relatively recent artifact of the criminal law. As new judges come to the federal bench, many of them will see the sentencing guidelines as fixed in their universe, never having the power or the burden of broad discretion in sentencing. They will not miss what they never had. They may criticize the application of a particular provision or rule, but they will not perceive that they are denied judicial power, much less power essential to independence.

This may be the ultimate strength and weakness of an introspective approach to understanding judicial independence. If the structure of the Constitution is in most important respects fixed and static, how judges themselves understand and interpret their judicial role and their independence as a matter of experience will constantly evolve and develop. What introspection reveals today, for these interpreters, may or may not be what is significant tomorrow.

Why then consider the introspective sense of judges? Some might quarrel with our decision to add an introspective angle to the problem of judicial independence. Your view, they might say, does not help to solve the constitutional dilemmas likely to be faced by a court of law. The insights it offers may not lead us to clear answers on matters of legal doctrine. We borrow our response in part from Learned Hand, who often said that "nobody gives a damn what we [federal appeal judges] say."[115] He left unsaid the clear implication that no one would care about the opinions of those even lower on the totem pole of legal mavens—a group encompassing everyone in the world (including us) except, perhaps, the President, members of Congress, a few state supreme court judges, and whichever law professor has succeeded to T.R. Powell's role as the unofficial tenth Justice. Hand was wrong, but only slightly. People care about what judges and legal commentators think but only on the rarest of occasions, when a particular "hot" issue is on the table. It seems that many of the questions addressed in this symposium are not likely to come before any court in the near future,

115. Unable to find this direct quote, the authors consulted Judge Hand's biographer, Professor Gerald Gunther, who remembered reading such a statement in several of Hand's letters though he could not remember which. Telephone Interview with Professor Gerald Gunther (Jan. 3, 1995). In light of Professor Gunther's excellent biography of Hand, LEARNED HAND: THE MAN AND THE JUDGE (1994), his expertise is surely sufficient support for this citation.

and even if we are wrong, few specific issues of judicial independence will likely be "hot" enough to mandate deep research into its solution. In any case, our theory is influenced by the recognition that theory about what is practically necessary is often a poor predictor of what is truly essential in practice.

Even if no one cares what we say about judicial independence, judges are likely to consider their introspective senses of it, consciously or otherwise, in deciding what independence is and what is inconsistent with it if and when litigation over judicial independence arises. Given the fact that judicial independence in our time is unquestionably accepted as good and inherent in the Constitution, the definition of its limits will fall to judges. And their collective judgment, based on the introspection of each as individuals, will determine the stand of the judiciary and, ultimately, the state of the law for the Nation.