

ATITUDINI

Does Judicial Courage Exist, and if so, is it Necessary in a Democracy?

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Abstract:

Jurists are trained to value the rule of law and judges are expected to uphold same whatever the circumstances. Separation of powers controls interactions of the legislative, executive and judicial branches, creating potential for friction where the legality or legitimacy of state action is at stake. The real test of judicial independence comes in situations of crisis. Judges are not professional philosophers or politicians. Still, on a day to day basis, judges are called upon to make tough decisions that have dire consequences on a human level, which undoubtedly engages a judge's conscience. Changing values shape the face of justice; and with the rise of populism, the role of the judiciary in a democracy has become a major topic of discussion. Detractors of judicial activism dismiss such elitist thinking particularly as it is expressed by unelected members of the judiciary. Proponents of judicial activism reply that judicial restraint has no place where fundamental rights and freedoms are threatened.

The author has been a judge with the Federal Court of Canada since 2002. In this essay, he proposes a redefinition of judicial restraint and activism. Judicial courage better describes the reality of judicial intervention which is far from being unidimensional. Faced with two opposite views of judicial courage, and naturally inclined to follow a liberal one - according to which courage, virtue and integrity are tightly intertwined - the author also tests a conservative duty-based approach centered on rules and precedents. Throughout a historical journey, tackling with ethical



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challenges shaping the face of today's justice, a judge tries to find his own existential meaning. In the end, the author concludes that the true essence of justice lies in the judge's capacity to value persons in their humanity while keeping the rule of law at the center of his or her judicial life.

Rezumat:

Juriștii sunt instruiți să prețuiască statul de drept, iar judecătorii sunt obligați să respecte aceleași valori indiferent de circumstanțe. Separarea puterilor controlează interacțiunile ramurilor legislative, executive și judiciare, creând potențial de fricțiune în cazul în care este în joc legalitatea sau legitimitatea acțiunii statului. Adevăratul test al independenței justiției se dă în situații de criză. Judecătorii nu sunt filozofi sau politicieni profesioniști. Cu toate acestea, zilnic, judecătorii trebuie să ia decizii grele, care au consecințe grave la nivel uman, ceea ce implică, fără îndoială, conștiința unui judecător. Valorile în schimbare modelează chipul justiției; și, odată cu ascensiunea populismului, rolul justiției într-o democrație a devenit un subiect de discuție important. Detractorii activismului judiciar resping o astfel de gândire elitistă, în special, așa cum este exprimată de membrii nealeși ai sistemului judiciar. Susținătorii activismului judiciar răspund că restricția judiciară nu își are locul acolo unde drepturile și libertățile fundamentale sunt amenințate.

Autorul este judecător la Curtea Federală a Canadei din anul 2002. În acest eseu, el propune o redefinire a restricțiilor și activismului judiciar. Curajul judiciar descrie mai bine realitatea intervenției judiciare, care este departe de a fi unidimensională. Confruntat cu două concepții opuse privind curajul judiciar și având o înclinație naturală de a urma concepția liberală - conform căreia curajul, virtutea și integritatea sunt strâns legate între ele - autorul testează, de asemenea, o abordare conservatoare bazată pe datorie, centrată pe reguli și precedente. Pe parcursul unei călătorii istorice, în care se confruntă cu provocări etice care conturează chipul justiției de astăzi, un judecător încearcă să-și găsească propriul sens existențial. În cele din urmă, autorul concluzionează că adevărata esență a justiției constă în capacitatea judecătorului de a prețui persoanele în umanitatea acestora, păstrând statul de drept în centrul vieții sale judiciare.

Keywords: rule of law, separation of powers, judicial courage, judges

Introduction

"[Those who won our independence] believed liberty to be the secret of happiness, and courage to be the secret of liberty."—Justice Louis Brandeis¹

To be courageous (...) requires no „exceptional qualifications, no magic formula, no special combination of time, place and circumstance. It is an

opportunity that sooner or later is presented to us all."—John F. Kennedy²

Jurists are trained to value the rule of law, and judges are expected to uphold same, whatever the circumstances. Separation of powers controls interactions of the legislative, executive, and judicial branches, creating potential for friction where the legality or legitimacy of state

¹ *Whitney v California*, 274 US 357 at 375 (1927).

² John F. Kennedy, *Profiles in Courage*, 50th Anniversary ed (New York: Harper Perennial Modern Classics, 2006) at 225.

action is at stake. The real test of judicial independence comes in situations of crisis. Judges are not professional philosophers or politicians. Still, on a day to day basis, judges are called upon to make tough decisions that have dire consequences on a human level, which undoubtedly engages a judge's conscience. Changing values shape the face of justice. With the rise of populism, the role of the judiciary in a democracy has become a major topic of discussion.

I have been a Federal Court judge since 2002. A few years ago, I completed an eight-month sabbatical at the University of Ottawa's Faculty of Law. During this leave, beyond lecturing, I also researched and reflected on the issue of judicial ethics. This break provided me with the unique opportunity to explore a question I had on my mind for a while: Does judicial courage exist, and if so, is it necessary in a democracy?

Somewhat lost by the gravity of this rhetorical question, I asked several colleagues for guidance. In the end, I was left to decide which way I wanted to walk on the infinite road towards justice and truth. I could go in the right or the left direction, as a free and independent individual. However, amid this freedom, there was no compromise, no middle ground.

Some colleagues questioned the very existence of "judicial courage" as a concept, and even more so, the propriety of the expression itself. For them, there are no courageous judges, only judges who perform their judicial duty: to render justice and apply the law of the land—nothing more and nothing less. The law applies equally to everyone, they say. In countries where there is no guarantee of independence, judicial resistance may be necessary; however, suggesting that there is a need for judicial courage in a democracy would be fallacious. Judicial activism would be contrary to the principle

of separation of powers, and thus, the rule of law. I call this way of thinking the "path on the right," or, if you prefer, the conservative approach to the judge's role: it is more rule-oriented.

Other colleagues did not question the existence of judicial courage, and even provided me with examples of their own courageous acts. Judges must take a stand, even when they know the result will be unpopular or displease the authorities. They all viewed integrity as any decision maker's foremost virtue and as the ultimate guarantee of their impartiality and independence. Checks and balances are essential to freedom and democracy. Judicial courage is a universal value, whatever the state's nature. The judiciary is called to intervene when legislators or governments adopt laws or take actions that are no longer in line with the constitution but are obscured by fear and prejudice. Judicial restraint is not an option, and upholding the rule of law is not activism. Using the same metaphor, this is the "path on the left," or, if you prefer, the liberal approach to the judge's mission: it is more value-oriented.

Intuitively, my heart endorsed the liberal view, which is faithful to the individualized nature of justice. This seemed a more natural path, but reason was also telling me the conservative approach was not without any objective or legal foundation—since our confidence in the justice system ultimately resides in respect for democratic institutions. I confess that my former background as a labour arbitrator may have shaped my general approach to judging. Adjudicators will favour an interpretation of the collective agreement leading to a just result while resisting the temptation to fix things overlooked by parties during negotiations. Industrial peace is realized through compromise. A third party must not risk disturbing the fragile equilibrium reached by the parties through its actions.

On the other hand, judges are not merely umpires in a baseball game: they perform a public duty, and their decisions affect the lives of people, as well as important corporate or state interests. Laws are not negotiated between two parties, like commercial contracts or collective agreements. Laws are voted by Parliament—the majority rules—and apply to everyone. This makes it equally important to determine whether and to what extent forceful judicial action may be used at all—notably when fundamental rights and freedoms are at stake. Affirming that judges act as guardians of the constitution is a relatively simple proposition, but construing apparent conflicting rights or obligations in a multifaceted society poses an immense judicial challenge: “don’t let them scare you,” or perhaps I should say, “don’t let their fear and bigotry influence your critical judgment and independence.”

Bound by a duty of judicial reserve, judges do not divulge the actual deliberation process in any particular case they have heard. Any virtuous behaviour, any internal battle will stay behind the closed door of the judge’s conscience. Today I propose a redefinition of judicial restraint and judicial activism. Judicial courage better describes the reality of judicial intervention, which is far from being one-dimensional. Tackling ethical challenges that shape the face of justice, and throughout a historical journey, it is apparent that judges have tried hard and are still struggling to find their own existential meaning. I have no pretension to exhaustive coverage of the complex issues discussed in this essay. Academics are certainly better placed to theorize about courage and law, but, at the risk of erring on the side of caution, perhaps the true essence of justice lies

in the judge’s capacity to value persons in their humanity while keeping the rule of law at the center of his or her judicial life.

As a defender of the “righteous and the not so righteous,” Professor Alan Dershowitz cautioned lawyers who often work on an “ethically ambiguous terrain” to pick their heroes carefully, citing as his own legal heroes: Clarence Darrow, Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Hugo Black, William O. Douglas, Thurgood Marshall, and William Brennan, among others.³ I totally agree with him when he stated that “we need to create larger-than-life role models to look up to.”⁴ In my case, a role model and a source of inspiration is my former colleague Edmond P. Blanchard (1954–2014), who served on both the Federal Court and as Chief Justice of the Court Martial Appeal Court. Although he was recognized for his great intellectual capability, it was his profound humanity and deep moral commitment, coupled with an unflinching honesty, that gained him the total respect and adherence of colleagues, former companions in politics, parties, and lawyers appearing before him. Edmond was able to conjugate his passion for the law with reason and sound judgment. Good judges are inspired by a perennial sense of freedom and justice. This essay is dedicated to his memory.

I. The Conservative Duty-Based Approach

The conservative duty-based approach to the judge’s mission does not consider courage—a moral quality of the individual—to be part of the act of judging. Justice is essentially a declaratory process flowing from the nature of the office itself: A is right and B is wrong. A’s

³ Alan Dershowitz, *Letters to a Young Lawyer*, (New York: Basic Books, 2001) at 3, back cover.

⁴ *Ibid* at 3.

claim must be judicially affirmed and enforced against B's competing claim. The focus is not on the person—who they are and what they are feeling—but on the respect for rules and precedent. As expressed by Justice Hiller B. Zobel, former Associate Justice of the Massachusetts Superior Court, “[j]udges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists, and talk shows ... we do not administer justice by plebiscite.”⁵ This is in line with the conception that justice is blind, institutionally speaking.

But justice itself depends on the voluntary action of judging performed by the person who holds judicial office. According to German philosopher Immanuel Kant (1724–1804), there is a single moral obligation, the “categorical imperative” derived from the concept of duty.⁶ What really matters is the motivation itself: doing the right thing not because of what it accomplishes but because it is the right thing to do in the first place.⁷ Holders of public office may be called upon at some point in their careers to choose between loyalty to their constituents—the legal obligation—and what their conscience dictates—the moral obligation. Does this virtue–duty dichotomy really hold in practice? It is certainly delicate if we distinguish motivation and result. It is therefore important to understand the concept of moral obligation, which must be distinguished from legal obligation.

Justice—or should we say, its paradigm—lies essentially in the government of men who make, interpret,

In the face of sometimes irreconcilable values, an idealized view of democracy must not become a folding screen covering a reign of arbitrary decisions and injustice - under the guise that laws adopted by Parliament or Congress represent the will of the majority.

and apply rules of all sorts. There is an expectation that parties will submit to the authority of a judge, who, in turn, will accept to be bound by the rule of law. This supposes that the judge's autonomous-self is first freed of any contingent desire or allegiance. The law itself can only live through jurisprudence. Pure practical reason is substituted by a reasonable interpretation of the law of the land. The judge must give up the choice of being governed by the laws of nature or their remote interest as a citizen. The value of the rule of law lies in the respect given to it. This is what confers a dignified nature to the judicial office. As stated by Sir Thomas More (1478–1535) in Robert Bolt's play *A Man for All Seasons*: “[t]he world must construe according to its wits. This Court must construe according to the law.”⁸

More was canonized as a martyr 400 years after his death. He notably served as councillor to Henry VIII (1509–1547) and Lord High Chancellor of England. Well beyond his idealistic vision of the political world eloquently expressed in *Utopia*,⁹ More questioned the mixing of

⁵ Justice Hiller Zobel, cited in Claire L'Heureux-Dubé, “Judicial Independence and Judicial Activism” in Frederick Lee Morton, ed, *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 2002) 609 at 615.

⁶ Immanuel Kant, *Groundwork for the*

Metaphysics of Morals, translated by HJ Paton (New York: Harper Torchbooks, 1964) at 58–67.

⁷ *Ibid.*

⁸ Robert Bolt, *A Man for All Seasons* (London: Bloomsbury, 1960) at 97.

⁹ *Utopia* was first published in Latin in 1516.

law and religion.¹⁰ Unable to morally support the annulment of Henry VIII's marriage with Catherine of Aragon and the application of the statute giving legal effect to King's wishes, he resigned from the prestigious charge of Lord High Chancellor. In other words, he did not want to be in a conflict of interest. More accepted Parliament's right to declare Anne Boleyn the legitimate Queen of England, but he refused to take the oath of Supremacy of the Crown in the relationship between the Kingdom and the Church of England.¹¹ More was tried and found guilty of high treason and sentenced to death. His personal religious beliefs prevented him from condoning the King's project. We could say that, in resigning, More wanted to relieve himself of the legal duty as Lord High Chancellor to uphold a validly enacted law. At the same time, More showed the highest respect for the law by resigning from his judicial function. I would characterize his resistance as "speaking truth to power", which is naturally suicidal for an individual in the face of absolute power.¹²

We no longer live in More's divided world. Religious beliefs will not usually create a moral impediment forcing a scrupulous judge to resign from office. In

practice, it seems that the "Christian model of loving the other" has no impact in decisions rendered by judges who are faithful to their religious beliefs. On the other hand, "paradoxically, the very insistence that their professional work must be insulated from their personal lives, together with the need to exercise discretion often based on their own value-system, forces them to have a strong sense of personal morality," as noted by Newman.¹³ Be that as it may, where a judge's legal duty to apply the law of the land— as interpreted by the Supreme Court—may be in conflict with his religion's moral precepts (or conscience), it has been suggested that they should simply recuse themselves from the case.¹⁴ Yet, as mentioned by Brand-Ballard, "some individuals who have faced this conundrum identify resignation, rather than recusal, as the only permissible alternative to adherence."¹⁵

Although it is not directly related to any publicly expressed religious belief, I have been interested by the following modern example of integrity and courage. Justice Lois Forer (1914–1994) was considered an authority on criminal justice.¹⁶ She had already spent 32 years practising law and

¹⁰ See generally Edward McGlynn Gaffney Jr, "The Principled Resignation of Thomas More" (1997) 31 Loy LA L Rev 63. He notes: "There is an important piece of evidence which suggests that although More did not think that the Pope would grant the annulment Henry sought, More was willing to swear an oath to the part of the Reformation Statutes that ensured the legitimacy of royal succession through Anne Boleyn, Henry's second wife. The problem of conscience was on a different level, the claim of the Crown to absolute authority over the church. That was for More a principle worth resigning over and even worth dying for" (*ibid* at 72).

¹¹ *Ibid*.

¹² "Speaking truth to power" has become a popular way to describe taking a stand, even when the people speaking truth to power are powerful themselves.

¹³ Louis E Newman, "Beneath the Robe: The Role of Personal Values in Judicial Ethics" (1995) 12 J of L & Religion 507 at 509, 524 and 530.

¹⁴ See William H Jr Pryor, "The Religious Faith and Judicial Duty of an American Catholic Judge" (2006) 24 Yale L & Policy Rev 347 at 347–362.

¹⁵ Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* (Oxford, UK: Oxford University Press, 2010) at 176.

¹⁶ See Wolfgang Saxon, "Lois G. Forer, 80, a Judge and Author, Dies", *The New York Times* (11 May 1994), online: <nytimes.com/1994/05/11/obituaries/lois-g-forer-80-a-judge-and-author-dies.html>. Lois G. Forer is the author of many books including: *Criminals and Victims: A Trial Judge Reflects on Crime and Punishment* (New York: Norton, 1984); *A Rage to Punish: The Unintended Consequences Of Mandatory Sentencing* (New York: Norton, 1994).

16 years on the bench when she resigned in 1987 following her refusal to impose the mandatory five-year imprisonment required by a 1982 Pennsylvania law. Sentencing has always been an important area where judicial discretion allows criminal justice to perform both its dissuasive and reparative functions. Mandatory sentencing laws will nonetheless limit any such discretion. The offender in this case had committed a toy gun holdup against a cab driver. She had sentenced him to eleven and a half months in county jail, with a two-year probation period, and she permitted him to work outside the prison during the day to support his family. The prosecutor appealed the sentence. When the appeal was heard, the offender had already served his term of imprisonment and had paid restitution to the victim. The Pennsylvania Supreme Court ordered Justice Forer to resentence the offender to the five-year minimum sentence for a serious offence committed in or near a public transportation facility. She later explains the hard choice that led to resignation: I was faced with a legal and moral dilemma. As a judge I had sworn to uphold the law, and I could find no legal grounds for violating an order of the Supreme Court. Yet five years' imprisonment was grossly disproportionate to the offense.

The usual grounds for imprisonment are retribution, deterrence, and rehabilitation. Michael had paid his retribution

by a short term of imprisonment and by making restitution to the victims. He had been effectively deterred from committing future crimes. And by any measurable standard he had been rehabilitated. There was no social or criminological justification for sending him back to prison. Given the choice between defying a court order or my conscience, I decided to leave the bench where I had sat for sixteen years. That didn't help Michael, of course; he was re-sentenced by another judge to serve the balance of the five years: four years and fifteen days [...] Why not permit judges more freedom in making their decisions, provided that they give legitimate reasons?¹⁷

Justice Forer's resignation is somewhat unique and can certainly be considered a courageous act by all standards of conduct. While judges have no choice but to abide by a directed verdict or the substituted sentence pronounced by an appellate court in a matter earlier decided by them, this has not prevented many trial judges from adopting a form of judicial resistance—invoking the rule of law or the constitution—as a reasonable means not to enforce mandatory sentences. In Canada, during former Prime Minister Stephen Harper's tenure (2006–2015), many trial judges refused to implement mandatory minimum sentences in terms of fairness and rationality, as well as mandatory victim's surcharges in cases involving indigent offenders.¹⁸ For instance, while

¹⁷ Lois Forer, "Justice by Numbers", *The Washington Monthly* (April 1992) at 13–18, online: <unz.com/print/WashingtonMonthly-1992apr-00012/>.

¹⁸ See *R v Smickle*, 2012 ONSC 602, 110 OR (3d) 25. The decision was reviewed in part on other grounds in *R v Smickle*, 2013 ONCA 678, 311 OAC 288; Sean Fine, "Quebec judge lays out challenge to Tories' sentencing surcharge" *The Globe and Mail* (4 February 2014), online: <beta.theglobeandmail.com/news/politics/quebec-judge-lays-out-challenge-to-tories-entencingsurcharge/

article16702089>; *R v Cloud*, 2014 QCCQ 464 at para 15, 300 CRR (2d) 349 [*R v Cloud*]. While the constitutionality of the mandatory victim surcharge was not challenged in *R v Cloud*, it has been challenged multiple times in Ontario where it has both been upheld (see e.g. *R v Tinker, Judge, Bondoc & Mead*, 2015 ONSC 2284, [2015] OJ No 1758 (QL); *R v Eckstein*, 2015 ONCJ 222, 2015 CarswellOnt 5865) and found unconstitutional (see e.g. *R v Michael*, 2014 ONCJ 360, 121 OR (3d) 244; *R c Larocque*, 2014 ONCJ 428, [2014] OJ no 4113).

Justice Healy in *R v Cloud* stated that “[he was] bound [...] by the oath and dignity of my office” and “[could not] disobey the law,” his decision was rooted in his obligation to “interpret that law in a manner that best conforms in law, principle and policy to the whole of Part XXIII and the jurisprudence of the courts.”¹⁹ In this way, Justice Healy identified his role in applying the legislation enacted by Parliament, but drew upon reason and his understanding of the rule of law to achieve a just result. In April 2015, the Supreme Court of Canada held that the mandatory minimum sentences for prohibited or restricted firearms offences pursuant to paragraph 95(2)(a) of the *Criminal Code* were unconstitutional since they violated section 12 of the *Charter of Rights and Freedoms* (“*Charter*”), the guarantee against cruel and unusual treatment or punishment.²⁰ Whether this is “judicial activism” or not depends mostly on whether we accept that the Canadian Constitution can be interpreted in a progressive manner in lieu of deferential or creationist fashion; that is to say, in light of the original intention of the drafters of the Canadian Constitution.

II. Justice: Still an Act of God?

In the Bible, the sovereignty of God as master of the universe does not end at the borders of Israel and Judah, for God is the Lord of all Nations. Once God has determined to punish Sodom and Gomorrah for their sins, Abraham recognizes that God is the judge of men’s actions.²¹ Justice is a moral concept, a virtue and an end. So is the good and all qualities attributed by men to God, who stands against evil. Thus, for centuries,

justice has had for men a “godlike” essence. Indeed, the phrase “so help me God is prescribed in oaths as early as the *Judiciary Act of 1789*, for U.S. officers other than the president.²² Historically, justice was best personified in the sovereign and its magistrates, who abided by God’s commands under pain of punishment or destitution. Take Solomon, King of Israel and son of David, who remained the legitimate ruler of the Tribes of Israel as long as he feared the Lord and kept his commands: “[s]ince you have done this and did not keep my covenant and my statutes, which I commanded you, I will tear the kingdom away from you and give it to your servant.”²³

The fear of God is best expressed in the former style of the High Court of Admiralty of Great Britain, which dates back to at least 1360: “[t]hrice calling upon the name of Christ, and having the fear of God alone before his eyes, the judge pronounces and decrees,” as recited in the preface to the first volume of the Reports of Cases argued and determined in the High Court of Admiralty, commencing with the judgments of the Right Honorable Sir William Scott in 1798, the publication of which “may tend, with former precedents, to convince the world that the government of Great Britain has done and does justice, in the fullest and most open manner, to neutrals and war, as well as to its own subjects.”²⁴ The commentator further remarks: [A] British judge of the Admiralty was independent, in a certain degree, as much as the other judges of England by the Bill of Rights, and amenable only, like them, to parliament; that he must have a spirit of doing equal justice [...] this shows the original idea, that he might be a man of

¹⁹ *R v Cloud*, *supra* note 18 at para 51.

²⁰ *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773.

²¹ *The Bible*, Genesis 18:20–25 [*The Bible*].

²² *Judiciary Act of 1789*, ch 20, 1 Stat 73.

²³ *The Bible*, *supra* note 21 at 1 Kings 11:11.

²⁴ Sir George Hay & Sir James Marriott, *Decisions in the High Court of Admiralty, during the time of Sir G Hay, and of Sir J Marriott*, vol 1 (London: R Bickerstaff, 1801) at i–ii.

too pliant and practicable stuff; that he ought to be a man not actuated by personal views of ambition and avarice, and courting by a mean adulation, for the purposes of the day, the smiles of a superior, or the popularity of any set of men of any sort of professions. He should be without narrowness of mind, or meanness of education. *In short, a judge ought to be a man intrepid*” [emphasis added].²⁵ The use of the English word *intrepid* is revealing because it originates in the late seventeenth century and is derived from the French word *intrépide* or Latin *intrepidus*, which characterizes a person who is fearless.

The fact the American Declaration of Independence, adopted by the Second Continental Congress in Philadelphia on July 4, 1776, contains many references to God, while the 1789 United States Constitution contains none has not gone unnoticed. As put by lawyer Anthony J. Minna, author at *Journal of the American Revolution*: In stating that people’s rights were given to them by their creator, the Continental Congress endowed those rights with a legitimacy that knows no parallel in mortal sources ... Whereas the Declaration explained and justified a rebellion to secure God-given rights, the Constitution is a blueprint for stable and effective republican government in a free country. ... The absence of references to a deity in the Constitution is consistent with the strict religious neutrality of the entire document.²⁶

Interestingly, some two hundred years after the Americans, we Canadians inherited, in 1982, a new Constitution voted by the Parliament of the United Kingdom, which recognized in the

preamble of the *Charter* that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”²⁷ Retired Justice Barry L. Strayer, who was instrumental in the design of the *Charter* and the repatriation of Canada’s Constitution, has noted: The first trace I can find in the record for this bold statement is in the minutes of Cabinet for April 16, 1981, as the debate in Parliament was about to draw to a close. The minutes state: “*The Prime Minister* sought counsel on the inclusion of God in the government’s amendments.” The matter was left for the Prime Minister, the Minister of Justice (Jean Chrétien), and the President of the Privy Council (Yvon Pinard, the House Leader, later to be valued colleague on the Federal Court) to work out the details. While it is a trite saying that “the devil is in the details,” here it was God in the details! I was never consulted on this: if I had been I would have observed that structurally it is an odd preamble because of the reference to God. There is no clear causal link between the recognition of God in the preamble and what follows. Also, it seems to me it is full of ambiguity. One must ask “Which God?” or “Whose God?”²⁸

My former colleague is correct: “the devil is in the details,” and as a result God has been “constitutionalized.” True, God was not originally mentioned in the preamble of the *British North America Act, 1867*, but God had already made, centuries before, a distinguished entry in Great Britain. Eloquenty stated by King James I (1566–1625), the king is a godlike figure vested with absolute power: “[a]s it is atheism and blasphemy in a creature to dispute what the Diety may do, so it is

²⁵ *Ibid.*

²⁶ Anthony J Minna, “Why God is in the Declaration but not the Constitution” (22 February 2016) *J of the American Revolution*, online: <allthingsliberty.com/2016/02/why-god-is-in-the-declaration-but-not-theconstitution/>.

²⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) 1982*, c 11.

²⁸ Barry L Strayer, *Canada’s Constitutional Revolution*, (Edmonton: University of Alberta Press, 2013) at 162–63.

presumption and sedition in a subject to dispute what a king may do in the height of his power.”²⁹ With the divine right of the Crown to rule according to its conscience being seriously challenged and Parliament gaining sovereignty, this presumption is no longer true. Like a fallen angel, the earthly powers of the Crown are best expressed in the following maxim: “[r]ex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem,” or “The king is under no man, yet he is under God and the law, for the law makes the king.”³⁰ God prevents rulers from becoming tyrants. God’s recognition in the Canadian Constitution is a legal safeguard against fallacy and deception being made legal by man.

The same sentiment has been articulated by the Supreme Court of Canada: [Since 1867 there has been] a growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state. ... The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society.”³¹ While “the evolution of Canadian society has

given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs,” it remains that “[t]he preamble, including its reference to God, articulates the ‘political theory’ on which the *Charter’s* protections are based.”³²

The question is not whether Canada is a religious or atheist state, but whether Canada is founded on transcendental principles that allow the Canadian Constitution to grow as a “living tree” and the rule of law to breed and expand.³³ In this respect, I am inclined to endorse Dean of Osgoode Hall Law School and Professor Lorne Sossin’s opinion that “the supremacy of God should be read as repository for the tenets of our moral system and commitments to social justice.”³⁴ God *and* the rule of law complement each another. This is what allows universal ethical principles—which may themselves have developed from morals and religion—to revitalize the constitutional body of jurisprudence.

The health of democracy is not just dependent on the law: it counts on the continuous will of the people to be governed by law and treat one another in a fair and just manner. In that sense, we could say that if liberty represents the core value of the democratic state, fraternity is necessary to achieve liberty and the better living of all the people. This is an imminently moral enterprise where justice

²⁹ Sir William Blackstone, *Commentaries on the Laws of England*, (1765–69), Book I (Chicago: The University of Chicago Press, 1979) at 238.

³⁰ Sir Edward Coke, *Reports*, (1826), (New Jersey: The Lawbook Exchange Ltd, 2002) fourth part at xix; see also *ibid* at 227; Herbert Broom, *A Selection of Legal Maxims Classified and Illustrated*, 10th ed (London: Sweet & Maxwell Ltd, 1939) at 17–18.

³¹ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 67, [2004] 2 SCR 650.

³² *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at paras 72, 147, [2015] 2 SCR

3. See also the preamble of the Canadian *Bill of Rights*, SC 1960, c 44, (“the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions”).

³³ See Lorne Sossin, “The Supremacy of God, Human Dignity and the *Charter of Rights and Freedoms*” (2003) 52 U of New Brunswick L J 227 (2003); see also David M Brown, “Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights” (2000) 33 U of British Columbia L Rev 551.

³⁴ Sossin, *supra* note 33 at 237.

and equality are major gravitational forces. The founders originally sought in God a model to imitate, but the relationship between power and fraternity has always been chaotic. For scholar and Appellate Justice, John T. Noonan Jr. (1926–2017), “[t]he central problem ... of the legal enterprise is the relation of love to power ... only in the response of person to person can Augustine’s sublime fusion be achieved, in which justice is defined as ‘love serving only the one loved.’”³⁵ Noonan’s reliance on Saint Augustine (354–430) is not fortuitous: charity is the supreme virtue. Charity starts with one’s recognition of his or her own humanity. For Combs, “[t]he notion of doing justice by serving God is likely to strike many as Christian paternalism,” but it is nevertheless correct. He said that “in judging our neighbour, whom we love as ourselves, we serve him by endeavouring to lead him to the happy life. In so serving him, we also serve God and ourselves. In short, justice is love intended to lead the community to the happy life.”³⁶

However, it is not necessary to resort to any particular religion or belief to obtain the good result achieved by a responsible acting judge serving justice and applying the rule of law: “[n]o person itself, the law lives in persons,” and thus, as Noonan further observes, “[r]ules and persons may be conceived of as an antinomy – ‘government of law, government of men’ ... Abandonment of the rules produces monsters; so does neglect of persons. Which monsters are the worse I will not argue.”³⁷ Accordingly, I suggest that

human dignity—a softened adaptation of the virtue of charity—should now shape our understanding of civil rights in a society that has mostly become secular rather than spiritual, from the point of view of public governance, at least. Indeed, it is apparent today that the universal concept of dignity has certainly played a central role in the modern constitutional construction of rights and freedoms. Their development clearly would not have been possible without the structuring effect of the Kantian “Categorical Imperative”: the individual has a *perfect duty* not to use humanity merely as a means to some other end.³⁸

But this is with no avail: if the constitution is the supreme law of the land, so are judges when they interpret it. Since judges are not gods, some observers would say that they have the pretense to act as “godly figures” and possess the truth when they are judging, especially in the constitutional arena.³⁹ Detractors of an omnipotent judicial review power prefer that governments and legislators respond to the people. It has even been advocated that the Supreme Court of the United States is not a court and its justices are not judges, and, as suggested by Segall, “[i]f Supreme Court decision making is much more about values than law, constitutional law professors (and I am one) might not be the most qualified ‘experts’ to suggest what results the Court should reach.”⁴⁰ Expressed in another manner, Hutchinson remarks that “[t]he general problem is not whether or not any judge

³⁵ John T. Noonan Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and White as Makers of the Masks*, (Berkeley, California: University of California Press, 2002) at xii.

³⁶ Christopher Combs, “Saint Augustine and Martin Buber as Perspectives on John Noonan’s *Persons and Masks of the Law*” (1992) 37 *American J of Jurisprudence* 145 at 153–155.

³⁷ Noonan, *supra* note 35 at 4, 18.

³⁸ Kant, *supra* note 6 at 95–96.

³⁹ Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge, UK: Cambridge University Press, 2012) at 2–3.

⁴⁰ Eric J. Segall, *Supreme Myths, Why the Supreme Court Is Not a Court and Its Justices Are Not Judges*, (Santa Barbara, California: ABC CLIO, 2012) at 6.

ought to be 'a judge of Truth and Knowledge.' The fact of the matter is that they *are* treated as if they *do* have that power."⁴¹ This brings us back to our basic question: Should the individual be "virtuous" in any manner?

III. The Liberal Approach: Interweaving Independence, Integrity and Courage

The liberal approach focuses on an interweaving of the personal qualities or virtues that will ensure that justice will be rendered by an independent and impartial judiciary. As expressed by the Canadian Judicial Council, "[t]he judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law."⁴² Courage is a value equally cherished by the bar and the judiciary.

For example, there is an express reference to the virtue of "courage" in the Code of Judicial Ethics of British Columbia that provides that "[j]udges should be impartial, diligent and courageous" and that they "should not be influenced by partisan interest, public opinion, or fear of criticism."⁴³ This is not new. In 1951, Justice Ivan Rand (1884–1969) publicly stated that freedoms "can be preserved only through a judicial administration which, by intelligence, courage, and unremitting vigilance,

maintains their standards inviolate."⁴⁴ In a broader perspective, the European Network of Councils for the Judiciary considers that the judge must demonstrate "personal qualities of wisdom, loyalty, a sense of humanity, courage, seriousness and prudence, an ability to work and an ability to listen and to communicate effectively."⁴⁵ Interestingly, courage is not just a Western value. For example, the Judicial Committee of Lebanon mentions "moral courage" as a key principle upon which its Judicial Code of Ethics is based and which includes independence and impartiality, integrity, restraint, moral courage, modesty, honesty and dignity, competence, and diligence.⁴⁶

As the Canadian Judicial Council emphasizes, the judge must apply the law "without fear or favour" and with an open spirit. Michael S. Greco, former president of the American Bar Association, argued that the judiciary must protect the rule of law but can only do so if it is "independent, impartial, and, equally important, *ourageous* [emphasis added]."⁴⁷ Similarly, Justice Penny J. White of the Tennessee Supreme Court and the first woman on the First Judicial District Circuit Court said that "judicial independence is the *sine qua non* of due process, of equal protection, and of equal justice under the law."⁴⁸ Given the centrality of independence to the rule of law, "judges

⁴¹ Hutchinson, *supra* note 39 at 4.

⁴² *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council) at 9.

⁴³ Provincial Court of British Columbia, *Code of Judicial Ethics* (revised 1994), online: <provinciacourt.bc.ca/downloads/pdf/codeofjudicialethics.pdf>, rules 5.00 and 5.01.

⁴⁴ E Marshall Pollock, "Mr Justice Rand: A Triumph of Principle" (1975) 53 *Canada Bar Rev* 519 at 528.

⁴⁵ "Judicial Ethics - Principles, Values and Qualities," *European Network of Councils for the Judiciary* (2009-2010), online: <encj.eu/index.php?option=com_content&view=article&id=55%3

Aethics&catid=14%3Ajudicialethics&Itemid=233&lang=en>.

⁴⁶ Republic of Lebanon, Ministry of Justice, "The Judicial Code of Ethics Main Principles" (25 January 2005), online: <deontologie-judiciaire.umontreal.ca/fr/magistrature/documents/LIBANJudicialCodeOfEthicsENG.pdf>.

⁴⁷ Michael S Greco, *Judicial Courage in the 21st century* (2007) [unpublished paper presented at the Massachusetts District Court – 2007 Judicial Educational Conference] at 3.

⁴⁸ Penny J White, "Judicial Courage and Judicial Independence" (1996) 16 *J National Assoc of Administrative L Judges* 161 at 162.

must not bow to political pressure, to the untested will of the people. We remember all too many times when the people were wrong: slavery, debtors' prisons, segregation, gender discrimination ... And so I have encouraged those judges and the advocates that stand before them ... to be courageous and relentless in defence of judicial independence."⁴⁹

In practice, judges must accept changing their perception of themselves as much as their perception of the world itself, which is in constant evolution. Judges cannot live in the comforting illusion they may get from the prestige attached to their judicial function. At the same time, an inner sense of caution and prudence must always guide the judge before a particular course of action is taken in any given matter. We must see the judge as a scrupulous agent of the state who is independent of personal aims, attachments, and sympathies. This is the true essence of impartiality. Likewise, in arguing that the judiciary preserves freedom through courage, intelligence, and vigilance, Justice Rand once stated that "as the first condition of such functioning the judicial mind must itself be free."⁵⁰ However, as Justice Benjamin N. Cardozo (1870-1938) cautioned, "the judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."⁵¹

Scholar David Pimentel explicitly conceptualized judicial courage in terms of independence: a courageous judge is one "who is willing to act independently."⁵² Pimentel argued that structural protections afforded to judges, such as life-tenure or guarantees against salary cuts, are not "the most direct and compelling determinant of judicial independence," but rather "the degree of judicial courage the judge has or demonstrates in her work."⁵³ He also believes that "[i]t is this courage that enables the judge to withstand pressures and influences, even threats and exercise true independence in her decision-making. If we want a truly independent judiciary, it is essential that we have judges who demonstrate this courage."⁵⁴ Likewise, Lord Anthony Clarke conceptualizes "moral courage"—which he considers "a very important judicial attribute"—in terms of independence.⁵⁵ He stated that "[a] quiescent and timorous judiciary, unable or unwilling to act impartially or independently of the parties before it would lose public confidence."⁵⁶ For him, the "good character" requirement includes courage: "Moral courage rather than moral cowardice is needed for good character to be satisfied."⁵⁷ However, as mentioned by Pimentel, judicial courage alone "is not necessarily a virtue" since it "may just as easily embolden a judge to do the *wrong* thing."⁵⁸ I agree with him that the "scariest of all" are "the judges with low integrity and ample courage."⁵⁹ Thus, "[j]udicial courage becomes a virtue

⁴⁹ *Ibid* at 166–67.

⁵⁰ Pollock, *supra* note 44, citing Ivan C Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U of Toronto L J 1 at 5, 6, 14.

⁵¹ Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1922) at 141.

⁵² David Pimentel, "Reframing the Interdependence v Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and

Integrity" (2009) 57 Cleveland State L Rev 1 at 2.

⁵³ *Ibid* at 20.

⁵⁴ *Ibid*.

⁵⁵ Lord Clarke (Untitled speech delivered at Diversity Conference, London, 11 March 2009).

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ Pimentel, *supra* note 52 at 22.

⁵⁹ *Ibid* at 28

only when it is coupled with *judicial integrity*, ... a commitment to the highest principles of judicial decisionmaking.”⁶⁰

In the face of sometimes irreconcilable values, an idealized view of democracy must not become a folding screen covering a reign of arbitrary decisions and injustice—under the guise that laws adopted by Parliament or Congress represent the will of the majority. This is especially true considering the lobbying of political actors by powerful interest groups and the risk to the rights of minorities under majority rule. The rule of law does not allow for compromises. Justice Claire L’Heureux-Dubé once stated that judges must have “the courage to stand up for causes that may be unpopular and the courage to make decisions that we realize may attract criticism.”⁶¹ For French essayist and magistrate Denis Salas, judicial courage “is neither a knowledge nor an opinion but it is intimately connected to the judgment. It consists in acting in the immediacy of the moment when required without giving in to fear.”⁶² In light of rapid changes in the Western world, with democracy under severe attack and political actors or elites persistently deaf to the sounding alarm of populism, history offers a unique occasion to reconsider the role of judges and the importance of virtues—including integrity and courage—as shaping instruments of responsible decision-making in a democracy. In other words, justice is not for tomorrow but for today—*immediately*.

IV. The Moral Responsibility of Judging: Finding (your own) Truth

The quality of a good judgment lies in its reasoning. Still, many will see in its

expression an act of power where rhetoric will be used to convince the audience, starting with the parties themselves and, ultimately, the rest of the world. Indeed, particular words used in the judgment are inseparable from general beliefs and fundamental values endorsed by the trial judge, which become supposed truth, unless set aside on appeal. This is equally applicable to judgments of appellate courts—as long as the Supreme Court has not decided otherwise. Accordingly, there is no absolute truth in the legal world, only the truth spoken by the trial judge or the majority judges who decided the appeal. Detractors of the judicial review power will often say the result is “retrograde” or “ahead of its time,” depending on the point of view of the observer. This is not surprising. Truth is not one-dimensional: it has at least three dimensions (as a material recognition of an action taking place in space and time) and even more hidden facets. Only the individual (or God) really knows what is one’s true motivation for doing or saying something. Confronted with the same reality—the same evidence and set of legal rules—judges may decide a matter differently. Objectivity may only be apparent. One’s judgment may be tainted by some subjectivity, whether conscious or unconscious.

Truth also changes over time. For Aristotle (384–322 BC), “the brave man feels and acts according to the merits of the case and in whatever way the rule directs.”⁶³ Once a judgment becomes final, it must be respected. *Stare decisis* reinforces the stability of judicial pronouncements. Here is an illustration of the judiciary cleavage attributable to changing society and times.

⁶⁰ *Ibid* at 22–23.

⁶¹ L’Heureux-Dubé, *supra* note 5 at 615.

⁶² Denis Salas, *Le courage de juger: Le parcours d’un magistrat hors normes* (Montrouge, France : Bayard, 2014) at 24 (my own translation

from French to English).

⁶³ Aristotle, *The Nicomachean Ethics*, translated by William David Ross, book III, ch 7, online: <sacredtexts.com/cla/ari/nico/nico029.htm>.

Learned Hand (1872–1961) was a federal judge and judicial philosopher. He sat on the District Court for the Southern District of New York (1909–1924) and later the Court of Appeals for the Second Circuit (1924–1951). Despite having never served on the Supreme Court of the United States, Hand was most definitively influential to succeeding generations of American lawyers and judges. During the First World War, he rendered a memorable judgment regarding enforcement of the *Espionage Act*, which made hindering the war effort a federal crime.⁶⁴ In *Masses Publishing Co v Patten*, he ruled that a self-described “revolutionary journal” containing drawings, cartoons, and articles criticizing the government’s decision to go to war should not be barred from distribution through mail, since its language did not directly urge readers to violate the law and was thus protected by freedom of speech: “assimilate [political] agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard for free government.”⁶⁵ Hand’s judgment was later overturned on appeal.⁶⁶

Hand always defended the correctness of his rulings and their consistency with a principled view of the free speech constitutional protection, which did not distinguish between ideas or people. Free speech was his truth, a truth he would continue to hold all his life. In 1918, Congress enacted the Amendment to the *Espionage Act* of 1917 (commonly known as the *Sedition Act* of 1918), which made it a criminal offense to urge curtailment of production of

materials necessary to the war against Germany with intent to hinder the war’s progress.⁶⁷ Between 1918 and 1919, Hand attempted to persuade Supreme Court Justice Oliver Wendell Holmes Jr. (1841–1935), a man he greatly admired, of the soundness of his argument. On June 24, 1918, in a letter addressed to Hand, Holmes wrote: When I say a thing is true I mean that I can’t help believing it – and nothing more. But as I observe that the Cosmos is not always limited by my Cant Helps I don’t bother about absolute truth or even inquire whether there is such a thing, but define the Truth as the system of my limitations. I may add that as other men are subject to a certain number, not all, of my Cant Helps, intercourse is possible. When I was young I used to define the truth as the majority vote of that nation that can lick all others. So we may define the present war as an inquiry concerning truth.⁶⁸

One could say Hand’s efforts were fruitless, but time would prove that Holmes’ truth continued to evolve. In November 1919, Holmes’ dissenting opinion in *Abrams v United States* would urge greater protection of political speech.⁶⁹ Although the majority upheld the *Sedition Act* of 1918, what we remember today is Holmes’ observation: The best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [men’s] wishes safely can be carried out [...] we should be eternally vigilant against attempts to check the expression of opinions that we loathe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and

⁶⁴ See generally *Espionage Act*, 18 USC § 792ss.

⁶⁵ 244 F 535 (SDNY 1917) at 540.

⁶⁶ 246 F 24 (2d Cir 1917).

⁶⁷ *Sedition Act 1918* (an amendment to the Espionage Act 1917, which was repealed in 1921).

⁶⁸ Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind – and Changed the History of Free Speech in America* (New York: Metropolitan Books, Henry Holt and Company, 2013) at 25.

⁶⁹ 250 US 616 (1919).

pressing purposes of the law that an immediate check is required to save the country.⁷⁰

As noted by Healy, “[a]s expected, [Holmes’ dissent] caused a sensation. Conservatives denounced it as dangerous and extreme. Progressives hailed it as a monument to liberty. And the future of free speech was forever changed.”⁷¹

Holmes’ judicial reputation rests to a considerable extent on his dissents but, in retrospect, who would say that his dissent in *Abrams* was ahead of its time? Like Aristotle’s brave man, Holmes acted in whatever way the constitutional rule directed him. He simply refused to be guided by the desirable end Congress sought to achieve, by improper means, with the *Sedition Act* of 1918. But again, this is just a matter of perspective. The truth is that whatever expanded view on free speech Holmes may have had. McGlynn Gaffney stated the following: Holmes could barely disguise his contempt for the speech of those who had the courage to resist American participation in the senseless slaughter of what Europeans call their ‘Great War.’ Or think of Holmes as the judge who traded the epigram ‘[t]hree generations of imbeciles are enough’ for the principle that the government should refrain from interfering with the fundamental freedom of the human person to procreate. So I would not turn to Oliver Wendell Holmes Jr., as a model of the kind of courage and conviction that we celebrate with Thomas More.⁷²

As we can see, once a judgment has entered the public arena, freedom of speech allows its supporters or detractors

to claim victory or defeat in this endless fight for truth, which unfortunately is often tortured by adverse political agendas and divergent values, whether liberal or conservative.

Even if in their daily interactions appellate judges have a good and cordial rapport, this will not change differing points of view on fundamental issues. One may venture that this is the very reason why they were appointed to the appellate courts in the first place. Paradoxically, the independence of the judiciary is a pledge of their impartiality on an individual level. This is equated with the understanding that whatever the oath of office taken by judges, they must always be guided by the constitution, the laws, and their conscience in the discharge of their duties. Justice Holmes once likened the Supreme Court Justices to “nine scorpions in a bottle.” Not surprisingly, consensus is sometimes hard to reach and dissents are not uncommon at the appellate level. As Epstein, Landes, and Posner mentioned in their collective work, *The Behavior of Federal Judges: Since writing a dissenting opinion requires effort, a judge will not dissent unless he anticipates a benefit that offsets that cost. One benefit is to undermine the influence of the majority opinion, with which by assumption he disagrees, although possible offsets are that a dissent will draw attention to the majority opinion and may even magnify its significance by exaggerating its potential scope in order to emphasize the harm that it will do. And undermining a majority opinion with which one disagrees is not an end in itself; the aim is to promote one’s own legal views.*⁷³

⁷⁰ *Ibid* at 630.

⁷¹ Healy, *supra* note 68 at 5.

⁷² Gaffney Jr, *supra* note 10 at 66–67, which notably refers to *Buck v Bell*, 274 US 200 (1927) and Laurence H Tribe, *American Constitutional Law*, 2nd ed (New York: Foundation Press, 1988).

⁷³ Lee Epstein, William M Landes & Richard A Posner, *The Behavior of Federal Judges, A Theoretical and Empirical Study of Rational Choice* (Cambridge: Harvard University Press, 2013) at 256–57.

We can see the dialectics of the Machiavellian judicial denunciation at work in the dissent handed down in 1979 by then Associate Justice William Rehnquist (1924–2005) in *United Steelworkers of America v Weber*.⁷⁴ In this case, the Supreme Court of the United States held that Title VII of the *Civil Rights Act of 1964* did not bar employers in the private sector from favouring African Americans in order to eliminate manifest racial imbalances in traditionally segregated job categories. For the conservative Rehnquist, “[i]n a very real sense, the Court’s opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court’s opinion borrows, perhaps subconsciously, at least one idea.”⁷⁵ Rehnquist of course refers to a passage of George Orwell’s book on totalitarianism, *Nineteen Eighty-Four*.⁷⁶ In that extract, a governmental official of Oceania denounces Eurasia, the current enemy, to an assembled crowd.⁷⁷ “In mid-sentence, not only without a pause, but without even breaking the syntax,” he replaced Eurasia by Eastasia, which is now the current enemy of Oceania.⁷⁸ According to Rehnquist:

[T]oday’s decision represents an equally dramatic and equally unremarked switch in the Court’s interpretation of Title VII ... Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but as escape artists such as Houdini, the Court eludes clear statutory language, ‘uncontradicted’ legislative history, and uniform precedent in

concluding that employers are, after all, permitted to consider race in making employment decisions.⁷⁹

As can be seen from Rehnquist’s dissent in *Weber* and from Chief Justice Earl Burger’s (1907–1995) dissent as well, conservative judges will often use a formalistic view of constitutional rights and plant, in their denunciation of the majority ruling, the seeds to revisit such wrong interpretation of the law once the composition of the Supreme Court will have changed. Interestingly, in a related case on the validity of a governmental affirmative action program on remand from the Supreme Court of California, the Court of Appeals for the Fifth Circuit vacated both the trial court’s judgment and their own judgment affirming it.⁸⁰ In doing so, Appellate Circuit Justice Thomas Gibbs Gee (1925–1994) stated that the Court was “[o]bedient to the mandate of the Supreme Court,” but notes his “personal conviction that the decision of the Supreme Court in this case is profoundly wrong ... [as] sufficiently demonstrated by the dissenting opinions of the Chief Justice and Mr. Justice Rehnquist [in *Weber*].”⁸¹ Though he thinks it “gravely mistaken,” Justice Gee “[does] not say that the Court’s decision is immoral or unjust indeed, in some basic sense it may well represent true justice.”⁸² But subordinate magistrates such as him “must either obey the orders of higher authority or yield up their posts to those who will. I obey, since in my view the action required of me by the Court’s mandate is only to follow mistaken course and not an evil one.”⁸³ The nuance made

⁷⁴ 443 US 193 (1979) [*Weber*].

⁷⁵ *Ibid* at 219; see also *Civil Rights Act of 1964*, Pub L 88–352, 78 Stat 241.

⁷⁶ George Orwell, *Nineteen Eighty-Four* (London: Penguin Books, 2013).

⁷⁷ *Ibid*.

⁷⁸ *Weber*, *supra* note 74 at 220.

⁷⁹ *Ibid* at 219–21.

⁸⁰ *Price v Civil Service Com*, 26 Cal 3d 257 (SC Cal 1980); *Weber v Kaiser Aluminum & Chemical Corporation*, 563 F 2d 216 (5th Cir 1977), *Weber v Kaiser Aluminum & Chemical Corporation*, 611 F 2d 132 (5th Cir 1980) [*Kaiser*].

⁸¹ *Kaiser*, *supra* note 80.

⁸² *Ibid*.

⁸³ *Ibid*.

by Justice Gee is important, as it allows him to obey without posing a moral dilemma, since obeying the order does not lead to an evil course.

Humbly speaking, one can say that judging is an act of power that is inescapable from the juridical statute and importance of the court it emanates from, while the law's silence, obscurity, or insufficiency may not justify a judge's refusal to adjudicate, or worse, not to adhere to *stare decisis*. And yes, the task becomes particularly perilous when parties question the legality or legitimacy of state action. This reminds me of Bishop Benjamin Hoadly's sermon, preached before the King of England on March 31, 1717: "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the Person who first wrote or spoke them."⁸⁴ This may explain why courts are feared by rulers, and also why, in times of crisis, they must act courageously in order to be respected by subjects of these human kingdoms, many of which proudly proclaim that they are governed by the rule of law.

V. May the Force be with you

We cannot escape the fact that the judge is an ethical creature. Justice is the foremost virtue, but without courage, the judiciary will not stand up when there is a need to protect human dignity. Throughout history, judges have been asked to caution oppressive conduct and apply ignominious legislation in the face of adversity and injustice.

The law of the land will often be invoked by authoritarian rulers to justify the suppression of rights and freedoms, inasmuch as perverting the promise of democracy could be justified and made legal by parliamentary discourse and license. But let us not blind ourselves: it is all a matter of power, not law. Remember that for English philosopher Thomas Hobbes (1588–1679), it was not wisdom but authority that makes a law.⁸⁵ In Hobbes's view, the state—this new Leviathan—must have absolute power over every person and institution.⁸⁶ This absolute power is vested in the sovereign, whose role is to provide for the security of his subject.⁸⁷ Still, the sovereign himself is bound by the law and has to abide by its commandments like any of his subjects. The same is true in a republican system, where no person, even the elected president, is above the law.

This poses the question of judicial awareness—if not complicity—through wilful blindness: "[a] servant of arbitrary power who starts to think stops being its auxiliary and starts to become its enemy."⁸⁸ For Professor Mark J. Osiel, "the line between unthinking accommodation to lawlessness and the first steps of what will be perceived as resistance can be unwitting and almost imperceptible."⁸⁹ He further noted: These steps need not reflect any principled commitment to moral truth. They may merely evince the disposition to exercise independent judgment in a profession where competent practice requires it [...]. The central question is whether it is possible to increase resistance to evil law

⁸⁴ Russell M Dallen Jr, "An Overview of European Community Protection of Human Rights, with Some Special References to the UK" (1990) 27 Common Market L Rev 761 at 761, citing Bishop Hoadly, *Sermon preached before the King* (1717).

⁸⁵ Thomas Hobbes, *Leviathan*, ed by CB Macpherson (London: Penguin, 2003).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Mark J Osiel, "Dialogue with Dictators: Judicial Resistance in Argentina and Brazil" (1995) 20:2 Law & Social Inquiry 481 at 482 citing Ivan Klima, *Judge on Trial* (London: Chatto & Windus, 1993) at 340, 359, 361.

⁸⁹ *Ibid* at 482.

by instilling in judges a particular understanding of their job, one that makes capitulation to repression inconsistent with something basic to their professional self-image.⁹⁰

Jurists are trained to question others, but few position themselves as guardians of the world's stability. Nor do they think—even if they are practicing Christians—that God or religion should govern the legal order. So they prefer to keep Saint Paul's warning for themselves: "that in the last days perilous times will come."⁹¹ For the positivists, it is sufficient that the state's stability and institutions be assured by the rule of law. Nevertheless, the material world is a dangerous place to live in, as observed by Hannah Arendt (1906–1975): "fear is an emotion indispensable for survival; it indicates danger, and without that warning sense no living thing could last long."⁹² Indeed, for the political philosopher, "[t]he courageous [person] is not one whose soul lacks this emotion or who can overcome it once and for all, but one who has decided that fear is not what [she] wants to show. Courage can then become second nature or a habit but not in the sense that fearlessness replaces fear, as though it, too, could become an emotion."⁹³ True, judges are human and should not show fear when they perform their judicial duties, but who says they need to be courageous as guardians of the constitution and the rule of law?

In a democracy, justice is contingent on the judge's capability and willingness to act independently from other branches of power within the state. This is even more important in the face of dictatorship or totalitarianism. It has been suggested

that courts engage in a form of dialogue through "critical examination of the regime's most repressive policies."⁹⁴ However, there are serious limits to how far a non-independent judiciary can go in this critical examination without compromising the public's confidence in the judicial system and in the impartiality of its sitting judges. As observed by Osiel, "[t]he willing enforcement of evil laws is surely one of the most serious moral failures a judge can commit."⁹⁵ In a positivist approach, literalism or formalism may function as an "enabling constraint," enabling a judge to resist authoritarian rulers—who may be unprepared to state their repressive aims explicitly—by constraining him to apply the more liberty-enhancing interpretation of their decree."⁹⁶ On the other hand, where the authoritarian regime's intention is unequivocal, the demands of morality cannot be reconciled: "[i]n these cases, positive law is so repressive and so unequivocal in its meaning that the judge has been painted into a corner from which only naturalism can rescue him."⁹⁷ The only alternative for engaging in a "dialogue with dictators on the terms established by one's interlocutors is to ignore larger issues uncognizable within these necessarily narrow terms."⁹⁸ Otherwise, the judge should resign and publicly denounce the evil law.

When Adolf Hitler (1889–1945) was appointed Germany's chancellor on January 30, 1933, he was at the head of a coalition government. Germany was a democracy governed by the rule of law. Despite the burning down of the Reichstag – the German parliament—on February 27, 1933, a week before the

⁹⁰ *Ibid* at 482, 484

⁹¹ *The Bible*, *supra* note 21 at 2 Timothy 3.

⁹² Hannah Arendt, *The Life of the Mind* (San Diego, California: A Harvest Book, Harcourt Inc., 1978) at 35–36.

⁹³ *Ibid* at 36.

⁹⁴ Osiel, *supra* note 88 at 486.

⁹⁵ *Ibid* at 488.

⁹⁶ *Ibid* at 494.

⁹⁷ *Ibid* at 508.

⁹⁸ *Ibid* at 552.

general elections of March 5, 1933, Hitler had nevertheless failed to convince the German people to give him a clear mandate. Indeed, only 44 per cent of the people voted for the Nazi Party. Be that as it may, Hitler seized the opportunity to have all communist deputies arrested, and on March 23, 1933, the Reichstag voted to give him the power to make his own laws. From democracy to dictatorship, from Republic to Empire, it became even more dangerous to speak out and to stand against the will of the self-appointed Führer, once Paul von Hindenburg died and Hitler took over the office of president and became the commander-in-chief of the armed forces on August 2, 1934.

The German legal scholar and politician Gustav Radbruch (1878–1949), in a famous essay written in 1946, after the fall of the Third Reich, argued that where statutory law is incompatible with the requirements of justice to an intolerable degree or in deliberate disregard of equality—which is the core of justice—judges are permitted to deviate from same.⁹⁹ However, how can we resolve the conflict between justice and legal certainty? Radbruch provides the following guidance: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice. [...] Where there is not even an attempt of justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law,

then the statute is not merely ‘flawed law’, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.¹⁰⁰

Radbruch opined, in this respect, that “[t]he use of the court as a mere instrument [for criminal purposes] is especially clear in those cases where the indirect perpetrator could and did count on a politically tendentious exercise of the office of the criminal judiciary, whether owing to the political fanaticism of the judge or pressure applied by those in power.”¹⁰¹ However, for Radbruch, the judges’ personal liability presupposed that they had perverted the law; that is, where one could objectively determine that the statute applied was not law at all.¹⁰²

Did legal positivism render German jurists defenceless during the Third Reich? Ott and Buob do not believe so and suggested that quite a number of measures and special laws, which directly furthered national socialist aims, could all have been resisted in no uncertain terms from the legal positivist standpoint.¹⁰³ The technique of inserting masses of general clauses in the law, with ideological preambles and indeterminate legal concepts could have been legally questioned. In fact, both “euthanasia operations and massacres in the concentration camps were carried without any clear statutory basis.”¹⁰⁴ Thus, the problem was not legal but human: “[t]he fact that the majority of German jurists served the national socialist ‘renewal’ is

⁹⁹ Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law (1946)”, translated by Bonnie Litschewski-Paulson and Stanley L Paulson, (2006) 26:1 Oxford J of Leg Studies 1 at 1–11.

¹⁰⁰ *Ibid* at 7.

¹⁰¹ *Ibid*.at 9.

¹⁰² *Ibid*.

¹⁰³ Walter Ott & Franziska Buob, “Did Legal Positivism Render German Jurists Defenceless during the Third Reich?” (1993) 2 Social & Leg Studies 91.

¹⁰⁴ *Ibid* at 101.

to be explained rather by their authoritarian way of thinking.”¹⁰⁵ The German philosopher and jurist Karl Larenz (1903–1993) wrote in 1934: “[a] renewal of German legal thought is unthinkable without a radical departure from positivism and individualism.”¹⁰⁶ Indeed, the political leadership exercised in the judicial domain had a negative impact on judicial independence: “[a]bove all there was only *one* standard for the exercise of this newly created leeway in decision-making: that set by national socialist cases could have been rejected by the judge’s declaring himself bound by the law.”¹⁰⁷

Similarly, while a number of criticisms have been levelled at the German judiciary’s actions during the Third Reich, the French legal community was also at fault during the Vichy Regime, since “German power and coercion cannot alone account for the ills that befell Jews on French soil during 1940–44, some 90,000 of whom were deported from France to their extermination abroad.”¹⁰⁸ As constitutional law specialist Richard Weisberg noted, “[l]iberated from the smallest allegiance to textual concepts held dear for 150 years until the moment of Vichy’s association with the victorious Germans, Vichy lawyers were able to foster radical change [... and] generated rhetoric that directly led to the concentration camp ‘in the East.’”¹⁰⁹

Interestingly, an example of judicial resistance can be found in German occupied France during the Second World War. After being appointed Chief by President Albert Lebrun, Marshal Philippe Pétain ordered the French Government’s

military representatives to sign an armistice with Germany on June 22, 1940. Pétain subsequently established an authoritarian regime when the National Assembly of the French Third Republic granted him full powers on July 10, 1940. At that point, the Third Republic was dissolved. Following the occupation, the Vichy regime passed a number of so-called constitutional acts that reorganized the French state. One of these acts obliged all judges to swear allegiance to the head of state, Marshal Pétain. Paul Didier (1889–1961) entered the judiciary in 1919. On September 2, 1941, at the swearing-in ceremony for judges of the Tribunal of the Seine where he was appointed, Didier was the only French magistrate who refused to swear allegiance. This stand against the “New Order” was a pure act of courage. Didier was suspended and his judicial functions revoked. He was arrested shortly after this incident and sent to an internment camp. After his release from the camp and house arrest in February 1942, he joined the French Resistance. Following the liberation of France, he returned to the bench and sat on the Court of Appeal of Paris until he retired in 1958.¹¹⁰

World War II has been over for more than 70 years, and vague concepts such as “radical injustice” and “perversion of the law” are unnecessary in liberal countries. This is so because, by its very nature or essence, a democracy is a political system premised on the rule of law and its consequent respect by all stakeholders—the executive, the legislative, and the judiciary, included. Thus, manipulation of fundamental values

¹⁰⁵ *Ibid* at 101

¹⁰⁶ *Ibid* at 98, citing Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, (Tübingen: Mohr, 1934) at 39.

¹⁰⁷ *Ibid*.

¹⁰⁸ Richard Weisberg, “Legal Rhetoric under Stress: The Example of Vichy” (1991) 12 *Cardozo*

L Rev 1371 at 1372–73.

¹⁰⁹ *Ibid* at 1414–15.

¹¹⁰ Serge Portelli, *Juger* (Paris : Éditions de l’atelier, 2011) at 32–33; see also Liora Israe’ I, *Robes noires, anne’es sombres : la résistance dans les milieux judiciaires* (Paris: Fayard, 2005).

by legislators or governments—resulting in the abolition of the equality and dignity of each individual—would go against the democratic principle and could be declared illegal. Positivists will say this is precisely the conclusion reached by Radbruch: “[d]emocracy is indeed laudable, but a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such government.”¹¹¹

VI. With Great Power Comes Great Responsibility¹¹²

“The Lord God planted a garden eastward in Eden, and there He put the man whom He had formed” and Adam, its creature, was fortunate when the Lord God took one of his ribs to give him a female companion, Eve.¹¹³ Anthropologists and scientists now believe that Adam and Eve emerged in Africa a little over two hundred thousand years ago.¹¹⁴ Adam and Eve had children together, and their children had children, and so on ever since ... People have not found Eden, nor the perfect system of governance, but somewhere five hundred years before the modern era, as an accident of history, democracy was invented by men in classical Athens.¹¹⁵ Who can say democracy, still a recent phenomenon, will be able to survive men’s madness and insatiable appetite for power?

Democracy is never far from suicide. John Adams (1735–1826), America’s second president, is best remembered for bold affirmations such as this one derived from history:

Remember Democracy never lasts long. It soon wastes exhausts and murders itself. There never was a Democracy. Yet, that did not commit suicide. It is in vain to Say that Democracy is less vain, less proud, less selfish, less ambitious or less avaricious than Aristocracy or Monarchy. It is not true in Fact and nowhere appears in history. Those Passions are the same in all Men under all forms of Simple Government, and when unchecked, produce the same Effects of Fraud Violence and Cruelty. When clear Prospects are opened before Vanity, Pride, Avarice or Ambition, for their easy gratification, it is hard for the most considerate Philosophers and the most conscientious Moralists to resist the temptation. Individuals have conquered themselves, Nations and large Bodies of Men, never.¹¹⁶

Modern democracies—whether they are true republics or constitutional monarchies—have rejected direct representation and opted for a representative model of governance. Yet, this pragmatic choice, at its base, is derived from a somewhat elitist view. For the founding fathers of the United States, a government led by the best was preferable to indiscriminately transposing the models of Athens or Florence: “[i]f the

¹¹¹ Radbruch, *supra* note 99 at 11.

¹¹² See especially Stan Lee & Steve Ditko, *Amazing Fantasy #15* (New York: Marvel Comics, 1961–62) at the last panel (this source contains the first reference to the famous quote, which was subsequently repeatedly used in the various Spider-Man movies, books and other media).

¹¹³ *The Bible*, *supra* note 21 at Genesis 2:8.

¹¹⁴ “Genetic Adam and Eve did not live too far apart in time”, *Nature* (6 August 2013), online: <nature.com/news/genetic-adam-and-eve-did-not-

live-too-far-apart-in-time-1.13478>.

¹¹⁵ “Democracy: Whose idea was this?”, *The Independent* (11 May 2010), online: <independent.co.uk/news/uk/politics/democracy-whose-idea-was-this-1971167.html>.

¹¹⁶ “From John Adams to John Taylor, 17 December 1814”, Founders Online, online: <founders.archives.gov/documents/Adams/99-02-02-6371>. (this is an Early Access document from The Adams Papers).

people as a whole could not speak, a circle of the most outstanding must do so in their place. In a rather naïve, utopian way, Adams hoped that a gathering of such virtuous people would ‘think, feel, reason, and act’ like the rest of society. ‘It should be in miniature, an exact portrait of the people at large.’”¹¹⁷

Whether it was uttered by Winston Churchill, Franklin D. Roosevelt, or even Uncle Ben in the movie *Spiderman*, the “with great power comes great responsibility” slogan has become inescapable in modern times. Virtues such as courage make a difference and really count in politics. For Arendt, “[c]ourage is a big word,” but as she pointed out, “[c]ourage is indispensable because in politics not life but the world is at take.”¹¹⁸ Indeed, she said that the “*raison d’être* of politics is freedom, and its field of experience is action,” while “[f]reedom as inherent in action is perhaps best illustrated by Machiavelli’s concept of *virtù*, the excellence with which man answers the opportunities the world opens up before him in the guise of *fortuna*.”¹¹⁹

What has happened to the American dream? President John F. Kennedy (1917–1963), while still a young senator, thought that politicians had the moral obligation to act courageously and take unpopular courses of action to uphold rights:

For democracy means much more than popular government and majority rule, much more than a system of political techniques to flatter or deceive powerful blocs of voters. ... The true democracy, living and growing and inspiring, puts its faith in the people – faith that the people

will not simply elect men who will represent their views ably and faithfully, but also elect men who will exercise their conscientious judgment – faith that the people will not condemn those whose devotion to principle leads them to unpopular courses, but will reward courage, respect honor and ultimately recognize right.¹²⁰

One may think Kennedy’s discourse only applies to elected representatives. Still, courts—with constitutionally protected independence—exercise supervisory jurisdiction, which is essential to maintaining our institutions’ democratic character and respect for the rule of law. Judicial courage is a requirement, unless “we the people” are to accept, like Frank Underwood’s character in the hit political drama *House of Cards*, that “the road of power is paved with hypocrisy, and casualties. Never regret.”¹²¹

I like to think that each successive generation will produce models of civic courage such as Elmer Davis (1890–1958). We remember him as one of the great news reporters of the mid-twentieth century who did not fear to use the radio platform to criticize Senator Joseph McCarthy (1908–1957) for his anti-communist investigations. In 1953, at the height of the investigations, he concluded his text, “Through the Perilous Night,” with these optimistic words: The frightened men who are trying to frighten us, because they have no faith in their country, are wrong; and even wronger are the smart men who are trying to use the frightened men for their own ends. The United States has worked; the principles of freedom on which it was founded – free thought as well as political liberty – have worked.

¹¹⁷ David Van Reybrouck, *Against Elections: The Case for Democracy*, translated by Liz Waters (London: the Bodley Head, 2016) at 84.

¹¹⁸ Hannah Arendt, *Between Past and Future* (London: Penguin Books, 2006) at 154, 155.

¹¹⁹ *Ibid.*

¹²⁰ Kennedy, *supra* note 2 at 223.

¹²¹ “House of Cards: The Complete Second Season”, episode 22, DVD (Culver City, California: Sony Pictures Home Entertainment, Netflix, 2014).

This is the faith once delivered to the fathers – the faith for which they were living to fight and, if necessary, die, but for which they fought and won ... We shall have no heirs and beneficiaries, and shall deserve to have none, if we lack the courage to preserve the heritage they won for us ... this will remain the land of the free only so long as it is the home of the brave.¹²²

Are we acting as “hypocrites” when we leave to politicians—not judges—the responsibility to fix things? For Associate Justice Stephen Breyer of the Supreme Court of the United States, “[t]he principle of active liberty – the need to make room for democratic decision-making – argues for judicial modesty in constitutional decisionmaking, a form of judicial restraint.”¹²³ On the other hand, Chief Justice Laskin (1912–1984) once made the following statement: However we view the pace of the law, or our ultimate dependence primarily upon the Legislature to respond to social needs or social demands, there are basic values in our society which are essential to orderly and peaceful change and to the very climate of responsiveness of the political authorities that we look to the law to assure. In this area the courts have played a historic and courageous role. Chief among these values which our law has promoted and which our courts have protected, both against private and public invasion, are the political liberties of utterance, oral and written, assembly and association, conscience and religion.¹²⁴

But, practically speaking, how does judicial restraint or courage operate? For legal realists, the judge’s legislative or policy-making role is inescapable. Holmes’ famous slogan and opening statement in *The Common Law*, first published in 1881, influenced many generations of jurists: “[t]he life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”¹²⁵ For Justice Robert H. Jackson (1892–1954), it was all about judicial empowerment: “[w]e are not final because we are infallible, but we are infallible only because we are final.”¹²⁶ Pragmatics practice *virtù* and believe in *fortuna*. Contrary to conservative judges adhering to a textual construction of the constitution and considering tradition and precedents, liberal judges will not hesitate to change the course of history in ways that would have been unimaginable for their ancestors. Take *Roe v Wade*, where the Supreme Court of the United States ruled in 1973 that a Texas statute forbidding abortion except when necessary to save the life of the mother was unconstitutional.¹²⁷ True, the Supreme Court apparently had the last word on the issue. But was that myth or reality?¹²⁸

¹²² Elmer Davis, *But We Were Born Free* (Indianapolis: Bobbs-Merrill, 1954) at 113–15.

¹²³ Stephen Breyer, *Active Liberty, Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2006) at 37.

¹²⁴ Bora Laskin, “The Function of the Law” (1973) 11 *Alberta L Rev* 118 at 120.

¹²⁵ Oliver Wendell Holmes Jr, *The Common Law*, ed by Sheldon M Novick (New York: Dover Publications Inc, 1991) at 1.

¹²⁶ *Brown v Allen*, 344 US 443 (1953) at 540.

¹²⁷ 410 US 113.

¹²⁸ This is the very question generally raised by Justice Clément Gascon of the Supreme Court of Canada in 2016 at the 13th Claire L’Heureux-Dubé’s Annual Conference at the University of Laval, “Avoir le dernier mot? Mythe ou réalité?”, in *Les Cahiers de droit*, (Volume 58, numéro 3, septembre 2017) at 579–92.

Most importantly, what really matters is not that the judiciary may declare a law unconstitutional; it is rather the preservation of judicial independence. In the end, if the people lose confidence in the courts' capacity to uphold the rule of law, democracy is in peril. This brings me to address some of the challenges the judiciary has to face in this rapidly changing environment. Many colleagues I interviewed were concerned by the fact that judges are vulnerable to unjustified and unwarranted public criticism. Canadian judges cannot publicly defend their findings and legal reasoning. An oversimplification of complex legal issues invites the public to take sides in a Manichean way for or against a cause as personified by the winning or losing party, which is depicted as good or evil. In such a dualist world, the population is urged to question the judge's common sense, who is often presented as an activist or a weak person.

But let me illustrate this point with the following example. In 1999, there was public outcry in response to the decisions rendered by the lower courts in *R v Sharpe*.¹²⁹ Justice Duncan W. Shaw found Robin Sharpe not guilty of possessing child pornography on the grounds that the *Criminal Code* provisions in question were unconstitutional. His judgment was severely criticized, and Shaw himself was caricatured in local newspapers and given the glorious nickname "Mr. Justice Bonehead" by a radio host, who asked him to come to the radio station to explain his judgment to

the outraged listeners.¹³⁰ Police had to protect his residence. In short, his life and the lives of his family were disrupted for a period of time.¹³¹ On appeal,¹³² in finding that Canada's child pornography laws were unconstitutional in treating teenagers the same way as young children, Justice Southin stated during the appeal that "[w]e have to recognize that our views about these matters might change radically."¹³³ Although the Supreme Court allowed the appeal, Chief Justice McLachlin (as she then was), writing for the majority, noted that the trial judge "courageously ruled that s. 163.1(4) is unconstitutional."¹³⁴ Demonstrating a form of judicial realism, the Supreme Court nevertheless chose to "read in" exceptions that allowed the disputed provisions of the *Criminal Code* to withstand the constitutional challenge despite their apparent defects.

In 2002, Justice Shaw gave a short account of his distressing experience and noted in a resilient manner that "[d]espite the discomfort I felt from the criticisms of my judgment and me personally, I continue to believe in the public right to criticize the decisions of the courts. We are a strong society because of freedom of expression, even when ill-informed."¹³⁵ But the point is well taken: nobody wants to become a *persona non grata*. Although this is all part of freedom of expression and freedom of the press, judge-bashing can undermine the public's confidence in the judicial system. In turn, this can seriously erode judicial independence. Former Chief Justice of Quebec, Michel

¹²⁹ 22 CR (5th) 129, 169 DLR (4th) 536, 1999 CanLII 6380 (BCSC).

¹³⁰ Ian Bailey, "Child porn judge considered student of the law", Canadian Press (21 January 1999); "Judge assailed for child-porn decision", Lubbock Avalanche Journal (25 January 1999).

¹³¹ Duncan W Shaw, *Child Pornography and the Media: R v Sharpe dans Dialogues sur la justice : le public, le législateur, les tribunaux et les médias*,

édités sous la direction de Patrick A. Molinari, Institut canadien de la justice 2002, Les Éditions Thémis, 2002, at 99–106.

¹³² *R v Sharpe*, 1999 BCCA 416.

¹³³ Robert Matas, "Attitudes toward child porn could change, B.C. judge says" *The Globe and Mail* (27 April 1999).

¹³⁴ 2001 SCC 2, [2001] 1 SCR 45 at para 13.

¹³⁵ Shaw, *supra* note 131 at 103.

Robert, considered that it was his responsibility—after having verified the facts and with the consent of the judge involved—to issue a public statement rectifying an improper or incorrect account by the media of a case or judgment, since the bars may not always take a public stand.¹³⁶

Today, the Western world is at war against terrorism, which is a perpetual war, even if undeclared, against no particular state. The events of 9/11 have changed the equation. Enemies are now everywhere. Populations live in constant fear. Issues of security have reached a level unseen before in the Western world. The state's role is assuring the security of its population. Even judges are at risk.¹³⁷ However, justice is universal, not situational or geographical. Should we ensure that fundamental rights and freedoms continue to be enforced? This point is disputed by utilitarians when security and equality are in opposition. As noted by James M. Olson, a former chief of CIA counterintelligence, “[s]ince defense and national security are paramount values for many utilitarians, it is not surprising that they tend toward an end-justifies-the-means approach in these matters.”¹³⁸ For Roman politician and lawyer Marcus Tullius Cicero (106–43 BC), who served as consul in the year 63 BC, “[t]he safety of the people is the supreme law.”¹³⁹ However, in today's world, for countries such as Canada, the constitution is the “supreme law.”

But where does the constitution guide the brave judge? Remember that the rule of law is an important operating principle. I will quote Justice William L. Dwyer (1929-2002), who served as district judge for the Western District of Washington: We are living in “difficult times” where people in the Western Society must find a “center” – a shared set of beliefs and values providing coherence, morale, and inspiration. This center is no longer a dominant and official religion, nor the shared commitment to economic development and material progress, but if there is a center we should look first now, it is the rule of law: “By the rule of law I do not just mean law and order, although that is important, but much more. I mean equality before the law, access to the law and freedom under the law. I mean the jury system, the Bill of Rights, constitutional liberty, and justice provided through a fair, honest, and open court system. This is the core value in which nearly all Americans believe: the value of justice; the value of liberty in a just society ... Is the rule of law itself enough? No, it will have to be accompanied by a broader ethic, a shared source of confidence and inspiration. This confidence is only possible if the judge keeps the rule of law at the center of his judicial life.”¹⁴⁰

I have no difficulty in endorsing his point of view. Judges have a duty to act responsibly. Detractors of “judicial activism” dismiss elitist thinking—particularly as it is opined by unelected

¹³⁶ February 14, 2014, interview in Montreal by the author with Michel Robert, transcript, at 43–44.

¹³⁷ While the author was reviewing this text, it was reported that an Indian citizen had been jailed for 27 years in the United States for sending funds to al-Qaeda and plotting to kill a federal judge: “Man jailed for 27 years for plotting to murder US judge”, *BBC News*, November 7, 2017, online: <bbc.com/news/world-us-canada-41898016>.

¹³⁸ James M. Olson, *Fair Play: The Moral Dilemmas of Spying* (Nebraska: Potomac Books,

2006) at 28.

¹³⁹ Marcus Tullius Cicero, *The Treatises of MT Cicero: On the Nature of the Gods; On Divination; On Fate; On the Republic; On the Laws; and On Standing for the Consulship*, translated by CD Yonge (London: Henry G Bohn, 1853) at 464; see also, *Constitution Act, 1982*, s 52(1).

¹⁴⁰ William L Dwyer, *Ipse Dixit: How the World Looks to a Federal Judge* (Seattle: University of Washington Press, 2007) at 56–57.

members of the judiciary. People should put their faith in Congress or Parliament, who know better. But their optimistic reliance on the positive side of political *virtù* and wisdom ignores the transformative action of *fortuna* when power has become corrupted or concentrated in the hands of a sociopath. This can happen in any democracy. There are many examples in history. Like Frank Underwood's character in the *House of Cards* drama, for many skeptics "democracy is so overrated,"¹⁴¹ and political courage can be summarized as follows: "a lion does not ask permission before he eats a zebra".¹⁴² In other words, "for those of us climbing to the top of the food chain, there can be no mercy, there is but one rule: 'hunt or be hunted.'"¹⁴³ This is sad: justice is not a prey of any kind. We will only reinforce popular skepticism in the judicial institution if we lack the courage to stand up when our turn comes to express our faith in the rule of law.

As Justice Stephen Breyer, Associate Justice of the United States Supreme

Court, puts it: "[a]t the end of the day, the public's confidence is what permits the Court to ensure a Constitution is more than words on paper [...] when Benjamin Franklin was asked what kind of government the Constitutional Convention had created, his famous reply, 'A republic, Madam, if you can keep it,' challenges us to maintain the workable democratic Constitution that we have inherited."¹⁴⁴ This is equally true in any democratic type of system, such as ours in Canada, that is still faithful to the English model of a constitutional monarchy. So, I ask, why should the zebra fear the lion? English poet and novelist Stevie Smith (1902–1971) elegantly resolves the question: "Oh Lion in a peculiar guise, Sharp Roman road to Paradise, Come eat me up, I'll pay thy toll with all flesh, and keep my soul."¹⁴⁵ This requires courage in the face of rising populism, even more so when the judiciary is attacked by the president of the United States himself.¹⁴⁶

¹⁴¹ *Supra* note 121 at episode 15.

¹⁴² "House of Cards: The Complete Third Season", episode 30, DVD (Culver City, California: Sony

¹⁴³ *Supra* note 121 at episode 14.

¹⁴⁴ Stephen Breyer, *Making Our Democracy Work, A Judge's View*, (Vintage Books, 2011) at xiv, 217.

¹⁴⁵ Stevie Smith, "The Roman Road" in *Collected Poems and Drawings of Stevie Smith* (London: Faber & Faber, 2015).

¹⁴⁶ See e.g. Mark Randler, "Appeals Court Rejects Request to Immediately Restore Travel Ban", *The New York Times* (4 February 2017), online: <nytimes.com/2017/02/04/us/politics/visa-ban-trump-judgejames-robart.html?_r=0>. President Trump publicly criticized the judicial rulings that stayed the application of his travel ban order denying entry of nationals of Muslim-majority countries: "[t]he opinion of this so-called judge [referring to District Judge James L. Robart], which essentially takes lawenforcement away from our country, is ridiculous and will be overturned" (ibid). On February 9, 2017, the United States Court of Appeals for the Ninth Circuit dismissed the Federal

Government Motion for a stay of the restraining order during the appeal of that order. (*Washington v. Trump*, 847 F. (3d) 1151 (9th Cir. 2017)). Prior to the adverse ruling made by the Court of Appeals, President Trump would have said: "I don't even want to call a court biased, so I won't call it biased ... But courts seem to be so political, and it would be so great for our justice system if they would be able to read a statement and do what's right". Be that as it may, the President enacted a second order on March 6, 2017, *Protecting the Nation From Foreign Terrorist Entry Into The United States*, 82 F.R. 13209 (2017) (which revoked and replaced the January 2017 ban). These attacks on the judiciary have been publicly denounced and even brought a response from his own Supreme Court nominee, now-Justice Neil M. Gorsuch, who told a senator that the criticism was "disheartening" and "demoralizing" to independent federal courts: Julie Hirschfeld Davis, "Supreme Court Nominee Calls Trump's Attacks on Judiciary Demoralizing", *The New York Times* (8 February 2017), online:<nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html>.

Conclusion

My sabbatical leave is long past. In retrospect, I am happy this essay was not written earlier. The general question, “does judicial courage exist, and if so, is it necessary in a democracy?” has somewhat lost its gloss, as I have come to realize in this process that judging is more an art than a science, and certainly not a unidimensional exercise. Judging requires a complex set of skills. The judge may be unaware of the noise of social determinism. At an unconscious level, this bias will affect the quality of the judgment rendered, unless deep down in his or her heart, the judge is able to turn off the switch. Deliberation cannot be escaped. It is not an expediency, but a necessity. This is really where, in private, the judge is truly himself or herself. Absent any publicity, there is no greater freedom in the judge’s potent power to render justice. Only judges “know” what extraneous considerations or repressed emotions have invited themselves without permission in very private chambers, namely their conscience.

We find the following inscription at the entrance to hell in Canto III of the *Inferno* (1320) by Dante Alighieri (1265–1321): “All hope abandon ye who enter here.”¹⁴⁷ While the rule of law can provide strong legal foundation for judicial resistance, a collective moral commitment to tradition and democratic institutions is nevertheless required. I call this the human factor. In a Manichaeian way, there lies the potential to attack the empire in its very essence, which is purely material. I sincerely believe, and I say to all pessimists: if we can only accept our humanity, there is some hope for humanity. “May the force be with you,” I

am tempted to say to all judges of this brave new world, who as respectable members of the judicial order—much like the Jedi Order—must take a stand where democracy is about to fail and where its values are obscured by fear, prejudice, and bigotry.

As a final note, the tenets of reason and law are instruments of persuasion that go beyond the exercise of external authority. Justice should not be commanded by formalism, but by the necessities imposed by values that give meaning and life to the law. Good judges never lose sight of who we all are in the first place: a reasonable species. It all comes down to this very notion of judicial independence: the judge’s capacity to think independently from the collective and to assume a personal and moral responsibility where faced with the unimaginable. Integrity pairs with courage: both virtues constitute the price of freedom and democracy. I fully accept the responsibility bestowed upon me both as a human being and member of the judiciary. I am comforted by Learned Hand’s cautionary remark: “[i]f we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”¹⁴⁸ A never-ending song, judicial courage is best expressed in the lyrics from Roger Waters’ last song (“Eclipse”) in Pink Floyd’s *Dark Side of the Moon*: “and all that is now, and all that is gone, and all that’s to come.”¹⁴⁹ This has become my truth.

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¹⁴⁷ “Canto III” in Dante Alighieri, *The Inferno of Dante*, 2nd ed, translated by Ichabod Charles Wright (London: Longman, 1833) at 23.

¹⁴⁸ Learned Hand (Keynote speech delivered to the New York Legal Aid Society’s 75th

anniversary celebration, 16 February 1951).

¹⁴⁹ Pink Floyd, “Eclipse” in *The Dark Side of the Moon* (London: Abbey Road Studios, 1973), CD: *The Dark Side of the Moon* (New York: Sony Music, 2016).