

Just Listening: The Equal Hearing Principle and the Moral Life of Judges

Barry Sullivan*

*"[T]o regard law only as a game is to forget that in the process human opportunities and liberties and life itself may be taken."*⁷⁰

*"[O]nly a novel would do justice to justice as it sat in front of me, full of both charm and steel, ready to discuss the law in practice and in theory."*⁷¹

Abstract:

Listening means finding the facts for oneself, perhaps not literally, as Maye did, but in the more general sense of attempting to learn as much about a case as one reasonably can, as Justice Brandeis aspired to do, and not dismissing plausible alternatives and legal theories out-of-hand, as Redmond did in the case of the unmarried teacher. It means acknowledging one's biases, intellectual and otherwise, to the fullest extent that one can know and understand them. It also means trying to see things from another's perspective, pondering what one has seen and heard, and discussing those things with others (in the case of collegial or shared decision making), so that one's ultimate decision may be as fully informed as possible. It also means pushing lawyers to grapple with relevant arguments that they may have overlooked or dealt with inadequately, but without crossing the line that properly separates the judge's role from that of the lawyer. It means thoroughly evaluating arguments and justifying one's conclusions, and it means being open to persuasion. To do these things is to risk having a profound encounter with other people, their ideas, and their problems. If there is "spiritual quiet" to be found as a judge, that is its source.



* Cooney & Conway Chair in Advocacy and Professor of Law, Loyola University Chicago School of Law. The author is grateful to Robert P. Burns, James Gathii, Zelda Harris, Liz Heffernan, Alfred S. Konefsky, Joan M. Shaughnessy, Winnifred Fallers Sullivan, and Cristina Tilley for helpful comments on earlier drafts, to Jeffrey W. Gordon for excellent research assistance, to Julienne Grant of the Loyola University Chicago Law Library for

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⁷⁰ JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WYTHE AS MAKERS OF THE MASKS* 14 (1976).

⁷¹ Colm Tóibín, *A Brush with the Law*, 28 DUBLIN REV. 11, 32 (Autumn 2007) [hereinafter Tóibín, *A Brush with the Law*].

There are many obstacles, to be sure, to the actualization of this view of judging, in terms of resources, dispositions, and innate limitations; and this view of judging is one that can never be actualized perfectly or completely. But neither those obstacles nor the fact that this ideal can never be fully realized should prevent judges from trying. Above all, judges need to resist the temptation to make a virtue out of the obstacles that confront them. In the world in which most of us live, being mastered by our biases is something that we must always try and avoid, even if we can never be wholly successful in freeing ourselves from them.

Rezumat:

Ascultarea înseamnă a găsi faptele pentru sine, poate nu literalmente, așa cum a făcut-o Maye, dar în sensul mai general de a încerca să înveți la fel de mult despre un caz cât poate un om rezonabil, așa cum a aspirat să o facă judecătorul Brandeis, nerespingând alternativele plauzibile și teoriile juridice din afara lor, așa cum a făcut Redmond în cazul profesorului necăsătorit. Înseamnă recunoașterea prejudecăților, intelectuale și altfel, în măsura în care cineva le poate cunoaște și înțelege. Înseamnă, de asemenea, încercarea de a vedea lucrurile dintr-o perspectivă a altcuiva, să gândim ceea ce am văzut și auzit și să discutăm despre aceste lucruri cu alții (în cazul luării deciziilor colegiale sau comune), astfel încât decizia definitivă să fie cât mai complet informată posibil.

Aceasta înseamnă, de asemenea, a determina avocații să ia în seamă argumentele relevante pe care le-ar fi ignorat sau să le trateze inadecvat, dar fără a trece linia care separă în mod corespunzător rolul judecătorului de cel al avocatului. Înseamnă a evalua temeinic argumentele și a justifica concluziile și înseamnă a fi deschis la convingere. A face aceste lucruri înseamnă a risca o întâlnire profundă cu ceilalți oameni, cu ideile lor și cu problemele lor. Dacă există "o liniște spirituală" care să fie găsită ca judecător, aceasta este sursa ei. Există multe obstacole în calea actualizării acestui punct de vedere asupra activității de judecată, în ceea ce privește resursele, dispozițiile și limitările înăscute; această viziune este una care nu poate fi actualizată perfect sau complet. Dar nici aceste obstacole, nici faptul că acest ideal nu poate fi realizat pe deplin ar trebui să împiedice judecătorii să încerce. Mai presus de toate, judecătorii trebuie să reziste tentației de a face o virtute din obstacolele cu care se confruntă. În lumea în care trăim cei mai mulți dintre noi, să fim stăpâniți de prejudecățile noastre este ceva ce trebuie evitat întotdeauna, chiar dacă nu reușim să ne eliberăm niciodată de ele.

Keywords: *moral life of judges, the "equal hearing" principle, moral complexity of difficult cases, factors that influence the decision of cases*

Introduction

In *Laird v. Tatum*, then-Justice William H. Rehnquist famously declined to recuse himself in a case involving the constitutionality of a

controversial domestic spying program – an issue with which he had been intimately involved, and about which he had spoken publicly, as an executive branch lawyer.⁷² In a spirited defense of

⁷² *Laird v. Tatum*, 409 U.S. 824, 824–29 (1972) (memorandum opinion of Rehnquist, J.). The underlying case involved an action for declaratory and injunctive relief concerning the constitutionality of an Army surveillance program aimed at allegedly "lawful and peaceful civilian political activity." See *Laird v. Tatum*, 408 U.S. 1, 2 (1972) (holding that

"respondents [had not] presented a justiciable controversy in complaining of a 'chilling' effect on the exercise of their First Amendment rights where such effect [was] allegedly caused, not by any 'specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system, which [was]

his refusal to recuse, Justice Rehnquist wrote: “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”⁷³ The point is an important one. Clearly, we do not think that judges can or should approach their cases with minds that are wholly unformed.⁷⁴

To think that competent judges can – or should – be perfectly agnostic about questions of law is unrealistic. Most judges will have spent their professional careers thinking about legal questions, and they will have developed strong views about how many of those questions should be answered. New judges (as Justice Rehnquist then was) necessarily approach legal issues in light of their prior experiences,⁷⁵ and long-serving judges

confined to the Army and related civilian investigative agencies”). In an opinion by Chief Justice Burger, the Court held that the plaintiffs had failed to establish a justiciable controversy by alleging that the “mere existence” of a counter-intelligence program had a “chilling effect” on the exercise of First Amendment rights. *Id.* at 12–16. Four Justices dissented, with Justice Rehnquist providing the deciding vote.

⁷³ *Laird*, 409 U.S. at 835. Justice Rehnquist further explained:

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.

Id. at 834. Of course, Justice Rehnquist’s defense may seem somewhat self-serving and beside the point. His critics were not suggesting that a judge’s mind should be perfectly blank, and his views on the issue could hardly be described as “tentative notions.” *Id.* at 835. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 216–21 (4th ed. 2010) (discussing Justice Rehnquist’s position in *Laird v. Tatum*); Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 *BUFF. L. REV.* 813, 851–63 (2009) (same).

⁷⁴To begin with, most American judges are professionally trained. In our system, as a general matter, that means that they will have been trained as common law lawyers and may therefore be expected to approach their cases from the perspective of lawyers trained in that tradition. For such lawyers, some arguments will count as proper legal arguments, while others will not. See, e.g., PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 43–45 (1999) (“Legal decision-making differs from other kinds of policy formulation in just this way: it always begins from a set of sources that already have authority

within the community’s past. Legal arguments do not begin by asking about ‘the best outcome, all things considered.’... We can imagine a policy science that is wholly unbounded by the past, but that is not law’s rule.”). See also ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 3–4 (2007) (“Some would associate thinking like a lawyer with superior analytical skills in a neutral sense; I would instead characterize the acquisition of lawyerly ‘thinking’ as an initiation into a particular linguistic and textual tradition found in our society.”); LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 4–5 (2005) (discussing the centrality of analogy to legal reasoning, but acknowledging the absence of rules “that prescribe how much or what sort of similarity is enough to sustain analogies generally or to sustain a particular analogy”).

⁷⁵Scholars have long recognized that individual judges may reach different results in similar or identical cases. See, e.g., Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 *ILL. L. REV.* 96, 104–05, 116 (1922) (suggesting that insufficient attention had previously been paid to the effect on adjudication of the life experiences of judges, and that judging represents an exercise in judgment “that carr[ies] us to the very roots of human nature and human conduct”). See also FELIX FRANKFURTER, *OF LAW AND LIFE AND OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956–1963* 59 (Philip B. Kurland ed., 1965) (“Since the litigation that comes before the Supreme Court is so largely entangled in public issues, the general outlook and juristic philosophy of the justices inevitably will influence their views and in doubtful cases will determine them. That is saying something very different from the too prevalent notion that divisions on the Court run along party lines.”). Indeed, we know that Presidents nominate judicial candidates (particularly Supreme Court Justices) precisely because they think that they know how their nominees will decide questions that the Presidents care about; advocacy groups of various stripes support or oppose nominees based

tend to be protective of their own prior decisions and theories.⁷⁶ Judges also typically labor under the burden of heavy caseloads, which necessarily limits the amount of time they can devote to any

particular case; the weight of those caseloads also undoubtedly reinforces a natural tendency not to reconsider what has previously been considered, and to try and fit new problems into old categories.⁷⁷

on the groups' predictions about how the nominees will vote on issues of concern to them; and members of the Senate attempt, albeit more effectively in some instances than in others, to find out how the Presidents' nominees are likely to decide issues that the senators care about. See, e.g., JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 330–45 (2007) (detailing the campaign mounted by conservative groups against President George W. Bush's nomination of White House Counsel Harriet Miers to fill the vacancy created by the retirement of Justice Sandra Day O'Connor); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 977 (2007) ("But, competence is not inconsistent with partisan affiliation or particular ideologies, considerations which have long played a role in the selection of nominees by Presidents and in the Senate's willingness to confirm."). We also know that such predictions do not always turn out to be correct. See, e.g., BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 172–73, 326 (1983) (discussing President Eisenhower's regret over his nominations of Chief Justice Earl Warren and Justice William J. Brennan, Jr.). See also *Presidents Sometimes Regret Justices They Appoint*, USA TODAY (July 4, 2005, 8:29 PM), http://usatoday30.usatoday.com/news/washington/2005-07-04-defiant-justices_x.htm (collecting names of Justices who allegedly disappointed the Presidents who nominated them).

⁷⁶The profession (and sometimes, the public) properly esteems judges who have made a particular area of law their own. See, e.g., Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 894 (1980) (stating that Judge Leventhal "in less than fifteen years on the bench emerged as one of the Nation's most respected appellate judges and a principal author of the modern law of administrative government"); Frank T. Read, *The Penman of the Court: A Tribute to John Minor Wisdom*, 60 TUL. L. REV. 264, 271 (1985) ("No judge in America contributed more to the evolution of school integration law than John Minor Wisdom."); Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777, 780 (1997) ("Judge Friendly is said to have done 'more to shape the law of securities regulation than any [other] judge in the country.'"). As a judge's jurisprudential commitments harden, however, it is

possible that the judge may become less receptive to new or different ideas. An advocate's challenge may therefore become easier or more difficult, depending on which side of the judge's predilections his or her case falls. To appreciate the point, one need only consider the challenge that Solicitor General Erwin Griswold faced in the Pentagon Papers case, arguing for a nonabsolutist interpretation of the First Amendment to a bench that included Justice Hugo L. Black. See Transcript of Proceedings at 75, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873), http://www.nytimes.com/1971/06/27/archives/transcript-of-oral-argument-in-times-and-post-cases-before-the.html?_r=0 ("Now Mr. Justice, your construction of [the First Amendment] is well-known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law,' and I would seek to persuade the court that that is true."); see also *New York Times Co.*, 403 U.S. at 717–18 (Black, J., concurring) (criticizing Griswold's argument). The problem may be less serious, of course, in multi-member courts, particularly where all of the judges are actively involved in the decision-making process. In addition, some judges may be more temperamentally inclined than others to reconsider their views. Finally, in addition to having strong views on substantive legal issues, some judges may have strong commitments to particular interpretive strategies. See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (describing Justice Breyer's interpretive theory); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (describing Justice Scalia's interpretive theory).

⁷⁷ More generally, Thomas Morawetz has argued that judges do not simply have different values, but "different ways of giving order to experience." Thomas S. Morawetz, *The Epistemology of Judging: Wittgenstein and Deliberative Practice*, 3 CAN. J.L. & JURIS. 35, 57 (1990).

What they share is mediated by language and the ways in which they differ are also reflected in language. The issue is not, as some political philosophers say, that some favor liberty and others equality. The issue is rather that the ways in which persons fit psychological, economic, political, social experiences together, the ways in which they make sense of their own lives and the lives of others, differ significantly and that hard questions of decision

On the other hand, open-mindedness or impartiality is universally recognized as a critical component of judicial decision making.⁷⁸

All of this raises an important question that I would like to explore in this Essay: To what extent do we expect judges to have an open mind about difficult questions of law, or, at the very least, to be able to give a fair hearing to interpretations of law with which they might be predisposed to disagree? Or, more generally, what do we expect of judges in their decision making?

These are difficult questions to answer, particularly because of the great variety of judicial offices and functions. In some respects, for example, what we expect of a Supreme Court Justice may be different from what we expect of family court judges. But there are some requirements to which all judges should

be held, albeit perhaps in different ways, to differing degrees, and with differing degrees of importance.

One answer to these questions, therefore, is that we expect judges to listen, to listen carefully, and to take seriously what they hear. By “listening,” we mean something more than the physical act of hearing. We mean to say that judges should engage the litigants’ arguments rigorously and respectfully, reflecting on the issues presented in a case as seriously as they would if their own interests were at stake. Indeed, we expect more than that. We expect a judge to try and see the parties’ dispute, not solely from the judge’s vantage point, but also from the perspectives of the parties and those of the individuals and institutions that may be affected by the judge’s decision.⁷⁹

making fall prey to that diversity. The fact that some are libertarian and others egalitarian is merely a symptom of this more encompassing and greater diversity.

Id. at 57–58. Nonetheless, Professor Morawetz rejects the view that judges are wholly unconstrained in their individual or collaborative deliberations, or that they are unable, because of those differing values and ways of ordering experience, to engage in genuine dialogue: “They are constrained individually by a particular way of addressing and understanding interpretive questions and they are constrained collectively by the fact that the shared practice embraces a limited range of ways of proceeding. This limitation is mutually understood and recognized.” *Id.* at 59.

⁷⁸ Impartiality is particularly important where legal questions are close ones and their resolution depends on the spirit with which they are considered. See, e.g., JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 97 (1985) (“It is not a defect but a merit of our system that judges are acknowledged to have discretion, that legal questions are seen as open and difficult, that juries can decide within a wide range.... It is the aim of our law not to obliterate individual judicial judgments in favor of a scheme, but to structure and discipline them, to render them public and accountable.”); Stephen G. Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2013 (2011) (“[L]egal questions that reach the Supreme Court are difficult, uncertain, and close

ones.”); Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930) (“For in such matters [as constitutional interpretation] everything turns upon the spirit in which [the judge] approaches the questions before him.”). Impartiality requires introspection and a commitment to the pursuit of self-knowledge on the part of the judge, who must try and come to terms with his or her biases, including those that are only implicit. See, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (“Our research supports three conclusions. First, judges, like the rest of us, carry implicit biases concerning race. Second, these implicit biases can affect judges’ judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias. Third, and conversely, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”).

⁷⁹ See, e.g., TED COHEN, THINKING OF OTHERS: ON THE TALENT FOR METAPHOR 9 (2008) (“[U]nderstanding one another involves thinking of oneself as another, and thus the talent for doing this must be related to the talent of thinking of one thing as another; and it may be the same talent, differently employed.”). See also *id.* at 13 (“Thinking of one person as another is a bemusing and mysterious enterprise, but if I am right, the ability to do this is a fundamental human capacity without which our moral and aesthetic lives would scarcely be possible.”).

We also expect judges to try and learn as much as they reasonably can (within the limits imposed by their caseloads and the nature of the adversary system)⁸⁰ about the particularities of the case they must decide. In this respect, we hope that judges will take their cue from Justice Louis D. Brandeis, rather than from Justice Oliver Wendell Holmes, who observed that Justice Brandeis “always desire[d] to know all that can be known

about a case whereas I am afraid that I wish[ed] to know as little as I [could] safely go on.”⁸¹ We want judges to respect the need for stability in the law, but also to be open, where appropriate, to the possibility that an earlier decision might not be controlling, that it might simply be wrong, or that the rule it articulated might have proved ineffective in practice and should therefore be modified or abandoned.⁸² We expect judges to press advocates to

⁸⁰See, e.g., *Rowe v. Gibson*, 798 F.3d 622, 639 (7th Cir. 2015) (Hamilton, J., dissenting) (“The foundation of our legal system is a confidence that the adversarial procedures will test shaky or questionable evidence. ‘Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.’” (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 586 (1993))). One of the issues involved in *Rowe* was the majority’s use of factual material gleaned from the Internet in reversing a summary judgment. *Id.* at 628–31 (majority opinion). See also *Mitchell v. JCG Indus., Inc.*, 753 F.3d 695, 702–03 (7th Cir. 2014) (order denying petition for rehearing en banc, over the dissent of four judges, with respect to a panel decision in a “doffing-and-donning” labor case that was based in part on a time-and-motion study conducted in the chambers of the writing judge); *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 843 (7th Cir. 2014) (Posner, J.) (holding that time spent donning and doffing mandatory protective gear was not compensable under federal labor laws, based in part on a time-and-motion study conducted in the chambers of a member of the appellate panel hearing the case). Chief Judge Wood dissented from the panel opinion, taking issue, among other things, with the writing judge’s reliance on the in-chambers time-and-motion study. See *id.* at 846 (Wood, C.J., dissenting).

⁸¹ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* 230 (1957) (quoting Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 3, 1925)). See also Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 247 (1964) (“[Holmes] could rely on the comprehensive abstractions that he had long before worked out because he was not interested in the individual and particular aspects of a situation.... This ability to stand off and discern a few central and governing issues – to see ‘the same old donkey’ – helps to explain not only the brevity of Holmes’ opinions, but also his quite remarkable speed in writing them. (‘A case doesn’t generally take more than two days if it does that.’) That facility was related to the way in which he was so far from

Brandeis’ belief that ‘knowledge is essential to understanding; and understanding should precede judging.’”).

⁸²See, e.g., *Batson v. Kentucky*, 471 U.S. 79, 98–99 (1986) (allowing challenges to racial discrimination in jury selection based on the use of peremptory challenges in a single case), *overruling Swain v. Alabama*, 380 U.S. 202, 227–28 (1965) (conditioning relief from racial discrimination in jury selection on proof of a pattern of discrimination); *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 664 (1978) (determining that a municipal corporation was a “person” within the meaning of Section 1983), *overruling Monroe v. Pape*, 365 U.S. 167, 186–91 (1961) (holding that a municipal corporation was not a “person” within the meaning of the statute). Justice White, the author of the majority opinion in *Swain v. Alabama*, explained his reasons for abandoning it in *Batson v. Kentucky*. See *Batson*, 471 U.S. at 100, 101 (White, J., concurring) (“The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference [of discrimination], which the prosecutor carries the burden of refuting.... I agree that, to this extent, *Swain* should be overruled. [*Swain* should have put prosecutors on notice] that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause. It appears, however, that the practice of peremptorily eliminating blacks from petit juries remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs.”). A classic example of the Court repudiating an earlier interpretation of the Constitution as simply wrong is *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (holding that public school officials violated the free speech clause of the First Amendment by requiring students to salute the flag and say the Pledge of Allegiance), *overruling Minersville School District v. Gogbitis*, 309 U.S. 586, 598–600 (1940) (holding that state officials could require public school students to say the Pledge of Allegiance and salute the flag, notwithstanding their religious beliefs).

engage relevant arguments that may have been made poorly or not at all, rather than allowing the case to be decided by default – while also respecting the line that separates the judge’s role from that of the advocates and being mindful of the power that judges necessarily exercise over those they encounter in the courtroom.⁸³ We also expect judges to be susceptible, within limits, to being persuaded by the advocates’ arguments, and, in the context of multi-member courts, by their colleagues’ views. And we expect judges to focus, as they deliberate, on the particularities of the case at hand, rather than relying on generalities they may have worked out to own their satisfaction many years before.

On this view, in other words, we expect a great deal from judges: we expect them to engage their cases in a way that risks a genuine encounter, not only with the relevant text and existing jurisprudence, but also with other human beings, their situations, their problems, and their ideas. Heavy caseloads and time constraints may make it difficult for judges to meet those expectations. So, too, may the human mind’s apparently natural inclination to make quick judgments; to try and fit things that are new or unfamiliar into existing patterns, regardless of how well they actually fit; and to give effect to biases that may be unknown even to the person who harbors them.⁸⁴ These factors

⁸³There are limits, of course, to the extent to which judges may properly take it upon themselves to re-cast the issues presented in a case, particularly where the record has been set in a lower court and the reviewing court’s scope of review is limited to questions that have been properly presented and accepted for review. See, e.g., Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 162–64 (2011) (arguing that the Supreme Court exceeds its constitutional limits when it treats “cases simply as vehicles for changing the law in a way that a majority of the Court [feels] desirable” and “decide[s] issues that were not based on a record below, had not been the subject of decisions by lower courts, and sometimes had not even been briefed by parties or amici”). See generally Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958–1960 and 2010–2012*, 2015 UTAH L. REV. 1005, 1071–79 (summarizing empirical data and noting the apparently increased dominance of the Justices at oral argument). In addition, judges always stand in position of great power with respect to the lawyers and litigants whose cases they decide. See *id.* at 1032–33 (“Tough questions are an essential part of oral argument, and most judges do not abuse their position. But the relationship of judge and counsel is not one of equality; sarcasm, rudeness, sharp questioning, and other aggressive judicial tactics can easily become an abuse of the power relationship that necessarily exists in any courtroom. That potential for abuse is enhanced when a Justice openly disrespects a party or her counsel or adopts an explicitly adversarial posture toward one side or the other.”). Justice William J. Brennan, Jr., once

wrote that his way of reading the Constitution differed from other people’s ways of reading other texts because “consequences flow from a Justice’s interpretation in a direct and immediate way.” William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX L. REV. 433, 434 (1986). A Justice’s interpretation of the Fourteenth Amendment, for example, is “not a contemplative exercise in defining the shape of a just society,” but “an order – supported by the full coercive power of the State – that the present society change in a fundamental aspect.” *Id.*

⁸⁴See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing “System 1,” as the fast, intuitive way humans think and discussing the situations in which individuals should and should not trust their intuitions or “fast thinking”); Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014) (analyzing the “anchoring effect,” a cognitive shortcut that may lead to errors in judgment, in judicial decision making, including sentencing decisions); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (explaining that judges may be vulnerable to cognitive illusions that have significant impacts on judicial decision making); Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 LOY. U. CHI. L.J. 1377 (2013) (emphasizing the importance to legal practice of distinguishing between fast and slow thinking and recognizing the inability of human beings to act solely on the basis of reason); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009)

Above all, judges need to resist the temptation to make a virtue out of the obstacles that confront them.

present challenges that require a significant amount of judicial circumspection and self-awareness.⁸⁵ Judges may never free themselves completely from their biases, particularly those that are unconscious, but we expect them to try and recognize those biases and to be mindful of them.⁸⁶

There is another view, however, that holds that such expectations are not only difficult or impossible for judges to meet,

but largely unnecessary – and even undesirable. On that view, deliberation – whether the internal deliberation of a single judge or the give-and-take of a judicial panel – has little value. If one has a firm view of the world and how it works, one need learn little about either the particularities of a case or the views that others have of it before coming to a conclusion about how the case should be decided. That seems to have been the view expressed by Justice Holmes when he wrote that he, unlike Justice Brandeis, “wish[ed] to know as little [about a case] as [he could] safely go on.” Similarly, Judge Richard Posner has suggested that a judge’s difficulty in making up his or her mind should be viewed as “a psychological trait rather than an index of conscientiousness.”⁸⁷ On that view, for example, the purpose of a post-argument conference of a multi-member court is not for the judges to exchange views, or to

(finding that judges, much like the general population, harbor implicit biases concerning black Americans that may influence judicial decision making). See also Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 47 (2014) (“Implicit biases stir within all of us. In our role as lawyers and judges we must be conscious of implicit bias’ hold on us. Indeed, unless we self-assess our underlying assumptions and attitudes, implicit biases can and will lead us to actions and decisions we otherwise might not have undertaken.”).

⁸⁵ Another important factor, of course, is the quality of lawyering that is brought to bear on a particular case. Although the significance of that factor must be left for another day, it bears noting that there are significant shortcomings in the “umpireal” metaphor that has been used to describe the judge’s role, particularly in cases in which one party is not represented by counsel, one party is represented by incompetent counsel, or the strength of the judge’s known or perceived biases have caused certain arguments not to be made. While judges must be careful not to “take over” a case, they should push lawyers to address relevant arguments that have been made poorly or not at all. See *supra* text accompanying note 83 (“We expect judges to press advocates to engage relevant arguments that may have been made poorly or not at all, rather than allowing the case to

be decided by default—while also respecting the line that separates the judge’s role from that of the advocates and being mindful of the power that judges necessarily exercise over those they encounter in the courtroom.”).

⁸⁶ See Morawetz, *supra* note 77, at 58 (noting that judges cannot choose the perspective from which they will decide a case, but participation in a practice is “subject to reflection and conditioned by learning”).

⁸⁷ RICHARD A. POSNER, *HOW JUDGES THINK* 299 (2008). Judge Posner has described his own approach:

My approach to judging is not to worry initially about doctrine, precedent and all that stuff, but instead, try to figure out, what is the sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask ‘is this blocked by some kind of authoritative precedent of the Supreme Court? If it is not blocked, I say fine, let’s go with the common sense, sensical [sic] solution.

See Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN’S BLOG (Nov. 6, 2015), www.joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent/ (discussing Judge Posner’s approach to judging).

attempt to persuade each other, but simply to tally the votes and confirm the outcome.⁸⁸ It is the vote that matters, not the reasons or the explanation.⁸⁹ Along the same lines, Judge Posner has suggested that judges can be expected to make short work of opinion writing: a good first draft of a Supreme Court opinion should take no more than four hours.⁹⁰ That argument suggests that there is little room for persuasion: the arguments of counsel and the reflections of one's fellow judges seem largely beside the point, and so does much of the adversary process itself.

The argument of this Essay is that we should prefer the first view of judging, however imperfect its actualization may be. We should expect judges to listen, and to listen in a particular kind of way, that

is, by encountering the issues presented in their cases seriously and authentically. We should expect judges to approach their cases not merely as intellectual puzzles to be solved (although the choice among possible readings of a relevant text may well be puzzling), but as real disputes involving real people with competing interests, ideas, and concerns that are important to them and deserving of the judge's respect and attention. We should not count a judge's inclination toward deliberation in a difficult case as a shortcoming or character flaw. We take this view, not because we think that it will necessarily guarantee better results (although we expect that it will), but because we believe that judging as a human activity requires it.

This Essay will make that argument by offering a close reading of two novels

⁸⁸ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 308–09 (Harvard Univ. Press rev. ed. 1999). Post-argument conferences tend to be perfunctory, according to Judge Posner, because, where there is disagreement, “the principal effect of arguing is... to drive the antagonists farther apart—or at least to cause them to dig in their heels.” POSNER, *supra* note 87, at 302. *But see* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1360 (1998) (“[W]e do spend a great deal of time listening to each other’s views and considering arguments each of us makes. This dynamic process of discussion and dialogue is what I have in mind when I speak of collegial deliberation.”). In recent years, the Supreme Court seems to have adopted a conference model that places less emphasis on the process of persuasion. *See, e.g.*, THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 117 (Del Dickson ed., 2001) (“The nature of the conference continued to evolve under Burger’s leadership. The Justices became less interested in using the conference to exchange ideas, debate, or persuade others. Instead, they began to view the conference merely as an opportunity to declare their individual positions and count votes.”). *See also* Sullivan & Canty, *supra* note 83, at 1028 (“The contemporary conference is thought to have become very formally structured, with little, if any, give-and-take; the Justices do not interrupt each other or talk out of turn.”).

⁸⁹ *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 19 (1994) (“There is also the intrinsic pleasure of writing, for those who like to write, and of exercising and displaying analytical prowess or other intellectual gifts, for those who have them and want to use them. But I ignore these and other sources of satisfaction in the work of a judge as adding little of analytical significance to voting. Also, they are not important to most judges, who are happy to cede opinion-writing to eager law clerks, believing (consistent with my analysis) that the core judicial function is deciding, that is, voting, rather than articulating the grounds of decision.”). *See also* POSNER, *supra* note 87, at 110 (“The judicial opinion can best be understood as an attempt to explain how the decision, even if (as most likely) arrived at on the basis of intuition, could have been arrived at on the basis of logical, step-by-step reasoning.”).

⁹⁰ RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 246 (2013) (stating that Justice Ginsburg’s “claim not to have enough time to write opinions puzzles me given how few opinions Supreme Court Justices write.... [They write] an average of sixteen per term. Suppose it would take her four hours to write the first draft of an opinion, on average. That may be a generous estimate. Supreme Court opinions don’t have to be long, since the Court usually grants certiorari to decide only one or two issues and doesn’t have to worry about lower-court case law.... Four hours of drafting each of sixteen opinions would add up to sixty-four hours a year”).

concerned with the lives and work of judges, namely, Ian McEwan's *The Children Act*⁹¹ and Colm Tóibín's *The Heather Blazing*.⁹²

Part I of the Essay briefly considers the meaning and significance of the "equal hearing" principle, emphasizing, in particular, that the principle is concerned not only with equality of access, but also with the quality of access, that is, with the nature and substance of "the hearing" itself. In turn, the quality of the hearing depends not only on compliance with certain forms, but, and at least equally important, on the attitudes of the judges and their openness to hearing arguments with which they might be inclined to disagree or predisposed to reject. The "equal hearing" principle can therefore be thought to entail a "hearing" in the fullest sense – that is, paying attention to the parties' arguments, learning as much as possible about the case, deliberating about the case, and giving a reasoned explanation for the result.

Part II aims to achieve a deeper appreciation of the "equal hearing" principle through a close reading of two novels that are deeply concerned with the inner lives of judges, the moral complexity of difficult cases, and the factors that influence the decision of cases. The decisional processes described in these two books are not offered as ideal types and the judges portrayed in the books are not perfect. By and large, however, these fictional judges take seriously the difficult questions they are required to decide; they puzzle over them; and they sometimes cannot "leave [them] alone,"⁹³ even after a judgment has been rendered. These judges sometimes think – correctly or not – that they could have done better.⁹⁴ In that sense, these judges embody what most of us at least hope that judging entails: that judges do struggle with decisions in hard cases, and that a judge's inability to come to a quick decision in a difficult case is indeed a matter of conscientiousness, or, at least, the

⁹¹ IAN MCEWAN, *THE CHILDREN ACT* (2014).

⁹² COLM TÓIBÍN, *THE HEATHER BLAZING* (rev. ed. 2012). Tóibín originally published the novel in 1992; the 2012 version contains a revised chapter and an afterword explaining the revision. See *infra* note 259.

⁹³ MCEWAN, *supra* note 91, at 29.

⁹⁴ *Billy Budd*, Herman Melville's short novel set in the year of the "Great Mutiny," may also shed some light on the haunting power of the recognition that one might have done better. See HERMAN MELVILLE, *BILLY BUDD AND THE PIAZZA TALES* 11 (Dolphin Books ed., 1962). Following the sailor Billy Budd's accidental killing of John Claggart, the villainous master-at-arms, Captain Vere, the ship's commanding officer, convenes a "drum-head" court to try Billy Budd for the killing. *Id.* at 71. Seeing fit to intervene in the court's deliberations, Vere makes several arguments aimed at stiffening the judges' resolve and dissuading them from showing mercy to the defendant. In one line of argument, he admonishes them: "For that law and the rigor of it, we are not responsible for it. Our vowed responsibility is in this: That however pitilessly that law may operate, we nevertheless adhere to it and administer it." *Id.* at 77. Later, he concludes his intervention with this argument:

Your clement sentence [the crew] would account pusillanimous. They would think that we flinch, that we are afraid of them – afraid of practicing a lawful rigor singularly demanded at this juncture lest it should provoke new troubles.... But I beseech you, my friends, do not take me amiss. I feel as you do for this unfortunate boy. But did he know our hearts, I take him to be of that generous nature that he would feel even for us on whom in this military necessity so heavy a compulsion is laid.

Id. at 79. Once Billy Budd has been condemned, however, and Vere has communicated his fate to him, Vere's face is described as "one expressive of the agony of the strong," reflecting that "the condemned one suffered less than he who mainly had effected the condemnation." *Id.* Later, when Vere is dying from wounds suffered in battle, his thoughts once more turn to Billy Budd, whose name he is heard to murmur. *Id.* at 95. In writing *Billy Budd*, Melville seems to have been inspired in part by a true story of the American navy. See generally BUCKNER F. MELTON, JR., *A HANGING OFFENSE: THE STRANGE AFFAIR OF THE WARSHIP SOMERS* (2003) (describing naval incidents that may have inspired Melville to write *Billy Budd*); HERSHEL PARKER, *HERMAN MELVILLE: A BIOGRAPHY, VOLUME I, 1819–1851* (1996) (same).

necessary condition of humanity, rather than a mere “psychological trait” or character flaw.

Finally, Part III briefly revisits the subject of adjudication and the equal hearing principle in light of the two novels and emphasizes once more the idea of “listening” as an essential aspect of judging, inviting further research and reflection.

I. The Equal Hearing Principle

In *Justice Is Conflict*, the philosopher Stuart Hampshire argues:

No one is expected to believe that [the Supreme Court’s] decisions are infallibly just in matters of substance; but everybody is expected to believe that at least its procedures are just [in the sense that] they conform to the basic principle

governing adversary reasoning: that both sides should be equally heard.⁹⁵

The importance of the principle that “both sides should be equally heard” – the “equal hearing principle” – to the proper functioning of the Supreme Court seems too obvious to warrant discussion. After all, the Supreme Court does not simply resolve disputes of great practical significance to the parties involved; the Court almost always articulates important principles of federal constitutional or statutory law in the course of resolving such disputes.⁹⁶ Among other things, the Court gives clarity and substance to a constitutional text that was not only written in a different age, but written in terms that were sometimes – and perhaps intentionally – left quite vague and open to interpretation.⁹⁷ More often, the Court

⁹⁵ STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 95 (2000). See also *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

⁹⁶ See, e.g., *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (noting that “it is emphatically the province of the judiciary to say what the law is”). But see *United States v. Windsor*, 133 S. Ct. 2675, 2699 (2013) (Scalia, J., dissenting) (“[D]eclaring the compatibility of state or federal laws with the Constitution is not only not the ‘primary role’ of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were – when that is necessary to resolve the dispute before us. Then, and only then, does it become ‘the province and duty of the judicial department to say what the law is.’”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (“Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.”) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)). Of course, the modern Supreme Court does not normally grant review simply to resolve a dispute between two parties. The Supreme Court mainly grants review to decide important questions of federal law that have not been resolved in a satisfactory or uniform way by the lower state and

federal courts. See SUP. CT. R. 10 (describing the factors that normally guide the Court’s discretion in deciding whether to grant review). Occasionally, when one or more Justices is disqualified (or when one or more vacancies exist), the Court may decide a case by equally divided vote, in which case the Court writes no opinion and the decision below stands, but without precedential value except in the jurisdiction from which the case originated. See *Durant v. Essex Co.*, 74 U.S. 107, 110 (1868) (“No affirmative action can be had in a case where the judges are equally divided in opinion as to the judgment to be rendered or the order to be made.”); EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 6 (9th ed. 2007).

⁹⁷ See THE FEDERALIST No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) (“All new laws [including constitutions], though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”). See also *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J.) (“Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights that the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities.... The real clue to the problem confronting the judiciary in the

is asked to determine the proper interpretation or application of a statute or the legitimacy of an administrative regulation.⁹⁸ In either case, the effects of the Court's decisions are likely to be far reaching. The "equal hearing" principle is obviously important to the parties whose interests are directly involved in a Supreme Court case; it is essential that they should have confidence in the impartiality of the Court's procedures. But the "equal hearing" principle is also important to the proper resolution of the significant questions of law and policy that are typically presented in Supreme Court cases, and, ultimately, to the maintenance of public confidence in the judicial process.

Although Professor Hampshire was speaking specifically about the Supreme Court in *Justice Is Conflict*, his claim is necessarily broader and more comprehensive.⁹⁹ Indeed, the "equal hearing" principle might well be considered definitional with respect to the nature of adjudication in any liberal democracy.¹⁰⁰ Whatever else might be said, we expect that courts will be fair in some general sense, that is, that the courts will be independent from the other branches of government, for example, and that they will administer the law impartially, doing justice without regard to the litigants' wealth or status, political beliefs or affiliations, creed or color, gender or sexual orientation. But we also expect the courts' proceedings to be fair in the very

application of the Due Process Clause is not to ask where the line is once and for all to be drawn, but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion."'), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., Inc.*, 347 U.S. 582, 646–47 (1949) (Frankfurter, J., dissenting) ("The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers.... Great concepts like 'Commerce... among the several States,' 'due process of law,' 'liberty,' 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (Jackson, J.) ("[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.").

⁹⁸See ROBERT A. KATZMANN, *JUDGING STATUTES* 3 (2014) ("Indeed, a substantial majority of the Supreme Court's caseload involves statutory construction (nearly two-thirds of its recent docket by one estimate).").

⁹⁹See *supra* text accompanying note 95.

¹⁰⁰ Indeed, there may be some criteria that are essential to any system of law, regardless of the nature of the regime. In his famous recounting of the hypothetical king, "Rex's bungling career as legislator and judge," Lon L. Fuller identifies eight ways in which Rex's "attempt to create and maintain a system of legal rules [has] miscarried." LON L. FULLER, *THE MORALITY OF LAW* 38–39 (rev. ed. 1969). The hypothetical Rex managed to discover and pursue "eight distinct routes to disaster." *Id.* at 39. The first, according to Professor Fuller, was Rex's "failure to achieve rules at all, so that every issue must be decided on an ad hoc basis." *Id.* "The other routes are: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration." *Id.* Professor Fuller concludes: "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract." *Id.*

specific sense of conforming to the ancient maxim “*audi alteram partem*” (hear the other side) when deciding the “unavoidable and disputable issues”¹⁰¹ that courts often are called on to decide. It is in this way, Professor Hampshire explains, that “justice is to be done and seen to be done.”¹⁰²

When we talk about the “equal hearing” principle, we are likely to emphasize its equality component: justice requires that both sides be treated equally. But that is not the only requirement – or the full meaning – of the “equal hearing” principle. The principle necessarily has two parts: one requires “equality” of treatment, as we have seen; the other requires a particular kind of treatment – a “hearing.”

In the common law or Anglo- American legal tradition, the “hearing” requirement has a relatively specific meaning or connotation. Among other things, the parties must be afforded access to the tribunal; and the tribunal must be able to hear directly from those with the most intimate knowledge of the controversy and the most direct stake in the outcome. It is the parties’ understandings of the dispute and their arguments about it that matter. Thus, denying a “hearing” to both sides might satisfy the requirement of equality, but it cannot satisfy the access – or hearing – component of the “equal

hearing” principle.¹⁰³ Suppose, for example, that a tribunal were to adopt a bureaucratic, non-adversary procedure for deciding disputes without hearing directly from either side, either in person or in writing. What the tribunal would hear in that event is not two competing narratives by the parties most intimately involved and interested in the dispute, but “One Big Story authorized by a state official,”¹⁰⁴ as Robert P. Burns nicely puts it. In such circumstances, the procedure might be fair in the sense of treating both sides equally, and the tribunal might even render decisions that were considered substantively fair and impartial. But, from the standpoint of the common law tradition, the process would necessarily fall short. Even if the result were thought well reasoned, as well as fair and impartial, we would consider it procedurally flawed or mistaken.

Thus, the “equal hearing” principle requires that each side be afforded “a hearing.” Each side must be given the opportunity to present its evidence and make its arguments. In this sense, each side must be heard. Each side must be listened to.

To say that the “equal hearing” principle requires that both sides “be listened to” comes closer to the heart of the matter. That expression, after all, may be taken to suggest that the quality, as

¹⁰¹ HAMPSHIRE, *supra* note 95, at 8. Professor Hampshire notes the existence in society of various institutions for the resolution of conflicts, and their varying conceptions of fairness: “Fairness in advocacy is different from fairness in adjudication; fairness in parliament and in party politics is different from fairness in a law court and in an arbitration.” *Id.* at 54–55.

¹⁰² *Id.* at 9. See also *R v. Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, 259 (“[J]ustice should not only be done, but should be manifestly and undoubtedly seen to be done.”).

¹⁰³ *But see* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT

258 (Conor Cruise O’Brien ed., Penguin Books 1986) (1790) (“Equal neglect is not impartial kindness.”).

¹⁰⁴ See ROBERT P. BURNS, A THEORY OF THE TRIAL 165 (1999) (comparing “the two-story structure of opening statement” with the “One Big Story authorized by a state official”). See also *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004) (Scalia, J. dissenting) (discussing the importance of public trials and the right of confrontation in the Anglo-American system of criminal justice). See *id.* at 43 (“The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”).

well as the existence, of a “hearing” is critical. The “hearing” – by which we mean the judge’s overall interaction with the case, including his or her interaction with the facts and the law, the parties and counsel, and, if relevant, fellow judges – must be a real one. It must be genuine and authentic. It is not enough that the parties be given “some kind of hearing”¹⁰⁵ in a formal sense; the parties’ arguments must be “listened to” – that is, they must be seriously considered and carefully weighed. In other words, in addition to requiring that a tribunal afford the parties an opportunity to present their respective narratives, the “equal hearing” principle requires that the tribunal authentically engage the merits of those narratives, not only at the time of the live hearing (if one is provided), but throughout the adjudicatory process.¹⁰⁶

What this entails, at least in part, perhaps, is the judge’s internalization of the adversarial perspective. Successful advocates cannot afford to be blinded by the brilliance of their own arguments, but must always be vigilant as to both the weaknesses of their arguments and the strengths of the best arguments on the other side. Only then can an advocate plan any reasonably promising strategy for winning the case. As Professor

Hampshire suggests, “[d]iscussions in the inner forum of an individual mind naturally duplicate in form and structure the public adversarial discussions.”¹⁰⁷ When an individual is confronted by “the ever-recurring cases of conflict of principles, adversary argument and then a kind of inner judicial discretion and adjudication are called for.”¹⁰⁸ Just as a competent advocate will be able to grasp the strengths and weaknesses on both sides of an argument, so too must a conscientious judge. At the very least, the “equal hearing” principle requires a serious and engaged inquiry into the facts of the case and the merits of the parties’ legal arguments.

From this perspective, it also seems clear that the “equal hearing” principle is not simply a necessary structural element in a system of adjudication, but a normative requirement that constitutes part of the professional and moral obligation of judges. In this sense, the “equal hearing” principle necessarily subsumes an array of requirements, including the requirement that judges (unlike most public officials) give reasons for the conclusions they reach. Thus, as James Boyd White writes in *Heracles’ Bow*, “the hearing is the heart of the law,... but the hearing reaches its fullest

¹⁰⁵ See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (describing due process hearing requirements).

¹⁰⁶ Some judges have had the practice of allowing oral argument, but then reading a written opinion granting judgment to one side or the other at the conclusion of the argument. It may be that the judge was listening attentively to the argument and would not have delivered the opinion, as written, if anything had been said to change his or her mind. It seems more likely, however, that the oral argument in such circumstances was simply an empty form and that nothing that could have been said at oral argument would have changed the judge’s mind. In other circumstances, the problem may be that the judge’s clerk has only skimmed the briefs before finding a case that seems to resolve the question presented and drafting an opinion that

merely regurgitates the earlier opinion, without seriously engaging the possible differences between the two situations. Alternatively, a judge might listen to both sides equally in an effort to grasp the nature of the problem to be solved, and then simply decide the case according to his or her own lights, without listening to anything else that the parties might wish to say. The parties in these cases would have been treated equally, but in no sense would their positions have been afforded the kind of “serious consideration” contemplated by the “equal hearing” principle.

¹⁰⁷ HAMPSHIRE, *supra* note 95, at 8.

¹⁰⁸ *Id.* Those who are successful in argument, Professor Hampshire suggests, will have developed the “habit of balanced adversary thinking”—an ability to anticipate and answer the best arguments for the other side. *Id.* at 9.

significance only where it is coupled with the obligation to explain.”¹⁰⁹ As Professor White explains:

What we should demand in each case is that the judge give to the case attention of a certain sort and make it plain in writing that he or she has done so, for there, in the attention itself, is where justice resides. We are entitled not to “like results” but to “like process” (or “due process”), and this means attention to the full merits of a case, including to what can fairly be said on both sides: to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language.¹¹⁰

What Professor White has said of lawyers and judges generally is particularly true with respect to judges:

[W]hen we evaluate an opinion or an argument, or the work of a judge or a lawyer, we normally do not speak merely in terms of analytical acuteness, skill in presentation, and intellectual coherence – though these are of course important qualities – but in much more general terms: openness to other ways of thinking; responsiveness to questions; honesty in facing difficulties; sensitivity to historical

and social context; understanding of the situations and motives of others; awareness of the real costs and dangers of a particular decision; the capacity to make sense of the case as a whole, both standing alone and in connection with other cases. Beyond such things, we speak of even more general qualities: courage, for example, and wisdom, and a sense of justice, and good judgment. The legal intelligence in its ideal form would comprise nearly every intellectual, psychological, and moral virtue, and these qualities, when they are present, will manifest themselves in speech and writing.¹¹¹

H. Jefferson Powell has made a similar point, specifically with respect to the work of the Supreme Court:

The Court plays its part in the system only when its members make it clear through their words that they are genuinely engaged with the hard issues before them, and that they are being honest with themselves and with us about the considerations that drive them. Only when their opinions seek to persuade our judgments, not just coerce our wills, can the decisions of the Court truly be called authoritative.¹¹²

¹⁰⁹ WHITE, *supra* note 78, at 241.

¹¹⁰ *Id.* at 133–34. As Professor White has noted, this view of judging is “profoundly anti-bureaucratic.” *Id.* at 123. See also *id.* at 123–24 (“It rejects the idea, for example, that the judge can properly make himself (or herself) merely an analyzer of costs and benefits, or merely a voice of authority, or merely a comparer of one case with another, or merely a policy-maker or problem-solver. The judge is always a person deciding a case the story of which can be characterized in a rich range of ways; and he (or she) is always responsible for his choice of characterization and for his decision. He is always responsible as a composer for the composition that he makes. One great vice of theory in the law is that it disguises the true power that the judge actually has, which it is his true task to exercise and to justify, under a pretense that the result is compelled by one or another intellectual system. Our way of reading takes aim at those pretenses, and seeks to destroy them, by defining the work of the law as the work of individual minds, for which individuals are themselves responsible.”).

¹¹¹ JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 212 (2006).

¹¹² H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 108–09 (2008). See also *id.* at 119–20 (“Under our practices, by an understanding dating back to the first years of the Republic, this means that questions of constitutional meaning are questions of law, to be resolved through the forms of legal argument. As we have seen, the constitutional virtues are necessary to make this possible in the face of the Constitution’s ambiguities and the inevitable presence of questions of degree in difficult cases. Any morally responsible involvement in the constitutional enterprise thus demands the constitutional virtue of faith as I have described it: confidence that it is possible to make sense of what we must do to interpret the Constitution as law, and a commitment to do what is required. In addition, and critically, the virtues bring the decisions of the justices and other officials within the scope of informed criticism by the political community at large.”).

This view of judging rejects the idea of the judge as a superior form of intelligence, delivering wisdom from on high. The judge should not be seen as the genius who “prepare[s] small diamonds for people of limited intellectual means,”¹¹³ as Justice Holmes once described himself, or as the member of some exalted fraternity of alchemists who transform “the sordid controversies of litigants” into “great and shining truths,” as Justice Cardozo put it.¹¹⁴ Those views of the judicial role do not reflect the attitude that we expect judges in a democratic society to show toward their work, or toward the problems and concerns of those they serve.

As Professor White has argued, the judge, like all legal actors, “is never merely a center of discretionary power; he or she is always, at least in form, a servant, or a trustee.”¹¹⁵ Professor White’s choice of the word “trustee” is particularly interesting. A trustee is a fiduciary, of

course, and we expect fiduciaries to take the matters with which they are entrusted as seriously as their own. Thus, to refer to the judge as a “trustee” is to assume a high level of caring and commitment, both to the law and to the cases that come before the judge. It is to assume that the judge will give the same level of attention to a case that he or she would give to it if the judge’s own life, liberty, or property were at stake. In addition, of course, the judge must try, to the best of his or her ability, to appreciate the significance of the case from the parties’ perspectives, which may well be different from the judge’s own perspective. The judge must also be mindful of the public interest, and of the need to preserve that balance between freedom and constraint that animates our democratic institutions.

At the risk of grossly oversimplifying the nature of the decisional process, one might provisionally divide the questions presented for decision by judges into two

¹¹³ HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932 173 (Mark De Wolfe Howe ed., 1941) (Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Dec. 1, 1925)). Justice Holmes’s well-known preference for judicial restraint was not the product of any belief in the efficacy of democratic government. His early “loath[ing] [for] the thick-fingered clowns we call the people – especially as the beasts are represented at the political centers – vulgar, selfish, and base” appears to reflect a persistent attitude. See TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861–1864 70–71 (Mark De Wolfe Howe ed., 1947) (Letter from Oliver Wendell Holmes, Jr., to Amelia Holmes (Nov. 16, 1862)). David Luban has written: “A more eccentric foundation for judicial self-restraint than Holmes’s would be hard to find. A form of judicial review based on atheism and cosmic indifference to human aspiration, on the arbitrariness of all value judgments, on the contemptibility of attempting to relieve human suffering through public policy, and on ‘judicial obedience to a blindly accepted duty’ to speed one’s fellow citizens on their self-appointed path to Hell could not survive the test of full publicity.” David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 510 (1994). See generally ALBERT W. ALSCHULER, LAW WITHOUT

VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 10 (2000) (concluding that Justice Holmes, who “had a brutal worldview and was indifferent to the welfare of others,” has had a largely negative influence on American legal thought). Justice Brandeis had a very different view of democracy. See, e.g., Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 686 (1988) (“To Brandeis, as to Jefferson, the key to a successful democracy lies in the spirit, the vitality, the daring, the inventiveness of its citizens.”).

¹¹⁴ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 35 (1921). See also Lewis Henry LaRue, *How Not to Imitate John Marshall*, 56 WASH. & LEE L. REV. 819, 830 (1999) (“[T]hose who teach rhetoric and composition often advise their students to start each paragraph with a topic sentence. Yet it seems fair to say that Marshall’s topic sentence [in *McCulloch v. Maryland*—‘If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action’—] is rather extreme in the aggressiveness of its statement. One who disagrees seems cast out beyond the pale of mankind.”).

¹¹⁵ WHITE, *supra* note 78, at 239.

categories: questions of fact and questions of law.¹¹⁶ Assuming the validity of that rough division, it seems clear that the “equal hearing” principle must apply to both. A judge might be tempted to fudge the facts for one reason or another (perhaps to make the case appear more consistent with one line of authority than

another),¹¹⁷ but misstating or ignoring the evidence is a particularly crude manifestation of bias, and the professional community can be expected, at least in the long term, to call to account a judge who systematically distorts the facts. For that reason, judges may be unlikely to misstate the facts,¹¹⁸ at least consciously,

¹¹⁶ The conventional division of issues into questions of law and questions of fact may be useful for present purposes, but it also represents a somewhat arid view of adjudication, which is far more complicated than this simple dichotomy would allow. See BURNS, *supra* note 104, at 215 (citing RICHARD J. BERNSTEIN, *BEYOND OBJECTIVITY AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 147–48 (1983)) (A judge “does not simply ‘apply’ fixed, determinate laws to particular situations [but] must interpret and appropriate precedents and law to each new, particular situation. It is by virtue of such considered judgment that the meaning of the law and the meaning of the particular case are codetermined.”). See also Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501–502 (1948) (“The pretense is that the law is a system of known rules applied by a judge.... In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible.... [I]t cannot be said that the legal process is the application of known rules to diverse facts. Yet it is a system of rules; the rules are discovered in the process of determining similarity or difference.”).

¹¹⁷ Of course, various formulations or resolutions of relevant factual issues may permit a judge to formulate or resolve legal questions in different ways. Judges may therefore be tempted to find factual questions where none actually exist or to resolve factual disputes in an unnatural way. Judge Charles Hough reportedly emphasized the point by stating that he did not care who laid down the law of the land so long as he could find the facts. See generally Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 788 (1981) (discussing Judge Hough’s dictum and outlining various changes in the federal judicial process that were aimed at increasing judicial efficiency, but arguably undermined the quality of justice). Monroe Freedman, one of the leading authorities on legal and judicial ethics, has suggested that the problem is more widespread than we might otherwise be inclined to think. In a 1989 speech to the Federal Circuit Judicial Conference, Professor Freedman observed: “Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or

omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.” Monroe Freedman, Speech to the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), *reprinted in* 128 F.R.D. 409, 439 (1989). See generally Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. U. L. REV. 7 (2015) (critiquing, from an advocate’s perspective, a court’s assertions concerning the facts, issues, and procedural history involved in a particular case); Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 799 (1994) (“A very substantial number of lawyers contacted by the Council believe that Chief Judge Posner routinely ignores crucial facts to reach desired conclusions; others believe that he is as faithful to the facts as is any appellate judge. The Council cannot give a firm opinion on this issue without comparing factual statements to the records of numerous cases. However, the fact that many lawyers of high integrity and ability strongly believe that Chief Judge Posner does not pay sufficient attention to the facts suggests that this is an area of important concern.”); Anthony D’Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1313 (1990) (critiquing, from an advocate’s perspective, a court’s factual assertions in a particular case). Dissenting judges also occasionally criticize a panel majority’s treatment of the facts. See, e.g., *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 283 (7th Cir. 1992) (Cudahy, J., dissenting) (“The majority review of the facts here is so lopsided as to be almost droll—if it were not such serious business.”).

¹¹⁸ That is particularly true of judges who sit on courts whose judgments are regularly reviewed by a higher court. For that reason, federal trial judges may be less likely than federal appellate judges to play fast-and-loose with the facts because the decisions of trial courts are regularly reviewed, while the decisions of appellate courts (particularly in the federal judicial system at the current time) are seldom reviewed at all. Indeed, the Supreme Court virtually never grants review to resolve a factual question, and the suggestion that factual issues may be raised is a strong disincentive to the granting of review. STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 272–75 (10th ed. 2013).

and, if they do, they will probably feel that they have done something wrong. They know that they have not acted as judges are supposed to act. But judges may be more likely to turn a deaf ear to legal arguments or interpretative theories that they find uncongenial – and they are not likely to feel guilty about that. For example, certain tools or interpretative strategies may have served a judge well in the past, and the judge is not likely to give them up just because other strategies might arguably provide better tools in a particular case. Nor will a judge be eager to reject jurisprudence that he or she has contributed to fashioning in the past. That is especially true, of course, where a judge has burnished his or her reputation by trumpeting his or her views on particular points of legal doctrine or methodology. In those circumstances, demonstrating an open mind might seem to require that something be “walked back.”

But a full appreciation of the problem necessarily takes us back to Justice Rehnquist’s argument in *Laird v. Tatum*.¹¹⁹ What that argument seductively – and erroneously – suggests is that judges do nothing wrong when they fail to consider legal arguments they are predisposed to reject. What they are doing is not analogous in any way to fudging the facts. They are not denying anyone an “equal hearing.” They are simply demonstrating their professional competence. Their minds are not a *tabula rasa* and they are not meant to be. On that view, therefore, there is no reason for judges to feel guilty about refusing to

take seriously legal arguments they find uncongenial. Indeed, they can take comfort in knowing that they are well prepared for their jobs and are performing their duties in an exemplary fashion.

But that argument is not persuasive. The “equal hearing” principle properly applies to questions of law as well as to questions of fact. Legal issues may present a more difficult set of problems, but the principle applies nonetheless. The proper question is where to draw the line. Just because a completely open mind may signal a lack of professional qualification (to say nothing of constituting a human impossibility), it does not follow that “anything goes,” or that a completely closed mind about the relevant legal doctrine or applicable methodology is consistent with judicial duty. In this respect, if the “equal hearing” principle is to be a real and working part of our system of justice, rather than simply a pious fiction, we do well to remember that “everything turns,” as Judge Hand said, “upon the spirit in which [the judge] approaches the questions before him.”¹²⁰

Let us turn to two fictional judges whose stories have been told in two novels by contemporary novelists who are masters of the literary form. Both novels are useful in terms of understanding what it means “to listen” in this context.

II. *The Children Act*

We meet Madam Justice Fiona Maye, an English High Court judge, on the first page of *The Children Act*¹²¹ – a novel that takes its name from an act of Parliament

¹¹⁹ 409 U.S. 824 (1972) (memorandum opinion of Rehnquist, J.).

¹²⁰ Hand, *supra* note 78, at 12.

¹²¹ McEWAN, *supra* note 91, at 3. Although McEwan refers to Madam Justice Maye as “Fiona”

throughout the novel, and a real High Court judge would be called “Madam Justice Maye,” she will be called “Maye” in this essay. Similarly, Mr. Justice Eamon Redmond, the main character in *The Heather Blazing* will be called “Redmond.”

concerned with the welfare of children.¹²² The act is central to the novel because Maye sits as a judge in the Family Division, a specialized branch of the High Court that is responsible, among other things, for enforcing the act in a broad array of cases that reflect the multiculturalism and heterogeneity of London's population. When we meet her, Maye is not in chambers or in the courtroom; she is at home on a Sunday evening, "supine on a chaise longue," surrounded by tasteful possessions, "[a] Bokhara rug spread on wide polished floorboards," and a draft judgment on the floor "within her reach."¹²³ She "was on her back, wishing all this stuff at the bottom of the sea."¹²⁴

As we soon learn, Maye is in the midst of a domestic crisis. She and her husband Jack, a professor of ancient history, live alone in Gray's Inn Square, a short walk from the Royal Courts of Justice.¹²⁵ Jack, who has always been "loyal and kind," has just told Maye that he would like her

permission to embark on an affair with a young colleague.¹²⁶ Jack does not want a divorce, and would like to keep "everything the same,"¹²⁷ while pursuing the affair. Jack believes that his situation is dire: he is sixty (he says fifty-nine, but Maye corrects him) and this is his "last chance" for "one big passionate affair."¹²⁸ To drive home the irresistible logic of his claim, Jack asks: "Fiona, when did we last make love?"¹²⁹ She dissembles: "I don't keep a record."¹³⁰ But, in truth, she does not know; she cannot recall. It is against this backdrop that the events of the novel unfold.

The personal and the professional are inextricably intertwined in *The Children Act*. That fact is made clear from the first line of the novel, when we are told that the time is "Trinity term, one week old."¹³¹ It is a Sunday evening and the judge is at home. She is not even working on a case, but time is measured by the court calendar. Like the rhythms of the church year,¹³² the court calendar apparently

¹²² The Children Act 1989, c. 41, § 1 (Eng.) (providing, in relevant part: "When a court determines any question with respect to... the upbringing of a child... the child's welfare shall be the court's paramount consideration"). James Boyd White uses the concept of the "best interests of the child" to exemplify the need for conceiving of law "less as a bureaucratic system than as a language and a set of relations." WHITE, *supra* note 78, at 133 ("What are the standards by which custody is determined when two adults are quarreling over a child, or when the state seeks to intervene to protect a child? The 'child's best interests,' we are told (and this is indeed an advance over regarding the child as someone's property): but how on earth are those 'best interests' to be determined?... Rules that further specify what is meant by the 'best interests'... have the defect that they too are categorical and will be both over-inclusive and under-inclusive.").

¹²³ McEWAN, *supra* note 91, at 1.

¹²⁴ *Id.*

¹²⁵ *Id.* at 41–45.

¹²⁶ *Id.* at 5–6, 8. Maye reflects:

Hurting her and not caring – that was new. He had always been kind, loyal and kind, and kindness, the Family Division daily proved, was the essential human ingredient. She had the power to remove a

child from an unkind parent and she sometimes did. But remove herself from an unkind husband? When she was weak and desolate? Where was her protective judge? *Id.* at 8.

¹²⁷ *Id.* at 6.

¹²⁸ *Id.* 4, 7.

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 6.

¹³¹ *Id.* at 3.

¹³² See, e.g., M. Cathleen Kaveny, *Billable Hours and Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 LOY. U. CHI. L.J. 173, 215 (2001) ("In sharp contrast to the way time is viewed in the framework of billable hours, I have described its contours in the very different perspective offered by Roman Catholic belief and practice. Here, time is perceived to have intrinsic value rather than merely instrumental value. Time is viewed not as a commodity valued in terms of its ability to satisfy human desires, but as a prism that is revelatory of the way those desires should ideally be directed (i.e., toward fellowship with God and one another). It is not fungible, but marks points of unique importance in the lives of individual persons and the broader community. It is not an endless, flat extension, but an integral spiral that encompasses

gives meaning to the days of its presbyters. Later, reflecting on her childlessness, she describes the day of her judicial oath taking, when “she knew the game was up; she belonged to the law as some women had once been brides of Christ.”¹³³

The Children Act describes several cases that Maye has decided – or soon will decide. On this Sunday evening, when Maye is trying to come to terms with her husband’s declaration of anticipatory infidelity, we are introduced to three of her cases. The first is a case that she had decided a few weeks before, but which still intrudes on her thoughts: she had allowed the surgical separation of Siamese twins, contrary to their parents’ wishes, and one of the twins had died, as expected. The second involves two

Jewish schoolgirls whose parents fundamentally disagree about the girls’ upbringing. She has decided the case in favor of the mother, but is still revising her written judgment for publication. Finally, a third case intrudes on her evening when her clerk calls to tell her that a hospital is seeking a hearing date for a motion to allow the hospital to transfuse a seventeen-year-old boy, contrary to his religiously grounded objections and those of his parents.¹³⁴

A. Matthew and Mark

In the first case, a London hospital has sought permission to separate Siamese Twins named Matthew and Mark.¹³⁵ The operation necessarily would cause the death of Matthew, who lacked the organs necessary to live on his own. Mark,

decision moments, including reversals of direction... Just as importantly, I have tried to describe some of the ritualized practices that inscribe those perspectives on time in the lives of believers. The idea that time is an integral spiral is reinforced by the way in which believers experience the cyclical nature of the liturgical calendar. The regular observance of feasts and fasts reinforces the conviction that all time is not fungible, that every moment offers its own possibilities, which may not return a second time. The celebration of the sacraments, especially the Eucharist, fixes in the minds and hearts of participants the belief that there is some transcendent value to their earthly lives.”)

¹³³ McEWAN, *supra* note 91, at 49.

¹³⁴ McEwan has written about the circumstances in which he became aware of the real English law cases that served as models for those included in the novel. See Ian McEwan, *Law Versus Religious Belief*, *GUARDIAN* (Sept. 5, 2014), <https://www.theguardian.com/books/2014/sep/05/ian-mcewan-law-versus-religious-belief> (“These judgments were like short stories, or novellas; the background to some dispute or dilemma crisply summarized, characters drawn with quick strokes, the story distributed across several points of view and, towards its end, some sympathy extended towards those whom, ultimately, the narrative would not favour.”). The first case in the novel appears to have been based on a 2000 English case involving a dispute between the parents of Siamese twins and the twins’ health care providers. The health care providers wished, contrary to the parents’ religious

convictions, to perform a surgical separation that would likely result in the death of one of the twins. See *Re A (Children) (Conjoined Twins)* [2000] 4 All ER 961 (permitting the surgical separation of conjoined twins contrary to the parents’ wishes). The case was a matter of great public interest and aroused strong opinions in England. Cormac Cardinal Murphy-O’Connor, the Roman Catholic Archbishop of Westminster, took the unusual step of making a submission to the Court of Appeal in the case. *Siamese Twins, Jodie & Mary: A Submission by Archbishop Cormac Murphy-O’Connor, Archbishop of Westminster, to the Court of Appeal in the Case of Central Manchester Healthcare Trust V Mr and Mrs A and Re A Child (By Her Guardian Ad Litem, The Official Solicitor)*, DIOCESE OF WESTMINSTER (Sept. 14, 2000), http://www.rcdow.org.uk/cardinal/default.asp?library_ref=1&content_ref=45. M. Cathleen Kaveny has provided a thoughtful analysis of the moral and theological issues presented in the case. See generally M. Cathleen Kaveny, *Conjoined Twins and Catholic Moral Analysis: Extraordinary Means and Casuistical Consistency*, 12 *KENNEDY INST. ETHICS J.* 115 (June 2002). The third case in the novel is based on an English case involving a fifteen-year-old child who, in accordance with his family’s religious beliefs, refused a transfusion. See *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 *FRL* 386 (deciding the case of a fifteen-year-old Jehovah’s Witness who refused blood transfusion and blood products).

¹³⁵ McEWAN, *supra* note 91, at 26.

however, would likely live as “a normal healthy child.”¹³⁶ If the twins were not separated, both would die because Mark’s heart could not continue to support both circulatory systems. The twins’ parents were devout Catholics who did not believe that they had the right to take the life of one child to save the other.¹³⁷ Their view diverged from that of the medical professionals. The case – and Maye’s handling of it – were closely watched:

In part, her memory was of a prolonged and awful din assaulting her concentration, a thousand car alarms, a thousand witches in a frenzy, giving substance to the cliché: the screaming headline. Doctors, priests, television and radio hosts, newspaper columnists, colleagues, relations, taxi drivers, the nation at large had a view.¹³⁸

For Maye, “there was only one desirable or less undesirable outcome, but a lawful route to it was not easy. Under pressure of time, with a noisy world waiting, she found, in just under a week and thirteen thousand words, a plausible way.”¹³⁹ Her task was made more difficult because she found the hospital’s reasoning unpersuasive. The hospital argued that separating the twins was

analogous to “turning off Matthew’s life-support machine, which was Mark.”¹⁴⁰ But the procedure was too invasive and could not be analogized to turning off a switch. “Instead, she found her argument in the ‘doctrine of necessity,’ an idea established in common law that in certain limited circumstances, which no parliament would ever care to define, it was permissible to break the criminal law to prevent a greater evil.”¹⁴¹

The profession had pronounced Maye’s judgment “elegant and correct,” while her mail contained “the venomous thoughts of the devout.”¹⁴² Most important, Maye “was unhappy, couldn’t leave the case alone, was awake at night for long hours, turning over the details, rephrasing certain passages of her judgment, taking another tack.... Those intense weeks left their mark on her, and it had only just faded. What exactly had troubled her?”¹⁴³ She found it difficult to explain the effect that this case had had on her:

How was she to talk about this? Hardly plausible, to have told [Jack] at this stage of a legal career, this one case among so many others, its sadness, its visceral details and loud public interest, could affect her so intimately. For a while, some

¹³⁶ *Id.* at 27.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 28.

¹⁴⁰ *Id.* at 29.

¹⁴¹ *Id.*

[T]he purpose of the surgery was not to kill Matthew but to save Mark. Matthew, in all his helplessness, was killing Mark and the doctors must be allowed to come to Mark’s defense to remove a threat of fatal harm. Matthew would perish after the separation not because he was purposefully murdered, but because on his own he was incapable of flourishing.

Id. One problem with the doctrine of necessity has to do with who should decide when necessity trumps the law and on what grounds. In *Billy Budd*, for example, Captain Vere found “necessity” to exist in the somewhat inchoate demands of military discipline. See MELVILLE, *supra* note 94, at 79. See

also *Regina v. Dudley & Stephens*, 14 QBD 273 (1884) (rejecting necessity defense in case of cannibalism in shipwreck). In addition, justification by reference to necessity may signal an abandonment of the constraints that law normally imposes. See, e.g., KAHN, *supra* note 74, at 43 (“Legal decision-making differs from other kinds of policy formation in just this way: it always begins from a set of sources that already have authority within the community’s past. Legal arguments do not begin by asking about ‘the best outcome, all things considered.’”).

¹⁴² McEWAN, *supra* note 91, at 30.

¹⁴³ *Id.* A few pages before, Maye had told Jack that, if the situation were reversed, she would not have found “a man and then open[ed] negotiations,” but would have found out “what was troubling you,” whereupon he responded: “So what is troubling you?” *Id.* at 25.

part of her had gone cold along, along with poor Matthew. She was the one who had dispatched a child from the world, argued him out of existence in thirty-four elegant pages.¹⁴⁴

It is not difficult to understand the depth of the anguish that Maye experienced with respect to this decision itself or the discomfort she continues to feel with respect to the reasons she gave for it. Maye had been asked to decide a question of the utmost importance, but one to which the law provided no ready answer. She was therefore required to craft an argument and make a decision for herself. She engaged the issues as seriously and as authentically as anyone could, but a satisfactory legal answer was not forthcoming. She was ultimately required to decide the case based on the concept of “necessity” – a route to judgment that she understandably found unsatisfactory. She had done everything that she could do, but she was nonetheless uneasy with her decision.

B. Rachel and Nora

The draft judgment that rests on the floor beside Maye in the opening scene of the novel involves “[t]he fates of two Jewish schoolgirls.”¹⁴⁵ The judgment has been delivered orally, and the girls’ situation was thereby settled, but “the prose [of the written judgment] needed to be smoothed, as did the respect owed to piety in order to be proof against appeal.”¹⁴⁶ As the evening proceeds, Maye re-reads the draft judgment and continues to edit and reflect on it.

The schoolgirls – Rachel and Nora – are the children of Judith and Julian, who “were from the tight folds of the strictly

observant Haredi community.”¹⁴⁷ Julian had hoped for a large family, but Judith was unable to conceive again after the second child’s birth. After recovering from depression, Judith “studied at the Open University, gained a good qualification and entered on a career in teaching,” a path that “did not suit [her husband] or the many relatives.”¹⁴⁸ It was not the community’s custom to receive much formal education; the men devote themselves to the study of Torah, while the women “raise children, the more the better, and look after the home.”¹⁴⁹ The dispute between Judith and Julian seemingly concerned the girls’ schooling, but it really involved “the entire context of the girls’ growing up. It was a fight for their souls.”¹⁵⁰

Judith has sent the girls to a co-educational Jewish school “where television, pop music, the Internet and mixing with non-Jewish children were permitted,” and she wishes for them to be able to stay on at school after the age of sixteen.¹⁵¹ None of this is consistent with the Haredi community’s values. Judith also wanted the girls “to know more about how others lived, to be socially tolerant, to have the career opportunities she had never had, and as adults to be economically self-sufficient, with the chance of meeting the sort of husband with professional skills who could help support a family.”¹⁵² She believed that “nothing denigrated a person, boy or girl, more than the denial of a decent education and the dignity of proper work.”¹⁵³ But Julian sought “to persuade the judge that his wife was a selfish woman with ‘anger management problems’... who had turned her back on

¹⁴⁴ *Id.* at 32.

¹⁴⁵ *Id.* at 3, 9.

¹⁴⁶ *Id.* at 9–10.

¹⁴⁷ *Id.* at 10.

¹⁴⁸ *Id.* at 11.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 12.

¹⁵² *Id.*

¹⁵³ *Id.* at 14.

her marriage vows, argued with his parents and her community, cutting the girls off from both.”¹⁵⁴

Maye recognizes that, “[t]he court must choose, on behalf of the children, between total religion and something a little less. Between cultures, identities, states of mind, aspirations, sets of family relations, fundamental definitions, basic loyalties, unknowable futures.”¹⁵⁵ Maye resolves these issues by deciding that the girls should continue to attend the school chosen by their mother, and that they should remain in school, if they so choose, beyond the age of eighteen. In Maye’s view, her judgment “paid respect to the Haredi community [and] the continuity of its venerable traditions and observances” and “took no view of its particular beliefs beyond noting that they were clearly sincerely held.”¹⁵⁶ She takes comfort in the fact that Julian’s witnesses have undercut his case: their testimony as to the community’s expectations for its young people “lay well outside mainstream parental practice and the generally held view that children should be encouraged in their aspirations.”¹⁵⁷ The judgment Maye gives is further supported by a social worker’s conclusion that the girls would be cut off from their mother if they were returned to their father, whereas the opposite was less likely to happen if they remained in their mother’s care.¹⁵⁸ In this way, Maye takes comfort

in her ability to rest her decision on factual findings about intermediate issues, rather than fully confront the underlying clashes of religious and cultural values that her judgment must implicitly resolve.

Once again, Maye must make a decision, not simply about the fate of two young lives, but about giving effect, or not, to the religious values and social customs of a community. Unlike the case of Matthew and Mark, there is no conflict between the “welfare” of the two children subject to the court’s supervision, so Maye can rely on the statutory standard – “the child’s welfare shall be the court’s paramount consideration.”¹⁵⁹ But how much guidance does that standard really afford in a culturally complex case such as this one? In what sense will granting custody to the girls’ mother, or, alternatively, to the girls’ father, better advance the girls’ “welfare,” and how is “welfare” to be understood, given the particular conflict that exists between the father’s values and the mother’s? In the end, Maye decides that awarding custody to the mother will better advance the girls’ welfare by keeping more options open for them to choose from when they reach the age of majority. But this solution is far from perfect. It depends on implicitly choosing between different understandings of “welfare” and on giving ultimate effect to one set of contested cultural values; it cannot help but lessen the girls’ ties to their religious and cultural tradition.¹⁶⁰

¹⁵⁴ *Id.* at 13.

¹⁵⁵ *Id.* at 14.

¹⁵⁶ *Id.* at 38.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 39.

¹⁵⁹ The Children Act 1989, c. 41, § 1 (Eng.).

¹⁶⁰ Somewhat analogous issues were raised in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, the Supreme Court of the United States held that Amish parents were entitled to withdraw their children from school, despite a Wisconsin compulsory attendance law, once the children had completed the eighth grade. Dissenting in part, Justice Douglas argued that the Court erred in assuming that “the only interests at stake were those of the Amish parents, on the one hand, and State,

on the other.” *Yoder*, 406 U.S. at 241. Justice Douglas continued:

It is the future of the students, not the future of the parents, that is imperiled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel.... If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today. *Id.* at 245–46.

C. Adam

Maye's conversation with her husband Jack on the Sunday evening on which the novel opens "had been heading towards excruciating frankness,"¹⁶¹ and she was not unhappy when the conversation was interrupted by a telephone call from Nigel Pauling, her clerk. Pauling has called to tell her about a case that will require an expedited hearing during the coming week: a hospital has applied for authorization to transfuse a seventeen-year-old boy, a Jehovah's Witness, contrary to his wishes and those of his family. Maye tells Pauling to set the case for hearing on Tuesday. She then reflects on the new case and considers visiting the boy in hospital, but eventually dismisses the idea as "a sentimental whim":

Perhaps it was perverse to discover in this sudden interruption a promise of freedom. On the other side of the city a teenager confronted death for his own or his parents' beliefs. It was not her business or mission to save him, but to decide what was reasonable and lawful. She would have liked to see this boy for herself, remove herself from the domestic morass, as well as from the courtroom, for an hour or two, take a journey, immerse herself in the intricacies, fashion a judgment formed by her own observations. The parents' beliefs might be an affirmation of their son's, or a death

sentence he dared not challenge. These days, finding out for yourself was highly unconventional. Back in the 1980s a judge could still have made the teenager a ward of court and seen him in chambers or hospital or at home. Back then, a noble ideal had somehow survived into the modern era, dented and rusty like a suit of armour.... Nowadays, social workers... did the job and reported back. The old system, slow and inefficient, preserved the human touch. Now, fewer delays, more boxes to tick, more to be taken on trust. The lives of children were held in computer memory, accurately, but rather less kindly.¹⁶²

The hearing occurs on the following Tuesday afternoon. As Maye enters the courtroom, the court rises, and "the last traces, the stain, of [Maye's] own situation vanished completely. She no longer had a private life, she was ready to be absorbed."¹⁶³ The hospital and Adam's parents are represented by counsel, as are Adam and the social worker who is his guardian ad litem. Adam is suffering from leukemia; the standard treatment consists of a four-drug protocol – two of the drugs inhibit the body's ability to produce blood cells and platelets. Patients generally are transfused for that reason during treatment, but Adam and his parents have declined the transfusions on religious grounds.¹⁶⁴ The hospital

¹⁶¹ McEWAN, *supra* note 91, at 36.

¹⁶² *Id.* at 36–37. In *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), a federal appellate court judge famously decided to visit the bedside of a hospital patient whose family declined, on religious grounds, to authorize a transfusion that the hospital deemed to be medically necessary. A trial judge had already denied the hospital's emergency application for permission to transfuse the patient, but the appellate court judge granted the hospital's request for relief after his unorthodox exercise in fact-finding. The appellate court judge's handling of the petition was the subject of considerable discussion. See ARTHUR SELWYN MILLER, A "CAPACITY

FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT 174–88 (1984). The legal anthropologist Lawrence Rosen has thoughtfully considered the case from the viewpoint of the intersection of law and culture. See LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY 69–73 (1989) (discussing case). In *AC v. Manitoba (Director of Child & Family Services)*, [2009] S.C.R. 181 (Can.), the Supreme Court of Canada, over a strong dissent by Justice Ian Binnie, upheld an involuntary transfusion of a girl fourteen months short of the age of consent who was deemed by three psychiatrists to be sufficiently mature to make the decision for herself.

¹⁶³ McEWAN, *supra* note 91, at 65.

¹⁶⁴ *Id.* at 67.

seeks the court's permission to transfuse Adam, notwithstanding his objections and those of his parents. Adam is seventeen years and nine months of age;¹⁶⁵ if he were eighteen, he would be free to refuse treatment.

Maye hears testimony from the consulting hematologist, who "gave the impression that he considered the court procedure a nonsense and that the boy should be dragged by the scruff of his neck to an immediate transfusion."¹⁶⁶ She also hears from Adam's father, who testifies about his own background and religious conversion, his love for his son, and the strength of his son's faith.¹⁶⁷ On cross-examination of Adam's father, the hospital's counsel attempts to show that Adam's actions are motivated by fear of being shunned, and by the elders' intimidation, rather than by any deeply held religious conviction.¹⁶⁸ The court also hears from Marianna Greene, the social worker who has been appointed to serve as Adam's guardian. She testifies that Adam has emphasized to her that he is his "own man" and is "deciding for [him]self."¹⁶⁹ When Maye asks for her opinion as to what action the court should take, Greene responds that Adam is "clever and articulate, but still very young," and that "[a] child shouldn't go killing himself for the sake of religion."¹⁷⁰

In closing arguments, the hospital argues that Adam lacks the maturity to make the decision for himself, while the parents' lawyer argues that Adam is "far closer to being an eighteen-year-old than... to being seventeen" and that he has "repeatedly and consistently made his wishes clear."¹⁷¹ The guardian's counsel briefly argues that the boy is bright and almost eighteen, but still a minor, so it is up to "Her Ladyship to decide the weight she should apportion to the boy's wishes."¹⁷² Maye, who has not found the evidence and arguments compelling, abruptly announces that she will go to the hospital with Greene, interview Adam, and deliver her judgment when she returns:

Given the unique circumstances of this case, I've decided that I would like to hear from Adam Henry himself. It's not his knowledge of scripture that interests me so much as his understanding of his situation, and of what he confronts should I rule against the hospital. Also, he should know that he is not in the hands of an impersonal bureaucracy. I shall explain to him that I am the one making the decision in his best interests.¹⁷³

Adam's hospital room is foreign territory. Unlike the opening of court, there is no grand entrance: no one rises; the room does not come to order. In these

¹⁶⁵ *Id.* at 75.

¹⁶⁶ *Id.* at 68.

¹⁶⁷ On cross-examination, the hospital's counsel also inexplicably attempts to show that the Jehovah's Witnesses' opposition to transfusions is based on a misunderstanding of scripture. *Id.* at 81, 83.

¹⁶⁸ *Id.* at 82–84.

¹⁶⁹ *Id.* at 85.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 88.

¹⁷² *Id.* at 85–91.

¹⁷³ *Id.* at 91. When she is traveling to the hospital with Adam's guardian, she observes that:

This... was either about a woman on the edge of a crack-up making a sentimental error of

professional judgement, or it was about a boy delivered from or into the beliefs of his sect by the intimate intervention of the secular court. She didn't think it could be both.

Id. at 95. Maye's decision to visit the hospital might also be understood as an exercise in arrogance, reflecting a belief that she could understand more about Adam's situation in a few minutes of conversation than trained professionals had been able to do after a period of detailed observation, or, alternatively, as the result of a judge's reasonable frustration at the legal and social welfare professionals' inability to provide her with the information that she deemed necessary to do her job properly.

circumstances, it is not surprising that Maye quickly loses whatever opportunity she might have had to determine how the interview would be structured. “[T]he boy was already talking to her as she entered, the moment was unfurling, or erupting, without her and she was left behind in a daze.”¹⁷⁴ Adam seems to have the upper hand, luring Maye into the conversation he wishes to have, not the conversation that she needs or wants to have; her clumsy responses to Adam’s questions quickly lead to a conversation about the devil – definitely Adam’s territory, not hers. Eventually, she gains some ground and invites him to focus on the consequences that might befall him short of death, such as blindness or kidney failure, but an interruption occurs as one of the nurses comes into the room. Maye resumes the conversation by asking Adam about his poetry.¹⁷⁵ He then reads one of his poems and says that it was inspired by a conversation with one of the elders, who told him that, “if the worst were to happen [and he were to die], it would have a fantastic effect on everyone” and “would fill our church with love.”¹⁷⁶

Maye asks Adam what his parents think and what they say to him. He responds that there is not much to say. “We know what’s right,” he says.¹⁷⁷ Maye reflects on this:

As he said this, looking at her directly, with no particular challenge in his voice, she believed him completely, he and his parents, the congregation and the elders knew what was right for them. She felt

unpleasantly light-headed, emptied out, all meaning gone. The blasphemous notion came to her that it didn’t much matter either way whether the boy lived or died. Everything would be much the same. Profound sorrow, bitter regret perhaps, fond memories, then life would plunge on and all three would mean less and less as those who loved him aged and died, until they meant nothing at all. Religions, moral systems, her own included, were like peaks in a dense mountain range seen from a great distance, none obviously higher, more important, truer than another. What was to judge?¹⁷⁸

Shaking her head “to dispel the thought,” Maye begins to ask the question she had intended to ask before the nurse came in: “Why exactly won’t you have a blood transfusion?”¹⁷⁹ Adam then holds forth like “the star pupil in the school debate.”¹⁸⁰ Maye “recognized certain phrases from [Adam’s] father. But Adam spoke them like the discoverer of elementary facts, the formulator of doctrine rather than its recipient.”¹⁸¹ In other words, Adam spoke with authority.¹⁸²

Maye explains to Adam that she must decide what is in his best interests and asks what he would think if she were to rule that the hospital could legally transfuse him against his wishes. He smiles, saying that he would “think My Lady was an interfering busybody.”¹⁸³ “It was such an unexpected change of register, so absurdly understated, and her

¹⁷⁴ *Id.* at 103.

¹⁷⁵ *Id.* at 103–11.

¹⁷⁶ *Id.* at 113.

¹⁷⁷ *Id.* at 116.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 117.

¹⁸¹ *Id.*

¹⁸² The biblical allusion in the expression “formulator of doctrine” is clear. See *Matthew* 7:29

(King James) (1973) (“For he taught them as one having authority, and not as the scribes.”). Soon after, Maye expresses concern that she may be jeopardizing her own authority when she proposes singing to Adam’s accompaniment. See McEWAN, *supra* note 91, at 120 (noting Maye’s shock and concern when she finds herself making this impulsive suggestion).

¹⁸³ *Id.* at 117–18.

own surprise so obvious to him, that they both began to laugh.”¹⁸⁴ The social worker is puzzled, but Maye tells Adam that he has made it “pretty clear that you know your own mind, as much as any of us ever can.”¹⁸⁵

Adam has been learning to play the violin while in hospital and Maye asks to see his violin. “She hadn’t intended for him to play, but she couldn’t stop him. His illness, his innocent eagerness made him impregnable.”¹⁸⁶ He plays a sad Irish air – Benjamin Britten’s setting of Yeats’s poem of lost love, *Down by the Salley Gardens*. It is a song Maye knows well.

The melancholy tune and the manner in which it was played, so hopeful, so raw, expressed everything she was beginning to understand about the boy.... Hearing Adam play stirred her, even as it baffled her. To take up the violin or any instrument was an act of hope, it implied a future.¹⁸⁷

Being moved, she makes a proposal “far removed from anything she would have expected of herself, and which risked undermining her authority”: she proposes that Adam play the tune again while she sings the words, which he does not know.¹⁸⁸ The social worker gets “to her feet, frowning, perhaps wondering whether she should intervene.”¹⁸⁹

On the first verse they were tentative, almost apologetic, but on the second, their eyes met and, forgetting all about [the social worker], who was now standing by the door, looking on amazed, [Maye] sang louder and Adam’s clumsy bowing grew bolder, and they swelled into the mournful

spirit of the backward-looking lament.¹⁹⁰

Maye delivers her judgment at 9:15 that evening. She addresses each of the three arguments presented against the hospital’s application: That Adam was only three months short of his eighteenth birthday, highly intelligent, understood the consequences of his decision, and should be treated as “Gillick competent”;¹⁹¹ that refusing medical treatment was a fundamental human right with which a court should not lightly interfere; and that his religious faith was genuine and should be respected.¹⁹² Notwithstanding her statement to Adam – that it is “pretty clear that you know your own mind, as much as any of us ever can”¹⁹³ – Maye rules in favor of the hospital. Maye finds that Adam’s “welfare is better served by his love of poetry, by his newly found passion for the violin, by the exercise of his lively intelligence and the expressions of a playful, affectionate nature, and by all of life and love that lie ahead of him.”¹⁹⁴ Granting the hospital’s application, she observes:

I find that A, his parents and the elders of the church have made a decision which is hostile to A’s welfare, which is this court’s paramount consideration.... He must be protected from his religion and from himself. This has been no easy matter to resolve. I have given due weight to A’s age, to the respect due to faith and to the dignity of the individual embedded in the right to refuse treatment. In my judgement, his life is more precious than his dignity.¹⁹⁵

¹⁸⁴ *Id.* at 118.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 119.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 120.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 120–21.

¹⁹¹ See *Gillick v. W. Norfolk & Wisbech Area Health Auth.* [1985] 3 All ER 402 (HL) (stating the test for determining whether a child under the age

of sixteen is sufficiently mature to consent to medical treatment without the intervention of a parent). Technically, *Gillick* does not apply to Adam’s situation because it addresses the question of consent to treatment, rather than the right to refuse treatment, but the parties have discussed it by way of analogy.

¹⁹² McEWAN, *supra* note 91, at 123–24.

¹⁹³ *Id.* at 118.

¹⁹⁴ *Id.* at 126–27.

¹⁹⁵ *Id.* at 127.

Following his successful treatment, Adam writes to Maye, telling her that he was very upset when he was told of her decision, but that his parents were overjoyed – a reaction that caused him to question the depth of their faith.¹⁹⁶ Adam tells Maye that he has abandoned his faith, that he reads *Down by the Salley Gardens* every day, and that he “daydream[s] about us, impossible wonderful fantasies, like we go on a journey together round the world in a ship.”¹⁹⁷ Maye prepares a response, but does not mail it. She later receives a second letter, not mailed to her chambers this time, but left on the doormat of her flat. Adam says that he feels like “the top of my head has exploded,” with “[a]ll kinds of things... coming out.”¹⁹⁸ He does not mean to harass her, but he needs to talk to her.¹⁹⁹ Maye asks for a report from the social worker, which is positive, and she decides not to respond to Adam’s letter.²⁰⁰

Later, when Maye is to sit in Newcastle, Adam follows her there,

arriving at the visiting judges’ residence during a heavy rain.²⁰¹ She finds the beauty of his face distracting.²⁰² Adam tells Maye that he has left home after “a huge row” with his father, and he tries to explain his motivation for refusing to be transfused. He felt “pure and good,” he says, when he rebuffed the efforts of the nurses and doctors to persuade him to accept the transfusion, and he liked it that his parents and elders were proud of him.²⁰³ He even “rehearsed making a video, like suicide bombers do,” and he liked to imagine his funeral, with “everyone weeping, everyone proud of me and loving me.”²⁰⁴ When she asks where God was in this, he replies: “Behind everything. These were his instructions I was obeying. But it was mostly about the delicious adventure I was on, how I would die beautifully and be adored.”²⁰⁵

Adam tells Maye that her “visit [to the hospital] was one of the best things that ever happened,” and that his “parents’

¹⁹⁶ *Id.* at 144 (“They were so happy, hugging me, and hugging each other and praising God and sobbing. I was feeling too weird and I didn’t work it out for a day or two. I didn’t even think about it. Then I did. Have your cake and eat it!... [T]hey can have me alive without any of us being [excommunicated]. Transfused, but not our fault! Blame the judge, blame the godless system, blame what we sometimes call ‘the world.’”). When they meet later, Adam tells Maye that he is “full of Yeats.” *Id.* at 170. Of course, the phrase “the world” recalls Yeats’s “Adam’s Curse.” See WILLIAM BUTLER YEATS, *Adam’s Curse*, in W.B. YEATS, *COLLECTED POEMS* 78 (1956). (“For to articulate sweet sounds together/ Is to work harder than all these, and yet/ Be thought an idler by the noisy set/ Of bankers, schoolmasters, and clergymen/ The martyrs call the world.”). In Adam’s final poem, he also makes ironic use of at least one other Yeats poem. Compare McEWAN, *supra* note 91, at 180 (referencing the poem, *The Ballad of Adam Henry*), with McEWAN, *supra* note 91, at 138 (referencing the poem, *The Song of Wandering Aengus*). See YEATS, *supra*, at 57. See also McEWAN, *supra* note 91, at 164 (“When I saw my parents crying like that, really crying, crying and sort of hooting for joy, everything collapsed. But this is the point. It collapsed into the truth. Of course they don’t want me to die! They love me. Why didn’t

they say that, instead of going on about the joys of heaven? That’s when I saw it as an ordinary human thing. Ordinary and good. It wasn’t about God at all.”).

¹⁹⁷ *Id.* at 145.

¹⁹⁸ *Id.* at 148.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 148–49.

²⁰¹ *Id.* at 161.

²⁰² *Id.* at 162–63 (“As he looked away from her to order in his thoughts the sequence of events, she wondered if this was what her mother would have called an old-fashioned face. A meaningless idea. Everyone’s notion of the face of a Romantic poet, a cousin of Keats or Shelley.”); see also *id.* at 163 (“The ceiling light... heightened the contours of his cheekbones and lips, and picked out the fine twin ridges of his philtrum. It was a beautiful face.”).

²⁰³ *Id.* at 166.

²⁰⁴ *Id.*

²⁰⁵ *Id.* Adam compares what he did in the name of religion to the conduct of an anorexic friend who died: “Yeah, well, actually, anorexia’s a bit like religion.... Oh, you know, wanting to suffer, loving the pain and sacrifice, thinking that everyone’s watching and caring and that the whole universe is all about you. And your weight!” *Id.* at 167.

religion was a poison and you were the antidote.”²⁰⁶ On the other hand, he acknowledges that Maye had not spoken against his parents’ religion, but simply acted like a “grown-up,” just “ask[ing] questions and listen[ing].”²⁰⁷ Adam says: “It’s this thing you have.... A way of thinking and talking.”²⁰⁸ When Adam eventually tells Maye that he wants to come and live with her, she tells him that he must leave.²⁰⁹ She arranges for Pauling to book Adam into a hotel for the night and buy him a railway ticket for tomorrow’s train to Birmingham, where he intends to stay with an aunt. As they part, she intends to kiss him on the cheek, but they accidentally kiss on the lips.²¹⁰

Maye later worries that someone may have seen them kiss and that she will be subject to disciplinary action.²¹¹ But the truth is more serious. Adam’s leukemia returns, and, having achieved legal majority, he exercises his right not to be transfused.²¹² That action may be seen in different ways. In one sense, Adam has killed himself. In another, he has asserted his dignity and autonomy. Before dying, Adam sends Maye a poem in which he portrays her as Satan and recounts the kiss: “Her kiss was the kiss of Judas, her

kiss betrayed my name.”²¹³ She does not respond.²¹⁴

D. Some Observations on Judging in The Children Act

It is tempting to take away from *The Children Act* some thoughts about judging that are quite harsh: Maye stepped too far out of her assigned role in the judicial bureaucracy; she acted unwisely in focusing on the humanity of judging; and serious negative consequences followed. But that seems too simplistic. The lessons to be drawn from the three principal cases presented in the novel,²¹⁵ including the case of Adam Henry, are more complex and nuanced than a simple condemnation of Maye’s understanding of the judicial role would allow. Even Maye’s stumbles occur within a context defined by her view that judges are personally responsible for their work and must make decisions based on their own listening. Each of the three cases presents a complex cultural problem that does not give rise to a straightforward legal question that can be readily answered by resort to the language of the governing statute. In each case, the statutory mandate – that “the child’s welfare shall be the court’s

²⁰⁶ *Id.* at 168.

²⁰⁷ *Id.* at 169–70.

²⁰⁸ *Id.* at 168.

²⁰⁹ *Id.* at 172.

²¹⁰ *Id.* at 174.

²¹¹ *Id.* at 180.

²¹² *Id.* at 217.

²¹³ *Id.* at 188.

²¹⁴ *Id.* at 189. At the time Maye thought it “only kindness, not to send him a letter.” *Id.* “He’d write by return, he’d be at her door and she’d have to turn him away again.” *Id.* After reading the poem, but before learning about his death, Maye thinks:

He would soon move on. Either he had drifted back into religion, or [the allusions to] Judas, Jesus and the rest were poetic devices to dramatise her awful behavior, kissing him then packing him off in a taxi [with Pauling]. Whichever it was, Adam Henry was likely to succeed brilliantly at his postponed

exams and go to a good university. She would fade in his thoughts, become a minor figure in the progress of his sentimental education.

²¹⁵ There are several other cases mentioned in the book, namely those that are part of her call on the day following the Sunday evening events that open the book. In one, the justice system is helpless in the face of a Moroccan father’s removal of his daughter from the jurisdiction. *Id.* at 51. Another involves a woman seeking maintenance. *Id.* at 57. A third involves an ex parte application for an order excluding a husband from the matrimonial home. *Id.* at 58. Maye is dismissive because the husband has not been consulted, let alone served. *Id.* at 58. Ironically, Maye has solved her own problem simply by having the locks to her flat changed. *Id.* at 52–53. Another involves a man who feared violence from his ex-wife’s boyfriend. *Id.* at 54–58. Yet another involves a mother’s application to have her children’s passports lodged with the court. *Id.*

paramount consideration” – cannot itself resolve the case. The statutory language merely sets the stage for consideration of the central question: What counts, in this particular context, for the true “welfare” of the child, and how do we know it? There is no self-evidently “right answer” for the judge to find, and we cannot fault Maye on that basis. In the end, we must judge Maye based on the seriousness with which she exercises the responsibility that she has been given and with which she encounters the issues that she must decide.

In the case of the Siamese Twins, the question for decision is simply stated, if not so simply resolved: Should law intervene and afford one of the twins the possibility of life, which necessarily will cause the death of the other, or should nature be allowed to take its course, in which case both twins will die? What may be conducive to the welfare of one is not arguably consistent with the welfare of the other. The matter is before the court, of course, because there is disagreement among those responsible for protecting the welfare of the children. The twins’ parents, who love both of them, believe that choosing one of the twins to live, the other to die, would violate God’s law. The hospital’s function is to preserve life. In its view, therefore, saving the life of one is better than letting both die.

Although Maye believes that “there was only one desirable or less undesirable outcome,”²¹⁶ she cannot accept the hospital’s argument and therefore turns to a different source – the principle that law may be violated “to

prevent a greater evil.”²¹⁷ Her colleagues find that move “elegant and correct.”²¹⁸ But to rely on the principle of “necessity” is to invoke a term that has the aura, but not necessarily the reality, of being grounded in legal principle.²¹⁹ It obscures rather than illuminates an unavoidable moral choice.

Maye herself is not satisfied: “[S]he was unhappy, couldn’t leave the case alone, was awake at night for long hours, turning over the details, rephrasing certain passages of her judgment, taking another tack.”²²⁰ What is troubling her? “She was the one who had dispatched a child from the world, argued him out of existence in thirty-four elegant pages.”²²¹ If she had decided otherwise, would she have felt responsible for dispatching two children from the world, arguing two of them out of existence? What are we to make of this? Are we to think that Maye’s thoughts are those of a person temperamentally unsuited to judging – or of a judge who understands the significance of her role, the difficulty of the decisions she must make, and the moral obligation that she has to act for proper reasons that can be explained?

Maye seems to decide the case of the Jewish schoolgirls with greater “spiritual quiet,”²²² although the issues presented in that case, as Maye recognizes, are neither easy nor insignificant: “The Court must choose, on behalf of the children, between total religion and something a little less. Between cultures, identities, states of mind, aspirations, sets of family relations, fundamental definitions, basic loyalties, unknowable futures.”²²³ Once

²¹⁶ *Id.* at 28.

²¹⁷ *Id.* at 29.

²¹⁸ *Id.* at 30.

²¹⁹ See *supra* text accompanying note 141 (discussing problems of reliance on “necessity”).

²²⁰ *Id.* at 30.

²²¹ *Id.* at 32.

²²² See McCree, *supra* note 117, at 797 (“A great judge of the Second Circuit, Charles M. Hough, once wrote that “the legal mind must assign some reason in order to decide anything with spiritual quiet.” (quoting U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006, 1008 (S.D.N.Y. 1915))).

²²³ McEWAN, *supra* note 91, at 14.

again, there is a profound cultural and religious conflict at the root of the case that Maye is being asked to decide. The children's mother has moved beyond the boundaries of their Jewish sect. But their father has not. And he does not want his children to be brought up in a culture foreign to what he has known. The continued existence of a human life is not at stake here. What is at stake, however, are the cultural and religious identities of two little girls, as well as the values – and perhaps the survival – of a community and a way of life.

Maye's relative comfort in deciding the case in favor of the mother rests in part on Maye's ability to hear and evaluate the witnesses who support the father's position. Their testimony concerning the community's expectations for young people "lay well outside mainstream parental practice."²²⁴ Moreover, expert testimony suggested an important lack of symmetry: it would be easier for the girls to maintain contact with their father's family if their mother were given custody than it would be for them to maintain contact with their mother if custody were given to their father; and it would be easier for them to move from their mother's world to their father's, if they so chose, once they came of age.²²⁵ One option therefore seemed more final and irremediable than the other. "Above all, the duty of the court was to enable the children to come to adulthood and make their own decisions about the sort of life they wished to lead."²²⁶ Significantly, Maye does not consider speaking directly to the girls whose lives she may be determining. The ordinary processes of adjudication – listening to witnesses in court, evaluating

their testimony, and coming to conclusions based on that evaluation – point Maye in the direction of what may be the less bad outcome. They also deflect attention from the underlying cultural conflict. Legal processes make the case seem more manageable and amenable to resolution.

But Maye's immediate response to hearing about the case of Adam Henry is to think about going to the hospital, spending "an hour or two" with him, determining for herself whether his refusal to be transfused is the result of his own decision or "a death sentence [imposed by his parents' religion] that he dared not challenge," and then "fashion[ing] a judgment formed by her own observations."²²⁷ Perhaps that immediate reaction is simply the product of a desire to escape from her unsatisfactory domestic situation, but it may also be due to her personal inability to credit the idea that someone could rationally and freely choose death over life because of an abstract religious principle. That idea is simply too foreign and too incomprehensible for her to grasp. But she dismisses the possibility of visiting the hospital as a "sentimental whim."²²⁸ "These days," a judge's "finding out for [her]self [is] highly unconventional."²²⁹

Once Maye has heard the evidence and argument, however, she reconsiders her position. What she has heard has not been helpful in terms of the decision she must make: the consulting hematologist obviously thinks that no one – of whatever age or station – should ever be permitted to act against professional medical advice, while Adam's parents sincerely believe that transfusions are contrary to God's will.

²²⁴ *Id.* at 38.

²²⁵ *Id.* at 39.

²²⁶ *Id.* Of course, the girls' schooling might predispose them to reject the values of their father's community in a way that would not have happened

if they had been able to grow up as part of that community.

²²⁷ *Id.* at 36.

²²⁸ *Id.* at 37.

²²⁹ *Id.* at 36.

The court must make a decision based on its understanding of Adam's welfare. When all is said and done, however, what is Adam's welfare, and how is it to be protected? Should the law permit Adam to make the decision for himself? Should the court enter an order permitting the hospital to preserve Adam's life against his professed wishes, and those of his parents, or should he be allowed to die and thereby vindicate his interests in autonomy and dignity? All this, of course, has to do not with welfare in the abstract, or with the value of life in the abstract, but with the welfare of a particular person and the value of a particular life.

Is Maye's decision to make her own inquiry into Adam's motivation simply an impetuous action taken amidst trying personal circumstances? Maye herself entertains that possibility on her way to the hospital, when she observes that her decision might well be that of "a woman on the edge of a crack-up making a sentimental error of professional judgment."²³⁰ Or is it the decision of an arrogant judge who believes that she can better evaluate Adam's capacity in a short time than trained professionals have been able to do by following their detailed, established protocols? Or is it the manifestation of an understandable frustration that the professionals have not been helpful in her effort to reach an appropriate result? Those are additional possibilities.

Certainly, the decision to interview Adam is problematic in several respects: Maye announces the decision peremptorily; she gives the lawyers no opportunity to object or offer suggestions as to the proper procedure to be followed; she conducts the interview *ex parte*, without having the lawyers present; she makes no record of the interview; and she simply

announces her conclusions on her return, without giving the lawyers any opportunity to make any further arguments in response to what she believes that she has learned by interviewing Adam. Because it is now "highly unconventional" for judges to "find out for [themselves],"²³¹ there seems to be no established protocol for conducting such an interview, and Maye gives little thought to what kind of process might be required. In that sense, her conduct may well seem impetuous and unprofessional.

But there is more to be said than that. In view of the virtually certain consequences of a refusal to be transfused, the question whether legal effect should be given to Adam's professed wishes is as serious an existential decision as most judges are likely to face. Moreover, the proper course of action had not become clear, in Maye's view, from the trial evidence and arguments. In these circumstances, it is not surprising that Maye should feel obliged to see Adam for herself. Nor is it surprising, given the stakes, that Maye should think that Adam should see her – that he is entitled to see the person who is to make this uniquely important decision and be reassured that his fate is "not in the hands of an impersonal bureaucracy."²³² If Maye is to "listen" to Adam's case in an authentic way, seeing him for herself seems to be a reasonable – even necessary – first step.

But how is one to judge all that ensues? One might conclude that Adam's story does not have a happy ending, although that is debatable, given the fullness of the life that he is able to live in the immediate aftermath of Maye's intervention. It is debatable for the additional, and perhaps more important, reason that Maye's intervention ultimately

²³⁰ *Id.* at 95.

²³¹ *Id.* at 36.

²³² *Id.* at 91.

affords Adam the opportunity to make his own choice about life or death, and thereby vindicate his interests in dignity and autonomy. If the end of the story is deemed to be an unhappy one, however, it is not because of Maye's decision to visit the hospital at all, but because of her failure to plan adequately for it, and because of what happens during and after the visit. By identifying so closely with Adam, letting him set the agenda, and expressing too intimate an interest in his poetry and music, Maye may have gone too far in betraying her own authority: an escape from bureaucratic judging need not have entailed the singing of a sorrowful love song to the accompaniment of Adam's violin. Maye recognizes at the time that she may be undercutting her authority, and she certainly underestimates the effect that her demonstration of interest will have on this very needy boy. Even so, one cannot help thinking that Maye's strategy (whether arrogant, unprofessional, or simply ill-advised) might have been thought brilliant if it had succeeded – and Adam had chosen to live, once the decision was his to take.

It may be that Maye crossed the line in their interview, but the main harm seems to have been done later. Having shown kindness to Adam, Maye does not know how to respond to the emotions that her kindness has released in him. She obviously cannot let him come and live with her, as he proposes, but her response to his show of admiration and affection is clumsy and inadequate. Her fears concerning the possible professional consequences of their kiss seem somehow unworthy. Perhaps it is time for Maye to fall back on the social welfare bureaucracy (or to try and recover the formalism and impersonality of the law),

when Adam begins to write to her, and then tracks her down at the visiting judges' lodge in Newcastle. But Maye does not do that. In an important sense, the problem is not that Maye chose to listen, but that she ceased to listen and did not speak.

III. *The Heather Blazing*

In *The Heather Blazing*,²³³ Colm Tóibín paints a vivid portrait of the intimate and professional lives of Eamon Redmond, a respected judge of the Irish High Court. As in *The Children Act*, the personal and the professional are deeply connected. In addition, Redmond and Maye are both High Court judges in very similar legal systems; they share a common professional identity and status, but differ in gender, nationality, and generation.

Unlike Maye, who sits in a specialized court in the former center of empire, and necessarily deals with the legacy of empire in the multiculturalism and heterogeneity of her clientele, Redmond sits as a judge of general jurisdiction in Dublin, the small capital city of a small country – a former possession of the imperial power. The cultural complexity that Redmond faces may be less obvious, but no less real. It stems from the transformation of Ireland from one kind of society to another. During the course of the novel, Redmond will be required to pass judgment in a number of cases, some more easily than others.

As with Maye, we make Redmond's acquaintance on the first page of the novel. Unlike our initial meeting with Maye, we do not meet Redmond in the drawing room, but in the courthouse.

Nearing the end of his career, Redmond is not unaware that his professional success owes as much to

²³³ TÓIBÍN, *supra* note 92.

his family's service to the long-ruling Fianna Fáil party as to his own considerable gifts. Redmond's grandfather was detained during the rebellion of 1916.²³⁴ His father and uncle participated in the Civil War beside those who would later lead the party,²³⁵ and they remained staunch party members throughout their lives. Redmond himself was "noticed" by the party before he entered university,²³⁶ and it was in the course of party canvassing that he met and courted Carmel, the woman who

would become his wife.²³⁷ For most of Redmond's life, the government would be in the hands of the Fianna Fáil party.²³⁸ From his earliest days at the bar, therefore, the party was able to groom him for eventual elevation to the bench. The government included him in important cases when he was still a junior counsel and saw to it that he became a Senior Counsel at an early age. He soon became the party's leading constitutional lawyer.²³⁹

²³⁴ *Id.* at 68.

²³⁵ *Id.* at 168–69. Indeed, we soon learn that Redmond was named for Eamon de Valera, the party leader. *Id.* at 25. The fictional family's republican roots run deep in County Wexford, which was the focal point of the Rebellion of 1798. See generally THOMAS PAKENHAM, *THE YEAR OF LIBERTY: THE GREAT IRISH REBELLION OF 1798* (1969) (providing an account of the Rebellion of 1798). See also J.K. CASEY & TURLOUGH O'CAROLAN, *BY THE RISING OF THE MOON, ON SONGS OF IRELAND* (2002), http://www.thebards.net/music/lyrics/Rising_Of_The_Moon.shtml (song memorializing the Irish Rebellion of 1798). Redmond's father, a schoolteacher, has a keen interest in the history of Wexford and has organized a museum to celebrate the exploits of those who fought in 1798. TÓIBÍN, *supra* note 92, at 21–22, 24–25. In later years, Redmond is somewhat reticent about disclosing the nature or extent of his family's participation in the Civil War. *Id.* at 175–76.

²³⁶ *Id.* at 168–70.

²³⁷ *Id.* at 159–60, 170.

²³⁸ In 1982, Basil Chubb, a prominent political scientist, commented on the great stability of parliamentary governments in Ireland during the twentieth century, which he explained in part by the long-standing dominance of Fianna Fáil after achieving its first majority government in 1932:

Even though, as has usually been the case, parliamentary majorities have been small and usually to be counted on the fingers of one hand, the history of almost 60 years up to 1980 included two unbroken periods of sixteen years each (1932–48 and 1957–73) and one of ten years (1922–32). Between 1922 and 1977, governments with majorities of their own party supporters were in office for almost forty-one years, minority governments for only fourteen. This is a record of great stability. To what extent it can be attributed to the electoral system or be said to be in spite of it is another matter. Clearly, the salient factor has been, to repeat, the critical size and great stability of Fianna Fáil support for nearly half a century.

BASIL CHUBB, *THE GOVERNMENT AND POLITICS OF IRELAND* 149–50 (2d ed. 1982). See also *id.* at 148 tbl.8.3 (Irish Governments, September 1922–June 1977). Conor Cruise O'Brien has described the formation of a coalition government in 1948 as "the greatest change in the political life of the new state since Fianna Fáil's victory in 1932." CONOR CRUISE O'BRIEN, *MEMOIR: MY LIFE AND THEMES* 133 (1998). The 1948 coalition government was significant for several reasons, not the least of which was that it marked the brief return to power of Fine Gael, the ideological successor to Cumann na nGaedheal, the party which (unlike Fianna Fáil) had supported the Anglo-Irish Treaty of 1921. See PAUL BEW, *IRELAND: THE POLITICS OF ENMITY 1789–2006* 416–43 (2007) (discussing the Anglo-Irish Treaty and the alignment of parties around the Treaty); CALTON YOUNGER, *IRELAND'S CIVIL WAR* 512 (1968) (same).

²³⁹ TÓIBÍN, *supra* note 92, at 212–13, 218. In *A Brush With The Law*, Tóibín describes conversations he had with judges and lawyers at the Four Courts, the seat of the judiciary and the bar in Dublin, before writing *The Heather Blazing*. He notes that he "listened carefully to the Fine Gael side, realizing that they had held power in the Four Courts between the foundation of the state and 1961 but had lost it now and were puzzled as to how this had come about." Tóibín, *A Brush with the Law*, *supra* note 71, at 29. The year 1961 marked the beginning of a new era for the Irish courts, as Mr. Justice Gerard Hogan has written:

The generation of judges who sat on the High and Supreme Courts in the 40s and 50s were, for the most part, steeped in the British tradition of parliamentary sovereignty. The judgments of that era seem staid and unadventurous to the modern reader.... The appointment [by Fianna Fáil Prime Minister Sean Lemass] of Cearbhall O'Dálaigh as Chief Justice in 1961 heralded the beginning of a new era.... Both he and Mr. Justice [Brian] Walsh were determined to make a fresh start and to release the Irish legal system from the state of almost servile dependency on English judicial developments into which it had lapsed.

At home, the man of words is often silent.²⁴⁰ By the time the story opens,²⁴¹ Carmel believes that she really does not understand him,²⁴² and his relationships with his two adult children are fraught. Redmond soon learns that his unmarried daughter Niamh, who works as a statistician in Dublin, is pregnant; she will give birth to a son as the novel progresses.²⁴³ Redmond is not pleased. Having children outside of marriage would have been a serious matter in Ireland at the time. And Redmond strongly disapproves of the kind of legal career that his barrister son Donal has chosen. In Redmond's view, Donal would fare better at the bar if he did not associate himself with progressive political and social causes.²⁴⁴

But the subject of Tóibín's novel is not strictly limited to the intimate and professional lives of the Honorable Mr. Justice Redmond. Through the cases he discusses, Tóibín also paints a vivid portrait of Ireland itself – a nation in the midst of a profound transformation from

a relatively closed, inward-looking, traditional society to a modern European nation, increasingly indistinguishable in important ways from many of its neighbors.²⁴⁵ Indeed, the novel situates itself at the intersection of these two portraits, as Redmond, the man and the judge, affects and is affected by that transformational change.²⁴⁶

The Heather Blazing is organized around three decision days at the end of three consecutive court years. As was true in *The Children Act*, three principal cases provide the focus for the professional aspect of *The Heather Blazing*.

A. The First End of Term Decision Day

When we first meet Eamon Redmond, he is standing at the window of his chambers in the Four Courts, looking down at the street traffic and the waters of the River Liffey. It is the last day of the court term.²⁴⁷ Redmond thinks back to earlier years, when terrorism was a

Gerard Hogan, *Irish Nationalism as a Legal Ideology*, 75 *STUD.* 528, 531–32 (Winter 1986). See also Brian Girvin, *Church, State, and Society in Ireland Since 1960*, 43 *ÉIRE/IRELAND* 74, 78 (Spring/Summer 2008) (“When the Irish government appointed Cearbhall O Dálaigh as Chief Justice and Brian Walsh as a member of the Supreme Court in December 1961, [Prime Minister Sean] Lemass told them that he wanted the Supreme Court to be ‘more like the United States Supreme Court.’ The two judges believed that Lemass wanted them to take a more flexible view of the constitution.”).

²⁴⁰ TÓIBÍN, *supra* note 92, at 220–21.

²⁴¹ The book begins two years before the point at which it concludes, but the progression is not linear. The recent past proceeds in chapters alternated with chapters that recount events in the past.

²⁴² *Id.* at 152–54.

²⁴³ *Id.* at 11, 94–98.

²⁴⁴ *Id.* at 113–14.

²⁴⁵ See DIARMAID FERRITER, *THE TRANSFORMATION OF IRELAND 1900–2000* 536–759 (2005) (discussing developments in Ireland from 1960 to 2000); see generally ROY F. FOSTER, *LUCK AND THE IRISH: A BRIEF*

HISTORY OF CHANGE FROM 1970 (2008) (discussing developments in Ireland since 1970). *The Heather Blazing* was published in 1992 and the main events of the novel appear to be set in a period shortly before that time. Ireland has continued to change dramatically, and in numerous ways, since that period. See, e.g., Girvin, *supra* note 239, at 75 (further discussing recent changes in Irish society); Brian Girvin, *Continuity, Change and Crisis in Ireland: An Introduction and Discussion*, 23 *IRISH POL. STUD.* 457 (2008) (discussing dramatic changes in Ireland over the preceding two decades).

²⁴⁶ An interesting point of intersection between Redmond's personal and professional lives comes with the second case, which involves a challenge to the treatment of an unwed mother. See TÓIBÍN, *supra* note 92, at 86 (discussing a case before Redmond regarding the treatment of an unwed pregnant woman who moved in with the father of her child, who was himself separated from, but still married to, his wife). Indeed, given Redmond's daughter's situation, together with the volatility of the issue in Ireland at the time, one wonders whether Redmond should have recused himself in the case.

²⁴⁷ *Id.* at 3–4.

serious threat, particularly for judges who tried terrorism cases (as Redmond did), and security officials insisted that judges check for explosives under their cars in the judges' car park before getting in and turning the ignition key.²⁴⁸ Today he has motions to hear and a judgment to deliver in a reserved judgment case before leaving the court for the long holiday.²⁴⁹ At the end of the day, he and Carmel will drive to their holiday cottage in Cush – where “they spen[d] each summer recess... close to where they [were] born, where they were known.”²⁵⁰

In court, Redmond quickly disposes of the motions and proceeds to read his judgment in the merits case previously reserved for decision. In that case, a hospital has applied for permission to discharge “a handicapped child who need[s] constant care and would need such care, in the view of the doctors, for the rest of his life.”²⁵¹ Redmond states the facts: the handicapped child is one of seven children in the family; the father is employed; the mother does not work

outside the home. He then discusses the legal precedents that counsel brought up during the course of the hearing and explains that there is “nothing in the Constitution” that explicitly or implicitly creates “an inalienable right to free hospital treatment.”²⁵² Indeed, “[t]he state’s functions and responsibilities [must] cease at some point; the state ha[s] freedoms and rights as well as the citizen.”²⁵³

As Redmond reads the judgment in court, “he became even more certain of [its] rightness... and began to see as well that it might be important in the future as a lucid and direct analysis of the limits to the duties of the state.”²⁵⁴ When Redmond finishes, counsel for both parties rise and ask for costs. Without any particular reason, he puts over the matter of costs until the next term.²⁵⁵

Tóibín describes at length the process by which Redmond has prepared his judgment, which rejects the parents’ constitutional argument, but contains an important proviso concerning the State’s

²⁴⁸ *Id.* at 3–4, 177. The Special Criminal Court sits in Dublin. It was originally created to hear cases involving terrorism, but its jurisdiction was more recently expanded to include organized crime cases as well. The Special Criminal Court is unlike other Irish trial courts in several respects, including the fact that the court consists of three judges, who sit without a jury. See generally FERGAL F. DAVIS, *THE HISTORY AND DEVELOPMENT OF THE SPECIAL CRIMINAL COURT, 1922–2005* (2007) (describing the organization and history of the Special Criminal Court from its inception). See also Paul O’Mahony, *The Constitution and Criminal Justice*, in *CRIMINAL JUSTICE IN IRELAND* 72, 80–83 (Paul O’Mahony ed., 2002) (describing the Special Criminal Court); see generally Liz Heffernan, *Evidence and National Security: “Belief Evidence” in the Irish Special Criminal Court*, 15 *EUR. PUB. L.* 65 (2009) (discussing the use of senior police official “belief” evidence concerning membership in terrorist organizations). A second Special Criminal Court was established in 2016. See *First Sitting of Second Special Criminal Court*, *IRISH TIMES* (May 6, 2016), <http://www.irishtimes.com/news/crime-and-law/courts/first-sitting-of-second-special-criminal->

[court-1.2636993](http://www.irishtimes.com/news/crime-and-law/courts/first-sitting-of-second-special-criminal-court-1.2636993). The continued existence of the Special Criminal Court has been controversial in recent years. See *FactCheck: Who Wants to Get Rid of the Special Criminal Court?*, *THE JOURNAL.IE* (Feb. 10, 2016, 7:00 AM), <http://www.thejournal.ie/ge16-election-2016-ireland-fact-check-special-criminal-court-2594422-Feb2016/> (fact checking Sinn Féin’s claims regarding the Special Criminal Court).

²⁴⁹ TÓIBÍN, *supra* note 92, at 3–4.

²⁵⁰ *Id.* at 5.

²⁵¹ *Id.* at 6.

²⁵² *Id.* at 7.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 8. In Irish practice, costs generally “follow the event,” that is, the losing party generally is responsible for paying the costs incurred by the prevailing party. See, e.g., *Grimes v. Punchestown Devs. Co., Ltd.* [2002] 4 IR 515, 522 (Denham, J.) (stating that the normal rule is that costs follow the event). See also HILARY DELANY & DECLAN McGRATH, *CIVIL PROCEDURE IN THE SUPERIOR COURTS* § 23-02 (3d ed. 2012).

admitted duty to provide adequate social services:

It had taken him several months, the long afternoons of the spring and early summer in his chambers and then later in his study [at home] in [the South Dublin neighborhood of] Ranelagh, thinking through the implications of articles in the Constitution, the meaning of phrases and the significance which earlier judgments had given to these phrases. He looked through judgments of the American Supreme Court and the British House of Lords. He wrote it all down, slowly and logically, working each paragraph over and over, erasing, re-checking and re-writing.... [H]e worked on his judgment in the same way as he had always worked. He would find that a single sentence by necessity expanded into a page of careful analysis; then sometimes a page would have to be re-written and its contents would form the basis for several pages, or give rise to further thought, further erasures and consultation. Or, in the light of early morning, when he read over his work, the argument would seem abstruse, the points made would appear irrelevant, the style too awkward or too dense. He would take the page and throw it in a ball across his office....

He realized as he wrote the judgment what it meant: the hospital would be able to discharge the child, and the parents would be left with the responsibility of looking after a handicapped son. He added the proviso to his judgment that the

Health Board should ensure, in every possible way, that the child's welfare be secured once he was discharged from the hospital. He noted the state's account of the social services which the parents would have available to them, and he said that his judgment was provisional upon those services remaining at the parents' disposal.²⁵⁶

B. The Second End of Term Decision Day

The second decision day that Tóibín describes occurs on the last day of the term a year later, when, once again, Redmond will hear some emergency motions and then deliver a reserved judgment in a merits case. At the end the day, he will drive with Carmel to their holiday cottage at Cush. The account of that decision day actually begins in the middle of the night before, when Redmond awakens and goes downstairs to his study. His judgment, which is written in longhand as usual, sits on his desk. "He wondered for a moment [whether] he should have it typed, but he was worried about it being leaked. No one knew about it; even as he sat down to write it himself he did not know what he would say, what he would decide."²⁵⁷

The case involves the wrongful dismissal of an unmarried convent school teacher "in one of the border towns,"²⁵⁸ who has lost her job after becoming pregnant and moving in with the father of her child – a man whose wife had deserted him and their children.²⁵⁹ The

²⁵⁶ TÓIBÍN, *supra* note 92, at 7–8.

²⁵⁷ *Id.* at 83.

²⁵⁸ *Id.* at 86.

²⁵⁹ *Id.* When Tóibín originally published *The Heather Blazing* in 1992, he included a slightly different version of the case that proves troublesome to Redmond on the second decision day. Instead of being a case about a convent schoolteacher who becomes pregnant and is discharged from her position, the case concerns a convent school student who is expelled after she becomes

pregnant. According to Tóibín, the original manuscript included the teacher's case, rather than the student's case, but a lawyer friend persuaded Tóibín to alter the text on the ground that the facts of the teacher's case were too close to those of an actual case and would likely reveal the identity of the jurist who was the inspiration for Tóibín's main character. Many years later, after the judge had died, Tóibín published a revised version of the novel, substituting his original version of the case for that which appeared in the novel as originally published.

case comes to the High Court as an appeal from the Employment Appeals Tribunal, but plausible constitutional questions are raised on the facts. As Redmond sits in his study on the night before he will announce his judgment, he reflects:

There was so little to go on, no real precedent, no one obviously guilty. Neither of the protagonists in the case [the teacher and the principal who fired her] had broken the law. And that was all he knew: the law, its letter, its traditions, its ambiguities, its codes. Here, however, he was being asked to decide on something more fundamental and now he realized that he had failed and he felt afraid.²⁶⁰

“What was there beyond the law?” he wonders. He writes “law” on a pad, and then “natural justice,” and “right” and “wrong,” and, finally “God.” But that, too, does not help: [T]he idea of God seemed more clearly absurd to him than ever before; the idea of a being whose mind put order on the universe, who watched over things, and whose presence gave the world a morality which was not based on self-interest, seemed beyond belief.... He crossed out the word “God.” He felt powerless and strange as he went back to read random passages of his judgment. He felt a need to go to bed and sleep some more; maybe he would be more relaxed about his judgment in the morning.²⁶¹

Later, Redmond thinks to himself “that he would like to get into his car now and drive with Carmel to Cush and never set foot in the court again.”²⁶² Indeed, contrary to the hope that he expressed in the middle of the night, the morning of a new day does not find him feeling more relaxed about the judgment than he did in the middle of the night: “He thought that he should read it over before going into the court, but he could not face it. He felt unsure about it, but as he left the house and drove into the city the uncertainty became deep unease.”²⁶³ Like the judgment Redmond delivered on the previous decision day described in the novel, this judgment is not the product of haste or inattention. Redmond had listened carefully to the testimony and the arguments of counsel for three trial days; he had taken “notes, asked questions, sought clarifications”; he had formed a strong impression of the character of the witnesses;²⁶⁴ and he had spent “six weeks working towards a conclusion, a judgment.”²⁶⁵ The judgment itself is the product of careful writing and re-writing:

The line of reason in his judgment was clear, he thought. It had not been written in a hurry; evening after evening he had sat in his study and drafted it, working out the possibilities, checking the evidence and going over the facts. Even so, he was still not sure.²⁶⁶

Tóibín recounts this history in an afterword to the revised edition. See *id.* at 247–48 (describing the edits made to the case in the original 1992 publication, and the re-insertion of the original text pre-edit in the 2012 publication). See generally Tóibín, *A Brush with the Law*, *supra* note 71 (detailing further the background of the novel).

²⁶⁰ TÓIBÍN, *supra* note 92, at 83.

²⁶¹ *Id.* at 83–84.

²⁶² *Id.* at 85.

²⁶³ *Id.*

²⁶⁴ *Id.* at 87.

He remembered how calm the [convent school’s] head nun had been when she came to

give evidence, and how the teacher, too, had been direct. There was a pride, almost a nobility in the way they spoke. He realized this was one of the few cases in which he had ever been involved where both sides were clearly telling the truth and were not afraid of the truth. Both women were sincere; neither wished to hide anything, except one had no job now, and wanted the court to right the wrong which she felt had been done to her.

Id. He also “remembered their faces, the teacher much older than he had expected, the nun younger-looking.” *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 85.

The unease and anxiety of the second decision day stand in sharp contrast to the judicial self-confidence Redmond seemingly experienced on the first. The problem, of course, is the case itself. On one level, as Redmond suggests, the case is not a complicated one: “[I]t was, he thought, merely a case of unfair dismissal.... It was simply his job to decide if the woman had been unfairly dismissed or not, if she deserved compensation, or if she should get her job back.”²⁶⁷ Presumably, there was an established body of law marking the difference between an unfair dismissal and one that was proper; a body of law governing the appropriateness of particular remedies in cases in which the unfairness of the dismissal had been proved; and, most important, at least from a judge’s perspective, a body of law laying out the degree of deference, if any, owed by a reviewing judge to a determination of the Employment Appeals Tribunal. But these bodies of law are not sufficient to provide Redmond with a sense of “spiritual quiet” in this case, despite his having “spent three days listening to the evidence and the arguments and then six weeks working towards a conclusion, a judgment.”²⁶⁸ There is a gap between real life and the law.

The case involves something more than technical questions about the proper scope of judicial review of administrative action, or even the correct delineation between proper and improper dismissals. There is no law against living with a man to whom one is not married, Redmond thinks. On the other hand, neither is there any explicit constitutional right to do so. And doing so is hardly consistent with “the Christian principles outlined in the preamble to the Constitution.”²⁶⁹

Moreover, while the Constitution offers special recognition and protection to the rights of the family, “[n]o judgment thus far in the history of the Constitution and the courts had called what she was involved in ‘a family.’ It was, instead, a broken family.”²⁷⁰ Redmond continues with this train of thought:

Her child would be illegitimate in the eyes of the state. But she was not breaking the law by living with this man, or by having a child. The law offered her the same protection as any other citizen. Her rights under the law were only diminished when those rights came in conflict with another’s rights.²⁷¹

What were those conflicting rights, if any, in this case, and how were they to be adjusted?

As the time for announcing his judgment approaches, Redmond continues to reflect on the case and the problem it presents:

Counsel for the school had maintained that she was not fit to be a teacher in a religious school, that her personal life was in breach of the school’s ethos and articles of association. Her having a child outside of wedlock was not the issue, but her continuing to live openly with a married man was. She had been warned, he said, but she had continued, in full knowledge of her employers’ wishes, to act against them. The parents of children under her care had complained, counsel for the school had emphasized....

There was no argument about facts or truth, guilt or innocence. In the end he was not the legal arbiter, because there were no legal issues at stake. Most of the issues raised in the case were moral issues: the right of an ethos to prevail against the right of an individual not to be dismissed from her job. Basically, he was

²⁶⁷ *Id.* at 85–86.

²⁶⁸ *Id.* at 87.

²⁶⁹ *Id.* at 86.

²⁷⁰ *Id.*

²⁷¹ *Id.*

being asked to decide how life should be conducted in a small town. He smiled to himself at the thought and shook his head.

As he worked on the judgment, he realized more than ever that he had no strong moral views, that he had ceased to believe in anything. But he was careful in writing the judgment not to make this clear. The judgment was the only one he could have given: it was cogent, well-argued and, above all, plausible.

He went to the window again and stood there looking out. How hard it was to be sure! It was not simply the case, and the complex questions it raised about society and morality, it was the world in which these things happened that left him uneasy, a world in which opposite values lived so close to each other. Which world was the one that could claim a right to be protected?²⁷²

Redmond walks over to the bookshelves in his chambers and takes down “his sacred text: the Irish Constitution, *Bunreacht na hÉireann*.”²⁷³ The preamble speaks of “the Christian nature of the state” and specifically refers to the Holy Trinity.²⁷⁴ But how does one apply that language to a legal case?

[Becoming] pregnant outside marriage and... liv[ing] with a man already married was clearly alien to Christian principles. It had never been accepted in any Christian society, he thought, until he realized he had taken the argument too far. What was a Christian society? Had there ever been one?²⁷⁵

To give meaning to the words of the preamble, one would need to be certain about the meaning of Christianity and the essential characteristics of a Christian society:

He wrote down three words on a notepad: charity, mercy, forgiveness.

These words had no legal status, they belonged firmly to the language of Christianity, but they had a greater bearing on the case than any set of legal terms. If the teacher were merely pregnant, the nun had said, they could have forgiven her, but the fact that she continued to transgress – he wrote the word down with an exclamation mark after it – meant that they had to take action.²⁷⁶

Just as he has assumed, perhaps incorrectly, that he understands the significance of the reference to Christianity in the preamble to the Constitution, he recognizes that he had assumed, perhaps also incorrectly, that he understood the proper meaning of “the family,” as that term is used in the Constitution:

One other matter began to preoccupy him. The family, according to the Constitution, was the basic unit of society. What was a family? The Constitution did not define a family, and at the time it was written, in 1937, the term was perfectly understood: a man and his wife and their children. But the Constitution was written in the present tense, it was not his job to decide what certain terms – he wrote “certain terms” in his notepad, underlined it and wrote “uncertain terms” below that – such as “the family” had meant in the past. It was his job to know what these terms meant now. This woman was living with a man in a permanent relationship, they were bringing up children. Did a man, a woman and their children not constitute a family? In what way were they not a family? They were not married. But there was no mention of marriage in the Constitution.

He thought about it for a while and the consternation it would cause among his colleagues, a redefinition of the concept

²⁷² *Id.* at 86–88.

²⁷³ *Id.* at 88.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 88–89.

of the family. The teacher would have to win the case then, and the nuns would have to lose. The idea seemed suddenly plausible, but it would need a great deal of thought and research. It had not been raised as a possibility by counsel for the teacher. Lawyers, he thought, knew that he was not the kind of judge who would entertain such far-fetched notions in his court.

If he were another person he could write the judgment but as eleven o'clock drew near he knew that the verdict he had written out on his foolscap pages was the one he would deliver, and it would be viewed by his colleagues as eminently sensible and well-reasoned. But he was still unhappy about the case because he had been asked to interpret more than the law, and he was not equipped to be a moral arbiter. He was not certain about right and wrong, and he realized this was something he would have to keep hidden from the court.²⁷⁷

When the time comes for court to resume, the courtroom is crowded. The press and public benches are both full. Once again, there are motions to deal with before proceeding to his reserved judgment. He disposes of the motions as quickly as possible and then proceeds to read his judgment. As he does, he surveys the crowded courtroom:

There were a lot of young women, he noted, and he presumed that they were friends and supporters of the sacked teacher. He knew that this judgment would be news. It would be carried on the radio and there would probably be editorials in the newspapers. He would certainly be attacked in *The Irish Times*. As he settled down to read the judgment, sure now of his conclusions, he thought

about how ill-informed and ignorant the comment would be, and how little of the processes of law the writers would understand.²⁷⁸

Redmond recites the facts and the contested points, and, as he... came near the passage which would make the result clear he found that he was enjoying the tension and noticed that he had begun to speak more clearly and distinctly, but he stopped himself and went back to the rigorous monotone which he had adopted at the beginning.²⁷⁹

"When he had finished, counsel for the nuns was on his feet, his face flushed with victory. He was looking for costs. There was no choice, he could delay it until the new term, but it would be pointless and he wanted to [be] done with the case."²⁸⁰ Counsel for the teacher asks that the application be denied, but, unlike the previous decision day, when Redmond put over the application for costs until the new term, he now follows the general rule that "costs follow the event" and "rule[s] against [the teacher] without offering any explanation."²⁸¹

Redmond hopes to avoid the radio news as he and Carmel drive to Cush with Niamh and her baby, because Carmel undoubtedly would want to know why he ruled in favor of the nuns,²⁸² and it would be worse with Niamh. "He realized that he would prefer if they never found out about [the ruling]. It would be difficult to explain."²⁸³ Redmond avoids turning on the radio on the way to Cush, but Carmel and Niamh listen to the evening news once they have arrived in Cush, and Redmond cannot avoid having to defend his judgment.²⁸⁴ He is challenged again when Donal and his girlfriend Cathy, also

²⁷⁷ *Id.* at 89–90.

²⁷⁸ *Id.* at 90.

²⁷⁹ *Id.* at 91.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 93.

²⁸³ *Id.*

²⁸⁴ *Id.* at 96.

a barrister, visit on the following day.²⁸⁵ Notably, Cathy does not join in the criticism of Redmond's judgment. Although Redmond does not recall seeing her before, Cathy discloses that she was one of the lawyers for the sacked teacher – the junior counsel who spoke on the motion for costs.²⁸⁶

C. The Third End of Term Decision Day

The third decision day occurs at the end of term a year later. Carmel has died, the result of a stroke she suffered in Cush during the first weekend of the summer holiday the year before. Once more, we find Redmond standing at the window of his chambers.²⁸⁷ On this decision day, Redmond will not be delivering a written judgment in a reserved case. Instead, he will be sitting as the senior judge of a three-judge Special Criminal Court empaneled to hear a case of alleged terrorist activity.²⁸⁸ He would be taken to the Special Criminal Court under armed guard, in an unmarked police car with two detectives carrying machine guns. The building where the Special Court sits is itself protected by armed soldiers.²⁸⁹ Redmond does not like being taken to court in this way, but there seems to be no choice, despite the fact, as we learned at the beginning of the novel, that, “[n]ow things [are] safer; things [are] calm in the south.”²⁹⁰

Significantly, we learn that the fictional Redmond is one of the architects of the Special Criminal Court. In the early 1970s, he wrote a series of reports for the government, recommending, among other things, “non-jury courts [be

established] for IRA [Irish Republican Army] cases.”²⁹¹ One of his reports had included a section in which he described the approach to terrorism taken by other nations – a section that he still “did not want... to come to light, [feeling] that it would be misunderstood.”²⁹² In addition, he had included “a section on how the courts, in particular the Supreme Court, could become a difficulty for any administration trying to combat terrorism. But this had been seen only by the [Prime Minister] and the Minister for Justice.”²⁹³

The case to be tried involves three men who have been charged with membership in the IRA, possession of firearms, shooting at a police officer in the course of his duty, attempted murder, and resisting arrest. As the hearing begins, it becomes clear that it is not “a simple case.”²⁹⁴ Redmond notices that, with respect to the attempted murder charge, there is no real evidence against two of the three defendants. He decides, therefore, to interrupt defense counsel's cross-examination of one of the police officers to ask the prosecutor whether he intends to pursue the attempted murder charge against all three defendants. The prosecutor assures the court that he intends to pursue the case against all the defendants, but proceeds to drop the charges after the lunch break. The defense makes little headway otherwise. For example, the defense argues that the arrests were improper because they occurred “north of the border,”²⁹⁵ but the court is not receptive to that argument.

We are given little sense of what the evidence is, apart from Redmond's observations that the key defendant “did not look like a man with strong political

²⁸⁵ *Id.* at 116.

²⁸⁶ *Id.* at 116–17.

²⁸⁷ *Id.* at 173.

²⁸⁸ *Id.* at 177.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 3.

²⁹¹ *Id.* at 173–74.

²⁹² *Id.* at 175.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 180.

convictions,” and his testimony “had that guarded, puzzled quality as though he had been brought in from the street, as though he had never been involved in the IRA in his life.”²⁹⁶ The trial proceeds quickly. “By half past three it seem[s] [to Redmond that]... the case could be decided very quickly.... He would give the first [defendant] six years, and the others four. His colleagues, he thought, might want to give harsher sentences.”²⁹⁷ In conference, another judge begins to talk about the case as if all three defendants could be considered together, but Redmond quickly challenges that approach: “We must take the first accused... and the other two separately, as they face separate charges.”²⁹⁸ The three judges soon reach a unanimous result – the same that Redmond would have reached if he had been sitting alone. With that, the case is over, as is the term itself. Redmond would be returned to the Four Courts under armed guard and would then be free to leave for his summer holiday at Cush.²⁹⁹

D. Some Observations on Judging in The Heather Blazing

Although Redmond’s judgment in the handicapped child case will have

important consequences for the family involved, the judgment is far from noteworthy in terms of its legal holding. The judgment might have broken ground if Redmond had construed the relevant constitutional provisions to preclude the hospital from discharging the child, but he seems not to have seriously considered that possibility. While Redmond is mindful of the heavy burden placed on the child’s parents, he thinks that finding a constitutional right in favor of the child would tilt the constitutional balance between individual rights and the state’s rights too far in favor of the individual. The state, however, has conceded that substantial social services would be available to the parents in any event, and the wily old judge has specifically conditioned his judgment on the continued availability of those services.³⁰⁰ In other words, Redmond has been able to provide some (albeit incomplete) relief to the parents without making any new law. This may be one of the reasons, we suspect, why he thinks that his judgment may “be important in the future as a lucid and direct analysis of the limits to the duties of the state.”³⁰¹ The judgment is clear, but it operates only so long as the Health Board continues to provide the

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 181.

²⁹⁹ Much more could be recounted concerning the aspect of the novel that concerns the story of Eamon Redmond the man, but Tóibín’s account of the third decision day effectively concludes the part of the novel dedicated to the story of Eamon Redmond the judge. At the end of the term, Redmond returns to Cush for the first time since Carmel’s death and struggles to find his footing unencumbered by his professional obligations, which have proved a potent distraction from thoughts of his personal life. He is restless, but “[h]e had nowhere to go. The court was on holidays and the house in Dublin was too big and empty.” *Id.* at 205. In this part of the novel, Redmond, who is keenly aware of the void left by Carmel’s passing, begins to move, albeit slowly and somewhat tentatively, toward renewing his relationship with his family and with Cush itself. In the weeks following

the end of term, the law is largely absent. Significantly, it is mentioned only in connection with Redmond’s decision to read some books on European Union law, an area that he has previously left to his “younger colleagues.” *Id.* at 212, 235.

³⁰⁰ *Id.* at 8 (“He added the proviso to his judgment the proviso the Health Board should ensure, in every possible way, that the child’s welfare be secured once he was discharged from the hospital.”).

³⁰¹ *Id.* at 7. Redmond’s approach brings to mind Judge Noonan’s description of Chief Justice Marshall’s opinion in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825): “General question – particular case; the antithesis was not unusual for Marshall, who inclined to decide the big abstract question one way and give the losers on the abstract issue a victory on the facts.” JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* 112 (1977).

services that it has promised to provide. Moreover, the Health Board has a strong incentive to abide by its promise. The alternative might result in the entry of a judgment that recognizes greater obligations on the part of the state, as a matter of constitutional law.

There are limits to what a judge can accomplish through wiliness, as the second case demonstrates. In the case of the discharged teacher, there seems to be no middle ground. Redmond must either base his judgment on the teacher's constitutional rights – which would require an innovation in constitutional doctrine and perhaps “a redefinition of the concept of the family”³⁰² – or find in favor of the school. The most plausible argument in favor of the teacher may be that the teacher's termination is contrary to the constitutional protection explicitly afforded to the family, but the teacher's lawyers have not urged that argument, presumably because they assumed that Redmond “was not the sort of judge who would entertain such far-fetched notions in his court.”³⁰³ Perhaps they also thought that it was an argument that the Supreme Court of Ireland would not accept in any event. Nonetheless, as Redmond thinks about the case, and the difficulties it presents, an argument based on the constitutional protection of the family unit “suddenly seem[s] plausible,” even though the development of such an argument would require “a great deal of thought and research” and ultimately would “cause [consternation] among his colleagues.”³⁰⁴ Redmond's discomfort with the outcome has kept him awake, but he finally rejects the possibility of further “thought and research” out-of-hand, not because the argument is not worth

pursuing, but because, as the teacher's lawyers have recognized, Redmond is not that “sort of judge.”³⁰⁵

It is with some sadness that we hear Redmond confess that, “[i]f he were another person, he could write the judgment”³⁰⁶ in favor of the teacher and of an expanded understanding of the family. But he is not “another person”; he will deliver the judgment he has written over these several months, reject the teacher's claim, and his colleagues will view his judgment “as eminently sensible and well-reasoned.”³⁰⁷

Redmond is uncomfortable with the idea of ruling in favor of the teacher because that would require him to act as a “moral arbiter” and “decide how life should be conducted in a small town.”³⁰⁸ What leaves him uneasy is nothing less than “the world in which these things happen[]” – “a world in which opposite values live[] so close to each other.”³⁰⁹ But surely Redmond knows that he cannot avoid acting as “a moral arbiter” or affecting the way in which life is conducted in a small town. He must decide the case one way or the other, and, in either case, his decision will affect “how life should be conducted.” That is the nature of his position as an interpreter of the Constitution. Refusing to consider seriously the plausible constitutional argument that might be made on behalf of the teacher cannot save him from acting as a moral arbiter. It does, however, prevent him from acting as a morally responsible judge.

Redmond seems adept at walling off his private life, so that any empathy he might (or might not) feel for his daughter's situation seems entirely separate from his consideration of the teacher's case.

³⁰² TOIBIN, *supra* note 92, at 89.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 89.

³⁰⁸ *Id.* at 88, 90.

³⁰⁹ *Id.* at 88.

Nonetheless, he is deeply conflicted about the judgment he renders. It is a “safe decision,” plausible at a superficial level, and it will be seen as “eminently sensible and well-reasoned” by those who, like Redmond, will be content not to think too deeply about it, let alone explore all the dimensions of the constitutional issues, or ask hard questions about whether this is a result that the Constitution – or justice – requires.

As Redmond “settle[s] down to read the judgment in court,” we are told that he is “sure now of his conclusions,” and he reflects on “how ill-informed and ignorant” the criticism of his judgment will be.³¹⁰ When Redmond catches the teacher’s eye, he notes that she has “the resigned look of someone who knew she was going to lose,” of someone who has been told that, “he [is] not a judge who would rule in her favour.”³¹¹ But perhaps it is, after all, his own sense of resignation that he perceives. He may now be confident in the correctness of the result he reached, but it is telling that he hopes that Carmel and Niamh will “never [find] out about it.”³¹² The resignation is that of a man who is not the kind of person who could explore those issues and write the kind of judgment that gave effect to constitutional values. It is the resignation of one who recognizes that he has not done what he should have done.

In the third case, Redmond is not sitting alone, but as part of a three-judge Special Criminal Court. Redmond does not like traveling in an unmarked car with police detectives carrying machine guns to a special courthouse guarded by armed sentries.³¹³ And he finds soon after the case begins that he does not like the way

in which the case is being prosecuted.³¹⁴ At the very least, he does not like having his time wasted (or his impartiality tested) by prosecutors who have no evidence at all to support some of their charges.³¹⁵ We learn very little about the evidence in the case, but we sense that Redmond may have some doubt as to whether the first of the defendants (who gets the stiffest sentence) is a terrorist at all:

He was a small man, in his late thirties. He did not look like a man with strong political convictions. And his evidence, too, had that guarded, puzzled quality as though he had been brought in from the street, as though he had never been involved in the IRA in his life.³¹⁶

Moreover, a possibly important jurisdictional question – whether the defendants were arrested in the republic or “north of the border” – is brushed aside.³¹⁷

As a result of this brief trial, two men are convicted of illegal possession of firearms, while the third is found guilty of attempt to endanger life. They are sentenced to four years and six years, respectively.³¹⁸ Redmond is effective in securing his colleagues’ agreement to sentences he thinks appropriate, but his initial suspicion that his colleagues might be looking for harsher sentences is not borne out. Redmond improves the integrity of the proceeding somewhat by causing the prosecution to withdraw the charges that lack any evidence to support them, but the proceeding otherwise seems perfunctory at best, and he does nothing to make it less so. Redmond is obviously uncomfortable with the secret processes of the Special Criminal Court, but he does little to resist them. Finally,

³¹⁰ *Id.* at 90.

³¹¹ *Id.* at 91.

³¹² *Id.* at 93.

³¹³ *Id.* at 177.

³¹⁴ *Id.*

³¹⁵ *Id.* at 177–80.

³¹⁶ *Id.* at 180.

³¹⁷ *Id.* at 180.

³¹⁸ *Id.* at 180–81.

in comparing the third case to the first two, it is striking that Redmond and his colleagues seem so much more comfortable in dealing with complicated issues of law and order than Redmond was in dealing with issues of law relating to family and social life.

IV. Conclusion

In *The Children Act* and *The Heather Blazing*, we see judges struggling with complex cases that present extremely difficult problems at the intersection of law, culture, and human existence. In each book, the cases we learn about might be disposed of quite easily if the judges were willing to apply some mechanical rule, without digging – or thinking – too deeply. The deeper these judges look into the cases, however, the more they think about them, and the more they try to justify their decisions (particularly by writing judgments), the more difficult and the more deserving of attention the cases seem to be. These cases may seem unusually complex, and therefore atypical, but cases that are not unusually complex may not ultimately require judicial intervention. They will normally be settled in other ways.

With Fiona Maye, we meet a judge who wants to know the facts as best she can. In the case of the Siamese Twins, she ultimately recognizes that the ordinary tools of the law do not provide a sufficient basis for deciding the case, but she finds a solution in the doctrine of necessity – essentially a departure from law as we understand it. That move allows her to decide the case (and be applauded by her colleagues), but it leaves her uneasy. She has not decided the case with “spiritual quiet” and is not satisfied.

In the case of the Jewish schoolgirls, it is her careful listening to the testimony of the father’s witnesses and the social worker’s critical insight that makes it possible for her to decide the case. To

rule in favor of the mother, Maye concludes, is less likely to interfere with the girls’ ability to decide for themselves how they want to live, once they reach the age of consent. As in the case of the Siamese Twins, Maye chooses what she deems to be the less-bad outcome. But even that ruling is not neutral; it represents an intervention on behalf of the mother’s values and against those of the father and his community.

Similarly, when Maye first hears that she will have to decide the fate of a seventeen-year-old boy who is refusing to be transfused for religious reasons, her immediate reaction is to think about going to the hospital to question and evaluate him for herself. She quickly puts that possibility out of her mind, based on deference to contemporary judicial convention. But after hearing the parties’ evidence and arguments, she decides that she must indeed listen to the young man herself. There is no established protocol for doing so, and Maye thinks too little about what procedures would be appropriate. Among other things, she is being asked once more to validate the values of one community over another. It is not possible, as a judge, to avoid that. All that she can do beyond that is to listen. Some may believe that Adam’s story does not end well, but is that because Maye did not listen well enough or long enough, or because she chose to listen at all?

With Eamon Redmond, we meet a judge who spends many hours thinking about his cases; he spends much time preparing his written judgments, and he takes great pride in them. He is also concerned with justice in some sense, as he shows in the case of the handicapped boy who will require hospitalization for the rest of his life. He resists the possibility of a constitutional solution to the problem because he thinks it would unacceptably alter the balance of rights between the state and the individual, but he reaches a

reasonably just solution by holding the government to its commitment to provide the family with an appropriate level of assistance.

Redmond seems adept at manipulating the system to create reasonably just results, as he does in the case of the handicapped boy, but he has difficulty with cases in which the middle road is not possible, where he must be bold in the pursuit of justice. In such cases, he finds that convention is too great an obstacle to overcome. “If he were another person he could write the judgment” addressing the proper weight to be given the constitutional provision relating to the family in the case involving the unmarried teacher; but he is, tragically, the person he is, rather than another. The tragedy rests not in his refusal to rule in favor of the teacher, but in his willingness to dismiss out-of-hand the constitutional argument that might well be made on her behalf. As the teacher’s lawyers know – and his conduct confirms – Redmond is not willing to listen to that argument, despite his recognition that it merits consideration. He is uneasy, he says, living in “a world in which opposite values live[] so close to each other,” and he refuses to act as a “moral arbiter” or “to decide how life should be conducted in a small town.” But his effort at abstention cannot insulate him from moral responsibility. By refusing to engage the constitutional arguments that might be made, he is “decid[ing] how life should be conducted in a small town” every bit as much as he would be if he were to rule in favor of the teacher. He has the authority to decide one way or the other, but no authority to refuse to engage the arguments on both sides.

In the third case, that of the “terrorists,” Redmond is more than ready to challenge

the prosecution on one issue: the fact that charges were brought against all three defendants, despite the absence of evidence against two of them. But otherwise we learn very little about any of the evidence in the case. We assume that this is true of the judges as well. They apparently wish to know, in Justice Holmes’s words, “as little as [they can] safely go on.”³¹⁹ The trial itself seems perfunctory; the consideration the evidence receives when the judges deliberate seems even more so. One has the sense that these three judges are simply going through the motions, making their moral stand, if at all, only at the sentencing stage, without having much engagement with questions of guilt or innocence. The judges are content to treat the case superficially, as if it were a simple one. Once more, we see Redmond manipulating the system to secure a reasonably just resolution, but that seems inadequate in this context. Without a better sense of what the evidence is, however, we cannot begin to know what a reasonably just resolution would entail.

The lesson that we might take away from our reading of these two novels, and from the accounts of judging they offer, has to do with the importance of listening, and, in particular, of listening to both sides of a question as thoroughly and as open-mindedly as the limits of our human nature permit. That is particularly true, of course, when the questions presented are exceedingly difficult, law is sparse, and moralities uncertain or conflicting. In such cases, it is not enough that judgments be deemed by a judge’s colleagues to be “sensible and well-reasoned,” let alone “elegant and correct.” As Judge Hand has said, everything may depend on “the spirit in which [the judge] approaches the questions before him.”³²⁰ In other words,

³¹⁹ BICKEL, *supra* note 81, at 230.

³²⁰ Hand, *supra* note 78, at 12.

much depends on whether judges choose to “listen,” as we have understood that concept here, and on how well they “listen.” Judges must give themselves existentially to the case, and success or failure ultimately will be judged as much by the quality of that engagement as by the outcome of the case.

Listening means finding the facts for oneself, perhaps not literally, as Maye did, but in the more general sense of attempting to learn as much about a case as one reasonably can, as Justice Brandeis aspired to do, and not dismissing plausible alternatives and legal theories out-of-hand, as Redmond did in the case of the unmarried teacher. It means acknowledging one’s biases, intellectual and otherwise, to the fullest extent that one can know and understand them. It also means trying to see things from another’s perspective, pondering what one has seen and heard, and discussing those things with others (in the case of collegial or shared decision making), so that one’s ultimate decision may be as fully informed as possible. It also means pushing lawyers to grapple with relevant arguments that they may have overlooked or dealt with inadequately, but without crossing the line that properly separates the judge’s role from that of the lawyer. It means thoroughly evaluating arguments and justifying one’s conclusions, and it means being open to persuasion. To do these

things is to risk having a profound encounter with other people, their ideas, and their problems. If there is “spiritual quiet”³²¹ to be found as a judge, that is its source.

There are many obstacles, to be sure, to the actualization of this view of judging, in terms of resources, dispositions, and innate limitations; and this view of judging is one that can never be actualized perfectly or completely. But neither those obstacles nor the fact that this ideal can never be fully realized should prevent judges from trying. Above all, judges need to resist the temptation to make a virtue out of the obstacles that confront them. In the world in which most of us live, being mastered by our biases is something that we must always try and avoid, even if we can never be wholly successful in freeing ourselves from them; having difficult conversations with those with whom we disagree is also something that we cannot avoid; and having difficulty coming to a decision in a difficult case is indeed a mark of conscientiousness, and not simply a character flaw or shortcoming. That is true of all of us in our everyday lives, and it is no less true of judges in theirs.

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³²¹ McCREE, *supra* note 117, at 797.