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I. Introduction

Usually, when we have a job to be done, we define the responsibilities of that job and then look for someone qualified to fulfill those responsibilities. That is not how we pick our judges—at least not in Pennsylvania. In Pennsylvania, political parties pick their judicial candidates based upon their ability to be elected, not necessarily because they are qualified; those who vote know almost nothing about the candidates; and the process of getting elected undermines, if it does not destroy, the winner's credibility. The result? The public does not respect the courts.[1]

The question, in short, is no longer whether to change the way we

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1. I do not propose, in this paper, to justify this assertion in any detail but leave that to others. Suffice it to say that two recent nationwide surveys found that "76 percent of voters now believe that donors to judges' campaigns get special treatment in court—and even 26 percent of judges agree." Press Release, Justice at Stake Campaign, State Judges and Voters Sound Alarm: Money and Special Interests Increasingly Threaten Fair and Impartial Courts (February 14, 2002), *at* http://www.JusticeatStake.org. In Pennsylvania, 88 percent of the respondents to a 1998 poll stated their belief that judges' rulings are at least sometimes influenced by large contributions to their election campaigns. PENNSYLVANIANS FOR MODERN COURTS, BLUEPRINT FOR THE FUTURE OF JUDICIAL SELECTION REFORM 2 (1999), *available at* http://pmconline.org/blue/text.htm. "A 1999 survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents believed that campaign contributions have a 'very significant' or 'somewhat significant' influence on judges' decisions." Brief of the Amici Curiae Public Citizen at 9, Republican Party v. Kelly, 122 S. Ct. 2528 (2002) (No. 01-521) (citing JUDICIAL CAMPAIGN FIN. STUDY COMM., SUPREME COURT OF TEX., REPORT AND RECOMMENDATIONS 4 (1999)).

pick our judges, but how to change it. Any change will entail amending the Pennsylvania Constitution and that will require voter approval. Therefore, the first and principal part of this paper will outline a course designed to explain to non-lawyers, the persons to whom it matters the most, the nature of judges' responsibilities—not all of their responsibilities but the central one: to decide cases according to the law. My hope is that such a course will improve the chance that when we *do* make a change, it will be a good one. For the greater the number of persons who understand how judges do, or should, decide cases, the greater the chance of a sound amendment changing the way we pick our judges.

The second part of this paper is a plea for help. As outlined, the course materials include literature and films. These selections are highly personal and are offered tentatively and provocatively. My plea is that others, perhaps led by a law school or the organized bar, will strengthen and complete the course and teach it, or teach others to teach it.

Finally, the third part of this paper explains why I believe that understanding the nature of a judge's responsibilities leads irresistibly to the conclusion that judges should not be elected but should be appointed after a nonpartisan (or bipartisan) determination of their qualifications. Among those who agree that judges should be appointed, there are differences of opinion regarding the composition of the body responsible for determining qualifications. I do not attempt to resolve these differences in this paper. That is for another day, and for others more astute than I to the political compromises that will be necessary.

II. The Course: How Do Judges Decide?

Judges are technicians; judging is a craft. Learned Hand, quoting Oliver Wendell Holmes, described it as a "job."[2] But it is more than just a job. Different judges will sometimes perform the same job differently: using the same legal tools, one will vote to affirm, the other to reverse. This may reflect a difference in skill. But judges of equal skill may also differ, for they may bring different experiences and perspectives to the job at hand. Therefore, when we are considering whether a particular

2. CONTINUING LEGAL EDUC. FOR PROF'L COMPETENCE, THE REPORT ON THE ARDEN HOUSE CONFERENCE 116-23 (1958), *reprinted in* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 185 (1976).

> When we [Holmes and Hand] got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him, "Well, Sir, goodbye. Do justice!" He turned quite sharply, and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules." I have never forgotten that.

Id.

person should be a judge, we should consider much more than whether that person is a competent technician. We should also ask, "Is this the sort of person I want to decide matters of great importance and difficulty?"

In the course outlined in this paper, the participants would be asked to act as judges in difficult situations. The hope is that by doing so, they would encounter, and therefore sense, the demands that being a judge makes, not so much on one's technical skill as on one's personal resources. I believe that if the participants do sense these demands, they will be better judges of who their judges should be and, therefore, of how to select them.

The following outline is in the form of a Discussion Leader's Guide. The Discussion Leader might be a law professor or lawyer, but probably should not be a judge, who would likely inhibit robust criticism of judges and the judicial system. The Discussion Leader might also be a teacher in a field related to the law, such as history, government, or philosophy.

The imagined participants include voters, high school students, college students, and any persons aspiring to citizenship. The suggested course materials have been chosen accordingly. The central materials are excerpts from literature or films easily accessible and mostly well known.[3] Nevertheless, any serious discussion of a judge's responsibilities requires the participants' understanding of some basic legal principles, for example, that our government is a government of limited and separated powers. For that reason, some instruction using legal materials is provided. No effort is made, however, to provide a baby law school course, which could only be second rate, or worse.

A suggested syllabus is attached in Appendix A. Most teachers, I expect, have found that, after an hour and a half, no one is listening to them. The syllabus accordingly suggests nine sessions, each an hour or a little more. The number of participants should be small enough to involve everyone in the discussion.

A. The First Session: The Rule of Law

When we discuss a judge's responsibilities, we discuss the fundamental premise of our system of government: The Rule of Law. It

3. Some copyright and logistical problems may be noted. The outline draws heavily from a course on judicial ethics developed in 1997 at the University of Pennsylvania Law School, with copyright privileges later being assigned by the University to the American Bar Association. Ideally, participants in the course should read the literature in advance, but that would not be essential—the Discussion Leader could summarize it. Neither would it be essential to show the film excerpts, although they are brief and vivid and wonderful stimulants of discussion. Use of the literature and film excerpts would require further consideration of copyright issues.

is quite true that our history includes lawless violence, such as "frontier justice" and lynching, but we recognize that such conduct *is* lawless. Our faith, or conviction, was early stated by Chief Justice Marshall:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve that high appellation, if the laws furnish no remedy for the violation of a vested legal right.[4]

In quoting this passage, I do not suggest that the Discussion Leader begin by stating the facts and holding of *Marbury v. Madison*. That can come later. But quotation would not be a bad way to begin, for this passage is canonical. Everyone, at least everyone concerned about our legal system, should know it.

The often-quoted Alexis de Tocqueville observed that respect for the rule of law has "penetrate[d]" our society; it is among "the habits and tastes" of "the whole people."[5] Nevertheless, the idea of the "rule of law" or of "a government of laws, not men," is not a simple idea. Any careful examination requires one to ask what exactly do we mean by "law"?[6] This question is considered later, starting with the next session. At this point, as an introduction, discussion may be more general.

The Discussion Leader might use all sorts of materials to illustrate the strength of the principle of the rule of law in our society. The materials might include the work of the American Bar Association with Eastern European countries seeking to reform their legal systems. Such materials would demonstrate the value that societies may place on the rule of law when they do not have it. Or the Discussion Leader might seek the help of the participants. A participant who has lost a friend in a drive-by shooting could comment on whether it was an exaggeration for the Chief Justice to say that the rule of law is the "very essence of civil liberty."[7] But whatever materials the Discussion Leader selects to

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

5. RONALD A. CASS, THE RULE OF LAW IN AMERICA 23 (2001) (quoting de Tocqueville's observations and providing a balanced and comprehensive discussion). My discussion here and throughout is indebted to Dean Cass's book. It might well be assigned reading in a course for undergraduates.

6. *Id.* at 4-19 (defining the elements of the rule of law). In Dean Cass's view, "the rule of law" does not require, or imply, that the "law" conform to morality. Thus he would not "pull the meaning of the rule of law away" to exclude immoral laws such as laws on slavery. *Id.* at 17. Among the other merits of his book is its fair-minded recognition of a contrary opinion, accompanied by notes amounting to an excellent bibliography.

7. *Marbury*, 5 U.S. at 163.

illustrate the strength of the rule of law, the point to be driven home is that, in our society, the rule of law is taken very seriously; no one is above the law.

The attached syllabus suggests that the strength of the rule of law be demonstrated by two cases. In *United States v. Nixon*,[8] the Court rejected President Nixon's claim of executive privilege and ordered him to respond to the special prosecutor's subpoena for tape recordings. In *Clinton v. Jones*,[9] the Court held that President Clinton was not immune from suit by Paula Corbin Jones for alleged improper sexual advances while he was governor of Arkansas and ordered that he submit to being deposed. President Clinton might have believed that he could evade damage, but President Nixon could not have thought so. Can one imagine Stalin, or Pinochet, or Trujillo, or any other tyrant, acceding to the Court's order?

In concluding the first session, the Discussion Leader might introduce the participants to the formal rules that state a judge's responsibility to respect and comply with the law by giving them a copy of the Code of Judicial Conduct of the jurisdiction in which the course is being presented. By examining the Code, the participants could identify the three defining characteristics judges must have if we are to enjoy the rule of law: competence in the law;[10] impartiality;[11] and independence.[12] The ensuing sessions are designed to explore each of these characteristics in turn. The next session focuses on judicial competence, more specifically, on how judges construe a statute.

B. The Second Session: Competence: Statutory Construction

In preparation for this session, the participants should read Herman Melville's novella, *Billy Budd*,[13] or the Discussion Leader may open the session by playing the court-martial scene from the movie based on *Billy Budd*.[14] But neither pre-class reading nor in-class videotape is essential. Instead, the Discussion Leader may simply open discussion by telling the story of Billy Budd, as I do briefly below, to define the issue presented.

The facts are undisputed. Budd, a sailor on a British man-of-war under the command of Captain Vere, struck and killed John Claggart, the master-at-arms. Budd struck Claggart because Claggart had falsely

8. United States v. Nixon, 418 U.S. 683 (1974).
9. Clinton v. Jones, 520 U.S. 681 (1997).
10. PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 3A (2002).
11. PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 2 (2002).
12. PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 1 (2002).
13. HERMAN MELVILLE, BILLY BUDD (Frederic Barron Freeman ed., Washington Square Press 1972) (1924).
14. *But see supra* note 3.

accused him of plotting a mutiny. Budd, furious and frustrated in how to reply because of a speech defect, hit Claggart, but did not mean to kill him. When Captain Vere saw that the members of the court martial were about to acquit Budd, he intervened and persuaded them to sentence Budd to death.

Captain Vere agreed with the members of the court that on general moral principles, Budd was innocent and should not be condemned to death.[15] He argued, however, that under the Mutiny Act, Budd was guilty. The Act made it a capital offense to strike a superior; there was no requirement that the striking be with the intent to kill. This, Captain Vere told the members of the court, was "the law." "For the law and the rigor of it, we are not responsible . . . [H]owever pitilessly that law may operate, we nevertheless adhere to it and administer it."[16]

Captain Vere supported his argument by reference to the context in which the case arose. Great Britain and France were at war and recently there had been a serious mutiny in the British Navy. If Budd was not executed, as in Vere's view the Mutiny Act required: "Your clement sentence," Vere told the members of the court, "they [the other members of the crew] would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor demanded at this juncture . . . ."[17]

Having thus stated the case, the Discussion Leader should ask the participants to imagine themselves as members of the court martial convened to try Billy Budd. "How would you have decided? Would Captain Vere's arguments have convinced you to condemn Budd to death? If not, why not?" In asking these questions, the Discussion Leader should point out that Vere's arguments present at least two distinct issues: one, was he right in his interpretation of the Mutiny Act, and, two, if he was right, was the Act so "pitiless," so contrary to moral principle, that the court should have refused to enforce it (as one member of the court sought to do by attempting to withdraw)?

Without a doubt, Captain Vere's argument is powerful. On one occasion, when I presented *Billy Budd* to a group of Georgia trial and appellate judges, a substantial majority agreed with Vere. But that is the point. Some of the Georgia judges thought that it may be argued still more powerfully that Billy Budd should not have been condemned to death but acquitted. The argument might go something like this:

> All civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to

15. MELVILLE, *supra* note 13.
16. *Id.* at 73.
17. *Id.* at 75.

> be punished has done the outward act of a crime [striking Claggart], but on his having done it in a certain state or frame of mind or will.[18]

The authors of the Mutiny Act, as civilized representatives of a civilized king, it might be argued, must have known this general principle. Therefore, when they wrote that it was a capital offense to strike a superior, they must have assumed that the reader would understand that they meant, to strike with the intent to kill or do substantial harm, without their having to say so explicitly. At the very least, if they meant that it was a capital offense to strike a superior even without such an intent, they should have said so. As for Captain Vere's deterrence argument: it proves too much. The threat of execution may deter someone from acting with bad intent; it cannot deter someone who acts in understandable anger maliciously provoked.

Some of the Georgia judges took a middle ground. While inclined to agree with Captain Vere, they sought reassurance and said that they would order execution but defer it until the sentence had been reviewed by higher authority with the power to grant clemency.

After the participants have debated Billy Budd's fate, the Discussion Leader should point out that a judge's interpretation of a statute is not unconstrained but is guided by long-settled rules of construction. Some of these rules are illustrated by the three cases for the third session cited in the syllabus.[19] The participants should be prepared to discuss these cases at the next session.[20]

C. The Third Session: Competence: Law and Morality

In 1910, Congress passed the Mann Act, which said it should be "known and referred to as the 'White-Slave Traffic Act.'"[21] The Act made it a crime to transport

> any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or give herself up to debauchery, or to engage in any other immoral

18. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1969), *reprinted in part in* JOHN ARTHUR & WILLIAM H. SHAW, READINGS IN THE PHILOSOPHY OF LAW 287 (3d ed. 2001). This collection of readings is for non-lawyers, and like CASS, *supra* note 6, might be assigned reading.

19. *See infra* app. A.

20. To show how old the rules of statutory construction are, and how little the statement of them has changed, the participants might also be given a copy of the excerpt from Blackstone reprinted in ARTHUR & SHAW, *supra* note 18, at 90-91.

21. White-Slave Traffic (Mann) Act, ch. 395, § 1, § 2, § 5, § 8, 36 Stat. 825, 825-27 (1910) (current version at 18 U.S.C. § 2421 (2002)).

purpose.[22]

In *Caminetti v. United States*,[23] the United States Supreme Court held that two men violated the Act when they took their mistresses across a state line. Under the "plain" meaning of the Act, the Court said that the men had transported the women for an "immoral purpose."[24] Three Justices dissented. In their view, the purpose of the Act, as particularly shown by its title, was to make it a crime to engage in "commercialized sex, immoralities having a mercenary purpose."

In *Mortensen v. United States*,[25] the Mortensens, who ran a house of prostitution in Nebraska, took two of their employees on vacation to Salt Lake City and Yellowstone Park. The Court reversed their conviction under the Mann Act, holding that the Act's prohibition of an interstate trip should not be interpreted to include a trip "undertaken for an innocent vacation purpose."[26] "[W]hat Congress has outlawed . . . is the use of interstate commerce as a calculated means for effectuating sexual immorality."[27] Four Justices dissented, stating that "Courts have no . . . concern with the policy and wisdom of the Mann Act."[28] The fact was that "in bringing [the two women] back to Nebraska," the Mortensens "intended that they should resume there the practice of commercialized vice."[29]

In *Cleveland v. United States*,[30] the Court reviewed the conviction of six members of the Mormon Church who believed in polygamy and had transported their wives across state lines. The Court affirmed their conviction, holding that "polygamous practices have long been branded as immoral in the law."[31] One Justice dissented on the ground that Congress's prohibition of "any other immoral purpose" should be interpreted to refer to practices such as "prostitution" and "debauchery" and not to "one of the basic forms of marriage" recognized since ancient times.[32]

The Discussion Leader might ask the group if they think the decisions in *Caminetti*, *Mortensen*, and *Cleveland* are consistent. "Should courts be consistent? If their decisions are unpredictable, you cannot have a rule of law, can you? How do you explain why the

22. *Id.*
23. Caminetti v. United States, 242 U.S. 470 (1917).
24. *Id.* at 485-86.
25. Mortensen v. United States, 322 U.S. 369 (1944).
26. *Id.* at 375.
27. *Id.* at 375.
28. *Id.* at 377.
29. *Id.* at 378.
30. Cleveland v. United States, 329 U.S. 14 (1946).
31. *Id.* at 19.
32. *Id.* at 25-26.

justices so disagreed among themselves?"

This last question may lead to the second issue raised by Captain Vere's argument to the members of the court martial: his assertion that "Nature," or morality, and "the law" are distinct, and that judges should be concerned to enforce the law, not morality. As he puts it, Captain Vere's argument invites the response: Suppose the Mutiny Act provided that Billy Budd should be executed because he was a Jew. Would the court still be obliged to condemn him to death? Is there not some point at which a law, even though duly enacted by the organ of government authorized to enact laws, ceases to be "law" to which a judge must be "faithful"? One of the members of the court martial in *Billy Budd* wanted to withdraw, on the ground that he felt unable to enforce a law as "pitiless" as the Mutiny Act (as interpreted by Captain Vere). Was he right? The Discussion Leader may ask whether the judges in Nazi Germany and Vichy France should have refused to enforce the laws providing for the transportation of Jews to slave labor and gas ovens.

A great deal has been written on whether the force of a law, and, hence, a judge's responsibility to uphold it, depends on the extent of its conformance to some conception of justice. At this point, the Discussion Leader may well wish to refer the participants to some of the writings that debate the issue.[33] I suggest, however, that the Discussion Leader be wary, lest the course run off track. The purpose of the course is not to study the philosophy of the law but, as mentioned above, to help non-lawyers understand a judge's responsibilities by asking them to confront the problems a judge encounters. In real life, our judges don't much worry about whether they should refuse to enforce a law because it is so immoral as not to deserve enforcement; the United States is not Nazi Germany. But that is not to say that they do not worry about the relationship between law and morality. It is only that their worry takes a different form. It is not as agonizing as it must have been for some of the German and French judges, but it is agonizing enough.

Judges' personal standards of morality do not vanish when they ascend the bench. Instead, judges know that when they interpret a statute, their responsibility is to determine what the legislature meant. But to what extent is that determination affected by their personal standards? "Consider the Mann Act cases," the Discussion Leader may say, "do you think that the justices' different interpretations of the legislature's word, 'immoral,' was affected by their own view of what was 'immoral'?" "Or," the Discussion Leader may go on to ask, "do you

33. My own selection would be LON L. FULLER, THE MORALITY OF LAW (1964). For provocative and accessible collections of readings summarizing conflicting positions, see ARTHUR & SHAW, *supra* note 18, and ALDISERT, *supra* note 2.

think, upon reflection, that your decision whether to convict or acquit Billy Budd was affected by your personal view of the morality of the death penalty? How can a judge draw the line between giving too much and too little weight to personal morality?"

Finally, the Discussion Leader may ask the participants how open a judge should be in acknowledging tension between public and personal standards. Consider the case of a Florida judge who wrote two letters to his local newspaper and an article for his church newsletter.[34] In these writings, he stated his opposition to capital punishment, but also stated that he would enforce the law providing for capital punishment.[35] The Florida Judicial Qualifications Commission recommended that the judge be disciplined, but the Florida Supreme Court rejected the recommendation, stating that a judge

> in an appropriate forum may express his protest, dissent, and criticism of the present state of the law as long as he does not appear to substitute his concept of what the law ought to be for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge.[36]

The rule of law posits judges following what the law actually is, not what they think the law ought to be. But the law may be unjust; criticism may make it better. "Would you have disciplined the Florida judge?" the Discussion Leader may ask.

Two points are at issue: one, a judge's responsibility to determine what the law is, and then to be faithful to the law; and two, a judge's responsibility not to say or do things that raise doubts about the judge's faithfulness. The Discussion Leader should make this distinction clear. Some Discussion Leaders may prefer to defer discussion of the second issue—which was the issue in the case of the Florida judge—until later, when considering a judge's responsibility to be impartial, both in fact and in appearance. The advantage of discussing the Florida judge early is that doing so emphasizes the tension that may arise within a judge who, according to Captain Vere, "flinches" from recognizing and following the law.

In closing the session, the Discussion Leader may point out that "the law" does not only include statutes, such as the Mutiny Act or Mann Act, but also judge-made law, or common law, to be considered in the next session.

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34. *In re* Gridley, 417 So. 2d 950 (Fla. 1982).
35. *Id.* at 954.
36. *Id.*

D. The Fourth Session: Competence: The Common Law

The phrases "the rule of law" and "faithful to the law" at least imply, if they do not state explicitly, that a judge is to reach out to a body of rules already in existence. "If that isn't what judges do," the Discussion Leader may ask, "but instead they create new rules, are we not being ruled not by law but by judges?" From their discussion up to this point, the participants will have learned that when judges may differ when interpreting a statute. But judges do not differ about their responsibility. They agree that their responsibility is to try to find the legislature's intention—not to create it. But judges do create, and know they create, the common law.

These are deep waters, dangerous to navigate. But here is a suggestion on how to do it.

In 1920, the dean of the Yale Law School asked Benjamin Cardozo, then a judge on the New York Court of Appeals, to deliver the Storrs Lectures. At first, Cardozo declined, but he made an appointment to meet the dean and faculty. There a faculty member asked, "Judge Cardozo, could you not explain to our students the process by which you arrive at the decision of a case, with the sources to which you go for assistance?" "With a bird-like movement of the head, and a mere moment of hesitation, [Cardozo] replied: 'I believe I *could* do that.'"[37] The resulting lectures were published as *The Nature of the Judicial Process*,[38] and in my view, they are still the best description of what judges actually do.

As Professor Kaufman, in his biography of Cardozo, observes: "The proper role of the judge has been the subject of a continuous debate that has renewed itself in every generation because judicial law-making both reflects and affects American institutions, politics, and society."[39] I remain uncertain whether this continuous debate should be retraced as part of the course for non-lawyers that I am urging.[40] An advantage of doing so would be to place into context the current vociferous insistence that judges should determine and enforce the "original intent" of the authors of the Constitution as a resurfacing of the equally vociferous late nineteenth century insistence that judges do not make the law, they find it. Also, some balance might be provided to the assertion by some critical legal scholars that legal doctrine is so "indeterminate" that judges

37. ANDREW L. KAUFMAN, CARDOZO 203-04 (1998) (quoting Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 197-98 (1961)).

38. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

39. KAUFMAN, *supra* note 37, at 200.

40. If the Discussion Leader decides to do this, Professor Kaufman's summary of it would be a good place to start. *Id.*; *see also* CASS, *supra* note 5, at 46-97.

"decide cases any way they wish and then dress up the result in traditional legal language."[41]

I believe, however, that this tempting debate should probably be avoided, except perhaps in a college course, for the materials that would have to be read are too extensive. Put differently, they are too long a way around to the main point, which is to give the participants a sense of the way judges think when faced with a problem not controlled by a statute. Better, I suggest, to push the participants in and let them swim. Asking them to discuss the majority and dissenting opinions in the Pennsylvania Supreme Court's recent decision in *T.B. v. L.R.M.*[42] should do the trick.

In *T.B.*, the court reconsidered the proper definition of the judge-made doctrine of *in loco parentis*. T.B. and L.R.M. were two women who lived together and decided to have a child.[43] They agreed that L.R.M. would be impregnated and T.B. would pick the donor.[44] When the child was born, in August 1993, L.R.M. and T.B. shared the responsibilities of caring for the child and the child referred to T.B. as her "aunt."[45] In May 1996, L.R.M. and T.B. bought a new home.[46] Shortly afterwards, T.B. left to have a relationship with another woman, and, in August 1996, L.R.M and T.B. separated.[47] T.B. visited the child in September 1996, but, thereafter, L.R.M. refused to permit her to visit or telephone the child.[48]

T.B. argued that she should be granted visitation because she had acted as the child's parent for more than three years while she and L.R.M. lived together.[49] L.R.M. argued that T.B. had no standing to sue for visitation.[50] Affirming the Superior Court, the majority of the Pennsylvania Supreme Court held that T.B. did have standing and remanded for a hearing on whether visitation would be in the child's best interests.[51] The way the majority reached this decision nicely illustrates how judges develop the common law.

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41. KAUFMAN, *supra* note 37, at 200. Kaufman notes that this claim is usually not made in such blunt language but "more elliptical[ly]." *Id.* at 636 n.5.

42. T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001). Of course, other cases might be chosen, for example, Judge Cardozo's most famous decision, *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (illustrating judge-made law of when a duty of care arises).

43. *T.B.*, 786 A.2d at 914.

44. *Id.* at 915.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 920.

Until the Court's decision, the doctrine of *in loco parentis* had never been held to give standing to a third party like T.B. In the opinion of the dissenting justices, it should not have been expanded to include her.[52] The dissenting justices stated that "deference" should be given to the "long recognized" and "fundamental" "interest of the natural parent in raising her child without government interference (including being forced to defend that interest in court)."[53] The dissenting justices supported their view by reference to the Domestic Relations Code, which they read as "imply[ing] that child custody disputes are understood as occurring primarily within the framework of biological or legal parenting and the break-up of an attendant marital relationship."[54] They noted that, under Pennsylvania law, T.B. and L.R.M. could not marry, and they cited language in earlier cases to the effect that the doctrine of *in loco parentis* described a relationship in which one assumed the rights and responsibilities of a "lawful parent."[55] They also noted that the only statutory reference to the doctrine of *in loco parentis* employed the doctrine to give standing to a grandparent.[56]

The majority acknowledged the authorities relied upon by the dissent but read them very differently. The majority held that the statutory provisions relied upon by the dissent were irrelevant; the doctrine of *in loco parentis* was "entrenched in our common law "and could not be "repeal[ed] by implication."[57] With regard to the rights of L.R.M. as the child's biological mother, the majority adopted a statement by the Superior Court:

> [w]hile it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent.[58]

On this view, it was of "no legal significance" that T.B. could not marry L.R.M. or adopt the child.[59] Instead, the question was whether she had "assumed a parental status and discharged parental duties."[60] The

52. *Id.* at 921.
53. *Id.*
54. *Id.*
55. *Id.* at 922.
56. *Id.* at 921.
57. *Id.* at 918.
58. *Id.* at 917 (quoting J.A.L. v. E.P.H., 682 A.2d 1314, 1319-20 (Pa. Super. Ct. 1996)).
59. *Id.* at 918.
60. *Id.* at 918-19.

record was clear that she had. Furthermore, it was clear that she had done so with L.R.M.'s acquiescence and encouragement. Accordingly, the case was "not a case where the third party assumed the parental status against the wishes of a biological parent."[61]

After discussing *T.B.*, the Discussion Leader might state the four methods Cardozo identified as those he used when he decided a case: one, logic—reasoning from cases and principles of law already established; two, "the line of historical development . . . [and] the method of evolution"; three, "the customs of the community . . . [and] the method of tradition"; and, four, "the lines of justice, morals and social welfare."[62] "Which of these methods," the Discussion Leader might ask, "did the justices in *T.B. v. L.R.M.* use?"

Like Cardozo, the majority justices in *T.B.* started with the case law. The participants should be asked to criticize the majority's analysis. Among the cases relied upon by the majority was *Bupp v. Bupp*,[63] which rejected a biological mother's contention that her boyfriend had no standing to invoke the doctrine of *in loco parentis*.[64] Granted, this case represents an extension of the doctrine beyond family members, but does it support an extension to include a member of a same sex couple? The majority noted that to refuse T.B. standing "could potentially affect the rights of stepparents, aunts, uncles or other family members who have raised children."[65] But are such "family members" analogous to T.B.? As noted above, the dissenting justices relied principally on implications they found in certain statutes. Reminding the participants of their discussion of the Mann Act during the third session, the Discussion Leader should ask whether the implications were as clear as the dissent said they were.

Neither the majority nor the dissenting justices discussed historical development. Why not? The majority might have assembled considerable evidence of change in the notion of what constitutes a "family," and whether it is still presumed that it is in a child's best interests to be in the custody of the biological mother.[66] Would such evidence have strengthened the majority's reading of the cases?

The dissenting justices' argument that various statutes reflected a

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61. *Id.* at 919.

62. CARDOZO, *supra* note 38, at 30-31.

63. *T.B.*, 786 A.2d at 918 n.7 (citing Bupp v. Bupp 718 A.2d. 1278 (Pa. Super. Ct. 1998)).

64. *Id.*

65. *Id.* at 917.

66. For a review of changes in domestic relations law in response to changes in the conception of a "family," see Siobhan Morrissey, *The New Neighbors: Domestic Relations Law Struggles To Catch Up with Changes in Family Life*, A.B.A. J., Mar. 2002, at 37.

"legislative policy" that custody disputes should be resolved in "the context of legally recognized familial relationships,"[67] appears to be an invocation of what Cardozo might have described as "customs of the community" or "tradition." Thus the dissenting justices described "the statute's focus" as "the long-recognized interest of the natural parent in raising her child without governmental interference."[68] But surely community beliefs and attitudes have changed as regards gays and lesbians.[69] Why did the majority justices not point that out? Did they wish to avoid seeming to approve of the change? Did they think comment unnecessary? Would their opinion have been more forthright if they had taken the issue of attitude head-on? More controversial? Might the dissenting justices have acknowledged change but argued that a court should not encourage it, but that it should be reversed? When feeling its way, is a court wise to say as little as possible? Does that make evolution of the law easier or harder?

The opinions are mostly silent on considerations of "justice, morals and social welfare." The dissenting justices acknowledged that T.B. had "established close relationships" with the child and was "sincere[ly] interested in [the child's] well being."[70] Yet, the dissenting justices denominated these "important concerns" as simply "competing considerations" that the legislature had decided were insufficient to confer standing on T.B. to seek custody.[71] The majority justices probably considered their emphasis that the law should serve the child's best interests as a statement of what was in the social welfare. Although the majority justices did not specifically discuss morals, they did emphasize that L.R.M., having "voluntarily created and actively fostered" the relationship between T.B. and the child, should not now be able to exclude T.B. "simply because after the parties' separation she regretted having done so."[72] This reasoning sounds like reasoning from consideration of justice and fairness.

Having worked through the majority and dissenting opinions[73] in *T.B.* in some such manner, the Discussion Leader may wish to end by

67. *T.B.*, 786 A.2d at 923.

68. *Id.* at 921.

69. *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (relying almost entirely on tradition to uphold a Georgia statute that made sodomy a crime), *with* Powell v. State, 510 S.E.2d 18 (Ga. 1998) (invalidating that same Georgia statute and holding that the Georgia Constitution provided protection for sexual acts that occurred without force in the private home between persons legally capable to consent to the acts).

70. *T.B.*, 786 A.2d at 922.

71. *Id.* at 922-23.

72. *Id.* at 919 (quoting J.A.L. v. E.P.H., 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996)).

73. There was also a concurring opinion by Justice Cappy. *Id.* at 920 (emphasizing that the court had "never considered" the ability to marry the biological parent or to adopt the child determinative of the right to seek custody).

taking on the challenge of many critics of the courts. Did the majority justices impose personal values not shared by "ordinary citizens" and "disrespectful of tradition and traditionally important institutions"?[74] Do the majority and dissenting opinions taken together show that judges can "decide cases any way they wish"?[75] Or the Discussion Leader may prefer simply to state these question as the subject of the next session.

E. The Fifth Session: Constraints on Judicial Decision Making

From their examination of the Mann Act cases and *T.B.*, the participants will be familiar to some degree with the constraints that judges feel when they decide a case. But further examination is warranted about two particular constraints: one, the doctrine of *stare decisis*, and, two, the obligation to explain the basis of a decision.

The strength of the doctrine of *stare decisis* as a constraint on judicial decision making is dramatically illustrated by the opinion in *Planned Parenthood v. Casey*.[76] In this case, Justices O'Connor, Kennedy and Souter refused to overrule a decision that they clearly did not agree with: whether there is a constitutional right to an abortion. This issue is one of the most divisive in the United States. I suggest, however, that it should not be avoided because there can be no understanding of a judge's responsibilities without recognizing that in our society, the most divisive issues regularly assume the form of legal claims that the courts must decide. "I recognize, and respect, your personal opinion about abortion," the Discussion Leader may say, "but what do you think of the three justices' conclusion that overruling *Roe v. Wade*[77] 'would subvert the Court's legitimacy?'[78] Do you agree, at least, that that was a legitimate concern?"

While *Planned Parenthood* illustrates the strength of the doctrine of stare decisis, it also illustrates its limits. In his dissenting opinion, Justice Scalia announced that "*Roe* was plainly wrong,"[79] and criticized the joint opinion as a "lengthy lecture,"[80] "not reasoned judgment"[81] but "emptiness."[82] Justice Scalia's statements illustrate judicial arrogance, the precise sin the doctrine of *stare decisis* is designed to curb.

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74. CASS, *supra* note 5, at 110 (referring to criticisms by Robert Bork, Thomas Sewell, and Richard Epstein, among others).
75. *See supra* note 33.
76. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
77. Roe v. Wade, 410 U.S. 113 (1973).
78. *Planned Parenthood*, 505 U.S. at 867.
79. *Id.* at 982-83.
80. *Id.* at 997.
81. *Id.* at 982.
82. *Id.* at 983.

Perhaps the greatest constraint on a judge's ability to manipulate legal principles to reach whatever result he or she want—a constraint even stronger than *stare decisis*—is the obligation to explain the basis of a decision.[83] This constraint is illustrated by Hollis Alpert's savage short story, "The Home of a Stranger."[84] An American army officer with General Patton's army examines the site of a camp where Jews were exterminated. The army's advance interrupted the camp's operations; the dead are lying where they were machine gunned and trenches are filled with bodies covered only with lime. When the officer returns to the German woman's home where he is billeted, the officer and his aide proceed to smash her china, stomp on her plants, rip up her sheets and blankets, and otherwise vandalize the home. They end by plugging the kitchen sink and turning on its faucets. As they leave, the aide says, "That woman isn't going to understand. She won't know why we did it." "All the better," the officer replies. "No," the aide says, "we should have left her a note."[85]

The "judges" in this story are the officer and his aide. "Should they have left a note?" the Discussion Leader may ask. "What might they have said? Was she responsible for the extermination camp? Had she known about it or in some way supported it? If the officer and his aide had felt obliged to explain why they were punishing her, might they have acted differently? Have you ever found yourself changing your mind when you tried to explain your decision?"

Just as the officer and his aide might not have done what they did if they had felt obliged to explain their actions before they did them, so a judge may end by writing an opinion coming out a different way than his initial "hunch"—and most judges will admit that they do often "hunch" a case. A legal opinion is an art form, as much as a sonnet or sonata. Every opinion must be supported factually, by citing to the record, and legally, by citing case law, statutes or treatises. Every citation must withstand scrutiny, and to withstand scrutiny, standards must be followed. For example, the evidence must be read in the light most favorable to the verdict winner.[86] If the jury accepted the plaintiff's version of the facts as true, a judge's citation will not withstand scrutiny if it relies on the defendant's version of the facts. Similiarly, to

83. If I may be forgiven for citing myself on the importance of a written opinion, see *Commonwealth v. Riggins*, 332 A.2d 521, 529 n.6 (1974) (Spaeth, J., dissenting).

84. Hollis Alpert, *The Home of a Stranger*, *in* THE NEW YORKER, June 10, 1950, at 26-29.

85. *Id.*

86. *See, e.g.*, Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g), 771 A.2d 1246 (Pa. 2001) (holding that on appeal the court must read the evidence in a light most favorable to the prevailing party below).

withstand scrutiny, citation to a case must be only to support a proposition for which the case stands.[87] These formal requirements do not preclude disagreement, as the participants will have learned from their examination of the Mann Act cases and *T.B.* But they do constrain arbitrariness, and they have changed many a judge's mind.

This session will conclude the examination of a judge's responsibility to be competent. By now, the participants will have learned about, and will themselves have tried to use, some of a judge's tools. Thus, they will have more than a glimmering of an idea of how difficult it may be to determine what the "law" is and how to be "faithful" to it.

F. The Sixth Session: Impartiality

This session opens with an excerpt from the film, "Rambling Rose."[88] The story takes place in a small town in Georgia, in the 1930's. Rose was a sweet, young homeless woman when the Hilliers, a well-to-do family, took her in. Since then, Rose has taken care of the Hilliers' three children. The Hilliers and their children have become very fond of her. Rose is also pretty and sexually active, and the Hilliers have decided she must leave. Meanwhile, however, Rose has become sick and the Hilliers have asked their doctor to examine her.

In the excerpt from the film, Mr. and Mrs. Hillier and their doctor are discussing Rose's sickness. Addressing Mr. Hillier, the doctor reports that he has diagnosed Rose's condition as an ovarian cyst and he recommends that she undergo a complete hysterectomy. He says that ordinarily he would not make such a recommendation because the procedure will make Rose less sexually attractive. He explains, however, that the operation will reduce Rose's sexual activity, which he attributes to emotional dysfunction. Nothing is said explicitly, but at least some viewers will have a queasy feeling that the doctor and Mr. Hillier have themselves been sexually attracted to Rose and may even have been rebuffed by her.

When Mr. Hillier accepts the doctor's recommendation, Mrs. Hillier becomes outraged. She accuses the two men of conspiring against Rose. She then turns on her husband, telling him that she had thought of him as "a good man" and cannot believe that he would agree that Rose should suffer such a terrible operation. Mr. Hillier, visibly shaken, says that the doctor's recommendation seemed "right" and in Rose's best interests, but

87. *See* Weinberg v. Sun Co., Inc., 777 A.2d 442 (Pa. 2001) (reversing a Superior Court decision that cited a case defining attorney general's burden of proof as though it defined a private plaintiff's).

88. RAMBLING ROSE (Carolco Pictures 1991).

he soon admits that he had not given the matter enough thought. In the end he agrees with his wife that neither Rose nor any other young woman should suffer such an operation. "You were right," he tells her, "and I was wrong."

The Discussion Leader may use this scene to develop several points. One point is that the doctor and the Hilliers were engaged in the same sort of inquiry as were the judges in *T.M.*: what was in Rose's best interests? Two, a judge must listen to all the arguments before deciding (who was the judge? Mr. Hillier?). Three, each party should be represented (who represented Rose? Mrs. Hillier?). Four, if the parties and public are to have confidence in the court's decision, it is important for the court to include judges of different backgrounds and perspectives (Mrs. Hillier's prespective was very different from the men's prespective). Finally, as in "The Home of a Stranger," when one is trying to explain or defend one's position, one's explanation may lead to a change of mind (that happened to Mr. Hillier). But the main point to be developed is that the decision of a conscientious, technically competent judge may go askew because of unconscious bias.

The participants may argue that the doctor and Mr. Hillier were *con*sciously biased, even perhaps, that they were taking revenge on Rose because she had rebuffed them. The Discussion Leader should ask them, however, to take the doctor and Mr. Hillier at their word; assume that, however mistaken, the doctor was sincere in his belief that his recommendation was in Rose's best interests and that Mr. Hillier believed that the doctor was "right." "Do you think," the Discussion Leader may ask, "that you have any unconscious biases that may affect important decisions you must make? How do you guard against them? How should a judge?"

Such questions will lead easily to a discussion of Susan Glaspell's short story, "A Jury of Her Peers."[89] A sherrif and county attorney investigate the death of a farmer, who has been strangled. The farmer's wife is arrested and the two men, with their wives along, go to inspect the farmhouse. In the course of their investigation, the men make many condescending remarks about women's abilities to the general effect that women are not good for much beyond managing a home. In the end, the men learn nothing from their inspection of the house. The two women, however, not only deduce why the farmer's wife killed her husband; they discover, and agree to hide, the evidence that would convict her.

"So," the Discussion Leader may say, "the men were blind, weren't they? And they didn't know it. How can judges be sure they're not

89. Susan Glaspell, *A Jury of Her Peers* (1917), *reprinted in* SOCIAL INSIGHT THROUGH SHORT STORIES 62 (Josephine Strode ed., 1946).

blind, without knowing it? What perhaps unconscious bias other than gender should a judge be alert to? Racial? Ethnic?"

"A Jury of Her Peers" was written in 1917, when women couldn't serve on a jury—much less be lawyers. The story, thus, is a stinging reminder of how beliefs that are unquestioned and widely held may prove grievously wrong. Is this not another way of saying that the rule of law, or perhaps the judges who declare the law, may be wrong, not ill-willed but wrong nevertheless?[90] With this somber comment, the discussion may end, to resume for a discussion even more somber at the next session.

G. The Seventh Session: Impartiality

Many of the participants will be familiar with *The Merchant of Venice (The Merchant)*. The Discussion Leader should, however, have a copy of the play, to be able to quote from it. Technically, *The Merchant* is a comedy because it has a happy ending: Bassanio wins Portia. But in fact, very little light illuminates its darkness. For this course, the play may be used to explore two points: actual bias in the law (as distinguished from the unconscious bias seen in "Rambling Rose" and "A Jury of Her Peers"), and the relationship between justice and mercy.

Clearly, Shylock is a sort of monster. His hatred of Antonio is understandable and in some sense, justified: " . . . many a time and oft/ In the Rialto you have rated me/ About my moneys and my usances/ . . . You call me misbeliever, cut throat dog/ and spit upon my Jewish gabardine/ . . . You spurned me . . . ."[91] His hatred, however, hardly excuses his determination to cut off Antonio's flesh and let him bleed to death.[92] But judges must quite often deal with people who do, or try to do, terrible things. How should judges do it?

What I am about to say will provoke disagreement; discussion of *The Merchant* always does. But, in my view, Portia shows exactly how judges should not act. She is as cruel as Shylock. Judge Posner has said that *The Merchant* "takes the side of equity against law in law's narrow

90. "A Jury of Her Peers" has provoked extensive comment. *See, e.g.*, Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U. L. REV. 557 (1990). If the course includes extra assigned reading, as it well might if given for high school seniors or college undergraduates, the Discussion Leader might wish to include some feminist jurisprudence. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988). On whether the presence of women judges makes a difference, see Elaine Martin, *Women on the Bench: A Different Voice?*, 77 JUDICATURE 126 (1993); Jilda M. Oliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 8 JUDICATURE 232 (1995).

91. *See* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3, ll. 104-27 (William Lyon Phelps ed., Yale University Press 1923).

92. *Id.* act 4, sc. 1, ll. 256-60.

sense of a set of mechanically, unfairly, unimaginatively enforced rules."[93] I find this reading strange. Portia does, famously, urge Shylock to "be merciful,"[94] going on to describe mercy "as the gentle rain from heaven . . . an attribute to God himself."[95] But when Shylock demands "the law,"[96] she hardly gives him "equity."

First, Portia pretends to decide in Shylock's favor, declaring Antonio's bond "forfeit"[97] and entering judgment in Shylock's favor. "A pound of that same merchant's flesh is thine./ The court awards it, and the law doth give it."[98] Then, as Shylock is about to execute on his judgment, Portia intervenes. "Tarry a little,"[99] she says, and proceeds to construe the words of the bond allowing "a pound of flesh" to mean "[taking a pound] without "shed[ing] [o]ne drop of Christian blood,"[100] and she refuses to permit Bassanio to pay Shylock the principal. When Shylock goes to leave the court, saying that Antonio can keep the principal, Portia informs Shylock that half his property is forfeit to Antonio and half to the state, and that his life is "in the mercy/of the Duke."[101] The Duke then declares that he will spare Shylock's life, on condition that he becomes a Christian and that he bequeath all he dies possessed of to his daughter, Jessica, and Lorenzo, a Christian she has run off with.[102] When Portia asks, "Art thou contented, Jew? What dost thou say?"[103] Shylock replies, "I am content,"[104] and leaves, promising to sign whatever papers are necessary. This is equity?

Portia's construction of the terms of Antonio's bond should remind the participants of their discussion of how to construe the Mutiny Act in *Billy Budd*, and the word "immoral" in the Mann Act cases. "Do you think," the Discussion Leader may ask, "that permission to cut a 'pound of flesh' necessarily implies permission to shed blood?"

But there is more to point out than Portia's questionable construction of the bond. Portia based her final judgment, forfeiting Shylock's property and putting his life at the mercy of the Duke, on "the laws of Venice."[105] That law stated that if "an alien"—and Shylock, as a

93. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 97-98 (1988).
94. SHAKESPEARE, *supra* note 91, act 4, sc. 1, l. 180.
95. *Id.* act 4, sc. 1, ll. 183-93.
96. *Id.* act 4, sc. 1, l. 204.
97. *Id.* act 4, sc. 1, l. 228.
98. *Id.* act 4, sc. 1, ll. 297-98.
99. *Id.* act 4, sc. 1, l. 303.
100. *Id.* act 4, sc. 1, ll. 305-08.
101. *Id.* act 4, sc. 1, ll. 353-54.
102. *Id.* act 4, sc. 1, ll. 378-90.
103. *Id.* act 4, sc. 1, l. 391.
104. *Id.* act 4, sc. 1, l. 392.
105. *Id.* act 4, sc. 1, l. 346.

Jew in Venice, was an alien—directly or indirectly sought the life of any citizen, that citizen could seize half the alien's property, the state the other half, and the Duke could condemn him to death.[106] Again harking back to *Billy Budd*, the Discussion Leader may ask, "It was clear that Shylock had sought Antonio's life, wasn't it? But was the law cited by Portia a just law to be enforced? Suppose a citizen sought the life of an alien. Was that made criminal?"

And finally, the Discussion Leader may press the participants to say what judgment they would have entered and, accepting the obligation to explain it, to say why. "Might Portia have declared Antonio's bond invalid on the ground that no one should be permitted to agree to be killed, anymore than to be a slave? Would you have let Shylock accept Bassanio's offer to pay the principal? Or would you have decided to let Shylock recover nothing?"

In short, *The Merchant* can serve as a reprise of all of a judge's responsibilities discussed so far, and with a sinister emphasis. For Shylock's trial illustrates how oppressive the law can be in the hands of a judge as skillful and prejudiced as Portia.

The Merchant also brings something new to the discussion: what is the relationship between justice and mercy? Portia's answer is famous. When Antonio confesses his bond, she says, "Then must the Jew be merciful."[107] Mercy, she explains, is "above" the "throned monarch"; it is "an attribute to God himself"; it "seasons justice."[108] Mercy can "mitigate" justice, but only if Shylock chooses to be merciful. If he insists upon "justice," Portia says, "this strict court of Venice/Must needs give sentence 'gainst the merchant there."[109]

There are those who agree with Portia that it is no part of a judge's responsibilities to be merciful:

> If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice .... Thus to be merciful is perhaps to be unjust..... We (society) hire this individual [the judge] to enforce the rule of law under which we live. We think of this as "doing justice," and the doing of this is surely his sworn obligation. What business does he have, then, ignoring his obligations to justice while he pursues some private, idiosyncratic, and not publicly accountable virtue of love or compassion. [110]

Plainly, Captain Vere would agree. In his view, the Mutiny Act had

106. *Id.* act 4, sc. 1, ll. 346-55.
107. *Id.* act 4, sc. 1, l. 180.
108. *Id.* act 4, sc. 1, ll. 187-95.
109. *Id.* act 4, sc. 1, ll. 201-03.
110. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 167-68 (1988).

to be read as a command to order Billy Budd's execution—as an express prohibition of showing mercy.

A French philosopher, seeking to rank mercy with the other great virtues, has distinguished it from clemency, "which merely renounces punishment," and from compassion, "which sympathizes only with suffering."[111] Mercy, he argues, "requires that we understand something"[112]—for example, that the other person is wicked, or misguided, or ruled by passion—and then that we forgive, which means "to accept."[113] Mercy is not the same as love "but [it] stands in for love when love is not possible."[114] It "triumphs over rancor, over justified hatred ... over resentment, over the desire for revenge or punishment."[115] It does not season or mitigate justice, as Portia argued, it "goes beyond justice."[116]

Canon 3B(8) of the ABA Model Code of Judicial Conduct requires that "[a] judge shall dispose of all judicial matters . . .fairly."[117] Interestingly, this requirement is not included in the current Pennsylvania Code of Judicial Conduct, which became effective on January 1, 1974, and is modeled after the 1972 version of the ABA Model Code. "Why," the Discussion Leader may ask, "is that? What does 'fairly' mean?"

In some instances, notably under sentencing guidelines, a judge's discretion is so limited as to reach Captain Vere's result: mercy is excluded. But many situations arise in which, with or without an explicit command in the Code of Judicial Conduct, a judge must exercise discretion or must decide what is "fair." Should a continuance be granted because the mother of a lawyer to one of the parties has died? Should a snap judgment be opened? Should proof of a prior conviction not be allowed? "Do you think judges should be tough, hard-boiled?" the Discussion Leader may ask. "Or merciful? What is the difference between being 'merciful' and being 'fair'? Suppose you were in a court as a victim or as a defendant." Portia concludes:

> That in the course of justice none of us should see salvation. We do pray for mercy, and that same prayer doth teach us all to render the deeds of mercy.[118]

"Can you improve on this conclusion? Are judges exempt from

111. ANDRE CONTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES 119 (2001).
112. *Id.* at 121.
113. *Id.* at 122.
114. *Id.* at 130.
115. *Id.* at 119.
116. *Id.*
117. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(8).
118. SHAKESPEARE, *supra* note 91, act 4, sc.1, ll. 197-200.

Portia's injunction?"

H. The Eighth Session: Independence

Most of the participants will likely have read *To Kill A Mockingbird*[119] *(Mockingbird)* or have seen the movie in which Gregory Peck plays the heroic lawyer, Atticus Finch.[120] But for the course we are considering, let us shift the focus from Atticus Finch to the judge: what does *Mockingbird* tell us about a judge's responsibilities?

The story takes place in Georgia, in 1935. One must be careful not to criticize the judge's conduct by standards not applicable at the time, which was before the Supreme Court's decision in *Gideon v. Wainwright*[121] and the segregation cases. The judge was under no obligation to appoint a lawyer to defend Tom Robinson, much less to appoint Finch, the best lawyer in town; and the segregated seating in the courthouse and the segregated jury—all-white male—were not unlawful. And yet, it is very painful to watch the trial. Robinson never had a chance. In one sense, Atticus Finch's heroism is that he knew Robinson never had a chance but he fought for his client as hard as he could against overwhelming odds.

Where does this leave us? It wouldn't be fair to fault Judge Taylor for not transforming the community into a place in which a black man was regarded as equal in the eyes of the law to a white man. With that said, the trial still was not fair. Robinson knew it wasn't, and so did the black community. Did Judge Taylor know it wasn't? If not, why not? If he did know, why didn't he *do* something, like ordering Mayella Ewell to answer Atticus Finch's questions, or directing an acquittal on the ground that the evidence was as a matter of law insufficient to permit a finding of guilt beyond a reasonable, or unprejudiced, doubt?

We are all children of our time, which means that we all have blind spots, emphatically including our judges, as *Dred Scott*[122] and *Plessy v. Ferguson*[123] tragically prove, not to mention other decisions blind to the legitimacy of legislation that would enable people to exercise their individual rights.[124] The question raised by *Mockingbird* is: what do we

119. HARPER LEE, TO KILL A MOCKINGBIRD (Warner Books, Inc. 1982) (1960).

120. A few do not regard him as heroic. *See* Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994). Professor Freedman's essay is one of a collection of essays submitted at a symposium on *To Kill A Mockingbird*.

121. Gideon v. Wainwright, 372 U.S. 335 (1963).

122. Scott v. Sanford, 60 U.S. 393 (1857).

123. Plessy v. Ferguson, 163 U.S. 537 (1896).

124. The paradigmatic case, of course, is *Lochner v. New York*, 198 U.S. 45 (1905) (holding a New York law regulating bakers' hours invalid as an illegal interference with the bakers' "rights . . . to make contracts regarding [their] labor upon such terms as they may think best").

mean when we speak of an "independent judiciary"? We mean two things, do we not? First, we mean a judiciary with an independent vision of what the law requires—a vision clearer than that of the prosecutor, who addressed Robinson as "boy," and of the jurors who convicted him of raping a white girl because he was black. And, second, we mean a judiciary with the courage to do what the law requires.

We shall never know whether Judge Taylor had such vision and courage. In the end, Robinson didn't trust the legal system—and who can blame him? He tried to escape and was killed. But some judges have had the vision and courage that the ideal of judicial independence demands:

> On June 22, 1933, two months after he had sentenced Haywood Patterson [one of the Scottsboro boys] to death and postponed the remaining trials, Judge James E. Horton convened court in his home town of Athens, Alabama, to hear the defense's motions for a new trial.[125]

Instead of hearing argument, Judge Horton read a seventeen-page decision, concluding:

> The testimony of the prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is contradicted by other evidence, and in addition thereto the evidence greatly preponderates in favor of the defendant. It therefore becomes the duty of the Court under the law to grant the motion in the case.[126]

When he read his decision, Judge Horton was in the fifth year of his second six-year term.[127] "In the primary, in May 1934, . . . he was decisively defeated."[128] We say we want an independent judiciary, but do we? This question leads to the final session of the course.

I. The Ninth Session: Is the Rule of Law Democratic?

The most frequent and heated criticism of federal judges, and the most passionate defense of electing state judges, is that judicial review is "undemocratic" and that judges should be "accountable to the people." One cannot understand a judge's responsibilities, or decide how we should select our judges, unless one is able to respond to this claim of accountability.

In examining how to respond, the Discussion Leader should start, I

125. JAMES GOODMAN, STORIES OF SCOTTSBORO 172 (1994).
126. *Id.* at 181-82.
127. *Id.* at 174.
128. *Id.* at 207.

suggest, by noting the extent to which the claim that judges should be "accountable" is exaggerated. Discussion, and the course, may then conclude by returning to the quotation from *Marbury v. Madison*, with which the course started, and developing the point that if we are to enjoy "a government of laws, and not of men,"[129] sometimes judicial review *must* be "undemocratic."

Quite often a complaint that a judicial decision is "undemocratic," or "usurps the people's will," has nothing to do with democracy. Often it is simply a misdirected criticism of the judge's technique, or a failure to understand the constraints on the judge. As discussion of *Billy Budd* and the Mann Act cases should have shown, when judges construe a statute they are not acting undemocratically. To the contrary, they are trying to determine what the people, speaking through their elected representatives, want. When judges expand the common law, as the majority of the court did in *T.B.*, one of the factors they consider is what Cardozo referred to as "the customs of the community . . . the method of tradition . . . morals and social welfare."

Sometimes the court's appeal to democratic values is overt, as in the redistricting cases. In *Wesberry v. Sanders*,[130] the Court held that "the command of Art. 1, §2 [of the Constitution], that Representatives be chosen 'by the People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[131] In *Reynolds v. Sims*,[132] the Court ordered redistricting of state legislative districts on the ground that

> [the] right of a citizen to equal representation and to have his vote weighed equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other [house].[133]

The court's appeal to democratic values is overt in other areas of the law as well. In its struggle to define prohibitable obscenity, the Court has referenced to "contemporary community standards."[134] In considering whether the death penalty may be cruel and unusual punishment, the Court has referred to "consensus."[135]

There are other cases where the courts, far from being

129. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
130. Wesberry v. Sanders, 376 U.S. 1 (1964).
131. *Id.* at 7-8.
132. Reynolds v. Sims, 377 U.S. 533 (1964).
133. *Id.* at 576.
134. Roth v. United States, 354 U.S. 476 (1957).
135. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2246 (2002).

undemocratic, have sought to enhance democracy. Perhaps the most striking and influential of these cases is *New York Times v. Sullivan*.[136] There, the Court held that a state may not constitutionally provide that a libeled public official may recover damages unless the defendant proves that the stated facts were "true in all their particulars."[137] "[D]ebate on public issues," the Court said, "should be uninhibited, robust, and wide-open."[138] In such debate, some erroneous statements are inevitable and some allowance must be made. Accordingly, the Court held that a public official may not recover damages for a defamatory statement "relative to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[139]

But when all this has been said, the fact remains that judicial review sometimes is, and should be, undemocratic. If Judge Taylor had granted Tom Robinson a new trial, as Judge Horton granted a new trial in the *Scottsboro Cases*, the result would without doubt have been against the will of almost everyone in the community. "How is it," the Discussion Leader may ask, "that in a democracy we permit such a result? Do a judge's responsibilities require that sometimes the judge must be undemocratic? How does a judge decide when that is?"

The discussion should then turn to the United States Constitution,[140] starting with the preamble. The government created by the Constitution is *our* government: "We the People of the United States [have] ordain[ed] and establish[ed] it."[141] But, as Madison observed, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[142] There are three ways in which the Constitution tries to solve this difficulty.

First, the Constitution gives the government limited powers. The Framers judged these powers to be enough, but no more than enough, to "enable the government to control the governed." At this point, the

136. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

137. *Id.* at 267.

138. *Id.* at 270.

139. *Id.* at 279-280. Of course, many other cases might be chosen by the Discussion Leader. *E.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (justifying judicial intervention where legislation "restricts . . . political processes," in its famous footnote 4). But remember, this is a course for non-lawyers.

140. A pocket-sized copy of the Constitution has been printed by the National Constitution Center written for non-lawyers by Professors Akhil Amar and Douglas Kmiec. It contains an excellent introduction, a copy of the Declaration of Independence, a list of important dates, and a useful index.

141. U.S. CONST. pmbl.

142. THE FEDERALIST NO. 51 (James Madison).

Discussion Leader should briefly discuss federalism somewhat as follows (the discussion will have to be expanded later). To enable the people to speak as a Nation, the Constitution gives the federal government powers at the expense of the states. For example, the federal government has the power to "regulate Commerce with foreign Nations, and among the several States"[143] to "coin money,"[144] and to "declare War."[145] But many powers not given to the federal government remain with the state governments,[146] and each state may exercise its powers differently. For example, one state government may declare conduct a crime that another state government permits, or one state government may impose taxes that another does not.[147] Thus, each of us is subject to two governments: federal and state.

Second, to inhibit hasty or arbitrary exercise of the limited powers that are given to the federal government, the Constitution divides the federal government into three parts: the legislative,[148] the executive,[149] and the judicial.[150] Furthermore, each part may check the other. For example, the executive may veto action by the legislature,[151] or the legislature may refuse to give approval required before executive action may become effective.[152] At this point, the Discussion Leader may ask the participants to go through the Constitution and identify as many such checks and balances as they can.

Third, the people, deteremined not to be oppressed by their new federal government, specified specific rights that are not to be violated. Some of these rights are found in the Constitution itself, as, for example the prohibition of passage of an *ex post facto* law.[153] Other are found in the supplemental Bill of Rights,[154] forbidding the government to "make [any] law" denying certain treasured individual rights, as, for example, "the freedom of speech,"[155] "the right . . . against unreasonable searches and seizures,"[156] and "the right [in all criminal prosecutions] to a speedy

143. U.S. CONST. art. I, § 8.
144. *Id.*
145. *Id.*
146. U.S. CONST. amend. X.
147. To illustrate this, the Discussion Leader should be able to refer to the constitution of the state in which the course is being presented.
148. U.S. CONST. art. I.
149. U.S. CONST. art. II
150. U.S. CONST. art. III.
151. U.S. CONST. art. I, § 7.
152. U.S. CONST. art. II, § 2 (providing for Senate approval of, *inter alia*, treaties, ambassadors, judges).
153. U.S. CONST. art. I, § 9.
154. U.S. CONST. amends. I-X.
155. U.S. CONST. amend. I.
156. U.S. CONST. amend IV.

and public trial, by an impartial jury."[157] Again, the Discussion Leader may ask the participants to identify the rights promised them. The Discussion Leader should also refer the participants to their state constitution, noting that it also promises rights, which may differ from those promised by the federal constitution.

Upon completing this exercise, the participants will be ready to turn to *Marbury v. Madison*.[158] I should give them a copy of *Marbury*, for it is one of the foundation documents of our nation (and, besides, I admire the Chief Justices's haughty style).[159] The Discussion Leader should explain the background disagreement between the Federalists and Republicans to indicate what was at stake: whose conception of how strong the federal government should be should prevail.[160] The Discussion Leader should also explain some technical matters, in particular, what is a writ of mandamus and what is the difference between original and appellate jurisdiction. I know from my own experience that non-lawyer groups are perfectly capable of accurately grasping these technicalities.

Marbury may be summarized as follows. The Constitution gave the Court appellate power. Appellate power does not include the power to issue a writ of mandamus. Nevertheless, Congress passed an act giving the Court the power to issue a writ of mandamus. The Court held that when the legislature passes an act that is thus "repugnant" to the Constitution, the Court must hold the act invalid and as of no effect.[161]

The Discussion Leader should emphasize the Court's holding. It must not be fudged. "Isn't it clear," the Discussion Leader may ask, "that in *Marbury*, the Court acted undemocratically by declaring an act of the people's duly elected representatives invalid? But, wasn't that the

157. U.S. CONST., amend VI.

158. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

159. For example: "The question whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." *Id.* at 176. Indeed!

160. *See, e.g.*, JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 296-326 (1996); *see also* WILLIAM SAFIRE, THE SCANDALMONGER (2000). Smith's exposition is marvelous and perfectly accessible to a non-lawyer, and might well be assigned in an undergraduate course.

161. For a contrary view, see *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825) (Gibson, J., dissenting) (rejecting Chief Justice Marshall's reasoning and arguing to deny the Pennsylvania Supreme Court authority to hold unconstitutional an act of the state legislature). *Compare* LEARNED HAND, THE BILL OF RIGHTS 1-30 (1958) (finding "nothing in The United States Constitution that gave courts any authority to review the decisions of Congress"), *with* HERBERT WECHSLER, TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW, IN PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 4-10 (1961) (finding no escape from the obligation of review). I do not consider, however, that intellectual honesty requires discussion of these, or comparable materials. Agree or not, *Marbury* is settled law.

Court's unavoidable responsibility? If you disagree, then how do you answer the Chief Justice's argument that not to declare the act invalid would make the legislature omnipotent? Suppose Congress, by overwhelming vote, enacted a law that atheists couldn't vote, or that persons who criticized the conduct of a war committed a crime. Could a judge avoid declaring both laws invalid?"

Having demonstrated the federal courts' power of judicial review, the Discussion Leader should return to federalism and the state courts. After all, a primary purpose of the course is to consider the responsibilities of state judges, not only federal. To this end, the syllabus suggests that the Discussion Leader should review *Cohens v. Virginia*,[162] *Brown v. Board of Education*,[163] and *Duncan v. Louisiana*.[164]

In *Cohens*, the issue was whether the United States Supreme Court had authority to review the decision of a state court that applied state law in a state criminal trial. Philip and Mendes Cohen had sold tickets for a national lottery authorized by Congress. They were convicted and fined for violating a Virginia statute prohibiting the sale of out-of-state lottery tickets. The issue was whether Virginia's statute was inconsistent with the act of Congress authorizing the national lottery. The Virginia courts had held that it was not.

On appeal to the United States Supreme Court, Virginia argued that the Court had no jurisdiction to hear the Cohens' appeal. This argument was a high-water mark of the compact theory of states rights—the theory, as Jefferson put it, that the federal and state governments are "equally supreme," "as independent as different nations."[165] On this view, the Supreme Court of Virginia was as competent as the Supreme Court of the United States to say whether a state law violated the Constitution. Chief Justice Marshall's rejection of Virginia's argument remains one of his most eloquent statements:

> [T]he American people are one .... The people have declared, that in the exercise of all powers given [the federal government by the Constitution] ... it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as

162. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); *see also* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (holding the New Hampshire legislature's modification of Dartmouth's charter a violation of the contract clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding the Maryland legislature's imposition of a tax on the Second Bank of the United States a violation of the necessary and proper clause and rejecting the claim that the Constitution recognizes the states as sovereigns equal to the federal government).

163. Brown v. Bd. Of Educ., 347 U.S. 483 (1954).

164. Duncan v. Louisiana, 391 U.S. 145 (1968).

165. *See* SMITH, *supra* note 160, at 466.

> they are repugnant to the Constitution and laws of the United States, are absolutely void. [166]

Thus, after *Cohens*, a state judge must consider, not only what state law requires, but whether state law violates the federal constitution.

After the Civil War, with approval of the Fourteenth Amendment, the limitations on state action were expanded: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[167]

It was not until decades later that these limitations were recognized. In *Brown*, the Court held that a state that required black children to attend segregated schools denied them "the equal protection of the laws."[168] In *Duncan*, the Court held that the provision of the Louisiana Constitution granting the right to trial by jury only in capital cases and cases where imprisonment at hard labor could be imposed denied "due process of law."[169] The Discussion Leader should note that in defining "due process" the Court has turned to the Bill of Rights. Thus, in *Duncan*, the Court held that the Sixth Amendment's guarantee of trial by jury in criminal cases is such a basic right that it must be included in the concept of "due process," and other cases have held equally basic other rights guaranteed by the first eight amendments, such as the rights of speech, press and religion.[170]

And so the examination of the duty of judicial review, with its possible "undemocratic" consequences, may conclude. Permit me, however, to state a concluding caution, which should perhaps have been expressed at the outset: Just beneath examination of how judges decide, passions rage. Issues that engage deep feelings are confronted throughout the course: the states' rights fervor that erupted with *Cohens*, and later with the Civil War; the racism confronted in *Brown* and illustrated in *Mockingbird*; the religious prejudice in the *Merchant*; disagreements about sex and morality in "Rambling Rose," "A Jury of

166. *Cohens*, 19 U.S. at 413-14.

167. U.S. CONST. amend. XIV.

168. *Brown*, 347 U.S. at 495.

169. *Duncan*, 391 U.S. at 161-62.

170. The Discussion Leader should no doubt be careful not to imply that all of the first eight amendment rights are incorporated "bag and baggage" in the Fourteenth Amendment, but it would seem unnecessary to try to recapitulate the debate between Justices Cardozo and Frankfurter, arguing for incorporation only of "fundamental" rights, and Justice Black, of all of the Bill of Rights. The point may be adequately made by reference to *Duncan* itself, and to subsequent cases such as *Williams v. Florida*, 399 U.S. 78 (1970) (holding that due process does not require 12 person jury in state trial for non-capital case), and *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding a non-unanimous state jury verdict in non-capital case).

Her Peers," and *T.M.* But that is the point: these are issues judges must confront. We cannot understand a judge's responsibilities, and we cannot know what sort of persons we should select as our judges, unless we understand the passions our judges must confront.

This puts a heavy burden on the Discussion Leader, who must deal with passions dispassionately. I am sure that I would encounter some difficulty, were I the Discussion Leader, in presenting *Cohens* and *Brown*, for example. Virginia's argument and Jefferson's correspondence outrage me. One may no doubt criticize *Brown* for its reliance on empirical evidence, but on the merits, how could the Court *not* have concluded that the children were being denied equal protection? The purpose of the course, however, is not to teach the *conclusions* a judge should reach when deciding a case, but the *tools* a judge should use, while at the same time imparting some sense of the required learning and skill and self-control if we are to live under the rule of law.

Perhaps at the end the Discussion Leader might sum up as follows. A judge is responsible to the law, and only to the law, never to "the people," or "the majority," or a political party or ideology, "liberal" or "conservative," "activist" or "passive." Determining the law will sometimes be difficult beyond the ability of a judge to be persuasive; conscientious judges and thoughtful citizens will disagree. This is inevitable, for the tools available to the judges are imprecise. And when the judge has determined the law, such fierce popular disagreement may result that sometimes the judge will falter. The most extraordinary feature of our system of government is that we know that all this is so, and, yet, we put our faith in our judges' fulfilling their responsibilities. We accept "the rule of law."

Most of the time, our faith has been justified. But not always. Let us therefore reflect that we should give the closest possible attention to how we select our judges. Is the process we have chosen designed to ensure, to the extent any political process can ensure, that our judges will justify our faith in them?

III. A Plea to Teachers and the Bar

My plea is in two parts: one, for recognition of the importance of a course instructing non-lawyers on the nature of a judge's responsibilities; and, two, that the course as I have outlined it above be criticized and made stronger than I have made it.

For some years, while I was a judge and afterward, I was a part-time law teacher. I therefore have some appreciation of the view most teachers share: that their highest obligations are to scholarship and to their students. To take time to review, strengthen, and teach the

idiosyncratic course I have outlined will strike many teachers as time they cannot afford. I can only hope that the urgency of the need to reform our process of selecting judges will overcome that concern. Besides, I suggest, the effort would deepen scholarship and lead to better teaching, as *pro bono* representation often makes for better lawyers.

The problems that the outlined course would put to the participants are difficult. I was never able to master them. The effort to define the problems accurately, to marshall the most effective materials to illustrate their dimensions, and to do this so well that persons untrained in the law will grasp their difficulty and thereby gain a deeper understanding of our system of government, that would be a worthy task. And it would bring together scholars who don't usually work together—for example, teachers of law, literature, history and government. We would all be enriched.

IV. We Should Select Our Judges on Their Merits, Not by Elections

Merit selection systems differ in detail but not on essentials.[171] A nonpartisan, or bipartisan, committee, with a membership representative of the state's citizens, recommends a number of persons found by it to be qualified to fill a judicial vacancy. The governor nominates one of these persons to the senate. If confirmed, the nominee serves a relatively brief term and then stands for a retention (yes/no) election to a full term. In my view, when we understand a judge's responsibilities, we must conclude that merit selection is more likely than elections to produce competent, impartial, and independent judges in whom the public will have confidence.[172]

A. Competence

An elected judge may turn out to have the knowledge of the law and the analytical skills necessary to do a respectable job of construing a statute and developing the common law. But that is more the result of good luck because too often, successful judicial candidates in an elective system win because of random factors having little to do with qualifications. Such factors could include having a well-known name, personal wealth or the ability to raise lots of money to become known,

171. For a discussion of different ways of structuring a meri selection system, see PENNSYLVANIANS FOR MODERN COURTS, *supra* note 1.

172. I am unhappily aware of the fact that some judges, including some of my former colleagues, may interpret this paper as a personal criticism of them. I hope they will not. In over twenty years on the bench I worked with many judges, and for many of those I came to have both affection and admiration. It is not my intention to criticize any judge but to criticize the system of which the judges are apart—a system as unfair to them as it is to the public.

regional residence, and so forth. A merit selection nominating committee charged with evaluating qualifications – rather than electability – has a much better chance of finding competence than does the process of partisan election.

For one thing, unlike political parties, the nominating committee is concerned with legal ability, not the ability of an applicant to get elected. Legal ability is a quality that can be determined with considerable confidence. Lawyers know who among their ranks are the most competent: they have crossed swords, and the best have a track record. In addition, the nominating committee will have a much bigger pool from which to select competent persons, for many highly competent lawyers who would be willing to accept judicial nomination and appointment will not run for election, as a partisan and a supplicant of campaign contributions.

The pool, moreover, will not only be bigger but more diverse. Political parties nominate candidates they think can be elected. That reasoning often excludes women and members of minority groups. A nominating committee with women and minority members is likely to recommend a diverse group of persons to the governor. The resulting more diverse bench will produce better, more informed decisions, and will encourage public confidence in the courts.

B. Impartiality

Elections by definition are partisan exercises. Calling elections "nonpartisan" by removing party labels doesn't sanitize them; the parties and special interest groups remain free to identify the candidates they support. Moreover, the lawyers who run for election as judge may see themselves and may run as partisans, overtly appealing to the same constituencies as a candidate for legislative or executive office.[173]

But even judicial candidates who attempt to remain above partisanship are tainted by the election process, not simply because of their party label but because of the partisan support they receive. In particular, judicial candidates receive contributions to their campaigns from lawyers who may appear before them and from special interests.[174]

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173. *See, e.g., In re* McMillan, 797 So. 2d 560, 562-63 (Fla. 2001) (stating that candidate would "always have the heart of a prosecutor" and "defense attorneys would not be happy"); *In re* Mullin, 2000 WL 1603819, at *1 (N.Y. Comm. Jud. Conduct, Sept. 25, 2000) (dealing with campaign literature that identified candidate as "The Authentic Right To Life Judicial Candidate").

174. Big money is involved, and is getting bigger. From 1983 to 1989, the cost of a race for the Pennsylvania Supreme Court increased 500%, and, from 1987 to 1997, 159%. The largest amounts raised by contenders increased from $407,711 and $115,457 in 1987 to $1,848,142 and $926,019 in 1995. *See* PENNSYLVANIANS FOR MODERN

The point is not that a judge elected with such support may nevertheless in fact be impartial; whatever the fact, the appearance of partiality to the causes of the judges' contributors is unavoidable.

The damage done to the judicial process by partisan elections cannot be overstated. "Trial before an 'unbiased judge' is essential to due process."[175]

> [The requirement of neutrality in adjudicative proceedings] preserves both the appearance of reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not pre-disposed to find against him.[176]

Under merit selection, the nominating committee is able to recommend persons who have demonstrated by their manner of practicing law and by their lives in the community that they are not partisan by temperament but even-handed and fair in all their dealings. Nomination by the governor and confirmation by the senate occur without any election and its attendant compromising partisanship and campaign expenses.[177]

C. *Independence*

As they undermine a judge's impartiality, so elections undermine a judge's independence, if not in fact then in appearance. There is no escape. If the judge decides in favor of a former supporter, the suspicion of favoritism will arise. If the judge decides against, the suspicion that the judge "leaned over backwards" and anger due to betrayal will arise. Too often, an election campaign results in commitments, even if only

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COURTS, *supra* note 1, at 2 (citing AMERICAN BAR ASS'N., REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS 83 app. 3, tbl. 1 (1998)). In Texas, the parties and lawyers in the twelve cases heard by the Texas Supreme Court in November 2001 had contributed $1,603,409 to the nine positions; in the nine cases heard in September 2001, $1,449,329. *See* Brief of the Amici Curiae Public Citizen at 9, Repbulican Party v. Kelly, 122 S. Ct. 2528 (2002) (No. 01-521) (citing TEXANS FOR PUBLIC JUSTICE, DOLLAR DOCKET (2001)).

175. Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (quoting Bloom v. Illinois, 391 U.S. 194 (1968)).

176. Marshall v. Jerrico Inc., 446 U.S. 238, 242 (1980) (internal citation and quotation marks omitted).

177. When the retention election occurs, partisanship and financial expenditures by special interests for or against retention may occur, but the effect will not be so damaging as in a pure elective system: first, because a retention election is not a contest between candidates, and, second, because if a candidate is not retained, the merit selection process simply starts over. No system of selecting judges is without flaw. The reasonable goal is not to eliminate, but to minimize flaw.

implicitly, to decide a particular sort of case in a particular way. Having made the commitment, the judge's ability to make a decision that the losing litigant and the public alike will consider an independent decision based on the law is inevitably compromised.

Under merit selection, this danger may not be eliminated, for some politically partisan considerations may be seen as affecting the nomination and confirmation process. The danger will, however, be greatly reduced, for with no need to campaign and to raise money for campaign expenses, the nominee is under much less pressure to act as a partisan or make statements that may appear to be commitments. The pressure will be just the other way: to demonstrate to the nominating committee, and at the confirmation hearing to the senate, the ability and temperament to be impartial and faithful to the law.

V. Conclusion

We urgently need to stop electing our judges, in fairness to litigants, to the public, and to the judges themselves, who, to become judges, must participate in a process that may compromise their ability to do their job.[178] Nevertheless, efforts to change the judicial selection process in Pennsylvania have so far failed.[179] I hope this paper will help those who are working for change to realize it.

178. For some judges' reaction to their situation, see Press Release, Justice at Stake Campaign, *supra* note 1. "In Pennsylvania, 59 percent of the state judges support a generic proposal for merit selection and retention of judges compared to a plurality of state judges nationally who oppose this idea." *Id.*

179. For a brief history, see PENNSYLVANIANS FOR MODERN COURTS, *supra* note 1, at 8-12.

APPENDIX A

The First Session: The Rule of Law
- Clinton v. Jones, 20 U.S. 681 (1997)
- United States v. Nixon, 418 U.S. 683 (1974)
- Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
- Pennsylvania Code of Judicial Conduct

The Second Session: Competence: Statutory Construction
- Court martial of Billy Budd

The Third Session: Competence (continued): Law and Morality
- Caminetti v. United States, 242 U.S. 470 (1917)
- Mortensen v. United States, 322 U.S. 369 (1944)
- Cleveland v. United States, 329 U.S. 14 (1946)

The Fourth Session: Competence (continued): The Common Law
- T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001)

The Fifth Session: Competence (concluded): Constraints on Judicial Decision Making
- Planned Parenthood v. Casey, 505 U.S. 833 (1992)
- "The Home of a Stranger"

The Sixth Session: Impartiality
- Excerpt from film, "Rambling Rose"
- "A Jury of Her Peers"

The Seventh Session: Impartiality (concluded)
- *The Merchant of Venice* (trial scene)

The Eighth Session: Independence
- *To Kill a Mockingbird* (trial scene)

The Ninth Session: Is the Rule of Law Democratic?
- United States Constitution
- Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

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