

REFRAMING THE INDEPENDENCE V. ACCOUNTABILITY  
DEBATE: DEFINING JUDICIAL STRUCTURE IN LIGHT OF  
JUDGES’ COURAGE AND INTEGRITY

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#### ABSTRACT

The perennial debate over striking the right balance between judicial independence and judicial accountability largely misses the mark. The tension between these concepts arises only in the structural sense of the terms, i.e. the conflict lies in the structural approaches traditionally taken to protect independence and to enforce accountability. In actuality, our primary concern should be the judge’s own sense of independence and her internal sense of accountability. These more subjective concepts—which may be termed “judicial courage” (for the judge who is willing to act independently) and “judicial integrity” (for the judge who is willing to hold herself accountable)—do not conflict with each other and therefore need not be balanced. The structural protections (to insulate judges from outside influence) and the accountability mechanisms (to police judicial misconduct) are still important, but these structures should be considered in terms of their impact on judges’ exercise of courage and integrity. Given cultural and personal differences in judges, however, the optimal structural prescription is highly variable. This Article demonstrates how the proper balance depends on the judicial culture and the judges already in the system, illustrating through a graphical analysis how to craft a system-specific approach to such policy questions. The analysis also yields a caution that any attempt to impose a one-size-fits-all solution for protecting independence while promoting accountability may well do more harm than good.

#### I. INTRODUCTION

In the spring of 2002, I addressed an assembled body of court presidents and ministers of justice in Bosnia and Herzegovina, laying out for them some recommendations on reforming the operation of their court systems. One of the wizened judges—the president (i.e. chief judge) of a Court of Appeals in Bosnia’s Republika Srpska—stood up and excoriated me for presuming to tell them how to

run their courts. He implied that I was attempting to “export” American-style justice to a place where it did not fit and did not belong. He then, with a dramatic flourish, stormed from the room. The old judge’s assumptions were not well grounded—we were *not*, in fact, prescribing an American-style system—but his point that American approaches to judicial structure may not apply effectively in Bosnia was a sound one.<sup>1</sup> In my later work to restructure the Bosnian judiciary, I was continually reminded that what works in the United States or even Western Europe cannot be presumed to suit the culture or society of the post-war Balkans.<sup>2</sup> My subsequent judicial reform efforts in Bosnia—as well as in other countries and cultures—raised fundamental and recurring questions about judicial independence and accountability—how these goals might be most appropriately pursued and enshrined in that society’s court system.<sup>3</sup>

Notwithstanding cultural differences, there *are* universal ideals to be pursued in judicial systems, including principles of judicial independence and accountability. The dissolution of the Supreme Court in Pakistan in November 2007, for example, violated the widely shared ideal of judicial independence, prompting expressions of outrage not only from the United States,<sup>4</sup> but from the rest of the world, including the legal profession within Pakistan.<sup>5</sup>

The legal literature explores these principles—judicial independence and accountability—in broad and wide-ranging discussions, focusing very much on how

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<sup>1</sup>Regrettably, some clumsy attempts to promote American concepts of justice elsewhere in the world have marred international perceptions of Americans’ credibility, motives, and vision when it comes to international assistance. Those perceptions led many to assume, because I am an American, that my sole interest was in exporting American legal and judicial culture. The irony in this instance is that I was not representing the United States in any way, but was, at that time, in Bosnia as part of a consulting and reform team headed by a Norwegian judge and funded entirely by the Norwegian government. In my experience, I never saw anyone accuse the Norwegians of trying to export Scandinavian-style justice.

<sup>2</sup>America and Americans must be cautious about the hubris with which we promote our own judicial system as a model for the rest of the “less-enlightened” world. The impact we can have with such reform efforts—usually with the best intentions to promote the rule of law in general—is limited by the level of credibility we can muster. That credibility has certainly been damaged by the recent, ill-fated efforts to bring American-style democracy and “freedom” to Iraq.

<sup>3</sup>See generally David Pimentel, *Restructuring the Courts: In Search of Basic Principles for the Judiciary of Post-war Bosnia and Herzegovina*, 9 CHI. J. INT’L L. 107 (2008) (exploring the criteria for establishing meaningful judicial reforms).

<sup>4</sup>See, e.g., Yale Law School News & Events: *Legal Community Releases Statement Regarding Rule of Law in Pakistan*, <http://www.law.yale.edu/about/5866.htm> (last visited Nov. 1, 2008).

<sup>5</sup>Every day, thousands of lawyers and members of the civil society striving for a liberal and tolerant society in Pakistan demonstrate [protesting the dissolution of the Supreme Court] on the streets. They are bludgeoned by the regime’s brutal police and paramilitary units. Yet they come out again the next day.

Aitzaz Ahsan, *Pakistan’s Tyranny Continues*, N.Y. Times, Dec. 23, 2007, at 10, available at <http://www.nytimes.com/2007/12/23/opinion/23ahsan.html>.

they are or should be applied within the U.S. political system. A proper understanding of such principles, however, requires us to look (1) beyond issues of judicial structure, in the United States or anywhere, to consider the true *goals* of judicial independence and accountability, and (2) beneath those same structural issues to understand the true *determinants* of the individual judges' exercise of independence and accountability.

As will be explained in this Article, a sharper focus on our ultimate goals for the judiciary and on the individual judges' motivations—with specific reference to their respective endowment of judicial courage and integrity—produces more responsive policy prescriptions for judicial structure. Indeed, individual differences among judges and among their respective communities or societies will yield different, even inconsistent answers to the basic structural questions: we cannot look for a one-size-fits-all solution. Productive analysis in this area must go beyond our culture-centric expectations for judicial independence and accountability and, at the same time, probe beneath such expectations to identify the determinants of independent and accountable judicial behavior. This analysis can be depicted graphically and will, in turn, suggest what balance of structural protections and accountability mechanisms will best promote a strong and effective judiciary in that society.

## II. JUDICIAL INDEPENDENCE: DEFINING AND REFINING THE CONCEPT

“Judicial independence” is widely viewed as a principle to be embraced and promoted.<sup>6</sup> That said, attempts to define “judicial independence” have met with limited success, yielding formulations that are hopelessly vague.

One good example is the United Nations' attempt, reflected in the 1985 *Basic Principles on the Independence of the Judiciary*, which sets forth the following standard: “The judiciary shall decide matters before them . . . without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>7</sup> There is no attempt to define what an “improper influence” might be, or how it might be distinguished from a “proper” one. Notwithstanding the obvious weaknesses in this treatment of the issue, in August 2007, the American Bar Association House of Delegates voted overwhelmingly to formally endorse this standard and definition.<sup>8</sup> The uncritical approach of the ABA may reflect the obviousness of the issue<sup>9</sup>: the universal

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<sup>6</sup>PETER H. RUSSELL, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY I (Peter H. Russell & David M. O'Brien eds., 2001).

<sup>7</sup>U.N. Dept. Int'l Econ. Soc. Affs., U.N. Secretariat, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 26 - Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, 59, U.N. Doc. A/CONF.121/22/Rev.1 (1985), available at <https://www1.umn.edu/humanrts/instree/i5bpjij.htm>.

<sup>8</sup>ABA House of Delegates: Select Committee Report 14 (Sept. 7, 2007), available at [www.abanet.org/leadership/2007/annual/docs/SelectCommitteeReport.doc](http://www.abanet.org/leadership/2007/annual/docs/SelectCommitteeReport.doc).

<sup>9</sup>The Author was present at the ABA House of Delegates (in San Francisco on August 13, 2007) when the resolution was taken up. No one spoke against it or offered cautionary words or other misgivings.

acceptance of the idea that judicial independence is a positive and worthy goal. No one will oppose an endorsement of judicial independence when it is so obviously good for the system.

The one caveat, sometimes offered, is that judicial independence should not come at undue cost in terms of judicial accountability. If, for example, a judge is afforded life tenure in an effort to insulate her from outside influences, and then she demonstrates an invidious bias in her performance, the independence inherent in the life tenure makes it difficult if not impossible to hold her accountable for her unacceptable bias. Conversely, judicial accountability can undermine independence. For example, if a robust system of judicial discipline and removal is put in place to hold judges accountable for their biases, the judges' independence is inevitably infringed, as the disciplinary regime can always be used to intimidate judges from rendering unpopular decisions. This depicts the problem as one of balancing two competing interests.

But this prosaic formulation of the issue runs the risk of obscuring the ultimate goals and purposes of the judiciary.<sup>10</sup> The fact that independence may need some tempering is a tacit admission that there are other purposes or ideals to be served. Any examination of the principles of independence and accountability in judicial systems should keep in mind the ultimate "end" to be pursued, as well as the sources and bases of judges' exercise of judicial independence. As further explained below, discussion of the regimes for protecting independence and enforcing accountability—and of the perceived tension between them—too often obscures the more compelling issues underlying and served by these structural prescriptions.

#### *A. Why Judicial Independence Is Important*

Judicial independence is a bulwark of the Rule of Law.<sup>11</sup> If the law is to be enforced evenhandedly, the judges must be free to act independently in applying the law and rendering judicial decisions. If ours is to be a "government of laws and not men,"<sup>12</sup> we must have a court system that respects law more than it respects the power of any individual(s).

More pointedly, in a democratic society, the role of the judiciary may be to protect the minority from the "tyranny of the majority."<sup>13</sup> In that scenario, it naturally follows that the democratic majority may well disapprove of a given judicial intervention. And the elected political branches of government, reflecting the views of the electorate, may be unhappy with the judiciary's imposition of constitutional or other limits on the majority's ability to pursue its agenda unchecked, i.e. its power to trample the rights of any unpopular minority. It is inevitable that pressure will be brought to bear against the judiciary that is filling its proper role of protecting that minority, and the judiciary must be independent enough to withstand that pressure.

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<sup>10</sup>See *infra* Part B.2.

<sup>11</sup>Samuel L. Bufford, *Defining the Rule of Law*, 46 JUDGES' J. 16, 20 (2007).

<sup>12</sup>MASS. CONST. pt. 1, art. XXX.

<sup>13</sup>See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 138-42 (1835).

But “judicial independence” connotes more than insularity from the political process and political pressure. Judges may also be subject to threats and pressure from litigants, including society’s criminal element. Organized crime has, historically, been quick to recognize the value of having judges “on their side” and has tapped its considerable expertise in the field of extortion and bribery to influence judges in corrupt ways.<sup>14</sup>

As a rallying cry for this cause, however, the term “judicial independence” does not always strike the desired chord. While that phrase resonates within the legal community as something desirable—lawyers certainly do not want judges subject to political or other corrupting influence or beholden to outside causes or interests—it may seem less desirable in other circles for two reasons.

First, as already noted, those in power may not be at all happy that judges can exercise independence to subvert their will, which they will characterize as the will of the majority.<sup>15</sup> For that reason, it is the marginalized minority, unable to implement its agenda through the political process, who will champion an “independent” judiciary as its best hope to advance its interests. The majority, aggrieved by judicial decisions that subvert their agenda, will brand the independent judges as “activist judges” and condemn them.<sup>16</sup>

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<sup>14</sup>See Shirley S. Abrahamson, *Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 10 (2003) (discussing how threats of physical harm impair judicial independence); see also, generally, CHARLES R. ASHMAN, *THE FINEST JUDGES MONEY CAN BUY, AND OTHER FORMS OF JUDICIAL POLLUTION* (1973) (documenting the cases of dozens of corrupt judges); ROBERT COOLEY, *WHEN CORRUPTION WAS KING: HOW I HELPED THE MOB RULE CHICAGO, THEN BROUGHT THE OUTFIT DOWN* (2004) (recounting the historical perspective of a mob attorney turned state’s evidence).

<sup>15</sup>See, e.g., Franklin D. Roosevelt, *Fireside Chat Discussing the Plan for Reorganization of the Judiciary* (Mar. 9, 1937), available at <http://www.fdrlibrary.marist.edu/030937> (“Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses. It is the American people themselves who are in the driver’s seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.”). See also Frances Kahn Zemans, *Pound Revisited*, 48 S. TEX. L. REV. 1063, 1066 (2007) (regarding “President Roosevelt’s court-packing plan . . . . Members of the court were attacked as activist judges who were imposing their will over the legislative and executive branches of government”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 5 (2006) (“Critics of judicial activism frequently charge that whenever a court strikes down a law, it effectively thwarts the will of the majority that passed that law.”).

<sup>16</sup>See generally the criticism of judges involved in the Terry Schiavo cases, described in Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 912-13 (2006).

Second, to the general public at least, and even to legislators at times, the words “judicial independence” may smack of the judges’ self-interest—shoring up judges’ power or enhancing their comfort by insulating them from any consequences for their actions. For those who already view judges as over-privileged and too powerful, such “judicial independence” would be at best a low priority, and more likely a problem in need of a remedy.<sup>17</sup> Acknowledging the potential for this misperception, some who actively promote the independence of the judiciary have begun using different terminology, insisting that they are working toward a judiciary that is impartial or fair, rather than one that is independent.<sup>18</sup>

### B. *Judicial Independence as a Means to an End*

The shift in terminology is not a matter of mere semantics. Even the most ardent champions of judicial independence acknowledge that it is only a means to an end.<sup>19</sup> While the “means to and end” formulation is largely uncontroversial, it is not always clear what the “end” should be. Some focus on an independence that inspires public confidence and trust in the judiciary.<sup>20</sup> Some have embraced the phrase “fair and impartial courts,” which appears to be closer to the mark,<sup>21</sup> but some caution is

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<sup>17</sup>See, e.g., Kelly J. Varsho, Comment, *In the Global Market for Justice: Who Is Paying the Highest Price for Judicial Independence?*, 27 N. ILL. U. L. REV. 445, 452 (2007) (“[A]n independent judiciary is accountable to no one. People argue that there can be too much judicial independence; since judges are government officials who exercise plenary power, they should be accountable to the public.”).

<sup>18</sup>See, e.g., Abrahamson, *supra* note 14, at 3 (recognizing “fair[ness]” and “impartial[ity]” as ideals sought as the ends of judicial independence and accountability); ABA Standing Committee on Judicial Independence, <http://www.abanet.org/judind/aboutus/home.html> (last visited Nov. 1, 2008); University of Denver: Institute for the Advancement of the American Legal System, <http://www.du.edu/legalinstitute/mission.html> (last visited Nov. 1, 2008); The Justice at Stake Campaign: Why Judicial Independence Matters, <http://www.faircourts.org/contentViewer.asp?breadCrumb=2> (last visited Dec. 18, 2008).

<sup>19</sup>Compare Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323, 324-30 (proposing that the end varies as the goals of politics determine what is desired in a court), with Abrahamson, *supra* note 14, at 4 (describing the end as due process, “a fair trial according to the law.”). Both sources agree, however, that judicial independence is a means to one of these ends, and not an end in itself.

<sup>20</sup>As former Chief Judge J. Clifford Wallace put it, “The people must desire judicial independence because of the benefits that will enure to them, so reforms designed to secure such independence must be implemented with an eye to improving the quality and quantity of justice to a country’s citizens.” J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 247 (2001).

<sup>21</sup>“Impartial” is a good word because it suggests freedom from corrupting influences, where one can get a fair trial. Accordingly, this phrasing may be as good as any. In the end, we assume that “fair and impartial courts” will apply the law responsibly, consistent with principles of justice and equity, and without regard for the popularity of the decision with any group or the public at large. Professor Dinh has made a particularly elegant statement on achieving impartiality, characterizing it

warranted here as well, specifically with regard to the word “fair.”<sup>22</sup> A judge should be expected to follow and apply the law, even though the law may sometimes generate outcomes the public views as “unfair”; and if the law prescribes such results, it is up to the legislature to amend the law, rather than up to the judge to disregard it, substituting her own sense of fairness for it.<sup>23</sup> Bearing in mind these cautions, and the need for further attention to the issue, for purposes of this Article it is sufficient to characterize the end as *a judicial system that affords due process to all parties, impartially and according to law*.<sup>24</sup>

But this formulation is unlikely to resolve the ongoing debate. There is no universal consensus, of course, on “due process”: what it is or what characterization of it should be enshrined as an inviolable principle of justice. Nonetheless, this formulation is sufficient for and important to the analysis that follows, however, because it suggests the judges’ obligation to adhere to principles of law. Professor Charles Geyh has pointedly observed that judges will not and cannot realistically apply principles of law in a mechanistic way, without reference to the judges’ own personal values. They can and must be expected to apply the law in ways that serve each judge’s own sense of what the law should be “in light of their [own] ideological attitudes.”<sup>25</sup> It is certainly unrealistic, even if it were desirable, to expect judges to behave as automatons, applying externally dictated legal principles, uninformed by the judge’s own values, perspective, and conceptions of justice.

On the other hand, it is similarly unrealistic and repugnantly cynical to assume that judges will always serve only their own ideological instincts in utter disregard of

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as “free[ing] judges to decide cases based on what the law actually requires, and on nothing else.” Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 931 (2007).

<sup>22</sup>As Dr. Frances Zemans has observed,

It may also be necessary to avoid terms such as “fair” and “good” unless tempered by reference to restrictions imposed by the written law. The impression that the judge relies on fairness as the standard against which to measure decisions can have dangerous implications that the judge is free to follow her conscience despite the law. Sometimes the law itself is unfair or unwise, but lacking a constitutional infirmity the judge is bound by it. And unless there is a legal basis, the judge cannot right every wrong. In addition, judges do not set their own agendas. Thus, they are dependent on others to bring claims before them. While these are quite obvious to judges and lawyers, they may not be so obvious to those who need to be convinced that judicial independence is to be valued and protected.

Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 644, 646-47 (1999).

<sup>23</sup>Dr. Zemans goes on to observe: “In discussions of judicial independence, judges are frequently referred to as symbols of our justice system . . . . For many, dissatisfactions with the justice system—including those relating to police, prosecutors, private attorneys and the law itself—are not the judge’s responsibility or usually within the judge’s power to correct.” *Id.*

<sup>24</sup>This formulation is inspired by that used by Abrahamson, *supra* note 14, at 4.

<sup>25</sup>Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretence: The Role of Law and Preference in Judicial Decision-Making and the Future of Judicial Independence* (2008) (on file with the author) (quoting JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 73 (1993)).

existing law.<sup>26</sup> As a matter of principle, we do expect judges to respect and apply legislative enactments, whether they agree with them or not. We demand sufficient character of our judges to withstand the temptation to pursue personal agendas, and to responsibly apply established legal principles, even as they let their own legal philosophy and ideological values influence such application.

Adherence to law in judicial decision-making, therefore, is a principle of ethics. The judge's ethical foundation must be strong enough to withstand the natural inclination to pursue self-interest or to yield to outside pressures. The formulation of the desired "end," therefore, must emphasize the obligation to adhere to the law, to resist the temptation to deviate therefrom. With that in mind, the formulation set forth above—a *judicial system that affords due process to all parties, impartially and according to law*—is sufficient to the purpose.

### C. Alternative Characterizations for Judicial Independence

While it certainly helps to understand the ultimate purpose of judicial independence, that does not settle persistent uncertainties about what the phrase means.<sup>27</sup> Judicial independence is an appealing concept—indeed it has been recognized as a universal human right<sup>28</sup>—but the attempts to define it often generate formulations that are vague and of limited value.<sup>29</sup> Some of the literature seems to focus on weakness in the courts, where judges bend to pressure, using essentially anecdotal analysis demonstrating what judicial independence is not.<sup>30</sup> Just as often, the literature condemns those outside the judiciary for the pressure and public

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<sup>26</sup>*Id.*

<sup>27</sup>Similar observations have been made about concepts such as "separation of church and state," which on a superficial level seem to resonate, but which are devilishly difficult to define with any degree of precision. See, e.g., John C. Knechtle, *If We Don't Know What It Is, How Do We Know if It's Established?*, 41 BRANDEIS L.J. 521, 528 (2003) (noting that the strict separationists' high and impregnable wall of religion is impossible to achieve under the Court's definition which recognizes the "diversity of practices and beliefs in the United States").

<sup>28</sup>Universal Declaration of Human Rights, G.A. Res. 217A, art. 10, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (December 12, 1948); see International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 14(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976).

<sup>29</sup>See *supra* Part B, nn.7-9 and accompanying text.

<sup>30</sup>See, e.g., Carl E. Stewart, Contemporary Challenges to Judicial Independence, 43 Loy. L. Rev. 293, 298-300 (1997) (noting that in response to an immediate congressional and media denouncement of his holding in *Bayless*, Judge Baer reversed his holding). *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), vacated on reconsideration, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff'd*, 201 F.3d 116 (2d Cir. 2000) (finding no abuse of discretion by Judge Baer in reconsidering his initial ruling to suppress evidence of flight from police in a drug case because it constituted the suspect's natural reaction to police given the history of police abuse toward African Americans), cert. denied, 529 U.S. 1061 (2000).

criticism they apply, implying that such influences violate judicial independence, or that true judicial independence requires the absence of such pressures or criticism.<sup>31</sup>

For purposes of this discussion, it will be helpful to be more precise in our definitions, distinguishing between what I will call “objective” or “structural” judicial independence and “subjective” or “personal” judicial independence. These are explained more fully below.<sup>32</sup>

### 1. Objective or “Structural” Judicial Independence

One of the more popular conceptions of judicial independence defines it with reference to structural protections afforded the judges, measuring their judicial independence in terms of the structures that insulate judges from retribution for unpopular decisions they may render.<sup>33</sup> The types of protections that may exist include (1) guarantees of long- or life-tenure,<sup>34</sup> (2) guarantees against salary cuts,<sup>35</sup> and (3) a disciplinary regime that is largely removed from the other branches of government.<sup>36</sup> No less important is (4) the provision of adequate security protection

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<sup>31</sup>Geyh, *supra* note 16, at 915 (“Critics of the critics, however, argue that court-bashers are simply seeking to intimidate judges into contorting the law to reach outcomes the critics favor.”).

<sup>32</sup>This distinction tracks closely a distinction in types of judicial independence made by Professor Peter Russell:

In political science literature, judicial independence has been used to refer to two concepts. One of these is the autonomy of judges—collectively and individually—from other individuals and institutions. . . . Judicial independence is also used to refer to judicial behavior that is considered indicative of judges enjoying a high measure of autonomy . . . .

RUSSELL, *supra* note 6, at 6.

<sup>33</sup>For an example, consider the court system of Romania, where until recently all judges were under, and reported to, the Minister of Justice, who, in turn, is a very political appointee of the president. The European Union concluded that the judiciary there failed to meet the EU’s minimum standards of judicial independence, based on the *objectively observable* fact that judges were vulnerable to political consequences for their decisions and, therefore, vulnerable to political pressure. In response, the 2003 Constitution of Romania, created a Council of the Magistracy in order to comply with the European Union’s requirements for the judicial independence of its member nations. ABA: Central European and Eurasian Law Initiative, <http://www.abanet.org/ceeli/countries/romania/legalinfo.html> (last visited Jan. 30, 2008).

<sup>34</sup>*See, e.g.*, U.S. CONST. art. III, § 1.

<sup>35</sup>*Id.*

<sup>36</sup>If issues of judicial misconduct and discipline are handled *within* the judiciary, by other judges who also enjoy the tenure and income protections already cited, the whole process enjoys some insulation from political forces. J. Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT’L L.J. 341, 345 (1998) (Judge Wallace “suggest[s] that to preserve judicial independence, these investigations should be left primarily to the judicial branch”). Otherwise this “judicial accountability system” may be misused by political players to intimidate judges or otherwise influence judges in their decisions.

for judges and their families, lest they be intimidated by criminal threats.<sup>37</sup> Judicial independence includes independence from *all* outside influences, not just political ones.

These protections are designed to insulate judges from outside pressures in their individual decision-making, in the judgments they render. This type of judicial independence is sometimes characterized, therefore, as “decisional independence.”<sup>38</sup>

The term “judicial independence” can also be characterized more broadly to refer to the independence of the judicial branch as a whole—i.e. separation of powers—rather than to the independence of an individual judge in decision-making in her own cases. This concept has been distinguished from decisional independence with the label “institutional independence.”<sup>39</sup> It is important to keep the distinction in mind, lest principles of judicial macro- (or institutional) independence be inadvertently conflated with those of judicial micro- (or decisional) independence. In the “macro” analysis, for example, the legislative branch is certainly capable of asserting pressure on the judicial branch, if it wishes to, because it controls the judiciary’s budget allocation.<sup>40</sup> Beyond budgets, the judiciary may stand in need of other forms of legislative relief, such as overdue judicial improvements, the creation of new judgeships to address short-staffing and swelling caseloads, and the filling of vacant judgeships (at least in the federal system where the legislature must confirm judicial appointments). The third branch is, of course, beholden to the legislature—as well as to the executive branch’s veto authority—for these things. Accordingly, it is easy for these other branches to make life difficult for the judiciary as a whole if they are unhappy with recent judicial decisions.

That pressure is a blunt instrument for influencing individual judges, however, and is, therefore, less of a threat to judges’ decisional independence. Indeed, it can be felt by individual judges only because they—among many—suffer directly the consequences of budgetary or other legislative measures, or because they may feel pressure from their judicial colleagues who are suffering a much larger cumulative impact of the other branches’ retaliatory measures.<sup>41</sup>

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<sup>37</sup>It is important to remember that judicial independence may be compromised not just by meddling of other branches of government, or by the whims of electoral majorities, but also by threats and influence from the criminal element or other parties with interests pending before the court. Abrahamson, *supra* note 14, at 10 (discussing how threats of physical harm impair judicial independence).

<sup>38</sup>Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 386 (2006) (“[I]t is common to distinguish *decisional* independence from *institutional* and other components of judicial independence.”).

<sup>39</sup>*Id.* See also Ronald M. George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345 (2005) (discussing observable steps taken by the state of California to shore up this institutional independence of the courts).

<sup>40</sup>See Wallace, *supra* note 20, at 246 (“The legislature’s control over the provision of financial resources to the judiciary prevents the judiciary from being completely independent from the rest of the government.”).

<sup>41</sup>The independence of individual judges from their colleagues within the judicial branch is a subject that has yet to be explored, at least as it applies within the United States. For a compelling discussion of this issue in the Japanese court system, see David M. O’Brien & Yasuo Ohkoshi, *Stifling Judicial Independence*

## 2. Subjective or “Personal” Judicial Independence

“Structural independence,” as explained above, however, does not directly address the decision-making behavior of judges. The fact that a judge may face objectively observable pressures or be vulnerable to threats of removal or discipline in the exercise of her or his judicial function, does not itself establish that the judge is not acting independently. If the judge does not bow to the pressure—is *not*, in fact, influenced by it—how are the principles of judicial independence compromised?<sup>42</sup> While we think judges *should* be free from such pressures and criticisms as a matter of policy, or that perhaps it is unfair of us to expect them to be independent in the face of such pressures, the independence of the judge is not compromised until and unless she succumbs to them.<sup>43</sup> In other words, as a matter of definition, a judge demonstrates subjective or “personal” independence,” if she or he is not actually influenced by these outside pressures the structure allows, quite regardless of their number or intensity.<sup>44</sup>

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*from Within*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 37, 37 (Peter H. Russell and David M. O’Brien eds., 2001).

<sup>42</sup>The evils of “pressure” on judges are not limited to the risk that judges may succumb to the pressure, of course. The fact that the pressure exists may well lead to problems of perception. A judge who is subjected to pressure from the Executive Branch to rule a certain way, and who does rule that way, may well be perceived to have bowed to the pressure. Her decision may not command the respect it deserves, and she may be perceived as a “tool” even if the decision is made entirely independently of the pressures asserted. While this perception is itself a serious problem, it does not speak to the issue of judicial independence per se, but rather to the collateral issue of “perception.” See the discussion of the controversial ruling of Judge Harold Baer *infra* Part E.1. See also Stewart, *supra* note 30.

<sup>43</sup>Professors Burbank and Geyh suggest that “judicial accountability” may be a key element of judicial independence, intimating that accountability requires the judge’s own exercise of moral restraint. See Burbank, *supra* note 19, at 325 (“[J]udicial independence and judicial accountability ‘are different sides of the same coin.’ An accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous.”); see also Geyh, *supra* note 16, at 915 (affirming Professor Burbank’s assertion that judicial independence and judicial accountability are ‘two sides of the same coin,’ giving further explanations of the less-understood ‘tails’ side, and emphasizing judges’ *intent* for determining appropriate measures of accountability). This argument is analogous to the “subjective” analysis I propose here, that judges can and should do the (or “a”) right thing, whatever pressures may exist to do otherwise. They suggest that the judges must keep their noses clean in this way if they want to maintain the degree of objective structural protections they now enjoy. Any abuse of that independence to act unethically will surely prompt the other branches of government to act to curtail the structural protections presently in place.

<sup>44</sup>Professor Russell describes such judges, at least hypothetically:

We can all imagine judges, and perhaps some of us can even point to a few, who, despite lacking the main ingredients of judicial independence in the first sense [i.e. insulation from the influence of outside forces, particularly the other branches of government], nevertheless were brave enough to defy those who could and would sanction them for their decision making and to assert judicial independence in the second sense [i.e. the assertion of independence in the judge’s behavior].

RUSSELL, *supra* note 6, at 6.

The concept was aptly described, in rather informal terms by Lady Brenda M. Hale, Senior Law Lord, United Kingdom, who responded recently to a concern that the highest court in the United Kingdom is actually and literally part of the House of Lords, a legislative body. While this court lacks separation of powers, and therefore suffers seriously deficient structural independence, the court and the judges (or Law Lords) on it are nonetheless independent in operation: “People go on the way they go on, and it’s what people do, rather than the institutions that matter. We are independent as members of the House of Lords. We do our job independently of the Parliamentarians, albeit in the same building.”<sup>45</sup>

This subjective or personal judicial independence, reflecting the judge’s subjective motivations and actions, is hard to analyze from a distance, as it is neither observable nor measurable with any degree of directness. It is perhaps for this reason this is so often neglected in the literature. On the other hand, to the extent we care about the independence judges actually exercise, the subjective approach is vital.

Another way to look at this is that when we assess the level of judicial independence in a judicial system objectively, in terms of the structural protections provided to judges, we are only measuring a surrogate. We may, perhaps, assume a high correlation between the protections provided to judges from outside pressure and their ability to resist such pressure. But focusing too much on the surrogate may obscure other compelling issues relating to the subjective independence of the judge or the judiciary overall. Developing a sound public policy to promote and preserve the judges’ true or personal independence requires that we start with a subjective analysis, and consider its nuances, rather than assume them away in our pursuit of appropriate structural protections.

### III. JUDICIAL ACCOUNTABILITY: DEFINING AND REFINING THE CONCEPT

Judicial accountability is another term that is difficult to pin down, although there are a few basic principles about which everyone can agree. First, we all want judges who will follow the law, respecting and applying proper legislative enactments, setting aside any personal legislative agenda. One might be tempted to oversimplify and say that we want judges to “do the right thing,”<sup>46</sup> whatever that may be, although that characterization is problematic in the extreme, because there is no consensus on what the “right thing” might be in any particular case, and because the phrase misleadingly implies that there is only one “right thing” to do. Professors Ferejohn and Kramer explain:

No one really believes that law is wholly indeterminate, but virtually everyone recognizes that modern jurisprudential tools create a range of legitimate choices in almost any given case. And even those who believe in objectively “right” answers appreciate that the process by which these answers are generated hinges on

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<sup>45</sup>Discussion at Georgetown Law Center’s Hart Auditorium: Webcast – Justice Ginsburg and Baroness Hale: The British and United States Legal Systems (Jan. 24, 2008), <https://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=473>.

<sup>46</sup>*Cf.* DO THE RIGHT THING (40 Acres & a Mule Filmworks 1989) (in which filmmaker Spike Lee explores the difficulty in determining what is “the right thing” in a given situation).

arguments and judgments of a kind about which reasonable people can (and will) subjectively disagree.<sup>47</sup>

As discussed above, it is an essential element of judicial decision-making that the judges' own perspective and values will play a significant role in the decision, even as the judge adheres appropriately to the constraints of the law she is applying. This clearly admits the possibility, even the inevitability, of a range of "right things" in any particular scenario.<sup>48</sup>

At the same time, while faithful adherence to law admits a range of options to the ethical and accountable judge, wholesale disregard of the law is not within the range of ethical and accountable judicial behavior. Thus, while we will never find a consensus on what the right thing is, it may be easier to identify or envision scenarios of abuse of judicial authority that "cross the line." So while it is problematic to say that a judge should "do the right thing," it may be less so to assert that a judge should "*not* do the wrong thing."

The second issue for consensus—and a far easier one to assert—is that the judge striving to do "a" (if not "the") right thing should do it for the right reason. Biases, outside pressures, conflicts of interest, and other self-dealing or self-interested behaviors are all anathema to the proper and ethical exercise of judicial powers. Here the focus is not on the decision itself being wrong—indeed, the judge's brother-in-law may well have deserved to win the case under the law anyway—but with the judges' improper reasons for rendering that decision.<sup>49</sup> These expectations we have of judges are tied up in the concept of accountability.

While the word "accountable" often implies the existence of an external authority to whom one is accountable, it is clear that the word has a more general definition as well, synonymous with "responsibility."<sup>50</sup> In this latter sense, the judge may be deemed accountable to higher principles—higher than her own self interest, anyway—or to herself.<sup>51</sup> Some may insist that accountability to "principles" or to oneself (*i.e.* "holding oneself accountable"), rather than to an authority with the

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<sup>47</sup>John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 973 (2002).

<sup>48</sup>The multiplicity of appropriate outcomes in any judicial decision is evidenced by the prevalence of dissenting votes in appellate courts. It would be ridiculous and unfair to suggest that every split decision or reversal on appeal means at least one judge was abusing her independence and failed to meet minimum standards of judicial accountability.

<sup>49</sup>Geyh, *supra* note 16, at 914-15 (emphasizing judges' *intent* when determining appropriate measures of accountability).

<sup>50</sup>The word "responsible" appears as a synonym for "accountable" in most dictionaries, for example. Random House Unabridged Dictionary of the English Language (1987); American Heritage Dictionary, 4th ed. (2000), *available at* <http://bartleby.com/61/42/A0044200.html> (last visited March 14, 2008).

<sup>51</sup>The writings of Professors Geyh and Burbank recognize the correlation between judicial behavior and accountability in this way. *See supra* text accompanying note 43. But accountability can also refer to answerability, presumably to some person or body of authority; this meaning is characterized as "objective or structural accountability" in this Article. *See infra* text accompanying note 62.

power of punishment or correction is not accountability at all. Nonetheless, this internal sense of responsibility, this integrity, as explained below, is type of accountability that is most important for purposes of pursuing our ultimate goals for the judiciary.

#### A. *Why Judicial Accountability Is Important*

Judicial accountability, like judicial independence, is also a bulwark of the Rule of Law.<sup>52</sup> Public confidence in the courts is inspired not so much by independence as by accountability: if the public perceives the court to be making principled decisions based on the law, and without corrupt motive or influence, they will trust the judiciary and abide by its decisions.<sup>53</sup> A judge may be deemed “accountable,” by just about any definition, if she adheres to the normative ethical and legal principles of her culture and society.

It is important to note here that concepts of ethics may be highly dependent on culture, and may differ widely from one society to another.<sup>54</sup> Each society is entitled to demand of its judges a strict adherence to the prevailing moral code as defined in that community. While the basic principles are likely to be shared across cultural lines, it is easy to imagine scenarios in which the relative weight given to one moral imperative over another may not be shared in a contrasting cultural milieu. For example, in one culture, women may be recognized as a vulnerable group, deserving of special protections and solicitude afforded by judges; in other cultures, the principle of equal protection may trump this, and any special deference given to the needs of women would be considered an unethical bias.

In the United States, much of the recent controversy over judicial accountability has derived from the notion that a court’s decisions should reflect the preferences of the majority. Judges whose decisions are perceived as contrary to prevailing public opinion are routinely condemned as “judicial activists,” and demands are made that they be more “accountable” to the public. This Article does not squarely address that issue, other than to suggest that judges, in their role to protect the rights of unpopular minorities, should not be subjected to or accountable to majoritarian will.<sup>55</sup> As discussed above, judges must adhere to the law and should be accountable to the highest principles of law and justice.

The degree to which judges should (1) defer to the legislature or (2) stand up to the legislature (in defense of basic principles of constitutional justice) is a matter of

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<sup>52</sup>See Bufford, *supra* note 11, at 21 (“The rule of law further requires that no public official be above the law or exempt from its requirements. While public officials enjoy a measure of immunity while working in their official capacities, the rule of law requires that they nonetheless be subject to the same laws as every other individual outside the sphere of their official duties.”).

<sup>53</sup>Wallace, *supra* note 20, at 246 (“When the judiciary is either corrupt or subject to influence or intimidation by corrupt officials, groups, or individuals, the citizens will not trust it, and they will lack confidence that resort to judicial process will achieve a just resolution of their conflicts.”).

<sup>54</sup>See Burbank, *supra* note 19, at 331 (providing support for the idea that “identifying and understanding the complex . . . norms and understandings . . . may have more practical importance . . . than any formal rules.”).

<sup>55</sup>See discussion *supra* Part B.1 and note 13.

differing views or even ideology, but for purposes of this Article, we need not quibble over such differences. Judicial selection mechanisms, for the most part, take into account the judicial candidate's judicial philosophy.<sup>56</sup> And quite regardless of where a judge appears on the ideological spectrum, a judge should conform her decisions to some principled analysis. Even though she will certainly bring her own values to the table, accountability requires that she premise her decisions upon a dedication to the rule of law, not upon self-interest, upon a personal agenda, or upon partiality for an interested party.

### *B. Alternative Characterizations of Judicial Accountability*

Even more than “judicial independence,” a common understanding of what we mean by “judicial accountability,” as already discussed, is elusive. As already noted, there is a vital distinction between (1) the judge who is accountable to the law, to higher principles of justice, and to her own sense of ethical responsibility, and (2) the judge who is deemed “accountable” only to the extent that she is *held* accountable by some external force with powers of discipline or retribution. I am already taking some liberties in using the word “accountability” in this first sense. Accordingly, for purposes of this discussion, it will be helpful to be more precise in our definitions, distinguishing between what I will call “objective” or “structural” judicial accountability and “subjective” or “personal” judicial accountability. These are explained more fully below.

#### 1. Objective or “Structural” Judicial Accountability

This first of these concepts shows up in most of the literature discussing judicial accountability. Judges cannot be allowed to run amok, and must be held accountable for their own lapses of ethics or other abuses of judicial authority. A disciplinary regime must be in place to police judicial misconduct, and those enforcement mechanisms will be observable, both on paper and—unless it is an entirely confidential process—in operation.<sup>57</sup> When the public is outraged by “judicial activists” they will call for “more accountability” in terms of enhanced power to rein in the perceived miscreant judges. Accordingly, the powers of the disciplinary authority can be adjusted (strengthened or relaxed) to reflect public policy goals. In any case, this institutional check on judicial abuses can be characterized as objective or “structural” accountability.

#### 2. Subjective or “Personal” Judicial Accountability

However, the subjective or *personal* accountability of the judge comes from within; one's internal moral compass is not a function of that person's vulnerability

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<sup>56</sup>In the federal system, the President appoints, and the Senate confirms, all Article III judges—a process well calculated to ensure that the judges appointed are not out-of-step with prevailing norms on such exercises of judicial power. *See* U.S. CONST. art. II, § 2, cl. 2.

<sup>57</sup>Of course, the appellate courts will also serve a role in enforcing accountability, at least as to the merits of the cases appealed. The appellate courts have never been characterized as a threat to the independence of lower courts however.

to discipline or other retribution for misdeeds.<sup>58</sup> We should expect—or at the very least hope—that judges will adhere to the law and to higher principles of justice and ethics not merely because they fear detection and punishment under a disciplinary regime, but because it *is* the right thing to do.<sup>59</sup> If we expect this level of integrity from anyone, we should certainly expect it of our judges.<sup>60</sup>

This *personal* accountability—the internal, professional integrity of the judge—however, is not something that is objectively observable, and it is therefore difficult to analyze.<sup>61</sup> It is not surprising, therefore, that the scholarly discussion tends to focus on objective or structural accountability,<sup>62</sup> the nature and power of the system of judicial discipline, using that as a surrogate for, if not an outright definition of, judicial accountability.<sup>63</sup>

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<sup>58</sup>See Wallace, *supra* note 36, at 345 (“In the end, judicial independence can be preserved only if judges exert the moral leadership and strength of character required to ensure judicial accountability. Benjamin Franklin’s statement applies equally to a judiciary: ‘Only a virtuous people are capable of freedom. As a nation becomes corrupt and vicious, they have more need of masters.’”).

<sup>59</sup>*Cf. supra* notes 46-48 and accompanying text (discussing problems with defining what is “the right thing”).

<sup>60</sup>Elected officials are always subject to the will of the electorate and are bound in a very practical sense to follow the majority’s view on matters of policy. Their re-election depends on it. Judges are often insulated from public sentiment—we have to be able to trust their ethical sense, their commitment to doing the right thing, much more than we do for our elected officials. See Geyh, *supra* note 16, at 925.

[H]onest mistakes may be corrected by fellow judges via the judicial process and, absent evidence of incompetence, offending judges should be insulated from discipline or other punishment. As Tennessee Justice Adolpho Birch put it, “Judicial independence is the judge’s right to do the right thing or, believing it to be the right thing, to do the wrong thing.”

*Id.*

<sup>61</sup>*Cf. Zemans, supra* note 22, at 645, which emphasizes how the public can observe disciplinary regimes and objective accountability:

Some jurisdictions have programs designed to inform citizens about the operation and accessibility of judicial discipline. All of these programs offer means by which courts and judges are held accountable. Whether they result in enhanced legitimacy of the courts and thus justification for judicial independence depends on what the public learns.

*Id.* (citations omitted). Subjective accountability is almost entirely unobservable and unmeasurable.

<sup>62</sup>An interesting exception here is Professor Dinh, who has contrasted judicial independence with judicial “restraint,” suggesting that judges must restrain themselves from an otherwise natural inclination to overreach in their decisions, exceed their judicial powers, or engage in policy making from the bench. Dinh, *supra* note 21. The term “restraint” presupposes a judicial agenda, however, it is inconsistent with the judge’s proper role and must therefore be restrained. The term “integrity” better captures the essence of a judge’s motivation, i.e. to do what the law requires or what is right.

<sup>63</sup>Geyh provides a tripartite taxonomy of accountability, dividing the discussion into three forms of accountability: (1) institutional accountability, (2) behavioral accountability, and (3) decisional accountability. In so doing, he seeks to establish

## IV. JUDICIAL INDEPENDENCE V. JUDICIAL ACCOUNTABILITY: WHERE IS THE CONFLICT?

At this point, we can revisit the conventional wisdom that there is inherent tension between the principles of judicial independence and judicial accountability. The typical analysis, summarized above, goes as follows: If we institute structural protections for judges, enabling them to follow the law and render unpopular but just decisions without fear of political (or other) retribution, we are simultaneously freeing them to disregard the law and to render corrupt decisions without fear of retribution.<sup>64</sup> At the same time, any disciplinary regime designed to punish judges for misconduct inevitably subjects judges to the influence of the disciplinary authority, impairing their independence. This has led some to characterize the issue as a direct trade-off.<sup>65</sup> If we hold judges accountable for their bad behavior, that does inherent violence to their independence; and if we shore up their independence, we limit the system's ability to police judges' misconduct, and the judges are rendered "unaccountable."<sup>66</sup>

It should be obvious at this point, however, that the entire debate—the whole concept that independence and accountability come only at each other's expense—is true only for these principles in their *objective* or *structural* sense. The disciplinary regime will always be a threat to *structural* judicial independence, i.e. to those structural protections that might otherwise protect judges from outside influence. Whoever has the power to discipline judges may, at some point, misuse that power in an effort to exert improper influence on judges. At the same time, if we strengthen *structural* independence, insulating judges from the reach of their critics, we inherently weaken any system for enforcing judicial accountability.

However, the conflict or trade-off evaporates when we look at *personal* independence and *personal* accountability, looking beyond and beneath the conventional structural approaches toward safeguarding the two principles, and considering the principles in their subjective sense. There is nothing inherently

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which modes of punishment are appropriate for each form. Geyh, *supra* note 16, at 917.

<sup>64</sup>*Id.* at 916 (“[J]udges who are so independent that they can disregard the law altogether without fear of reprisal likewise undermine the rule of law values that judicial independence is supposed to further.”).

<sup>65</sup>In 2006, Case Western Reserve Law Review conducted a symposium, referenced frequently in this Article, entitled “Judicial Independence and Judicial Accountability: Searching for the Right Balance.” The title of the symposium alone betrays the nearly axiomatic understanding that these two principles are in fundamental conflict and that a balance must be struck between them. Symposium, *Judicial Independence and Judicial Accountability: Searching for the Right Balance*, 56 CASE W. RES. L. REV. 899-1118 (2006).

<sup>66</sup>Professor Burbank suggests that there is no inherent conflict here, but that is only because he uses judicial accountability in a more subjective sense, consistent with that advanced more fully in this Article. See the discussion of “judicial integrity” at *supra* Part C.2.ii and *infra* Part E.2; Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (1999) (observing that judicial independence and judicial accountability are “different sides of the same coin”); *see also* Burbank, *supra* note 19, at 330-32.

contradictory between a judge's subjective or personal independence (her refusal to be influenced by outside pressures, however great or small) and her subjective or personal accountability (her commitment to adhering to the law and higher principles of justice). Quite the contrary, these things are fully complementary. A judge may well find the courage to act independently in the face of outside pressures precisely because the judge has such a strong ethical commitment. Conversely, the judge may be able to preserve and maintain her *personal* accountability only by exercising the *personal* independence to resist outside pressures. Any capitulation to such pressures constitutes a compromise of both principles—the compromised judge has demonstrated weakness in terms of personal independence, and a fully corresponding weakness in personal accountability.

So true independence and true accountability can be fully consistent and mutually reinforcing. It is only the clumsy mechanisms we adopt to safeguard that independence—by minimizing the negative consequences a judge may face by standing up to outside pressures—which conflict, in turn, with the even clumsier discipline mechanisms we adopt for enforcing accountability. The core principles are in harmony; it is the objectively observable surrogates that conflict.<sup>67</sup>

This popular conception that judicial independence and judicial accountability conflict, therefore, presents an oversimplification of the factors truly at play. Because structural protections for judges are not the source or determinant of a judge's personal independence, the relative strength or weakness of those protections is not a direct measure of the degree of true judicial independence that exists in a judicial system. At the same time, disciplinary mechanisms, or other threats to a judge's career or tenure that may exist as a sanction for bad behavior, are not the source of the judge's personal accountability and can never serve as a meaningful measure of the same.

#### V. FOCUSING ON MORE RELEVANT FACTORS: DEFINING NEW TERMS

Ultimately, in terms of our desired “end”—“a judicial system that affords due process to all parties, impartially and according to law”<sup>68</sup>—the *personal* independence of the individual judges is far more important than the *structural* independence reflected in the system. We promote structural independence only because we hope and expect that it will, in turn, promote personal independence. Similarly, in terms of achieving our highest aspirations for our court system, the *personal* accountability of judges is far more compelling than the effectiveness of any disciplinary regime. The structural accountability in the system is designed to promote and foster personal accountability among the judges.

Given the popular usage of the terms “judicial independence” and “judicial accountability” in such widely varying ways—most notably to refer to the more

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<sup>67</sup>Some would argue that by defining judicial accountability to mean the same thing as “integrity.” See *supra* Part C.2.ii and *infra* Part E.2. I have defined the conflict away. There is no doubt that structural accountability still conflicts with concepts of independence, and that I have substituted the concept of internal accountability for external accountability. But the point remains that structural accountability is of secondary importance, as a poor surrogate for the more vital issue for the judiciary, which is the personal accountability of the judge. And for that, there is no conflict.

<sup>68</sup>See *supra* Part B.2.

objectively observable, structural mechanisms—it will be useful for this discussion to define new terms. The concept of subjective judicial independence—the willingness of the judge to defy external forces and consequences and assert personal independence—might be more descriptively referred to as “judicial courage.” By the same token, the concept of a judge’s subjective accountability to the law and higher principles—personal accountability—might be more meaningfully described as “judicial integrity.” These terms help focus attention on the subjective, internal, and ultimately far more important determinants of our “end” objectives.

#### A. *Judicial Courage*

As explained above, the most direct and compelling determinant of judicial independence is not the degree of structural protection the judge may enjoy, but rather the degree of *judicial courage* the judge has or demonstrates in her work. It is this courage that enables the judge to withstand pressures and influences, even threats, and exercise true independence in her decision-making. If we want a truly independent judiciary, it is essential that we have judges who demonstrate this courage.

Judicial courage is an essential attribute for judges no matter how much structural protection they may enjoy. Indeed, the system can never insulate judges completely from backlash or pressure. Federal District Judge Harold Baer in New York was a lightning rod for public denunciation after his controversial ruling suppressing evidence in a highly publicized drug case.<sup>69</sup> Specifically, Judge Baer suppressed almost eighty pounds of cocaine and heroin that had been seized by police, as well as the videotaped confession of the drug courier, as fruit of the illegal seizure, stating that the suspects fleeing from a car when approached by police did not give those police probable cause to search the car. Particularly controversial was the language in the judge’s decision that highly publicized police corruption in that New York neighborhood made it reasonable, not suspicious, for people to flee when police officers approach.<sup>70</sup> This set off a firestorm of public denunciations of both the decision and the judge, led by public commentators and public officials right up to the White House.<sup>71</sup>

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<sup>69</sup>See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff’d*, 201 F.3d 116 (2d Cir. 2000).

<sup>70</sup>*Id.* at 242.

<sup>71</sup>The denunciations by high-level public officials are summarized at John Q. Barrett, *Introduction: The Voices and Groups that Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN’S J. LEGAL COMMENT. 1, 2 n.4 (1996):

Government officials led the criticism of Judge Baer. New York Governor George Pataki stated that “[t]he judge’s decision is despicable.” New York Suspect May Walk Away From Drug Arrest (CNN television broadcast, Jan. 26, 1996). New York City Mayor Rudolph Giuliani, who had been Baer’s colleague when each was an Assistant United States Attorney in the United States Attorney’s Office for the Southern District of New York, said the Judge’s ruling was “mind-boggling in its effect,” and that the decision was “very, very troubling and very, very disturbing.” Clifford Krauss, Giuliani and Bratton Assail U.S. Judge’s Ruling in Drug Case, N.Y. Times, Jan. 27, 1996, § 1, at 25. Senator Daniel Patrick Moynihan (D-NY) recommended that Judge

As a life-tenured judge, removable only by impeachment, it is highly unlikely that Judge Baer ever could have been disciplined or removed for this most unpopular decision.<sup>72</sup> Indeed, the structural protections afforded federal judges are widely recognized as the most robust anywhere in the world. But he and his family certainly suffered terribly from the nationwide opprobrium heaped upon him. While one should be reluctant to interpret his later reconsideration and reversal of the unpopular ruling as capitulation to the pressure he must have felt, there is a possibility that such pressure may have played a role in his ultimate disposition of that issue and that case. Many perceived it so.<sup>73</sup> The perceptions themselves, true or not, do tremendous violence to public confidence in the independence of the judiciary.<sup>74</sup> And if those perceptions are correct, this presents a compelling example

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Baer be sentenced to live one year in Washington Heights, to see if he would run away when he saw police, see A.M. Rosenthal, *Contempt in Court*, N.Y. Times, Jan. 30, 1996, at A15. New York City Police Commissioner William Bratton called Judge Baer's decision "absolutely crazy" and stated that Baer is "living in a fairyland." Paul Moses & Joseph W. Queen, Judge: Men Not Wrong to Run From Cops, *Newsday*, Jan. 26, 1996, at A3. New York State Attorney General Dennis Vacco said that judges "should not be handcuffing our cops with arcane technicalities." Greg Smith & Frank Lombardi, Rudy, Gov. Hit Judge For Axing Drug Case, N.Y. Daily News, Jan. 26, 1996, at 4. Senate Majority Leader Robert Dole (R-KS) blasted judges who "believe[ ] that police officers are a bigger threat to the well-being of our communities than those who peddle drugs to our kids." 142 Cong. Rec. S539 (daily ed. Jan. 26, 1996) (statement of Sen. Dole). Senator Orin Hatch (R-UT) called Baer a "bleeding-heart judge" who "lacks common sense and judgment." Gov't Press Release, Feb. 9, 1996. Speaker of the House Newt Gingrich (R-GA) called Judge Baer a "pro-drug dealer, pro-crime" judge. Lawmakers Call for Resignation of Judge, U.P.I., March 6, 1996. Rep. Fred Upton (R-MI) stated that Judge Baer is "a Monopoly game gone bad, . . . handing out 'get-out-of-jail' free cards with reckless abandon." *Id.* White House Press Secretary Michael McCurry, speaking on behalf of President Clinton, stated that Judge Baer "made a bad decision." White House Regular Daily Briefing; Trading Symbols, F.D.C.H. Political Transcripts, March 21, 1996.

Newspaper columnists and editorial writers also were scathing in their criticism of Judge Baer's ruling. See, e.g., *The Drug Judge*, Wall St. J., Jan. 26, 1996, at A10 ("Winning the war on drugs won't be easy if the battles end up in courtrooms like that of Harold Baer"); *Judge Baer Mocks Justice*, N.Y. Daily News, Jan. 26, 1996, at 38 ("Federal Judge Harold Baer has become an accomplice to evil"); A.M. Rosenthal, *supra* ("some judges use their social and political inclinations, ego, antagonisms and biases to shape their decisions").

<sup>72</sup>Although several members of Congress talked about impeachment possibilities for Judge Baer in the wake of his decision, *id.* at 3 n.6, nothing ever came of it.

<sup>73</sup>See, e.g., Joyce Price & Warren Strobel, *Judge Bows to Critics, Reverses Drug Ruling*, WASH. TIMES, April 2, 1996, at A1; see also American Judicature Society, Political Threats to Judicial Independence, [http://www.ajs.org/cji/cji\\_politicalthreats.asp](http://www.ajs.org/cji/cji_politicalthreats.asp) (last visited Nov. 3, 2008) ("The fact that Judge Baer reversed his previous ruling is cause for concern about the implications for judicial independence.").

<sup>74</sup>See *id.* U.S. District (now Chief) Judge for the Ninth Circuit Court of Appeals Alex Kozinski said:

What worries me is that the comments made by members of the political branches might have made it difficult for Judge Baer to change his mind without looking like he was caving in. Essentially, it put him in a position that whatever he did—stay put,

of a less-than-fully independent judiciary and, notably, one that is not the function of poor structural protections for judges. If the judges bow to pressure in such circumstances, compromising judicial independence, the weakness that precipitates the compromise is not one of structural protection, but of judicial courage.

The point here is that judicial courage is necessary, even where strong structural protections are in place. The existence of good protections for judges, such as Article III judges enjoy in our federal system, is neither a substitute for nor a source of judicial courage.

There are many remarkable examples of judicial courage where judges withstood remarkable pressures and did “the right thing” anyway. Some of these judges suffered serious repercussions as a result.<sup>75</sup> The most obvious examples come from the judges who handed down desegregation decisions in the South in the 1950s and 1960s. Professor Susan Estrich tells a story of Judge J. Skelly Wright, then a federal district court judge in Louisiana, had been the victim of public backlash so many times, he instructed the U.S. Marshals’ security detail watching his home not to even call him unless the crosses burning in his yard were too close to the house, putting the house itself at risk of fire.<sup>76</sup> These are our heroes of judicial courage, our champions of judicial independence.<sup>77</sup>

### B. Judicial Integrity

Judicial courage however, standing alone, is not necessarily a virtue. Judicial courage may just as easily embolden a judge to do the *wrong* thing, the self-interested thing, the politically motivated thing.<sup>78</sup> Judicial courage becomes a virtue only when it is coupled with *judicial integrity*, which we may characterize as a

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rehear the case, change his mind outright or recuse himself—he might be accused of yielding to political pressure.

<sup>75</sup>The judges involved in the Terry Schiavo case were not subject to discipline or removal due to their unpopular rulings, but they were vilified in public and in the press nonetheless. Geyh, *supra* note 16, at 912.

<sup>76</sup>Professor Susan Estrich, University of Southern California Gould School of Law, Address at the Association of American Law Schools Annual Meeting: Judicial Independence and Political Accountability (Jan. 5, 2008). A particularly compelling account of the harassment Judge Wright’s family suffered in that period can be found in Liva Baker, *THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED-YEAR STRUGGLE TO INTEGRATE THE SCHOOLS* 423-26 (Harper Collins 1996). It is noteworthy that when Judge Wright was elevated to the Court of Appeals, he could not be put on a court in the South, where his decisions had made him so unpopular, but instead was named to the D.C. Circuit. *Id.* at 462-66.

<sup>77</sup>Jack Bass, *Tribute to John Minor Wisdom: John Minor Wisdom and the Impact of Law*, 69 MISS. L.J. 25, 26-29 (1999). See generally David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (reviewing MICHEAL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)).

<sup>78</sup>See discussion *supra* Part D. A judge insulated from repercussions for her decisions is not only free to do the right thing, but free to do the wrong thing. Even more compelling, the judge who exhibits great judicial courage may assert that courage to pursue either lofty principles of justice or, no less, a pattern of corrupt behavior.

commitment to the highest principles of judicial decision-making. Judicial integrity is essentially synonymous with personal or subjective judicial accountability as defined earlier in this Article,<sup>79</sup> but the term is more evocative of the underlying concept.

The threat of judicial discipline—structural judicial accountability—is not a source for judicial integrity, and it is indeed a poor means of inspiring judges to do the right thing. Judicial integrity, like judicial courage, is better viewed as something that “comes from within,” reflecting the individual’s grounding in moral principles and commitment to the rule of law. As used in this Article, “judicial integrity” is that quality that enables her to recognize the “right” thing to do in her decision,<sup>80</sup> and the predisposition to do that right thing.<sup>81</sup>

Professor Burbank implicitly argues that this judicial integrity—to which he attaches the less precise label of “judicial accountability”—is vital to preserving judicial independence. He notes that unless judges demonstrate this type of integrity, the other branches of government and the public will not have sufficient confidence or trust in the judiciary to allow them unfettered independence. It is when judges fail to exercise such integrity that outside forces (other branches of government, or even the public) feel the need to intervene, to weaken the judges’ structural protections, and even to threaten them with repercussions.<sup>82</sup>

But judicial discipline structures are a poor fix for a judge who lacks judicial integrity. It is far too difficult to distinguish an entirely appropriate, but unpopular, judicial decision from one that abuses authority or is driven by improper motives. An aggressive disciplinary regime may have negative repercussions on a judge who is doing the right thing; a more cautious regime will allow abuses to go unchecked. And all the minor, invisible, and unprovable offenses of judges who lack judicial integrity are unreachable in any case.

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<sup>79</sup>At best, the term “judicial accountability” is cumbersome in this context. At worst, it can be misleading, as it may shift focus to structural accountability: the potential to discipline or “rein in” judges who are out of line. Hence, the term “judicial integrity” is a more descriptive term.

<sup>80</sup>Of course, the concept of integrity does not require that there always be one unique “right thing” in any given case. See Ferejohn & Kramer, *supra* note 47. It is common for judges of the highest integrity, sitting on the same case, to reach different conclusions, dissenting from each other’s opinions.

<sup>81</sup>While we are using the term “integrity” to avoid potential confusion between structural accountability and personal accountability (as previously defined), the use of the word “integrity” could be misleading in another way. Some definitions of “integrity” incorporate an element of courage as well. Dictionary definitions may refer to integrity as “uncompromised adherence” to ethical principles. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 700 (1991). This may suggest not only the recognition of what is right and the predisposition to do the right thing, but also the courage to do so in the face of pressure or other adverse consequences. For purposes of this Article, however, we will define the term “integrity” as the mere recognition of and predisposition toward the right thing. Courage works hand in hand with integrity as mutually reinforcing concepts, of course, as explained *supra* Part D.

<sup>82</sup>See generally Geyh, *supra* note 16; Burbank, *supra* note 19.

## VI. DETERMINANTS OF JUDICIAL COURAGE AND INTEGRITY

So given that our policy objective—“a judicial system that affords due process to all parties, impartially and according to law”<sup>83</sup>—is a function of these two elements, judicial integrity and judicial courage, we must consider what the determinants are of such integrity and courage. The answer is not entirely obvious and deserves considerable attention, more than can be afforded in this Article.

A. *The Innate Qualities of Judicial Appointees*

As already suggested, these qualities—judicial integrity and judicial courage—to a large degree, are likely to reflect the innate qualities of the persons appointed to the bench: their values and personalities. In other words, judicial integrity and courage may be simply elements of a judge’s character, drawn from the inside, perhaps cultivated over the years,<sup>84</sup> and not so much the product of external laws, structures, or forces that come into play after they are appointed to the bench, as suggested by the typical “independence v. accountability” debate.

To the extent that is true, the most critical decision-point is the initial selection of judges.<sup>85</sup> Judicial selection criteria and processes may or may not be well-crafted to find and install as judges those individuals who demonstrate the qualities of judicial courage and judicial integrity. Senate confirmation hearings—as applies to Article III judges in the federal judiciary—could probe for these values, but only if the Senators, and those who advise them, choose to focus on such attributes.

How judges *should* be selected to increase the likelihood that they will demonstrate these qualities on the bench is beyond the scope of this Article, but certainly worthy of further analysis. It is sufficient to note here that if we want to preserve judicial independence—or, more precisely, a *system that affords due process to all parties, impartially and according to law*—our judicial screening and selection criteria should weight these characteristics heavily.<sup>86</sup>

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<sup>83</sup>See Zemans, *supra* note 18.

<sup>84</sup>This conclusion could be asserted as a self-evident truth, but it could be enlightening to examine or conduct psychological research to ascertain the sources of an individual’s courage and integrity and what factors may cultivate those attributes in our judges. For purposes of this Article, a judge’s endowment of courage and integrity are assumed—as a product of their innate qualities and of their cultural norms—with attention focused on the impact of judicial structure on the exercise of those attributes.

<sup>85</sup>Following this line of thought, perhaps those concerned about promoting judicial independence should be paying far more attention to the judicial screening and selection process than to the “independence v. accountability” debate. To a large degree, the best thing we can do to preserve a *system that affords due process to all parties, impartially and according to law* is to appoint the right judges in the first place.

<sup>86</sup>Of course, in the post-Bork era, bold and courageous individuals are less likely to get nominated in the first place, as anyone who has generated controversy is considered an easy target in the confirmation process. One might well argue that the federal judicial selection process is now skewed heavily in favor of judges whose careers have been unremarkable, without accomplishments that could have generated note or controversy. This seems unlikely to be the pool of the most courageous judicial candidates.

*B. Cultural Norms: Informal and Formal Customs and Expectations*

Professor Burbank has suggested that societal norms, customs, and expectations are among the most compelling determinants of the American “tradition of judicial independence.”<sup>87</sup> That tradition undoubtedly inspires much of the judicial integrity and judicial courage we see exercised in the American judiciary today.

But cultural norms, by definition, vary with the culture. Since the end of the Cold War, there has been a tremendous push to promote international judicial exchange and dialogue between jurists from both East and West. It has become almost routine for delegations of foreign judges to come to the United States on “study tours” to observe the U.S. justice system in action, to meet with American judges, and to learn what they can about the American judiciary that may be worthy of emulation in their own systems back home. Almost without exception, the Eastern Europeans express admiration for the degree of funding, dignity, and independence enjoyed by the judges in the American courts, as well as regret that it could never be replicated in their own systems.<sup>88</sup>

Why not? Mostly because there is no cultural tradition or norm in these societies to give their courts the kind of deference accorded the judges and judiciaries of the United States.<sup>89</sup> Often, the legislatures will not (or cannot) fund the third branch sufficiently; the Executive Branch may manipulate or disregard judicial decisions; and the public—after decades of judicial manipulation by the “Party”—are unlikely to respect the judges or their decisions.<sup>90</sup>

Of course, public confidence in the judiciary is very much a function of the customs, norms, and traditions that it associates with the judicial function. But no less important is the fact that judges aspire to high integrity because they live and work in a culture that prizes it. Indeed, the greatest heroes of the American judiciary, and for that matter of American legal history, are the maverick judges who stood up and did the right thing in the face of overwhelming political and personal pressure to do otherwise.<sup>91</sup> In the American legal culture, almost every judge—on

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<sup>87</sup>Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 913 (2007) (“. . . the work of Charles Geyh, has thus made it clear that the traditional equilibrium between the federal judiciary and the other branches—what the organizers of this Conference have called ‘our nation’s tradition of judicial independence’—owes its existence primarily to informal norms and customs.”).

<sup>88</sup>Interview with Jeffrey Barr, Attorney-Advisor, Administrative Office of the U.S. Courts, in Washington, D.C. (June 27, 2007).

<sup>89</sup>See generally Pimentel, *supra* note 3 (discussing the efforts made to reform the “culture of low expectations” that prevailed in the pre-war Bosnian judiciary).

<sup>90</sup>See Zemans, *supra* note 22, at 626 (“[A] grant of authority has depended on the perceived legitimacy of the courts and their role in our system of government.”).

<sup>91</sup>See the example of J. Skelly Wright, *supra* note 76, just one of many courageous judges who oversaw desegregation of schools after *Brown v. Board of Education*. Of course, sometimes it takes time for history to determine whether the courageous decision was a good one. The Wisconsin Supreme Court’s 1854 bold and courageous decision on the Fugitive Slave Law is sometimes cited as an example of courage to do the right thing, particularly now that history has vindicated the anti-slavery cause served by that decision. *In re Booth*, 3 Wis. 1 (1854). Many

some level—dreams of being that hero, who demonstrates both the *integrity* to make the right decision and the *courage* to withstand the pressure to do otherwise.

We should be careful not to take these customs, norms, and traditions for granted. Just as judicial reform efforts in Eastern Europe are striving to cultivate a culture that respects the independence and dignity of the judiciary, our own culture is also evolving, and some have warned that the American traditions of independence for the judiciary are vulnerable.<sup>92</sup> Expectations and cultural norms, though easily overlooked or undervalued, may go further in explaining how a judiciary achieves true independence and accountability than any other factor.

*C. Structural Factors: The Balance of Structural Protections v. Discipline Mechanisms*

It is in the exercise of judicial independence that the conventional debate over “independence and accountability”—i.e. striking the right balance in the structural forms—has its true relevance. The issue is not balancing independence against accountability *per se*, but balancing the structural components of the judiciary in the manner most likely to cultivate appropriate exercises of both judicial courage and integrity.

The existence of structural protections to support judicial independence, while not the source of judicial courage, can enhance a judge’s exercise of such courage. They can leverage what courage is already there and amplify its impact by emboldening a judge who otherwise might waver at the moment of truth.<sup>93</sup> Similarly, the existence of a system of judicial discipline does not generate integrity. Rather it is an environmental factor that may influence a judge in her exercise of integrity, i.e. it may mitigate the harm when integrity is lacking, primarily by giving the judge other reasons to do the right thing or to avoid the wrong thing.

In addition, structural independence and accountability can help foster the development of a culture of courage and integrity among judges. The mere existence of these structures can inspire confidence in the judicial system, both within it and outside it, quite separate from the structures’ practical impact and operation. These

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judges have exercised courage to hand down bold and controversial decisions, only to have history condemn them for picking the wrong side. *See, e.g., Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>92</sup>*See, e.g., Burbank, supra* note 87, at 913.

[W]e know that customs, norms, and traditions can change. Neither the fact that periods of friction between the judiciary and the other branches have recurred throughout our history nor the fact that they have been succeeded by a return to normalcy is adequate grounds for confidence that the pattern will hold. Similarly, optimism that norms of interdependence between the Executive and Legislative branches can be restored provides little comfort. For, if I am correct about the dynamics leading to our current malaise, there is reason to fear a tipping point, a point of no return to the traditional equilibrium in interbranch relations affecting the judiciary.

*Id.*

<sup>93</sup>Structural safeguards for judicial independence may be justified on other grounds, not that it is necessary to compensate for the judges’ tepid courage, or that judges would not do the right thing without such protections, but that it is inherently unfair for us to ask and expect judges to take those risks and make those sacrifices.

are symbols, and while it is difficult to assess the impact of symbols, it is foolish to underestimate them.

The upshot is that the “accountability v. independence” debate is further removed from the ultimate policy objective than we normally think. Because the “end” we seek—a *system that affords due process to all parties, impartially and according to law*—is a function of judicial integrity and courage, we should focus on how to build and shore up those principles among our judges. Accountability mechanisms and structural safeguards of judicial independence are only two of a variety of factors that might influence judges’ integrity or their courage to act on it. To strike the right balance for any particular system or society—and we do, after all, have to decide how much structural independence and accountability to build into the system—we need to evaluate separately the impact of these two factors on judges’ integrity and courage.

## VII. GRAPHING THE PROBLEM

The multiple dimensions of this issue can be illustrated on a simple graph, depicting judicial integrity on the vertical axis and judicial courage on the horizontal axis. Every judge or judicial candidate/nominee has some endowment of judicial integrity and a second one of judicial courage, allowing her to be plotted at a unique spot on the graph. The graph can then be subdivided into four quadrants, those on the right including judges of high courage, and those on the top including judges of high integrity.

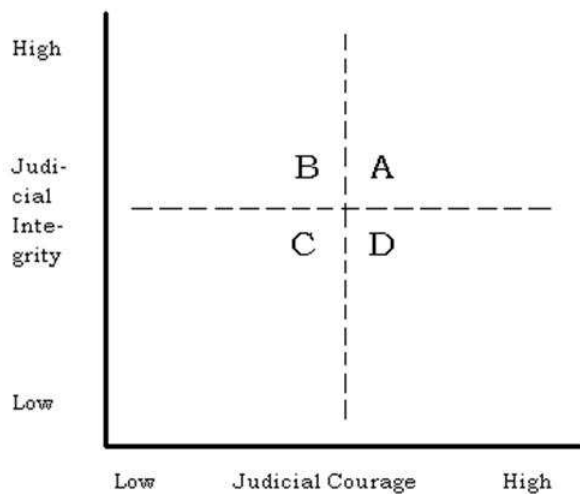


Fig. 1 – Plotting Judicial Integrity Against Judicial Courage

More specifically, in the Northeast quadrant (Quadrant A), we find the judges of the highest integrity and the highest courage. These are our “heroes.” In the Northwest quadrant (Quadrant B), we find judges who want to do the right thing, but are vulnerable to outside threats and pressures; their integrity is high, but their

courage is lacking.<sup>94</sup> Quadrant C, in the Southwest, includes the “corruptible” judges, whose integrity is dubious, and who, lacking courage, are susceptible to pressure. Here is where you might find judges who pander to the whims of the executive branch or who are even in the pocket of the mob. They are not bent on pursuing their own corrupt agenda (see Quadrant D, *infra*) as they lack the courage for such an enterprise, but are manipulable, and may well end up doing the bidding of others. In the Southeast (Quadrant D) we find the scariest of all, the judges with low integrity and ample courage; these are what Judge Noonan described as “monsters” in his book on judicial ethics—judges who boldly pursue their own corrupt objectives.<sup>95</sup>

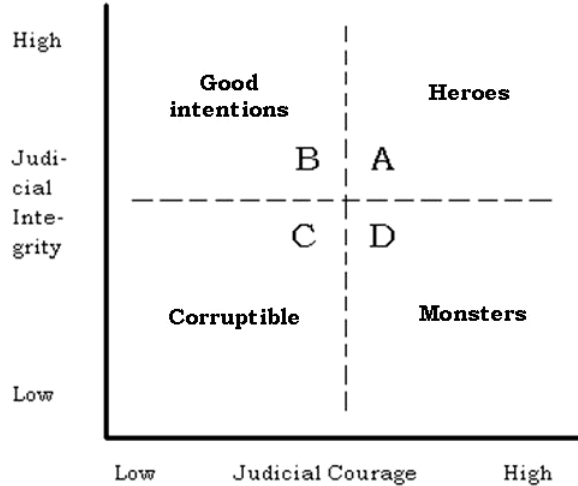


Fig. 2 – Categorizing Judicial Types by Quadrant

In setting forth this taxonomy of judges, there is no intent to insult the judges presently on the bench in the American judiciary or any other judiciary. The four quadrants posited here should not be interpreted as a suggestion that a quarter of our judges, or any presently sitting for that matter, are “monsters.” On the other hand, this taxonomy is not completely hypothetical. Judge Noonan has documented the existence of monsters on the bench in history; it is certainly possible that this may

<sup>94</sup>While it may be hard to know how many judges fall into this quadrant, literature is full of tragic characters who know what is right and want to do what is right, but who succumb to pressure. They have not lost their moral compass—indeed they are tortured by their ethical lapses—but at the critical moment they lacked the courage to do the right thing. Two that come to mind quickly are Joseph Conrad’s *Lord Jim*, and Lt. Col. Markinson in Aaron Sorkin’s play (and Rob Reiner’s film) *A Few Good Men*. JOSEPH CONRAD, *LORD JIM* (1900); AARON SORKIN, *A FEW GOOD MEN* (1989); *A FEW GOOD MEN* (Columbia Pictures 1992).

<sup>95</sup>THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 35-47 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

happen again. Accordingly, the proffered taxonomy is offered as an analytical rubric to help us understand the proper role of structural protections and disciplinary regimes in producing/supporting a *judicial system that affords due process to all parties, impartially and according to law*.

#### A. Impact of Judicial Discipline (Accountability) Regimes

Using the graphical depiction, we can see that the imposition of a disciplinary regime is not going to move judges from Quadrant D upward to Quadrant A. Monsters will not acquire integrity through the threat of discipline. Their courage numbs them to such influences—they are unlikely to be swayed by fear. Rather, the disciplinary regime will have its greatest impact on the left side of the graph, where judges are susceptible to outside pressures. For these judges the threat of discipline will nudge them upward from Quadrant C to Quadrant B.

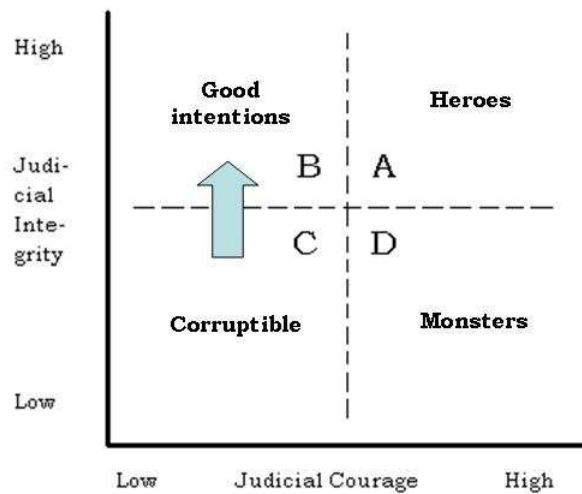


Fig. 3 – The impact of a judicial discipline regime

#### B. Impact of Structural Protections for Judges

At the same time, structural protections will bolster the exercise of judicial courage, nudging judges to the right, wherever they may start on the graph. Those in Quadrant B will be pushed toward Quadrant A, a positive development, when additional protections are provided to judges to strengthen their position and insulate them from outside threats and pressures. This is the dynamic that prompts reformers to call for greater protections, to support the ideal of greater judicial independence. In most courts of the United States, and for most sitting judges, this is indeed a desirable goal.

At the same time, however, the strengthening of judges' structural protections may push judges from Quadrant C toward Quadrant D, turning them into monsters. If the judges already lack integrity, new protections may embolden them, convincing

them that they can get away with pursuit of their own agendas, rather than of the rule of law.

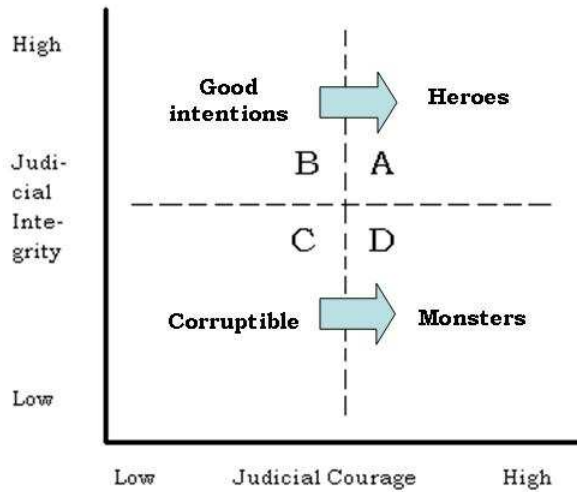


Fig. 4 – Impact of strengthened structural protections for judges

#### VIII. INTERPRETING THE GRAPH TO ARRIVE AT THE “RIGHT BALANCE”

When it comes to “finding the right balance” in terms of structural features, therefore, the answer depends on where the judicial system sits on the chart, i.e. in which quadrant we find most of the judges, where the most significant cluster of plots lies.<sup>96</sup>

If judges are concentrated in Quadrant C, then the beefing up of judicial accountability mechanisms is warranted. These judges are vulnerable to pressure; we need to make sure that whatever pressure they feel nudges them up toward Quadrant B, where they are exercising greater integrity. Absence of such positive pressure may leave them subject to political pressures and worse.

If the judges are, for the most part, in Quadrants B and A, they are already showing integrity, and should be strengthened in that position. It is in these situations that it makes the most sense to install or upgrade structural protections (such as life-tenure, security, etc.). Those in Quadrant B can be nudged to the right toward Quadrant A, as such protections embolden them to exercise courage to act on their already-ethical instincts.

If, in contrast, a judiciary has a concentration of judges in Quadrant D, the appropriate balance may involve removing some structural protections. A judicial system full of monsters needs the power to “clean house”: to, at the very least, send a strong message that bad judges risk consequences if they continue to pursue a pattern

<sup>96</sup>See, e.g., Burbank, *supra* note 19, at 324 (observing that there is no one-size-fits-all in finding the right balance of judicial independence).

of corruption. The removal or weakening of structural protections may nudge judges from Quadrant D toward Quadrant C; it will make them more vulnerable and therefore more susceptible to the threat of discipline. For true monsters, one would hope for a sufficient weakening of structural protections to permit their removal from the system altogether—by impeachment, recall/retention elections, disciplinary removal, or whatever—as the influence of structural adjustments is unlikely to ever get them to Quadrant A.<sup>97</sup>

Overall, the pattern of reform can be depicted primarily as a clockwise motion on the graph. But the structural approaches must be flexible enough to respond to the current state of the judiciary and the attributes of the majority of the judges in that system. Structural protections must be relaxed enough to clear judges out of Quadrant D, and then disciplinary regimes can be imposed to nudge judges northward, from Quadrant C to Quadrant B, where they are showing more integrity. By the time the judges are mostly concentrated in the top half of the graph, strengthened structural protections are warranted to nudge judges eastward, emboldening them to show more courage.

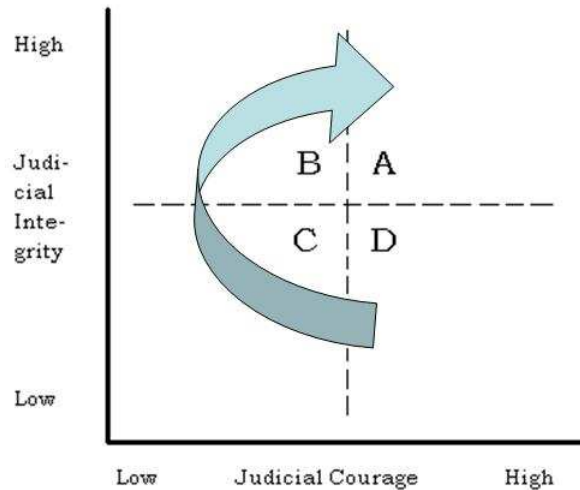


Fig. 5 – The trajectory of judicial reform

The upshot is that there is no one right “balance”—no one-size-fits-all solution—to be struck between judicial independence and judicial accountability. The individual qualities of the judges, and the culture of the judiciary—including

<sup>97</sup>Consider, for example, the challenge faced by court reformers in Bosnia, who felt it necessary to conduct a clean sweep of the Bosnian judiciary. See Pimentel, *supra* note 3, at 111-13 (discussing the efforts made to reform the “culture of low expectations” that prevailed in the pre-war Bosnian judiciary). While these judges certainly were not all monsters—indeed, more than half of them were appointed to new posts afterward—there was a sufficient prevalence of weak and corrupt judges to warrant complete suspension of structural protections. *Id.*

traditions, norms, and expectations—will dictate where the balance should be struck in any given place and time. And the pattern of reform may well require a sequence, on appropriate intervals, of structural changes to bring the judges to where they can be effective—demonstrating both the courage and the integrity necessary to sustain the Rule of Law.

#### Application in International Judicial Reform

In the United States, although we enjoy strong cultural norms for a robust and ethical judiciary,<sup>98</sup> we should not expect to find identical situations in the federal and various state judiciaries. Even less analogous would be the prevailing standards of independence and accountability in other countries. As already noted, many foreign judiciaries may covet the independence that prevails in the American judiciary, but it does *not* follow that if a structure like ours is adopted elsewhere, the foreign judiciary will acquire the attributes of the American system. For this reason, as suggested at the outset of this article, the American judicial system may be a poor blueprint for international judicial reform efforts.

The graphics set forth above illustrate the point clearly. While in the United States we may find most judges in Quadrant A or perhaps B, we can justify a regime of strong structural protections for incumbent judges. Such a regime strengthens and comforts the courageous, and builds courage among those who are ethical but timid. A dysfunctional court in a less-developed nation, or particularly one that never had a truly independent judiciary, however, may have no tradition of judicial integrity. Replicating American concepts of structural protection, therefore, may exacerbate problems in that country as the monsters in Quadrant D are made untouchable, and as the weak and corruptible judges in Quadrant C are assured that they may pursue their corrupt agenda without fear of consequences.

The challenge in international judicial reform, therefore, then becomes one of cultivating a culture of a strong, ethical, and independent judiciary. As new cultural norms are established, the ideal balance—the policy balance struck between structural independence and structural accountability—may shift. In any case, whatever balance is right for a particular society now, that will not necessarily be the right balance in another place today, or in the same place tomorrow.

### IX. CONCLUSION

Improvements in judicial performance, occasioned by structural adjustments to the protections and discipline accorded the judges and the judicial branch as a whole, will come only as a slow, evolving response to such adjustments. As New Jersey Supreme Court Justice Arthur T. Vanderbilt said over a century ago, “[J]udicial reform is no sport for the short-winded.”<sup>99</sup> But despite the patience required, the questions and issues are absolutely fundamental to establishing and maintaining the Rule of Law.

With that in mind, it is essential that we have a clear idea of what our goal is and how best to get there. The simplistic characterization of the issue as one of balancing two worthy interests against each other—judicial independence v. judicial

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<sup>98</sup>See *supra* Part F.2.

<sup>99</sup>*Chem. Separation Tech. Inc. v. United States*, 51 Fed. Cl. 771, 817-18 (2002) (quoting MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (Arthur T. Vanderbilt ed., 1949)).

accountability—has framed the discussion of these issues in the past. But this oversimplified approach neglects the fundamental importance of the judges' individual endowments of judicial courage and judicial integrity as well as the culture in which they are exercised. To appreciate how we achieve an independent and accountable judiciary, we need to examine how the structural elements—(1) insulating judges from outside influence and (2) subjecting them to appropriate discipline—influence judges in their exercise of courage and integrity. Our ultimate goal, to produce a judicial system that affords due process to all parties, impartially and according to law,<sup>100</sup> will be best served by adopting a judicial structure that leverages these judicial attributes to maximum effect.

Because the prevailing cultural norms may differ and may change, and because the individual judges may exhibit varying degrees of courage and integrity, any search for one “ideal” balance between structural independence and accountability is misguided. A more culture-specific, court-specific and, in extreme cases even judge-specific analysis—focusing on judges' courage and integrity—is far more likely to yield effective policy prescriptions for judicial reform, both at home and abroad.

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<sup>100</sup>See *supra* Part B.2.