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Reading Reinhardt: The Work of Constructing Legal Virtue (*Exempla Iustitiae*)

Is the California prison system so overcrowded as to require a reduction in population in order for the state to comply with its constitutional obligation not to be “deliberately indifferent” to the known medical needs of prisoners?¹ Is the phrase “under God,” added in the 1950s to the Pledge of Allegiance, unconstitutional?² When does the First Amendment protect the speech of

AUTHOR. Judith Resnik is the Arthur Liman Professor of Law, Yale Law School, all rights reserved. Thanks are due to Denny Curtis, who joined me in some of the reading of Reinhardt, as he does in friendships with Stephen Reinhardt, Ramona Ripston, Stanton Wheeler, Marcia Chambers, and Rachel and Stephen Wizner. Help also came from several of Judge Reinhardt’s former and future law clerks including Joshua Civin, Stella Burch Elias, Talia Inlender, and Daniel Winik; from Heather Gerken, Ben Sachs, Lucas Guttentag, and Reva Siegel; and from Yale Law School students Victoria Degtyareva, Jason Glick, Matthew Pearl, and Brian Holbrook.

Special acknowledgment is needed of the remarkable friendship between Stan Wheeler and Stephen Reinhardt, who shared years together as undergraduates at Pomona College, a love of Yale Law School and of Los Angeles, deep concern for individuals in the criminal justice system, and broad commitments to social justice and racial equality. Were Stan alive, he would be leading this band of appreciation for Stephen Reinhardt’s contributions. I in turn am grateful that *The Yale Law Journal* has provided me the opportunity to reflect on Judge Reinhardt’s achievements.

1. See *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at *76 (E.D. Cal. & N.D. Cal. Aug. 4, 2009); see also *Order To Reduce Prison Population*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. Cal. & N.D. Cal. Jan. 12, 2010), *appeal granted and jurisdictional consideration postponed sub nom.* *Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010).
2. See *Newdow v. Rio Linda United Sch. Dist.*, 597 F.3d 1007, 1012 (9th Cir. 2010) (Reinhardt, J., dissenting). Prior decisions in that litigation include *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

government employees?³ How long can the federal government hold an immigrant in detention after that person is ordered to leave the United States?⁴ These questions have come to the fore of constitutional jurisprudence in part through decisions by Stephen Reinhardt, appointed in 1980 by President Jimmy Carter to the U.S. Court of Appeals for the Ninth Circuit.

But to focus only on cases that have made headlines is to miss the bulk of Judge Reinhardt's work. According to one database, from January of 2005 through July of 2010, Judge Reinhardt participated in more than fifteen hundred decisions.⁵ My reading of Reinhardt takes but a slice of this large corpus addressing human relations and legal obligations that is, as detailed below, a jurisprudence of facticity. His lengthy opinions are dense with the experiences of individuals who, while rights-holders, sometimes encounter inattentive judges and ineffective lawyers.

Yet, despite his own documentation of law's failures, Judge Reinhardt remains optimistic about law's power to cabin officialdom's misbehavior. Judge Reinhardt reads the U.S. Constitution as purposefully protective of individuals in their encounters with government. When doing so, Reinhardt is well aware that he lives in an era where, as he put it, many of his cohort prize "efficiency" . . . and "judicial economy" and therefore rebuff claimants in the name of those goals. Reinhardt instead argues that his—and other judges'—rulings ought to be animated by efforts to enhance "justice and liberty."⁶

Absent sustained ethnographic case studies of many judges and complementary econometrics, one cannot know how unusual Judge Reinhardt's output is. What can be seen is that his judgments illustrate the choices entailed in exercising the "judicial voice."⁷ Judge Reinhardt's work thus

3. See *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004) (Reinhardt, J.), *rev'd*, 547 U.S. 410 (2006).

4. See *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000) (Reinhardt, J.), *vacated sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001).

5. See *Litigation History Report: Stephen Reinhardt*, WESTLAW, <http://www.westlaw.com> (open any decision of Judge Reinhardt, follow "Litigation History Report" hyperlink) (last visited Sept. 20, 2010). The list of more than 1700 cases included summary dispositions. To invoke this database is not to endorse its count or method but to provide one metric.

6. *Phelps v. Alameida*, 569 F.3d 1120, 1123 (9th Cir. 2009) (Reinhardt, J.).

7. A wealth of materials, relying on diverse methodologies and analytics, considers theories of the judge, interpretation, narrative styles, preferences, collegial interactions, and patterns of judgment. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); LEE EPSTEIN, THOMAS G. WALKER, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* (4th ed. 2007); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 25 (2002); Robert

provides a contemporary counterpart to what Renaissance Europe called “*exempla virtutis*”—allegorical narratives of a person’s deeds exemplifying attributes seen as virtuous. A subset, “*exempla iustitiae*,” identified traits particularly admirable for judges.⁸

What was desirable then? Renaissance justice stories stressed judicial loyalty to the state and subservience to ruling powers. Town halls were adorned, for example, with pictorial renditions of the Roman Brutus, who ordered the slaying of his own sons because of their treason against the Republic. Also portrayed was the Greek Zaleucus, who gouged out one of his own eyes as he also imposed that punishment on his son for violating the law.⁹ The messages were autocratic and patriarchal, insistent on obedience to the law even at the cost of inflicting pain on one’s family members and oneself. Moreover, whenever judges breached their obligations, kingly powers would mete out punishments to warn judges against going awry. Another regularly shown picture was that of a son forced to sit as a new judge on the skin of his father, who had accepted a bribe and was flayed alive at the direction of a ruler.¹⁰

Today, as democratic precepts have radically changed their obligations, judges are no longer posited as servants of the state but are, instead, admired for different traits. Judges are both prohibited from sitting in judgment of their relatives and protected from kingly oversight through norms of judicial independence. Further, judges must now listen to all persons and treat them fairly and equally. Yet the older idea—of virtue exemplified—remains a useful

A. Ferguson, *Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990). Efforts are underway to expand systematic studies of judicial role and behavior through various collaborative research projects and newly formed organizations. See, e.g., THE LAW AND SOC’Y ASS’N, COLLABORATIVE RESEARCH NETWORKS, <http://www.lawandsociety.org/> (follow “Collaborative Research Networks” hyperlink) (last visited Oct. 18, 2010) (including research networks on “Gender and Judging” and on “Civil Justice and Disputing Behavior”); UNIV. COLLEGE LONDON, JUDICIAL STUDIES INSTITUTE, <http://www.ucl.ac.uk/laws/judicial-institute/index.html> (last visited Oct. 18, 2010).

8. See Hugo van der Velden, *Cambyzes for Example: The Origins and Function of an Exemplum Iustitiae in Netherlandish Art of the Fifteenth, Sixteenth and Seventeenth Centuries*, 23 SIMIOLUS: NETHERLANDS Q. FOR THE HIST. OF ART 5 (1995).
9. Amsterdam’s Town Hall of 1655 included both. That imagery is reproduced and analyzed in JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES TO DEMOCRATIC COURTROOMS 38-61 (2011).
10. A particularly graphic diptych could be found in the fifteenth-century Town Hall of Bruges. See Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1737-38 figs.5a & 5b (1987).

way to think about what one wants from judges. Below I examine different metrics by which to assess the voice, visibility, and jurisprudence of judges and explore the facets of Judge Reinhardt's decisions that make him worthy—per the Renaissance tradition—of imitation.

I. LEGAL PRESENCES AND ABSENCES

Many Reinhardt decisions bring individuals into focus. One such person is Juan Antonio Perez, who came from Mexico “without inspection” into the United States and then sought asylum.¹¹ At issue was the legal import of Perez's belated arrival for his asylum hearing. To understand the doctrinal and theoretical import of the decision requires knowing what happened one morning in Los Angeles.

Having appeared at his first immigration court proceeding in a timely fashion, Perez was late to a second hearing because “his car overheated in the middle of rush hour traffic.”¹² After making his way by bus, Perez arrived two hours past the appointed time. As Judge Reinhardt recounts: “When Perez entered the courtroom, around 11:00 AM, the IJ [immigration judge] was still on the bench. Perez approached the IJ's assistant and handed her his notice of the removal hearing. At that moment, the IJ stood and left the courtroom.”¹³ The administrative assistant told Perez that the judge was “done for the day”—but as it turned out, not quite: on the same day, the immigration judge ordered Perez “removed in absentia.”¹⁴

Was Perez absent? Is that a physical fact, a psychological (if not existential) experience, a discretionary judgment, or a legal ruling? Non-lawyers might not pause long over these questions, for absence is commonly understood to be the antithesis of presence,¹⁵ and Perez and the immigration judge shared a physical space—the same courtroom—on the day of the hearing.

Yet “in absentia” is also a legal concept, encountered with some regularity in the criminal context. Under the Federal Rules of Criminal Procedure, a trial

11. *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008).

12. *Id.* at 772. Judge Reinhardt wrote the panel decision, joined by Judge Betty Fletcher. The dissent, by Judge Pamela Rymer, characterized the facts as uncertain; the agency lacked record evidence as to “when Perez arrived at court, or what was going on when he got there.” *Id.* at 775 n.1 (Rymer, J., dissenting). Judge Rymer would have denied the petition for review on that basis alone. *Id.* at 776 n.1. The government is not reported by the dissent or the majority to have disputed the facts described by the majority.

13. *Id.* at 773 (majority opinion).

14. *Id.*

15. See 1 OXFORD ENGLISH DICTIONARY 46 (2d ed. 1989).

cannot proceed if a defendant is not present at its beginning,¹⁶ and hence courts have debated how to respond to no-shows, as well as whether to draw distinctions between a defendant's "flight before and flight during a trial"¹⁷ or thereafter. The current doctrine is that courts may decline adjudication if defendants flee while appeals are pending. Thus, a defendant loses whatever claims existed.¹⁸ But that sanction is to be mitigated if the legal claims of a "former fugitive" are unrelated to the flight.¹⁹

Unlike trials, with confrontation and presentment rights requiring physically present participants, appellate review does not directly involve litigants, who often do not attend oral arguments. Why, then, impose sanctions for a criminal defendant absent when an appeal is to be decided? Enforcement of judgments is one answer. Were an appellate court to uphold a conviction and sentencing or to reverse and remand for new proceedings, neither judgment could take effect without a defendant.²⁰ Courts dismissing "fleeing fugitive appeals" also explain their holdings in terms of deterrence and an "interest in efficient, dignified appellate" process²¹ that would be undermined by the "disrespect" of flight.²²

Yet these various concerns are to be balanced against the potential that the loss of appellate review could result in a person "serving a sentence that under law was erroneously imposed."²³ Orderly process, procedural regularity, and respect for the institutions of adjudication could well demand a litigant's presence, but draconian penalties sometimes must be limited so as to focus on

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16. See Fed. R. Crim. P. 43. A defendant can, however, be deemed to have "waived" the right to a "continued presence" if voluntarily absenting him or herself "after the trial has begun." Fed. R. Crim. P. 43(c).
 17. *Crosby v. United States*, 506 U.S. 255, 261 (1993).
 18. See *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) ("While . . . an escape does not strip the case of its character as an adjudicable case or controversy . . . it disentitles the defendant to call upon the resources of the Court for determination of his claims.").
 19. *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 (1993) (delineating the parameters of the "fugitive dismissal rule"). Chief Justice Rehnquist, joined by Justices White, O'Connor, and Thomas, dissented.
 20. See *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97 (1876). Both opinions were referenced by Justice Stevens in *Ortega-Rodriguez*, 507 U.S. at 239-42.
 21. *Ortega-Rodriguez*, 507 U.S. at 242 (citing *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975)).
 22. *Id.* at 246 (quoting *Ali v. Sims*, 788 F.2d 954, 959 (3d Cir. 1986)).
 23. *Estelle*, 420 U.S. at 544. The "dismissal of fugitive appeals is always discretionary," as being a fugitive "does not 'strip the case of its character as an adjudicable case or controversy.'" *Ortega-Rodriguez*, 507 U.S. at 250 n.23 (quoting *Molinaro*, 396 U.S. at 366).

the underlying legality of decisions. On occasion, the Supreme Court has vacated the dismissal of an appeal based on the absence of the appellant.²⁴

How might these ideas be translated into the immigration context, conceived as a “civil” rather than a “criminal” proceeding? What are the stakes in refusing to hear a person who has absconded, as contrasted with one who is present but late to a hearing? What magnitude of discretion ought to be accorded administrative judges?

These questions, exemplified by *Perez*, are moored in federal statutes that require appearances and recognize limited justifications for absences. Upon a failure to appear, a person shall “be ordered removed in absentia if the [Immigration] Service establishes by clear, unequivocal, and convincing evidence that . . . written notice [of the hearing] was . . . provided and that the alien is removable.”²⁵ A removal order precludes not only an opportunity to raise legal claims to remain but also the possibility that an immigration judge could authorize a “voluntary departure.” For those permitted to depart voluntarily, return under certain circumstances may be available, whereas a removal order can bar reentry for ten or more years.²⁶ But even if a person is found to have been “in absentia,” reopening is an option under “exceptional circumstances,” defined as those beyond the immigrant’s control and exemplified in the statute by “battery or extreme cruelty” or “serious illness” befalling an immigrant or her immediate family, and by no “less compelling circumstances.”²⁷

The statute speaks of failures to appear but not belated arrivals. One could, however, read the words “appear” to mean that the alien must appear at a time fixed, rather than as being physically present in the appointed place. In immigration decisionmaking, “in absentia” appears (to borrow that word) to have taken on that meaning and to be regularly conflated with being late—albeit without much by way of statutory interpretation or reference to the law on fleeing fugitives. Reported decisions by the Board of Immigration Appeals (BIA) rely on tardiness to order removal “in absentia.”²⁸ Appellate courts

24. See, e.g., *Ortega-Rodriguez*, 507 U.S. at 239–52.

25. 8 U.S.C. § 229a(b)(5)(A) (2006).

26. *Id.* § 182(a)(9)(A) (2006).

27. *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008) (quoting 8 U.S.C. §§ 229a(b)(5)(C)(i), (e)(1)).

28. One case holding that lateness rendered that person “in absentia” noted that the respondent had “waited outside the courtroom for his attorney to arrive” but concluded that “the respondent ha[d] not indicated that he was instructed by his attorney or anyone else to not enter the courtroom until the arrival of his counsel” and had not claimed ineffective

sometimes reverse (by delineating factors constituting “mitigating circumstances” to distinguish a particular lateness from ordinary “tardiness”²⁹), while at other times they approve the administrative removal orders.³⁰ Given the reported decisions, data from the Executive Office for Immigration Review—that thirty-nine percent of noncitizens failed to appear for removal hearings in 2006³¹—may well include some unknown number of late arriving respondents alongside those who never came at all.

Where did Mr. Perez’s situation fit within the statutory scheme? The immigration judge ruled that physical presence had not sufficed to negate a conclusion of Perez’s legal absence. The superior administrative body, the BIA,

assistance of counsel. See *In re Chaman Singh*, No. A72 567 465, 2004 WL 3187212, at *1-2 (B.I.A. Dec. 20, 2004) (unpublished and “cannot be cited”).

One can also find decisions forgiving lateness. For example, an immigrant arrived at a federal building on time “but was not able to enter because of a lengthy security line.” *Matter of Bao Di Lin*, No. A29 879 052, 25 *Immig. Rptr.* B1-77 (Immigration Non-Precedent Decisions, March 14, 2002) (granting reopening). In contrast, a dissenting board member argued that “[u]nless we are to apply a per se rule that a late appearance shall not constitute a non-appearance—something this Board has not previously done—it is hard to see the Immigration Judge’s error in this case.” *Id.* A 1997 three-person BIA panel ruling granted reopening based on “exceptional circumstances” because respondent’s “step-son’s illness was responsible for his 15-minute delay in arriving at his deportation hearing.” *In re Kanwaljit Singh*, No. A70 942 039, 21 *I. & N. Dec.* 998, 1000 (B.I.A. 1997); see also *In re Ismael Vasquez-Palacios*, No. A27 621 985, 8 *Immig. Rptr.* B1-42 (Immigration Non-Precedent Decision, March 14, 1990) (ordering reopening when respondent and his father were on time but waited outside the hearing room as another matter was pending).

29. See, e.g., *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 117 (3d Cir. 2006) (per curiam) (granting reopening when Mr. Cabrera-Perez arrived some twenty minutes late and had “likely entered the courthouse before the IJ left the bench”); *Twum v. INS*, 411 F.3d 54, 58 (2d Cir. 2005) (remanding after the immigration judge heard no evidence on the claim that “security guards’ refusal to admit him to 26 Federal Plaza” precluded his arrival); *Herbert v. Ashcroft*, 325 F.3d 68, 69-70 (1st Cir. 2003) (granting reopening because Mr. Herbert was thirty minutes late due to traffic); *Nazarova v. INS*, 171 F.3d 478, 481 (7th Cir. 1999) (permitting reopening when Ms. Nazarova explained that she had waited for a translator). The *Nazarova* court also noted that the immigration judge had ordered deportation to Russia instead of the Ukraine, where Ms. Nazarova was from. The judge had assumed that because she spoke Russian, she came from Russia. See *Nazarova*, 171 F.3d at 481.
30. For example, the Eleventh Circuit denied reopening when an immigrant had alleged that he was a few minutes late to the hearing because he “went to the incorrect location.” *Pineda v. U.S. Att’y Gen.*, 186 F. App’x 854, 855 (11th Cir. 2006) (per curiam).
31. OFFICE OF PLANNING, ANALYSIS, & TECH., EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP’T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK, at H2 (2007), available at <http://www.justice.gov/eoir/statspub/fy06syb.pdf>; see also Rebecca Feldmann, Note, *What Constitutes Exceptional? The Intersection of Circumstances Warranting Reopening of Removal Proceedings After Entry of an In Absentia Order of Removal and the Due Process Rights of Noncitizens*, 27 WASH. U. J.L. & POL’Y 219 (2008).

summarily affirmed. The next stage was the Ninth Circuit, which—because of the summary BIA affirmance—was to “review only the reasoning presented by the IJ”³² so as to evaluate whether the refusal to reopen was “arbitrary, irrational, or contrary to law.”³³

In the opinion authored by Judge Reinhardt, the Ninth Circuit held that Perez was not “in absentia” when he was standing—albeit late—in a courtroom where an immigration judge was sitting. Because, as a matter of law, Perez had not failed “to appear,”³⁴ the question of “exceptional circumstances” was not relevant.³⁵ The dissenting judge would have found otherwise: “Juan Antonio Perez was *two hours* late for his immigration hearing—so late that even his lawyer had given up and gone home.”³⁶ But Judge Reinhardt read the congressional directives on removal “in absentia” to preclude the administrative apparatus from looking people in the face and deeming them absent.

II. PERSONAL IMMEDIACY

If one facet of immigration law regulates government practices on deportation, another addresses government power to hold immigrants. One issue is what to do when a person, properly deportable, cannot be repatriated. Hence, another Reinhardt decision begins: “Petitioner Kim Ho Ma is an alien who left his native land, Cambodia, as a refugee at the age of two and has resided in the United States as a legal permanent resident since he was six.”³⁷

32. *Perez*, 516 F.3d at 773 (quoting *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004)).

33. *Id.* (quoting *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2002)).

34. *Id.* at 774.

35. Perez’s lawyer had conceded that exceptional circumstances did not exist. The majority left open that question for future cases. *See id.* at 773-74 & n.2. As discussed in note 29, other circuits have dealt with lateness by finding mitigation, rather than interpreting the statute as did the Reinhardt decision to be inapplicable. *See generally* Feldmann, *supra* note 31.

In another context, Judge Reinhardt addressed the discretion of federal trial judges in dealing with requests for continuance when a defendant had diligently presented the request, no findings of inconvenience to the government were made, and prejudice to the defendant resulted. *See United States v. Kloehn*, Nos. 06-50456, 07-50274, 2010 WL 3385542 (9th Cir. Aug. 30, 2010). That majority decision reversed a conviction because a trial judge “refused to continue the trial for two days to allow [the defendant] to see his dying son.” *Id.* at *3. Below, the defendant then waived his right of presence and left the trial, and his son died an hour after he arrived. *Id.* at *4.

36. *Perez*, 516 F.3d at 775 (Rymer, J., dissenting).

37. *Kim Ho Ma v. Reno*, 208 F.3d 815, 818 (9th Cir. 2000), *vacated sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001). Judge Reinhardt was joined by Judges Thompson and Nelson.

Because he had committed a crime, however, the government sought to deport him at the end of his prison sentence. Ordered removed because of the conviction, Kim Ho Ma was held after the end of his sentence because, without a repatriation agreement between Cambodia and the United States, the United States had no place to send him (“and hundreds of others like him”).³⁸ The government asserted that it could hold him “in detention indefinitely.”³⁹

The Ninth Circuit disagreed, construing the relevant statute to permit detaining a person for only a “reasonable period.”⁴⁰ Like the Ninth Circuit, a majority of the Supreme Court held that indefinite detention with “no reasonable likelihood of . . . removal in the foreseeable future” was impermissible.⁴¹ In Kim Ho Ma’s case, the Court remanded to determine the “likelihood of successful future negotiations” for repatriation.⁴²

The narrative structure of the *Kim Ho Ma* decision, like that of the *Perez* opinion, exemplifies a common feature of many Reinhardt opinions. He starts with a person’s circumstances,⁴³ some of which are poignant, some veering toward Kafka, and others unappealing (pun intended), in that the person is alleged to have (and in some cases has been found to have) visited grievous harm on others. Immigration decisions are one template; another is postconviction relief. Reinhardt opinions often center on individuals who encounter the “Law” – as embodied in police officers, prosecutors, immigration officials, lawyers, administrative judges, and courthouse judges. Law, in these accounts, fails because officials are overwhelmed, inattentive, or punitive

38. *Id.*

39. *Id.*

40. *Id.*

41. *Zadvydas*, 533 U.S. at 702. Justice Breyer wrote for the Court. Two dissents were filed, one by Justice Kennedy, joined by Chief Justice Rehnquist and by Justices Scalia and Thomas in part, *id.* at 705 (Kennedy, J., dissenting), and the other by Justice Scalia, joined by Justice Thomas, *id.* at 702 (Scalia, J., dissenting). All of the dissenters shared the view that the Attorney General had “statutory authority to detain criminal aliens with no specified time limit.” *Id.* at 702 (Scalia, J., dissenting). Justice Scalia’s separate comments were directed at Justice Kennedy’s view that courts might in some situations order release. *Id.*

42. *Id.* at 702 (majority opinion).

43. Another example is *United States v. Lopez-Velasquez*, 568 F.3d 1139, 1140-46 (9th Cir. 2009), in which the Ninth Circuit affirmed the district court’s dismissal of the indictment based on the invalidity of the initial deportation order. Judge Reinhardt’s opinion began: “Edmundo Lopez-Velasquez waived his right to appeal and was deported in 1994 in a group proceeding in which the immigration judge (IJ) did not advise him of the availability of relief from deportation He had a United States citizen wife and two young United States citizen children . . . and would surely have been a strong candidate for discretionary relief [then available].” *Id.* at 1140-41.

toward individuals—like Juan Perez and Kim Ho Ma—who may, under governing legal rules, be eligible to be heard on the merits.

While Judge Reinhardt is sometimes abrupt in print⁴⁴ and in person, he continues (now in his fourth decade on the bench) to display remarkable patience with legal and factual nuance in his judgments. He painstakingly details relevant records (often going beyond excerpts provided in appellate appendices) and the governing law.⁴⁵ That intensive investigation documents inadequacies of lawyers⁴⁶ as well as of judges.

Consider, for example, Reinhardt's account of one habeas petitioner's efforts:

For over eleven years, Kevin Phelps has sought to present his petition for *habeas corpus* to a federal judge. For over eleven years, he has been unsuccessful. Given the trend these last decades on the part of Congress and the Supreme Court “increasingly to bar the federal courthouse door to litigants with substantial federal claims,” *habeas* petitioners—including petitioners who may have suffered severe deprivations of their constitutional rights—now face myriad procedural hurdles specifically designed to restrict their access to the once-Great Writ. In this modern era, which prizes “efficiency,” “parity,” and “judicial economy” often at the expense of justice and liberty, it is not at all unusual for an individual who fails to satisfy one of those many procedural hurdles to toil on for years in hopeless pursuit of an opportunity to be heard on the merits of his claim—an opportunity that he will never receive. It is, however, very unusual for an individual who meticulously *has* overcome each of those procedural hurdles to sit in prison for more than a decade nonetheless, without ever being heard on

44. See, e.g., *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1116 (9th Cir. 2010) (Reinhardt, J., dissenting) (“Today’s majority opinion will undoubtedly be celebrated by a large number of Americans as a repudiation of activist, liberal, Godless judging. That is its great appeal; it reaches the result favored by a substantial majority of our fellow countrymen and thereby avoids the political outcry that would follow were we to reach the constitutionally required result. Nevertheless, by reaching the result the majority does, we have failed in our constitutional duty as a court.”).

45. The judge is well known for seeking similarly hard-working clerks. I know from my own experience that both he and they can be reached many late nights in chambers.

46. See, e.g., *Richter v. Hickman*, 578 F.3d 944, 946 (9th Cir. 2009) (en banc), cert. granted *sub nom.* *Harrington v. Richter*, 130 S. Ct. 1506 (2010) (“At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client’s defense. Here, counsel did not meet his basic obligation to his client.”).

the substance of his petition. That, however, is exactly what happened to Kevin Phelps.⁴⁷

As Reinhardt explained, Phelps, accused of murder, had been prosecuted three times; two juries hung and the third convicted. Phelps was sentenced to a term of thirty years to life.⁴⁸ Phelps argued that exculpatory evidence, discovered after conviction, coupled with ineffective assistance of counsel, entitled him to a new trial. The opinion then meticulously accounts how misinterpretation of legal provisions blocked Phelps's access to a decision on the merits.⁴⁹

Several judges ruled that Phelps had missed a statute of limitations for his habeas filing, in violation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁵⁰ However, the Ninth Circuit held, Phelps had not—as a matter of fact and of law—missed the filing; the statute had not run because Phelps's appeal was pending before the California courts.⁵¹ Indeed, at “each stage in Phelps's struggle over the past eleven years to have his federal *habeas* petition evaluated on the merits,” Phelps's “arguments have been much more than sound—they have been *undeniably correct* under *currently* governing law.”⁵² In fact, Phelps's arguments had often been embraced by higher courts in other cases only a few months after Phelps's claims had been rejected.⁵³

The *Phelps* decision is a lament, not only in its detail of the errors in his case but also of a legal regime generating the labyrinth through which Phelps weaved his way. The period of eleven years in which Mr. Phelps waited for justice was, Judge Reinhardt commented, “the epitome of our obsession with

47. *Phelps v. Alameida*, 569 F.3d 1120, 1122–23 (9th Cir. 2009) (footnote omitted) (quoting *Judice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting)), *cert. denied*, 130 S. Ct. 1072 (2010).

48. *Id.* at 1124.

49. *Id.* at 1125.

50. *Id.* at 1125–29.

51. *Id.* at 1125–27; *see also* 28 U.S.C. § 244(d)(2) (2006) (providing that AEDPA's provisions are tolled when a case is pending in state court). Because “Phelps had already suffered extremely prolonged delay,” and the federal district court had had three occasions on which to rule on a motion for reconsideration, the court decided the reconsideration motion in his favor. 569 F.3d at 1135–37.

52. 569 F.3d at 1123.

53. *Id.* (“Phelps’ one and only fault throughout this protracted process, if it can be described as a ‘fault’ at all, is that his arguments have been overly prescient: On multiple occasions, the legal arguments that Phelps put forward for why his petition was properly filed were rejected by the judges before whom he appeared, only to be fully embraced within a matter of months by judges authoring a more authoritative, controlling opinion in a different case.”).

form over substance.”⁵⁴ (“All of this energy—and, more important to Phelps, all of this *time*—has been spent evaluating one procedural question after another: Was the initial petition filed fifteen days early or fifteen days late?”⁵⁵)

In short—and these sparse excerpts of the decision only hint at the pile of details supporting the holding—the opinion displays not only a characteristic and unabashed Reinhardtian *cri de coeur* for justice, but also Judge Reinhardt’s commitment to documenting the impact of legal barriers and mistakes on individuals. And *Phelps* is one of many instances in which Reinhardt deliberately engages the vocabulary of justice and injustice as he invites his colleagues to understand the judicial task as facing and fixing injustices.

III. REINHARDT’S OPTIMISM

As the decision in *Phelps* illustrates, Reinhardt’s jurisprudence is replete with examples of judges who do not focus on the merits of the claims people bring to them. Reciting facts in a manner more often associated with great trial judges and less commonly (wrongly or rightly) with appellate courts,⁵⁶ decision upon decision unsparingly details disheartening interactions in a myriad of settings in which officialdom ignores humanity. Yet, as illustrated by the *Perez* ruling that an immigration judge could not find a person who was physically present to be legally absent, Reinhardt insists on law’s presence as a source of fairness and justice.

Reinhardt repeatedly calls on law to act justly,⁵⁷ even when the individuals invoking legal rights have themselves injured others.⁵⁸ None of the Reinhardt

54. *Id.* at 1141.

55. *Id.*

56. William Wayne Justice is one such exemplar: his legacy includes the district court decisions in cases involving the rights of undocumented children to attend public schools and of Texas prisoners to be housed in constitutionally adequate conditions. *See, e.g., Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978), *aff’d*, 457 U.S. 202 (1982) (schooling). The Texas Prison litigation generated dozens of decisions. *See, e.g., Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff’d in part, rev’d in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part by, vacated in part by*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

57. For example, Judge Reinhardt objected to the holding in *Carlisle v. United States*, 517 U.S. 416 (1996), that, because “Charles Carlisle’s lawyer missed a deadline by one day, his conviction was upheld even though the district judge found that there was insufficient evidence to prove his guilt.” Stephen Reinhardt, Keynote Address, *The Role of Social Justice in Judging Cases*, 1 U. ST. THOMAS L.J. 18, 26 (2003) [hereinafter Reinhardt, *Social Justice in Judging*].

58. *See, e.g., Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001). The panel remanded for a hearing on two claims, including findings that had made Richard Louis Arnold Phillips

opinions that I read adopts what Christopher Eisgruber called a posture of “apology,” in which, with a tinge of regret, jurists feel the onus to explain, justify, and excuse their exercise of judicial review.⁵⁹ Rather, Reinhardt embraces the idea that the U.S. Constitution’s central work is to buffer individuals from the state⁶⁰ and that the Constitution is ever-present in the encounter between an individual and the state.

As Reinhardt explained in an article written to honor his colleague John Noonan, the “Constitution is a collective covenant designed to effectuate the broad purposes outlined in its preamble.”⁶¹ Quoting that text, Judge Reinhardt added emphasis to certain phrases: “We the People of the United States, in Order to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide for the common defense, *promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity.”⁶²

Given his approach, Reinhardt has registered objections to various doctrinal developments, such as “standing, mootness, ripeness, prejudice, waiver, estoppel, procedural default, and retroactivity principles,” that diminish the role of the federal judiciary.⁶³ Reinhardt dissented from concerns—recorded in the 1995 *Long Range Plan for the Federal Courts*—that the federal judiciary was growing too large and that Congress should be wary of providing more jurisdiction, creating new causes of action, and chartering

“eligible for a sentence of death.” *Id.* at 970. As the majority recounts, Phillips admitted at his second penalty-phase trial that he had committed perjury at his first trial, where he had said he was not at the crime scene. Phillips alleged that a key witness against him had an undisclosed plea agreement that promised leniency for identifying Phillips as having committed a murder in the course of a robbery—therefore rendering him eligible to be sentenced to death. *Id.* at 972-74. The majority (in an opinion running more than twenty pages) recounted that Phillips argued that his lawyer’s failure to investigate resulted in the lawyer acceding to a “hopeless” alibi defense rather than advancing a defense based on evidence relating to which bullets caused the death. *Id.* at 976-77. The dissent argued that Phillips had failed to establish cause and prejudice as required to be heard on the claim. *Id.* at 990-92 (Kleinfeld, J., dissenting).

59. Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 3-4 (1993).
60. Reinhardt, *Social Justice in Judging*, *supra* note 57, at 22-23.
61. *Id.* at 20.
62. *Id.* at 20-21 (quoting the Constitution’s preamble). Reinhardt then recorded his objection to “[o]riginalists” who “skip over these stirring words.” *Id.* at 21.
63. Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 288 (1996) (providing Judge Reinhardt’s remarks made during a panel discussion) [hereinafter Reinhardt, *The Future of the Federal Courts*].

more judgeships.⁶⁴ Reinhardt broke ranks with many of his colleagues on the bench by calling for more judges and more access.⁶⁵ The unwillingness to increase the number of judges did not, he wrote, “make a lot of sense to me: we have more problems, more cases, and more people, but we do not want to have more judges to keep up with them.”⁶⁶

To cast Judge Reinhardt’s posture only by reference to his focus on individuals, his refusal of apology, and his embrace of jurisdictional obligations would be to miss another recursive element in the Reinhardt writings—optimism. Confronted with claims of outrageous injustice, Judge Reinhardt looks to law as the source of well-being, even in the face of records that make plain law’s oppressions. The case of Falen Gherebi, in detention in the wake of 9/11, provides another example.

Mr. Gherebi came before the Ninth Circuit twice; in both instances, Judge Reinhardt wrote for the panel. As he explained in an amended ruling, the question was “whether the Executive Branch may hold uncharged citizens of foreign nations in indefinite detention in territory under the ‘complete jurisdiction and control’ of the United States while effectively denying them the right to challenge their detention in any tribunal anywhere, including the courts of the U.S.”⁶⁷ The answer, from the Ninth Circuit and subsequently

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64. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 23, 28 (1995), reprinted in 166 F.R.D. 49. The *Long Range Plan* included more than ninety recommendations, including that Congress have a presumption against enacting new civil causes of action with enforcement jurisdiction in federal courts. As the *Plan*, adopted by the Judicial Conference, put it: “Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism.” *Id.* at 88 (Recommendation No. 6); see generally Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).
 65. Stephen Reinhardt, *A Plea To Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52. But see Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983).
 66. Reinhardt, *The Future of the Federal Courts*, *supra* note 63, at 292; see also *id.* at 322 (“I am concerned about a judiciary that is not giving adequate protection to individual rights. . . . [as its] jurisdiction is being limited more and more.”).
 67. *Gherebi v. Bush*, 374 F.3d 727, 728 (9th Cir. 2004) [hereinafter *Gherebi II*]. The Ninth Circuit had previously heard Mr. Gherebi’s case in 2003. See *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) [hereinafter *Gherebi I*], cert. granted and vacated by 124 S. Ct. 2932 (2004) (vacating the judgment and remanding to the Ninth Circuit in light of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)). The Reinhardt amended decision analyzed the jurisdictional precedents and concluded that federal courts had the power to hear the issues raised and that, in light of *Padilla*, venue was proper in the District of Columbia, to which the case was transferred. 374 F.3d at 738-39.

from the Supreme Court, was “no”: federal courts have the authority to entertain such petitions from detainees at Guantánamo⁶⁸ and, as the Supreme Court later concluded, under certain circumstances from citizens detained abroad.⁶⁹

As recounted in the Ninth Circuit’s first *Gherebi* opinion, in December 2003, the Justice Department lawyer argued that the government was free to imprison anyone it deemed an “enemy combatant” and that no court had the power to oversee that detention. As the reported opinion reflects, the panel asked the lawyer about what the government’s position would be “if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees.”⁷⁰ The questions seemed like a “gotcha,” aiming to back the government lawyer into the obvious admission that, of course, the U.S. Constitution gives such a person a right of access to court. Thus, the appellate argument would have proceeded by reasoning from that hypothetical to the question before the panel: what about access to courts for allegedly unconstitutional indefinite detention?

But the Justice Department lawyer did not answer as anticipated. Instead, the lawyer replied that no court could hear claims even of torture or of summary executions. Judge Reinhardt wrote for the panel that, “to our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition.”⁷¹ This view was “so extreme that it raises the gravest concerns under both American and international law.”⁷²

68. The Ninth Circuit held that “by virtue of the United States’ exercise of territorial jurisdiction over Guantanamo, habeas jurisdiction lies in the present case.” *Gherebi II*, 374 F.3d at 737. The relevant sequence in the U.S. Supreme Court runs from *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008). See generally Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010).

69. *Munaf v. Geren*, 553 U.S. 674, *reh’g denied*, 129 S. Ct. 19 (2008).

70. *Gherebi I*, 352 F.3d at 1299-1300.

71. *Id.* at 1300.

72. *Id.* As for Mr. Gherebi, in 2004, Judge Joyce Hens Green held that the D.C. District Court could entertain his petition. *Gherebi v. Bush*, 338 F. Supp. 2d 91 (D.D.C. 2004). In 2009, Judge Reggie Walton held that Mr. Gherebi’s detention was authorized under the Authorization for Use of Military Force, Pub. L. No. 107-40, § (a), 115 Stat. 224, 224 (2001). *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009). As of October 15, 2010, Gherebi remained in his ninth year of detention at Guantánamo. See *The Guantánamo Docket: Salem Abdul Salem Ghereby*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/189-salem-abdul-salem-ghereby#1> (last visited Oct. 17, 2010).

About a year later, in 2004, the rhetorical proved real, as people at Guantánamo began claiming that they had been subjected to torture. It was revealed that in 2002 the Office of Legal Counsel at the Department of Justice had advised in memoranda—popularly called “The Torture Memos” and now withdrawn⁷³—on the legal permissibility of the infliction of pain that many of us understand to entail torture. Those memoranda aspired to give defenses to persons ordering or imposing such awful practices on persons within America’s control.⁷⁴ And, despite Judge Reinhardt’s optimism, in December 2005 and again in 2006, Congress sought to limit federal court jurisdiction to entertain challenges to such actions.⁷⁵ Yet the Supreme Court, 5-4, agreed with Judge Reinhardt on a basic proposition and held for the first time that Congress unconstitutionally suspended habeas corpus. Justice Kennedy’s opinion in *Boumediene v. Bush* echoes Reinhardt’s concerns that law must not be absent but must instead “call the jailer to account.”⁷⁶

IV. REGULARLY READ BY, INTER ALIA, THE SUPREME COURT

Turning from the author to the audience, appellate judges aim to have their understandings of legal obligations and rights read. To assess Judge Reinhardt’s impact entails tracing his work’s reception by litigants, as well as its invocation by other circuit judges (both on his circuit and others), by district, bankruptcy, magistrate, and administrative judges, and by state courts. In addition, because government officials are repeatedly before the courts, one would want to trace responses by legislative and executive branches, both federal and state, acceding to, embracing, or pressing back against interpretations and decisions. For example, Governor Arnold Schwarzenegger—here standing for various state and local officials because he is the respondent in the massive California prison litigation I mentioned at the

73. Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm> (recounting the withdrawal of the August 2002 “torture memos” and superseding those memoranda in their entirety).

74. Many public databases provide copies of these memos, including those from the *Washington Post* and the American Civil Liberties Union. A small portion is reprinted in Resnik, *supra* note 68, at 610 fig.6.

75. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

76. 553 U.S. 723, 745 (2008).

outset—should be understood as regularly in legal exchanges with Judge Reinhardt.

Another prominent interlocutor is the U.S. Supreme Court, sitting in a hierarchical relationship with the circuits and offering responses readily quantifiable. The Court’s saliency is obvious, and yet, even as I detail some of the recent exchanges, I must also note concern. Because doing so is relatively easy, it deflects attention that should be turned to these many other sectors affected by Judge Reinhardt’s decisions but whose readership is much harder to track.

Within legal circles, a few appellate judges are well known for sending cases to the Supreme Court through dissents that function as “cert petitions,” implicitly calling for their colleagues to be overturned. Judge Reinhardt is one of the high-visibility judges whose majority opinions are also seen as attracting the Court’s attention. Some use that perception as a form of critique rather than as the compliment it is. Even as members of the Court often disagree with him, Reinhardt is engaged in an extended discussion with the Justices about the shape and meaning of American law.

For example, as of July 1, 2010, the Supreme Court had thirty-six cases from the federal courts on its docket for the upcoming 2010-2011 Term.⁷⁷ One, now captioned *Schwarzenegger v. Plata* and mentioned at the outset, involves a three-judge court on which Judge Reinhardt sat, along with District Judges Thelton Henderson and Lawrence Karlton, both of whom had dealt with parts of the California prison litigation in earlier phases on single-judge courts.⁷⁸ That 116-page per curiam slip opinion dealt with the plight of 160,000 people in the California prison system. The decision concluded that conditions of the prisons, filled to “almost double” the operating capacity, rendered medical care unconstitutionally deficient.⁷⁹

77. The total of thirty-nine cases on the docket at that time included two from the state courts and one under the Court’s original jurisdiction. Thanks to Matthew Pearl, Victoria Degtyareva, and Daniel Winik for compiling the data through coding judgments by judge to gain information not provided readily on the various databases that track Supreme Court decisions.

78. See, e.g., *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2007 WL 3046043 (E.D. Cal. Oct. 18, 2007); *Plata v. Schwarzenegger*, No. C01-1351, 2007 WL 2601391 (N.D. Cal. Sept. 6, 2007).

79. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520, C01-1351, 2009 WL 2430820, at *1 (E.D. Cal. & N.D. Cal. Aug. 4, 2009); see also *Order To Reduce Prison Population*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. Cal. & N.D. Cal. Jan. 12, 2010), *appeal granted and jurisdictional consideration postponed sub nom. Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010). The panel’s opinion began with a discussion of the prison system in disarray from overcrowding, resulting in “problems that every day threaten the lives and

Including this three-judge court decision, seventeen of the thirty-six cases on the Court's docket by way of the federal courts came from the Ninth Circuit.⁸⁰ Four of those thirty-six were from the Fifth Circuit, three from the Fourth Circuit, and two from each of the Third, Seventh, Eighth, and Federal Circuits. Judge Reinhardt was on six of the Ninth Circuit's sixteen; he wrote the majority opinion for two, one of which was en banc, and was one of the three signing the three-judge per curiam decision.⁸¹ Thus, within this small set, Judge Reinhardt had the most decisions pending before the Court.

What are the issues in the cases on which Judge Reinhardt wrote or joined panels that were, as of the summer of 2010, on the Supreme Court's docket? In different ways, all six are about access to courts. The California prison conditions litigation raised questions about the remedial authority of federal

health of California prisoners." *Id.* The court observed that as of "mid-2005, a California inmate was dying needlessly every six or seven days." *Id.* (emphasis in original). Further, the court found: "Thousands of prisoners are assigned to 'bad beds,' such as triple-bunked beds placed in gymnasiums . . . , and some institutions have populations approaching 300% of their intended capacity." *Id.*

80. *Pinholster v. Ayers*, 590 F.3d 651 (9th Cir. 2009) (en banc), *cert. granted sub nom. Cullen v. Pinholster*, 130 S. Ct. 3410 (2010); *Martin v. Walker*, 357 F. App'x 793 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3464 (2010); *Siracusanano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3411 (2010); *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom. AT & T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010); *Ransom v. MBNA*, 577 F.3d 1026 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 2097 (2010); *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009) (en banc), *cert. granted sub nom. Harrington v. Richter*, 130 S. Ct. 1506 (2010); *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3505 (2010); *Coleman*, 2009 WL 2430820; *Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009), *cert. granted sub nom. Belleque v. Moore*, 130 S. Ct. 1882 (2010); *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3350 (2010), and *sub nom. Garriott v. Winn*, 130 S. Ct. 3324 (2010); *McCoy v. Chase Manhattan Bank, USA*, 559 F.3d 963 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 3451 (2010); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2008), *cert. granted sub nom. Chamber of Commerce of U.S. v. Candelaria*, 130 S. Ct. 3498 (2010); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *cert. granted sub nom. Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010); *Humphries v. Cnty. of L.A.*, 554 F.3d 1170 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1501 (2010); *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 2089 (2010); *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1878 (2010); *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1755 (2010).
81. The six cases are *Pinholster*, 590 F.3d 651; *Laster*, 584 F.3d 849; *Richter*, 578 F.3d 944; *Moore*, 574 F.3d 1092; *Winn*, 562 F.3d 1002; and *Coleman*, 2009 WL 2430820. The two in which Judge Reinhardt wrote the majority opinions are *Richter*, 578 F.3d 944; and *Moore*, 574 F.3d 1092.

judges under the Prison Litigation Reform Act of 1995.⁸² Three others related to the availability of federal habeas relief for criminal defendants. One involved a defendant who pled guilty after his lawyer failed to move to suppress an involuntary confession,⁸³ and the other concerned a defendant whose lawyer failed “to consult *any* forensic expert in blood evidence before settling upon a defense strategy that excluded the use of expert testimony.”⁸⁴ The third case, in which Judge Reinhardt joined the majority, dealt with a defendant sentenced to death after his lawyer prepared minimally for the sentencing phase.⁸⁵ All three entailed detailed technical questions about the innards of the statutes and doctrine governing habeas corpus, and yet—through the filter of convicted defendants—they simultaneously implicated major issues of the allocation of responsibility between state and federal courts, between trial and appellate courts, and between lawyers and judges.

A fifth case, in which Judge Reinhardt joined the opinion written by Judge Fisher, returns the Court to a series of decisions exploring indirect public support of religious education.⁸⁶ In this instance, the issue was the constitutional validity of, and the standing of taxpayers to challenge, an Arizona tax credit for scholarships, some of which supported religious education.⁸⁷ The sixth case pending before the Court—in which Judge Reinhardt joined the majority opinion of his colleague Carlos Bea—was about consumer access to courts. At issue was the enforceability of a form contract clause that precludes class-wide arbitration, held by the Ninth Circuit to be

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82. The questions before the Court in *Coleman* are whether the three-judge court had “jurisdiction to issue a ‘prisoner release order,’” and whether they had made the requisite findings under, and sufficiently tailored the relief as required by, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 03-804, 110 Stat. 1321-66, 1321-70 to -75 (1996) (codified in relevant part at 18 U.S.C. § 626 (2006)).
83. *Moore*, 574 F.3d 1092 (Reinhardt, J.).
84. *Richter*, 578 F.3d at 956 (Reinhardt, J.). As framed by the Supreme Court, “[i]n addition to the question presented, parties are directed to brief and argue the following question: Does AEDPA deference apply to a state court’s summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 . . . (1984)?” *Harrington*, 130 S. Ct. at 1506-07.
85. *Pinholster*, 590 F.3d 651 (Smith, Jr., J.). Chief Judge Alex Kozinski authored a dissent, joined by Judges Pamela Ann Rymer and Andrew J. Kleinfeld.
86. See *Hibbs v. Winn*, 542 U.S. 88 (2004). Prior decisions on the issue include *Board of Education v. Grumet*, 512 U.S. 687 (1994); and *Norwood v. Harrison*, 413 U.S. 455 (1973).
87. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009), *cert. granted sub nom. Garriot v. Winn*, 130 S. Ct. 3324 (2010).

unenforceable under California law that was not, in turn, preempted by federal arbitration law.⁸⁸

But a focus on Judge Reinhardt ought not to obscure that he is not the only repeat-player appellate judge and moreover, looking back at other Terms, not always at the top of the list of those whose cases went “up.” A review of the Supreme Court docket over just the last two and a half Terms makes plain that Judge Reinhardt joins many other appellate judges also in regular conversation with the Supreme Court. A few more numbers and names are therefore required to inform this discussion about the construction of judicial voice and of what factors contribute to Reinhardt’s visibility.

Looking back to the 2009-2010 Term, the Supreme Court decided seventy-five cases from federal appellate courts.⁸⁹ Once again, Judge Reinhardt’s circuit had the most cases selected: fifteen came from the Ninth, followed by eleven from the Seventh Circuit, ten from the Eleventh Circuit, seven from the Second and Sixth Circuits, and five each from the Third and Fourth Circuits, with the remaining cases coming from the other circuits.⁹⁰ As for the repeat-player judges, Chief Judge Frank Easterbrook⁹¹ and Judges Richard Posner⁹² and William Bauer⁹³ of the Seventh Circuit participated—in majorities or

88. See *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), cert. granted sub nom. *AT & T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010). In July 2010, the Second Circuit reached a conclusion paralleling that of the Ninth Circuit on the unenforceability of a contract ban on class arbitrations. See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124 (2d Cir. 2010).

89. This count includes summary reversals, but not cases dismissed as improvidently granted.

90. SCOTUSBLOG, *SCOTUSBlog FINAL Stats OT 09–7.7.10: Circuit Scorecard*, <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Charts-070710-10.pdf> (last visited Oct. 4, 2010). Four of the decisions reviewed came from the Fifth, three from the Eighth and D.C. Circuits, two from the First and Tenth, one from the Federal Circuit, and eight from the state courts. *Id.*

91. Judge Easterbrook wrote the majority opinion in three cases. *NRA v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *rev'd sub nom.* *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *rev'd sub nom.* *Kucana v. Holder*, 130 S. Ct. 827 (2010); *Jones v. Harris Assocs. L.P.*, 527 F.3d 627 (7th Cir. 2008), *vacated*, 130 S. Ct. 1418 (2010). He joined the majority in two cases. *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008), *rev'd sub nom.* *Carr v. United States*, 130 S. Ct. 2229 (2010); *Lewis v. City of Chicago*, 528 F.3d 488 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2191 (2010).

92. Judge Posner wrote the majority opinion in three cases. *Dixon*, 551 F.3d 578; *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), *vacated*, 130 S. Ct. 2963 (2010); *Lewis*, 528 F.3d 488. He joined the majority in two cases. *NRA*, 567 F.3d 856; *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), *vacated sub nom.* *Alvarez v. Smith*, 130 S. Ct. 576 (2009). The vacated case aside, the Supreme Court’s majorities disagreed with Judge Posner in these cases.

93. Judge Bauer wrote the majority opinion in one case. *Corcoran v. Buss*, 551 F.3d 703 (7th Cir. 2008), *vacated sub nom.* *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009). He joined the majority

dissents—on the most cases (five) decided that Term. Judge Ed Carnes⁹⁴ of the Eleventh Circuit and Judge Karen Nelson Moore⁹⁵ of the Sixth Circuit each sat on four of the cases decided.

Indeed, in the set coming from the Ninth Circuit, Judge Reinhardt was not much present; he was on two cases, for which he authored one majority opinion and joined one panel decision.⁹⁶ As for the Ninth Circuit's rulings, the Supreme Court affirmed four,⁹⁷ reversed or vacated nine,⁹⁸ and affirmed in

opinion in four cases. *NRA*, 567 F.3d 856; *New Process Steel, L.P. v. Nat'l Labor Relations Bd.*, 564 F.3d 840 (7th Cir. 2009), *rev'd*, 130 S. Ct. 2635 (2010); *Lewis*, 528 F.3d 488; and *Smith*, 524 F.3d 834. Judge Bauer likewise joined his Seventh Circuit colleagues in meeting disagreement at the Supreme Court.

94. Judge Carnes wrote the majority opinion in two cases. *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209 (11th Cir. 2008), *rev'd*, 130 S. Ct. 1662 (2010); *United States v. Johnson*, 528 F.3d 1318 (11th Cir. 2008), *rev'd*, 130 S. Ct. 1265 (2010). The remaining two cases were decided per curiam. *Krupski v. Costa Cruise Lines, N.V., LLC*, 330 F. App'x 892 (11th Cir. 2009), *rev'd sub nom.* *Krupski v. Costa Crociere S. p. A.*, 130 S. Ct. 2485 (2010); *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048 (11th Cir. 2008), *aff'd*, 130 S. Ct. 599 (2009).
95. Judge Moore wrote the majority opinion in one case. *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008), *rev'd*, 130 S. Ct. 2250 (2010). She joined the majority opinion in two cases. *Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009), *rev'd sub nom.* *Bobby v. Van Hook*, 130 S. Ct. 13 (2009); *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1382 (2010). In the remaining case, she filed an opinion concurring in part and dissenting in part. *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008), *rev'd sub nom.* *Smith v. Spisak*, 130 S. Ct. 676 (2010).
96. *Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008) (Smith, J.), *rev'd sub nom.* *Hui v. Castaneda*, 130 S. Ct. 1845 (2010); *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008) (Reinhardt, J.), *rev'd sub nom.* *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam). Both cases are discussed *infra* note 100.
97. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (rejecting First Amendment challenge to Washington's Public Records Act that made referendum petitions public), *aff'd*, 130 S. Ct. 2811 (2010); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law, v. Kane*, 319 F. App'x 645 (9th Cir. 2009) (mem.) (rejecting First Amendment free speech and expressive association challenges to a law school policy requiring all groups, including those predicated on religion, as a condition of receiving official recognition, to accept all who want to join as voting members), *aff'd sub nom.* *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010); *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008) (holding that notice was sufficient, as a statutory and constitutional matter, for student loan discharges in bankruptcy through Chapter 13 plans), *aff'd*, 130 S. Ct. 1367 (2010); *Tablada v. Thomas*, 533 F.3d 800 (9th Cir. 2008) (upholding the U.S. Bureau of Prisons' interpretation of a federal statute calculating good-time credits), *aff'd sub nom.* *Barber v. Thomas*, 130 S. Ct. 2499 (2010).
98. *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912 (9th Cir. 2009) (holding that a court, rather than an arbitrator, should resolve the threshold question of unconscionability of a contract for mandatory arbitration), *rev'd*, 130 S. Ct. 2772 (2010) (reading the contract's delegation to an arbitrator to decide all disputes as precluding court decisionmaking on unconscionability); *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009)

part and reversed in part in two.⁹⁹ In both of the Reinhardt cases that Term, one about the failure to treat a detainee's known medical needs in an

- (upholding as not an abuse of discretion an injunction against the planting of genetically altered alfalfa pending the preparation of an environmental impact statement by the Animal and Plant Health Inspection Service), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (finding that Monsanto had standing and reversing the injunction as an abuse of discretion); *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985 (9th Cir. 2009) (determining that the Carmack Amendment to the Interstate Commerce Act, which provided "default rules governing the inland rail leg of a shipment between a foreign country and . . . the United States," applied to "a maritime case about a train wreck"), *rev'd*, 130 S. Ct. 2433 (2010) (concluding that the Carmack Amendment was inapplicable); *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008) (concluding that a state law violation is not necessary to sustain an honest services fraud conviction under 18 U.S.C. § 1341), *vacated per curiam*, 130 S. Ct. 2971 (2010) (remanding in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010)); *Friend v. Hertz Corp.*, 297 F. App'x 690 (9th Cir. 2008) (mem.) (using the "place of operations" test to determine corporate citizenship for diversity jurisdiction), *vacated and remanded*, 130 S. Ct. 1181 (2010) (instructing the lower courts to apply the "nerve center" test as the governing test for corporate citizenship under 28 U.S.C. § 332(c)); *Castaneda*, 546 F.3d 682 (concluding that an immigration detainee can proceed under *Bivens* for the government's failure to treat his lethal cancer), *rev'd sub nom.* *Hui*, 130 S. Ct. 1845 (holding that the Public Health Service Act precluded a *Bivens* claim against Public Health Service employees who had been sued for acts undertaken as part of their official duties by Castaneda's survivors for his injuries caused by the alleged constitutional violations); *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008) (holding that a reasonable expectation of privacy existed in text messages of a city police department employee and that the department's search of text messages violated the Fourth Amendment), *rev'd sub nom.* *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (concluding that no Fourth Amendment violation had occurred because the city's review of its employee's email was "reasonable"); *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008) (upholding a grant of habeas corpus to state prisoner on the grounds that DNA evidence produced at trial was later proven to be inaccurate and misleading and, absent DNA evidence, other evidence was insufficient to convict), *rev'd sub nom.* *McDaniel v. Brown*, 130 S. Ct. 665 (2010) (concluding that the district court should not have admitted new evidence to discredit DNA evidence and that the state trial record presented sufficient evidence of guilt); *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008) (holding that a federal statute transferring public land in the Mojave National Preserve, which bears a cross to honor World War I soldiers, does not cure the Establishment Clause violation), *rev'd sub nom.* *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (sending the case to the courts below to determine whether, in light of the congressional "policy of accommodation" evidenced in the statute, a violation of the Establishment Clause existed and remedies were appropriate).
99. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009) (striking down as violating the First Amendment portions of the "material support" sections of the Antiterrorism and Effective Death Penalty Act and the 2004 amendment, the Intelligence Reform and Terrorism Prevention Act, on vagueness grounds), *aff'd in part, rev'd in part sub nom.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (upholding the material support statute as not vague as applied to the activities of those challenging the provisions); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 546 F.3d 1169 (9th Cir. 2008) (holding that the

immigration facility and the other about rights to counsel for a habeas petitioner, the Supreme Court unanimously reversed.¹⁰⁰

In the 2008 Term, the Supreme Court had a docket of eighty-three cases, sixty-three of which were from the federal appellate courts.¹⁰¹ Once again, the Ninth Circuit sent the most cases—sixteen—to the Court. The appellate judge most often in this set of certiorari grants was Judge Kim Wardlaw, who sat on five.¹⁰² Judge Reinhardt followed, sitting on four cases, one of which overlapped with Wardlaw.¹⁰³ In the four cases in which he participated, Judge

trial court erred in not ordering arbitration and concluding that a claim of tortious interference with contract fell outside the scope of the Labor Management Relations Act), *aff'd in part, rev'd in part*, 130 S. Ct. 2847 (2010) (holding that a dispute about the ratification date of a collective bargaining agreement was to be decided by the district court and not an arbitrator, even as the claim of tortious interference claims were not, as the appellate court had concluded, cognizable).

100. In *Castaneda*, 546 F.3d 682, the Ninth Circuit had held that a detainee's survivors could bring a *Bivens* claim for tragic failures to treat his cancer. The Supreme Court reversed, concluding that a federal statute precluded the *Bivens* claim. *Hui*, 130 S. Ct. 1845. In *Belmontes*, 529 F.3d 834, the Ninth Circuit upheld a habeas petitioner's claim of ineffective assistance of counsel and concluded that prejudice resulted from counsel's failure to present available mitigating evidence during a capital sentencing hearing. The Supreme Court, per curiam, reversed and concluded that no prejudice had resulted. *Wong*, 130 S. Ct. 383.
101. See SCOTUSBLOG, *SCOTUSBlog FINAL Stats OTo8—6.29.09: Circuit Scorecard—OT 08*, <http://www.scotusblog.com/wp-content/uploads/2009/06/circuit3.pdf> (last visited Oct. 5, 2010). Fifteen came up through state courts, two from three-judge courts, and one from the Court of Appeals for the Armed Forces. *Id.*
102. *Redding v. Safford Unified Sch. Dist. # 1*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009); *linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876 (9th Cir. 2007), *rev'd sub nom. Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009); *Hulteen v. AT & T Corp.*, 498 F.3d 1001 (9th Cir. 2007) (en banc), *rev'd*, 129 S. Ct. 1962 (2009); *Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 495 F.3d 1024 (9th Cir. 2007), *rev'd sub nom. Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732 (2009); *Mizrayance v. Knowles*, 175 F. App'x 142 (9th Cir. 2006), *vacated and remanded*, 129 S. Ct. 1411 (2009).
103. *Nat'l Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 683 (9th Cir. 2008) (upholding a preliminary injunction against the U.S. Navy's training exercises involving sonar based on findings that the Navy's need to continue did not constitute "emergency circumstances" within the meaning of the National Environmental Policy Act and that there was possibility of irreparable harm to marine mammals), *rev'd*, 555 U.S. 7 (2008) (reversing the injunction for failing to appreciate that the balance of equities supported the Navy's actions); *Hulteen*, 498 F.3d 1001 (ruling that the calculation of credit for service to the corporation that included all leaves for temporary disability, except pregnancy, taken prior to the Pregnancy Discrimination Act of 1978 (PDA) violated Title VII), *rev'd*, 129 S. Ct. 1962 (2009) (holding that the corporation's policy did not violate the PDA); *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007) (holding that prosecutors were not entitled to absolute immunity from suit on allegations of failure to develop policies and to train personnel on

Reinhardt wrote one opinion concurring in part and dissenting in part; in the remaining three cases, he was on the panel. In all four, the view that Judge Reinhardt espoused was reversed.¹⁰⁴

Judges Betty Fletcher and Susan Graber of the Ninth Circuit also sat on four of the cases that went before the Supreme Court; Judge Fletcher also met with disagreement,¹⁰⁵ as did Judge Graber to a lesser extent.¹⁰⁶ As for the judges participating in three or more decisions, they included Judges Marsha Berzon,¹⁰⁷ Ray Fisher,¹⁰⁸ William Fletcher,¹⁰⁹ and Ronald Gould¹¹⁰ of the

constitutional obligations to preserve exculpatory evidence), *rev'd sub nom.* Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009) (holding that absolute immunity extends to that conduct); *Sarausad v. Porter*, 479 F.3d 671, 694-703 (9th Cir. 2007) (Reinhardt, J., concurring) (concluding that a state court's instructions to the jury on accomplice liability were ambiguous and thus unconstitutionally relieved the government of its burden of proof), *rev'd sub nom.* Waddington v. Sarausad, 129 S. Ct. 823 (2009) (holding that jury instructions were not ambiguous and that, even if they were, the state court determination of reasonableness had to stand under federal statutes dictating deference).

104. See *supra* note 103.

105. *Winter*, 518 F.3d 658; *United States v. Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781 (9th Cir. 2007), *rev'd*, 129 S. Ct. 1870 (2009); *Cubic Def. Sys., Inc.*, 495 F.3d 1024; *Flores v. Arizona*, 516 F.3d 1140 (9th Cir. 2008), *rev'd sub nom.* *Horne v. Flores*, 129 S. Ct. 2579 (2009).

106. The Supreme Court reversed Judge Graber in three cases. *Hulteen*, 498 F.3d 1001; *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638 (9th Cir. 2007), *rev'd sub nom.* *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009). In the fourth case, the Supreme Court affirmed the majority opinion, written by Graber. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008) (Graber, J.), *aff'd*, 129 S. Ct. 2484 (2009).

107. *Flores*, 516 F.3d 1140; *Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781; *Hulteen*, 498 F.3d 1001.

108. *Redding v. Safford Unified Sch. Dist. # 1*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009); *Hulteen*, 498 F.3d 1001; *Cubic Def. Sys., Inc.*, 495 F.3d 1024.

109. *Osborne v. Dist. Att'y's Office for the Third Judicial Dist.*, 521 F.3d 1118 (9th Cir. 2008), *rev'd*, 129 S. Ct. 2308 (2009); *Hulteen*, 498 F.3d 1001; *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 2007), *rev'd sub nom.* *Waddington v. Sarausad*, 129 S. Ct. 823 (2009).

110. Judge Berzon wrote the majority opinion in two cases and joined the majority in one. *Flores*, 516 F.3d 1140; *Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781; *Hulteen*, 498 F.3d 1001. Judge Fisher joined the majority in two cases and wrote a dissenting opinion in one. *Redding*, 531 F.3d 1071; *Hulteen*, 498 F.3d 1001; *Cubic Def. Systems, Inc.*, 495 F.3d 1024. Judge W. Fletcher joined the majority in two cases and wrote the majority opinion in one. *Osborne*, 521 F.3d 1118; *Hulteen*, 498 F.3d 1001; *Sarausad*, 479 F.3d 671. Judge Gould joined the majority in one case and filed dissenting opinions in two cases. *Redding*, 531 F.3d 876; *linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876 (9th Cir. 2007), *rev'd sub nom.* *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009); *Hulteen*, 498 F.3d 1001.

Ninth Circuit, Judge Bruce Selya of the First Circuit,¹¹¹ Judge José Cabranes¹¹² and then-Judge Sonia Sotomayor¹¹³ of the Second Circuit, Judge Allyson Kay Duncan¹¹⁴ and former Judge Karen Williams¹¹⁵ of the Fourth Circuit, Judge Emilio Garza of the Fifth Circuit,¹¹⁶ and Judge Martha Craig Daughtrey of the Sixth Circuit.¹¹⁷

In short, Judge Reinhardt is one of several judges who are repeat players before the Supreme Court, and many have similarly high numbers of cases reviewed during the brief period (chosen for its recentness and not tested for typicality) of this snapshot. Before embracing a view of either a distinctive Reinhardt or of a “Ninth Circuit effect,” an econometric analysis would have to take into account variables such as a circuit’s relative size; the number of cases assigned to senior judges, active judges, and those sitting by designation; the changing composition of both circuit courts and the Supreme Court; the allocation of work among the lower federal courts; and the kind of decisions rendered.

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111. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007), *rev'd*, 129 S. Ct. 788 (2009); *Good v. Altria Grp., Inc.*, 501 F.3d 29 (1st Cir. 2007), *aff'd*, 129 S. Ct. 538 (2008); *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).
 112. *U.S. ex rel. Eisenstein v. City of New York*, 540 F.3d 94 (2d Cir. 2008), *aff'd*, 129 S. Ct. 2230 (2009); *Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007), *rev'd sub nom. 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009); *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).
 113. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009); *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008), *rev'd sub nom. Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009); *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007), *rev'd sub nom. Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).
 114. *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); *Bell v. Kelly*, 260 F. App'x 599 (4th Cir. 2008), *dismissed as improvidently granted*, 129 S. Ct. 393 (2008); *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *rev'd*, 129 S. Ct. 1262 (2009).
 115. *al-Marri*, 534 F.3d 213; *United States v. Abuelhawa*, 523 F.3d 415 (4th Cir. 2008), *rev'd*, 129 S. Ct. 2102 (2009); *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), *rev'd*, 129 S. Ct. 1079 (2009).
 116. *United States v. Yeager*, 521 F.3d 367 (5th Cir. 2008), *rev'd*, 129 S. Ct. 2360 (2009); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 497 F.3d 426 (5th Cir. 2007), *aff'd*, 129 S. Ct. 865 (2009); *Negusie v. Gonzales*, 231 F. App'x 325 (5th Cir. 2007), *rev'd sub nom. Negusie v. Holder*, 129 S. Ct. 1159 (2009).
 117. *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008), *rev'd*, *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008), *rev'd sub nom., Bobby v. Bies*, 129 S. Ct. 2145 (2009); *Crawford v. Metro. Gov't of Nashville*, 211 F. App'x 373 (6th Cir. 2006), *rev'd*, 129 S. Ct. 846 (2009).

To fill in a few of these data points, recall that the Ninth Circuit is the largest circuit, comprised of nine states with a population of over sixty-one million, just under one-fifth of the over three hundred million people now living in the United States.¹¹⁸ Looking at the overall docket of the federal courts, between 300,000 and 350,000 civil and criminal cases¹¹⁹ and approximately one million bankruptcy petitions¹²⁰ are filed each year. Appellate filings average around 60,000, and total dispositions run around that number.¹²¹ (Most litigation takes place in state courts: as of 2007, more than thirty-nine million cases were filed in state courts.¹²²) Looking at another snapshot—2008—the Ninth Circuit disposed of more than 13,000 cases, or more than a fifth of the total federal appellate dispositions.¹²³ The other high-volume circuits that year were the Fifth Circuit, which disposed of more than 9000 cases, followed by the Second and Eleventh, each of which disposed of more than 6000.¹²⁴

The number of dispositions, in turn, does not equate with the number of opinions written, the number marked for publication, or the range of substantive issues decided. For example, in 2009, the federal appellate courts

118. U.S. CENSUS BUREAU, 2009 ANNUAL POPULATION ESTIMATE, available at <http://www.census.gov/popest/states/NST-ann-est.html>. The figures were derived by summing the Census Bureau's 2009 current population estimates for each of the nine states to 61,204,820 and then dividing by the 2009 current population estimate for the United States: 307,006,550.

119. ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, 2008, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2008.aspx>, at tbls. C, D [hereinafter FEDERAL JUDICIAL STATISTICS 2008].

120. *Id.* at Table F (901,927 bankruptcy filings in 2008); see also ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, 2009, at tbl. F, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2009.aspx> (1,202,503 bankruptcy filings in 2009) [hereinafter FEDERAL JUDICIAL STATISTICS 2009].

121. FEDERAL JUDICIAL STATISTICS 2008, *supra* note 119, at tbl. B; FEDERAL JUDICIAL STATISTICS 2009, *supra* note 120, at tbl. B. Per the Administrative Office's practice, the figures in this note and those that follow regarding appellate filings and dispositions do *not* include statistics from the Federal Circuit, which sees around 1500 appellate filings per year and disposes of approximately the same number. See FEDERAL JUDICIAL STATISTICS 2008, *supra*, at tbl. B-8; FEDERAL JUDICIAL STATISTICS 2009, *supra*, at tbl. B-8.

122. See Shauna M. Strickland et al., State Court Caseload Statistics: An Analysis of 2007 State Court Caseloads, Table 1, available at http://www.ncsconline.org/D_Research/csp/2007_files/StateCourtCaseloadStatisticsFINAL.pdf.

123. FEDERAL JUDICIAL STATISTICS 2008, *supra* note 119, at tbl. B-1.

124. *Id.*

disposed of 59,604 cases¹²⁵ and issued decisions for publication in under seventeen percent.¹²⁶ Publication does not, however, invariably predict Supreme Court interest. In both the 2008-2009¹²⁷ and the 2009-2010 Terms¹²⁸

125. FEDERAL JUDICIAL STATISTICS 2009, *supra* note 120, at tbl. B.

126. ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT TO THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at tbl.S-3, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/So3Sep09.pdf> (2010); see also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

127. *United States v. Flores-Figueroa*, 274 F. App'x 501 (8th Cir. 2008) (holding that, to convict of aggravated identity theft, the government was not required to prove that a defendant knew the identity belonged to another person), *rev'd*, 129 S. Ct. 1886 (2009) (concluding that the government was required to prove defendant's knowledge); *Bell v. Kelly*, 260 F. App'x 599 (4th Cir. 2008) (denying federal habeas relief for a state prisoner who invoked counsel's failure to present mitigating evidence), *dismissed as improvidently granted*, 129 S. Ct. 393 (2008); *United States v. Boyle*, 283 F. App'x 825 (2d Cir. 2007) (holding that the government did not violate defendant's due process rights by asserting that a single robbery was the predicate act of two different enterprises for a racketeering conviction), *aff'd*, 129 S. Ct. 2237 (2009) (concluding that an association-in-fact racketeering enterprise must have a "structure," but that the court's jury instructions need not use this exact language); *Negusie v. Gonzales*, 231 F. App'x 325 (5th Cir. 2007) (affirming the Board of Immigration Appeals' finding that an alien was ineligible for asylum on the ground that he had worked as a prison guard in Eritrea), *rev'd sub nom. Negusie v. Holder*, 129 S. Ct. 1159 (2009) (holding that coercion and distress must be considered when evaluating whether the "persecutor bar" applies to asylum claims); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 211 F. App'x 373 (6th Cir. 2006) (holding that participation in an investigation was not protected for the purposes of alleging a violation of rights under Title VII), *rev'd*, 129 S. Ct. 846 (2009) (concluding that Title VII's antiretaliation provisions protected responses to an investigation of a coworker's complaint); *Mirzayance v. Knowles*, 175 F. App'x 142 (9th Cir. 2006) (holding that a state court had erred and that a defendant was denied effective assistance of counsel when counsel advised him to withdraw an insanity plea), *rev'd*, 129 S. Ct. 1411, 1411 (2009) (concluding that the California decision rejecting the ineffective assistance of counsel claim was not "contrary to or an unreasonable application of clearly established federal law").

The practice of issuing summary decisions as well as labeling some "not for publication" has drawn a good deal of academic attention. See, e.g., Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS., Summer 1998, at 157; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001).

128. *Hardt v. Reliance Standard Life Ins. Co.*, 336 F. App'x 332 (4th Cir. 2009) (holding that, because a party's only claim in ERISA litigation was for long-term disability benefits, which the district court did not award, the party was not a "prevailing party" and, thus, not entitled to attorney's fees), *rev'd*, 130 S. Ct. 2149, 2152 (2010) (concluding that, under 29 U.S.C. § 132(g)(1), a district court has discretion to award attorney's fees to a nonprevailing party in ERISA litigation as long as the party had "some degree of success on the merits" (internal quotation marks omitted)); *Krupski v. Costa Cruise Lines, N.V.*, 330 F. App'x 892

the Supreme Court granted review in six cases in which the federal appellate courts have not thought the issues worthy of published decisions.

Visibility of judges comes not only from whether the Court takes the case but also from what the Court does with the judgment below. As already noted, in the two full Terms considered here, a majority of the Court disagreed with Judge Reinhardt's views in each of the six cases on which he sat—twice unanimously, once by a 7-2 decision, and three times in a 6-3 decision.¹²⁹ (Responding to mention of such exchanges with the Court, Judge Reinhardt once commented: “A lot of the times when we have been reversed we have been applying the law as it is, and they’re reversing it, which they are allowed to do.”¹³⁰)

Even these variables miss another: voice. An illustration of a persistent jurisprudential narrative tone in Reinhardt's corpus can be found in a 2003 decision. At issue was the retroactive application of the Supreme Court's 2002 opinion in *Ring v. Arizona*,¹³¹ holding that the Constitution required juries rather than judges to decide the facts underlying those “aggravating circumstances” that are a predicate to capital sentencing. An en banc decision of the Ninth Circuit, written by Judge Sidney Thomas, held that retroactivity was

(11th Cir. 2009) (holding that, under Federal Rule of Civil Procedure 15(c), an amended complaint may relate back to the original action only when the amending party was mistaken about the defendant's identity and that the district court did not err in finding that the amended complaint did not result from mistaken identity), *rev'd sub nom.* Krupski v. Costa Crociere S. p. A., 130 S. Ct. 2485, 2490 (2010) (concluding that “relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge”); Christian Legal Soc'y of the Univ. of Cal, Hastings Coll. of the Law v. Kane, 319 F. App'x 645 (9th Cir. 2009), *aff'd sub nom.* Christian Legal Soc'y of the Univ. of Cal, Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010) (discussed *supra* note 97); Lett v. Renico, 316 F. App'x 421 (6th Cir. 2009) (upholding the district court's determination that the Michigan court violated the Double Jeopardy Clause by declaring a mistrial after the jury could not reach a unanimous verdict and retrying the petitioner), *rev'd*, 130 S. Ct. 1855 (2010) (concluding that the Michigan Supreme Court's application of federal law was not unreasonable); Wilkins v. Gaddy, 308 F. App'x 696 (4th Cir. 2009) (per curiam) (affirming the district court's denial of a state prisoner's 42 U.S.C. § 983 claim on the basis of the district court's determination that the prisoner's injuries were de minimis), *rev'd*, 130 S. Ct. 1175 (2010) (per curiam) (holding that a prisoner's excessive force claim under § 983 must be decided on the “nature of the force rather than the extent of the injury”); Friend v. Hertz Corp., 297 F. App'x 690 (9th Cir. 2008), *vacated*, 130 S. Ct. 1181 (2010) (discussed *supra* note 98).

129. See *supra* notes 100, 103.

130. Adam Liptak, *A Judge Known for Pushing the Envelope*, N.Y. TIMES, June 30, 2002, available at <http://www.nytimes.com/2002/06/30/national/30JUDG.html>.

131. 536 U.S. 584 (2002).

required.¹³² Judge Reinhardt concurred, endorsing the majority opinion and objecting to the dissent's view of nonretroactivity. He described the dissent as arguing that

additional people should now be put to death following unconstitutional proceedings even though the Court has recognized the unconstitutionality inherent in those future executions To me, this represents a seriously warped view of the nature of our legal system, and the relationship of that system to its ultimate objective: justice.¹³³

For Reinhardt, the state could not “deliberately execute persons knowing that their death sentences were arrived at in a manner that violated their constitutional rights,”¹³⁴ as doing so would be to tolerate a profoundly arbitrary system in which a person's challenge to capital punishment turned upon the happenstance of where his or her case sat in a court's queue.¹³⁵

In the U.S. Supreme Court, four Justices agreed with Judge Reinhardt that retroactivity was required. Their dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, explained that the *Ring* rule was “implicit in the concept of ordered liberty, ’ implicating fundamental fairness,” and was “central to an accurate determination of innocence or guilt, ’ such that its absence ‘create[d] an impermissibly large risk that the innocent [would] be convicted.’”¹³⁶ The dissenters saw factfinders in death penalty cases to have “a special role that can involve, not simply the finding of brute facts, but also the making of death-related, community-based value judgments,” and hence rights going to the accuracy of determinations and not only the procedure for them were at stake.¹³⁷ But the majority decision, authored by Justice Scalia, rejected those propositions. Joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, Justice Scalia held that *Ring* was not to be applied to cases already final on direct review.¹³⁸ For them, the issue was procedural

132. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003).

133. *Id.* at 1122 (Reinhardt, J., concurring).

134. *Id.* at 1124.

135. *Id.* at 1124-25.

136. *Schriro v. Summerlin*, 542 U.S. 348, 359 (2004) (Breyer, J., dissenting) (quoting excerpts from *Teague v. Lane*, 489 U.S. 288, 311-13 (1989)).

137. *Id.* at 361.

138. *Id.* at 358 (majority opinion). On remand, the same en banc panel (with one substitution) of the Ninth Circuit again granted habeas and overturned the death sentence on ineffective assistance of counsel grounds. *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005). As the opinion by Judge Thomas explained: “The net result was that Summerlin presented no affirmative evidence and no rebuttal evidence, although . . . there was an abundance of

rather than substantive, and its relationship to accuracy too attenuated to support retroactive application.¹³⁹

This brief excursion into the exchanges between appellate and Supreme Court jurists underscores that audience and speakers interactively shape understandings of the import of opinions. Teasing out relationships among individual judges, kind of case, outcome at the circuit level, and Supreme Court rulings requires analyses of a host of variables, simply sketched here. The socio-legal import is yet another question, turning on one's understanding of the relevant law, facts, and (per Judge Reinhardt) justice of opinions—all requisite to forming conclusions about how to assess the Supreme Court's approval or disapproval of particular decisions of lower court judges.

V. CONSTRUCTING LEGAL VIRTUE

This account has, thus far, detailed Reinhardtian traits of facticity, patience with legal and factual nuances, thoroughness, preparation, optimism, and an unembarrassed embrace of the judicial role as justice-seeking and as protective of all persons. Another facet of his analytic stance bears attention: his efforts to shape norms about what constitutes a good judge in this polity.

Reinhardt is a sophisticated jurist who understands well what Rogers Smith has called the “conflicting visions of citizenship in U.S. history.”¹⁴⁰ As Smith explained, despite de Tocqueville's account of “liberal democratic features” of “American political culture,”¹⁴¹ American legal history is constituted from multiple traditions, some welcoming vulnerable minorities and others deeply inegalitarian. Statutes and case law not only insist on equal treatment but also instantiate “forms of second-class citizenship, denying

available classic mitigation evidence concerning family history, abuse, physical impairments, and mental disorders.” *Id.* at 635. The Supreme Court denied certiorari. 547 U.S. 1097 (2006). Following a resentencing hearing, Summerlin was sentenced to life with the possibility of parole after twenty-five years. Summerlin appealed, raising issues regarding his original trial and his factual innocence. An Arizona appellate court denied the appeal. *State v. Summerlin*, No. 1 CA-CR 09-0074, 2009 WL 3116831 (Ariz. Ct. App. Sept. 29, 2009).

139. *Schriro*, 542 U.S. at 356-57. As Justice Scalia put it, “The evidence is simply too equivocal to support” the conclusion that “judicial factfinding so ‘seriously diminishe[s]’ accuracy that there is an ‘impermissibly large risk’ of punishing conduct the law does not reach.” *Id.* at 355-56 (quoting *Teague*, 489 U.S. at 312-13).

140. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

141. *Id.* at 5.

personal liberties and opportunities for political participation to most of the adult population on the basis of race, ethnicity, gender, and even religion.”¹⁴²

Reinhardt is a self-conscious member of the political elites, identified by Smith as participants in struggles over the meaning of American law. Reinhardt consistently draws on one of the “rival civic ideologies,”¹⁴³ that of an unapologetic liberal egalitarianism. Reinhardt maintains that “wholly aside from one’s personal or religious beliefs, there is a universal wellspring of social justice in the United States—a wellspring that constitutes a wholly appropriate foundation for judicial decision-making.”¹⁴⁴ Reinhardt’s reading of the Constitution requires dismantling the barriers that Smith detailed—of disenfranchisement and of disenfranchisement also claiming a lineage in American constitutionalism and legalism. Knowing full well that many called “judge” aspire to a model that is “increasingly . . . technocratic proceduralist,”¹⁴⁵ Reinhardt offers a counter-image of judges committed to elaborating legal rules recognizing individuals at risk in relationship to power. His is an evolving social order that—as he appreciates—is already remarkable for its dedication of high-profile individuals (judges and justices on federal and state courts), obliged to speak to individuals in their encounters with law.

Reinhardt’s efforts to shape this understanding of civic values are anchored in another of his attributes: his commitment to open acknowledgement by judges of their world views. In an article addressing whether judges should give speeches, Reinhardt argued that “judges should speak directly to the public,” as part of a “dynamic discussion surrounding this country’s developing conception of rights and liberties.”¹⁴⁶ Hence, a hallmark of his work—in speeches and opinions—is forthrightness. Reinhardt is a proponent of what Jeremy Bentham called “publicity”¹⁴⁷ and what Reinhardt terms “a duty to be open and forthcoming with the public, and, correlatively, to subject

142. *Id.* at 2. Smith’s conclusion stemmed in part from a review of statutes from 1798 through 1912 on “fourteen dimensions of U.S. citizenship laws” and a survey of some 2500 cases. *Id.* at 4.

143. *Id.* at 6.

144. Reinhardt, *Social Justice in Judging*, *supra* note 57, at 20.

145. *Id.* at 19.

146. Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 *LOY. L.A. L. REV.* 805, 806 (1995) [hereinafter Reinhardt, *The Open Judiciary*].

147. See JEREMY BENTHAM, *Rationale for Judicial Evidence, Specially Applied to English Practice* (1827), in 6 *THE WORKS OF JEREMY BENTHAM* 191 (John Bowring ed., Edinburgh, William Tait 1843); see also Judith Resnik & Dennis E. Curtis, *From ‘Rites’ to ‘Rights’ of Audience: The Utilities and Contingencies of the Public’s Role in Court-Based Processes*, in *REPRESENTATIONS OF JUSTICE* 195, 197 (Antoine Masson & Kevin O’Connor eds., 2007).

ourselves to criticism just like all the other members of a democratic society.”¹⁴⁸ (As Bentham put it, a judge, while presiding at trial, is also “under trial.”¹⁴⁹)

That “duty” results in our knowing what Reinhardt thinks about the obligations of judges. He explained his posture in the context of praising his colleague, Judge Noonan, whose opinions, Reinhardt wrote, “exude a passion for social justice for ordinary people—workers, immigrants, and the underprivileged.”¹⁵⁰ As Reinhardt also noted, what he admired in Noonan is what he shared: “This commitment to social justice is central to his, and my, understanding of how courts should conduct their business.”¹⁵¹

Thus, to read Stephen Reinhardt is to see on display “the premise that minority rights are a fundamental part of our nation’s ideals and constitute a core element of our American democracy.”¹⁵² Reinhardt implements this precept by forcing us to encounter persons arguing for these ideals. His authority comes from his thoroughgoing engagement with the facts and laws as applied to such individuals, and it is these traits that make him an exemplar of justice worthy of imitation—for those now selecting judges and for those now sitting as judges.

Why should one hold him up as a model? Because an analysis of Reinhardt’s jurisprudence necessarily entails discussion of individuals like Juan Antonio Perez, Kim Ho Ma, Kevin Phelps, and Falen Gherebi, who serve here as placeholders for hundreds of persons whose experiences have, via Reinhardt, become part of the annals of American law. Their travails—from judges ignoring people standing literally before them to judges avoiding the legal claims advanced and acceding to the prospects of indefinite detention or refusing to remedy facts of sanctioned degradation and torture—return me to the idea invoked at the outset: *exempla iustitiae*.

The Renaissance narratives were about judges who put the state’s law before themselves, at times at great personal expense. Reinhardt is equally loyal to law but conceives that mandate to oblige loyalty to “Justice” and “Welfare”—the words he chose to italicize when writing about the preamble to the U.S. Constitution.¹⁵³ What Judge Reinhardt is willing to do is to face the possibility of state injustice as well as to hope for its fairness and generosity. Thus, he not only is an exemplary jurist but one who also gives to us the *exempla iustitiae* of

148. Reinhardt, *The Open Judiciary*, *supra* note 146, at 805.

149. BENTHAM, *supra* note 147, at 355.

150. Reinhardt, *Social Justice in Judging*, *supra* note 57, at 18.

151. *Id.*

152. *Id.* at 22.

153. See *supra* note 62 and accompanying text. In another language, he is what is called a *mensch*.

Perez, Kim Ho Ma, Phelps, and Gherebi—standing as painful warnings about the harms incurred when justice has gone astray.