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CIVILIZATION, INTEGRITY, AND JUSTICE: SOME OBSERVATIONS ON THE FUNCTION OF THE JUDICIARY*

IN HONOR OF JUDGE IRVING L. GOLDBERG

by

*The Honorable Frank M. Johnson, Jr.***

DEAN Rogers, Members of the Faculty and the Student Body, Judge Goldberg, and distinguished guests:

A few years back, after a particularly tedious conference that was a part of an en banc session of the old Fifth Circuit, a number of judges rode down in the elevator together. One of my colleagues commented that being a judge is a tough way to earn a living. I had only to reflect for a moment on an adolescence part of which was spent working as a farmhand before responding that it sure beats plowing!

In fact, the business of judging is a tough job.¹ We do, after all, spend the better part of our days endeavoring to do that which everyone else tries his best to avoid—making decisions on hard questions. For some judges the burden has proved too much; these judges have trivialized what they do. Rabelais tells the story of the fictional judge who decided cases by tossing dice.² Indeed, one nonfictional Manhattan criminal court judge a few years back resorted to flipping coins and allowing the courtroom spectators to vote as to which witness they found more credible.³ I knew a judge in Birmingham who presided over the municipal court, handling many cases, most of them criminal. After determining guilt, the judge would require the defendant to roll the dice that the judge kept on the bench in order to determine the number of days the defendant would spend in jail. The judge would then pronounce the sentence accordingly.

As the case load has multiplied over the years, the time judges can devote to any given case, or to the other things that make life more pleasant and

* First Irving L. Goldberg Lecture, delivered at Southern Methodist University School of Law (January 19, 1989).

** United States Circuit Judge.

1. See, e.g., Alpert, *Learning About Trial Judging: The Socialization of State Trial Judges*, in *COURTS AND JUDGES* 107-27 (J. Cramer ed. 1981).

2. See F. RABELAIS, *GARGANTUA AND PANTAGRUEL*, bk. III, chs. XXXIX-XLIII (T. Urquhart trans.) (Dent ed. 1955).

3. See *Quotes*, 69 A.B.A. J. 730 (1983).

relaxing, has been reduced to a minimum. At times, judging can lead even the most patient man to despair. For example, the Lord Chancellor of England in the mid-nineteenth century lamented that "my spirit almost dies away when I think I am to pass the remainder of my days in hearing witnesses swear that the house was all secure when they went to bed, and next morning they discovered that the window had been broken and their bacon was gone."⁴ Yet I know that judging is to both Judge Irving Goldberg and myself not merely a job, or worse a bloodless intellectual game, but instead an exercise of compassion, a joy. In sum, as Learned Hand once remarked, the practice of judging is "a delectable calling."⁵

The organizing committee for this lectureship, honoring my dear friend Judge Irving Goldberg, has asked me to offer you my observations about judicial integrity. Judges seldom voluntarily turn the spotlight of scrutiny upon themselves. Consider the lot of the great eighteenth century jurist, Lord Mansfield, and you may understand why. Lord Mansfield had just stated the judgment for the four judges of the King's Bench when he looked down at the unfortunate lawyer who had represented the losing party and asked him to tell the bench his real opinion and whether he thought they had decided the case correctly.⁶ The chagrined barrister replied that he believed it his duty to do what the Court asked and thus was compelled to say that he did not think that there were four other men in the world who could have given such a ridiculous judgment.⁷ It seems to me, however, that we cannot really talk about judicial integrity (which must surely rank beside the flag and mothers as something that we all agree is good) without talking first about judges: who they are, what they do, and why society lets them do it.

I. CIVILIZATION: THE PURPOSE OF THE JUDICIAL FUNCTION

I have styled this lecture "Civilization, Integrity, and Justice: Some Observations on the Function of the Judiciary." I draw my title from a passage by the British legal historian, Sir John Macdonell. Sir John noted the lack of any accepted test of civilization:

It is not wealth, or the degree of comfort, or the average duration of life, or the increase of knowledge. All such tests would be disputed. In default of any other measure, may it not be suggested that as good a measure as any is the degree to which men are sensitive to wrong-doing and desirous to right it?⁸

I agree with every word of that observation. I hope everyone in this room would too. The hallmark of any society that claims to be civilized has to be, precisely, its ability to do justice: its ability to apply its rules with equal favor to the high and to the lowly. My thesis today is that it is the function

4. 2 R. HEUSTON, *LIFE OF LORD CAMPBELL* 295 (J. Hardcastle ed. 1881) (quoting the Lord Chancellor of England).

5. L. HAND, *The Preservation of Personality*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 43 (I. Dillard ed. 1960).

6. D. PANNICK, *JUDGES* 105-06 (1987) (relating the event).

7. *Id.*

8. J. MACDONELL, *HISTORICAL TRIALS* 148 (1927).

of judges to act as a civilizing force in the body politic. The strong leaders that established this government were acutely aware that the function of the judiciary would be to ensure this civilizing force. In 1789 the first Congress enacted the first federal judiciary act. Oliver Ellsworth, a member of the convention that framed our Constitution and afterwards the Chief Justice of our Supreme Court, formulated the act. Speaking of this earnest patriot, Mr. Webster said that he was "possessed of the clearest intelligence and deepest sagacity as well as the utmost purity and integrity of character."⁹

Upon the relative functions of the different branches of government and the necessity for an independent judiciary, Chief Justice Ellsworth said:

If the general legislature should, at any time, overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers; if they make a law, which the Constitution does not authorize, it is void; and the judiciary power, the national judges, who, to secure their impartiality, *are to be made independent*, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is usurpation upon the general Government, the law is void, and upright, *independent judges* will declare it to be so.¹⁰

Next to Oliver Ellsworth, the man most active in the establishment of our federal judiciary to insure it would be a civilizing force was, in my opinion, Alexander Hamilton. Upon the reasons for an absolutely independent judiciary, Hamilton observed:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the acts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the Government and serious oppressions of the minority party in the community.¹¹

I submit that the reason for such an acute sensitivity as to the role our federal judiciary was to play was, and still is, that we as Americans share a broad popular conception of, and faith in, justice. It is this conception that, in turn, underlies our notion of judicial integrity.

How does the judge contribute to the existence of a just society and thereby to the civility of the nation he serves? The civilizing function of a judge has been best defined, I think, as "the *removal* of a sense of *injustice*."¹² I find this a very thought-provoking definition. It turns our traditional conception of the judicial function on its head: not to do justice but to remove injustice. This turnabout, I submit to you, makes much clearer that the judge's role is more than simply to decide who wins or who loses. Judges

9. E. WHITE, *LEGAL ANTIQUITIES* 96 (1913).

10. *Id.* at 96-97.

11. *The Judiciary and Public Sentiment*, Presentation at the 24th Annual Meeting of the Missouri Bar Association (1906).

12. P. DEVLIN, *THE JUDGE* 3 (1979) (emphasis added).

also have the duty to provide both parties with the confidence that, win or lose, they had their day in court, that they were given a fair chance to air their grievances before an impartial decision-maker.

A sense of injustice arises not from the simple fact of being hit and injured by a street car, or of having one's house burgled. Although these incidents are unjust in some cosmic sense, in actuality they are only incidents of fate. Rather, injustice breeds in the feeling that one has been wronged by another without recourse—that one has no effective means to challenge the conduct of another that one finds manifestly unjust. Deny an individual some means to redress injustice, and he or she becomes bitter and cynical. Deny a whole class of people the means to put right such wrongs, to remove the sense of injustice, and the inevitable result is a social unrest. We need only look to recent history to confirm this observation: the predominantly peaceful civil disobedience that came in response to discrimination against blacks, women, and other minority groups in the United States, the violent protests of the students in South Korea, and the terrorism of the neo-Maoist Shining Path in Peru.

It is no mere conceit that prompts me to suggest that, because of this civilizing function, no society worth living in could exist without judges. Indeed, even in Sir Thomas More's conception of Utopia, while society could live without lawyers, it could not dispense with the judges.¹³ This premise is true, I submit, because judges tend the gate between order and anarchy. To the extent judges can dispense justice and articulate reasons why their decisions are just, they remove from persons otherwise disaffected the feeling of injustice; they preserve our system of ordered liberties. We must always keep in mind that in times of social change judges are particularly necessary to a civilized society. It is essential to the stability of society that those whom change hurts be able to count on even-handed justice. That this is the essential role of judges is, of course, doubly true when society calls upon the courts to vindicate the rights of politically weak minorities.

When I say that judges perform a civilizing function, and when I explain why it is *necessary* for judges to perform this function, I refer to the judge's role in vindicating the rights of those who cannot do so for themselves. That position raises a second, related question: why does society permit judges to perform this function? The answer lies ultimately in the expectation of judicial integrity.

II. INTEGRITY: THE JUSTIFICATION FOR THE JUDICIAL FUNCTION

A judge decrees that schools are to be desegregated, and, sometimes grudgingly, school boards comply. A judge announces that governmentally sponsored prayer in the schools is unconstitutional, and state-enforced prayers stop. A judge holds that capital punishment is constitutional and that a man was fairly sentenced to death in accordance with our laws, and the man is executed.

13. See T. MORE, *UTOPIA* 106 (P. Turner trans. 1965).

In our federal system we have given these unelected and largely unaccountable men and women we call judges the right and responsibility to exercise enormous power, *in the name of the law*, by enjoining them, as Chief Justice Marshall put it nearly two hundred years ago, to "say what the law is."¹⁴ We have given judges the power to overrule the decisions of the elected branches of the government. We have entrusted in them the power to make decisions that, not infrequently, an appreciable portion of society finds obnoxious and wrong. Why do we entrust judges with this power? Why do our people obey?

From a purely legal standpoint, the power to say what the law is, otherwise referred to as judicial review, derives from *Marbury v. Madison*,¹⁵ a case decided in 1803. The legal and constitutional legitimacy of this principle has fueled abstruse articles by myself and many others over the years.¹⁶ Congress's rejection of the nomination of undesirable lawyers or judges to the Supreme Court, coupled with the failure of recent efforts to generate support for the chimerical notion of original intent, I submit to you, has laid to final rest any serious challenge to the legal and constitutional justification for broad judicial power.

This legal and constitutional justification is only one half, and in my view the less important half, of the foundation of the judicial function. The people of America obey judges because the law tells us to do so. But the reason that the law tells us to, and ultimately the only explanation for the legitimacy of the controversial decisions that I alluded to earlier, must rest on some broader popular conception of, and faith in, justice by the American people.

The fact remains that, even in the face of invitations to engage in massive, organized resistance, the American public has, for the most part and certainly in the end, accepted the judgments of the courts. They have complied with the law as construed by the judges even when doing so in some instances meant abandoning norms and byways that had guided them their entire lives.

Why have they done so? Looking back over my thirty-three years on the

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

15. *Id.*; cf. THE FEDERALIST NO. 78, at 227 (A. Hamilton) (R. Fairfield ed. 1961): "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment" (Emphasis in original).

16. Cf. C. BLACK, THE PEOPLE AND THE COURT (1960) (role of court to interpret constitution); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (judges must fashion law when constitution and statutes silent); L. HAND, THE BILL OF RIGHTS (1958) (court should not invalidate legislative acts); L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969) (contrasting restraints of English courts with innovations of American courts); F. JOHNSON, *Judicial Activism Is a Duty—Not an Intrusion*, in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 279 (M. Cannon & D. O'Brien eds. 1985) (duty of judges to interpret constitution); Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (judges should limit themselves to original intent when interpreting constitution); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (disagreeing with need for judicial review of legislative actions).

federal bench, and the changes that the courts have wrought in our social fabric in that time, I have come to the firm conclusion that the American people believe, fundamentally and absolutely, in the rule of law. They may not agree with the law. They may try to change the law through the political processes. This, the American people have the absolute right to do. But, they revere the concept of justice, and their conscience tells them to obey the law once they understand what it is.¹⁷ This reverence is a fact of profound importance. It not only underlies the stability of our polity,¹⁸ it exemplifies the fundamental goodness of our people.

Americans believe in justice. Why have they come to rely upon judges to tell them what justice is? The answer lies, I submit, in the expectation that judges will be men and women of integrity. In common parlance, a man or woman of integrity is honest, straightforward, and upright. While we hope and expect that our judges have integrity in this sense, not all judges have lived greatly in the law. Within the past decade, the United States has had to endure the impeachment proceedings for alleged corruption of three sitting federal judges. We live in an imperfect world; judges, like all other men and women, have not been sanctified. As Justice Black observed, judges "[l]ike all the rest of mankind . . . may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal."¹⁹

When I use the term judicial integrity, however, I mean something quite different from the type of integrity about which Justice Black wrote. In rendering justice under law, as another great Texan, Professor Charles Black, has recognized, a judge must make and act upon decisions concerning justice, morality, fitness, and expediency.²⁰ To me, the essential attribute of judicial integrity is a *passion* for justice informed by a deep and abiding morality, a *compassion* that propels the judge to a just conclusion even when the

17. Lord Devlin, I think, put it best in observing that law is really a social consensus, and that "consensus in a community consists of those ideas which its members as a whole like or, if they dislike, will submit to—what is for one reason or another acceptable." P. DEVLIN, *supra* note 12, at 2. *But cf.* 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (1883) (noting laws may be justified by popular prejudices because, absent law according with such views, the majority might resort to mob action to enforce its views). Aryeh Neier took this notion one step further and recognized that it is largely the public's respect for the integrity of the judiciary that has caused it to accept judicial decisions recognizing the rights of groups "so widely disliked, or held in [such] contempt . . . that they have little hope of persuading the public at large that wrongs they may suffer warrant redress." A. NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 29 (1982).

18. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 106-07 (1975):

If substantial portions of the statute book had to be enforced by direct action—whether through civil or criminal litigation—against large numbers of people, we would have a very different and infinitely more disagreeable society than we do The secret of this enterprise is that most people, most of the time, need only to be made aware of the law in order to obey it.

19. *See generally* Green v. United States, 356 U.S. 165, 198 (1958) (Black, J., dissenting); J. BORKIN, THE CORRUPT JUDGE 23-186 (1962) (discussing career of Judge Martin T. Manton); N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT ch. 9, at 192-217 (1973) (closer scrutiny of judicial conduct necessary); D. PANNICK, *supra* note 6, ch. 4, at 75-104 (little can be done in case of judicial misconduct).

20. C. BLACK, DECISION ACCORDING TO LAW 26 (1981).

party or the issue before the bar is unpopular. I speak of those occasions when, as Justice Black so eloquently said, the "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."²¹ When a judge has the courage of his convictions, a willingness to do *what his understanding of the law tells him is right*, he can in my view properly be called a judge of integrity.

Let me suggest further that we, as a society, must measure the worth, and the integrity, of the judiciary not by the extent to which its judgments are popular or accepted by some ephemeral majority, however defined,²² but rather by the extent to which the judgments of the courts spare us from the disorders that otherwise inevitably result from injustice.²³ Desegregation may have been an unpleasant experience for many, but it demonstrated an exercise of judicial power that redressed manifest injustice. The only alternative to the changes ordered in the United States by judges like Judge Irving Goldberg is writ large in Soweto, and Pretoria, and Johannesburg.

III. JUSTICE: THE WHOLE OF THE JUDICIAL FUNCTION

Aristotle taught that judges should be the very personification of justice.²⁴ By that, of course, he meant that judges must be men and women of rectitude. But he also meant, I believe, that judges personify justice because they are persons of integrity as I have defined it—they do not, when parties properly present a justiciable controversy, fear to interpose themselves squarely between the competing factions in our society. Judges must interpose themselves in order to protect and vindicate certain values—freedom of speech and religion, due process of law, political and social rights, equality, justice—that we as a nation deem indispensable and irreducible.

I began by observing that being a judge is hard work. It falls to the judge to make the unpopular decisions, the ones from which the elected branches all too often shy away, for it is our lot in a democratic and pluralistic society to function as a gadfly on the social conscience. Having said all this, let me offer you one final proposition: the man this University, in sponsoring this series of lectures, honors today, Judge Irving Goldberg, comes as close as any judge I have known in thirty-three years to meeting Aristotle's ideal. To me, Irving Goldberg *is* the personification of justice. His performance as a judge illustrates the type of honesty, straightforwardness, and uprightness which all judges should exercise.

I realize that for many students in the audience the social upheaval of the civil rights movement, and the malignant system of racism that spawned it,

21. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

22. As I put it in another forum, judging is about decision making, but "decision making free from the need to please." F. Johnson, Address to the Joint Meeting of the National Conference of Bar Presidents and National Association of Bar Executives 14 (Feb. 9, 1979).

23. P. DEVLIN, *supra* note 12, at 4.

24. See Aristotle, *Nicomachean Ethics* bk. V, ch. 4, at 115 (D. Ross trans. 1966) ("to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice").

seems as distant and unreal as the Great Depression or the War of 1812. Much dimmer in your minds would be the heroism of men like Judge Irving Goldberg. For that reason, let me tell you a few facts about Judge Goldberg and some of the decisions he has made as a judge.

Irving Goldberg learned from the cradle what it feels like to be different from the majority. He grew up as a Jew in the small city of Port Arthur, Texas, in the early years of this century. It was a time when the Ku Klux Klan still enforced its own brand of vigilante justice on blacks, Jews, Catholics, and others who did not conform to their standards. When he left for the University of Texas, and later Harvard Law School, Irving Goldberg carried with him not only a deep and abiding faith and pride in his religion but also a deep and abiding passion for justice and compassion for the less fortunate. It was this passion that reinforced within him the brotherhood of all men. When he returned to Dallas, he began practicing law. Eventually he joined with Bill Fonville, Richard Gump, Bob Strauss, Jack Hauer, and Alan Feld, to build the law firm of Goldberg, Fonville, Gump and Strauss, now known as Akin, Gump, Strauss, Hauer and Feld, one of the nation's preeminent firms.

Irving Goldberg, after a distinguished career as a private practitioner, came to the bench in 1966. He was already sixty years old. Although observers at the time praised his awesome intellectual powers, they doubted that at his age he could have much impact on the law in the Fifth Circuit.²⁵ How wrong they were. He very quickly demonstrated to his colleagues two salient characteristics: a graceful pen and an unwavering faith in what was right and proper.

Let us consider the former. One of the worst characteristics of judges in particular, and the legal profession in general, is a penchant for dull or simply incomprehensible writing, a fact decried by the likes of Shakespeare, Swift, Bentham, and many others.²⁶ The task of making legal writing not only accessible to the layman, but in fact delightful to read, has been a personal crusade of Judge Goldberg.²⁷ He is, after all, the judge who observed

25. See F. READ & L. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 180-81* (1978).

26. See W. Shakespeare, *The Merchant of Venice*, act III, sc. ii, lines 75-77 ("In law, what plea so tainted and corrupt/ But, being season'd with a gracious voice/ Obscures the show of evil?"); J. SWIFT, *GULLIVERS'S TRAVELS: A VOYAGE TO THE COUNTRY OF THE HOUYHNNMS* 255 (Bernbaum ed. 1920) (writing judges and lawyers speak "a peculiar cant and jargon of their own, that no other mortal can understand"); 7 *THE WORKS OF JEREMY BENTHAM* 282 (J. Bowring ed. 1843) (deriding "lawyers' cant" and "flash language").

27. See, e.g., *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973). Judge Goldberg observed:

Appellants themselves issued the invitation to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that "Good Night Ladies" should have been played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not The Last Tango for the Parish. Appellants still have an encore to perform and their day in court is not yet over.

in an otherwise dry copyright case, in which Kentucky Fried Chicken and the other party both accused each other of infringement, that the case presented the “implausible—some might say unappetizing—contention that the man whose chicken is ‘finger-lickin’ good’ has unclean hands.”²⁸ In a case where a Georgia moonshiner had endured the tragedy of watching 175 gallons of his mash engulfed in a fire, Judge Goldberg observed wryly that “the lush dreams of bourbon living that the still owners must have harbored were suddenly scotched.”²⁹ He resorted to the Bible to enliven a tax case when he wrote:

“To everything there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted;” a time to purchase fertilizer, and a time to take a deduction for that which is purchased. In this appeal from the Tax Court decision, we are asked to determine when the time for taking a fertilizer deduction should be.³⁰

Indeed, so numerous are these gems, some in playful verse³¹ and others with literary³² or cinematic³³ allusions, that his former clerks catalogued them in a monogram called *Irving Goldberg’s Greatest Hits*, a tribute to the

Id. at 1114; *see also* *Graves v. Barnes*, 343 F. Supp. 704, 708 (W.D. Tex. 1972) (three-judge court) (per curiam), *aff’d in part sub nom.* *White v. Regester*, 412 U.S. 755 (1973). The court commented:

We are once again in the Texas sector of the political thicket of legislative redistricting and required to contour the condition of the individual trees as well as the physiography of the forest as we explore for “crazy quilts,” “groves,” contiguity, compactness, specie, motivation in planting, and other possible impedimenta to constitutionality in redistricting. In ten years wandering about this political thicket, we have not yet found the burning bush of final explanation.

343 F. Supp. at 708.

28. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 372 (5th Cir. 1977).

29. *United States v. Miller*, 500 F.2d 751, 753 (5th Cir. 1974), *rev’d on other grounds*, 425 U.S. 435 (1976).

30. *Schenk v. Commissioner*, 686 F.2d 315, 316 (5th Cir. 1982) (paraphrasing *Ecclesiastes* 3:1). Judge Goldberg recently reprised this Biblical allusion—or was he moved by his passion for baseball—when he noted in a bankruptcy case that “[a] paradox of appellate jurisdiction is that the season begins only after the game has ended.” *In re Greene County Hosp.*, 835 F.2d 589, 589 (5th Cir. 1988).

31. *See, e.g.*, *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 327-28 (5th Cir.) (“There was an oil company from Iran whose lawyers devised a neat plan”), *cert. denied*, 108 S. Ct. 329 (1987); *United States v. Batson*, 782 F.2d 1307, 1309 (5th Cir. 1986) (“Some farmers from Gaines had a plan. It amounted to quite a big scam.”) (italics omitted).

32. *United States v. Garth*, 773 F.2d 1469, 1471 (5th Cir. 1985) (quoting Emerson’s *Conduct of Life*); *Oil, Chemical & Atomic Workers Int’l Union, Local 4-16000 v. Ethyl Corp.*, 644 F.2d 1044, 1046, 1048-49, 1053, 1055 (5th Cir. Unit A May 11, 1981) (deriving case headings from Homer’s *The Odyssey*).

33. *See, e.g.*, *Peerless Ins. Co. v. Texas Commerce Bank New Braunfels, N.A.*, 791 F.2d 1177 (5th Cir. 1986). Judge Goldberg noted the following about a Uniform Commercial Code case:

It arises, one could say, from Vincent J. Menier’s desire for more cream in his coffee. While Joe DiMaggio confidently extolled the virtues of “Mr. Coffee” coffee makers, which are manufactured by appellant North American Systems, Inc., Menier, the Vice President of North American’s Fairfield Filter Division, pilfered and filched checks through the financial filter of forged endorsements.

Id. at 1178; *see also* *United States v. Garth*, 773 F.2d at 1473 n.5 (5th Cir. 1985) (citing the film *Country*).

success of Judge Goldberg's crusade. Many appear also in a law review article surveying judicial humor.³⁴

I told you that Judge Goldberg's arrival on the Fifth Circuit was important in two ways. The first was the wit, joy, and craftsmanship that stamped opinions as uniquely his own. But, of course, the second was the more telling. Almost from the day Judge Goldberg donned his robe, his judicial role thrust him into the vortex of the social and political storm that settled upon the old Fifth Circuit. For more than twenty years that court faced squarely, and usually first, the most contentious, divisive issues that have confronted us as a people since the Civil War. It is no hyperbole to say that a political and social revolution was taking place in the United States, and it was the lot of the judges of the old Fifth Circuit to act as the umpires.

Consider the range of cases that Judge Goldberg has heard and participated in deciding, and I think you will agree that they represent some of the most thorny issues a judge can face. Because these cases so often were cases of first impression, the lack of any real guideposts to help with the decision made the task of deciding them even harder. For example, in the area of political rights, the *Graves v. Barnes* per curiam opinion³⁵ clearly reveals, both through its reasoning and its prose, the hand of the master. The court held that major metropolitan areas, such as Dallas, could not use a county-wide, at-large voting system because it diluted Hispanic and black voting strength.³⁶ All nine Justices of the Supreme Court voted to affirm this important vindication of the principle of one-man, one-vote.

Furthermore, Judge Goldberg's opinion for the court in *Carr v. Montgomery County Board of Education*³⁷ proved critical to the efforts of district judges throughout the South to craft pragmatic solutions to the desegregation dilemma. This decision permitted judges to strike a proper balance between the necessity of desegregation and the desirability, if at all possible, of local school boards devising their own tailor-made solutions.³⁸ Judge Goldberg also presided over a three-judge district court in *Rodriguez v. San Antonio Independent School District*.³⁹ The case recognized that heavy reliance upon property taxes to finance local schools has the effect of unfairly disadvantaging poor districts, thus denying those students the very means necessary to raise themselves up out of poverty.⁴⁰ Judge Goldberg's court found that education was a fundamental right.⁴¹ Surprisingly, the Supreme Court disagreed in a 5-4 vote.⁴²

34. See Note, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 709-14 (1987).

35. 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court) (per curiam), *aff'd in part sub nom.* *White v. Regester*, 412 U.S. 755 (1973).

36. 343 F. Supp. at 718-34.

37. 429 F.2d 382 (5th Cir. 1970).

38. *Id.* at 386.

39. 337 F. Supp. 280 (W.D. Tex. 1971) (three-judge court) (per curiam), *rev'd*, 411 U.S. 1 (1973).

40. 337 F. Supp. at 282-83.

41. *Id.* at 282.

42. 411 U.S. at 35.

In the area of personal freedoms, *Roe v. Wade*⁴³ was undoubtedly the most celebrated case on which Judge Goldberg has sat. The three-judge district court over which he presided held that the Texas abortion laws that deprived single women and married couples of their ninth amendment right to choose whether to have children must be declared unconstitutional.⁴⁴ The Supreme Court affirmed this enormously controversial decision.⁴⁵

More recently, Judge Goldberg's opinion in *Cleburne Living Center, Inc. v. City of Cleburne*⁴⁶ acknowledged for the first time that, for purposes of equal protection, mentally retarded people are entitled to heightened scrutiny because all too often society views them as pariahs to be kept locked out of sight.⁴⁷ Curiously, the Supreme Court determined that the evidence was insufficient to conclude that the mentally retarded have suffered the types of prejudice that Judge Goldberg so persuasively set forth in his opinion, and that heightened scrutiny was therefore inapplicable.⁴⁸ The city, however, opened the group home. The Supreme Court applied rational basis scrutiny, with bite, to achieve the same result.⁴⁹

What can we conclude from these cases, and from the many others that make up the Goldbergian jurisprudence? I suggest that the only conclusion has to be that Irving Goldberg is a judge of integrity, and that he is a judge who personifies our ideal of justice.

Understand that whether one agrees with the results Judge Goldberg reached in these cases is not the point. Certainly Judge Goldberg and I have differed on any number of issues over the years. The point is that in each of these decisions one can discern the characteristic that, to me at least, is the essence of a judge of integrity: the courage to reach the result that his understanding of the law tells him is right—not the result that reading of the latest polls tells him will be the most popular.

I can tell you honestly that this is easier said than done. But I think there can be no doubt that, for Judge Irving Goldberg, this is his credo. In his more than twenty years on the bench, I can think of no occasion when he has abandoned this maxim, not even in the face of abuse and opprobrium the likes of which most in this room could not even imagine.

Ultimately, I can do no better than to offer you Judge Goldberg's own words on his conception of the role of the judge:

Preachers and writers have been preaching and writing for generations that we should do certain things for our brothers and they have been heard, but not heeded. And that's where the courts come in. The courts not only are heeded, but what's important in their being heeded is . . . that the courts do speak for the moral heights of our society. And

43. 314 F. Supp. 1217 (N.D. Tex. 1970) (three-judge court) (per curiam), *aff'd*, 410 U.S. 113 (1973).

44. 314 F. Supp. at 1221.

45. 410 U.S. at 167.

46. 726 F.2d 191 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985).

47. 726 F.2d at 196-98.

48. 473 U.S. at 448.

49. *Id.* at 446.

when they don't, they forfeit their responsibility.⁵⁰

Judge Irving Goldberg has, by his integrity and his example, contributed to the civilization of this great country for us all, rich or poor, man or woman, black or white. Judge Irving Goldberg has throughout his judicial career demonstrated a judicial integrity that makes him a jewel in the sacred treasures of national reputation. His calmness of temperament, accuracy of judgment, unblemished character, and sound legal views clearly reflect that he has justly earned the honor that this University has today bestowed upon him.

50. J. BASS, UNLIKELY HEROES 328 (1981) (quoting Judge Goldberg).