

HARVARD LAW REVIEW

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IN MEMORIAM: JUDGE STEPHEN REINHARDT

The editors of the *Harvard Law Review* respectfully dedicate this issue to Judge Stephen Reinhardt.

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*Justice Anthony M. Kennedy\**

As a person and as a judge, Stephen Reinhardt was devoted to protecting the powerless and the oppressed. In my forty-three years on the bench few, if any, judges with whom it has been my privilege to serve were more dedicated to the cause of justice.

Steve came to the bench after my appointment, so he was my junior in the judicial hierarchy; but he was far from my junior in all other respects. At every session he was remarkably well-prepared. For Steve, no case was small or unimportant. In conference and in his writing he would remind us that our decision would touch a real person, and that the law must not be so formal or remote that it forgets this.

Always, we were close friends. Steve visited here a short time ago. We had not seen each other for some months, and it was exciting to find that his warmth and smile and laugh and his passion for the law were as dynamic as ever. For both of us our friendship was a treasure, a treasure that now remains to teach and to guide me.

With repeated expressions of profound sorrow, I remain.

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\* Associate Justice, Supreme Court of the United States. This Tribute is adapted from a letter from Justice Kennedy to Judge Reinhardt's family on April 26, 2018.

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*Justice Sonia Sotomayor\**

To describe Stephen in just a few words is not an easy task when there is so much to say, but if forced to do so, I would say this: Stephen Reinhardt was fiercely loyal.

First, Stephen was fiercely loyal to the law. His opinions were always meticulous and exceedingly well reasoned and well supported. I remember once waiting with him as we were getting ready for an event we were doing together; Stephen was pacing back and forth, mumbling to himself. When I listened closely, I realized he was going through the legal issue in his head: first one side of the argument, then the other. This went on for a while, until finally it was time to speak to the audience. I was a little concerned, given what I had just witnessed: Was he going to mumble like that in front of all of these people?

But his presentation was clear and forceful. I realized that his mumbling of the arguments back and forth was his way of making sure he knew the issue inside out. He knew every argument in favor of his position and, most important, he knew the response to every argument against it. I imagine his writing process was much the same.

There is no denying that Stephen kept us busy at the Supreme Court. You cannot read a news story about him without reading a line or two about how often our Court reviewed his opinions. But what people miss when they say he kept the Supreme Court busy is that whenever anyone disagreed with one of his brilliant opinions, it would take extra-hard work to explain the basis for reversal. His loyalty to the law ensured that each opinion had a rock-solid foundation that was difficult to break.

Second, Stephen was also fiercely loyal to those whose lives are affected by the law. He never lost sight of them. He never forgot that we as judges have a truly awesome responsibility — not only to interpret the law, which in itself is a weighty charge, but to decide the fate of so many. And he tried to fulfill that duty as justly as he could in every case. Whether it involved a multimillion-dollar lawsuit brought by big-firm lawyers, or a pro se litigant, he was careful and thorough always. He was an example to all of us — a reminder that loyalty to the law is not, and should not be, divorced from our loyalty to those whose lives we affect through our decisions. It is not inconsistent to judge with your head and with your heart at the same time.

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\* Associate Justice, Supreme Court of the United States. This Tribute is adapted from remarks delivered at Judge Reinhardt's memorial service.

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Third, Stephen was also fiercely loyal to his clerk family. When I joined the Court, he was adamant in his quest to get me to hire one of his law clerks. He was persistent, and let me tell you something: he did not make it easy for me. He was one of the most frustrating recommenders you could ever encounter. Every year when I called him to ask for his insight into a candidate, he would say: “All of my clerks are brilliant. They are all my children, and I don’t have a favorite.”

He loved them all. When I finally did hire one of his clerks, I knew immediately that he was right, and I was grateful he was so persistent. The many hours he spent with them arguing about cases and going through drafts of an opinion helped shape them into the excellent lawyers they are today.

I have no doubt Stephen will be remembered as one of the greatest legal minds of our lifetimes. Books will talk about his amazing intellect, his brilliance with words, and his willingness to speak out. But I think one of his greatest legacies in the law is the clerk family that he has sent out into the legal community — the Reinhardt Army, as I have heard some call it, which includes many brilliant lawyers who were trained by him and share his passion for the law and for justice. He was so proud of his clerks. They have done, and will continue to do, great things. I am grateful to him for leaving us that gift.

Finally, Stephen was fiercely loyal to his family and to his friends. Every clerk I have met always has the same story to tell about Stephen. He could be in the middle of a heated debate, angry about something or other, but if Ramona or one of his children called, he stopped and answered the phone with nothing but love in his voice. Any time he spoke about his wife, children, or grandchildren, you could see him light up with love and pride.

And he was also a devoted and thoughtful friend. No matter how busy he was, he always took the time to send me a note with a recommendation for his latest favorite show in New York or for a movie he had just seen that made him think of me. And of course, it was always a pleasure to talk about our passion for the Yankees (which I will add is yet another example of his good judgment).

Stephen was a good friend, and I will miss him terribly. I will always be thankful for the many good moments we shared; for his fearlessness; and for his dedication to the law and to justice all of these years on the bench. We have lost one of the giants of our federal judiciary — one who cared deeply about the way the law could shape our society and impact our pursuit of justice. Someone like Stephen cannot be replaced. He set an example for judging that anyone with a passion for the good in the law should follow.

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*Judge David J. Barron\**

There was an undeniable charm to the Judge — as I, like so many, always called him. But, even after all these years, I struggle to explain why. Was it the twinkle shining through the gruffness? The gentleness tempering the exactitude? The total loyalty leavening the dauntingly high expectations? The shrewdness grounding the idealism? The old-school formality giving way to a surprising intimacy? I don't know. I do know that to make him laugh, and to laugh with him even in the midst of serious work — in fact, especially in the midst of it — was true joy for me.

The Judge was a jumble of contrasts and nothing if not original. He was also impassioned and a patriot through and through. He loved the country that he served, and one could not help but respect his commitment to doing right by its people. The people whose cases came to him inspired him to do his job with an intensity that was intoxicating and, implicitly, insisting. Will you be sure to work this way? Will you be sure to do the kind of work that makes working this way worth it?

In case after case, through determination and skill, he identified some flaw in the government's treatment of a person with few resources and great need and convinced his fellow panelists to right the wrong. In case after case, he discerned some overlooked aspect of the record or precedent and led his court to ensure that a person with a lawful claim to protection could secure it. Of course, this was true in the "big" cases, too. Chewing on a pencil, staring out on the city that he loved, he discarded arguments that didn't work and honed those that did, knowing the stakes of a constitutional ruling that could affect millions. The resulting decisions did not always stick. But they still left a trail — stunning in its breadth — for others to follow.

The Judge not only changed the lives of those whose cases came before him. He also sketched arguments that lawyers and judges all over the country used to do their own part in righting wrongs — often when, in the sea of precedents available to them, little besides that one tightly reasoned and much-worried-over Reinhardt opinion supported their view.

The Judge even changed the lives of those who had no occasion to rely on his work. A rigorous judge who did not shy from words like

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“justice” or “fairness,” his voice recalled the legal era defined by the Court he so admired, the Warren Court. But, even at a half-century’s remove from that very different time, he made that voice sound contemporary, vigorous, confident, undiminished. That voice inspired not only those who agreed with him, but many of his adversaries, too. They all knew the importance of there still being in this country a judge of that sort.

There is one other group of people whose lives his work changed — his law clerks. A year with him was exhilarating — and exhausting. It was also — for me — life changing. Exactly why a single person in one’s career comes to have such an outsized influence is mysterious. But, after just twelve months in chambers, I had a new sense of what I should do as a lawyer and a lasting connection to a man I came to love. I am so grateful to have had him in my life for as long as I did — and so grateful that the power of his own life has been recognized as the example, and the inspiration, that it is.

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*Andrew Manuel Crespo\**

To admirers and to critics, his sobriquets were many. Liberal Lion. Bad Boy of the Federal Judiciary. Chief Justice of the Warren Court in Exile. But to those of us who knew him and who loved him, he was, simply, Judge.

That is not to say that the sobriquets — any one of them — missed the mark. On the contrary, they were together of a piece. For if he was a Lion he was “a Lion in Winter,” perhaps the “last great liberal lion of a once-numerous pride.”<sup>1</sup> He graduated from law school the year that the Supreme Court decided *Brown v. Board of Education*, and for the rest of his life he believed it was “the obligation of the courts to ensure fairness and equality for all.”<sup>2</sup> To him, the “law was about justice” and the “courts were where people could come when they have a problem,”<sup>3</sup>

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\* Assistant Professor of Law, Harvard Law School. Professor Crespo clerked for Judge Reinhardt from 2008–2009.

<sup>1</sup> Garrett Epps, *In Prop. 8 Ruling, a Liberal Lion Coos*, THE AM. PROSPECT (Feb. 7, 2012), <http://prospect.org/article/prop-8-ruling-liberal-lion-coos> [https://perma.cc/XS9P-D8N8].

<sup>2</sup> Stephen Reinhardt, Lecture, *The Anatomy of an Execution: Fairness vs. “Process,”* 74 N.Y.U. L. REV. 313, 352 (1999).

<sup>3</sup> Gavin Broady, *The Lion in Winter: Judge Stephen Reinhardt*, LAW360 (Apr. 1, 2014, 8:10 PM) (quoting Judge Reinhardt), <https://www.law360.com/articles/523190/the-lion-in-winter-judge-stephen-reinhardt> [https://perma.cc/9FRG-6S7H].

presenting their claims to judges who should above all else insist on treating every person with dignity and respect — most especially “the poor, the disenfranchised, and the underprivileged,” whose hardships all too often go ignored.<sup>4</sup>

But while his life as a lawyer may have been born of summer, he spent his life as a judge exiled to a cooler clime. Every day that he sat on the federal bench he worked beneath a Supreme Court whose majority disagreed with him on nearly every major decision that he issued. To the extent he was known as a Bad Boy within that judiciary, it was because he often disagreed with the Justices right back — publicly castigating those whom he saw as “limiting rights generally, especially those of racial minorities.”<sup>5</sup>

Some saw in this public disagreement an “open resistance, defiance even, toward a Supreme Court that was moving ever further to his right.”<sup>6</sup> From time to time, he encouraged that view, wryly remarking that when it came to reversing his opinions the Supreme Court simply couldn’t “catch ’em all.”<sup>7</sup> Beneath that rapsallion riposte, however, Judge Reinhardt appreciated a subtle but essential distinction between “resistance” and “defiance.” He proudly practiced the former, emphatically declaring that it is not the “mission” of a lower court judge “to anticipate the Supreme Court’s deprivation of constitutional rights.”<sup>8</sup> If the Supreme Court reversed him, he noted, it was “not for failing to apply the law” that the Court had “previously enunciated,” but rather because he had failed to embrace of his own accord some “previously undeclared, and extreme rules that” the Court would later announce — in what he saw as its unending campaign “to limit the ability of federal courts to enforce the rights embodied in the Constitution.”<sup>9</sup> Against that program, he resisted, confident in the view that “reversal by a higher court is not proof that justice is thereby better done.”<sup>10</sup>

But just as insistently as he practiced such resistance, he firmly rejected the idea of defiance. Once the Supreme Court decides an issue, he would say, “you have to follow it.”<sup>11</sup> And follow he did, time and again. On occasion, he would publish his sharp disagreement with the

<sup>4</sup> Reinhardt, *supra* note 2, at 314.

<sup>5</sup> *Id.* at 315.

<sup>6</sup> Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. TIMES (Apr. 12, 2018), <https://nyti.ms/2lQ3GiP> [<https://perma.cc/B29X-XR3L>].

<sup>7</sup> *Id.* (quoting Judge Reinhardt).

<sup>8</sup> Broady, *supra* note 3 (quoting Judge Reinhardt).

<sup>9</sup> Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1222 (2015).

<sup>10</sup> Reinhardt, *supra* note 2, at 314 (alteration omitted) (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

<sup>11</sup> Broady, *supra* note 3 (quoting Judge Reinhardt).

result that precedent compelled him to reach, memorably dissenting “as a citizen” all the while concurring “as a judge.”<sup>12</sup> Indeed, sometimes he would be urged to go further — not to concur but to dissent, to embrace outright the defiance that had already, if inaccurately, been ascribed to him. There, though, he drew the line. And his reasoning was simple: “We in the appellate courts dutifully follow the existing Supreme Court law,” he explained, “because the system of law that we so admire and respect contains a hierarchy in which the Supreme Court rests at the top.”<sup>13</sup>

There, as always, it was: his devotion to our system of law, a system to which he dedicated the many long hours of his life. That life had a few great loves — his wife Ramona, his children and grandchildren, his cat Delano, followed closely by baseball, basketball, football, and the movies (*all* of the movies).<sup>14</sup> But high on that list there was his deep and abiding love of the law, which he demonstrated over the course of his many decades through an equally deep and abiding optimism about the law’s future. “I am an optimist,” he wrote.<sup>15</sup> “I see a trend toward progress and social justice.”<sup>16</sup> Sometimes, he explained, that progress comes only “after painful battles,” sometimes only “after painful lapses or even painful defeats.”<sup>17</sup> But in the end, he knew that winter precedes spring — and that so too with the law “the pendulum will surely swing.”<sup>18</sup>

His optimism, though, was always flinty eyed, never once betraying the slightest hint of naiveté. The pendulum does not *inevitably* swing, he knew, and it most assuredly does not swing by itself. Rather, if there was one personal virtue that the Judge both embodied and expected from those around him, it was a willingness and an ability to work hard — very, very hard — in pursuit of justice.

When I was his law clerk, Judge Reinhardt was more than fifty years my senior. I never knew him as a young man. But I never knew him as an old man, either. Instead, six days a week and often twelve or more hours a day, I and the many clerks who preceded and followed me struggled to keep up with *him*. Even now I can see him sitting there, in his high-backed chair, poring over the fourteenth or fifteenth draft of an

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<sup>12</sup> *Magana Ortiz v. Sessions*, 857 F.3d 966, 968 (9th Cir. 2017) (Reinhardt, J., concurring) (“I concur as a judge, but as a citizen I do not.”); *see also* *United States v. Hungerford*, 465 F.3d 1113, 1118, 1122 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment) (“Although precedent forecloses Marion Hungerford’s Eighth Amendment challenge to . . . her 159-year term of imprisonment, it cannot be left unsaid how irrational, inhumane, and absurd the sentence in this case is.” *Id.* at 1118. “Because I am required to do so, I concur in the judgment, but nothing more.” *Id.* at 1122.”).

<sup>13</sup> Reinhardt, *supra* note 9, at 1222, 1254.

<sup>14</sup> “I always thought I’d like to become commissioner of baseball or the National Football League, or run a movie studio,” he once said. Broady, *supra* note 3.

<sup>15</sup> Reinhardt, *supra* note 9, at 1254.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Reinhardt, *supra* note 2, at 352.

opinion. In his eighty-seven years, I doubt the Judge ever once touched a computer. Instead, we would print out our drafts and then sit by his side, hour after hour, as he read through each line, often grumbling his way through our inexperienced prose and chewing his pen to a stump in the process. Inevitably, sometimes incessantly, the pen would flick forward from his mouth, striking through some infelicitous phrase and replacing it with one far better, always scrawled out in his tight cursive hand. Then, he would look up and ask, “Why did you write it *that* way?” — the precursor to a sometimes hours-long debate over the finer points of law, logic, and the English language.

Only as I walked out of his office, both exhausted and exhilarated by the ordeal, did I realize that my three co-clerks were waiting to repeat the process with their own assigned drafts, and that the Judge was thus working four times as hard as each of us — which he did year in and year out for nearly four decades. With him as our model, we strove to do our very best and hardest work as well, recognizing that he depended on us and, even more so, that the work itself was necessary and important. After all, he reminded us, “Change will not come easily.”<sup>19</sup>

Reflecting back now, I have the dawning sense that he was working hard to effect such change in at least two respects. The first, of course, was in the law itself, which he hoped to win back from the “judicial philosophy of the right,” a philosophy championed, he noted, by “conservatives who fight for what they believe in” and thus “deserve respect and admiration.”<sup>20</sup> The other change, though, I think may have been one that he sought to effectuate in us — his clerks — and, more broadly, in the generation of young lawyers whom he met with when speaking at law schools across the country: “Change will not come easily. It will take hard work on the part of well-trained advocates and creative legal thinkers who refuse to accept” the status quo, and who through “their words and deeds” strive to “inspire” others to take up the cause of justice as well.<sup>21</sup>

That was his charge to the generations in his wake: to “carry on the work of the court’s great progressive thinkers — the justices who ended *de jure* racial segregation, brought us one man/one vote, opened the courts to the poor and needy, established the right to counsel for all defendants, gave women true legal equality.”<sup>22</sup> Throughout his life, Judge Reinhardt carried on that work, joining those earlier jurists in whose ranks and company he now rests. In the end, though, he knew

<sup>19</sup> *Id.* at 353.

<sup>20</sup> Stephen Reinhardt, *Who Will Keep the Liberal Flame, If Not Breyer?*, L.A. TIMES (May 26, 1994) (capitalization omitted), [http://articles.latimes.com/1994-05-26/local/me-62188\\_1\\_supreme-court](http://articles.latimes.com/1994-05-26/local/me-62188_1_supreme-court) [<https://perma.cc/9MK2-EUSQ>].

<sup>21</sup> Reinhardt, *supra* note 2, at 353.

<sup>22</sup> Reinhardt, *supra* note 20.

that his work was destined to go unfinished — that he would “not be around to see the day” when spring might finally creep over the horizon into the “valley” in which he spent his “long legal journey toward justice.”<sup>23</sup> Indeed, he privately came to concede that when it came to reversing his attempts to leave his mark on the law, the Supreme Court could, in fact, catch them all.

And so his optimism came to rest all the more on his second means of effecting change — not through his opinions but through his efforts to inspire, with his words and his deeds, the generations of younger lawyers working in his wake. Indeed, those of us who were fortunate enough to work for him soon came to see that beneath his gruff and gravelly exterior, we — his clerks — were among his great loves, too. And to those of us who knew and loved him in return, he was ever an inspiration, and will forever be our Judge.

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*Michael C. Dorf\**

Judge Stephen Reinhardt’s death came as a shock to me, as it did to so many of the other former clerks, lawyers, professors, and friends who knew and loved him. How is that possible? He was eighty-seven years old and a longtime cardiac patient. Whenever I shared a meal with the Judge, he casually pushed the vegetables to the side of his plate as if to avoid polluting his body with anything healthy. It was a miracle that he survived as long as he did. And yet, until the end, Judge Reinhardt was every inch the man we knew: brilliant; wickedly funny; sometimes caustic; kind hearted; demanding of others but even more demanding of himself; and most of all, full of life, indeed, larger than life. The abrupt end of such a titan could only be shocking.

Judge Reinhardt saw law as a tool for achieving justice and for holding the powerful accountable to the powerless. He was a masterful legal technician, but he was frequently dismayed by how some judges appeared to fetishize the law’s technical dimensions. He will be remembered as the last “liberal lion,”<sup>24</sup> or, as I have long thought of him, “the

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<sup>23</sup> Reinhardt, *supra* note 2, at 352.

\* Robert S. Stevens Professor of Law, Cornell Law School, and Law Clerk to Judge Reinhardt from 1990–1991. I am grateful to Sherry F. Colb for comments on a draft of this essay.

<sup>24</sup> Sam Roberts, *Stephen Reinhardt, Liberal Lion of Federal Court, Dies at 87*, N.Y. TIMES (Apr. 2, 2018), <https://nyti.ms/2GvtSCr> [<https://perma.cc/45DF-ST2W>].

Chief Justice of the Warren Court in exile.”<sup>25</sup> Those monikers fit, and Judge Reinhardt proudly embraced them. However, it would be a mistake to view him as some relic of a bygone age or even as a medieval monk preserving the ancient knowledge in the hope that it might be useful in some future renaissance. In Judge Reinhardt’s work we can see the core of a *contemporary* liberal jurisprudence.

Judge Reinhardt was confirmed to his seat as a federal appeals court judge in 1980. His career was roughly contemporaneous with those of two other giants of the federal bench, Justice Antonin Scalia (who was first appointed in 1982 and died in 2016) and Judge Richard Posner (who was appointed in 1981 and retired in 2017). Conventional wisdom would line these jurists up from left to right, placing Reinhardt and Scalia at opposite poles, while locating the pragmatic Posner in the center. That alignment makes sense as far as it goes, but seen from a jurisprudential rather than ideological perspective, Reinhardt was the golden mean between Scalia the formalist and Posner the hardcore legal realist.

Justice Scalia championed textualism in statutory interpretation and originalism in constitutional interpretation. Both philosophies are brands of formalism, a term Scalia cheerily accepted.<sup>26</sup> To be sure, Scalia did not champion what Dean Roscoe Pound derisively called “mechanical jurisprudence.”<sup>27</sup> Still, more than nearly any leading jurist of his age, Justice Scalia thought it vitally important to minimize the role of what he saw as inevitably idiosyncratic individual judgment in adjudication.<sup>28</sup>

Judge Posner, by contrast, is a legal realist and an antiformalist. He contends that the right way to decide a contested case is to figure out the best outcome, all things considered, and then to impose that outcome unless the law clearly rules it out.<sup>29</sup>

Most judges and scholars fall somewhere in between Scalian formalism and Posnerian legal realism. They (I should properly say “we”) think it appropriate, indeed necessary, for judges to seek guidance beyond the semantic content of legal texts but also think that the pre-existing law should properly play a substantial role in shaping outcomes; it should not merely rule some decisions out of bounds. Where a legal

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<sup>25</sup> Michael C. Dorf, *Requiem for Reinhardt, Chief Justice of the Warren Court in Exile*, VERDICT (Apr. 4, 2018), <https://verdict.justia.com/2018/04/04/requiem-reinhardt-chief-justice-warren-court-exile> [https://perma.cc/GK7A-ZJ9G].

<sup>26</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 25 (Amy Gutmann ed., 1997) (“Long live formalism.”).

<sup>27</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

<sup>28</sup> See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749–50 (2017) (arguing “that an insistence upon decisional justifications external to the judges’ will, and not a naked preference for rules, provided the central grounding for all of Justice Scalia’s commitments”).

<sup>29</sup> See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 78 (2016).

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text is unclear, most judges look behind the text to its animating spirit or purpose. This approach to judging has sometimes been called “purposivism,” although many judges deploy it almost unconsciously as a form of simple common sense.

Purposivism has no necessary ideological valence. Its leading mid-twentieth-century champions — Professor Henry Hart and Dean Albert Sacks — were centrists, and one could certainly be a conservative purposivist as well. That said, Judge Reinhardt’s judgments over a wide range of subjects show that purposivism most naturally supports liberal outcomes. In trying to ascertain the import of legal texts, Hart and Sacks said that, absent very strong indications to the contrary, a judge should assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>30</sup> (One could say the same thing about the nature, goals, and means of constitution writers and ratifiers.) For an empathic judge alert to injustice, a purpose to protect vulnerable people from abuse by the powerful will almost always seem more reasonable than a purpose to aid the powerful in abusing the vulnerable.

A case Judge Reinhardt decided the year I clerked for him nicely illustrates his liberal purposivism. The U.S. government kidnapped a Mexican national in Mexico in order to place him on trial in the United States. Backed by the Mexican government, he protested that the kidnapping violated an extradition treaty. The U.S. government argued that the treaty merely provided one — entirely optional — mechanism for bringing people to the United States to stand trial. It did not foreclose alternatives, such as kidnapping. Judge Reinhardt thought this argument made a mockery of the treaty’s principle of specialty — which allows a sending government to limit the crimes for which the extradited person may be tried. Under the government’s argument, he wrote:

once it is clear that the foreign government will only extradite a suspect for embezzlement and not for extortion, the government can simply drop its extradition proceedings, kidnap the individual, and try him for extortion without violating the treaty — because it has proceeded outside of the treaty framework. To us, viewed in this light the government’s argument simply makes no sense whatsoever.<sup>31</sup>

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<sup>30</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>31</sup> *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1351 (9th Cir. 1991), *vacated and remanded*, 505 U.S. 1201 (1992).

In one of three Supreme Court cases arising out of the kidnapping,<sup>32</sup> the Justices reversed. Writing for a majority, Chief Justice Rehnquist adopted the view that Judge Reinhardt thought nonsensical.<sup>33</sup>

By the time that happened, I was a law clerk for Justice Kennedy, who joined the majority opinion in the Supreme Court, but I had recused myself because I had worked on the case for Judge Reinhardt. When I saw the Judge some time later, he expressed amazement. Once the Supreme Court granted certiorari, he expected that his court's ruling would be reversed, but he thought the Court would accomplish the deed by holding that an unlawful arrest does not deprive a court of the power to try the arrestee, a position with substantial support in prior case law that his own opinion had labored mightily to distinguish.<sup>34</sup> He could not understand how the Court could rule based on the ground that it did. It just did not make sense of any reasonable purpose he could attribute to the treaty.

Judge Reinhardt was a curious combination of cynical and naïve about people. He understood the harm people are capable of inflicting on the vulnerable. He thus saw the primary role of law — and his role as expositor of it — as limiting arbitrary and other unfair exercises of power. Yet he always seemed to expect better and thus was frequently surprised and disappointed by the misdeeds, errors, or simple lack of empathy that others displayed. If I close my eyes, I can hear the disbelief in his voice and see him shaking his head.

From time to time Judge Reinhardt would call me up to complain about something I had written. “I never read blogs,” he would begin, saying “blog” the way one might say “horoscopes” or “pornography.” He would then tell me that one of his current clerks had pointed him to a blog post of mine, hastening to add that I was either flat-out wrong or wasting my time on an unimportant question. On more than one occasion, Judge Reinhardt upbraided me for referring to a “liberal Supreme Court justice.”

“There are no liberals on this Court,” he would say, not compared to “real liberals” like Justices William Brennan and Thurgood Marshall. Judge Reinhardt would allow that some of the current Justices were not as conservative as the others, but he would then list the disappointing recent decisions that the “supposed liberals” had written or joined. Even

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<sup>32</sup> See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). The other Supreme Court cases arising out of this incident were *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which held the Fourth Amendment inapplicable to a search by U.S. authorities of the Mexican residence of a Mexican citizen, and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which held, *inter alia*, that a foreign plaintiff's treatment violated no norm of international law of the sort that would warrant a cause of action giving rise to jurisdiction under the Alien Tort Statute.

<sup>33</sup> See *Alvarez-Machain*, 504 U.S. at 664–66.

<sup>34</sup> See *Verdugo-Urquidez*, 939 F.2d at 1345–49 (distinguishing prior cases on the ground, *inter alia*, that they did not involve an official protest from the country in which the kidnapping occurred).

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though Judge Reinhardt knew that Justices Brennan and Marshall had long ago departed, he maintained his capacity to be disappointed.

That capacity for disappointment fueled Judge Reinhardt. Even when he knew that he and the other judges who came closest to counting for him as liberal were outnumbered, he continued to fight the good fight. He did so not to go down swinging but because he believed that justice could prevail. Judge Reinhardt would not have admitted it — indeed, he would have laughed derisively and made a skeptical face if he heard me say it — but he was ultimately an optimist.

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*Heather K. Gerken\**

I know the Judge went by many names, but to his clerks he was *the* Judge, a term that embodies equal parts of affection, admiration, and exasperation. In the weeks after the Judge's death, one of the things that sustained all of his clerks is swapping Judge stories.

"Judge stories," for those who don't know, is a term I've used to describe the stories the clerks tell about the Judge.<sup>35</sup> They are over-the-top tales about his eating habits, his shockingly funny bluntness, or his complete inability to pull money from an ATM or gas from a pump. The Judge was stubborn and ornery and could argue about just about anything. I once edited one of his sentences to eliminate a dangling preposition. He took delight — and a good ten minutes — changing the sentence so it HAD to have a dangling preposition. Another clerk told me that his biggest debate with the Judge was over the spelling of the word *dilemma*.

Judge stories have *always* been the code the clerks use to talk about how much we love and admire the Judge. Judge stories are an indirect means of dealing with the intimidating strangeness of working for a legend. Judge stories are the way we explain what it meant to have worked for the man who was — until a few months ago — the last Warren Court judge left standing.

It seems fitting that the Judge graduated from Yale Law School the same year that the Warren Court issued *Brown v. Board of Education*. It

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\* Dean and Sol & Lillian Goldman Professor of Law, Yale Law School, and Law Clerk to Judge Reinhardt from 1994–1995. I owe a debt of gratitude to Chris Haugh, a beautiful writer and a good friend.

<sup>35</sup> Heather K. Gerken, Tribute, *Judge Stories*, 120 YALE L.J. 529 (2010).

was then that he began what amounted to a quest to bend history toward the rights of “the poor, the disenfranchised, and the underprivileged.”<sup>36</sup>

He took up pen and gavel to beat back the hounds of capital punishment; to protect the rights of all those accused of a crime; and to enshrine in law the right to marry whomever one loves. During nearly four decades on the bench, he kept the fires of the Warren Court alive long after its embers had gone cold. He is one of the few people I know who had the right to speak of healing the nation’s “constitutional wounds,”<sup>37</sup> precisely because he bore the scars of those fights.

What made the Judge all the more intimidating is that something unbreakable was woven into his spirit, which is why the death of an eighty-seven-year-old man came as a complete surprise to many of us. His work was Sisyphean. Reversals had a peculiar way of finding his chambers. One would think this could wear a man down. But the Judge was relentless. He would come in — each and every day — and do the work of justice all the same. He would scour briefs for weakness. He would pore over his opinions. And he would prepare mercilessly. All the while repeating his mantra: they can’t reverse them all.

Looking back, I now wonder whether he knew the truth of it — whether he knew that they could, in fact, reverse them all, or at least most of them. I’d like to think that he drew consolation from all the good he did in the small cases, the cases that flew under the radar, the ones involving people who are almost invisible to most of us . . . but never to him.

For the last few months, when I think of the Judge’s impossible combination of cynicism and persistence, I’m haunted by that Bart Giamatti line in a beautiful essay about baseball, one of the Judge’s abiding passions. Giamatti — a lawyer and a Red Sox fan — describes those who are willing to fall in love anew each spring, knowing full well that it will end again come October, as the “truly tough among us, the ones who can live without illusion, or without even the hope of illusion.”<sup>38</sup>

When I think about the Judge’s death . . . and the political moment we are in . . . and how different the Judge’s values were from the man who will appoint his replacement, my mind is pulled to Giamatti’s other observation about baseball. “It breaks your heart. It is designed to break your heart. . . . It breaks [your] heart because it was meant to, because it was meant to foster in [us] again the illusion that there was something abiding . . .”<sup>39</sup>

But perhaps I am too much the Reinhardt clerk or it’s just that I know that the Judge would never accept defeat. But right now, the

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<sup>36</sup> Stephen Reinhardt, Lecture, *The Anatomy of an Execution: Fairness vs. “Process,”* 74 N.Y.U. L. REV. 313, 314 (1999).

<sup>37</sup> *Id.* at 352.

<sup>38</sup> BART GIAMATTI, *The Great Green Fields of the Mind, in A GREAT AND GLORIOUS GAME* 7, 13 (1998).

<sup>39</sup> *Id.*

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Judge's legacy feels . . . abiding. I see his legacy in his remarkable family, including his grandson, Max, who has followed his grandfather's path to Yale Law School. I see it in the words he has written in dissents that we will read and cite well after the majority opinions that sparked those dissents are cast aside. And I see the legacy in his clerks, a generation trained by one of the finest lawyers I have ever known. A generation of lawyers trained to seek justice. A generation of people who worked for him precisely because they are as stubborn and exasperating and as relentless as he was.

Fifteen years after Giamatti died, the Red Sox won their first World Series in eighty-six years, stoked by the inspiration of generations of fans accustomed to loss but never accepting defeat. Let's not wait that long.

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*Adriaan Lanni\**

Judges, particularly appellate judges, have a lot of discretion over how hard they are going to work. They have lots of assistants, there is no supervisor, it is almost impossible to get fired, and at a certain point they can retire or go part-time without loss of salary. (It is not so different from being a law professor.) The one major check on them is reputational,<sup>40</sup> and this is largely dependent on the craftsmanship shown in a relatively small number of the judge's most "important" opinions. And clerks will tell you that appellate judges (also like law professors) vary considerably in how much they throw themselves into the other parts of the job.

As a former clerk for Judge Stephen Reinhardt, I can tell you that he worked hard, *very* hard — and not just on the important cases. Prisoner appeals, social security appeals, employment cases, asylum denials: there are no packed courtrooms for these cases, and many of these decisions will never be cited, or perhaps even read by anyone but the parties. But to the surprise of many new law clerks, these cases crowd the federal docket. And there is a great temptation to treat them as unimportant, to let them fall to the bottom of the pile — particularly among the clerks, who believe they were hired to write the next chapter in due process jurisprudence, or at least to add a new and fascinating squib note in Hart and Wechsler.

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<sup>40</sup> See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 15 (1993).

Judge Reinhardt emphatically did not give in to this temptation. One of my most vivid memories from my clerkship is from one of these apparently minor cases, in which an individual had established his right to Social Security benefits. The bar might consider this decision to be less important, but the Judge did not — he asked about it at every status meeting and wanted to issue the opinion quickly so the individual could get his benefits as fast as possible. Then almost seventy years old, and with twenty years on the bench, he was not remotely jaded. He never lost sight of the people behind the cases. Another example: The Ninth Circuit uses screening panels to decide less difficult cases without oral argument to help clear the court's crowded docket. Judge Reinhardt was known to dive into the details of many of these screened cases, despite pressure to resolve hundreds of them in three days, and regularly insisted on referring them to a regular oral argument panel for closer analysis.

There was a cost to sweating these details in every case. He worked well past dinner most weeknights and at least one day on every weekend. I can say from experience that this is a punishing workload even for just one year, but the Judge did it for almost forty years, keeping a full docket right up to the end. This is one of the purest kinds of integrity there is, and, invisible though it is, it probably does more to humanize the exercise of power by our government than the finest prose in the Federal Reports.

Graham Greene once said that God cares about the small sins more than the big ones.<sup>41</sup> I am sure that Judge Reinhardt will be remembered for his decisions in big cases, but what I will remember is his approach to the “small” ones.

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*Benjamin I. Sachs\**

Eleven days after Judge Stephen Reinhardt died, the Ninth Circuit issued a major Equal Pay Act<sup>42</sup> decision that he authored.<sup>43</sup> To a former clerk who loved and admired the Judge, the posthumous publication of *Rizo v. Yovino*<sup>44</sup> had a deep poignancy. Reading the words of this

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<sup>41</sup> GRAHAM GREENE, *THE POWER AND THE GLORY* (1940).

\* Kestnbaum Professor of Labor and Industry, Harvard Law School, and Law Clerk to Judge Stephen Reinhardt, 1998–1999. Thanks to Madeleine Joseph for excellent research assistance.

<sup>42</sup> 29 U.S.C. § 206(d) (2012).

<sup>43</sup> See *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc).

<sup>44</sup> 887 F.3d 453.

groundbreaking decision — a decision that prohibits employers from justifying salary differentials between men and women on the basis of prior salaries — felt like hearing the Judge speaking still. And it was undoubtedly his voice I heard throughout the en banc opinion. He started: “The Equal Pay Act stands for a principle as simple as it is just: men and women should receive equal pay for equal work regardless of sex.”<sup>45</sup> And he concluded:

Unfortunately, over fifty years after the passage of the Equal Pay Act, the wage gap between men and women is not some inert historical relic of bygone assumptions and sex-based oppression. Although it may have improved since the passage of the Equal Pay Act, the gap persists today: women continue to receive lower earnings than men “across industries, occupations, and education levels.” . . . Allowing prior salary to justify a wage differential . . . entrench[es] in salary systems an obvious means of discrimination — the very discrimination that the Act was designed to prohibit and rectify.<sup>46</sup>

In fact, *Rizo v. Yovino* is a classic Reinhardt opinion, encapsulating in thirty pages many of his judicial trademarks. Perhaps most importantly, the opinion stands as an excellent example of Reinhardt’s belief that judges should “harness” the law as an “engine of social progress” — as Linda Greenhouse aptly put it in her recent tribute to him.<sup>47</sup> In *Rizo*, the issue was pay equity, and, more particularly, how to ensure that a history of gender discrimination not perpetuate itself through the practice of justifying current salary levels on the basis of past ones. As the opinion rightly stated, this form of sex discrimination is alive and well in the U.S. today. Indeed, Equal Pay Day took place this year on April 10, the day after *Rizo* was published. That day marks how far into a current year the average woman has to work to earn what the average man made *by the end of the previous year*.<sup>48</sup> That is to say, a woman would have had to work until *Rizo* was issued in 2018 in order to earn what a male counterpart would have made by December 31 of 2017. Much work remains to be done on pay equity, and not even the best judicial decision will be enough to remedy this form of injustice. But Judge Reinhardt’s opinion in *Rizo* marks a major step in the direction of equality.

*Rizo* is also classic Reinhardt because it places his court, through his authorship, at the forefront of legal progress for working people. With *Rizo*, the Judge has done this for women workers and the Equal Pay

<sup>45</sup> *Id.* at 456.

<sup>46</sup> *Id.* at 468 (quoting Brief of Amici Curiae Equal Rights Advocates et al. in Support of Plaintiff-Appellee’s Petition for Rehearing and Rehearing En Banc at 12, *Rizo*, 887 F.3d 453 (No. 16-15372)).

<sup>47</sup> Linda Greenhouse, *Dissenting Against the Supreme Court’s Rightward Shift*, N.Y. TIMES (Apr. 12, 2018), <https://nyti.ms/2IQ3GiP> [<https://perma.cc/B29X-XR3L>].

<sup>48</sup> *Equal Pay Day*, NAT’L COMM. ON PAY EQUITY, <https://www.pay-equity.org/day.html> [<https://perma.cc/42QG-M9G4>].

Act. The Judge also facilitated enormous progress for low-wage workers seeking to enforce their rights under the Fair Labor Standards Act.<sup>49</sup> In *Lambert v. Ackerley*,<sup>50</sup> an opinion of major importance to the efficacy of that statute's antiretaliation clause, Judge Reinhardt — again for an en banc court — held that workers are protected when they demand minimum wage and overtime rights directly from their employers, and not only when they formally seek redress from a government agency or the courts.<sup>51</sup> This ruling opens the door for creative wage campaigns and ensures that workers without legal representation, or even without specific knowledge of the legal basis for their demands, can claim the wages they are owed without fear of reprisal. In addition — in the face of a remarkably hostile Supreme Court — Judge Reinhardt led the judicial move to offer protections to undocumented immigrant workers who stand up for their workplace rights. Thus, in *Rivera v. NIBCO, Inc.*,<sup>52</sup> the Judge held that employers may not use immigration status as a tool to prevent workers — regardless of their immigration status — from asserting Title VII rights.<sup>53</sup> And the Judge — here, again, standing against a seemingly ceaseless current moving in the opposite direction — expanded the rights of labor unions to organize workers. *United Food and Commercial Workers Union, Local 1036 v. NLRB*<sup>54</sup> is but one example. In that case, the Judge held that organizing new workers was so important to those already represented by unions that the costs of such organizing were “germane to collective bargaining” and thus chargeable to all members of existing bargaining units, whether members of the union or not.<sup>55</sup>

*Rizo* also offers an example of a holistic mode of statutory interpretation that is emblematic of Reinhardt's judicial style. Rather than starting with the text of the statute, the Judge began his analysis with the “underlying purposes which Congress sought to achieve.”<sup>56</sup> This allowed the Judge to frame the case as he would have seen it: as a question of justice and equity, rather than simply a question of the definitions of words. Thus, in the opinion's substantive Discussion section, Part A defined the issue at stake in the case: “The remedial *purpose* of the Act is clear: to put an end to historical wage discrimination against women.”<sup>57</sup> And, quoting from the legislative history: “The issue here is

<sup>49</sup> 29 U.S.C. §§ 201–219 (2012).

<sup>50</sup> 180 F.3d 997 (9th Cir. 1999) (en banc).

<sup>51</sup> *Id.* at 1001.

<sup>52</sup> 364 F.3d 1057 (9th Cir. 2004).

<sup>53</sup> *Id.* at 1074–75.

<sup>54</sup> 307 F.3d 760 (9th Cir. 2002).

<sup>55</sup> *Id.* at 774–75.

<sup>56</sup> *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018) (en banc) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974)).

<sup>57</sup> *Id.* (emphasis added).

really a very simple one—the *elimination* of one of the most persistent and obnoxious forms of discrimination which is still practiced in this enlightened society.”<sup>58</sup> After establishing the purpose of the statute under consideration, the Judge then turned, in Part B, to the words of the statute. Thus he wrote: “Basic principles of statutory interpretation *also* establish that prior salary is not a permissible ‘factor other than sex’ within the meaning of the Equal Pay Act.”<sup>59</sup>

To be sure, for Judge Reinhardt, this approach to reading statutes is neither new nor unique to *Rizo*. In *Lambert*, for example (the wage-and-hour case mentioned above), the question was whether the Fair Labor Standards Act’s antiretaliation clause protects employees who complain to their employers about substandard pay. The clause makes it unlawful for an employer to retaliate against any employee who has “filed any complaint . . . under or related to” the Act,<sup>60</sup> and so the question was whether complaints made to employers can be complaints “filed” under the Act. The Judge wrote that there is a “simple” approach that ought to be used when construing statutes, like the FLSA, that are “designed to protect individual rights.”<sup>61</sup> That approach entails that the court *start* with congressional purpose. Again, starting with purpose allowed the Judge to frame the case in terms of justice and fairness, not in terms of linguistics. Thus:

[The Fair Labor Standards Act] is remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil . . . Those are rights that Congress has specifically legislated to protect. *Such a statute must not be interpreted in a narrow, grudging manner.*<sup>62</sup>

And, with respect to the antiretaliation clause at issue in *Lambert*, the analysis began with the Judge’s determination that:

The FLSA’s anti-retaliation clause is designed to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act. Construing the anti-retaliation provision to exclude from its protection all those employees who seek to obtain fair treatment and a remedy for a perceived violation of the Act from their employers would jeopardize the protection promised by the provision and discourage employees from asserting their rights.<sup>63</sup>

Based on this construction of congressional purpose, the court then stated its holding: “We hold, therefore, that in order for the anti-retaliation provision to ensure that ‘fear of economic retaliation’ not ‘operate to

<sup>58</sup> *Id.* (quoting 109 CONG. REC. 9200 (1963) (statement of Rep. Dwyer) (emphasis added)).

<sup>59</sup> *Id.* at 461 (emphasis added).

<sup>60</sup> 29 U.S.C. § 215(a)(3) (2012).

<sup>61</sup> *Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) (en banc).

<sup>62</sup> *Id.* (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

<sup>63</sup> *Id.* at 1004.

induce aggrieved employees quietly to accept substandard conditions,' it must protect employees who complain about violations to their employers . . . ."<sup>64</sup>

The words of the statute do matter, of course. Starting with purpose allowed the Judge to establish the case as one about the "rights of those who toil" and to hold that the congressional design requires that the clause reach complaints made to employers. But the Judge did then carefully parse the words of the clause. As he wrote, "[a]lthough possibly subject to differing interpretations, the language of [the anti-retaliation clause] is fully consistent with this conclusion."<sup>65</sup> For example, the Judge points out that workers "file" grievances with their employers and that the clause refers to "any complaint" and thus: "If 'any complaint' means 'any complaint,' then the provision extends to complaints made to employers."<sup>66</sup>

Lastly, *Rizo* is emblematic of Judge Reinhardt in a final way, one that might be less visible than the others I have mentioned. The Judge taught his clerks an enormous amount about legal analysis, legal process, and judicial practice. I can say confidently that no one has taught me as much about law as did Stephen Reinhardt, and countless other clerks feel precisely the same way. Although I didn't have the opportunity to discuss *Rizo* with the Judge, I can see in the opinion a quality that I respected greatly in him — his willingness to change his views over time; to learn, I might hazard to say, from the same clerks who learned so much from him. In a case that occupied several years of the Ninth Circuit's attention and that became famous among clerks of a certain age, Maryann Stanley, the coach of the USC women's basketball team, sued USC under the Equal Pay Act because she earned a fraction of what the male coach of the men's basketball team earned. The Ninth Circuit, in an opinion that Judge Reinhardt joined, held for USC.<sup>67</sup> In many ways, including the ones described above, the Judge Reinhardt who joined the *Stanley* opinion is the same Judge Reinhardt who authored *Rizo* — with the same deep commitment to law as a tool of social justice. But in other ways, the *Rizo* Reinhardt may have been different than the *Stanley* one, perhaps even more open to seeing how past practices establish baselines that appear neutral but are in fact the products of discriminatory histories. And this is an enormous testament to the Judge's willingness to remain open to argument and reasoned persuasion, even after eighty-seven years of life and even after thirty-eight years as one of the smartest and most impactful appellate judges our country has ever known.

<sup>64</sup> *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1080 (9th Cir. 1999).