JUDICIAL COURAGE, CONTRARIANISM, AND CANDOR

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ABSTRACT

Contemporary discussions of judicial courage are muddled. Despite a vast literature on virtue ethics, as well as a more specialized literature applying lessons from virtue ethics in legal contexts, discussions of courage feature malleable and imprecise conceptions of the term. This Article cuts through the mess by examining two particularly misguided accounts of judicial courage and demonstrating that they advance a vision of judicial contrarianism. Justice Clarence Thomas and Fifth Circuit Judge James Ho each portray judicial courage to involve judges facing down bad-faith critics, remaining true to their own visions of the law, and learning to embrace criticism rather than simply resisting it. These conceptions of courage result in closed-mindedness—and, ironically, compromised independence—as judges begin to find personal satisfaction, professional benefits, and financial perks in goading on their purportedly disingenuous critics.

These misguided visions of judicial courage aren't entirely useless. Judicial contrarianism fills a gap in existing virtue jurisprudence literature that envisions courage as moderation between two extremes. One such extreme is cowardice, in which judges decide cases out of fear for popular or political reprisal. I argue that the other extreme is the judicial contrarianism of Justice Thomas and Judge Ho. Attention to judicial contrarianism contributes to virtue jurisprudence discussions by enriching existing conceptions of judicial courage and tying the virtue jurisprudence discourse to classic accounts of courage as moderation

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between extremes of cowardice and foolhardiness. This undertaking also sheds light on more effective, alternate conceptions of judicial courage that emphasize the importance of candor.

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I. INTRODUCTION

The Supreme Court is under fire. With a supermajority of conservative Justices, the Court has taken to overruling longstanding precedent and exerting its authority over other branches of government.[1] Gone is the right to abortion.[2] Ascendant is the right to bear arms.[3]

1. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) and the deference it called for in reviewing administrative agencies' legal interpretations).

2. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and holding that the Fourteenth Amendment does not protect a right to abortion).

Commentators accuse the Court of lopsided power consolidation and self-aggrandizement.[4] Reforms, including term limits and enforceable rules of conduct, are—at long last—part of the mainstream discussion.[5] In response, the Court's defenders accuse critics of politically motivated attacks prompted by unfavorable results and caution against reforms that may upset the balance of power and threaten the government's structure.[6]

In such a fraught environment, it's little surprise that judicial courage plays an increasingly central role. Those on both sides of the political spectrum invoke courage. Conservatives praise the Court and its Justices for courage in their aggressive (and, in some cases, unpopular) rulings, as well as their decision to hear some of the Court's more controversial cases in the first place.[7] Liberals cheer on the dissenting

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3. *See* New York State Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. 1, 17 (2022) (overturning New York's century-old concealed carry licensing regime on Second Amendment grounds). *But see* United States v. Rahimi, 602 U.S. 680, 700 (2024) (upholding a federal law prohibiting firearm possession by those subject to a protective order after being found to pose a danger to a third party).

4. *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 98-113 (2022), https://harvardlawreview.org/forum/vol-136/the-imperial-supreme-court; Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 638-40 (2023); Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 20-21 (2023).

5. *See* Joe Biden, *My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024, 5:00 AM), https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement [perma.cc/U9XP-YES3]; *cf.* Ezra Klein, *What a Reckoning at the Supreme Court Could Look Like*, N.Y. TIMES (July 10, 2022), https://www.nytimes.com/2022/07/10/opinion/supreme-court-biden-reform.html [perma.cc/K6H6-DF2W] (remarking on Biden's apparent "lack of interest" in the work of a 2021 commission formed by his administration to explore potential court reforms).

6. *See* The Editorial Board, *Biden's Supreme Court-Smacking Plan*, WALL ST. J. (July 25, 2024, 5:59 PM), https://www.wsj.com/articles/bidens-court-smacking-plan-reform-term-limits-amendment-ethics-e43d1fed [perma.cc/5FUX-FWHF] ("Undermining the separation of powers, the bedrock of American liberty, is quite a way to raise the stakes in November."); Donald Bryson, *President Biden's Supreme Court Reforms Would Set Dangerous Precedent*, CAROLINA J. (Aug. 5, 2024), https://www.carolinajournal.com/opinion/president-bidens-supreme-court-reforms-would-set-dangerous-precedent [perma.cc/U7X7-SQAW] (warning against "politicizing the judiciary" through judicial term limits).

7. *See* Ronald L. Trowbridge, *Making the Case for Alito's Courage*, HILL (May 9, 2022, 12:30 PM), https://thehill.com/opinion/judiciary/3481620-making-the-case-for-alitos-courage [perma.cc/LCV5-2BBL] (remarking on Justice Alito's courage in writing the (then-draft) opinion in *Dobbs* in light of the Court's longstanding fear of political backlash on abortion decisions); Steven Calabresi, *Defending Clarence Thomas from My Good Friend Steve Lubet*, REASON: VOLOKH CONSPIRACY (Jan. 3, 2024, 2:51 AM), https://reason.com/volokh/2024/01/03/defending-clarence-thomas-from-my-good-friend-steve-lubet [https://perma.cc/MWP2-G4DA] (proclaiming Justice Thomas to be courageous in light of his commitment to originalism); Meridith McGraw & Josh Gerstein, *Trump Congratulates Alito for Rejecting Recusal Calls Amid Flag Flap*, POLITICO, https://www.politico.com/news/2024/05/29/trump-samuel-alito-flags-00160484 [https://perma.cc/J2RQ-QE95] (May 29, 2024, 9:22 PM) (reporting on Trump's praise for Alito's

Justices for their courage in the work they have done, as well as for speaking out against a conservative supermajority.[8] Indeed, rhetorical use of courage by varying political camps, and its apparent manipulability depending on speaker preferences, has led some to argue for banishing the term from discussions over judicial behavior.[9]

This Article draws on the vast, varied literature on the notion of courage and how it relates to recent discourse and debates in the judicial context.[10] Explorations of courage date back millennia, and I draw on treatments of the concept by Aristotle and Thomas Aquinas to set the stage.[11] I also examine more recent philosophical discussions of courage in virtue ethics, particularly as they lead into even more recent work on virtue jurisprudence.[12] While my treatment of these literatures is necessarily brief, it provides tools for discussing and conceptualizing discussions of courage in the modern judicial context.

To that end, I analyze conceptions of judicial courage espoused by United States Supreme Court Justice Clarence Thomas, and Fifth Circuit Court of Appeals Judge James Ho.[13] I focus on Thomas and Ho primarily because both have spoken and written extensively on the subject of judicial courage in off-the-bench engagements and forums.[14] Additionally, Judge Ho is frequently referenced as a potential contender for a Supreme Court seat should Justice Thomas retire—a scenario

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refusal to recuse himself from cases involving Trump and the January 6 attack on the capitol, and highlighting Trump's statement that Alito "show[ed] the INTELLIGENCE, COURAGE, and 'GUTS' to refuse stepping aside from making a decision on anything January 6th related" (quoting Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (May 29, 2024, 2:01 PM), https://truthsocial.com/@realDonaldTrump/posts/112525685678532177 [https://perma.cc/UAN4-2PLE])).

8. *See* Joann Wypijewski, *On Principle: Ketanji Brown Jackson's Profile in Courage*, NATION (Mar. 18, 2022), https://www.thenation.com/article/politics/ketanji-brown-jackson-courage [https://perma.cc/GYB4-V8HZ] (praising then-nominee Ketanji Brown Jackson for her bravery in speaking out in favor of "the humanity of a despised class of people" by critiquing toughening criminal laws in her student note); Rebecca Shabad, *Holder Says Sotomayor's Affirmative Action Dissent Was 'Courageous*,*'* HILL (Apr. 23, 2014, 12:23 PM), https://thehill.com/blogs/blog-briefing-room/news/204162-holder-sotomayors-affirmative-action-dissent-was-courageous [https://perma.cc/45JG-KPN6] (noting that then-Attorney General Eric Holder had described Justice Sotomayor's dissent in an affirmative action case as "courageous").

9. *See* Orin S. Kerr, *Time to Retire the Notion of "Judicial Courage"?*, REASON: VOLOKH CONSPIRACY (Dec. 12, 2021, 4:28 PM), https://reason.com/volokh/2021/12/12/time-to-retire-the-notion-of-judicial-courage [https://perma.cc/6G9Y-WNDZ].

10. *See infra* Part II.

11. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* Part III.

14. *See infra* Part III.

which may be far more likely in the wake of the 2024 Presidential election.[15]

After detailing Thomas's and Ho's visions of judicial courage, I approach their formulations with a critical eye—concluding that both portray courage as a form of judicial contrarianism.[16] Because both Thomas and Ho view criticism of judges and Justices as bad-faith, personal attacks, they urge an inattention to critique that stymies opportunities for development and engagement with difficult questions. Ho, in particular, urges that judges go beyond remaining true to themselves in the face of criticism by learning to embrace the "booing of the crowd."[17]

This vision of courage as contrarianism isn't only harmful in its encouragement of judicial isolation and stagnation. To the extent that courage prompts judges to act in a manner designed to prompt backlash against their purportedly disingenuous critics, this undermines the independence of the judiciary. Where judges deliberately act in a manner intended to frustrate their critics, those critics' concerns are having an influence—albeit an indirect one—on the judge's actions.

This is not to say that contrarian conceptions of courage are entirely useless. Indeed, this Article contributes to the virtue jurisprudence literature by suggesting that judicial contrarianism is a missing piece of earlier attempts at formulating judicial courage.[18] Dating back to Aristotle, courage is treated as a virtue of moderation between the extremes of succumbing to fear and being overcome by rashness and recklessness.[19] Those who attempt to apply this concept to the work of judges find a ready metaphor for courage—think of judges who may be inappropriately swayed by even the slightest risk to their office or reputations, and who let that fear govern their determinations.[20] Judicial

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15. *See* Melissa Segura, *The Next Clarence Thomas? Abortion Pill Case Spotlights Rightwing Judge and His Wife's Shadowy Connections*, GUARDIAN (Mar. 25, 2024, 12:02 PM), https://www.theguardian.com/world/2024/mar/25/judge-james-ho-wife-mifepristone-abortion-pill [https://perma.cc/9C2P-PAFF]; *see also* Jacqueline Thomsen, *James Ho's Post-Election Remarks Fuel Supreme Court Speculation*, BLOOMBERG L. (Dec. 17, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-week/james-hos-post-election-remarks-fuel-supreme-court-speculation [https://perma.cc/S2MP-4UVH] (referring to Judge Ho as a likely contender for a Supreme Court seat should a vacancy arise).

16. *See infra* Part IV.

17. *See* James C. Ho, *Pressure Is a Privilege: Judges, Umpires, and Ignoring the Booing of the Crowd*, HERITAGE FOUND. 7-8 (Dec. 6, 2023) [hereinafter Ho, *Pressure Is a Privilege*], https://www.heritage.org/sites/default/files/2023-12/HL1339.pdf [https://perma.cc/UHW5-RFD7].

18. *See infra* Part IV.B.

19. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 48 (F.H. Peters Trans., 10th ed. 1906).

20. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 186-87 (2003) [hereinafter Solum, *A Virtue-Centered Theory of Judging*].

contrarianism is the opposite extreme of judicial cowardice—judges become so self-certain that they let their overconfidence and distaste for critics govern their determinations.[21] Courage, under this formulation, is the moderation between these two extremes.

Beyond my critique of modern conflations of contrarianism with courage and my contributions to ongoing virtue jurisprudential conceptions of courage, this Article adds two additional points. First, I propose that discussions of judicial courage give a renewed attention to the notion of judicial candor.[22] While remaining obstinately unchanging in their views or pointing to grand theories to justify their decisions may help judges and Justices evade scrutiny for their determinations, rigorous and genuine candor in setting forth the reasons for judicial opinions ought to be viewed as its own form of courage. Showing one's work renders one more vulnerable to criticism. Judges that leave themselves open to such critiques are taking more of a risk than those who obscure their reasoning.

Second, while I disagree with those who suggest that judicial courage is such a muddled, malleable concept that it ought to be abandoned, I acknowledge a need for greater scrutiny over whether a judge or Justice is truly acting with courage.[23] Drawing on Michel Foucault's treatment of parrhesia, I acknowledge that the value of courageous speech lies—at least in part—in being made under conditions that pose a genuine risk to the speaker.[24] Such speech is viewed as more genuine, and potentially more likely to be true, because the speaker deems the speech to be worth that risk.[25] Circumstances under which judges or Justices face such genuine risk are limited though—especially when we're discussing actors with life tenure and whose opinions are rarely, or never, subject to review. The power judges and Justices exercise cannot be ignored in discussions of judicial courage, and one must be cautious of making exaggerated claims of the frequency and magnitude of courageous actions by those in the judiciary.

Part II situates this Article in the existing literature on virtue ethics and virtue jurisprudence and explores the interrelated nature of judicial

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21. *Compare id.* (describing judicial cowardice as ruling based on a fear of losing office), *with* Clarence Thomas, Assoc. J., U.S., Speech at the Cordell Hull Speakers Forum (Nov. 17, 1994), *in* 25 CUMB. L. REV. 611, 620-21 (1995) [hereinafter Thomas, Cordell Hull Speech] (emphasizing the need to retain personal beliefs, especially in the face of harsh criticism).

22. *See infra* Part V.A.

23. *See infra* Part V.B.

24. *See* MICHEL FOUCAULT, FEARLESS SPEECH 11-12, 15-16 (Joseph Pearson ed., 2001).

25. *Id.* at 16 ("Parrhesia . . . is linked to courage in the face of danger: it demands the courage to speak the truth in spite of some danger.") (emphasis omitted).

courage and judicial independence.[26] Part III discusses two modern conceptions of judicial courage.[27] I first discuss Justice Thomas's vision of courage, which involves remaining true to one's own beliefs despite the ceaseless efforts of bad-faith interlopers.[28] I then address Judge Ho's adaptation of Justice Thomas's views, particularly his exhortation that judges go beyond ignoring criticism and instead embrace that criticism.[29] Part IV argues that these visions of courage are, in fact, visions of contrarianism.[30] I distinguish courage from contrarianism and suggest that it be considered as the opposite extreme to judicial cowardice in discussions of judicial virtue.[31] In Part V, I argue for considering candor as an essential aspect of judicial courage, and acknowledge that in many circumstances judges and Justices may not truly be deemed courageous due to the power they wield and their immunity from any meaningful backlash.[32]

II. JUDICIAL COURAGE: BACKGROUND AND CONTEXT

A. Courage and Virtue Ethics

To set the stage to discuss courage, a sensible starting point is the field of virtue ethics. There, courage makes frequent appearances. Distinguishing themselves from other ethicists, virtue ethicists urge a shift in focus from inquiring into "what it is that makes a right action right," to the question of, "what kind of person ought I to be?"[33] Taking a view of life "as a progress through harms and dangers, moral and physical," one seeks out virtues, "those qualities the possession and exercise of which generally tend to success in this enterprise, and the vices likewise as qualities which likewise tend to failure."[34] One's virtues and actions need not be disconnected, as some conceptions of virtue may incorporate kinds of actions into formulating the virtue—

26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part III.A.
29. *See infra* Part III.B.
30. *See infra* Part IV.
31. *See infra* Part IV.
32. *See infra* Part V.
33. TORBJÖRN TÄNNSJÖ, UNDERSTANDING ETHICS 95 (3d ed. 2013). This is, to be sure, a simplified account, and I do not mean to stake out a position on deeper questions of whether virtue ethics is indeed distinct from other forms of ethics, or deep theoretical nuances on virtue ethics theory. *See, e.g.*, Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?*, 3 J. ETHICS 163, 164-66 (1999) (arguing that it is mistaken to think of virtue ethics in a category apart from deontological and utilitarian theories of ethics).
34. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 135 (Univ. Notre Dame Press ed. 1981).

such as actions that typically exemplify the virtue, and actions that fail to live up to the virtue.[35]

In outlining the philosophical landscape of virtue ethics, Aristotle is a sensible starting point.[36] In *The Nicomachean Ethics*, Aristotle argues that virtue plays a role in achieving individual moral excellence, and that virtues are "habits or trained faculties" which people must develop to achieve this end.[37] At its core, virtue is "a kind of moderation," which avoids extremes in certain forms of conduct or inclinations.[38] Additionally, to be virtuous, one must act freely and with knowledge of one's actions—one cannot be "said to act justly or temperately [or like a just or temperate man] if what he does merely be of a certain sort," he must do so knowingly, choose that action, and do so out of "formed and stable character" for the description to be apt.[39] Determining the nature of courage and other virtues (temperance, liberality, magnificence, high-mindedness, and others) matters because Aristotle views the "good of man [to be the] exercise of his faculties in accordance with excellence or virtue, or, if there be more than one, in accordance with the best and most complete virtue."[40]

What does this have to do with courage? Courage is one of the virtues Aristotle identifies, describing it as "[m]oderation in the feelings of fear and confidence."[41] Too much confidence makes one "foolhardy," and too much fear makes one a coward—achieving the proper balance of both is the virtue of courage.[42] Enduring fear "for the sake of that which is noble" is the "end or aim of virtue," although Aristotle notes that one must not "take as fearful what is not really so" and that the end must, indeed, be noble for one to be described as courageous.[43]

Aristotle adds that there are instances which some may label as courage that are not true instances of the virtue.[44] He describes instances in which one faces danger because failing to do so will result in "legal pains and penalties" as examples of "political courage," and states that

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35. *See* JEAN PORTER, THE RECOVERY OF VIRTUE: THE RELEVANCE OF AQUINAS FOR CHRISTIAN ETHICS 105-09 (1990).

36. *See* Michael Slote, *Law in Virtue Ethics*, 14 L. & PHIL. 91, 91 (1995) ("Recent virtue ethics has modeled itself on Aristotle more than on any other figure . . . .").

37. ARISTOTLE, *supra* note 19, at 42-43, 78-79.

38. *Id.* at 52-53.

39. *Id.* at 41 (alteration in original).

40. *Id.* at 17, 54-55; *see also* Gerasimos Santas, *Does Aristotle Have a Virtue Ethics?*, PHIL. INQUIRY INT'L Q., Summer–Fall 1993, at 1, 9 (outlining Aristotle's progression of arguments to reach this conclusion).

41. ARISTOTLE, *supra* note 19, at 48.

42. *Id.*

43. *Id*. at 82.

44. *Id.* at 84-89.

this is not true courage—as one must not be compelled to act in the manner taken to be courageous.[45] Being accustomed to an event, such as a military drill, and thereby handling the event calmly while less-experienced individuals become panicked does not constitute true courage.[46] Nor does "[b]eing driven to face danger by pain or rage," unless that pain or rage is grounded in a noble source.[47] Those who are overconfident in their abilities or unaware of the nature of the danger they face may also appear to be courageous, and yet they are not truly so.[48]

Historical approaches to virtue ethics aren't limited to Aristotle. Jean Porter urges attention to the work of St. Thomas Aquinas, whose writing addressed the role of moral virtues in leading "the truly good life."[49] Aquinas's argument in favor of "fortitude" resembles discussions of the virtue of courage, as his conception of fortitude describes it as "restrain[ing] fear and moderat[ing] audacity."[50] Aquinas classifies fortitude as a virtue to the extent that it "conforms man to reason," as fortitude grants one the ability to act in accordance to reason despite difficulties or obstacles that might thwart one with less fortitude.[51]

Virtue ethics have taken on an increasingly significant role "in both moral philosophy and religious ethics" in recent decades.[52] Modern virtue theory, the rise of which is often associated with the work of G.E.M. Anscombe's *Modern Moral Philosophy*,[53] emphasizes attention to character traits—the development of virtuous traits and the avoidance of vices—over other ethical theories that focus on rules of conduct or evaluating particular actions.[54] Of modern scholars writing on virtue ethics, Alasdair MacIntyre is "[o]ne of the most influential figures" in the field.[55] One definition of virtue that MacIntyre proposes—albeit a "partial and tentative definition"—is "an acquired human quality the

45. *Id.* at 85-86.
46. *Id.* at 86-87.
47. *Id.* at 88.
48. *Id.*
49. PORTER, *supra* note 35, at 103.
50. *Id.* at 111-12 (quoting THOMAS AQUINAS, TREATISE ON FORTITUDE AND TEMPERANCE, *reprinted in* SUMMA THEOLOGICA 3384, 3389 (Fathers of the Eng. Dominican Province trans., Benziger Bros. ed. 1947) (asking Question 123, article 3, "Whether fortitude is about fear and dying?")).
51. AQUINAS, *supra* note 50, at 3886-87 (asking Question 123, article 1, "Whether fortitude is a virtue?").
52. Ryan Darr, *Virtues as Qualities of Character: Alasdair MacIntyre and the Situationist Critique of Virtue Ethics*, 48 J. RELIGIOUS ETHICS 7, 7 (2020).
53. *See* Amalia Amaya & Ho Hock Lai, *Of Law, Virture, and Justice–An Introduction*, *in* LAW, VIRTUE & JUSTICE 1, 1 (Amalia Amaya & Ho Hock Lai eds., 2013).
54. *See* SHELLY KAGAN, NORMATIVE ETHICS 204-05 (1998).
55. Darr, *supra* note 52, at 8.

possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods."[56]

Elaborating on this broader definition, MacIntyre describes the virtue of courage and how it fits into a broader virtue-ethical framework:

> We hold courage to be a virtue because the care and concern for individuals, communities and causes which is so crucial to so much in practices requires the existence of such a virtue. If someone says that he cares for some individual, community or cause, but is unwilling to risk harm or danger on his, her or its own behalf, he puts in question the genuineness of his care and concern. Courage, the capacity to risk harm or danger to oneself, has its role in human life because of this connection with care and concern. This is not to say that a man cannot genuinely care and also be a coward. It is in part to say that a man who genuinely cares and has not the capacity for risking harm or danger has to define himself, both to himself and to others, as a coward.[57]

Philippa Foot describes virtues as correctives on temptations that individuals may face as a result of their human nature that lead them away from reasonable actions, arguing that courage corrects an overreliance on fear that may lead one towards retreat or avoidance when "we should stand firm."[58] Foot notes that this conception of courage may lead to difficulty in labeling certain actors as more courageous than others or even courageous in the first place—as one may be inclined to label someone as courageous who overcomes fear, yet be inclined to deem someone less courageous if they were inclined to feel a comparatively more severe fear than others in the first place.[59]

Questions may also arise over when courage is desirable. Is the murderer who commits a bold, heinous crime without concern for the penalties courageous? Foot acknowledges that there is a discomfort in applying such a label, and suggests that where characteristics thought of as virtues fail to lead to "good action, and good desires," they may no longer be thought of as virtues.[60] MacIntyre notes that when our conceptions of virtue fail to account for "an overriding conception of the *telos* of a whole human life"—that is, the notion of the good life to

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56. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 178 (1st ed. 1981).

57. *Id.* at 179.

58. Philippa Foot, *Virtues and Vices*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 1, 9 (1978).

59. *Id.* at 12.

60. *Id.* at 15-16.

which virtues are directed—"our conception of certain individual virtues has to remain partial and incomplete."[61]

These are deep questions of ethics, and this summary provides little more than a brief sketch of ongoing debates over the nature of virtue and what makes a theory of virtue ethics complete. This context, however, serves to introduce the more specific literature of "virtue jurisprudence," in which legal scholars draw from virtue ethics and apply insights from that field to the actions of judges and other legal actors.

B. Virtue Jurisprudence

Parallels between virtues and the work of judges pepper the legal academic literature.[62] References to virtue pop up in legal scholarship on a variety of subjects, with adherents drawing on it to defend "originalist constitutional interpretation," "compliance with the law," and other "decidedly conservative" results.[63] Lawrence Solum coined the phrase "virtue jurisprudence" in a 2003 article,[64] and he and other scholars have built on and critiqued the notion in subsequent work in philosophical and legal contexts.[65]

Solum summarizes "virtue jurisprudence" as "the view that the proper aim of legislation is the promotion of human flourishing through creation of the conditions for the development of human excellence—the distinctively human virtues and vices."[66] In the judicial context, virtue jurisprudence manifests as "a theory of judicial excellence," in which "judicial virtues—courage, temperance, judicial temperament, intelligence, and practical wisdom," should be encouraged and prioritized.[67] A virtue-centered approach to judging often results in

61. MACINTYRE, *supra* note 56, at 188.

62. *See, e.g.*, Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851, 858-59 (1992) (describing the role of the judge in exercising the virtue of corrective justice by "rectifying injustice in a private transaction," and arguing that "[c]orrective justice must be understood not merely in terms of private right, but in terms of political virtue"); Timothy Cantu, Note, *Virtue Jurisprudence and the American Constitution*, 88 NOTRE DAME L. REV. 1521, 1540-41 (2013) (describing the state of virtue theory in legal academic thought, and arguing that a virtue ethics approach to judging is consistent with the original understanding of the Constitution).

63. G. Alex Sinha, *Virtuous Law-Breaking*, 13 WASH. U. JURIS. REV. 199, 207-10 (2021).

64. Solum, *A Virtue-Centered Theory of Judging*, *supra* note 20, at 178 n.4.

65. *See, e.g.*, Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1464-65 (2006) (situating virtue jurisprudence in the broader landscape of legal theory); R.A. Duff, *The Limits of Virtue Jurisprudence*, 34 METAPHILOSOPHY 214, 217-218 (2003) (arguing that judicial virtue does only a portion of the work in developing a theory of judging); Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2026-28 (2012) (arguing that virtue ethics can inform theories of originalist interpretation and methodology).

66. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 478 (2005) [hereinafter Solum, *The Aretaic Turn in Constitutional Theory*].

67. *Id.*

decisions that are "in accord with the letter of the law," though Solum acknowledges that there are instances where there may be multiple distinct, yet lawful, outcomes a judge may reach.[68] A virtue-centered approach also illuminates the role of judicial opinions or explanations for rulings, as these explanations not only show the reasoning that led a judge to reach a decision, but may also serve to "enable others to come to see the relevant features of the case," and therefore help others "acquire practical wisdom"—one of the judicial virtues.[69]

Courage, specifically "civic courage," is one of the judicial virtues that Solum identifies.[70] Judicial courage does not typically involve acting in the face of physical danger, but rather being "willing to risk career and reputation for the ends of justice."[71] Judicial courage is the virtue that contrasts with the vice of "civic cowardice," in which judges "fear the opinions of the public and the powerful as well as the consequences of [unpopular] decisions for their social positions," leading them to be "swayed by concern for their reputation on the wrong occasions and for the wrong reasons."[72]

Solum acknowledges Aristotle's writing on the virtue of courage, including Aristotle's identification of courage as "a mean with respect to the morally neutral emotion of fear," contrast with the vice of "rashness."[73] Solum states that it's "a bit difficult" to view judicial courage as a similar mean between opposing vices, as "it is a bit difficult to imagine the judge who cares too little for his career and reputation."[74] This difficulty will be worth recalling once we turn to the notion of judicial contrarianism.[75]

Courage as a judicial virtue appears elsewhere in legal scholarship. Suzanna Sherry contrasts judicial courage with judicial humility—suggesting that "widespread recognition of the need for humility makes it especially important to stress the need for judicial courage."[76] Sherry warns against "responding to humility with timidity," which may take the form of substituting singular grand theories in the place of the need to exercise "judgment and discretion."[77] Philip Frickey describes the "courage of our confusions" as "a preference for the broader confusion

68. Solum, *A Virtue-Centered Theory of Judging*, *supra* note 20, at 200, 202-04.
69. *Id.* at 202.
70. *See id.* at 190; Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 66, at 508.
71. Solum, *A Virtue-Centered Theory of Judging*, *supra* note 20, at 190.
72. *Id.* at 187.
73. *Id.* at 190.
74. *Id.*
75. *See infra* Part IV.B.
76. Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 804-05 (2003).
77. *Id.* at 805.

rather than any pat answer providing an artificial, smaller certainty," and urges Justices to exercise this courage and confront "complex, thankless, and frustrating issues."[78]

C. Judicial Courage and Independence

The preceding Subsections sketch out discussions of courage in ethics and connect these philosophical conceptions of virtue and courage with legal scholarship on judicial virtues.[79] But a great deal of modern discussion of judicial courage—including that which I focus on in this Article—tends to take a less philosophical and more colloquial approach to courage. In doing so, the theme of judicial independence plays a frequent, central, and varying role.

Discussions of judicial courage often overlap with the notion of judicial independence. At the federal level, judicial independence is baked into the structure of government, with federal judges guaranteed to hold their offices "during good behaviour"[80] and removable only through impeachment.[81] Alexander Hamilton argued that "permanent tenure of judicial offices" was necessary if "courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments," as nothing else "will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."[82] State supreme courts often emphasize the importance of an independent state judiciary on similar grounds—arguing that independent state courts are necessary for impartiality and judging cases on their merits, rather than being swayed by popular opinion.[83]

In describing judges, labels of independence and courage often appear alongside each other.[84] Sometimes these concepts are synonyms, with courage being treated as an example or variation of independence. Take Tennessee Supreme Court Justice Penny White's words on judicial courage and independence:

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78. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 487-88 (2005).

79. *See infra* Part II.A.–B.

80. U.S. CONST. art. III, § 1.

81. U.S. CONST. art. II, § 4.

82. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

83. *See* Rebecca Love Kourlis, *Judicial Independence and Independent Judges*, 80 DENV. U. L. REV. 746, 748-49, 752 (2003); Barry T. Albin, *The Independence of the Judiciary*, 66 RUTGERS L. REV. 455, 455-57 (2014).

84. *See, e.g.*, Lawrence H. Cooke, *Tribute to Justice Stanley Mosk*, 62 ALB. L. REV. 1219, 1219 (1999) (recognizing Justice Mosk's "courageous independence").

> There are numerous other examples of what America would look like without judicial independence. Courts from the highest to the lowest in this land have made decisions throughout our history that were unpopular, unaccepted, and unenforced. That is important for us to remember. Moreover, it is important that we support courageous and independent judges so that they do not fall victim to the clamor of an excited people, the tyranny of public opinion. It is essential that we as citizens undergird them with the strength to uphold the promise of equal justice under law.[85]

Similarly, Judge Leon Yankwich treats judicial independence and courage as closely related, if not synonymous, in criticizing efforts "to disqualify a courageous judge" from a case "while declaiming on festive occasions on the importance of the independence of the judiciary."[86] This argument's force comes from the assumption that it is inconsistent to speak out in favor of judicial independence while simultaneously attacking judges who act with courage—an inconsistency that presumably results from the overlap in judicial independence and courage.[87]

Alternatively, independence may be presented as a means to an end for courage, with institutional independence allowing courageous judges to make unpopular decisions.[88] And on other occasions, judicial independence is acknowledged as important, yet insufficient to guarantee courage resulting from a judge's personal inclinations.[89] Courage and independence are mutually reinforcing, according to Wisconsin Supreme Court Chief Justice Shirley Abrahamson:

> [W]e must recognize that we rely on the character of the judge. A judge needs courage. Judges with courage resist threats to judicial independence and actively advocate judicial independence. Those

85. Penny J. White, *It's a Wonderful Life, Or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 8 (1996); *see also* Richard H. Middleton, Jr., *Remembering Two Giants of Judicial Independence*, 35 TRIAL 9, 9 (1999) ("We are saddened by the loss of these courageous and forthright free thinkers. It is appalling to speculate where this country would be without the fierce independence that was the hallmark of their careers.").

86. Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PA. L. REV. 374, 380 (1957).

87. *See id.* (describing the intersection of judicial independence and courage).

88. *See, e.g.*, Suzanna Sherry, *Independent Judges and Independent Justice*, 61 L. & CONTEMP. PROBS. 15, 18-19 (1998) ("Courageous federal judges . . . integrated an obstinate and defiant South in the years after *Brown* . . . [and] used the independence bestowed by Article III to compel integration against both popular and governmental resistance . . . .").

89. *See* John R. Brown, *In Memoriam: Judge J. Skelly Wright*, 57 GEO. WASH. L. REV. 1029, 1029 (1989).

> lacking courage should neither apply nor run for the office. We must foster a culture that supports and rewards courageous judges.[90]

Judicial courage and judicial independence are often set forth as closely related notions—though their precise nature and relationship tends to vary.

While mainstream discussions of judicial courage tend not to acknowledge or interact with scholarship on virtue ethics or virtue jurisprudence, this is not to say that scholarship on these subjects is irrelevant. Indeed, in addition to addressing claims of judicial courage in popular and political contexts, considering how these claims stack up from a virtue jurisprudence perspective may also be worthwhile. To do so, however, a deeper dive into discussions of judicial courage is warranted.

III. JUDICIAL COURAGE, POPULAR OPINION, AND CANCEL CULTURE

In contrast to the courage of virtue ethics and virtue jurisprudence, consider Josh Blackman's approach to judicial courage. The courage that Blackman discusses relates not so much to discussions of ethics or jurisprudence as it does to the term as it's used by judges and other legal actors.[91] In attempting to define the term, Blackman resorts almost entirely to judicial accounts of the term or how courage may manifest in connection with the practical functions of the judiciary—such as the physical danger judges may face for rendering unpopular decisions.[92]

Such an approach to judicial courage exemplifies modern debates over the term. Courage is not considered in a philosophical light, and is instead considered as a political and civic notion. While such a shift is not inherently concerning, the outcome is a discussion that tends to become muddled, as commentators label as "courageous" opinions or results that they favor, rulings that are likely to be unpopular, or taking on potentially unpopular roles at some point in their legal career.[93] While

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90. Shirley S. Abrahamson, *Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO STATE L.J. 3, 11 (2003).

91. *See* Josh Blackman, *Judicial Courage*, 26 TEX. REV. L. & POL. 355, 368 (2022) (noting that Justices' opinions invoking the language of courage fail to "explain, at any length, how to define that virtue").

92. *Id.* at 368-70.

93. *See, e.g.*, Dahlia Lithwick & Mark Joseph Stern, *Supreme Court Served Up Another Chance to Kill Voting Rights Act*, SLATE (Feb. 5, 2025, 5:50 AM), https://slate.com/news-and-politics/2024/02/supreme-court-kill-voting-rights-act.html [https://perma.cc/WRQ3-QR68] (quoting Dahlia Lithwick's rhetorical question of, "What does courage look like in a judge?" followed by her suggestion that it was "a heavy lift for progressive judges" to marshal scholarly authority to critique the Supreme Court's abortion jurisprudence); Michael Stokes Paulsen, *The Magnificence of* Dobbs, PUB. DISCOURSE (June 26, 2022), https://www.thepublicdiscourse.com/2022/06/83022

these discussions often run astray from legal academic and philosophical discussions of judicial independence, virtue, and courage, they aren't entirely disconnected.[94] Popularity and the reaction of the judge's audience play significant roles in both political and legal academic discussions of judicial courage.[95]

It is in this area—partly academic, partly popular/political, largely focused on concerns over popular opinion—that we find the primary subjects of this Article: Justice Clarence Thomas's and Judge James Ho's conceptions of judicial courage. Both jurists' visions of courage are fundamentally tied to the (presumably hostile) reactions of their audience. This Section addresses Thomas's and Ho's conceptions of

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[https://perma.cc/V29L-LMJS] (describing *Dobbs* as perhaps "the most important, magnificent, rightly decided Supreme Court case of all time," and that it is "a rare act of judicial courage and principle"); Matt Clark, *Tom Parker, The End of Roe, and Judicial Courage*, 1819 NEWS (June 17, 2022), https://1819news.com/news/item/matt-clark-tom-parker-the-end-of-roe-and-judicial-courage [https://perma.cc/2MKS-XRLE] (lauding Chief Justice Tom Parker of Alabama for "courage and relentlessness" in "getting the U.S. Supreme Court to take" on the *Dobbs* case that resulted in the Court striking down the right to abortion); Wypijewski, *supra* note 8 (describing Justice Jackson's student Note on sex offenders as grappling with a topic that tended to draw strong, negative reactions from the general public).

94. *See, e.g.*, Ronald L. Trowbridge, *Making the Case for Alito's Courage*, HILL (May 9, 2022, 12:30 PM), https://thehill.com/opinion/judiciary/3481620-making-the-case-for-alitos-courage [https://perma.cc/LCV5-2BBL] ("In thinking of the courage that Justice Alito had in writing his opinion on abortion, I am finally reminded of what C.S. Lewis said, 'Courage is not simply one of the virtues but the form of every virtue at the testing point.'").

95. *See* Lawrence B. Solum, *Virtue Jurisprudence: Towards an Aretaic Theory of Law*, *in* 23 ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 1, 14-15 (Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho eds., Springer 2013) ("[T]here will be occasions where doing what the law requires may be profoundly unpopular. For this reason, judges need the virtue of civic courage—the disposition to put the regard of one's fellows in proper place and to take it into account in the right way on the right occasions for the right reasons. A judge with this virtue will note be tempted to sacrifice justice on the altar of public opinion."); Robert J. Araujo, *Moral Issues and the Virtuous Judge: Reflections on the Nomination and Confirmation of Supreme Court Justices*, 35 CATH. LAW. 311, 325 (1994) ("The virtue of courage keeps the open-minded judge from being swayed or prejudiced by any pressure that could promote deviation from seeking the just end. Courage, quite simply, is the virtue which steels the person to meet the challenges that endanger or threaten the judge who must survive the tide of strong public sentiment in order to protect those who need protection."); *cf.* Carrie Severino, *Courageous Supreme Court's Abortion Ruling Makes History*, FOX NEWS (June 27, 2022, 2:00 AM), https://www.foxnews.com/opinion/supreme-court-abortion-ruling-makes-history [https://perma.cc/DB7M-6WKD] ("The [C]ourt's majority held, and those [J]ustices should be recognized for their courage to withstand the intense pressure targeting them on so many levels."); Phil Boas, *Arizona Abortion Law Is Terrible, and the Justices Who Upheld It Are Profiles in Courage*, AZCENTRAL, https://www.azcentral.com/story/opinion/op-ed/philboas/2024/04/10/arizona-supreme-court-upheld-terrible-abortion-law/73274592007 [https://perma.cc/MSW5-YYRK] (Apr. 10, 2024, 3:13 PM) (arguing that the Arizona Supreme Court justices who voted to uphold Arizona's outdated prohibition on "almost all abortion" were "profiles in courage" in light of their decision's inevitable unpopularity).

judicial courage, and how their vision of courage relates to audience reactions and backlash.[96]

A. Justice Thomas and Judicial Courage

Justice Thomas is currently the longest-serving Justice on the United States Supreme Court.[97] His 1991 confirmation hearings resulted in "unprecedented" drama and polarization, in large part due to Anita Hill's allegations of sexual harassment against Thomas that led to public scrutiny and left the "Senate and the nation alike . . . deeply divided over whom to believe."[98] Thomas continued to draw attention throughout his tenure, resulting in multiple biographies and books attempting to dissect his "enigmatic" nature.[99] It is therefore of little surprise that judicial courage is a topic frequently on Thomas's mind, and that Thomas's views on the subject are both strong and idiosyncratic.[100]

1. A Polarizing Figure

Thomas's supporters frequently describe him in virtuous terms. When Thomas attended a 2021 Heritage Foundation event, the keynote speaker, then Senate Majority Leader Mitch McConnell, lauded Thomas's courage, stating that "'[f]or 30 years and counting, you have been the brightest possible North Star illumining the path before you, the courage and fidelity of Justice Clarence Thomas.'"[101] Marah Stith McLeod emphasizes Thomas's humility, manifesting in his willingness "to write opinions that are virtually certain to generate severe public backlash," and applauds his refusal change his views—or to even "retract or at least . . . explain and excuse the apparent harshness of his . . . opinions" as a "vain judge" otherwise might.[102] Thomas Jipping

96. *See infra* Part III.

97. *See* Robert W. Gomulkiewicz, *The Supreme Court's Chief Justice of Intellectual Property Law*, 22 NEV. L.J. 505, 510-11 (2022).

98. Scott D. Gerber, *Justice Clarence Thomas: First Term, First Impressions*, 35 HOW. L.J. 115, 116-18 (1992).

99. Shaun Ossei-Owusu, *Racial Revisionism*, 119 MICH. L. REV. 1165, 1165 (2021).

100. *See* Clarence Thomas, Assoc. J., U.S., AEI Annual Dinner Speech: Be Not Afraid (Feb. 13, 2001) [hereinafter Thomas, Be Not Afraid Speech], https://www.aei.org/research-products/speech/be-not-afraid [https://perma.cc/48MX-R9Y9].

101. Robert Barnes, *McConnell Lauds Thomas, Says Supreme Court Should Not Heed the 'Rule of Polls,'* WASH. POST (Oct. 21, 2021), https://www.washingtonpost.com/politics/courts_law/mcconnell-lauds-thomas-says-supreme-court-should-not-heed-rule-of-polls/2021/10/21/2766cbcc-32b9-11ec-9241-aad8e48f01ff_story.html [https://perma.cc/H6Z8-ANQT].

102. Marah Stith McLeod, *A Humble Justice*, 127 YALE L.J.F. 196, 201-03 (2017).

admires Thomas for "act[ing] by conviction, rather than fear."[103] Judge David Stras attributes his own judicial courage to the teachings of Justice Thomas:

> I have always strived, as Justice Thomas instructed me that day, to be my own judge, but his guidance has become a part of who I am. One of the most important traits he imparted to me is courage. As judges, we are asked to make tough decisions, but it is our job to ignore the noise and make the right call, not just sometimes or usually, but all the time, no matter how unpopular it may be.[104]

An "American hero."[105] A Justice who serves America with "unflinching bravery."[106] A "person of immense historic importance not only within the black community, but in our country and the world."[107] Unqualified praise for Thomas isn't in short supply among his supporters. Even critics of Thomas speak of him in the highest of terms.[108]

But Thomas is a polarizing figure, attracting notably harsh criticism from his detractors.[109] Following his dissent in *Grutter v. Bollinger*,[110] in

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103. Thomas Jipping, *A Black History Month Tribute to Clarence Thomas*, DAILY SIGNAL (Feb. 12, 2024), https://www.dailysignal.com/2024/02/12/black-history-month-tribute-clarence-thomas [https://perma.cc/CP8L-V68S].

104. David R. Stras, *Speaking Out on Justice Thomas*, 2021 HARV. J.L. & PUB. POL'Y PER CURIAM, Fall 2021, at 1.

105. Kathleen Parker, *Clarence Thomas Is an American Hero*, WASH. POST (Nov. 5, 2019), https://www.washingtonpost.com/opinions/clarence-thomas-is-an-american-hero/2019/11/05/6af2cf9c-0013-11ea-8bab-0fc209e065a8_story.html [https://perma.cc/6VS5-HC5G].

106. Michael Clark, *'Created Equal'—How Fortitude Carries Clarence Thomas*, NEWSMAX (Feb. 7, 2021, 7:07 AM), https://www.newsmax.com/michaelclark/hill-mellencamp-milius-pack/2021/02/07/id/1008948 [https://perma.cc/X9NK-7P87].

107. Ken Blackwell, *Justice Clarence Thomas Deserves Recognition as an Icon of Black History*, NEWSWEEK (Feb. 12, 2024, 11:26 AM), https://www.newsweek.com/justice-clarence-thomas-deserves-recognition-icon-black-history-opinion-1868607 [http://perma.cc/JJ2L-SR4U].

108. *See* Jay Willis, *Heartbreaking: Young Clarence Thomas Was Absolutely Jacked*, BALLS & STRIKES (Feb. 9, 2023), https://ballsandstrikes.org/legal-culture/clarence-thomas-jacked-oh-no [https://perma.cc/6PED-YZG9] (describing, with despair, Justice Thomas's athletic prowess and strength); *see also* Eric Segall, *Justice Clarence Thomas, Race, and Judicial Hypocrisy*, DORF ON L. (July 19, 2022), https://www.dorfonlaw.org/2022/07/justice-clarence-thomas-race-and.html [https://perma.cc/A9BX-Z83B] ("Justice Clarence Thomas is . . . a hero . . . ."); Eric Segall, *The Roberts Court and the Rule of Lawlessness*, DORF ON L. (May 1, 2024), https://www.dorfonlaw.org/2024/05/the-roberts-court-and-rule-of.html [https://perma.cc/2MGU-N9LR] ("Justice Thomas . . . is . . . demonstrably . . . trying to achieve . . . the . . . rule of law . . . ."). If Segall didn't want to be quoted in this manner, he shouldn't have done such a good job of highlighting masterful examples of this art by no less an authority than Chief Justice Roberts. *See* Eric J. Segall, *Chief Justice John Roberts: Institutionalist or Hubris-In-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107, 113-15 (2021) (describing Roberts's mangling of precedent through strategic ellipses use—all for the greater good of gutting the Voting Rights Act).

109. *See generally* Scott D. Gerber, *Introductory Address: Justice for Clarence Thomas: An Intellectual History of Justice Thomas's Twenty Years on the Supreme Court*, 88 U. DET. MERCY L.

which the Court upheld the University of Michigan Law School's affirmative action program,[111] Maureen Dowd wrote in *The New York Times* that Thomas's dissent "is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received."[112] Connecticut Supreme Court Justice Andrew McDonald critiqued Thomas's concurrence in *Dobbs v. Jackson Women's Health Organization*,[113] in which Thomas urged the reconsideration of a number of cases decided on substantive due process grounds.[114] McDonald noted that while "Mr. Justice Thomas had much to say about my loving marriage . . . he didn't have much to say about his 'Loving' marriage,"[115] suggesting that Thomas's logic threatened *Loving v. Virginia*,[116] which struck down bans on interracial marriage, while alluding to Thomas's own interracial marriage.[117] In addition to critiquing Thomas's rulings, Professor Eric Segall emphasizes how Thomas "hired as a law clerk a former fired employee of a far-right organization whose text messages to a friend included these sentiments, 'I HATE BLACK PEOPLE . . . I hate blacks. End of Story.'"[118] As for Thomas's opinions on affirmative action, Segall sums up: "Justice Clarence Thomas has done enormous damage to laudable efforts by lawmakers and others to achieve a less racist and more just America."[119]

Critiques of Thomas intensified in the wake of revelations of Thomas's relationship with billionaire Harlan Crow in 2023.[120] A series

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REV. 667 (2011) (detailing, and defending against, various criticisms of Thomas by journalists and legal academics).

110. 539 U.S. 306 (2003).

111. *See id.* at 343-44.

112. Maureen Dowd, *Could Thomas Be Right?*, N.Y. TIMES (June 25, 2003), https://www.nytimes.com/2003/06/25/opinion/could-thomas-be-right.html [https://perma.ccSRM7-UGS4].

113. 597 U.S. 215 (2022).

114. *Id.* at 331-34 (Thomas, J., concurring); Elura Nanos, *Gay State Supreme Court Justice Accuses Justice Clarence Thomas of Marriage Hypocrisy*, LAW & CRIME (June 28, 2022, 4:19 PM), https://lawandcrime.com/supreme-court/gay-state-supreme-court-justice-accuses-justice-clarence-thomas-of-marriage-hypocrisy [https://perma.cc/9AK5-SM7W].

115. Nanos, *supra* note 114.

116. 388 U.S. 1 (1967).

117. *See id.* at 12; Nanos, *supra* note 114.

118. Eric Segall, *Justice Thomas and Race: Making Life Harder for People of Color One Case at a Time*, DORF ON L. (Feb. 28, 2024), https://www.dorfonlaw.org/2024/02/justice-thomas-and-race-making-life.html [https://perma.cc/6LBG-AXXL].

119. *Id.*

120. *See* Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM) [hereinafter Kaplan et al., *Clarence Thomas and the Billionaire*], https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/2L2B-999X]; Abbie VanSickle, *Justice Thomas Reports Private Trips With Harlan Crow*, N.Y. TIMES (Aug. 31, 2023),

of articles in ProPublica detailed how Crow provided Thomas with multiple luxury vacations, private jet flights, payments for Thomas's mother's house, and payments for Thomas's grandnephew's private school tuition.[121] These reports fueled further critiques of Thomas's role as Justice, including arguments that his pro-business rulings align with the desires of his wealthy friends,[122] and concerns that he may have run afoul of tax requirements.[123]

Beyond such high-profile pushback, scholars take issue with Thomas's jurisprudence as well. While Thomas identifies himself as a constitutional originalist—often going out of his way to write separate opinions on cases in the vein of this theory—this originalism is frequently absent from Thomas's opinions in cases involving race.[124] Others disagree with Thomas's use of historical evidence to reach conclusions about constitutional meaning—arguing that his use of history is incomplete and selective, leading to incorrect conclusions.[125] Others critique the implications of his reasoning—suggesting that

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https://www.nytimes.com/2023/08/31/us/thomas-financial-disclosures-scotus.html [https://perma.cc/P59S-MEA7].

121. *See* Kaplan et al., *Clarence Thomas and the Billionaire*, *supra* note 120 (providing the initial reporting on multiple luxury vacations by Thomas, paid for by Crow); VanSickle, *supra* note 120 (detailing Thomas's listing of private travel funded by Crow, along with Thomas's statement attempting to justify private flights due to security risks following the leak of the Court's opinion in *Dobbs*); Justin Elliott, Joshua Kaplan, & Alex Mierjeski, *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/9ERR-82FS] (describing unreported payments by Harlan Crow to Thomas for the house in which Thomas's mother was living); Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/N5K7-RXWH] (reporting on tuition payments that Harlan Crow paid for Thomas's grandnephew's tuition).

122. *See* Corey Robin, *The Clarence Thomas Scandal Is About More Than Corruption*, POLITICO (Apr. 18, 2023, 4:30 AM), https://www.politico.com/news/magazine/2023/04/18/clarence-thomas-scandal-corruption-00092335 [https://perma.cc/KY2Q-FPEP].

123. *See* Adam Chodorow, *Clarence Thomas' Forgiven RV Loan Isn't Just an Ethics Issue*, SLATE (Oct. 26, 2023, 5:18 PM), https://slate.com/business/2023/10/clarence-thomas-rv-loan-forgiven-debt-taxes-welters.html [https://perma.cc/9L5J-PAR2].

124. *See* Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 96-108 (2014); *see also* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservativism?*, 34 HARV. J.L. & PUB. POL'Y 5, 16 (2011) (recognizing a "well-developed literature support[ing] the conclusion that Justices Scalia and Thomas are not consistent in the versions of originalism that they employ").

125. *See* Matthew L. Schafer, *In Defense:* New York Times v. Sullivan, 82 LA. L. REV. 81 *passim* (2021) (critiquing Justice Thomas's use of historical evidence in the context of First Amendment and defamation disputes).

Thomas's adherence to his favored principles can lead to absurd and harmful results.[126]

2. Thomas on Courage and Criticism

With this backdrop, how does Thomas frame the notion of judicial courage? In his 2001 speech to the American Enterprise Institute titled *Be Not Afraid*, Thomas begins by emphasizing the importance of judicial "fortitude" in the face of popular and legislative backlash, citing Hamilton's Federalist No. 78.[127] Thomas also emphasizes structural judicial independence, stating that "[b]y insulating judges from external retaliation and from internal temptations of ambition, the framers hoped that the judiciary would be free of pressure not only from the government, but also from the people."[128]

One aspect of Thomas's vision of courage consists of remaining "clear and confident about one's judicial philosophy, and hav[ing] the courage to stand by the decisions that an honest adherence to the law requires."[129] Judges, Thomas warns, "can be buffeted by strong winds that tear them away from the basic principles they have sworn to safeguard."[130] Impartiality is the goal, and judges must set aside factors like "a judge's race, sex, and religion . . . in order to render a fair, reasoned judgment on the meaning of the law."[131] Thomas admonishes his audience to "[l]isten to the truths that lie within your hearts, and be not afraid to follow them wherever they may lead you."[132]

Beyond remaining unfazed by attacks and external criticism, Thomas's conception of courage requires one to remain assertive and outspoken over one's unwavering principles. Building on an anecdote of his own harsh treatment by a *Washington Post* reporter, Thomas asserts that on "very difficult issues such as race there was no real debate or honest discussion," just enforced orthodoxy and "attacks that range from mere hostile bluster to libel."[133] In the face of such bad faith attacks, one

126. *See* George M. Dery III, *"In a Category of Its Own": The Supreme Court in* Safford v. Redding *Offers Schoolchildren Little Protection in Placing Limits on Student Strip Searches*, 5 DEPAUL J. FOR SOC. JUST. 295, 325-29 (2012) (arguing that Justice Thomas's insistence that schools may conduct searches of students under a "special needs" exception may justify "strip searches for peashooters" and "body cavity searches of students," extreme results that "seemed to have caused the rest of the Court to draw back from special needs' brink").

127. Thomas, Be Not Afraid Speech, *supra* note 100.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

may be tempted "to retreat," but doing so is "a plaintive admission of defeat."[134] Those who are courageous should "stand undaunted" in the face of their opponents' attacks.[135] Indeed, Thomas decries "an overemphasis on civility," in debates over "issues of consequence," and argues that holding back in one's arguments out of concern over "appearing 'judgmental'" results in the destruction of one's principles.[136]

There are several tensions throughout Thomas's vision of courage. One is the acceptable tenor of argument—Thomas repeatedly decries the vicious smears and attacks of critics, but urges that the courageous actor avoid self-censorship out of a misguided sense of civility.[137] Thomas emphasizes the importance of constraining the influence of judges' own personal views through the use of originalist methodology and bright-line rules.[138] But Thomas also urges his audience to maintain fidelity to their own opinions—even to "[l]isten to the truths that lie within [their] hearts" rather than being swayed by external influences.[139]

These tensions appear in Thomas's other speeches and writings. Nicole Garnett, a former Thomas clerk, recounts a speech that Thomas gave before the National Bar Association in 1998—a speech that Garnett characterizes as "packed with wisdom" and reflective of Thomas's "courage in the face of controversy and his response to the vitriol" against him in threats of protesting the speech.[140] As for the speech itself, Thomas warns against misguided tendencies to believe that one's views are "gospel," the need to examine these ideas "in the realm of reason, not as some doctrinal or racial heresy," and that he would "make no apologies for this view now, nor do I intend to do so in the future."[141] But when it comes to criticism of his and the Court's views, Thomas is generally unwelcoming, stating that "[s]ome of the criticism is profoundly uninformed and unhelpful," particularly when it consists of "uncivil second-guessing . . . not encumbered by the constraints of facts, logic or reasoned analysis."[142] Thomas did, however, acknowledge "the constructive and often scholarly criticism" as "almost always helpful in

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Nicole Stelle Garnett, *What I Saw at the Daytona 500*, HARV. J.L. & PUB. POL'Y PER CURIAM, Fall 2021, at 2, 7.
141. Clarence Thomas, Assoc. J., U.S., Speech to the National Bar Association (July 28, 1998), https://www.blackpast.org/african-american-history/1998-clarence-thomas-speech-national-bar-association [http://perma.cc/KAT4-WQHZ].
142. *Id.*

thinking about or rethinking decision," and that there is a "premium on outside scholarship," in light of the Court's limited ability to engage in public debate.[143]

Why, in Thomas's view, is criticism generally so unhelpful? Thomas went on to further describe the attacks he'd suffered himself:

> I, for one, have been singled out for particularly bilious and venomous assaults. These criticisms, as near as I can tell, and I admit that it is rare that I take notice of this calumny, have little to do with any particular opinion, though each opinion does provide one more occasion to criticize. Rather, the principal problem seems to be a deeper antecedent offense: I have no right to think the way I do because I'm black.[144]

Thomas goes on to identify criticism related to particular cases, to describe his experiences in the 1960s and 70s and how they were influenced by racial dynamics, and returns to the theme of fallibility, acknowledging that his views were not "perfect or infallible," but neither were the views of his critics.[145] While Thomas felt "pain[ed]" to be "perceived by so many members of my race as doing them harm," what "hurts more, much more, is the amount of time and attention spent on manufactured controversies and media sideshows when so many problems cry out for constructive attention."[146] Near the end of the speech, Thomas sums up:

> I have come here today not in anger or to anger, though my mere presence has been sufficient, obviously, to anger some. Nor have I come to defend my views, but rather to assert my right to think for myself, to refuse to have my ideas assigned to me as though I was an intellectual slave because I'm black. I come to state that I'm a man, free to think for myself and do as I please. I've come to assert that I am a judge and I will not be consigned the unquestioned opinions of others.[147]

Thomas distinguishes between "celebrity status" and the notion of "heroism," describing celebrity as "the condition of being much talked about," and little more than "a big name," while heroes are "people of great strength, integrity, or courage who are recognized and admired for

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

their accomplishments and achievements."[148] In Thomas's view, overemphasis on egalitarianism and—interestingly—a "[p]reoccupation with victim status" prevents people from recognizing the "talents and resources that are at their disposal," and that modern culture "discourages, and even at times stifles, heroic virtues—fortitude, character, courage[, and] a sense of self-worth."[149] Thomas warns against falling into the mentality of "think[ing] of ourselves as victims and thereby permit[ting] adversity to be the defining feature of our lives."[150]

3. Courage as Calcification?

Justice Thomas takes the position that when one's critics aren't enough to change one's opinions, courage takes the form of sticking to your beliefs.[151] Thomas recounts an experience from his youth when he "prayed that my views would change so that I could be comfortable and get along with everyone," and yet, his views remained unchanged.[152] As Thomas sees things, abandoning his beliefs "without being convinced would be a lie, a self-deception," resulting from lacking "the courage or the fortitude to accept the consequences of [his] honestly-held beliefs."[153] Notably, when elaborating on this notion, Thomas uses examples of critics attempting to convince a believer to accept absurd notions, such as "up is down and down is up."[154]

In light of this, it's worth questioning when (and whether) criticism rises to the level where changing one's opinions is warranted. Recall Thomas's conception of critics and discourse on controversial issues. Critics, in Thomas's view, tend to act out of bad faith, hurling insults and absurdities rather than arguments and attacking Thomas on the basis of his race rather than engaging with the merits of his opinions.[155] Hannah Weiner describes Thomas's rhetoric as "somewhat exaggerated," with Thomas "frequently compar[ing] his critics to slave owners and Ku Klux Klan members," while "cast[ing] himself as the

148. Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317, 322 (2000) [hereinafter Thomas, *Personal Responsibility*].

149. *Id.* at 322-23; *see also* Clarence Thomas, *The James McClure Memorial Lecture in Law Delivered by the Honorable Clarence Thomas*, 65 MISS. L.J. 463, 465 (1996) ("[O]ur political and legal systems now actively encourage people to claim victim status and to make demands on society for reparations and recompense.").

150. Thomas, *Personal Responsibility*, *supra* note 148, at 326.

151. *See id.* at 326-327.

152. Thomas, Cordell Hull Speech, *supra* note 21, at 620-21.

153. *Id.* at 621.

154. *Id.*

155. Thomas, Be Not Afraid Speech, *supra* note 100.

courageous victim who dares to think independently."[156] If one's critics are assumed to be acting in bad faith and hurling politically and racially motivated attacks rather than meritorious arguments, what reason is there to ever listen to them at all? Under Thomas's conception of courage, one must absorb these attacks and remain steadfast and outspoken in one's beliefs—resulting in the calcification of one's opinions in the face of criticism.[157] Thomas may pay lip service to a theoretical critique that may cause him to change his views. But if those advancing the critiques are assumed to be hacks—no better than slave owners and members of the Ku Klux Klan—such impactful criticism will never materialize.

It seems that Thomas's practices reflect his isolationist stance against critics. Writing on Thomas in 2009, Michael Barone observed that Thomas was "a man who says he does not read newspapers and seldom if ever watches newscasts. If true, it's probably a good thing, because he has been the center of political controversy since his confirmation hearings in 1991 and the object of patronizing and dismissive commentary by many legal scholars."[158] In a more recent speech, Thomas calls for judges to avoid seeking out attention, proclaiming that "[o]ur decisions should not be driven by a desire to be revered or lionized for reaching certain outcomes. We are not mass media icons . . . we are judges, nothing more and nothing less."[159]

On occasion, Thomas confronts his critics—sometimes directly, and more frequently by reference. Recall Thomas's 1998 speech before the National Bar Association, an event preceded by "weeks of turmoil" as members fought among themselves over whether to disinvite Thomas from speaking.[160] There, Thomas spoke directly to those who'd criticized his appearance and role as a Justice.[161] And yet, as discussed

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156. Hannah L. Weiner, *The Next "Great Dissenter"? How Clarence Thomas is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 DUKE L.J. 139, 171-72 (2008).

157. Thomas, Be Not Afraid Speech, *supra* note 100.

158. Michael Barone, *Clarence Thomas: The Courage of His Convictions*, WASH. EXAM'R (July 12. 2009), https://www.aei.org/articles/clarence-thomas-the-courage-of-his-convictions [https://perma.cc/FBH4-BCD5].

159. Associated Press, *Justice Thomas: Judges Must Uphold Law, Even When Unpopular*, VOICE AM. (Feb. 11, 2020, 2:10 PM), https://www.voanews.com/a/usa_justice-thomas-judges-must-uphold-law-even-when-unpopular/6184083.html [https://perma.cc/93N8-XF23] (quoting Clarence Thomas, Assoc. J., U.S., Address at the Nathan Deal Judicial Center Dedication Ceremony (Feb. 11, 2020)).

160. *See* Michael A. Fletcher, *Justice Thomas Faces Down Critics*, WASH. POST (July 30, 1998), https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/wp073098.htm [https://perma.cc/6KED-U439].

161. *Id.*

above, Thomas's speech did not engage with the arguments by his critics but instead called out his critics' motivations—accusing them of singling out and criticizing him because of his race rather than based on the substance and merits of his opinions.[162]

B. Judge Ho and Judicial Courage

Fifth Circuit Judge James Ho has made a name for himself as an outspoken conservative.[163] Appearing on President Trump's 2020 list of potential Supreme Court picks, Ho is often portrayed as angling for a Supreme Court nomination.[164] Ho's opinions bear this out, as he frequently writes separately on issues of controversy, even where his additions add little of substance.[165] Beyond the bench, Ho speaks and writes frequently on topics of the day, including his views of the nature of judging and how judges should respond or react to criticism.[166] These speeches and writings espouse a vision of judicial courage that moves from judicial obstinance and consistency into outright contrarianism.

1. "Cancel Culture"

A complete understanding of Ho's vision of judicial courage (and the irony of this vision) requires an understanding of the notion of "cancel culture." What follows is background on this phrase, partly as an attempt to define Ho's conception of the phrase, partly to educate current

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162. Thomas, Be Not Afraid Speech, *supra* note 100.

163. *See* Melissa Segura, *The Next Clarence Thomas? Abortion Pill Case Spotlights Rightwing Judge and His Wife's Shadowy Connections*, GUARDIAN (Mar. 25, 2024, 12:02 PM), https://www.theguardian.com/world/2024/mar/25/judge-james-ho-wife-mifepristone-abortion-pill [https://perma.cc/9C2P-PAFF].

164. *See* Jacob Sullum, *SCOTUS Contender James Ho Combines Respect for Free Speech and Gun Rights With a Troubling Deference to Cops*, REASON (Sept. 10, 2020, 3:05 PM), https://reason.com/2020/09/10/scotus-contender-james-ho-combines-respect-for-free-speech-and-gun-rights-with-a-troubling-deference-to-cops [https://perma.cc/9N3B-UA8B] (reporting on Ho's presence on Trump's list of potential Supreme Court nominees); Elie Mystal, *James Ho Wants to Be the Next Clarence Thomas*, NATION (Sept. 15, 2023), https://www.thenation.com/article/society/james-ho-next-clarence-thomas [https://perma.cc/V9U6-TF46] ("Since his appointment to the Fifth Circuit by Donald Trump in 2018, Ho has been campaigning to replace the oldest current Supreme Court justice and the one most likely to retire under the next Republican presidential administration: Clarence Thomas.").

165. *See, e.g.*, United States v. Smith, 110 F.4th 817, 841 (5th Cir. 2024) (Ho, J., concurring) (writing a one-page concurrence to an opinion on the constitutionality of geofence warrants consisting of little more than sound-bites like, "hamstringing the government is the whole point of our constitution" and "Our decision today is not costless. But our rights are priceless.").

166. Mystal, *supra* note 164; Joe Patrice, *Judges Should Get Comfortable 'Harsh Criticism,' Says Federal Judge Who Throws Epic Hissy Fits Over Student Criticism*, ABOVE THE L. (Oct. 30, 2023, 3:15 PM), https://abovethelaw.com/2023/10/judge-ho-harsh-criticism-hypocrisy [https://perma.cc/BAR3-CV8E].

readers who live under rocks (e.g., many law professors), and—most optimistically—partly to inform future readers of a term that's faded into well-deserved obscurity. How to define cancel culture? Merriam-Webster takes a stab, defining it as "the practice or tendency of engaging in mass canceling . . . as a way of expressing disapproval and exerting social pressure."[167] Canceling, according to the same source, consists of "withdraw[ing] one's support from" someone, such as a celebrity, or something, such as a company, publicly and especially on social media.[168]

But it isn't so simple. Thomas Kelly, for example, acknowledges that the definition of cancel culture is "contested," and refrains from setting forth even a working definition of the term—instead opting to present several cases that he claims exemplify the phenomenon before going on to give an account of cancel culture's pernicious impacts.[169] Those who criticize the use of the phrase emphasize the malleability and indefinability of cancel culture, noting that its vagueness makes it provable through "anecdotal, self-reported experiences of victimization," which are the fault of one's favored villain.[170] Tracing the phrase's development, Khiara Bridges explains that the term grew from initial misogynist references to dump or ditch women, to "collectives expressing distaste through social-media platforms for a person (or institution) and deciding to withdraw support," to instances in which "the marginalized 'speak back' to power."[171] Franciska Coleman provides a broad account of cancel culture, describing it as the "[s]ocial regulation of speech," that operates to "regulate *offensive* speech (rather than injurious speech) and to suppress disagreement."[172]

Ho's writing on the topic reflects the malleability of the term. In an article devoted to resisting cancel culture, Ho declines to define the phrase.[173] This omission seems intentional. If one uses the term only by

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167. *Cancel Culture*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cancel%20culture [https://perma.cc/S9TH-K4FC] (last visited June 7, 2025).

168. *Id.*

169. *See* Thomas Kelly, *Cancel Culture on Campus: A Critical Analysis*, 2 J. FREE SPEECH L. 359, 360, 362-64 (2022).

170. *See* Mary Anne Franks, *The Lost Cause of Free Speech*, 2 J. FREE SPEECH L. 337, 339, 349-50 (2022).

171. Khiara M. Bridges, *Language on the Move: "Cancel Culture," Critical Race Theory," and the Digital Public Sphere*, 131 YALE L.J.F. 767, 774-77 (2022).

172. Franciska Coleman, *The Anatomy of Cancel Culture*, 2 J. FREE SPEECH L. 205, 227 (2022).

173. *See generally* James C. Ho, *Agreeing to Disagree: Restoring America by Resisting Cancel Culture*, 27 TEX. REV. L. & POL. 1 (2022) (providing numerous examples of cancel culture without defining the term).

reference to Ho's claims of cancel culture's broad, diverse, and nefarious impacts (e.g., "cancel culture affects everything—even the English language"; "cancel culture has infected our educational institutions, the legal profession, corporate America, public health"; "cancel culture is one of the leading reasons why citizens no longer trust a wide-variety of once-leading institutions"), then "cancel culture" can be whatever the reader believes or wishes it to be.[174] Ho's decision to leave cancel culture undefined gives it the flexibility to be an omnipresent villain—threatening whatever corner of life or society Ho chooses to contemplate.

Ho is uniquely positioned as an authority on cancel culture because he is an avid canceller himself. In the wake of several disruptions of conservative speakers at Yale Law School, Ho announced that "he will no longer hire law clerks from Yale Law School because the university 'not only tolerates' the cancellation of conservative views but also 'actively practices it.'"[175] Ho later added Stanford Law School to the list of schools from which he wouldn't hire clerks after students heckled Judge Kyle Duncan at a Federalist Society Event—students who Duncan later remarked were "coddled law students" who "had behaved like 'dogshit.'"[176] In 2024, Ho (and other conservative judges) added Columbia to the list as a result of "the institution's handling of pro-Palestinian protests," with Ho and the other judges declaring that "Columbia has . . . become an incubator of bigotry. As a result, Columbia has disqualified itself from educating the future leaders of our country."[177]

These measures were met with criticism from commentators who have accused Ho of engaging in cancel culture himself.[178] But Ho's

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174. *See id.* at 8-9.

175. Debra Cassens Weiss, *Why This Conservative Federal Appeals Judge Will No Longer Hire Clerks from Yale Law School*, ABA J. (Oct 3, 2022, 11:44 AM), https://www.abajournal.com/news/article/why-this-federal-appeals-judge-will-no-longer-hire-clerks-from-yale-law-school [https://perma.cc/E2YR-52UU].

176. AJ McDougall, *Pair of Yale-Boycotting Judges Now Say They Won't Hire from Stanford*, DAILY BEAST (Apr. 2, 2023, 5:20 PM), https://www.thedailybeast.com/federal-judges-james-ho-and-elizabeth-branch-say-they-wont-hire-clerks-from-stanford-law [https://perma.cc/GYQ2-BF54] (quoting Interview by the Washington Free Beacon with Kyle Duncan, Judge, Fifth Circuit Court of Appeals (Mar. 10, 2023)).

177. Tobi Raji, *Conservative Judges Say They Will Boycott Columbia University Students*, WASH. POST (May 7, 2024, 6:42 PM), https://www.washingtonpost.com/national-security/2024/05/07/student-protest-judge-clerk-boycott-columbia-university [https://perma.cc/A4YW-J9F3] (quoting Letter from Judges Elizabeth L. Branch, James C. Ho, and Matthew H. Solomson to Minouche Shafik, President, Columbia University (May 6, 2024) (on file with the *Hofstra Law Review*)).

178. *See* Paul Waldman, *A Judge's Attack on Yale Explains the Right's 'Cancel Culture' Ruse*, WASH. POST (Oct. 11, 2022, 6:06 PM),

outbursts were also rewarding—with Yale inviting him and Judge Elizabeth Branch (who had joined Ho's Yale boycott) to "engage[] in a discussion about free speech on college campuses"—a discussion in which Ho proclaimed that "[c]ancel culture is a cancer on our culture," which "we need to cure . . . before it's too late."[179]

This diversion into cancel culture and Ho's demonstrated fixation on the notion provides context for Ho's broader views on how judges should react to public pressure. Viewing cancel culture as a constant threat judges face, Ho suggests that judges should embrace critiques of their work.[180] This notion of not only resisting, but embracing critique of one's opinions ends up taking Ho's contrarianism to even greater extremes than Thomas's.

2. Embracing Criticism

Judge Ho considers himself to be an originalist.[181] What he means by this isn't entirely clear. As with his discussion of "cancel culture," it remains unclear precisely what "originalism" or being an "originalist" means. Writing against selective, or "fair-weather" originalism, Judge Ho proclaims himself to be an originalist and promises to "spend a few words explaining what that means," then goes on to describe originalism as "principled, not partisan," "neither liberal nor conservative," and

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https://www.washingtonpost.com/opinions/2022/10/11/conservative-judges-cancel-culture-james-ho [https://perma.cc/SAP7-JXRU] ("Can you cancel 'cancel culture' by canceling the cancelers? Some Republican judges are answering with an emphatic 'Yes!'").

179. Ines Chomnalez, *Course Correction Underway at Yale Law, Boycotting Judges Say*, YALE NEWS (Dec. 1, 2022, 12:01 AM), https://yaledailynews.com/blog/2022/12/01/course-correction-underway-at-yale-law-boycotting-justices-say [https://perma.cc/GTD6-7GVF] (quoting James C. Ho, Judge, Fifth Circuit Court of Appeals, Remarks at William F. Buckley, Jr. Program at Yale University: "Is Free Speech Dead on Campus?" (Nov. 30, 2022)). Yale's deferential treatment of Ho and Branch didn't go unnoticed, with Steven Lubet characterizing Yale's actions as "acquiescence" that "rewarded them with a speaking invitation." Steven Lubet, *Yale's Perplexing Invitation to Judicial Bullies*, HILL (Nov. 2, 2022, 8:00 AM), https://thehill.com/opinion/judiciary/3715122-yales-perplexing-invitation-to-judicial-bullies [https://perma.cc/62A9-T7VG].

180. *See* Jacqueline Thomsen, *Fifth Circuit's Ho Calls on Judges to Embrace 'Harsh Criticism*,*'* BLOOMBERG L. (Oct. 25, 2023, 8:38 PM), https://news.bloomberglaw.com/us-law-week/fifth-circuits-ho-calls-on-judges-to-embrace-harsh-criticism [https://perma.cc/2WEU-A9X5].

181. *Nomination of James Ho to the Fifth Circuit Before S. Comm. on the Judiciary*, 163 Cong. (2017) (transcript available at https://www.judiciary.senate.gov/imo/media/doc/Ho%20Responses%20to%20QFRs.pdf) [https://perma.cc/MWD2-QZ9P] (answering a question consisting, in part, of "Would you describe your approach to constitutional interpretation to be 'originalist'?" with "Yes, I am an originalist," and going on to describe his approach by reference to other works and prior testimony by then-nominee Elana Kagan).

leading to "results that judges themselves dislike" and which "cultural elites despise."[182]

All of this rhetoric, however, fails to commit to a coherent definition of originalism.[183] The closest he comes to defining the term is in emphasizing fidelity to the Constitution's text, arguing that judges who claim authority arising from "anything other than legal text (or at least binding precedent)" make him "very nervous."[184] Elsewhere, Ho appears to equate originalism with "the principle that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."[185]

But defining originalism isn't Ho's goal. Originalism, as Ho presents it, is noteworthy for the reactions it inspires in others—the harsh criticism of "the cultural elites who control the national discourse."[186] Ho makes an analogy to baseball umpires, who tend to change their patterns in calling balls and strikes in response to crowds' booing and cheering.[187] Ho suggests that judges may also be similarly influenced by their critics, arguing that judges suffer from "'gold star' syndrome" which causes them to pursue accolades that include the approval of others.[188] Ho, like Thomas, takes a low view of critics, highlighting their extreme rhetoric and asserting that this criticism is motivated by a simple fact: "Some people just don't like the Constitution."[189]

Ho decries "fair-weather originalism," in which judges purport to adhere to originalist methodology (which he tends to equate with simply following the Constitution's text) until doing so results in criticism.[190] Fair-weather originalists are originalists "only when it's easy."[191] Ho argues that judges shouldn't seek out approval, arguing that "[y]ou should become a judge for public service—not for public applause," and

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182. James C. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary: Fair-Weather Originalism*, 46 HARV. J.L. & PUB. POL'Y 957, 957-60 (2023) [hereinafter, Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary*].

183. *Cf.* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459-60 (2013) (recognizing that while there are variations on originalist theory, they may still be individually defined, as well as united under "a core set of ideas").

184. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary*, *supra* note 182, at 958-59.

185. James C. Ho, *Fair-Weather Originalism: Judges, Umpires, and the Fear of Being Booed*, 26 TEX. REV. L. & POL. 335, 336 (2022) [hereinafter Ho, *Fair-Weather Originalism*].

186. *Id.* at 341.

187. *Id.* at 341-42.

188. *Id.* at 344.

189. *Id.* at 345-47.

190. *Id.* at 349.

191. *Id.*

that judges should stop "worrying about the critics" and focus on themselves—on "being the most principled originalist you can be."[192] "Do your job, and then go home. Have a wonderful, fulfilling personal life."[193]

Here, we see shades of Justice Thomas's courage as calcification. Judges should not listen to the bad-faith critics who hate the Constitution. They should look inward, focus on themselves, and be a principled originalist (a term that remains largely undefined).[194] But Ho goes further. In a separate, similar speech that largely copies his written work, Ho adds a point on just after urging judges to have a fulfilling personal life: "Don't just expect harsh criticism. Don't just get used to it. You should also get comfortable with it."[195] Here, Ho goes beyond Thomas's recommendation that judges clam up and look inward in the face of criticism. Ho argues that fierce criticism is a signal that a judge is doing something right.[196] Ho quotes from the Bible: "If you are insulted because of the name of Christ, you are blessed, for the Spirit of glory and of God rests on you."[197]

Ho's adaptation and extension of Thomas's visions of judicial courage envision a judge embracing Thomas's warning against false civility. Ho urges that judges not only remain true to themselves (or to his undefined notion of originalism), but that they take harsh criticism as a positive sign.[198] The next Section further explores and critiques this contrarian conception of judicial courage.[199]

IV. JUDICIAL CONTRARIANISM

A. The Contrarian Turn

Justices, including Justice Thomas, are occasionally labeled as contrarians in academic literature, though these labels appear to be signals of a Justice's distinct views or tendency to dissent rather than intentionally acting out in response to criticism.[200] Sometimes the

192. *Id.* at 351.
193. *Id.* at 352.
194. *Id.* at 351-52.
195. Ho, *Pressure Is a Privilege*, *supra* note 17.
196. *See id.*
197. *Id*. (quoting 1 *Peter* 4:14).
198. *See* Ho, *Fair-Weather Originalism*, *supra* note 185, at 353.
199. *See infra* Part IV.
200. *See* Kyle Langvardt, *Imagining Change Before and After* Citizens United, 3 ALA. C.R. & C.L. L. REV. 227, 228-29, 247-48 (2012) (describing Justice Thomas as a contrarian in light of his distinct views on First Amendment law and disregard for stare decisis); R. Nicholas Rabold, Note, *The Smug Assumption of Reverse Discrimination: Abigail Fisher and* Fisher v. University of Texas

contrarian label indicates a more consistent tendency to take an individual stance on cases despite institutional pushback.[201] Still, these accounts tend to reflect contrarian impulses brought on by the positions of others on the Court, rather than reactions to criticism from beyond the bench.[202]

Judicial contrarianism doesn't always carry negative connotations. Judge Michael Hyman describes Justice Stevens as the "Great Contrarian," characterizing the term "in the narrow sense of someone who questions conventional thinking, is not easily swayed by others, and welcomes the examination of possibilities that others might disregard. Contrarians keep an inquisitive mind and are self-assured."[203] The contrarian label may be used to label a judge or Justice who issues notable dissenting opinions, without any additional professional or ethical implications.[204] Those who adopt and advocate for an

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at Austin, 105 KY. L.J. 705, 748 n.327 (2017) ("Justice Thomas, ever the contrarian, maintains his view that racial distinctions are always unconstitutional."); Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1730-31 (2016) ("Justice Thomas has staked out his very own contrarian position in implied preemption cases such as *Wyeth v. Levine*—a position that vests his hostile attitudes toward agencies (both inside and outside the context of preemption cases) with a consistency that his conservative colleagues' approach lacks."); *see also* Robert F. Blomquist, *Witches' Brew: Some Synoptical Reflections on the Supreme Court's Dangerous Substance Discourse, 1790–1998*, 43 ST. LOUIS U. L.J. 297, 443, 462 (1999) (using the term "contrarian" as a stand-in for "dissenting").

201. *See* L.A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 L. & SOC. INQUIRY 1227, 1230 (2000) ("No justice had the nerve to suggest Douglas leave because all were aware of his contrarian iron will; a suggestion that he leave would have been taken as a mandate to stay.").

202. *See* Nancy Maveety, *The Era of the Choral Court*, 89 JUDICATURE 138, 138 (2005) ("Justice Antonin Scalia, not surprisingly, is candid in his contrarian praise of 'be[ing] able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues . . . [as] an unparalleled pleasure.'"); Timothy Bussey, *Pursuing Search and Seizure Issues in DUI Cases*, *in* THE LEGALITY OF SEARCH AND SEIZURE IN DUI CASES 1, 16 (2016) ("The more someone like Justice Alito presses for expanded governmental power, the more other justices might act with a contrarian impulse."); Note, *Justice Breyer: The Court's Last Natural Lawyer?*, 136 HARV. L. REV. 1368, 1370 (2023) ("Justice Breyer set himself apart with his contrarian willingness to engage forthrightly in the purposive legal reasoning characteristic of natural lawyering.").

203. Michael B. Hyman, *Justice Stevens: The Great Contrarian*, CBA REC. Sept. 2010, at 6, *reprinted in* CBA REC., Sept./Oct. 2019, at 26.

204. *See, e.g.*, Brandon L. Bigelow & Dalmau Garcia, *The Dissents of Justice Martha B. Sosman: Judicial Restraint and Intellectual Honesty*, 42 NEW ENG. L. REV. 453, 453, 469 (2008) (describing Justice Martha Sosman as "a brilliant jurist and a bit of a contrarian," and going on to describe Sosman's jurisprudence through her dissenting opinions); Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 268 (2005) (noting "Justice Scalia's contrarian tendencies" in the context of Scalia's distinct choice of literary references). Similar characterizations of Justices by reference to their dissenting practices occurs frequently, albeit without necessarily labeling Justices as contrarian. *See, e.g.*, MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 105 (2015) (noting that Justice John Marshall Harlan became known as the "Great Dissenter" due to his high-profile dissenting opinions).

unconventional view on a particular issue or doctrine may also be labeled as contrarians without the term taking on an inherently negative connotation.[205]

Against the backdrop of these sporadic and varying mentions of contrarianism, modern discourse on judicial courage has introduced a new version of the concept. Justice Thomas's and, in particular, Judge Ho's conceptions of judicial courage cross the line dividing courage and contrarianism. The particularly pernicious form of contrarianism that Thomas and Ho espouse is this: judges or Justices should actively ignore—or even embrace—criticism of their rulings and reasoning.[206] Rather than judicial courage or independence, which militate against public opinion and criticism influencing how judges decide cases, judicial contrarianism takes things a step further by encouraging, in mild cases, the outright disregard of any feedback or criticism and, in extreme cases, acting contrary to the opinions espoused by those critical of judicial rulings and reasoning.[207]

Ho isn't alone in espousing a version of judicial courage as contrarianism, though he is the highest profile legal actor whose writings suggest contrarian tendencies. Josh Blackman, whose scholarship on the subject of courage led off Part III, also blogs on the topic.[208] In his blogging, Blackman is more explicit in his focus on courage as resisting popular opinion—and, notably, what particular sort of popular opinion is to be resisted.[209] In Blackman's view, earlier opinions by the Court evinced courage when the Court continued to rule in favor of desegregation outcomes despite extensive backlash from southern

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205. *See, e.g.*, Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 637-42 (2014) (describing Justices who "envisioned a more robust role for the [Privileges or Immunities] Clause" of the Fourteenth Amendment as "*Slaughter-House* contrarians," in light of their rejection of the *Slaughter-House Cases* which—in the author's view—improperly limited the role of that Clause in future cases); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 152-53 (1998) (describing as "Barron contrarians" those who took a view contrary to the Supreme Court's ruling in *Barron v. Baltimore* that the Bill of Rights was limited in application to the federal government).

206. *See* Thomsen, *supra* note 180; Thomas, Be Not Afraid Speech, *supra* note 100.

207. *See* Thomas, Be Not Afraid Speech, *supra* note 100.

208. *See* Josh Blackman, *Justice Sotomayor Gets Judicial "Courage" Backwards*, REASON: VOLOKH CONSPIRACY (Dec. 11, 2021, 6:15 PM) [hereinafter Blackman, *Justice Sotomayor Gets Judicial "Courage" Backwards*], https://reason.com/volokh/2021/12/11/justice-sotomayor-gets-judicial-courage-backwards [https://perma.cc/R3MK-XTEQ]; Josh Blackman, *"I Could Carve a Judge With More Backbone Out of a Banana*,*"* REASON: VOLOKH CONSPIRACY (July 29, 2024, 8:31 AM) [hereinafter Blackman, *"I Could Carve a Judge With More Backbone Out of a Banana"*], https://reason.com/volokh/2024/07/29/i-could-carve-a-judge-with-more-backbone-out-of-a-banana [https://perma.cc/2DMW-8ZGB].

209. Blackman, *Justice Sotomayor Gets Judicial "Courage" Backwards*, *supra* note 208.

politicians and the broader public.[210] But today's world is "very different":

> The greatest threat to judicial independence comes not from odious segregationists, but from progressive elites. I am grateful the prospects of Court-Packing have faded for now, but it has gained a currency on the left that I never fathomed was possible. And make no mistake. The specter of Court-Packing is a transparent effort to pressure the Justices to reach results progressives favor. . . . Today, judicial courage is casting a vote in spite of these forces. Today, judicial courage is saying, "I don't care what you will do to my Court. I am going to follow the law." Today, judicial courage is saying, "Let the Constitution be neutral on this issue, and return it to the democratic process." . . . Today, judicial courage is saying, "I am willing to be denied entry to elite circles, so be it." Today, there is nothing courageous about ruling in favor of abortion rights. . . . Today, courage is casting a vote, knowing that progressive elites will object.[211]

Blackman pursues this conception of courage in other writing as well. In July 2024, Blackman wrote more on judicial courage and how Chief Justice Roberts and Justice Barrett exemplified—or failed to exemplify—the quality.[212] Blackman referenced conservative critiques of Roberts "to grow a 'backbone,' and not change his vote" before issuing a ruling ultimately upholding the constitutionality of the Affordable Healthcare Act.[213] Blackman has "come to peace with Roberts's decision," and applauds Roberts for "engag[ing] in an act of utter selflessness, and courage of the highest level," as he knew that his *National Federation of Independent Business v. Sebelius*[214] opinion would alienate him from conservatives, while his opinion in *Shelby County v. Holder*[215] would alienate him from those on the left—hardly "the stuff of a banana."[216]

Justice Barrett, on the other hand, did not exhibit the same strong stuff as Roberts.[217] Blackman argues that Barrett "did not take controversial positions on matters of public concern" as a professor,

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210. *Id.*

211. *Id.*

212. Blackman, *"I Could Carve a Judge With More Backbone Out of a Banana*,*" supra* note 208.

213. *Id.* (referencing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)).

214. 567 U.S. 519 (2012).

215. 570 U.S. 529 (2013).

216. Blackman, *"I Could Carve a Judge With More Backbone Out of a Banana*,*" supra* note 208 (referencing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) and Shelby Cnty. v. Holder, 570 U.S. 529 (2013)).

217. *Id.*

refrained from writing op-eds or amicus briefs, and that, with the exception of *Dobbs v. Jackson Women's Health Organization*,[218] her votes on controversial cases don't count as courageous, as she was one of six Justices.[219] Finally, Blackman includes a note on Justice Kavanaugh, applauding him for "righteous indignation" at his confirmation hearing and hoping "that Kavanaugh could bring that fire to the bench in some cases."[220] You may recall that this hearing involved Kavanaugh giving a lengthy, often shouty statement accosting the committee for their delay in the face of sexual assault allegations, stating that the confirmation process had become "a national disgrace," and proclaiming that "[y]ou sowed the wind for decades to come. I fear that the whole country will reap the whirlwinds."[221]

Blackman's co-bloggers pushed back. Sam Bray responds with "a set of more general observations" in response, including one on courage specifically:

> The suggestion that what we need in Supreme Court nomination hearings is more "courage" in an idiosyncratic sense (n. courage, 1a "owning the libs") is exactly wrong. Yes, courage is a virtue, but like most virtues it is not reducible to performative spectacle. Supreme Court nomination hearings have already moved too far in the direction of cable news meets WWF. That is a progression to arrest, not to pursue as if it were the path of enlightenment.[222]

Will Baude draws a distinction "between lacking courage, and just not agreeing with your colleagues (or your blog critics) about the right thing to do."[223] On Blackman's point about Barrett declining to write op-eds and amicus briefs or otherwise "get[ing] into the mix" as a law professor, Baude suggests that she simply had "better things to do with her time," adding that "if more con[stitutional] law professors would get 'out of the mix,' they would be much better scholars."[224] Finally, Orin

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218. 597 U.S. 215.

219. *See* Blackman, *"I Could Carve a Judge With More Backbone Out of a Banana*," *supra* note 208.

220. *Id.*

221. *See Brett Kavanaugh's Opening Statement: Full Transcript*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/26/us/politics/read-brett-kavanaughs-complete-opening-statement.html [https://perma.cc/ZFJ7-X2ZE].

222. Samuel Bray, *Banana Republican*, REASON: VOLOKH CONSPIRACY (July 29, 2024, 11:35 AM), https://reason.com/volokh/2024/07/29/banana-republican [https://perma.cc/FZL4-LRHL].

223. Will Baude, *Against Judicial Bravery Debates*, REASON: VOLOKH CONSPIRACY (July 29, 2024, 1:21 PM), https://reason.com/volokh/2024/07/29/against-judicial-bravery-debates [https://perma.cc/BQ3H-ST9U].

224. *Id.*

Kerr reprises a 2021 post in which he argued that the subjectivity of courage rendered the term of little value.[225]

Ho and Blackman envision aggressive judges eager to provoke their critics and defend their stances. Ostracization is a badge of honor—indicating that a judge or Justice has achieved some measure of courage. Some concerns over this vision of courage have already been aired, but the remainder of this Section goes further—demonstrating how contrarianism sacrifices judicial independence and renders judges and Justices overly resistant to meaningful, positive change.[226]

B. Contrarianism, Judicial Independence, and a Return to Virtue Jurisprudence

Justice Thomas and Judge Ho share some key assumptions in constructing their theories of appropriate judicial action. Both take dim views of their critics.[227] Both urge judges to remain true to themselves rather than be influenced by external backlash.[228] But Ho takes things further in espousing a contrarian vision of judicial action.

Ho quotes Thomas's *Be Not Afraid* speech at length, emphasizing the need for "intellectual honesty," remaining "faithful to what you're interpreting," and maintaining the "courage of your convictions" in the face of "the constant winds of protest and criticism."[229] Ho's suggestion that principled judges not merely ignore, but embrace booing from their critics ends up running contrary to Thomas's vision of remaining true to one's principles.[230] Rather than ignoring the booing of the crowd, Ho's ideal judge takes criticism and disdain as a sign that the judge is on the right track.[231] This is not independence. Judicial contrarianism that seeks out continued critiques from those a judge perceives as misguided or hostile gives those critics an indirect influence—judges consider what the critics want, and do the opposite. Contrarianism exerts a force, albeit

225. *See* Orin S. Kerr, *"Time to Retire the Notion of Judicial Courage," Reprise*, REASON: VOLOKH CONSPIRACY (July 29, 2024, 4:10 PM), https://reason.com/volokh/2024/07/29/time-to-retire-the-notion-of-judicial-courage-reprise [https://perma.cc/3394-88VA].

226. *See infra* Part IV.B.

227. *See supra* note 189 and accompanying text.

228. *See supra* notes 127, 188 and accompanying text.

229. James C. Ho, *"Be Not Afraid,"* HARV. J.L. & PUB. POL'Y PER CURIAM. Fall 2021, at 1-2 (2021) (quoting Thomas, Be Not Afraid Speech, *supra* note 100).

230. *Id.* at 4; Thomas, Be Not Afraid Speech, *supra* note 100.

231. Ho, *Fair-Weather Originalism*, *supra* note 185, at 351.

an indirect one,[232] on judges and Justices, that pushes them towards certain outcomes that will upset the critics they love to hate.

The contrarian impulse to actively contradict one's critics isn't the only way that judges—particularly the "originalist" judges that Ho addresses—lose their independence. There may be other influences rewarding judges for taking originalists stances. After all, it's not all that bad to be an originalist. Well-funded organizations readily provide judges the opportunity to learn the latest originalist methods and trends at luxury resorts.[233] Other organizations provide "educational seminars" for judges that focus on originalist methodology.[234] The Court's highest profile originalist (and frequent proponent of judicial courage) tends to receive quite a bit more largesse from his elite friends.[235] Defenders of these practices respond that the resorts hosting these events aren't all that expensive—perhaps not the best way to frame things.[236]

One wouldn't get this impression from Ho's writing. Ho asserts that "[p]rincipled originalists aren't exactly showered with praise from the media, awards from bar associations, recognitions and honors from distinguished institutions."[237] Ho's own track record contradicts this. The asterisk footnote from this article indicates that the article is "based on a series of speeches delivered before Federalist Society student chapters at the University of Chicago, the University of Virginia, Harvard, Columbia, Stanford, and Berkeley and lawyers chapters in Texas, Florida, and Illinois between November 2019 and June 2022."[238] Ho makes the same statement in another piece, adapted from his presentation to a large room of (mostly) fancy and important people at

232. *But cf.* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013) (arguing that originalism exerts an indirect or "gravitational" force on legal doctrine even when Justices are not engaging in explicit analysis of the Constitution's original meaning).

233. *See* Molly Redden, *Inside the Ritzy Retreats Hosting Right-Wing Judges*, HUFFINGTON POST (Mar. 26, 2024), https://www.huffpost.com/entry/judges-luxury-travel-corpus-linguistics_n_65f75ff6e4b0defe9b276601 [https://perma.cc/V3AC-BS6T].

234. *See* Kathryn Rubino, *Conservative Judges Under Fire for Luxurious 'Educational' Trips*, ABOVE THE L. (Aug. 22, 2023, 4:16 PM), https://abovethelaw.com/2023/08/conservative-judges-under-fire-for-luxurious-educational-trips [https://perma.cc/LJ5Z-PRH4].

235. *See* Kaplan et al., *Clarence Thomas and the Billionaire*, *supra* note 120.

236. *See* The Editorial Board, *Progressive Prejudice Against the Judiciary*, WALL ST. J. (Aug. 27, 2023, 4:21 PM), https://www.wsj.com/articles/fix-the-court-roslynn-mauskopf-judiciary-kimberley-strassel-32c8e6ad [https://perma.cc/R73U-EC46] ("Fix the Court doesn't elaborate on the impropriety. But it points to a colloquium sponsored by the Scalia Law School at a 'resort' in Girdwood, Alaska. The daily rates there are about the same as at an Embassy Suites in Washington, D.C.").

237. Ho, *Fair-Weather Originalism*, *supra* note 185, at 345.

238. Ho, *Fair-Weather Originalism*, *supra* note 185, at 335.

Harvard Law School.[239] Ho explores similar themes in the 2023 Joseph Story Distinguished Lecture hosted by the Heritage Foundation.[240] And, as already discussed, after announcing that he would no longer hire law clerks from Yale Law School, the school awarded Ho and another similar boycotting judge with the opportunity to speak at Yale along with other judges.[241]

With this in mind, it's worth thinking back to the virtue jurisprudence theory discussed at the Article's outset, prior to our journeys through the minds of Thomas and Ho.[242] Thinking back to Solum's conception of judicial courage, in particular, recall that Solum had difficulty making a precise analogy to Aristotle's virtue of courage. This was because Aristotle tends to present courage as a moderation between fear and foolhardiness.[243] Solum states that it is difficult to analogize to this sort of moderation when it comes to the civic courage of judges resisting political or social pressures in rendering their decisions.[244] While one can readily imagine a judge giving into fear over social or political reprisals, it is hard to consider the judicial equivalence of being overly foolhardy or being too willing to face political consequences.[245]

The contrarianism that Ho (and, perhaps, Blackman) espouse is the judicial equivalent to Aristotle's rashness and foolhardiness that are the opposite extreme of fear. A cowardly judge is one who is willing to cave to social or political pressure and tailor his or her opinions to appease those who might otherwise level critiques or attacks. A foolhardy judge is one who takes the opposite tack—shaping his or her opinions to rile up the critics, speaking out against critics in a manner unbecoming of a judge, and craving the negative attention that is attention nonetheless.[246]

In this light, courage to the point of contrarianism is not courage at all. A virtue-centric perspective on courage counsels moderation in the face of social and political backlash. Contrarianism overreacts, abandoning the moderation that is the virtue of courage and veering into

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239. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary*, *supra* note 182, at 957-60. Regarding the "mostly," see, Michael L. Smith, *Originalism, Common Good Constitutionalism, and Transparency*, 46 HARV. J.L. & PUB. POL'Y 1217, 1219 (2023) (based on remarks delivered at the same event).

240. *See* Ho, *Pressure Is a Privilege*, *supra* note 17.

241. Nate Raymond, *Trump-Appointed Judges Behind Yale Clerk Boycott to Speak on Campus*, REUTERS (Mar. 8, 2023, 4:27 PM), https://www.reuters.com/legal/legalindustry/trump-appointed-judges-behind-yale-clerk-boycott-speak-campus-2023-03-08 [https://perma.cc/WS83-3494].

242. Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 66, at 478.

243. ARISTOTLE, *supra* note 19, at 48.

244. Solum, *A Virtue-Centered Theory of Judging*, *supra* note 20, at 190.

245. *Id.*

246. No publicity is bad publicity, after all.

judicial foolhardiness. And to the extent that a notion of judicial courage is to be founded in judicial independence, contrarianism abandons this formulation as well. One who approaches the work of judging in a manner that is to be actively contrary to the backlash of disingenuous adversaries is indirectly influenced by that backlash.

C. Resistance to Change

Even if one is not willing to endorse Ho's contrarian vision of judging, the near-solipsistic independence that both he and Thomas espouse is reason for concern. Both Thomas and Ho paint their critics as disingenuous and distracting.[247] Thomas portrays critics as politically motivated actors seeking to enforce agency and shut down debate by employing "attacks that range from mere hostile bluster to libel."[248] Ho argues that "the principal challenge that originalists face is not a matter of intellect, but a matter of intimidation and insult," asserting that critics "just don't like the Constitution," and claiming that this "hatred of the Constitution is not an isolated viewpoint," but one that is "widely shared across the academy as well as the commentariat."[249] While Ho states that he "warmly welcome[s] these speakers to the discussion," he does not do so out of a desire for genuine debate; instead he states that debating critics will lead them to "say the quiet part out loud."[250]

With critics like these, it's no wonder that both Thomas and Ho urge judges to remain true to themselves in the face of pressure from critics. As Thomas puts it, one is to "expect to be treated badly" and "[n]onetheless . . . stand undaunted," as "it is bravery that is required to secure freedom."[251] Indeed, in maintaining one's stance, one should avoid the "desire to be decent and well-mannered people," as "yielding to a false form of 'civility'" may "allow our critics to intimidate us."[252]

This vision of courage—remaining true to oneself in the face of criticism—labels as courageous a judge who refuses to change. If a judge's critics are, indeed, uniformly bad-faith actors without a single meritorious claim between them, this conception of courage might be

247. Thomas, Be Not Afraid Speech, *supra* note 100; Ho, *Fair-Weather Originalism*, *supra* note 185, at 345-46.

248. Thomas, Be Not Afraid Speech, *supra* note 100.

249. Ho, *Fair-Weather Originalism*, *supra* note 185, at 341, 347-48.

250. *Id.* at 348.

251. Thomas, Be Not Afraid Speech, *supra* note 100.

252. *Id.*

sensible. But this isn't how things are—especially when one is engaged at all in the practice of law.[253]

Take, for example, the job of a civil litigator, which I enjoyed[254] for years before entering academia. My duties were to my client. It was my job to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[255] To do so effectively, I had to consider the arguments raised by opposing counsel in order to effectively prepare my own arguments in response, as well as to continuously evaluate the merits of my client's position and chances for success. Keeping an open mind, particularly in the early stages of cases, could head off needless fights that would only cost my client.[256]

And consider how one grows to become an effective practitioner. I sometimes tell my students—only partly in jest—that nearly all of what I know about the practice of law originates in a mistake made at some point in my career. There's nothing like getting a filing rejection notice, a call from the partner, or a baffled glare from a judge to cement a particular rule or procedure into one's mind. Making mistakes, and learning from them, is a crucial aspect of growing and improving as an attorney—or a judge.

Contrarianism as isolation from one's critics and doubling down on one's own views and preconceptions forecloses changes in a judge's opinion—including in the face of thoughtful, warranted critiques. Judges and Justices aren't necessarily at the peak of their knowledge and skill at the time of their election or confirmation—they may continue to learn over time as they hear more cases and are exposed to the arguments of counsel and their colleagues on the bench.[257] Maintaining an open mind, including to positions that may challenge one's previously held beliefs, may enhance the development of other judicial virtues, such as wisdom.[258] If one is to adopt Thomas's and Ho's view of the world, in which contrary views are nothing more than bad faith assaults on one's

253. *See, e.g.*, U.S. v. Stidman, 29 M.J. 999, 1002 (A.F. Ct. Crim. App. 1990) ("[J]udges are called upon from time to time for moral courage—the courage to subordinate a personal philosophy of the law or private distaste of child abuse to decide an issue logically and dispassionately.").

254. At times.

255. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2025).

256. *Cf.* Officemax Inc. v. Cinotti, 966 F. Supp. 2d 74, 81 (E.D.N.Y. 2013) ("[L]awyers, on behalf of their clients, should also have the freedom to speak to opposing counsel with a free and open mind prior to the commencement of litigation. Indeed, if a communication between lawyers about a possible violation of a settlement agreement was to be subject to a defamation action, the effect might well be to deter any attempts by lawyers to resolve such disputes before a lawsuit is filed.").

257. Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 821 (2011).

258. *See* Solum, *A Virtue-Centered Theory of Judging*, *supra* note 20, at 192-93 (describing the virtue of judicial wisdom).

character, chances of this intellectual and professional growth are stymied.

V. TWO FURTHER THOUGHTS ON JUDICIAL COURAGE

A. Courage as Candor

In light of current debates over judicial courage, how should we define the concept? Virtue ethics and their application in virtue jurisprudence are worth keeping in mind when evaluating claims about judicial courage that pop up in the judicial, academic, and political contexts. So too is the notion of judicial independence. Remaining unaffected by external pressure is desirable in a judge—to a point.[259] Clamming up against all criticism though risks a failure to recognize genuine mistakes, developments in the law, and relevant arguments—all of which are crucial for judges expected to exercise wisdom and render considered judgments.[260] Between the extremes of being influenced by the slightest of political winds and remaining unreachable to evidence or argument lies the moderation that characterizes classic formulations of virtue.[261]

While modern commentary on judicial courage is frequently misguided, I do not conclude that the topic ought to be avoided.[262] Instead, a conception of courage that better aligns with what we want from judges is worth developing. To that end, I suggest a turn to candor.

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259. *See* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, The First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 380 (2003) ("[D]ue process protections for litigants guarantee only that their judge will not be biased in favor of one of the *parties*, and that it is *better* to have a judge on the bench who has studied legal issues than it is to have a judge who has an 'open mind' because he has not thought about the duties of his office."); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 620 (1996) ("[A]ny evidence heard by a judge is bound to engender a certain reaction or attitude regarding how the case may be decided, but so long as the judge is not influenced by extraneous factors and so long as the judge keeps an open mind about the final outcome of the case, the judge will be considered sufficiently impartial.").

260. *See* Sonia Sotomayor, *Katzmann Lecture: Reflections About Judicial Independence*, 97 N.Y.U. L. REV. 875, 897-98 (2022) ("For me, most importantly, I think each judge on every court has to remember that we have an obligation to keep open minds that are willing to change with time and experience. If we don't show it, people will believe, perhaps wrongly, that we are just political creatures and not independent judges."); Zuberi B. Williams, Response, *"If Only We're Brave Enough to Be It": How Judges, Law Enforcement, and Legislators Can Be the Light Against #LWB Incidents*, 70 AM. U. L. REV. F. 135, 138 (2021) ("Judges should follow the rule of law, listen to the parties with an open mind, and interpret the law fairly.").

261. *Cf.* ARISTOTLE, *supra* note 19, at 79, 85.

262. *Cf.* Baude, *supra* note 223 ("I don't think grading the justices on their bravery—especially without evidence that their behavior isn't better explained by thoughtfulness, disagreement, or judicial philosophy—is particularly fruitful or accurate.").

Judicial candor—its nature, its limits, and its desirability—is the subject of protracted discussion.[263] And candor is often considered alongside courage as a virtue or desirable trait of judges and Justices.[264] But candor itself ought to be considered in conjunction with courage, much as the closely related notions of judicial courage and independence are discussed together.[265]

Under this approach, candor is treated as a manifestation of courage. A judge demonstrates courage through a genuine explanation of the reasons for his or her decision. Similar to courage (and other virtues), this conception of candor involves extremes. Judges should not attempt to think up every reason and consideration behind their decisions as doing so would be an endless, tedious process.[266] But they should not obscure their reasons for decisions either, and ought to make some effort toward giving reasons and explanations for the outcomes of the cases they decide.[267]

Exercising candor involves judicial courage because judges open themselves up to criticism and attack at the level of legal argument when giving reasons for their decisions.[268] Those who disagree with a particular ruling may disagree with it for a variety of reasons unrelated to the merits of the case. The opinion may establish a precedent that will undermine their position in a related legal dispute, the rule set forth in the opinion may be unfavorable for the critic's business interests, and the critic may be the party to the case whose investment of time and money into their cause or defense has now come to naught. While judges should be aware of the impacts their decisions have, these critiques arise from the interests of third parties rather than from the judge's reasoning or arguments in favor of the ruling.

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263. *See, e.g.*, Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265 *passim* (2017); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 *passim* (2010).

264. Sherry, *supra* note 76, at 797-98 (arguing that alongside "humility and courage" judges "also need empathy, imagination, candor, and self-awareness, among other traits"); Peter J. Rubin, *Keynote Address: Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 OHIO STATE L.J. 825, 826 (2009) (stating that "courage and candor are the hallmarks" of Justice Ginsburg's jurisprudence).

265. *See supra* Part II.C.

266. Fallon, Jr., *supra* note 263, at 2305.

267. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 652 (1995) (describing judges' provision of reasons for their opinions, including the process of making decisions when an opinion "won't write" and how this relates to the need to give reasons and the role reasons play).

268. *See* Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1690 (2006) ("Transparency is a check on the judge, both because it disciplines the judge's own thought and because the judge is opening himself to disciplining criticism from others.").

This changes, however, when a judge gives reasons for a ruling. Now, beyond claiming harm to oneself or one's community, the judge's critic can dissect the logic behind the opinion—calling out false assumptions, leaps of logic, and misuse of rules or precedent.[269] Where judges refuse to set forth a reason for an opinion, critics can never precisely call out just how the ruling went wrong.[270] But by showing their work, judges open themselves to this level of criticism—criticism which may generate results should (for example) a higher appellate court find the arguments convincing.[271]

In this way, the connection between candor and courage becomes more apparent. Judges who exercise greater candor in setting forth the reasons behind their determinations do so despite the increased risk of legal and methodological criticism resulting from this candor. Acting despite this risk parallels virtue jurisprudence's encouragement of candor.[272] And beyond developing this virtue of courage, such increased candor is laudable for its "demystif[ication of] the decisionmaking process" of judging,[273] increasing the legitimacy of the judge's determination in the eyes of those subject to his or her rulings,[274] and encouraging judges to approach their cases with "humility and caution"—including appropriate "recognition of the complexity of both the method and the issues."[275]

Is candor itself a judicial virtue? I see no reason why not. There are certainly plenty of mentions of candor as a virtue—some tying courage to the literature of virtue ethics and virtue jurisprudence,[276] and others taking a more colloquial stance.[277] Still, the colloquial mentions of

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269. *See* Kermit V. Lipez, *The Ways of a Judge and on Appeal*, 63 ME. L. REV. 439, 441 (2011) (acknowledging the risks of putting one's reasons for opinions into writing).

270. *See* Cohen, *supra* note 263, at 1114 ("Reasons provide grounds for criticism.").

271. *See* Christopher R. Drahozal, *Judicial Incentives and the Appeal Process*, 51 SMU L. REV. 469, 477 (1998) (noting that judges are "averse to reversal" and "do not like having their decisions reversed by higher courts").

272. *See* Solum, *A Virtue-Centered Theory of Judging*, *supra* note 20, at 190-91.

273. Lipez, *supra* note 269, at 441.

274. *See* Ronald J. Krotosynski, Jr., *On the Importance of Being Earnest: Contrasting the Dangers of Makeweights With the Virtues of Judicial Candor in Constitutional Adjudication*, 74 ALA. L. REV. 243, 246 (2022) ("People are far more likely to accept judgments with which they disagree when judges have the courage to offer the *actual reasons* that animate those judgments—rather than a verbal cellophane wrapper.").

275. Gewirtz, *supra* note 268, at 1690.

276. *See, e.g.*, H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 2D 369, 373, 375-76 (2006) (referencing the literature on virtue ethics and going on to describe "the constitutional virtues of integrity and candor").

277. *See, e.g.*, Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith*, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 408 (1991) (describing "the *virtues of judicial integrity and candor* (explicitly and

candor as a virtue are illuminating. Take Robert Leflar's thoughts on the topic from 1961, reflecting the moderation that is characteristic of virtue ethics:

> Candor is a virtue, in judicial opinions as elsewhere, and we need much more of it. But to "tell all," with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere. Restraint may be a virtue too, for reasons sometimes of decency and sometimes of wise planning. The problem of when to be candid, when silent, and how candid to be, is one that antedates the invention of pen and ink.[278]

Conceptualizing courage through an expectation that judges and Justices be forthcoming in how they approach and decide cases is more constructive than exhorting judges to ignore their critics or to structure their determinations in a manner designed to invoke further outcry. Rather than abandon the moderation characteristic of classical conceptions of virtue ethics through judicial contrarianism, a focus on transparency demands appropriate risk-taking by judges to accomplish constructive goals. Should judicial courage remain a catchphrase in our discourse, it should become synonymous with expectations of candor.

To be sure, this is not the only alternative definition of courage that may be worth addressing. One might consider defining courage as a willingness to act contrary to one's ideological peers, as doing so might result in personal or professional backlash from this peer group. Such a definition of courage may be harder to administer or apply, however, as it would require affixing an ideological label to a judge or Justice in order to identify particular outcomes that are contrary to the expectations of peer groups. Applying such a label isn't without controversy.[279]

Even so, such an approach to courage may be useful to the extent that it connects the virtue of courage with other guiding principles. A

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persuasively explaining and justifying principled, text-based interpretive judgments, tempered by specifically contextualized equity and public compliance concerns)").

278. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961).

279. *See* Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35-36 (2012) ("Politicization of the Supreme Court causes the American public to lose faith in the Court, and when public confidence in the Court is low, the political branches are well positioned to disrupt the constitutional balance of power between the judiciary and the political branches."); James F. McHugh & Lauren Stiller Rikleen, *The Politicization of SCOTUS Threatens Its Legitimacy*, BLOOMBERG L. (June 30, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/the-politicization-of-scotus-threatens-its-legitimacy [https://perma.cc/76LU-SK2R] (arguing that politicizing the Court harms its legitimacy, and blaming the politicization of the selection process and the injection of Justice selection into presidential election politics for the Court's increasingly politicized rulings).

courageous judge, for example, might be a liberal judge who follows the principle of stare decisis and maintaining consistency and predictability in the law despite the conservative outcome the decision may reach. Similarly, a conservative judge may follow an interpretive principle, such as originalism, and reach a liberal result.[280] Both of these judges may be said to be acting contrary to the expectations of their political peers. But doing so out of principle may be thought of as courageous.

While this may be an alternative definition or dimension of courage, it's worth noting that candor continues to play a role. The simple act of behaving contrary to one's ideological peers may not be an apparent act of courage absent an explanation for why one does so. A complete picture of courage may require not just acting against one's ideological peers, but an account of why one does so—in that one is acting on principle, rather than on grounds of personal self-interest.

B. Is Judicial Courage an Oxymoron?

Those writing on virtue jurisprudence tend to assert at the outset that courage is a judicial virtue. But some pushback against this initial stage of the discussion might be warranted. Will Baude, for instance, responds to Josh Blackman's thoughts on judicial courage by urging against discourse on bravery altogether where conceptions of bravery center on "who is bravely holding a nonconformist position in the face of persecution."[281] Baude's view is that this discourse is not typically all that "fruitful or accurate."[282] Baude has a point. Imprecise discussions over ill-defined concepts that hinge on the unknown motivations of judges and Justices may go nowhere fast given the lack of argumentative standards.[283]

But there may be a deeper reason why discussions of judicial courage are nonsensical from the outset. A more fundamental obstacle to sensible discussions of judicial courage may be the possibility that

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280. *See generally* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235 (2018) (critiquing claims that originalism is necessarily a politically conservative approach to constitutional interpretation and suggesting that there may be "surprising" instances in which following originalism will lead to results in line with liberals' and progressives' policy preferences).

281. Baude, *supra* note 223 (quoting Scott Alexander, *Against Bravery Debates*, SLATE STAR CODEX (May 18, 2023), https://slatestarcodex.com/2013/05/18/against-bravery-debates [https://perma.cc/WBS5-ASLJ]).

282. *Id.*

283. *See* Kerr, *supra* note 9; *see also* Schauer, *supra* note 267, at 637 ("Reasons do play a role in producing [judicial] decisions . . . but the form in which the conclusions are announced cuts off access to those reasons, suggesting that the reasons are none of the reader's (or hearer's) business.").

traditional conceptions of courage break down when the actor at issue is someone with life tenure and (in the case of a Supreme Court Justice) at the highest level of the judiciary with unreviewable power.[284] Lower federal court judges are also guaranteed jobs for life.[285] And even state court judges and Justices who are elected are in secure positions—with decisions at the trial level often being the final word on the matter.[286] Given judges' power over the cases before them and the overall rarity of appeals of their determinations, one may question whether judges can be fairly said to genuinely fear criticism at all.[287] And if there is no reason for judges to feel fear, there is no sense in discussing judges' courage.

Michel Foucault discusses the concept of "parrhesia," a Greek term that is ordinarily translated to mean "free speech."[288] Expanding on the term, Foucault writes:

> The one who uses parrhesia, the parrhesiastes, is someone who says everything he has in mind: he does not hide anything, but opens his heart and mind completely to other people through his discourse. In parrhesia, the speaker is supposed to give a complete and exact account of what he has in mind so that the audience is able to comprehend exactly what the speaker thinks. The word parrhesia, then, refers to a type of relationship between the speaker and what he says. For in parrhesia, the speaker makes it manifestly clear and obvious that what he says is his own opinion. And he does this by avoiding any kind of rhetorical form which would veil what he thinks. Instead, the parrhesiastes uses the most direct words and forms of expression he can find.[289]

The parrhesia Foucault discusses resembles the judicial candor discussed above. To be transparent in their reasoning, we expect judges to set forth the reasons for their decisions in a manner that is

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284. *See* Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 305 (2010).

285. *Id.*

286. *See* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1394 (2006) (noting rates of appeal by corporate and individual parties, finding that the highest rate of appeal (by corporate plaintiffs who lose at trial) is 28.5%, while individuals who lose at trial appeal at rates of 20% for plaintiffs and 17.1% for defendants).

287. *See* Rotunda, *supra* note 284, at 305 ("In fact, *federal judges*, of all people, should not fear criticism. As Professor Steve Lubet has reminded us, 'Federal judges have more insulation than anyone in American political life. A judge with life tenure needs less protection, not more, than an ordinary citizen.'" (quoting Henry Weinstein, *Complaint Against Judge Has Broader Ramifications*, L.A. TIMES, May 7, 2006, at B3, https://www.latimes.com/archives/la-xpm-2006-may-07-me-real7-story.html [https://perma.cc/4FCB-JJ8U])).

288. FOUCAULT, *supra* note 24, at 11.

289. *Id.* at 12 (emphasis omitted).

approachable to their audience.[290] Judges should not hide their reasoning behind rhetorical or other obscuring devices such as abstract theories or statements of methodology to which they might outsource the work of judging.[291] Doing so, as scholars like Suzanna Sherry point out, "privilege[es] humility over courage," as judges "seek refuge in constraining methodology designed to produce right answers without the exercise of judgment."[292]

Foucault's discussion of parrhesia also informs a discussion of whether judges may be properly said to exercise courage at all. Foucault writes that parrhesia is not simply a notion of free speech, but also one of true speech: "The parrhesiastes is not only sincere and says what is his opinion, but his opinion is also the truth. He says what he *knows* to be true."[293] The truth of the parrhesiastes's utterances is founded in the courage required to use parrhesia, as one can only truly be a parrhesiastes "if there is a risk or danger for him in telling the truth."[294] This need not be a "risk to life" or physical safety—loss of friendship or popularity may be considered in determining whether one is use parrhesia.[295] But certain figures—kings, for example—"cannot use parrhesia for [they] risk[] nothing."[296]

This connection between risk and assumptions of truthfulness isn't without parallel in the legal context. There are exceptions to evidence barred by the hearsay rule, for example, Federal Rule of Evidence 804(b)(3) exempts instances in which an out of court statement is one that:

> [A] reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.[297]

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290. *See* Fallon, Jr., *supra* note 263, at 2292-93.

291. *See, e.g.*, Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 961 (2015) (arguing that "judges should not outsource their legal decisions to historians" by drawing on "secondary histories to reach constitutional conclusions in particular legal disputes").

292. Sherry, *supra* note 76, at 805.

293. FOUCAULT *supra* note 24, at 14 (emphasis omitted).

294. *Id.* at 15-16.

295. *Id.* at 16.

296. *Id.*

297. FED. R. EVID. 804(b)(3)(A). To be sure, there are limits. In a criminal case where such a statement is offered to "expose the declarant to criminal liability," such a statement must also be "supported by corroborating circumstances that clearly indicate its trustworthiness." FED. R. EVID. 804(b)(3)(B).

The thinking behind this exception is that "a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently guaranteed, though oath and cross-examination are wanting."[298] As with parrhesia, the fact that the statement carries risk for the speaker functions as a guarantee of that statement's truth or reliability.

In light of judges' and Justices' relatively secure positions—some of which are guaranteed for life—one might fairly question whether their opinions and rulings can possibly be parrhesia or courageous speech. To be sure, there may be some circumstances under which an opinion might result in substantial physical danger to a judge or Justice.[299] One hopes these instances are rare under modern circumstances, but these situations may give rise to judicial courage in the face of genuine danger to life and safety. Beyond these circumstances, political consequences are possible, particularly for those judges who face election and reelection. But even then, the volume of cases handled may reduce the risk of any given decision to a trivial level. As for social consequences—missing out on desirable parties and events, facing ridicule from social luminaries, and increased tension in conversations with family and friends—one might wonder whether these rise to a sufficient level to require courage to overcome.[300]

These circumstances are worth considering in discussions of judicial courage—particularly when considering the courage of Supreme Court Justices. Those labeling particular opinions as courageous should be mindful of whether the opinion was issued in the face of any meaningful risk—and tailor their praise accordingly. As for whether judges' positions of power render claims of courage nonsensical, such a strong conclusion is not warranted. When speaking of state court judges, for instance, the prospect of retention elections, reputation among one's

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298. 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1457, at 1822 (Little, Brown, & Co. 1904).

299. *See, e.g.*, Daniel J. McMullen, *On Heroes and Idealists*, 42 CLEV. ST. L. REV. 373, 373-74 (1994) (describing "threats to life and safety" that judges faced when issuing desegregation decisions in the 1950s through 1970s); *see also* Mark Sherman, Michael Balsamo, & Michael Kunzelman, *Armed Man Arrested for Threat to Kill Justice Kavanaugh*, ASSOCIATED PRESS (June 8, 2022, 4:20 PM), https://apnews.com/article/us-supreme-court-brett-kavanaugh-district-of-columbia-maryland-government-and-politics-179d18e7f933b3decbaddb542ceb0b29 [https://perma.cc/FHQ5-BXAQ] (describing the arrest of a man who threatened to break into Justice Kavanaugh's house and kill him); Stephanie Domitrovich, *Judicial Security: Ensuring Safe Access for All Stakeholders*, JUDGES' J. Summer 2023, at 1 (describing security risks faced by judges and their family members).

300. *But see* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1566-70 (2010) (describing how Justices' social circles and attention to elite audiences influences their decision making).

immediate peers, and reversals on appeal are ever-present considerations.[301] While federal judges need not worry about reelection, the prospect of reversal and resulting ridicule may be a genuine concern.[302] Even Supreme Court Justices may face political and social backlash severe enough to warrant their attention and concern—particularly in cases where the subject matter of their decision involves statutory rather than constitutional law.[303] In addition to approaching courage through a lens of candor, it may therefore may be worth taking a harder look at when the label is appropriate.

VI. CONCLUSION

Modern discussions of judicial courage are frequently imprecise, muddled, and misleading. Contrarian notions of courage urge judicial vice rather than virtue, urging judges to become further enmeshed in already polarized political disputes. Despite this sad state of affairs, courage still ought to be part of the discussion. By revealing judicial contrarianism for what it is, recognizing circumstances where true courage is unlikely or impossible, and giving a renewed attention to candor's role, debates over judicial courage may yet be fruitful. At the very least, acknowledging the existence of courage as candor serves to enrich existing conceptions of courage in virtue jurisprudence discussions and provides additional theoretical grounding for critiques of those judges and Justices who have closed themselves off from reasoned debate.

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301. *See* Drahozal, *supra* note 271, at 475-77; Hallie Sears, *A New Approach to Judicial Retention: Where Expertise Meets Democracy*, 24 GEO. J. LEGAL ETHICS 871, 871-72, 876-77 (2011) (describing judicial retention elections, including a successful 2010 campaign to remove three Iowa Supreme Court Justices from the court through a retention election).

302. Drahozal, *supra* note 271, at 477.

303. *See* Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 342, 348, 352-53 (2010) (noting that Supreme Court Justices may take into account "the preferences of other relevant actors (here, Congress and the president)" to ensure that the Court's determinations are not at risk of "congressional overrides").