The Seven Virtues of Judging: Alvin Rubin's Civil Rights Opinions

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I. INTRODUCTION

While planning how to organize some thoughts for this memorial issue on Judge Rubin’s prodigious contributions to the law, and specifically in the field of civil rights, I recalled once hearing a lecture by Professor Laurence Tribe, whose work I know Judge Rubin respected. Speaking at Hastings in 1984, Professor Tribe noted:

We do not just inherit society, we help create it. The choices that we make as lawyers, as people, do much more than serve some mix of already existing “interests” and “values.” Our choices shape what our interests and values are by constituting who and what we ourselves become. To construe and build the law . . . is to choose the kinds of people, the kind of society, that we will be.1

In that lecture, Professor Tribe went on to criticize the Supreme Court of the United States for making the wrong choices. In his view, the Supreme Court had taken on “a managerial vision of deference to authority and expertise . . . reinforced by the illusory precision and pretended neutrality of a pseudo-scientific calculus for measuring claims and counterclaims.”2 Professor Tribe demonstrated his thesis by pointing out “seven deadly sins” that he saw as characteristic of this “profound perversion . . . of the perspective from which any constitutional court ought to view and help shape the political and social world.”3 Since the time Professor Tribe delivered this lecture, the Supreme Court has

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2. Id.
3. Id. at 171. Professor Tribe identified the sins he saw as: devaluing process, ignoring the distribution of power and wealth, becoming fixated on the tangible, inviting the tyranny of small decisions, overlooking the constitutive dimension, abdicating responsibility for choice, and indulging in judicial imperialism.
not changed course. If anything, especially with the recent changes in personnel, the speed has accelerated.4

I thought it would be useful to revisit the themes of that lecture here because by implication Professor Tribe also presented a positive vision of the judicial role in our society. For this article, I have made that positive vision explicit by transforming Professor Tribe's list of sins into the Seven Virtues of Judging. I suspect that I will not shock any gentle readers if I reveal that when Judge Rubin's civil rights opinions are measured against that vision, we see an example nonpareil of what judges should be doing to help us choose the kinds of people, the kind of society, we will be.

II. THE SEVEN VIRTUES OF JUDGING

A. Valuing Process

Professor Tribe criticized the Supreme Court for devaluing process—for "talking about values like those of procedural fairness as though they were simply tools, instruments, means to the end of maximizing the size of the total pie for society rather than things substantively valued in themselves."5 Professor Tribe illustrated this point by discussing two then-recent Supreme Court opinions6 where the Court stated that the costs of losing criminal convictions outweighed the benefits of incremental deterrence of police conduct. Professor Tribe criticized the Court for ignoring the more subtle point—that we should not allow the courts to be parties to police lawlessness.

Judge Rubin knew that process has value in and of itself. For example, it happens that the Fifth Circuit led the nation's federal courts in adopting the good-faith exception to the exclusionary rule7 that the

4. For example, in the very week I began to draft this article, the Supreme Court handed down decisions that were in keeping with the trend Professor Tribe identified. Both of these decisions were to the political right of what even the Bush Administration wanted in each case. See Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992) (rejecting the Justice Department's interpretation that preclearance was required under Voting Rights Act where power of elected official was reduced just before newly elected African-American took office); Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) (reversing NLRB ruling granting non-employees access to employees for organizing purposes).
5. Tribe, supra note 1, at 157.
7. United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc). Judge Rubin castigated the en banc majority for reaching the issue in a purely hypothetical context. Speaking for a group of ten judges, he pointed out that all twenty-four members of the Fifth Circuit agreed that on the facts of the case before it, the evidence in question was admissible because it was found during a valid search. Therefore, under ordinary principles of judicial self-restraint, it was completely inappropriate to reach out to create the good faith exception to the exclusionary rule. Id. at 848 (Rubin, J., specially concurring).
Supreme Court ultimately adopted four years later in Leon. Judge Rubin wrote a special concurrence in which he pointed out that even when the Supreme Court first adopted the exclusionary rule, deterrence was not its only basis. He noted that the Court's 1914 opinion in Weeks v. United States also relied upon "the duty of the courts to support the Constitution and to refuse to sanction practices destructive of rights secured by it."

There are other examples of Judge Rubin's acute awareness of the evils of devaluing process. Let us briefly examine a minor example and then another major one. In McDaniel v. Temple Independent School District, an African-American woman sued her employer for employment discrimination and retaliatory discharge. The primary issue on appeal was quite pedestrian—whether or not the district court's findings of fact in the defendant's favor were clearly erroneous. Except for one matter, this would be a completely run of the mine case; normally, I assume Judge Rubin would have agreed with the majority's fully considered view that the findings could not be disturbed under Rule 52 of the Federal Rules of Civil Procedure. However, what makes this case a bit unusual is that on the morning of the bench trial, the plaintiff's lawyer informed the district judge in chambers (without the client present) that she desired to withdraw from the case because the plaintiff "kept changing her testimony, that plaintiff's mental condition was deteriorating.

9. Williams, 622 F.2d at 849 (Rubin, J., specially concurring). Thus, Judge Rubin noted that the Weeks Court had said:

The effect of the fourth amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

. . . . This protection is equally extended to the action of the government and officers of the law acting under it. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Id. at 850 (quoting Weeks v. United States, 232 U.S. 383, 391-92, 394, 34 S. Ct. 341, 344-45 (1914)).
10. 770 F.2d 1340 (5th Cir. 1985).
11. Indeed, the case was so weak, the district court rendered judgment upon the defendant's motion for an involuntary dismissal after the close of the plaintiff's case in chief. Id. at 1346. Judge Rubin did not suggest this ruling was per se improper.
rating, and that the plaintiff was acting very aggressively."

In open court, the judge informed the plaintiff that her counsel wanted to withdraw, but did not disclose the details of the in-chambers conversation. The plaintiff replied that she nevertheless wanted the attorney to represent her. Although the panel majority agreed that the trial court should have disclosed the nature of the discussion to the plaintiff, it affirmed the judgment because it concluded that this mistake was harmless error.

Needless to say, Judge Rubin saw it differently. He thought the plaintiff had been prejudiced. The plaintiff’s entire case turned on her credibility, which her own lawyer had destroyed in a private meeting with the sole trier of fact. Even if there was no actual prejudice to what was evidently a rather weak case for the plaintiff, Judge Rubin felt that the very appearance of prejudice warranted a new trial. In concluding, he noted:

Judicial case management, avoidance of delay, and denial of unjustified continuances are all commendable. They are, however, only means to an end. That end is justice; justice done and perceived to be done. [I]t is not only [the plaintiff] who suffers from what was done here. The splendor of justice is tarnished.

In other words, process matters, even at the cost of a new trial where the outcome will probably not change.

For a final example, let us look at a case with far greater significance than the unusual circumstances of McDaniel, a case in which Judge Rubin’s views ultimately prevailed. In Edmonson v. Leesville Concrete Co., Judge Rubin wrote the decision for the panel, holding that in civil cases, attorneys could not use peremptory challenges to strike African-Americans from a jury. The Fifth Circuit, en banc, reversed, holding that Batson v. Kentucky was limited to criminal cases only. Judge Rubin dissented, contending that there was sufficient state action in the use of peremptory challenges in civil cases to warrant application of the Batson rule. Even if this would result in a more cumbersome procedure for civil cases, in Judge Rubin’s eyes, it was worth the price. Otherwise, “[b]y carrying out his duties in a way that permits peremptory challenges based on race, the . . . judge’s approval of discrimination rubs off onto society, corroding the national character by giving private

12. McDaniel, 770 F.2d at 1350 (majority opinion).
13. Id. at 1353 (Rubin, J., dissenting).
14. 860 F.2d 1308 (5th Cir. 1988).
15. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc).
prejudice the imprimatur of state approval."17 I am happy to report that this view ultimately prevailed when the Supreme Court reversed the en banc decision.18 Apparently, Judge Rubin’s position on the state action issue and his commentary on how the appearance that judges condone such racial discrimination would affect society helped sway a six-member majority to vote his way in the Supreme Court.19

Thus, in cases large and small, Judge Rubin understood that process has its own value, which a slavish adherence to cost-benefit analysis can mask. He undoubtedly would have agreed with Professor Tribe that judges can become “accomplices in illegality”20 if they allow process to be devalued.

B. Heeding the Effects of the Distribution of Power and Wealth

Professor Tribe next noted that the Supreme Court frequently ignored the distribution of power and wealth in making decisions concerning regulatory burdens placed upon the exercise of constitutional rights. He believed that members of the Court were much too accepting of the Chicago School of Economics’ world view, “where the inability to pay is a meaningless concept.”21 According to Professor Tribe, Chicago School adherents make the assumption that someone who has not “bought” X (in this case a constitutional right) just does not value X enough to give up other things in order to purchase it.22 In this portion of his lecture, Professor Tribe awarded the “Anatole France Award”

17. Edmondson, 895 F.2d at 233 (Rubin, J., dissenting). Later in his dissent, Judge Rubin stated: “Racial prejudice has no more place in the federal courtroom on the days the court is conducting a civil trial than it does on the days when the same judge, seated at the same bench, in the same courtroom, before the same American flag, is conducting a criminal trial.” Id. at 236.

18. Edmondson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991). Cost-benefit analysis was not put aside for the day, however. For example, in his majority opinion Justice Kennedy noted that “if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.” Id. at 2088. In dissent, Justice Scalia pointed out that there were other costs to the Court’s ruling—for example, making jury trials even more complex than they are already. Id. at 2095-96 (Scalia, J., dissenting). Thus, to some degree, the differences between the members of the Court just amounted to placing different values on the comparative costs and benefits of the competing rules; no one took the occasion to question the cost-benefit school of jurisprudence.

19. Justice Kennedy even took the trouble to write Judge Rubin a letter of appreciation for his powerful dissent in Edmondson, which helped Justice Kennedy see the need for a “morally persuasive voice that gives law its legitimacy and moral foundation.” Tony Mauro, Revelations off The Bench, The Recorder (S.F.), Sept. 15, 1992, at 8. Unfortunately, Judge Rubin died before the letter arrived in his chambers. Id.

20. Tribe, supra note 1, at 158.

21. Id. at 159.

22. Id.
to a case in which the Court held that denying financial aid to both poor and wealthy college students constituted equal treatment.\textsuperscript{23}

Where did Judge Rubin stand on this issue? Some opinions provide fairly strong hints that Judge Rubin did not care for the Chicago School approach to constitutional rights. For example, in \textit{Ruiz v. Estelle},\textsuperscript{24} he said:

Constitutional rights are not, of course, confined to those available at moderate costs. The very concept of federalism ... and the nature of the safeguards imposed by the Bill of Rights and the fourteenth amendment levy costs impossible for the accountant to calculate, but esteemed by us because they are literally priceless.\textsuperscript{25}

Perhaps the best example of Judge Rubin's views are contained in his opinion for a three-judge panel in \textit{Islamic Center of Mississippi, Inc. v. City of Starkville}.\textsuperscript{26} In \textit{Islamic Center}, an association of Muslim students attending Mississippi State University applied for permission to use a building near the campus as a mosque. The City of Starkville denied the application, citing its zoning ordinances and concerns for parking and traffic safety. The Center sued, contending that the City's denial of its application violated the civil rights of its members under the First and Fourteenth Amendments to the Constitution. After a bench trial, the district court found for the City. The district court noted that the City's ordinances neither “infringe[d] upon an individual's right or ability to turn toward Mecca and pray at the specified times during each day,” nor did they “preclude students from purchasing cars and driving to a worship site located in [another zoning] district or walking to a site located ... outside the Starkville city limits.”\textsuperscript{27}

To Judge Rubin, these findings also deserved a nomination for the coveted award:

The suggestion is reminiscent of Anatole France's comment on the majestic equality of the law that forbids all men, the

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\item \textsuperscript{23} Id. at 160-61 (citing Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 104 S. Ct. 3348 (1984)) (upholding regulations that withheld federal financial aid from students who did not certify they had registered for the military draft).
\item \textsuperscript{24} 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S. Ct. 1438 (1983).
\item \textsuperscript{25} Id. at 1146. Judge Rubin went on to note immediately after this quotation that remedies imposing great cost on a state (here involving the administration of the entire Texas prison system) should not be ordered unless the constitutional need had been demonstrated. Id.
\item \textsuperscript{26} 840 F.2d 293 (5th Cir. 1988). This was the first federal appellate decision to find any municipal zoning in violation of the free exercise clause of the First Amendment. See Richard J. Roddewig, Recent Developments in Land Use, Planning and Zoning, 21 Urb. Law. 769, 808 (1989).
\item \textsuperscript{27} Id. at 298.
\end{itemize}
IN MEMORIAM: ALVIN B. RUBIN

Rich as well as the poor, to sleep under bridges, to beg in the streets, and to steal bread. Laws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor, a class that includes many students. And a city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere. By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.  

I do not think that anyone would accuse Judge Rubin of ignoring the fact that there are times when facially neutral regulations can have a discriminatory impact on the exercise of constitutional rights by the poor.

C. Avoiding Fixation on the Tangible

In a portion of his lecture, Professor Tribe called attention to the fact that the Supreme Court's approach led to "a fixation on the tangible, visible impacts of challenged governmental practices, to the exclusion of such relative intangibles as the comparative status or dignity of distinct groups in society." Judge Rubin responded as follows to the district judge's argument that the City had not infringed on the students' rights:

We can understand Judge Rubin's perspective on this by looking further at Islamic Center. Judge Rubin responded as follows to the district judge's argument that the City had not infringed on the students'

28. Id. at 298-99.
29. Tribe, supra note 1, at 161.
32. The display was described as one typical for Christmas-time: besides the "traditional" creche scene depicting the birth of Jesus Christ, included were Santa Claus' house, carolers, a Christmas tree, colored lights, a sign saying "Season's Greetings" and perhaps more unusually, cutout figures of a clown, a teddy bear, and an elephant. Lynch, 465 U.S. at 671, 104 S. Ct. at 1358.
33. Tribe, supra note 1, at 161-62.
free exercise of religion because they could always pray on their own:

The assembly of a community of believers is an integral part of most religious faiths, certainly of the Muslim. The assembly of those bound by common beliefs and observances not only serves to create a sense of community among the members through the shared expression of their beliefs, it also communicates to outsiders the church's identity as a group devoted to a common ideal. By group worship, each worshipper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression. Ritual preserves, evidences, and perpetuates faith. If government exercises its power to affect group worship, it must demonstrate at least that the burden imposed serves an important government purpose and also that this purpose could not be accompanied by a means less burdensome to the exercise of religion.34

Although Professor Tribe never makes the point in quite this fashion, I think that he was referring to the fact that an all-Christian Supreme Court saw nothing wrong with condoning the Christian (i.e., the religious establishment) practices that were at issue in Marsh and Lynch.35 As members of that establishment, the Court found it difficult to truly appreciate how these symbols would be interpreted by people who were not. In contrast, what I see resonating in Islamic Center are the experiences of Judge Rubin, who spent virtually his entire life as a Jew in overwhelmingly Christian areas of Louisiana. Surely this gave him the perspective to fully appreciate the plight of the Muslim students who were living in a small city in neighboring Mississippi, which had over two dozen places of Christian worship but just could not make

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34. Islamic Center of Miss., Inc. v. City of Starkville, 840 F.2d 293, 300 (5th Cir. 1988). At a later point in the opinion, he added:
While lines must be drawn at some point, and, when traffic is congested, a few more cars may aggravate a bad situation, just as a final straw may break a camel's back, the City has advanced no rational basis other than neighborhood opposition to show why the exception granted all other religious centers was denied the Islamic Center. As the Supreme Court observed in City of Cleburne v. Cleburne Living Center, [473 U.S. 432, 447-49, 105 S. Ct. 3249, 3259 (1985)] an equal protection case, neighbors' negative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis for treating a home for the mentally retarded differently from other group or multi-unit housing institutions. There is even less justification for differentiating between familiar and unfamiliar religions.

Id. at 302.

35. The closest Professor Tribe came is when he observed: “When the government dons a cloak of religious sanctity and points to its opponents to suggest that they are unreligious, the cloak is least likely to be visible, much less objectionable, to those who wear the same colors.” Tribe, supra note 1, at 162.
room for a tiny group practicing another faith. As an active member of Jewish institutions wherever he lived in Louisiana, Judge Rubin knew well the messages that such establishments send to members of the religious group, as well as to the community at large, about the identity of the group. Probably more than most federal judges, he understood that under the cover of neutral governmental purposes, insiders could easily send a message to outsiders that they were not full members of the community.

D. Avoiding the Tyranny of Small Decisions

Professor Tribe used his fourth sin—inviting the tyranny of small decisions—to describe those who would “look down at their feet to figure out how far they’ve gone and where they’re heading.” As an example of this sin, Professor Tribe pointed again to Lynch, which he thought the Court had analyzed as being only marginally different from Marsh, and therefore just one more acceptably small step down the road. Professor Tribe used this and other examples to demonstrate that a series of small decisions could lead to tyranny when the Court failed to periodically take stock of how these decisions affected “what sort of society we are and what sort . . . we would like to become.”

Within the confined universe of his civil rights opinions, I could not find a perfect exemplar of Judge Rubin’s expressly avoiding the tyranny of small decisions. However, at least two opinions from this group indicate that Judge Rubin knew to look up and see where he was heading. First, in Patsy v. Florida International University, Judge Rubin dissented from an en banc decision holding that claimants under 42 U.S.C. § 1983 were required to resort to the exhaustion of administrative remedies before entering federal court. Judge Rubin noted that the majority looked for hints and emanations from Supreme Court opinions that the rule could be changed. In his view, however, the small steps that some members of the Supreme Court may have made should

36. See also Munn v. Algee, 924 F.2d 568 (5th Cir.), cert. denied, 112 S. Ct. 277 (1991). In Munn, the plaintiffs, who were African-American Jehovah’s Witnesses, charged that the trial court improperly allowed the defendant to question one of the plaintiffs about practices of Jehovah’s Witnesses that were unrelated to the case, which was an action for wrongful death. The Fifth Circuit held that this was harmless error. Judge Rubin, dissenting, stated, “I . . . see no way that a reviewing court could be ‘sure’—other than by substituting its own views for those of the jury or by inventing some post-hoc rationalization for the verdict—that [defendant’s] appeal to the jury’s religious prejudice and nationalism ‘had but slight effect’ on the verdict.” Id. at 583.

37. Tribe, supra note 1, at 162.

38. Id. at 165.


40. Patsy, 634 F.2d at 914 (Rubin, J., dissenting).
not have tempted the Fifth Circuit to take another, which would alter a congressionally-made policy judgment. He did not think it appropriate for the circuit court to second guess the legislative judgment that federal courts were "likely to provide a civil rights plaintiff with the swiftest, least costly, and most reliable remedy, and that the litigant should have access to these portals without first passing through state administrative antechambers." The Supreme Court unanimously agreed with Judge Rubin that in following small steps to a new rule, the en banc majority had left behind the salutary congressionally-sanctioned purposes of 42 U.S.C. § 1983.42

In a second example, Judge Rubin refused to be led by a defendant in step-wise fashion to a conclusion at odds with congressional policy. In *Gary W. v. Louisiana*,43 the state defendants sought relief from Judge Rubin's award of substantial attorney's fees to the plaintiffs, who had successfully represented a class of retarded Louisiana children, obtaining sweeping institutional relief for the class. Judge Rubin rejected the defendants' contentions that the attorney's fee award was not enforceable under Rules 69 or 70 of the Federal Rules of Civil Procedure. He rejected the defendants' "delicately wrought chain of apparent logic" because it "would have the court read the Federal Rules of Civil Procedure in such a fashion as to permit Louisiana or any other state to ignore a federal judgment against it." He clearly saw that the step-by-step process the state defendants urged would avoid implementation of a congressional mandate to strengthen the protection of individual rights under the Fourteenth Amendment of the Constitution. Judge Rubin did not accept the invitation to look at his feet. He watched where he was headed.

E. Incorporating the Constitutive Dimension of Governmental Action

The fifth sin—overlooking the constitutive dimension of governmental action—refers to the perspective of thinking about challenged actions only in terms of demonstrable effects on the world to the exclusion of what those decisions "say about who and what we are as a people and how they help to constitute us as a nation."44 In Professor Tribe's view, one reason the cost/benefit approach is inappropriate to judging is that there is no set schedule of values to consult. Constitutional decisions themselves set and alter the scale of society's values. "When

41. Id. at 916 (Rubin, J., dissenting).
44. Id. at 1125.
45. Tribe, supra note 1, at 165 (emphasis in original).
constitutional decisions are made, those decisions make a statement to the country about what counts as a cost and what counts as a benefit, about what we regard as a good and what we regard as an evil." Professor Tribe illustrated his thesis with a discussion of the criticisms of the exclusionary rule and the efficacy of alternative means of deterring illegal police conduct. However, for Professor Tribe, the "real issue" is "[d]o we want openly and visibly to pay the price for our fourth amendment . . . [o]r do we want to push it under the rug?" If we "push it under the rug," what does that say about what kind of society we are?

To illustrate the virtue of incorporating the constitutive dimension into judging, I think the best examples come from Judge Rubin's opinions and actions in the sub-category of civil rights cases known as institutional reform litigation. For it is here that it is particularly easy to see Judge Rubin's awareness of the constitutive dimension of governmental actions. Four cases deserve special attention: *Holland v. Donelon*, *Gary W. v. Louisiana*, *Jones v. Diamond*, and *Ruiz v. Estelle*.

*Holland v. Donelon*, brought on behalf of prisoners confined in the Jefferson Parish, Louisiana jail, was a fairly early example of a

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46. Id. at 166.
47. Id. at 167. Without going into unnecessary detail here, Professor Tribe developed the thesis that in the exclusionary rule cases, the Court was implicitly saying that members of our society preferred to be deceived about the true cost of enforcement of constitutional protections instead of confronting the choices openly and deciding whether to pay the price.
48. Institutional reform litigation attempts to invoke the equitable powers of the court to achieve broad-scale reform of public institutions such as prisons, public schools, and mental hospitals. See generally sources cited in David Schoenbrod et al., Remedies: Public and Private (chaps. 1 & 4) (1990).
51. 636 F.2d 1364 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950, 102 S. Ct. 27 (1981). The focus of *Jones* was the conditions in the jail run by Jackson County, Mississippi.
52. 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S. Ct. 1438 (1983). *Ruiz* was a class action filed on behalf of the over 33,000 inmates confined in
suit challenging conditions in and practices of a local jail. When assigned the case, Judge Rubin found an overcrowded jail with intolerable conditions. He found that hardened criminals were often put in cells with youthful first offenders or those merely charged with crimes. Mentally disturbed prisoners were held in that same facility as well. Some cells contained over twenty people, with inadequate floor and sleeping space, while some prisoners had to sleep with neither mattresses nor blankets. Several of the jail practices fostered racial discrimination and segregation.\(^4\) A later opinion focused on inadequacies in health, medical, sanitation, and exercise facilities in the jail.\(^5\)

In their case study of the implementation of *Holland*, Harris and Spiller reported that Judge Rubin achieved reform despite the difficult context within which he had to work. They noted that he faced public apathy toward the parish jail and prisoners in general, defendants who were unfriendly to the lawsuit, a fragmented local government structure with uncertain lines of responsibility, and tremendous personal rancor between the parties.\(^6\)

The case study of Judge Rubin’s work provides a textbook example of how, despite such formidable problems, federal judges can use the tools available to achieve meaningful institutional reform. Early on, he appointed a special master to assist in shaping the relief and in monitoring compliance.\(^7\) He selected someone whom the sheriff had recommended to serve as the special master.\(^8\) As was appropriate, Judge Rubin involved the defendants in shaping the order that would apply to them.\(^9\) He was careful to make clear that he was relying on the recommendations of the person the sheriff had wanted or upon the specific command of federal or Louisiana law.\(^10\) The relief ordered was

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 institutions operated by the Texas Department of Corrections. It was "the most comprehensive civil action suit in correctional law history." Ben M. Crouch and James W. Marguart, *An Appeal to Justice: Litigated Reform of Texas Prisons* 2 (1989).


\(^{54}\) M. Harris and D. Spiller, supra note 49, at 148-49.


\(^{56}\) Id. at 179-80.


\(^{59}\) M. Harris and D. Spiller, supra note 49, at 187. Harris and Spiller note that involving the defendants in shaping the relief was helpful but was not "a guarantee of ease in attaining compliance." Id. at 188.

\(^{60}\) Id. at 187.
specific about the ends that the defendants had to achieve, rather than the means, and was narrowly focused on the deficiencies identified in the course of the suit. 61

In order to achieve actual compliance with his orders, Judge Rubin relied on a number of enforcement tools. In addition to relying on the plaintiffs and their attorneys to serve as compliance monitors, he used the special master, who was also a United States Magistrate, for this function. The master's frequent and unannounced visits to the jail were an important stimulus for compliance. The judge also required compliance reports and set deadlines for action, which the plaintiffs could use as the basis for filing motions for additional relief. An escalating series of responses and sanctions were used to ensure compliance.

As reported by Harris and Spiller, the Holland suit led directly to substantial change in the conditions in the Jefferson Parish jail. Basic conditions and treatment of prisoners improved. For example, a max-

61. Id. at 186-88. Harris and Spiller discuss in some detail the importance of this type of specificity:

The relief granted reflected [Judge Rubin's] philosophy about the proper role of courts. The judge reported that he was not a great believer in government by judges and that he would prefer the courts have a lesser degree of responsibility for social change.... Such views undoubtedly contributed to the form that the relief took in Holland. Given defendants who were not known for their receptivity to outside intervention, specificity may have been necessary for obtaining compliance.... The relief in Holland was clear and unambiguous. This proved to be helpful in holding defendants to their responsibilities.... Most of the obligations imposed were of a nature that a simple assessment could be made of whether or not they had been, or were being fulfilled.... The nature of the orders... did contribute to a belief that the judge was committed to achievement of compliance and to standards for measuring it. In the long run, this approach paid off in substantial compliance with the letter of the orders.

62. Id. at 190-92.
63. Id. at 192-95. The jail staff complied with the special master's "requests" because of the fear that he was acting "en loco Rubin." Id. at 194. The master wielded great influence as a result of the judge's tacit support combined with his "inspector general" style of demanding full compliance with the judge's orders and the credibility he enjoyed with the defendants due to the fact that "he did not appear to be a bleeding heart" (Judge Rubin's words). Id. at 194-95.
64. Id. at 195-97.
65. For example, the judge started with an informal Saturday morning meeting with the entire parish council to make clear that he expected that there would be compliance with his order and that they could be held responsible for any failures. Id. at 197-98. Later, he used warnings, rebukes and finally an award of attorney's fees as a sanction for failure to comply with the orders. Holland v. Donelon, 3 Prison L. Rep. 288, 291 (E.D. La. 1974) (awarding fees as sanction). As one of the defense attorneys told Harris and Spiller, "you don't mess around with Judge Rubin's orders." M. Harris and D. Spiller, supra note 49, at 201.
imum limit on the jail population substantially improved prisoner safety and comfort. Sanitation and medical care were enhanced.66 There were indirect benefits as well. A release-on-recognizance program was revised to increase the number of eligible arrestees. Parish trial judges expedited trials to reduce jail time. The district attorney's office implemented a program that allowed assistant district attorneys to handle minor cases without requiring defendants to be jailed as part of the standard booking process. The lawsuit enhanced the visibility of the jail, making parish officials more aware of their responsibilities toward the jail. The parish council made more money available for the jail, and the voters passed a bond issue to build a new jail, which had been rejected in the past.67 All parties concerned agreed that Judge Rubin’s determined efforts led to an improved quality of life for the prisoners and a new level of concern for the parish jail among citizens and parish officials.68

The constitutive element of the *Holland* case is fairly obvious. Although the Harris and Spiller report does not go into detail on this matter, Judge Rubin was requiring Jefferson Parish to live up to its obligations to treat its prisoners in constitutionally minimal ways at a time when this was a fairly new concept.69 To have backed down at any stage of this case, which was a fairly early example of federal intervention into the traditionally local and sacrosanct function of jail administration, would have been a signal that the courts were not serious about enforcing compliance with their orders. Implicitly, the judge's message to the citizens of the parish was that they must be willing to pay the costs of having a jail run according to minimum federal and state standards. Judge Rubin was saying that our society treats everyone, even prisoners, with minimum human decency.

*Gary W. v. Louisiana*70 is a more well-known case where Judge Rubin made clear that the constitutive element was important to his

66. M. Harris and D. Spiller, supra note 49, at 204.
67. Id. at 204-09. The authors point out that some of the people they interviewed for their report noted that the suit indirectly had certain negative impacts as well. (There were no negative effects reported as being a direct result of any of Judge Rubin's orders.) Desegregation may have led to more prisoner-on-prisoner violence. Prisoners who were transferred to other facilities in order to keep the jail within the maximum population limits may have been sent to facilities that were even worse. Judges may have become reluctant to sentence appropriately for fear of overcrowding the jail. Jail personnel resented the implication that they were uncaring and were personally responsible for the deplorable conditions in the facility. Id. at 209-11.
68. Id. at 212-13. Of course, this constitutional minimum did not turn the jail into Shangri-la. As one plaintiff's attorney said, "It's still pretty rotten in there." Id. at 211.
69. E.g., see id. at 4 (describing previous attitude of federal courts as viewing prisoners as slaves of the state) and 179 (at time *Holland* was filed, there was little public understanding of the legal precedents being developed on the rights of prison inmates).
decision-making as a district judge. Gary W. represented a class of plaintiffs comprised of children from Louisiana who had been placed in institutions\(^7\) located in Texas (due to the lack of sufficient facilities in Louisiana) either at the direction of the State of Louisiana or with its financial support.\(^7\) The plaintiffs sought their return to Louisiana and the treatment due them under federal law.\(^7\)

Because of their severe and chronic conditions, for many of these children, in some sense, it was an act of mercy for them (and for their families) to be given state-sponsored custodial care. Judge Rubin noted that, nevertheless, the state could not offer institutional confinement unless it considered means "capable of achieving its purposes in ways that are least stifling to personal liberty, and it must offer a therapeutic consideration, 'a quid pro quo, for the deprivation.'"\(^7\) As in Holland, Judge Rubin wrote an order that tried to achieve several goals at once. While affording significant relief to the aggrieved children was the primary goal, Judge Rubin was careful not to impose more upon the state defendants than he felt the Constitution required. He also wanted to create a manageable decree.\(^7\)

71. The children were institutionalized for a variety of reasons: some were abandoned by their parents, some were delinquent, others were emotionally disturbed, mentally retarded and/or physically handicapped. Id. at 1213.

72. At the time the plaintiffs brought the case, there was really only one other like it in the country. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), enforced 344 F. Supp. 373 (M.D. Ala. 1972), modified sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). See Note, The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change, 84 Yale L.J. 1338 (1975). Gary W. was even more complex than Wyatt because the latter dealt with only one kind of person, mentally retarded adults. "The individual variations within that group [in Wyatt] may be great but they do not approach the differences in the various children who comprise the plaintiff class." Gary W., 437 F. Supp. at 1219.


74. Id. at 1217. However, Judge Rubin noted that under the Constitution, he could only impose a floor. "[T]he constitutional right to some quid pro quo does not imply a right to the best treatment available, any more than the right to counsel means the right to the nation's foremost trial lawyer. ... The quid pro quo the state must provide is treatment based on expert advice reasonably designed to affect [sic] the purposes of state action." Id. at 1217-18 (emphasis in original).

In a later section of the opinion, Judge Rubin took care to demonstrate that his order fit within the Supreme Court's opinion in O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486 (1975), which had pointedly neither endorsed nor rejected the quid pro quo thesis. "After full restudy of O'Connor ... I have concluded that the requirements imposed on the State are exacted by the constitutional rights of the plaintiff children, even if ... the confinement of the ... children ... is based on the State's historic role as parens patriae." Gary W., 437 F. Supp. at 1222.

75. In general, the Court has tried to avoid ordering the parties to comply with an order that would have the infinite detail of a set of engineering specifications. It has attempted to write guidelines that would prevent child
Despite his concern for not overstepping his constitutional authority and intruding unnecessarily into the state's affairs, Judge Rubin understood that in *Gary W.* he was making a statement about society's priorities:

No compassionate human being could fail to be moved by the plight of the children who are plaintiffs. Nor can that tragedy be viewed in isolation as the child's alone. For in many instances, the child's family is wrenched by the calamity. There is interaction between family and child, child and family, so intricately entwined that the family's disorder heightens the child's, and the child's plight rends the family. Unable to care for the child, parents are willing, sometimes eager, to have the child placed elsewhere if only to obtain the adequate custodial care that they can no longer manage to provide.  

In an echo of Professor Tribe's rejection of pushing problems "under the rug," Judge Rubin noted that it had long been thought improper to hide away deformed or inferior children. *Gary W.* clearly says that

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abuse and assure good treatment for children without writing an order that would require infinite precautions against spectral perils and without enmeshing treatment personnel in a bureaucracy. The children affected by this order will each have treatment plans; they will each be in a therapeutic institution; the institution and the child's plan will be subject to periodic review. *Gary W.*, 437 F. Supp. at 1223.

The order rejected two of the plaintiffs' main aims: (a) A ruling that the "least restrictive alternative" standard be interpreted to mean "the kind of treatment that is both nearest the home and imposes the least of all possible restrictions on the child's freedom." Id. at 1215; and (b) a ruling that the children must be treated in Louisiana. Id. at 1216. Judge Rubin concluded that although the plaintiffs had presented "what is presently known concerning the most desirable ways to treat children," id. at 1218, he could not "incorporate judicial sentiments, however noble" into "inexorable bonds" upon the state officials charged with caring for the children. Id. at 1219. He also rejected the contention that the children had to be treated in Louisiana as a matter of federal law. Although he required that they be returned to Louisiana for preparation of their individual treatment plans, he adopted the defendants' suggestion that the children be cared for in "the best available environment," wherever that may be for the individual child. Id. at 1220. Flatly requiring all the children to be treated in Louisiana would lead to "dumping" them because of the lack of sufficient facilities within the state. Id.

In the order, Judge Rubin, also considered but did not appoint a special master. Id. at 1225. At a later date, after the case was transferred to another judge when Judge Rubin was appointed to the Fifth Circuit, a special master was appointed because of the state's foot-dragging in implementing the ordered relief. See *Gary W.* v. Louisiana, 601 F.2d 240 (5th Cir. 1979) (affirming appointment of special master); Murray Levine, The Role of Special Master in Institutional Reform Litigation: A Case Study, 8 Law & Policy 275, 316-17 nn. 24-25 (1986) (some discussion of work of special master in *Gary W.*).


77. "For the welfare of his Ideal Commonwealth, Plato suggested a law
as a society we need to forthrightly confront the problems of these children and their families, and to pay the price the Constitution imposes for treating these citizens with decency.

Once he was appointed to the Fifth Circuit, Judge Rubin did not abandon the constitutive element in his decision-making. His appellate institutional reform opinions show the same concerns he expressed in Holland and Gary W.

*Jones v. Diamond* was initiated as a class action brought on behalf of prisoners confined in the jail operated by Jackson County, Mississippi. The prisoners contended that conditions and practices in the jail violated their constitutional rights in a number of respects. After the trial court made findings that were generally favorable to the county officials, the prisoner-plaintiffs appealed. As with the prior opinions, Judge Rubin clearly understood that the federal judicial role was to protect the constitutional rights of the prisoners without unduly interfering with local management of the prison.79 Speaking for the en banc majority, Judge Rubin found that despite the lower court's findings, there had been a number of constitutional violations, including segregated facilities, cruel and unusual punishment due to inadequate and overcrowded facilities, as well as exposure to violence and disease from other prisoners, improper treatment of pre-trial detainees, due process violations with respect to the imposition of discipline, and infringement of First Amendment rights.80 The majority opinion ordered injunctive relief in certain instances and further proceedings in the district court to resolve other issues, including fixing the award of attorneys and expert witness fees to the plaintiffs.

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78. 636 F.2d 1364 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950, 102 S. Ct. 27 (1981).
79. Judges are neither correctional officers nor penologists. Even if we had the expertise to analyze the practical and theoretical implications of the conditions of incarceration, we would have no warrant to impose our views, for a legislature—state or federal—is not required by the Constitution to operate penal institutions in accordance with criminological doctrine or to employ only experts in management. . . .
80. Id. at 1373-75.
The dissent, signed by ten of the twenty-four judges on the court, contended that Judge Rubin's opinion for the en banc majority had stretched the appellate role in three significant ways: (a) The dissent charged that Judge Rubin had retried the case at the appellate level;\(^8\) (b) it contended that the majority ignored the change in conditions created by the fact that a new jail had been built since the suit had been filed and that in other significant respects, there was no reason to believe that there was an "attitude of indifference for the welfare of prisoners" in Jackson County;\(^2\) and (c) the dissent also contended that the majority had legislated by awarding expert witness fees despite congressional silence on the subject.\(^3\).

Let us assume for the moment that in the privacy of his chambers, or perhaps at a corner table at Mother's Restaurant eating a dressed po' boy, Judge Rubin would have had to plead guilty as charged.\(^4\)

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81. In over fifteen years this is the first time, that I can recall, in which the Court makes its own credibility choices and findings of fact. . . .

The Court is obviously well aware of what it is doing when it repudiates the findings of the District Court, made on conflicting evidence, after that Court had seen and heard the witnesses.

Id. at 1387 (Coleman, J., dissenting).

82. Id. at 1385-86.

83. There is no doubt that Congress could, and may yet, legislate on the subject of expert witness fees in civil cases, just as it has on the subject of attorneys fees, but the inescapable fact is that it has not done so. That is immaterial, I suppose, for the Court now does so.

Id. at 1391.

84. (a) With respect to the charge of appellate fact-finding, Judge Rubin first noted that the trial court's findings were clearly erroneous in many respects, both in regard to conditions at the time the suit was commenced and when it was actually tried four years later. Id. at 1370. He wrote an extensive section labeled "Facts" on the basis of testimony and defendants' answers to interrogatories which Judge Rubin believed warranted a number of conclusions about the jail conditions when the suit was commenced. Id. at 1371-73. The dissent believed that "[w]hat we have here is the classical situation of experts and other witnesses testifying on opposite sides of a case and contradicting one another on the witness stand." Id. at 1389. Without careful investigation of the record, it is impossible to predict whether the Supreme Court would have agreed with Judge Rubin that the trial court's findings were clearly erroneous. E.g., Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511 (1985) ("Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.").

(b) Despite the improvements due to the construction of the new jail, [t]he provision of a new and sanitary building does not assure that it will be operated in a constitutional way, . . .

Because nothing in the record provides any comfort to the plaintiff class or any assurance to this court that the results of the almost seven-year litigation will not be lost and the wrongs of the past will not be recommitted, we deem the issuance of an injunction necessary.

Jones v. Diamond, 636 F.2d 1364, 1375 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950, 102 S. Ct. 27 (1981). Although it was hardly clear at the time Jones was written,
Why would he (along with thirteen other judges) break the normal bounds of the appellate role in this case? I believe this is a case where the en banc majority agreed with Judge Rubin's strong desire to see that constitutional minimums would be maintained even if the price to be paid was a stretching of the appellate role. Determining that the trial court's factual findings were clearly erroneous is fairly unusual; without saying so expressly, I think Judge Rubin was concerned about what would happen if the appellate court did not take a strong hand in guiding the district court's actions. He clearly lacked confidence in the defendants' ability to follow the demands of the Constitution; it seems he also had some doubts about the trial court's ability to do the same. In other words, the constitutive value of the case—the treatment of prisoners according to the constitutional minimums—was more important than some of the traditional niceties of appellate deference.

_Ruiz v. Estelle_ provides an interesting contrast to _Jones_. _Ruiz_, decided in the year following _Jones_, was also a class action brought on...
behalf of prisoners. Rather than challenging the operation of one jail, however, Ruiz was brought on behalf of the tens of thousands of inmates confined in the twenty-two institutions operated by the Texas Department of Corrections (TDC). Like Jones, the suit contended that the conditions of confinement violated the United States Constitution in a number of respects. Unlike the prior case, however, where the overriding issue was whether the trial court had not gone far enough to protect the class of prisoner-plaintiffs, the major question in Ruiz was whether the trial court had gone too far in the other direction.

With respect to the conduct of the trial and findings of fact, Judge Rubin's opinion for a unanimous panel gave the trial court substantial benefit of the doubt and affirmed its factual findings. In turning to a review of the relief ordered, Judge Rubin was not so indulgent. There were two reasons for this. First, subsequent to the district court’s order, the Supreme Court had held that double-ceiling prisoners was not unconstitutional per se. In light of Rhodes, it turned out that "the district court adopted some remedies that are not essential for the elimination of unconstitutional prison conditions." Second, Judge Rubin applied standards equivalent to those he had set for himself in Holland and Gary W. to measure the relief ordered by the district court in Ruiz.

88. Id. at 1126.
89. Judge Rubin framed the issue in similar terms to his handling of Holland and Gary W. as a district court judge:
We are required to determine whether the district court correctly found that the conditions of confinement in TDC violate the Constitution and, if so, whether the remedy imposed went beyond the correction of constitutional deficiencies and intruded unduly on the state's management of its prison system or enmeshed the court in the details of prison management.
Ruiz, 679 F.2d at 1126.
90. For example, Judge Rubin spent a substantial amount of time refuting the defense's contention that the "entire record is permeated with favoritism" toward the plaintiffs in the conduct of the trial, id. at 1129, and the contention that the district court failed to make sufficiently specific findings of fact, id. at 1132-33. In contrast to his conclusory finding in Jones that the trial court had made clearly erroneous findings of fact, in Ruiz, Judge Rubin meticulously reviewed the findings of fact in the opinion and concluded that they were not clearly erroneous. Id. at 1140-42.
92. Ruiz, 679 F.2d at 1145.
93. It appears desirable, therefore, first to undertake measures that will not be both costly and irreversible. If these measures do not work, then additional ones may be necessary. This "wait and see" approach ensures that the intrusion into state processes will be no greater than that required to achieve compliance with the Constitution.
He meticulously reviewed the provisions of the decree under these standards, affirming many of the provisions\textsuperscript{94} and trimming others.\textsuperscript{95}

After his careful review of a very complex order, Judge Rubin concluded his opinion by reminding the parties of the constitutive dimension of what they were all doing:

The Federal Constitution is a charter for all officials, federal and state. All those who wield the power of the sovereign must be equally obedient to its commands and faithful in ensuring its protections. They take the same oath we do—to uphold and defend it.

... The implementation of the district court's decree can become a ceaseless guerilla war, with endless hearings, opinions and appeals, and incalculable costs. But it is instead to be hoped that, if the state adopts the policy that inmates must be accorded their constitutional rights and that prison officials will not be permitted to indulge in petty practices designed to deny those rights, the period of judicial supervision can more speedily be concluded. ... [C]onstitutional peace is the consummation devoutly to be wished ... .\textsuperscript{96}

\textsuperscript{94} See id. at 1164 (listing provisions of decree that were affirmed by the panel).

\textsuperscript{95} Although this opinion is too extensive to review in detail all the changes the panel ordered, one example will suffice for the purposes of this article. Judge Rubin's opinion for the panel vacated the requirement that the TDC provide inmates with hospital facilities meeting the standards of the Joint Commission on Accreditation of Hospitals. Judge Rubin pointed out that many hospitals in the country do not meet these standards: "Literally millions of persons receiving private medical care are being treated in hospitals that do not meet the requirements imposed by the district court's decree." Id. at 1150. For inmates, the Supreme Court had determined that the Constitution "prohibits only 'deliberate indifference to serious medical needs.'" Id. at 1149 (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976)). Judge Rubin ordered the district court to limit relief to requiring the TDC to "provide the minimum level of hospital care required by the Constitution." Id. at 1150.

\textsuperscript{96} Id. at 1163. For discussion of the implementation of the \textit{Ruiz} decree, see Ben
Here again in *Ruiz*, it is quite clear what Judge Rubin thought society should regard as a good and what it should regard as an evil. Although throughout *Ruiz* he showed respect for the values of state autonomy and judicial reluctance to become involved in institutional administration, Judge Rubin also made clear that we should not permit those abstractions to allow us to tolerate unconstitutional conditions of confinement.

**F. Taking Responsibility for Choice**

Professor Tribe's sixth sin—abdicating responsibility for choice—refers to the "comforting illusion of inexorability" that comes from putting too much faith in technical expertise, cost-benefit analysis, or any other "fundamental faith" of judging. Professor Tribe illustrated this sin in bi-partisan fashion by examining abortion decisions from the left and right of the political spectrum. Within the limitations of the specific task I have taken on at the behest of the organizers of this special law review issue, I found it difficult to find pristine examples of Judge Rubin taking responsibility for choices he made. There are, however, strong hints that can be derived from several opinions.

For example, in *Alizadeh v. Safeway Stores, Inc.*, Judge Rubin had to decide whether a white female married to an Iranian national could state a claim for racial discrimination under 42 U.S.C. § 1981, on the basis that her husband was considered to be a member of a race other than white. Reversing the district court on this point, Judge Rubin decided that she could make such a claim, even though "[a]nthropologists classify Iranians as Caucasians." Rather than hide behind the experts, he felt that such a "taxonomical definition of race"...
was inconsistent with the statutory rationale and the Supreme Court's precedent.102

There are also examples in cases that we have already examined. In *Gary W. v. Louisiana*, Judge Rubin refused to bow to the technical expertise of the plaintiff's witnesses in deciding how the state had to treat the children entrusted to its care.103 The jail and prison cases certainly reject the idea that the technical expertise of the jailers deserved complete deference.

A final example serves to make the same point in a different context. In *Hill v. Mississippi State Employment Service*,104 a black woman who sought job referrals from the defendant alleged racial discrimination. The trial court found in favor of the defendant; the panel majority affirmed on the basis that it was not clearly erroneous for the court below to find that the plaintiff had failed to prove discrimination under either the disparate treatment or disparate analysis standards.105 The majority believed that it was forced to accept the defendant's excuse that "general inefficiency" was the reason for the apparent discrimination against the plaintiff.106 Judge Rubin was not willing to acquiesce in such an abdication of responsibility. In dissent, he rejected the idea that the defendants could rebut a prima facie case of racial discrimination by using the inefficiency of its employees in a very bureaucratic system as a legitimate excuse:

The allegedly inefficient, regulation-hamstrung, overworked employees whom it has hired and through whom it functions are the MSES [Mississippi State Employment Service]. It may not wash its hands of the spots . . . by which their actions have stained the MSES. Indeed were its employees merely inefficient, their actions would not have resulted in racial discrimination,

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102. Id. at 115.
103. [J]ust as "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," it does not codify current psychological theories concerning child development or the treatment of the retarded. . . .
   . . . Even though the constitution's precepts are evolutionary, it is after all a constitution, and not a textbook that can be revised periodically.
104. 918 F.2d 1233 (5th Cir. 1990), cert. denied, 112 S. Ct. 188 (1991).
105. Id. at 1234.
106. If in truth an agency's or employer's verified, detailed and documented inefficiency, absent any discriminatory animus, accounts for results that nonetheless appear at first glance to be the product of discrimination, it would be the height of unfairness to infer fallaciously such a discriminatory animus. We do not mean to condone inefficiency; we simply cannot punish it under Title VII.
   Id. at 1239-40.
for inefficiency would function as much to hamper white as minority applicants in seeking jobs.\textsuperscript{107}

Judge Rubin was not willing to abdicate responsibility for his decision by allowing the defendants to hide behind such a pretext—here, technical \textit{inexpertise}.\textsuperscript{108}

To be fair, there are other cases I could review that would show Judge Rubin reaching decisions that he might not agree with privately because he felt bound by precedent and the rules of judging, especially appellate judging.\textsuperscript{109} There are any number of examples of cases where he denied civil rights claims despite some uncomfortable facts, because he felt bound by the law.\textsuperscript{110} Is this abdicating responsibility for choice?

I do not think so. To a great degree, this is a key element of judging. One who takes the oath of office as a judge in the United States court system must adhere to certain understandings that make our version of the common law system operate—the need to accept legislative and executive superiority in their appropriate realms, the dual sovereignty inherent in our federal system, the role of precedent and the need for predictability, the hierarchy of courts (including rules that do not permit one panel of the circuit to overrule the holding of another), and the application of valid procedural rules, such as the clearly erroneous rule. Undoubtedly, there is a point where adhering to role becomes an inappropriate abdication of responsibility,\textsuperscript{111} but one must strive to stay within the role in order for the system to function.\textsuperscript{112}

\textsuperscript{107} Id. at 1241 (Rubin, J., dissenting) (emphasis in original).

\textsuperscript{108} See id. at 1244 ("The need for efficiency constitutes a defense in disparate-treatment cases. It would be ironic if the employer's claim of its own inefficiency also served as a defense.") (Rubin, J., dissenting).


\textsuperscript{110} E.g., \textit{White v. Walker}, 932 F.2d 1136, opinion on reh'g, 950 F.2d 972 (5th Cir. 1991) (no cause of action under Mississippi law where teenager committed suicide less than one hour after being taken improperly into police custody); \textit{Fulford v. King}, 692 F.2d 11 (5th Cir. 1982) (prison policy requiring certain prisoners to wear a device over their handcuffs on trips outside the prison did not constitute cruel and unusual punishment even when device caused numbness and temporary marks).

\textsuperscript{111} The judge whose decisions are entirely predictable is one who is not influenced by changing events, by reading briefs, by considering the arguments on both sides of a dispute, by thinking carefully about an issue with the knowledge that real people will be affected by his decision, or by the craftsman's need to explain that decision.

Rubin, supra note 109, at 314.

\textsuperscript{112} Judge Rubin described the balance as follows:

Judges' decisions should be reasonably consistent and coherent. When precedents and prior doctrine are disregarded or discarded, judges should be able to explain the reasons for doing so. Some of the explanation may lie in a
G. Avoiding Judicial Imperialism

I believe Professor Tribe would agree that it is vital to adhere to the rules of judging, even where that involves deferring to the power of other actors. But there are limits. Professor Tribe made his final sin one that went hand-in-hand with abdication of responsibility for choice—the sin of judicial imperialism masquerading as modesty or strict construction. Speaking in 1984, Professor Tribe pointed out that the Supreme Court had become highly imperial. "Unhinged from the discipline of conceding that it is making constitutional choices, the Court readily seizes power and says that it is just carrying out one neutral method or another." Even though Judge Rubin might have had something of a reputation as a liberal "activist judge," many of his opinions, in addition to ones already discussed here, make it unmistakable that Judge Rubin was not a judicial imperialist. For example, in Jones v. HUD, the plaintiffs were the residents of an apartment house that was scheduled for demolition. The plaintiffs alleged that the defendants' phase-out of the low-income housing project was motivated by racial discrimination. After describing the apartments as displaying "the classic signs of urban decay in its most acute form," Judge Rubin, sitting on the district court, felt compelled to point out:

But the fact that these apartments are not suitable places for people to live does not mean that a federal court has authority conflict in social or economic policy. The cases in which this is done may be the great cases, the textbook cases for the next edition of "Cases and Materials." In any court over any term there are few. The rest, the cases society lives by almost all of the time, are decided by doctrine. Most of that doctrine comes directly or indirectly from legislation or from the legislature's inaction. And in a democratic society that is the way it should be. If it were not, then a government by law would be impossible.

Rubin, supra note 109, at 314. In this article on the role of legal doctrine, Judge Rubin did suggest, but did not address, that there is a limit to following the rules, to avoid abdicating responsibility. See id. at 308 ("What judges should or can do . . . when following law leads to what they consider a miscarriage of justice is a serious topic . . . ").

113. Tribe, supra note 1, at 170.
114. His examples included Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976), striking down Congress' attempt to limit how the rich can dominate the political process, and INS v. Chadha, 462 U.S. 919, 103 S. Ct. 2764 (1983), declaring more acts of Congress unconstitutional in one opinion than the Court had done in its entire history. See Tribe, supra note 1, at 170-71. There are certainly examples that we could find from today's Court as well. E.g., supra note 4.
115. Tribe, supra note 1, at 171 (emphasis in original).
116. E.g., text accompanying notes 81-86.
118. Id. at 584.
to make them habitable or to order someone else to do so. Federal judges have no blanket authority to right all wrongs and remedy every injustice, however troubled by them they may be. The same Constitution that protects the rights of the people limits the jurisdiction and the authority of federal judges.

To succeed, the plaintiffs must prove that the defendants have in some fashion violated federal law and that, under the tests the law directs the court to apply, they are entitled to [relief].

These same notions of the judicial role clearly stayed with Judge Rubin throughout his career. We can see this by reviewing one of his very last opinions, Christopher M. v. Corpus Christi Independent School District. The eleven-year-old plaintiff was a profoundly handicapped child with an IQ of five and the functional development of an infant. When the authorities at the school he attended proposed reducing his school day from four to two hours, he sought, through his grandmother, to have his school day returned to a full seven hours per day. The administrative hearing officer and the district court both found that Christopher's school day should remain at four hours. In affirming, Judge Rubin had to balance what I am sure were his sympathies for the plight of the child and the child's grandmother, against the commands of the statute for an individually tailored education.

The opinion weaves together authority drawn from the federal statute, state law, Supreme Court and Fifth Circuit precedent, opinions of other circuits, and factual findings (including credibility choices) made by the district court. Although generally deferring to these authorities, Judge Rubin did decide that the appellate court should subject to de novo review, as a mixed question of law and fact, the district court's conclusion that the individualized education plan of a particular child fulfills the needs of his or her appropriate education. Thus, while avoiding judicial imperialism, he also did not abdicate responsibility for making the hard choice that was at the crux of the case.

Unlike many of the opinions I have highlighted here, Christopher M. has no overt explanation of judicial role and function. There is no

119. Id.
120. 933 F.2d 1285 (5th Cir. 1991). The opinion was released posthumously.
122. Christopher M., 933 F.2d at 1288.
123. E.g., id. at 1289 (“EHA does not require that the State attempt to maximize each child’s potential”; state only required to permit the child to benefit educationally in a meaningful way).
124. Id. at 1289.
one ringing statement in it that could serve as a fitting epitaph, but I trust I have done my part elsewhere. But, ultimately I think Christopher M. is a fitting opinion upon which to conclude, for it is an example of what Judge Rubin did repeatedly in his judicial career. He gave the parties a sympathetic hearing and made sure the plaintiff received everything he was entitled to under the law (and no more). He wrote an opinion which made clear the basis for every conclusion and delineated the rightful authority of appropriate actors in the proceeding—Congress, the school authorities, the hearing officer, the district court judge, and the appellate court. As a society, we could hardly ask for more from our judges.

III. CONCLUSION

As I indicated he would at the beginning, Judge Rubin passes my Tribe-derived test with flying colors. His civil rights opinions demonstrate adherence to the Seven Virtues of Judging: Valuing Process, Heeding the Effects of the Distribution of Power and Wealth, Avoiding Fixation on the Tangible, Avoiding the Tyranny of Small Decisions, Incorporating the Constitutive Dimension of Governmental Action, Taking Responsibility for Choice, and Avoiding Judicial Imperialism. Professor Tribe ended the lecture I heard by suggesting two possible reactions to the specter of a Supreme Court committing the Seven Deadly Sins. We could “retreat to cynicism, accepting for the rest of our lives the inevitability of a moral vacuum . . . even in our nation’s court of last resort.” Or “[w]e can . . . keep the faith, and keep arguing with passion for the . . . choices in which we believe and of which we dare to think we can convince others.”

Judge Rubin clearly made his choice: his civil rights opinions show us how to keep the faith, even while he adhered to the jurisprudential constraints imposed on federal judges in our system. If we remember and follow his example, we can be proud of the kinds of people, the kind of society we will be.

125. Also, I have in mind an incident from the annals of clerking for Judge Rubin that gives me pause before ending on too effusive a note. One day in 1979, he gave me one of those “wild goose chase” assignments every clerk enjoys. I ultimately located the article Judge Rubin wanted, Note, Crossing the Bar, 78 Yale L.J. 484 (1969), which is a deft review of judicial eulogies. Because Judge Rubin liked the article so much that he wanted to write a fan letter to the author, I had to persuade the Yale Law Journal to break the secret code revealing the name of the student who had written the decade-old Note, and then I had to find a current address for this person. Go read the Note and know you are sharing a laugh with Judge Rubin.
126. Tribe, supra note 1, at 172.
127. Id.