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INTERNATIONAL BOOK ESSAY

The Unintended Consequences of Judicial Valiance

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Courts in perilous times

We are living in perilous times for liberal democracy. According to the latest V-Dem Institute Report, the level of democracy worldwide has fallen to levels last seen in 1985 – prior to the fall of the Berlin Wall and breakup of the USSR. The world today has fewer democracies than autocracies for the first time in twenty years, and liberal democracy is now the least common regime type in the world (V-Dem Institute 2025, 6–9). Freedom House's *Freedom in the World 2025* report paints a similarly bleak picture, showing that sixty countries in 2025 experienced a decline in civil liberties and political rights, compared to only 34 that showed an improvement. The last time more countries improved on these measures than declined was twenty years ago in 2005 (Freedom House 2025, 1-3).

Over the past decade, these disturbing trends have made the study of authoritarian-leaning governments central to the fields of comparative politics and comparative constitutional law (Keck 2023). Such governments are hostile to core features of liberal democracy, including fundamental rights and institutional checks on their power. The first wave of scholarship in this subfield focused primarily on the "authoritarian playbook" (Diamond 2019). It looked at how authoritarian-leaning leaders who were popularly elected sought to systematically undermine democratic institutions (Levitsky and Ziblatt 2018). Chief among these institutions were courts, which had long been viewed as constitutional guardians and bulwarks for the rule of law against anti-democratic forces (Müller 2012).

Recent work has challenged that traditional conception. Scholars have explored how courts have facilitated and, in some cases, actively contributed to democratic

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decline around the world (Landau and Dixon 2020). In this context, *Valiant Judges, Iniquitous Law* is a welcome respite. Its author, Hans Petter Graver, is aware of the challenges facing courts and their societies today (24–26). Yet, he decided to write an optimistic book about individual judges who stood up for the rule of law in trying circumstances (5–6). Through detailed individual portraits, combining biography and historical context, Graver illustrates the courage shown by these jurists. He also advances a broader argument as to how judges should grapple with moral dilemmas. The first part of this essay outlines the book's main strengths and contributions to the literature. The second and third parts seek to unpack the broader (and often unintended) consequences of a certain type of valiant judge. In short, I show that some acts of judicial valiance that seem praiseworthy in isolation may end up harming the institutions and values they wish to uphold.

The value in studying valiant judges

There is a growing literature on the threats posed by courts to liberal democracy (Dichio and Logvineko 2025; Gardbaum 2024). As David Landau and Rosalind Dixon have shown, the practice of "abusive judicial review" has grown in recent years as regimes hostile to liberal democracy turn to courts to "carry out their dirty work" (Landau and Dixon 2020, 1317). It is precisely because courts are associated with the rule of law and with upholding constitutional values that these regimes benefit from using them to ban opposition parties, weakening independent institutions, and removing guardrails (like term limits) on executive power (Landau and Dixon 2020, 1334-38). In some cases—like the United States—political polarization has found its way to the judiciary (Porat 2023). The US Supreme Court has always been a political institution. Its decisions on salient constitutional matters have historically tracked public opinion (Dahl 1957; Epstein and Martin 2010). And on major social issues like same-sex marriage and access to firearms, it has been the principal decision-maker and policy-setter. But over the past decade, the justices have become more sharply divided into liberal and conservative camps, with the latter comprising six of the nine justices currently on the bench. This has led to a radical overhaul of the liberal constitutional order, on both rights and structure-based issues (Abeyratne 2025, 65–81). The Court has overturned long-established liberal precedents on, among other rights, abortion and affirmative action (Schultz and Bourgault 2025). It has also vastly expanded the scope of executive power, allowing the Trump administration to act in ways that would have been prohibited hitherto (Dodds 2025). In other jurisdictions, we see "court-packing," "court-hoarding," and the provision of post-retirement benefits to establishment-friendly judges to bring courts in line with authoritarian-leaning regimes (Kosař and Šipulová 2023; Leisure and Kosař 2024; Dam 2023).

A related line of scholarship explores the role of individual judges in expanding the remit of liberal constitutionalism or defending hard-earned gains on constitutional rights from reactionary forces. These "towering judges" or "judicial heroines" had outsized impacts on the trajectory of constitutional law in their home jurisdictions and were often widely known internationally as well (Abeyratne and Porat 2021; Delaney and Dixon forthcoming). These studies look at judges from a wide range of case studies and analyze their broader impact—jurisprudential, institutional, and political—on their respective legal orders.

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Parables of moral responsibility

By contrast, *Valiant Judges* is more modest with respect to methodology and case selection. Graver concedes that, as a Scandinavian scholar, his examples are drawn mostly from Northern Europe, with a few exceptions, including the former President of Israel's Supreme Court, Aharon Barak (2). Graver further notes that he is not engaged in a project of judicial biography. The thirteen selected judges were chosen to illustrate certain moral principles, rather than for their overall judicial record or impact on their legal systems (2–4). Graver refers to his judicial portraits as "stories," but they might be better characterized as parables. As he put it, the book seeks to illustrate "that some judges have demonstrated openly their moral responsibility and that is both possible and commendable" (2). This approach makes the book stand out from the literature, both in its optimism and in highlighting lesser-known judges (including a seventeenth-century Danish judge who stood up against witch trials). It also enables Graver to focus on a single case in each chapter, which provides the reader with rich detail about the legal issues, the broader political context, and the moral stakes at play.

Three kinds of judicial heroes

Another strength of *Valiant Judges* is Graver's definition and taxonomy of judicial heroism. His selected judges share a commitment to upholding the rule of law by publicly ruling against the state (8). Graver does not consider judges who resign in the face of oppression within his definition of judicial heroism, as resignation "only leads another person having to take office and contributing to the oppression of the regime" (18). Thus, his judicial heroes set an example to be emulated. While their actions may not bring down oppressive regimes or change the law, they have the capacity to inspire other judges and indeed all those who wish to oppose immoral laws (27–28).

Graver divides these heroes into three categories: (1) judges who have upheld the law in the face of state violations; (2) judges who opposed immoral or oppressive laws; and (3) judges who battle the state on how the law should develop (24).

The Scottsboro trial: James Edwin Horton exemplifies judges in the first category. He presided over the Scottsboro trial in 1933, in which nine African American teenagers were falsely accused of raping two white women (41). A small-town judge in Decatur, Alabama, Horton had to review the evidence and jury conviction against these men. He concluded that the evidence was far too thin to show that these women were raped, much less that these boys were the perpetrators (45–46). He upheld justice and the rule of law by overturning the conviction. And, as Graver explains, Horton did so at great personal cost. He was attacked in the press, and he lost the subsequent judicial election to keep his seat on the bench (46–47).

Resisting Nazi Killings of the Mentally Ill: Graver's second category is best illustrated by the German judge Lothar Kreyssig, who stood up to Hitler and the Nazi regime. In 1939, Kreyssig learned of a secret policy to take mentally ill patients away from an asylum and to kill them (49). He investigated the matter himself and reported it to the President of his court, pointing out the illegality and moral heinousness of executing people with no legal basis. Kreyssig later issued a written prohibition, preventing any persons within his custody from being moved without his consent (49–51). The case eventually made its way to the Ministry of Justice. In November

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1940, the Minister summoned Kreyssig to a meeting and told him in no uncertain terms that if he could "not accept the will of the Führer as the primary source of law," then he could no longer serve as a judge (51). Kressig informed the Ministry that he would rather retire than withdraw his prohibition order. He eventually retired with a full pension in 1942, after the state tried and failed to bring a criminal case against him for speaking out against the regime (51).

Battling the State on the Development of Law: Kreyssig and Horton are largely representative of the judges in this book. They are paragons of virtue in the face of oppressive laws and regimes, and showed great courage by going against the weight of societal and political opinion to rule in favor of unpopular groups. Graver's third category—judges who engage in a political struggle over the development of the law—fits less nicely with the other cases. Consider the example of Aharon Barak (incidentally, also one of the "towering judges") (Abeyratne and Porat 2021), who was responsible for a constitutional revolution in Israel in which the Basic Laws gained entrenched status and the scope of judicial review expanded significantly. Graver briefly notes these developments but focuses on Barak's jurisprudence in wartime and with respect to Palestinians. He lauds Barak for ensuring that on at least some matters of war and the occupation, the law did not fall silent (111–14). He also gives Barak credit for the judicialization of politics during a period of conflict (115)—a topic to which we will return when discussing the broader implications of Barak's jurisprudence. Suffice it to say for now that while Barak is undoubtedly a towering judicial figure, the moral probity of his actions is not nearly as clear or uncontested as that of Kreyssig and Horton (Harel 2021).

Judges in pursuit of virtue ethics

A final contribution to commend is the book's engagement with the moral and philosophical implications of these case studies. Building on Aristotle's classical theory alongside modern proponents like Alasdair MacIntyre and Lawrence Solum, Graver argues that virtue ethics provides the resources for judges seeking to navigate the tension between applying positive law and departing from it when morally necessary (167-70). As he explains, virtue ethics requires self-reflection towards becoming a better or more virtuous person. It is centered on what he calls *bildung*—the development of virtues as a learned ability or habit (170). Graver believes that judges should seek to develop within themselves the four classical virtues of wisdom, courage, temperance, and justice. While courage is the core virtue among the valiant judges, he explains how many of them benefitted from having that courage tempered by one or more of the other virtues (171–75). One might not agree with this ethical approach or with the notion that judges have a moral responsibility to cast aside what they believe are unjust laws in the service of classical virtues. But Graver does an admirable job putting flesh on the bones of virtue ethics in this context and teasing out its implications for his selected judges.

Political backlash

This section and the next illustrate how valiant judging, particularly within Graver's third category (judges who confront other state institutions as to how the law should

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develop), may have damaging political and institutional consequences. The judicialization of politics, particularly by expanding the scope of fundamental rights, can lead to charges of judicial activism and lead to the judiciary being attacked by reactionary, authoritarian-leaning governments.

Consider, for instance, the backlash in Israel to the more assertive and liberal Supreme Court brought about by Aharon Barak (Navot 2023). Barak served as a Justice on the Israeli Supreme Court from 1978 to 1995, and as its President from 1995 to 2006. In that time, Israel went through what he called a "constitutional revolution" (Barak 1993, 82). Barak credited the country's legislature, the Knesset, for this revolution through their enactment in 1992 of Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation. Yet, it was the judicial enforcement of these Basic Laws that was truly revolutionary. As Alon Harel has argued, Barak's court-led revolution was actually two revolutions: one that empowered the judiciary and another that entrenched liberal constitutionalism (Harel 2021, 178–85). As to empowerment, the Israeli Supreme Court in CA 6821/93 *United Mizrahi Bank v. Migdal* (1995) held for the first time that legislation incompatible with one or more of the Basic Laws could be invalidated. The Court also loosened procedural rules around standing to allow more litigants to approach the Court with constitutional claims and even ruled that it has the power to review the Basic Laws (Roznai 2024, 1–2). These moves vastly expanded the Supreme Court's jurisdiction. Meanwhile, the Court also infused its decision-making with liberal values such as dignity and equality, and robustly enforced fundamental rights through proportionality analysis (Harel 2021, 183–85).

For a time, conservative regimes in Israel benefitted from the Supreme Court's expanded powers and thus sought to keep judicial empowerment alive while attacking the liberal revolution (Harel 2021, 176). This changed in 2023, when Prime Minister Netanyahu's government introduced a package of "reforms" that would radically weaken the Supreme Court's jurisdiction and independence. The first reform proposal targeted judicial review. It would permit just the Supreme Court (and no other Israeli courts) to review the constitutionality of statutes. Under this proposal, the Court would only be able to invalidate laws with the support of a supermajority of twelve (out of fifteen) justices. And even if a statute were declared unconstitutional, the Knesset would have the authority to override that decision and reenact the statute by majority vote. The Court would also be stripped of the authority to review Basic Laws (Roznai 2024, 2–3; Navot 2023, 484–86).

The second reform would politicize the judicial appointments process by removing judges from the judicial selection committee and replacing them with politicians. The third reform would reverse one of Barak's landmark rulings to end "reasonableness" review of administrative action. This would reduce judicial scrutiny of the actions of Cabinet members and other executive officials, thus enabling more abusive and potentially illegal conduct. The fourth reform did not directly implicate the Supreme Court but would undermine the rule of law by transforming erstwhile independent legal advisors to the government into political appointees, loyal to those in power rather than to broader legal and ethical principles (Roznai 2024, 3–4; Navot 2023, 487–88).

When these proposals were introduced in January 2023, they were met with stiff opposition. Following widespread public protests, the government paused much of

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this "reform" agenda (Roznai 2025). However, in July 2023, the Knesset nonetheless enacted a constitutional amendment that ended reasonableness review of administrative action. The amendment was struck down by the Supreme Court in a landmark judgment issued in January 2024—the first time the Court struck down part of a Basic Law (Roznai 2025).

But this resistance was fleeting. As Yaniv Roznai has pointed out, the October 7, 2023, attacks and ensuing war in Gaza focused the country's attention elsewhere (Roznai 2025). The protests ceased, and the government switched to a stealthy, incremental strategy to get much of its original agenda enacted into law. For instance, in March 2025, the judicial selection committee was politicized by enabling the ruling coalition to control appointments to the bench. Independent institutions such as the ombudsperson for the judiciary and the Bar Association were also brought under partisan control (Roznai 2025).

Returning to Aharon Barak, he could not have anticipated quite how reactionary or *male fide* these countervailing political currents turned out to be. However, it is now clear that his actions contributed significantly to the conservative backlash in Israel. The two revolutions Barak led have arguably left the Supreme Court and the rule of law weaker than they had been prior to his interventions.

Judicial Mega-Supremacy

When judicial power is aggrandized, it may also lead to judges exercising their authority in arbitrary ways, contrary to established procedures and the rule of law. Consider here the experience of India. Its Supreme Court, led by Justice P.N. Bhagwati, revolutionized constitutional law through public interest litigation (PIL) in the 1980s. While initially successful, PIL has led to various institutional crises in the Supreme Court of India that have undermined the Court's public standing and ability to uphold the Indian Constitution.

Through PIL, Bhagwati transformed the Indian judiciary to a greater degree than Barak in Israel. Some of the moves were similar across the two countries—loosening standing requirements, expanding the scope of judicial review to include economic and social rights, and taking on serious civil rights violations long committed by central and state governments with impunity (Abeyratne 2021, 196–202). But the scale of these changes in India dwarfed those in Israel or any other country. Bhagwati's revolution effectively transformed the Court from a formalist institution with limited jurisdiction to an intrusive policymaking body whose decisions affected millions across the country. His remedial innovations are especially noteworthy, enabling the Court to award damages to disaster victims and to monitor government compliance with its orders over many years (Abeyratne 2021, 202–05).

All of this was done in the name of judicial valiance. Bhagwati and his allies believed that these changes were necessary to rid the Indian legal system of colonial remnants and to adapt the Court's jurisdiction to the needs of the masses (Bhagwati 2013, 33–36). While these developments were greeted enthusiastically for the most part in the early years (Baxi 1985), decades of experience with PIL have revealed its corroding procedural and institutional effects (Bhuwania 2017). Innovations intended to open the higher judiciary to society's lower socioeconomic strata have enabled judges untrammeled authority to hear the cases they prioritize, and even to initiate

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litigation on their own (*suo motu*). These powers are often exercised in an ad hoc manner, according to the whims and pet causes of individual justices, which is contrary to even a formal, minimal conception of the rule of law (Bhuwania 2017, 80–106). Meanwhile, the Court has used the cudgel of judicial independence to shield itself from accountability in the face of credible allegations of sexual harassment and corruption among its justices (Abeyratne and Karwa 2025, 166–75).

Today, the Indian Supreme Court retains little credibility as a guardian of constitutional rights or even as an institution that impartially administers justice. As in Israel, these consequences cannot be pinned entirely on Bhagwati and his colleagues, nor could they have been fully anticipated in the 1980s. But could these experiences inform how we evaluate judicial valiance going forward?

Valiance and virtues

One might argue that if Barak and Bhagwati were possessed of other classical virtues—especially temperance—they would have ruled more cautiously and thus mitigated the deleterious political and institutional consequences that followed. But what distinguishes valiant judges of this kind is their courage to challenge the legal status quo and expand judicial power in the service of justice. It was a lack of temperance that enabled Barak and Bhagwati to initiate and then entrench legal revolutions.

A more promising virtue going forward might be wisdom. Today's judges have the benefit of these cautionary tales, which should factor into their decision-making. One hopes that the Israeli and Indian experiences give pause to would-be valiant judges before they seek to revolutionize their legal systems. Judgments that appear to advance justice may ultimately leave the judiciary and its virtues in a more precarious position than ever.

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