

JUDGE GUIDO CALABRESI

Thank you Joan, David, friends of Brooklyn Law School. It's wonderful for me to be here, to see colleagues from the Second Circuit, and from the Yale Law School, former students — some now on the New York Court of Appeals, a nephew and a niece, classmates, and all sorts of friends, of mine and of the school; here at a great event, a great occasion. The building is magnificent. The building is *magnificent*. But as someone said of a great, new library: "Do not call the *building*, the library. The library is inside." So this is not the Brooklyn Law School, wonderful as the building is; Brooklyn Law School is inside. It is all of you. It is all of you who have come through here, all of you who will go through here.

On occasions like this, I tend to tell stories, rather than give speeches. And usually, as Joan probably would have told you, except that she was too polite, the stories involve me. And involve me in various situations. So, I will tell you two stories and then try to draw a moral from them; one has to do with faith in law and one has to do with faith in people.

Once when I was clerking for Justice Black, we were working on a dissent in two cases, *Abbate v. United States* and *Bartkus v. Illinois*, which involved questions of dual sovereignty—double jeopardy, whether, that is, the state or federal government could re-try defendants after one or the other jurisdiction had acquitted them. Justice Black was determined to show that a second trial was an abomination that had to be prevented, and that in all of Anglo-American jurisprudence the right to retry a defendant in a different sovereignty didn't exist. He wasn't satisfied in these cases to do what he so often did, which was to look to the language of the Constitution and say "here's the problem, here's the language, the language controls." He wanted to tweak Justice Frankfurter, who in his opinions always wrote about history and other such things. He wanted to show Justice Frankfurter that he could do it just as well.

And so he sent me out to do research. He wanted to demonstrate that such trials in two jurisdictions had never happened and that the notion of trying a defendant twice in such cases was something unheard of and terribly bad. He succeed-

ed in tweaking Justice Frankfurter. We came up, for instance, with the fact that Saint Jerome had said that "God himself does not punish people twice for the same offense," and Justice Frankfurter felt compelled in reading his opinion from the bench to say, "And what Saint Jerome had to say about it had nothing to do with it, and what happened in England had nothing to do with it, it's the American Constitution we're interpreting." Through all this, Hugo Black sat on the bench smiling, because he had gotten Felix Frankfurter to say exactly what he had wanted Frankfurter to say.

I researched and researched, and it really looked as though, until the time of prohibition, there had not been any instance in Anglo-American jurisprudence where such double trials had taken place. Unfortunately, near the end of my work, I found a statute dating back to Tudor times in England, which seemed to allow for precisely such double trials; one in the ecclesiastical courts and another in the King's Courts. I read the statute and I was upset. I showed it to a friend who said something extraordinarily improper: "You were going to say that you had found no case, no instance in the history of Anglo-American jurisprudence condoning such double jeopardy. Now you've found one, but why don't you still say the same thing? Only somebody as nit-picking as you would have dug deeply enough to find this Tudor statute. Nobody else will know that you found it and ignored it." But I said, "I can't do that, I found it, now I can't avoid it." He said, "Your judge won't be happy." And I said, "I know the judge won't be happy, he'll be very angry. But there it is."

So, I went up to "the judge," as we used to call him, and said, "Judge, I found a statute, here it is, and it seems to allow for just what we're saying was not and never should be allowed." The Judge looked at me calmly and said, "Guy,"—he couldn't pronounce "Guido," so he always called me "Guy"—"Guy, did you look at the original?" I said, "Judge?" He said, "Did you look at the *original*?" And I said, "Judge, this is a Tudor statute, I have a contemporary account, what do you mean look at the original?" He said, "Well, I'd be happier if you looked at the original." I said, "How am I going to do that?" "Well, look around and see what you can find. Go back further." Then I said, "But Judge, where?" And he said, "Here in the Supreme Court library there is a wonderful collection of

rare books, the Elbridge Gerry collection. You never know what they might have there. You could start there and see what you could find.”

I left, swearing under my breath at this old man who for some peculiar reason was causing me to go back and look for something I could never find. I called the librarian of the Supreme Court and said, “Do you have anything that would help me?” and she said, “Actually we do. We have a book of Tudor laws and it happens to be the book on which Mary Tudor, Bloody Mary, studied law.” I said, “Good Heavens!” and became very happy about the whole thing, for I was going to see something extraordinary.

They brought the book down. And I read it, with Mary Tudor’s annotations in it, the comments that she wrote down as she was taught law. Her comments made me think that she must have been *very* intelligent . . . and difficult, obviously. I read it and I found the statute. It was, word-for-word, identical to the contemporary account that I had found earlier. The only difference was the title. The title had not been given in the contemporary account, but it was given in this book. And the title revealed that this was an act dealing with the Jurisdiction of the Court of Star Chamber.

The moment I saw that, I laughed, because I knew exactly what Hugo Black would do. I showed it to him, and he smiled just slightly and said, “We’re going to say that the only instance in the history of Anglo-American jurisprudence that double jeopardy was countenanced in this kind of case was in the Court of Star Chamber, that nefarious court, whose abuses our framers had clearly in mind, and sought to prevent, when they wrote our Constitution and Bill of Rights. Well, fine. But over the years I wondered, “How did he know that?” You know? How did he *know* that? What made him ask me to go back and look at the original? He couldn’t have known about the title and the Court of Star Chamber. I mean, he read a lot. He made me read everything from the moment I started being his law clerk. But how could he know about this?

I now know that, of course, he didn’t know. But, over the years I’ve come to understand what it was that was moving him. The judge had a faith in law that was unshakeable. He had a faith that law would do the right thing. If something seemed to be wrong, and you looked deeply enough, hard

enough, you'd either find that it turned out to be different from the way it seemed, or you would ultimately find an explanation for why something that was wrong was being done. It was his faith in law which told him, in effect, to say to me, "I don't know what you'll find, but if you look hard enough, go deep enough, you will find something, which if we are indeed right, will help us. And if you don't find anything, then it will be a sign that maybe, just maybe, we are not right." It was that faith in law that I think motivated him and must motivate everyone who cares truly about law and about law learning.

That's the first of my stories.

The second of my stories has to do with prejudice and it also involves me. Now, I don't think of myself as a person who is prejudiced. I think of myself as a person who is as open minded as they come, open to all views, all people, all differences. And like most people, while I believe that and try to be that, I don't always succeed. We all have biases. And I must tell you about a biased prejudgment that I made.

Some years ago, there was a student at the Yale Law School, a graduate student, from South Africa. He was a wonderful kid. White guy, very much involved in all sorts of things in the community, doing all sorts of things during his time at Yale. He spoke very often about what was happening in South Africa, and how to change the situation there. He became my student and a really good friend. As the time approached for his graduation, he told me that his parents were coming from South Africa for the graduation. And I said, "Oh, isn't that wonderful. I'll be so glad to meet them." I wanted to meet the people who were responsible for rearing, in that setting, a youngster as fine and as decent as this youngster was. I then asked, "What do your parents do?" He told me that his father was the head of the Afrikaaner Church. And frankly, I froze. The Afrikaaner Church at that time was the pillar, the greatest supporter, of apartheid. This student's father was the head of that church. He was coming to the Yale Law School and I was supposed to greet him.

Such is the nature of prejudice; I said to myself, "I can't do that. I don't want to shake the hand of somebody who stands for that kind of evil. I just don't want to do it." On the other hand, I was Dean and this was a parent who was coming, and Deans are supposed to be very polite to parents, almost as

much as they are to alums. But, more important, this was the father of one of my kids whom I'd come to love dearly. And so, more out of politeness than out of conviction, when he came, I decided that I would greet him. When he arrived, he looked like the stereotypical Afrikaaner, tall, thin, and holier-than-thou in expression. The sort of person, who put me in mind of the man about whom Churchill once said, "There but for the Grace of God, goes God Himself." I gulped again, because his appearance seemed to confirm all my prejudices about South Africa.

Nevertheless, I reminded myself that he was my student's father and I greeted him. And we had a pleasant conversation. We didn't talk about anything substantive but it was pleasant, and he felt welcomed. When graduation ended he went back to South Africa. Three weeks later, this man got up and said, as head of the Afrikaaner Church: "apartheid is a sin." He said that it was not only wrong, that it not only had always been wrong, but that it was *a sin and had to be rooted out of South Africa*. It was that statement, more than any other, that was the beginning of dramatic change in South Africa. It formed the moral foundation for everything else that has happened.

When I read this statement I said to myself, "Good God, it was politeness, your job as Dean, no more than that, that caused you to be nice to this person who did something as heroic as that. How would you have felt if you had not been polite?" The story has a tragic end, because earlier this year, this man was murdered in South Africa. As he played with his grandchildren, he was shot by an extremist who had never forgiven him for making that statement, for leading the change. I spoke to his son, my former student. And we cried together as I told him for the first time about my prejudice and how ashamed I was that I had approached the issue from a position of prejudice rather than from a position of openness to what someone could be, might be.

I say that to you because I am still moved by this, obviously; it is something quite recent. But I also tell you this because it seems to me that there are two things that ought to guide you as lawyers, as law teachers, as law students, as people who benefit from this place. One is faith in law and in what it can do and what it has done in its basic understanding and desire to represent all that is best in humanity. And the other

is faith in people. Faith in people, which is the opposite of prejudice. It means in every case, look to what people may be, look to what they may do, look to what the hope is. Don't prejudge. Work with them. Because, if you do those two things, if you put faith in people, together with faith in law, you will be true to what this school has stood for from its founding nearly 100 years ago, true to the reasons for the dedication of this building today, and true to what this school must be 100 years from now.

Thank you.