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Vittoria Barsotti

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A SCHOLAR ON THE BENCH: A CONVERSATION WITH GUIDO CALABRESI

*VITTORIA BARSOTTI**

Vittoria Barsotti: This morning, while waiting to meet you for our conversation, I was browsing among some of your works. The book I started with is the one I love most, not because I think it is the most important, but because it is closer to my interests and feelings and probably also because it summarizes many facets of your judicial philosophy. I read again the last page of *A Common Law for the Age of Statutes*, where I found one of your most penetrating sentences: "As a scholar, it is my job to look in dark places and try to describe, as precisely as I can, what I see."[1] This is your job as a scholar. What about your job as a judge?

I would like to go over some of the great ideas that you developed over the years in so many articles and books. In other words, I would like to see whether these ideas have somehow changed since you were appointed to the bench. As a scholar, you looked in dark places; now, you probably have new and different tasks.

Guido Calabresi: Let me start telling you what Justice Hugo Black, on hearing of Charles Black's defense of absolutes in discussing torture,[2] once said to me: "You realize, Guy, I cannot agree with that." A long time after that conversation I understood what he meant: he could not accept the balancing of values because a judge must consider values as absolutes, taking the real world in no consideration. This is strange because to some extent, a judge must pay attention to what goes on in the real world and many times takes positions that he would not take as a scholar or as a politician. The explanation lies in the fact that a judge is part of a system. The judge must follow the law, but must also take into account, especially in an appellate court such as mine, the opinion of his colleagues. Many times I don't agree with my fellow judges, but nevertheless I decide not to write a separate opinion, concurring or dissenting, because if I go along with them I may contribute to

* Professor of Comparative Law, University of Florence School of Law. Ph.D., University of Florence.

1. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 180 (1982).

2. Charles Black, *Mr. Justice Black, The Supreme Court, and The Bill of Rights*, HARPER'S MAGAZINE, Feb. 1961, at 63, 67.

smoothing down their positions and eventually reaching a more balanced decision.

Sometimes, then, a judge does not take into consideration "absolutes," but instead takes into consideration the system as a whole and, because he is to some degree a lawmaker, makes "policy" decisions. As a scholar, if I don't agree, I am completely free to take a different stand. On the other hand—in order to protect certain fundamental rights—on some occasions a judge must recognize "absolutes," that is values that cannot be balanced one with another.

In any case, whether the judge is a clear-cut absolutist or acts in a more nuanced way, he always knows that his decisions have not only an immediate impact on real persons but that they also have a more remote impact on the law. The judge must take into account how his decisions fit in the system as a whole. The scholar instead operates in a vacuum and since he creates no precedent, he is completely free to express his personal ideas.

For instance, although as a scholar I think that courts should have the power of updating obsolescent statutes; in some of my opinions I have said that judges in our present system do not have that power.

VB: You have just touched on one of the fundamental and most fascinating issues discussed in *A Common Law for the Age Statutes*: what happens to old and obsolescent laws—to laws that the legislative body does not update for simple inertia or for political reasons?[3] In the book you suggest that courts should develop a judicial power over statutes, slowly, and in a common law fashion, but now, as a judge, you are denying this power.[4]

GC: In the book I talk about "subterfuges,"[5] which are part of the judge's natural power of interpretation. When an act can be interpreted by way of a subterfuge, I am free to use that subterfuge, eventually citing analogous cases.

VB: But in this way you are not only using a subterfuge, you are rather constructing and manipulating the statute in a common law style so as to put it back in the common law mainstream.

GC: I could openly follow this approach, this method, only if the legislative body had given me the power, but this is not yet the case. Nevertheless, the judge can hold that the statute is vague and consequently interpret it in a manner close to the common law. But

3. *See generally* CALABRESI, *supra* note 1.
4. *Id.* at 164–65.
5. *Id.* at 172.

this is not honest interpretation and for this reason I consider it a "subterfuge" and I am a harsh critic of those of my colleagues who use such a kind of construction too often.

VB: This is very clear in the book, your choice is for candor.[6]

GC: As a scholar, I am always candid.

In hard cases, a judge generally chooses not to use subterfuges openly, otherwise other judges would have to follow the precedent and use the same subterfuge. In the end, a judge can use subterfuges only when he is able to hide this practice, and here I have to go back to Justice Black and his response to Charles Black's defense of absolutes in discussing torture[7]: torture must never be admitted, not even in very special cases. Admitting torture for special cases would open a crack in the wall through which too many exceptions could go. The judge who openly recognizes his power of updating a statute ends up opening a crack in the system.

VB: I realize that you are trying to make me understand what happened to the ideas of *A Common Law for the Age of Statutes* now that you are on the bench.[8]

GC: The ideas are the same. What changes is their application. I believe very much in roles. When a person holds a certain position, he must follow the rules and duties of that position.

One of the most important things a judge must always remember is that his decisions have an impact on real persons' lives. If, for instance, a judge strongly believes in his theory but his fellow judges on the court are not ready to follow it, the outcome can be negative for the real person in the real world because the opinion of the majority tries to "resist" that theory.

The second very important thing a judge must consider is that his decisions make law. And if the opinion of a judge sharply contrasts with the majority, the result can be a court decision that is more "extreme" than what is needed—both for the parties in the case and for the development of the law.

VB: Let's go on now to other ideas and to other seminal works of yours. Let's talk about economic analysis of law. Let's take into consideration *The Cost of Accidents*,[9] *One View of the Cathedral*,[10] and,

6. *Id.* at 178–80.

7. *Id.* at 173–74; *see also* Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944) (Black, J.) (explaining further why confessions obtained through coercive methods should never be admissible).

8. *See* Calabresi, *supra* note 1.

9. Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970).

from a slightly different perspective, the volume *Tragic Choices*[11] As a judge, have you ever come to grasp with the theories expressed in these books and articles? I have in mind a decision in which you concurred in order to better explain your position and your theories based on economic analysis.

GC: One of my first decisions, *Taber v. Maine*,[12] was strictly related to *A Common Law*[13] and *The Cost of Accidents*.[14] In that case, the law was close to my theories and there was some room to maneuver because we had to apply the law of Guam, which is the law of the Ninth Circuit, which is also the law of California and thus common law.[15] My opinion was very good and completely coherent with my theories to the point that Judge Posner said: "It's Guido at his best." But I must add that the decision, even though a binding precedent, is hard for other judges to follow.

VB: Give me the facts of the case.

GC: There was a car accident between two soldiers, one of whom was driving while drunk.[16] Two questions were important.

The first question was, "Can driving be considered part of the military job of the soldier and therefore can the administration be held liable for damages as respondeat superior?"[17]

California had followed an important decision of Henry Friendly that cited my first works and followed my theories on economic analysis.[18] I was then able to refer explicitly to my ideas.[19] Moreover, according to my theories, the administration was to be held liable given the fact that drinking or not drinking is part of the intrinsic behavior of a soldier, which is in turn part of the administration's responsibility.[20] This is so true that after my decision the rules on drinking and driving in the military were changed.[21]

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10. Guido Calabresi, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

11. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

12. 67 F.3d 1029 (2d Cir. 1995).

13. CALABRESI, *supra* note 1.

14. CALABRESI & BOBBITT, *supra* note 11.

15. *See Taber*, 67 F.3d at 1033–42.

16. *Id.* at 1032.

17. *See id.* at 1033–37.

18. *See id.* at 1031 (citing Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171–72 (2d Cir. 1968)).

19. *Id.* at 1034–35.

20. *Id.* at 1033–42.

21. *See, e.g.*, John H. Dalton, Sec'y of Navy, A Holistic Approach to Curbing Sexual Harassment (Feb. 4, 1997), *available at* http://www.defense.gov/speeches/speech.aspx?speechid=622 (noting that "[in 1996 the Secretary of the Navy] established a senior-level Standing Committee on Alcohol Abuse Prevention and Alco-

The second question concerned the common law. Following the Supreme Court's *Feres* doctrine, soldiers could not sue the administration for damages.[22] Soldiers had to be considered as employees who can sue their employers only within the limits of workers' compensation.[23] Because soldiers have insurance plans similar to, though somewhat different from, workers' compensation, they cannot sue the administration.[24]

But in the case at hand, the soldier suffered damages for which the employer could have been sued under workers' compensation if he had been an employee.[25] This was the right way of interpreting the relevant statutes. But at the same time, I underlined that I did not agree with the *Feres* doctrine, a doctrine that improperly, I believe, was the result of courts misinterpreting statutory law just to make it consistent with the common law.[26]

I could do this in *Taber*,[27] but more often a case can be decided in a very limited way and still reach a fair result. Such a minimalist approach, however, often leaves unsatisfied scholars because it misses the general picture. It does not say where the case stands in the stream of the law.

In these cases the judge has two possible ways of reasoning.

In the first place, he may pretend that in order to decide the case he must rule in a broad way. He will say more than is needed. He will be an "activist" judge. I think this approach is wrong. The judge must decide the case at hand without indulging in broad theories. And this is especially true in a court like mine in which a panel of three judges makes decisions that are strictly binding on the other later panels. In my court, we can overrule a prior panel's decision only when we are sitting en banc—that is when all the judges on our court hear a case—but this occurs very rarely. Under the circumstances, it is very important that each panel does not decide more than is strictly necessary. Pretending that a broad decision is unavoidable can create problems for the later judges who will find themselves in the unpleasant situation of having to choose

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hol Use Deglamorization in the Department of the Navy to provide assistance and advice on matters and policies relating to alcohol use and abuse among sailors and Marines," out of which came two major programs to deal with alcohol abuse in the Navy and the Marine Corps).

22. *See Taber*, 67 F.3d at 1037 (citing Feres v. United States, 340 U.S. 135, 146 (1950)).

23. *Id.*

24. *Id.*

25. *Id.* at 1042–44.

26. *Id.* at 1038–42.

27. *Id.*

whether to disregard the precedent or follow it notwithstanding what they believe is an incorrect result.

In the second place, the judge can openly write dicta. But this practice can raise two sets of problems. How much can a judge say in dicta without making the decision more obscure? Moreover, we are a panel of three judges and if I write dicta, the other two must take a position with respect to the dicta. The other judges must say if they agree or if that part of the opinion belongs only to Calabresi; in the latter case they might have to say that they don't agree even if they don't have particularly strong feelings on the specific issue. I must consider very carefully that if I insist on writing dicta, my fellow judges may well feel they have to disagree now, even if in the future they might come to a position more in line with mine. Conversely, they might feel compelled to agree even if they are not entirely convinced. Instead, if I write a separate opinion, concurring with my own decision, I will first of all be able to explain where I think the decision stands within the whole system of law. I will also be able to explain more carefully my ideas and my theory about the law without binding anyone in the future. My fellow judges will be aware of my position and they will be able to take it into consideration for the future. This is extremely useful.

VB: This is what you did in *Ciraolo*.[28]

GC: Exactly!

VB: If I remember correctly, in *Ciraolo* you wrote a concurring opinion in which you explained punitive damages in terms of economic analysis and you expounded your theory at length.[29]

GC: Yes. Posner, more or less at the same time, wrote a decision similar to *Ciraolo*, but he wrote his ideas not in a concurring opinion but in the opinion of the court,[30] because in the end, he is more aggressive, more activist than I am.

VB: Through your concurring opinions you managed to be scholar even on the bench.

CG: Careful! When I concur in my own decision it might seem that I write as a scholar, but I am always a judge because the opinion is strictly related to the facts of the case.

VB: Let's move on. There is another extremely interesting theory that I would like to discuss with you. In the 1991 *Harvard Law Review*'s *Foreword*, you advanced the idea of postponement, of "sec-

28. Ciraolo v. City of New York, 216 F.3d 236, 242–50 (2d Cir. 2000) (Calabresi, J., concurring).

29. *Id.*

30. Kemezy v. Peters, 79 F.3d 33 (1996).

ond look."[31] I have labeled this new approach to judicial review as a "soft" approach because I think that it is a kind of judicial review that is very respectful of the legislative body. Have you ever had the opportunity to use the "second look" method in your decisions?

GC: Yes. Generally, I have advanced my "second look" theory in concurring or dissenting opinions. The case in which I have expounded my theory in more detail is *Quill v. Vacco*, an assisted suicide case.[32]

In *Compassion in Dying v. Washington*, the Court of Appeals for the Ninth Circuit had struck down as a violation of the Due Process Clause of the Fourteenth Amendment a Washington State statute regulating assisted suicide.[33] The statute prohibited physicians from prescribing life-ending medication for use by the terminally ill, competent adults who wished to hasten their own death.[34] Invalidating a law because it is in contrast with the Due Process Clause is the most activist way of invalidating the law because there is nothing the legislative body can do to resurrect the law.

Instead, in our case, *Quill v. Vacco*, my two conservative colleagues struck down a very similar New York statute holding that it was in contrast with the Equal Protection Clause.[35] This is extremely interesting because using the Equal Protection Clause as a benchmark gives the legislative body the possibility of enacting the law again in a wording respectful of the Constitution. My court then, basing its decision on equality between those who could commit suicide on their own and those who could only do so if assisted,[36] was more respectful of Congress than the Ninth Circuit.

In my opinion I affirmed that *Quill v. Vacco* was an appropriate case for applying the "second look" theory.[37] I wrote that we should remand the case to the legislative body, we should advise the legislative body about the possible unconstitutionality of the law, and give it the responsibility of deciding whether and how to modify the suspect statute.[38] I proposed a new doctrine, a new approach to judicial review, which I could do in a concurring opinion.[39] The other

31. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991).

32. 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997).

33. 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

34. WASH. REV. CODE § 9A.36.060 (2011).

35. 80 F.3d at 725–31.

36. *Id.*

37. *Id.* at 731–43 (Calabresi, J., concurring).

38. *Id.*

39. *Id.*

judges of my court in *Quill* adopted a more aggressive because they directly and immediately struck down the New York statute as a violation of the Equal Protection Clause,[40] even though theirs was not as aggressive a stand as the Ninth Circuit's.

Why did my colleagues decide the case in a way stronger than what I proposed in my concurring opinion? Probably because they believed they were following the Supreme Court, which was seemingly heading in that direction. We are certainly not bound to follow a presumptive and future decision of the Supreme Court, but it cannot be considered too activist for a court to try to precede such Supreme Court decisions.

The Supreme Court eventually overruled the appellate courts' decisions and held constitutionally valid the assisted suicide statutes.[41] But it did so in such a confused way as to leave the door open to other developments of the law. The Justices almost did what I had suggested and left some room for the states' legislative bodies.[42] The Justices adopted a subterfuge while I acted in a more candid and transparent manner.

At the time, Charles Krauthammer, a very conservative journalist, attacked the appellate court decisions, and especially my concurrence, bitterly criticizing such new approaches to judicial review as extremely dangerous practices.[43] Krauthammer wanted the courts simply to declare the statutes on assisted suicide valid.[44] Because of his ideological position he did not want to force the legislative bodies to take a second look.

VB: But offering the legislative body a second chance is a very moderate approach.

CG: Yes. It is a moderate approach, but for Krauthammer it was a dangerous one. He thought that courts generally act with restraint before declaring a statute unconstitutional because such a power is very strong and reserved to exceptional cases.[45] If, instead, courts have the possibility of asking the legislative body to take a second look, then they might lose their restraint and feel too free to

40. *Id.* at 725–31.

41. Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksberg, 521 U.S. 702 (1997).

42. *See Glucksberg*, 521 U.S. at 718–19, 735 (noting that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," and stating that the Court's holding "permits this debate to continue").

43. Charles Krauthammer, *Physician-Assisted Suicides Should Be Decided by Public, Not Courts*, CHIC. TRIB., Apr. 15, 1996, at 17.

44. *Id.*

45. *See id.*

press legislatures.[46] This is not a very democratic way of thinking. Krauthammer was clearly looking at the result and my approach led to a result he did not like. As a journalist, he attacked me.[47] The whole story amused me very much because it revealed that Krauthammer was criticizing not the supposed countermajoritarian nature of the courts but only the merits of the decisions.

Another example of my use of second look is that of Maher Arar.[48] A terrible case. Arar, a Canadian and Syrian citizen, was travelling from Switzerland to Canada and his plane had a stopover at J.F.K. Airport in New York. Based on Canadian intelligence warning U.S. intelligence that Arar was a terrorist, American agents picked up Arar at the airport and took him to Brooklyn.[49] We don't know exactly how he was treated there, but we do know that he was not given an opportunity to contact the Canadian embassy or a lawyer, nor was he given the opportunity to return to Switzerland.[50] The secret services sent him to Syria, via Jordan, where he was tortured and confessed to many facts that were eventually proved not to be true.[51] He was in prison for a year.[52] Finally, the Syrians acknowledged that he was not a terrorist and let him go back to Canada.[53] In Canada, an investigating committee made a serious inquiry into the case and recognized Arar's rights.[54] I know a lot about the investigation because Frank Iacobucci, a Canadian Su-

46. *Id.*

47. *See id.* ("The prize for judicial presumption, however, goes to Judge Guido Calabresi of the 2nd Circuit in New York for his opinion concurring that the current laws banning assisted suicide must be thrown out . . . .").

48. Arar v. Ashcroft (*Arar III*), 585 F.3d 559 (2d Cir. 2009) (en banc).

49. *See id.* at 565–66.

50. *Id.* at 585 (Sack, J., dissenting) (noting that during his initial detention in Brooklyn "Arar's continued requests to meet with a lawyer and make telephone calls were refused"). Initially, Arar was only given the opportunity to return to Syria, which he refused because he was afraid he would be tortured there. *Id.* After six days in detention Arar was permitted to make one phone call, to his mother-in-law in Canada, who in turn alerted the Canadian Office for Consular Affairs to his detention, and retained an attorney to represent him in the his removal proceedings. *Id.* ("[Until] his family contacted the Office for Consular Affairs . . . . The Canadian Consulate [was not] notified of Arar's detention.").

51. *Id.* at 586–87.

52. *Id.* at 587.

53. *Id.* at 566–67 (majority opinion).

54. *See* COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006), *available at* http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

preme Court Justice and a very good friend of mine, was involved.[55] Canada's conservative administration, acting very correctly, assigned Arar damages for ten million Canadian dollars.[56] Let's leave aside if sending people to torture is admissible or not. What is important is that when there is an error, that error must be corrected. At this point Arar sued—

VB: —the United States, the federal administration—

GC: —those that "sent me to Syria . . . to be tortured,"[57] as he said. Arar filed a *Bivens* action—a special procedure for constitutional violations.[58] The trial judge held that *Bivens* was not admissible and the case was appealed to a panel of our court.[59] At our court, Judge Cabranes wrote an absurd decision.[60] Cabranes declared that a *Bivens* action is not admissible when other defenses are possible (and this is true) and that there were many things an immigrant to the United States could do to defend himself.[61] But Arar was not given time to defend himself anyhow! Moreover, he was not an immigrant because he did not want to come to the United States and, therefore, immigration law was not applicable! Another judge on the panel, with my help, wrote a very good and strong dissenting opinion,[62] and our court decided to rehear the

55. *See generally* STANDING COMM. ON PUB. SAFETY & NAT'L SEC., REVIEW OF THE FINDINGS AND RECOMMENDATIONS ARISING FROM THE IACOBUCCI AND O'CONNOR INQUIRIES, 2009, H.C. (Can.), *available at* http://www.parl.gc.ca/HousePublications/Redirector.aspx?RefererUrl=%2fHousePublications%2fPublication.aspx%3fDocId%3d4004074%26Language%3dE%26Mode%3d1%26Parl%3d40%26Ses%3d2&RedirectUrl=http://www.parl.gc.ca/content/hoc/Committee/402/SECU/Reports/RP4004074/securp03/securp03-e.pdf&StatsEnabled=true. While Judge Iacobucci was not Commissioner of the Arar Inquiry, he was Commissioner of a similar judicial inquiry into whether Canadian officials had done enough to protect another dual Canadian-Syrian citizen from torture in Syria around the same time. *See id.* at 4–5.

56. *Arar III*, 585 F.3d at 574 n.8 (citing *Ottawa Reaches $10M Settlement with Arar*, CBC NEWS (Jan. 25, 2007, 9:06 PM), http://www.cbc.ca/news/canada/ottawa-reaches-10m-settlement-with-arar-1.682875.

57. *Maher Arar: My Rendition & Torture in Syrian Prison Highlights U.S. Reliance on Syria as an Ally*, DEMOCRACY NOW! (June 13, 2001), http://www.democracynow.org/2011/6/13/maher_arar_my_rendition_torture_in.

58. *See id.* at 563–64 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

59. Arar v. Ashcroft (*Arar I*), 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *vacated and superseded on reh'g en banc*, 585 F.2d 559 (2009).

60. Arar v. Ashcroft (*Arar II*), 532 F.3d 157 (2d Cir. 2008), *vacated on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009).

61. *Id.*

62. *Id.* at 193–216 (Sack, J., dissenting).

case en banc[63]—a very unusual procedure. At the en banc level many things happened. Sonia Sotomayor was appointed to the Supreme Court.[64] The appellant hired a new counsel who was closely related to one of the judges on our court, and who therefore had to be recused.[65] Another judge on our court went senior and was no longer part of the plenum.[66] At that point, the majority that voted for rehearing the case en banc had changed, but we still agreed that the panel's decision could not hold because *Arar* was not an immigration case.

We had to decide whether a *Bivens* action was available and that was a constitutional question. The majority held that in cases of political and international relevance *Bivens* was not available.[67] Four dissenting opinions were written, each partly concurring with the others.[68] My colleagues primarily addressed the question of *Bivens* actions and torture.[69] In my dissenting opinion—which provoked a great controversy because I wrote that in our court's history the day we decided *Arar* would be remembered as a bad day—I wrote that the *Bivens* action might be permitted.[70] But before deciding on the availability of such an action, a preliminary question had to be decided: whether there was a problem with privileged material, a problem with state secrets.[71] And in order to ascertain this question, the case had to be remanded to the district court.[72]

Why did I do this? All the dissenting opinions agreed (and this was also the opinion of the majority) that any decision on the availability of a *Bivens* action would be a decision at a constitutional

63. *Arar III*, 585 F.3d 559 (2d Cir. 2009) (en banc).

64. *See id.* at 562 n.*** (noting that Justice Sotomayor "was originally a member of the *in banc* panel and . . . participated in oral argument [before she] was elevated to the Supreme Court on August 8, 2009"); *see also* Oral Argument, *Arar III*, 585 F.3d 559 (2d Cir. 2009) (No. 16-4216), ECF No. 189, *available at* http://www.c-span.org/video/?282779-1/arar-v-ashcroft-oral-arguments.

65. *See Arar III*, 585 F.3d at 562 (noting that Judge Katzmann "took no part in the consideration or decision of the case"); Oral Argument, *supra* note 64 (noting in the docket entry that "Judge Katzmann is [recused]").

66. *See Arar III*, 585 F.3d at 562 n.* (noting that before he assumed senior status, "Senior Circuit Judge McLaughlin was a member of the initial three-judge panel" that heard oral argument in *Arar II*); *see also* Oral Argument, *supra* note 64.

67. *Arar III*, 585 F.3d at 580.

68. *Id.* at 582–610 (Sack, J., concurring in part and dissenting in part); *id.* at 610–23 (Parker, J., dissenting); *id.* at 623–30 (Pooler, J., dissenting); *id.* at 630–39 (Calabresi, J., dissenting).

69. *See id.* at 582–610 (Sack, J., concurring in part and dissenting in part); *id.* at 610–23 (Parker, J., dissenting); *id.* at 623–30 (Pooler, J., dissenting).

70. *Id.* at 630–39 (Calabresi, J., dissenting).

71. *See id.* at 634–37.

72. *Id.* at 605–610 (Sack, J., concurring in part and dissenting in part).

level.[73] But a decision based on the doctrine of state secrets is a decision based on common law and statute and therefore could be changed[74]—and in fact the Obama administration seems inclined to change the state secrets doctrine. Moreover, when a case cannot proceed for state secrets reasons, it often means that the action is well founded but cannot go forward precisely because of the state secret. In such a situation, it's easy for the trial judge to say, "The action is good, but I cannot proceed." This can put the administration under pressure, driving it towards a political solution "Canadian style." The administration will be pushed to pay damages to the person whose rights are allegedly violated without going through a judicial proceeding. In the end, a fair result can be reached in the case.

VB: In a sense, with your opinion you would have encouraged a political response.

GC: Yes. I would have encouraged and stimulated a political decision. I was also trying to avoid a constitutional issue. I was trying to avoid a decision on the significance of a *Bivens* action in a terrorism case, to avoid a situation where those who get excited when dealing with terrorism issues would tend to limit the reach of *Bivens* actions just because of the merits of the case.

In those two cases I was not successful. But there is a case in which my soft approach to judicial review succeeded.[75]

Grand jury proceedings are secret.[76] The administration may publicize grand jury proceedings, but such a decision lies only within the discretion of the administration.[77] Nobody is entitled to know what was said before a grand jury. We had a case in which a historian wanted to know what a certain person said to the grand jury during the anti-communist investigations of the 1950s.[78] The

73. *See Arar III*, 585 F.3d at 631 (Calabresi, J., dissenting) ("[T]he existence *ex vel non* of a claim meriting a *Bivens* remedy . . . is a matter of constitutional interpretation."); *see also id.* at 574 (majority opinion) ("Although this action is cast in terms of a claim for money damages . . . it operates as a constitutional challenge to policies promulgated by the executive."); *id.* at 602 (concurring in part and dissenting in part); *id.* at 620 (Parker, J., dissenting); *id.* at 627 (Pooler, J., dissenting).

74. *See id.* at 605 (Sack, J., concurring in part and dissenting in part).

75. *See In re* Petition of Craig, 131 F.3d 99 (2d Cir. 1997).

76. *Id.* at 101–02; *see also* Fed. R. Crim. P. 6(e)(2)(B).

77. *In re Petition of Craig*, 131 F.3d at 102 ("[D]istrict courts, as part of their supervisory authority over the grand juries that they have empaneled, are explicitly given the discretion to determine whether, if one or more of the listed exceptions to grand jury secrecy apply, disclosure of records is appropriate."); *see also* Fed. R. Crim. P. 6(e)(3).

78. *In re Petition of Craig*, 131 F.3d at 101.

administration denied the request arguing that all that is said before the grand jury is secret; the trial judge ruled for the administration.[79] On appeal, I wrote a decision in which I noted that if John Wilkes Booth, the murderer of President Lincoln, had not been killed during his arrest and if he had gone in front of a grand jury, historians, according to the government, would never be able to study what went on before the grand jury.[80] In my opinion I held that a time must come when grand jury proceedings are to be available to the public in order to be studied for research purposes.[81] But when is such a time reached? One might reasonably consider, for instance, if people involved in the case or people who made statements about the case are still alive. These issues are for the trial judge to decide. In the case at hand, I read the trial judge's decision to be a discretionary one.[82] In my view, the trial judge had simply thought that the time had not yet come to open to the public the proceedings of the grand jury of the anti-communist investigations of the McCarthy era.[83] The administration won the case and could therefore not appeal to the Supreme Court, which was then not able to decide the issue prematurely (as it seemed to me).

VB: But this is not a "second look," it's a shrewd move.

CG: It's another way to leave room to different institutional actors on difficult issues and I'll tell you why. The losers did not appeal because to a certain extent they were happy. What was in fact the result of the case? The result was that many decisions were taken on similar issues by various courts of appeals and all of them followed my opinion[84]—that is they "stopped" the Supreme Court and gave the administration only a "non-victory victory." At this point, the law is sufficiently clear. The grand jury, within certain time limits, can be open to the public. This does not mean that it will be impossible in the future for the Supreme Court to give a clear-cut victory to the administration, but it will be harder. This is a "second look" not regarding the legislative body, but regarding the other federal courts. If the issue will one day reach the Supreme Court, it will reach it as if Congress had already modified the law admitting the possibility of opening the proceedings of the grand jury. As a judge, I have learned that "second look" is a very sophisti-

79. *Id.*

80. *Id.* at 105–07.

81. *Id.*

82. *Id.* at 107.

83. *Id.*

84. *See, e.g.*, *In re* Special Grand Jury 89-2, 450 F.3d 1159, 1178 (10th Cir. 2006); *In re* Sealed Case No. 99-3091, 192 F.3d 995, 1004 (D.C. Cir. 1999).

cated theory. Generally, a "second look" is referred to the legislative body, but it can also be referred to other judges and to administrators.

VB: In any case, you leave a door open for dialogue.

GC: Exactly! I tried to initiate a dialogue among courts over the issue of the grand jury. In this case my decision was successful and this is the reason why nobody talks about it—it's not interesting because it's not dramatic. The problem with judges is their vocation for martyrdom, their temptation to write the great dissent, the great concurring opinion, saying "everybody but me is wrong."

VB: Here we go back to what you were telling me at the beginning of our conversation. The good judge must take into account the real case. In the situation that you just described, you took into account both the real case and the development of the law.

GC: When a judge writes a dissenting or a concurring opinion, he feels good because he writes for history. But he should not be happy because in such a case he has not found the right answer and has lost.

VB: Let's change perspective. Once, in discussing how courts should be free to decide—courts should be free to remand cases, ask for a "second look," decide prospectively—you mentioned what some European constitutional courts are allowed to do.[85] I am referring to *United States v. Then* where, looking at the European experience, you wrote beautifully, "Wise parents do not hesitate to learn from their children."[86]

GC: That's one of the most quoted sentences from my opinions.

VB: It's a very famous case, in which you cited a Florentine scholar, Mauro Cappelletti, and you acted like a true comparatavist.[87] Tell me something about Guido as both a judge and a comparatavist.

GC: First of all, I think that citing foreign countries' law not only is not a problem, as it is, for instance, for Justice Scalia, but it is part of the fundamental task of an American judge because the United States is a true federation. In our federation, values differ very much from one state to another. Vermont and Texas have different values. Yet, from the very beginning of our history, not only could one state refer to another state's law, but that practice was

85. United States v. Then, 56 F.3d 464 (2d Cir. 1995).

86. *Id.* at 469.

87. *Id.* (citing MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989)).

very common.[88] Scalia declares that it's not possible to quote another country's courts because that country's judges were not appointed by the President of the Unites States with the advice and consent of the U.S. Senate.[89] The consequence is that for Scalia, hard law is the only source of law.

But this was never true in our system because judges in Texas or California are not nominated by Vermont's governor and confirmed by Vermont's senate, yet judges in Vermont have always been free to cite opinions from Texas or California in order to decide their own cases better. Vermont, in taking into consideration other American jurisdictions, must look to "close" jurisdictions, to jurisdictions with values similar to those of Vermont, regarding the problem that has to be solved. But Vermont is also free to cite far and culturally remote countries in order, for example, to verify whether those countries have a different approach to a similar problem.

What does "close" mean? Obviously two jurisdictions can be geographically close, but they can also be close from a systematic point of view. For instance, New York and California frequently cite one another because they are both Field Code States. This is true not only for issues regulated by the common law, but also for constitutional issues. Courts talk among each other but they must be careful. For example: "Look! California has invalidated its guest statutes as a violation of the state constitution." And then Washington State follows California and invalidates its own guest statutes. But it is very different to declare a statute unconstitutional in California and in Washington. In California, the Constitution can be very easily amended.[90]

VB: And this is not the case in Washington.

GC: In California, a decision of unconstitutionality can be considered a "second look" vis-à-vis a referendum.[91] The second chance is given not to the legislative body but directly to the people.[92] The situation in Washington is different. In the end, Washington's reference to California is not proper. In order to follow another legal

88. *See, e.g.*, Riggs v. Palmer, 115 N.Y. 506, 512 (1889) (referring to Connecticut probate law); State v. Post, 20 N.J.L. 368, 377 (1845) (referring to the Virginia state constitution); Merrill v. Sherburne, 1 N.H. 199, 214 (1819) (referring to Massachusetts common law).

89. *See* David J. Seipp, *Our Law, Their Law, History and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1418 (2006) (listing opinions in which Justice Scalia "complained about the citation of foreign law").

90. *See* CAL. CONST. art. XVIII.

91. CAL. CONST. art. II.

92. *Id.*

system, one must be familiar with that legal system and be aware of its complexity.

VB: When one compares, she has to know what she is doing.

GC: She has to know what she is doing. But, that said, she has to do it as she has always done it. And many times it happens that the more easily comparable system—because of its cultural and legal similarities—is not within the US—

VB: —but is a foreign or a supranational system. It comes to my mind *Lawrence v. Texas*, the decision that declared sodomy laws unconstitutional,[93] which was bitterly criticized not only on its merits but also because it quoted extensively from the case law of the European Court of Human Rights.[94]

GC: It can be that, for Maine or Vermont, Canada's case law is more interesting than that of Texas or California. For an American judge, it is important and inevitable to be a comparatavist. But he has to be a good comparatavist. Once I heard Posner saying: "It's true, Scalia's position does not hold, but if a judge is allowed to refer to any jurisdiction, he would gain too much power because he will always be able to find the answer that he likes." He made me laugh because the issue that was debated was exactly if a judge could do anything he wanted and Posner was saying yes and I was saying no. This is how I concluded: "Well, for you, a judge can do anything anyway. What, then, is the difference?"

In any case, if a judge is allowed to cite the fifty-one jurisdictions of the United States, he will find everything he wants! It's the same old story. The judge must always be honest when he interprets the law and this is just as much so when, in the interpretation, he uses comparative law. Indeed, even when he uses subterfuges, he must be candid.

VB: And here we are back to *A Common Law for the Age of Statutes* and your "choice for candor."[95] I realized I have taken too much of your time. We've been talking all morning. Is there something else you would like to add to our conversation?

GC: Let me add a few more words on federalism.

The position of my court, as a federal court of appeals, is unique. It decides ordinary issues and constitutional issues and, in the great part of the cases, it's a court of last resort because the Supreme Court almost never grants certiorari. Only in those rare cases that reach the Supreme Court do we really act as an interme-

93. 539 U.S. 558 (2003).

94. *See* Seipp, *supra* note 89, at 1417 & n.3.

95. CALABRESI, *supra* note 1, at 178–81.

diate court of appeals. And we know very well which cases will reach the Supreme Court. As intermediate judges, we are also able to condition, to influence, the Supreme Court in deciding whether to grant review or not. The Justices now tend to accept cases where there is a conflict among circuits. Well, we can write a decision—

VB: —where you emphasize the conflict or not.

GC: I can say, for instance, that Judge Posner in Chicago has decided in a certain way, but that the fact situation in New York and Illinois differs very much, and what appears as a contrast probably is not. This kind of decision signals to the Supreme Court that there is no need to rush and suggests waiting for other circuits' opinions. To the opposite, we can emphasize that Posner said "black" and we said "white," and therefore that the contrast needs to be decided. But there is more. When we think that the Supreme Court will take the case, we write in a special way. We want to offer them a whole "menu"; we want to help the Court to decide.

VB: This is a crucial point. You "prepare" the case in order to influence the decision of the Supreme Court.

GC: We can even say, "You have gone in this direction, but we think it's wrong." For example, a few years ago, in a preemption case,[96] everybody said about my opinion, "Ok, Guido. You're right, but the Court is going completely in another direction and you will be reversed nine to zero or eight to one." I answered, "No problem!" It happened instead that one Justice did not participate in the decision, the remaining eight divided equally, and my opinion was affirmed.[97] Two years later, in a crucial case, my opinion was followed because there had been a different development in the law.[98] In the end, we also have the role of stimulating, of directing.

But we also have another role that is important when we apply state law. As you know, in diversity jurisdiction cases we apply state law—common law, statutory law, and constitutional law. When we interpret state law, we act like intermediate state judges. This is a very important part of American federalism.

VB: Yes. "There is no federal general common law."[99]

GC: Precisely! And why is there no federal general common law?

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96. Desiano v. Warner-Lambert & Co., 467 F.3d 85 (2d Cir. 2006), *aff'd sub nom.* Warner-Lambert Co., LLC v. Kent, 552 U.S. 440 (2008).

97. Warner-Lambert Co., LLC v. Kent, 552 U.S. 440 (2008).

98. *See* Holster v. Gatco, Inc., 130 S. Ct. 1575, 1577 (Ginsburg, J., dissenting).

99. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

It's a very interesting question because it brings us back again to *A Common Law for the Age of Statutes*.[100] Every state formally adopted the English common law as the law of their jurisdiction.[101] For instance, English common law, as elaborated by state courts, is the law of New York—this is expressly provided by the New York Constitution.[102] In other states, the same result was reached by statute.[103] State courts are delegated the power to develop English common law; this was never the case for the federal government. Therefore, as was held in *Erie Railroad Co. v. Tompkins,* there is "no federal general common law."[104]

In diversity cases, judges of most other circuits think they are better equipped than their state counterparts, and therefore tend to interpret directly state law. But probably one of the most important things I did as a judge was to consider that "superiority" attitude to be a wrong attitude. We must understand, I wrote, that in diversity cases we act as intermediate state judges and as a result, through certification, we must ask state supreme courts to interpret their own law.

My position shocked many of my colleagues because they thought that in so doing we would overburden state courts. But my answer was: "Not at all!" If we say to state courts, "Give us the interpretation!," that could be offensive. If, instead, we emphasize that we would be grateful if they gave us their interpretation, but that if they choose not to, we would try to do our best in giving meaning to state law, state courts would surely be collaborative.

This is what is going on, especially with New York State. Here the great Chief Judge Judith Kaye understood my ideas and once declared that the reason for such good relations between federal and state courts was "Guido's practice of certification." My court now asks state judges the meaning of their own law not only in diversity cases, but also in cases where the issue to be decided is whether a statute is constitutionally valid. In *Quill v. Vacco*,[105] I hoped the case would not reach the Supreme Court. I would have preferred to rehear that case en banc and, prior to the constitutional remand that I proposed to the panel level, I would have

100. CALABRESI, *supra* note 1.

101. *See* Richard C. Dale, *Adoption of the Common Law by the American Colonies*, 30 Am. L. Reg. 553 (1882).

102. N.Y. CONST. art I, § 14.

103. *See, e.g.*, Dale, *supra* note 101, at 572 (noting that Arkansas incorporated the common law of England by statute).

104. 304 U.S. at 78.

105. 80 F.3d 716 (2d Cir. 1996).

asked the New York court, through certification, the meaning of the 1818 New York statute on assisted suicide. The New York court would have been free not to answer our question, leaving us to interpret the statute. The state court might have preferred to wait for another case within its own jurisdiction before deciding the issue. Or they might have preferred to answer our question. When we use certification, New York judges can answer: "Yes, we are willing to decide." Or they can start a dialogue with us: "You decide first and then we will be free to follow your interpretation or not."

VB: In the end, if I try to put together all your answers, I can see that Guido Calabresi as a judge has emphasized some aspects of his original theories. As a judge, he is extremely open to dialogue and his approach to judicial review is as soft as possible. Guido Calabresi's openness is addressed not only to the legislative body, but also to other judges, federal and state. He has a dialogic attitude towards any subject that interacts with his court.

GC: You are right. The legal philosophy that I tried to develop is that of dialogue. And there should be a dialogue with state courts not only on state law but also, in certain cases, on federal law.

VB: Would it be fair to say, by way of conclusion, that as a judge you are minimalist, mild, and open to dialogue?

GC: Mild only to a certain extent. There are some constitutional values that must be considered absolutes. In this I follow Justice Black: there are cases in which the Framers have given a great power to courts, and in these cases that power must be used.[106] But, in general, you are right. Dialogue is a great part of my job as a judge; it lies at the core of my judicial philosophy.

106. *See* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 880 (1960).