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Paul R. Baier
Louisiana State University Law Center

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Chief Judge Melvin Shortess: A Pencil Sketch from Life*

Paul R. Baier**

In consideratione creaturarum non est vana et peritura curiositas exercenda; sed gradus ad immortalia et semper manentia faciendus.—
ST. AUGUSTINE***

I.

IF THE COURT PLEASE, LADIES AND GENTLEMEN:

I have never addressed Your Honors from this particular angle and I am uncomfortable with my back even slightly towards the Court. I like eye contact with the target of my remarks. But I shall do my duty as the lectern has been laid out. Rest assured, I am not after your Honors' votes. My aim is to touch Chief Judge Shortess's heart.¹

This has been a hard summer for me. I labor under a surgeon's orders not to engage in my daily regimen of exercise. I wish I could say 300-pound squats and 10K's, the routine of my colleagues Bill Corbett and Wendell Holmes. But the injunction was lifted this week and I had my first run with Chief Judge Shortess on the streets of downtown Baton Rouge, through the corridors of his life as a judge. We ended by running up the State Capitol steps with our arms outstretched in victory. I am sure you know the movie "Rocky." It is one of Judge Shortess's favorites. And then a little finishing cantor through the gardens of the State Capitol grounds. We came to rest on a park bench of solitude near the statue of Huey Long. Whatever doubts I had about belonging to this community were lifted when Judge Shortess spoke to me like a brother, if not like a father to his son. And may I add with glee that my Louisiana pedigree has soared to new heights of late when my precious daughter Erika (I do not mean to slight my other children) acquired a frisky Labrador puppy. Erika is engaged in a pediatrics residency and delivering premature babies at LSU Medical Center in New Orleans with her fiancé, Dr. David Rabalais. They will marry in November.

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* Paul R. Baier, Principal Address at Retirement Proceedings Honoring Chief Judge Melvin A. Shortess, First Circuit Court of Appeal, Baton Rouge (July 27, 2000). *Editor's Note:* Professor Baier has annotated his speech for publication in the *Louisiana Law Review*.

** George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Scholar in Residence, Louisiana Bar Foundation, 1990-92. Member of the Louisiana Bar.

*** (In the study of creature one should not exercise a vain and perishing curiosity; but ascend toward what is immortal and everlasting.) *De Vera Religione*, quoted and translated in Eric Voegelin, *Order and History*, Vol. III, *Plato and Aristotle* viii (LSU Press 1957).

1. "Any day in Washington Street, when the throng is greatest and busiest, you may see a blind man playing a flute. I suppose that some one hears him. Perhaps also my pipe may reach the heart of some passer in the crowd." Oliver Wendell Holmes, Jr., *The Soldier's Faith* (1895), in *The Occasional Speeches of Justice Oliver Wendell Holmes* 73 (Mark de W. Howe ed., 1962) [hereinafter *Occasional Speeches*].

Now it happens that this puppy is the baby of a big Mama Labrador named "Aspen." I don't know if she has any dangerous propensities. She looks gentle enough from the family photo I keep in my office. Aspen, in turn, is owned by Dr. Terrell Joseph, also in residency at LSU Medical Center. Terrell is the son of Baton Rouge's beloved child Cheney C. Joseph, Jr., my good colleague at the Law Center. And so, in a word, I proudly announce that Cheney Joseph and I are related—by *dog!* Cheney told me to recite my speech entirely in Latin. He advises that Judge Fitzsimmons of this Court enjoys a good Homeric recital in Caesar's native tongue. I thought this a bad idea. I am not Saul Litvinoff. But we reached a compromise, just as I am sure Your Honors have reached a compromise on occasion. What, after all, is the law but a delicate balance of competing enthusiasms.²

Now to my formal remarks.

II.

Chief Justice Calogero, Chief Judge Shortess, Members of the Bar, LSU Faculty, Guests, Your Honors of the First Circuit:

Saint Augustine tells us that in the study of creature one should not exercise a vain and perishing curiosity—"In consideratione creaturarum non est vana et peritura curiositas exercenda"; but ascend toward what is immortal and everlasting—"sed gradus ad immortalia et semper manentia faciendus." It is in this spirit that I offer my homage to Chief Judge Shortess and to Your Honors. I call my remarks "Chief Judge Melvin Shortess—A Pencil Sketch from Life."

Melvin Shortess calls himself "The Bookseller's Son," his shorthand sketch of his youth.³ His parents called him "Sonny" at home. Amazingly, or such is life, so

2. Judge Shortess's opinion in a child custody case brought under Louisiana's Post-separation Family Violence Relief Act alleging that a father sexually abused his daughter speaks of "a delicate balancing of the interests of the child of tender years against the rights of a parent to due process when faced with the total and partially permanent loss of the basic human right to have contact with one's child." *Folse v. Folse*, 714 So. 2d 224, 227 (La. App. 1st Cir. 1998). Enthusiasm for due process won out in the First Circuit, but Justice Kimball's reversing opinion on writs, 738 So. 2d 1040 (La. 1999), forcefully canvasses a competing enthusiasm for protecting children from sexual abuse and justifies a looser application of the rules of evidence to that compelling end. The vote in the Louisiana Supreme Court was close: Chief Justice Calogero, Marcus and Victory, JJ., "dissent for reasons assigned by Court of Appeal." *Id.* at 1052. The same competing enthusiasms are loudly evident, and divided the United States Supreme Court, 5-4, in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990) (per O'Connor, J.; Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

3. Born Cedar Falls, Iowa, 1933. Family moved to Baton Rouge in 1944, where he worked downtown at "The Lois Shortess Bookstore," 113 Third Street, throughout his LSU student days at both the University and at the Old Law School. Graduated from LSU Law School in 1958. Practiced law in Baton Rouge for eight years, two with D'Amico & Curet and six as a sole practitioner ("175 Chippewa Street, at the Intersection of Choctaw, Chippewa & N. Third Sts.") and as attorney for the Liquidation Dept. for Commissioner of Insurance Dudley A. Guglielmo. Elected to Baton Rouge City Court, 1967; first judicial oath, March 28, 1967. Two years later elected to 19th Judicial District Court, where he served for thirteen years. Elected to First Circuit Court of Appeal, 1982. Judge Pro Tempore Louisiana Supreme Court, 1990. Thirty-three years' experience judging cases. Member American, Louisiana, Baton Rouge Bar Ass'ns and American Judicature Society. Adjunct Professor at LSU Law School teaching trial advocacy courses, 1975-90. Outstanding Service Award, A.B.A. National Center

did mine. I am sure Melvin Shortess's parents had the same high hopes for their children, whatever their calling. The key, they knew, is education; they taught us the lesson of hard work.

And if Your Honors please, may I add the teasing comparison that in the cave of his chambers Mr. Justice Holmes called all his law clerks . . . "Sonny." More on that cave figure in a moment.

As a young man Melvin Shortess walked the stretch of Highland Road from campus to downtown Baton Rouge, where he worked in his family's bookstore on Third Street.

Thence to Chimes Street, closer to what today is remembered only as "The Old Law School," where he was touched with the fire of Joseph Dainow, Robert Pascal, George Pugh, and others. Yet he had the same self-doubt that confronts all of us who enter this door of the law. "[W]hat have you said to show me that I may reach my own spiritual possibilities through such a door as this?"⁴ I quote Holmes's speech "The Profession of the Law."

Yet Holmes believed there is an answer: "If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist, he will make—I do not say find—his world ideal."⁵

Melvin Shortess has the soul of an idealist. He has labored hard over the large terrain of causes to make our legal world ideal.

I salute our tender, hard-hearted "Chief" as he reaches the goal.⁶ I bring you the purple and gold laurel of your Alma Mater, LSU. President Jenkins, who is out of State, wants me to say that you have fulfilled our university's noblest aspiration: "To improve the common good of the community through LSU's great teaching Faculty and by the lives and zeal of its alumni." These are his words. And, of course, your teachers at LSU Law School wish you well. "A teacher affects eternity; he can never tell where his influence stops."⁷ You have put George Pugh's yearning for due process, and in turn your own yearning for due process,⁸ into Louisiana's law.

for State Courts, 1990-91. Named Louisiana Bar Foundation's Distinguished Jurist in 1993. Board Member, Baton Rouge Food Bank.

4. Oliver Wendell Holmes, Jr., *The Profession of the Law* (1886), in *Occasional Speeches*, *supra* note 1, at 22.

5. *Id.*

6. "The true teaching of life is a tender hard-heartedness which has passed beyond sympathy and which expects every man to abide his lot as he is able to shape it." Oliver Wendell Holmes, Jr., *Admiral Dewey* (1899), in *Occasional Speeches*, *supra* note 1, at 110.

7. Henry Adams, *The Education of Henry Adams* 300 (New York, 1931).

8. *See, e.g.*, *Lott v. Department of Pub. Safety & Corr.*, 712 So. 2d 660, 662 (La. App. 1st Cir. 1998) ("Did Lott suffer prejudice amounting to a due-process violation because a majority of the six-member panel did not hear the testimony in September? We have carefully considered the testimony taken that day in pondering this question. . . . We conclude that the failure of a majority of the commission to hear this testimony and weigh its credibility substantially prejudiced defendant to the extent that his due process rights were violated."). The Louisiana Supreme Court, per Calogero, C.J., *reversed*, 734 So. 2d 617 (La. 1999), but Judge Shortess's yearning knaws at the reader still. On remand, Judge Shortess did his intermediate appellate duty and affirmed the Louisiana State Police Commission's firing of Lott. 747 So. 2d 742 (La. App. 1st Cir. 1999).

I know your professors are proud of you. Your success is their great reward. And my happiness, Chief Judge Shortess, is the friendship you have allowed me of late over our few repasts at the Icehouse on Perkins Road and with Mrs. Shortess on Keed Avenue. All of this, and a glorious jog over the terrain of your life in downtown Baton Rouge, without a care in the world over the Blessed Docket—like a cardinal flitting in the boxwoods of the State Capitol grounds. We have shared life lived to its top. Am I wrong to believe that love abideth?

III.

Life is a curious amalgam of dispondency and hope.⁹ Our quintessential Chief Judge nearly quit law school.¹⁰ He resolved to resign before his first semester was out, but one of life's contingencies saved him. He was in love with Marna Bass. Miss Marna advises me it was a chemical, not a legal, bond. They later married and had three children, Amy, "Vin"—short for "Melvin"—, John and three grandchildren, Anna, Taylor, and Henry.

Melvin Shortess wants more time to tend to his garden, with its patchwork of purslane and doves nesting. He wants more time to play with his grand-children, more time for who knows what else. "The purpose of work is leisure," said Chief Justice Dixon when he retired. "I want out."¹¹ Meanwhile, Mrs. Shortess is stitching a patch-work quilt made out of, imagine, Chief Judge Shortess's worn out bow-ties! I saw it on an outing to the Shortess home, just as Cézanne saw sunlight strike Saint Victoire.

I mentioned to Mrs. Shortess that Your Honors were about to surrender Chief Judge Shortess to his family. She smiled and said—and here I had better quote her exactly: "I don't know what I'll do with him."

LSU co-ed Marna Bass knew Melvin's Shortess's potential better than Melvin himself. Dean Hebert was out of town and so his letter of resignation was refused. In those halcyon days, it was Mac Hebert's Old Law School rule that you had to

9. [M]ost of us find it easy to despond. When a man is satisfied with himself it means that he has ceased to struggle and therefore has ceased to achieve. . . . [O]ne would indeed be morbid if he did not hope, and were not ready to tell the younger men who hear him that the race is worth the running. . . . Those who run hardest probably have the least satisfaction with themselves, but they find, I am sure, that they know most of the joy of life when at top speed.

Oliver Wendell Holmes, Jr., *Despondency and Hope* (1902), in *Occasional Speeches*, *supra* note 1, at 147.

10. As I look back to those periods of misery, the war and the beginning of one's profession, I cannot forbear saying, as I always say when I have any beginners within hearing, that it is true that you grow—that you must go through that trial of wretched doubt—doubt as to your own significance, ignorance of even what question you want to ask—and that it is through faith and will—faith that there is a question and an answer—will to attain them—that one enters the door of life.

Oliver Wendell Holmes, Jr., *A Provisional Adieu* (1902), in *Occasional Speeches*, *supra* note 1, at 152-53.

11. Proceedings on the Retirement of Honorable John A. Dixon, Jr., Mar. 27, 1990, West's Louisiana Cases, 562 So. 2d-563 So. 2d liii, lxx.

tender your letter of resignation in person to the Dean. Over the weekend, Mary Bird Perkins saw Melvin in the family bookstore. She hit him hard with her telling comment: "Sonny, I didn't know you were a quitter."

Melvin Shortess is no quitter. His first judgment, mind you, was to reverse himself. Thereafter the logic of hard work made him Chairman of the Moot Court Board and proud recipient of the Bureau of National Affairs Award for the most improved record in the third year.¹² This was a year's subscription to U.S. Law Week. Melvin Shortess has been reading and writing the law reports ever since.

IV.

Fifty years ago a staggering continental thinker expounded good government at LSU. I mean Eric Voegelin. His dense book *Plato and Aristotle* was doubtless being jawed over in the Political Science Department. My dear colleague Robert Pascal, "Gaius of the Old Law School," as I lovingly know him, edited Volume 27 of Eric Voegelin's *Collected Works*.¹³ It enables you to sit with Melvin Shortess in Voegelin's Jurisprudence class at the Old Law School in the Spring of 1955. I have it on very high authority that the boys wondered whether Voegelin's trademark cigar was—"The entrance to Plato's Cave."¹⁴

It was Voegelin who taught Melvin Shortess Plato's *Parable of the Cave*,¹⁵ with its prisoners in chains and its mere *shadows of justice* on the wall. It was Voeglin

12. A letter from Dean Milton Harrison announced the award:

I am pleased to advise you that you were selected as the Senior making the most satisfactory scholastic progress during your final year in Law School. You are, therefore, the recipient of an award from the Bureau of National Affairs, Inc., publisher of U.S. Law Week, which award is a year's subscription to the U.S. Law Week. A certificate, prepared by the donor, is enclosed.

Milton M. Harrison, Former Dean LSU Law Center, to Melvin A. Shortess (July 31, 1958) (copy on file, Registrar's Office, LSU Law Center.) Dean Harrison added: "I am happy that in addition to your many other activities and your very fine work as Chairman of the Moot Court Board that you were able to raise your scholastic average successfully. This is evidence of your ability and your conscientious efforts." *Id.* Writing back as the junior associate of D'Amico & Curet, Attorney at Law Shortess reported to Dean Harrison: "I am enjoying my subscription to 'U.S. Law Week' very much. I want to extend to you and the entire faculty my sincere and humble appreciation for selecting me as the most improved senior of 1958." Melvin A. Shortess to Milton Harrison (Oct. 28, 1958) (copy on file, Registrar's Office, LSU Law Center).

13. Eric Voegelin, *The Nature of Law and Related Writings* (Robert A. Pascal et al. eds., 1991). Voeglin's *The Nature of Law* (1957) was a copyrighted mimeograph distributed to his students in his Jurisprudence course which he taught at the Old LSU Law School from 1954 through 1957. *Id.* at ix (Editors' Preface). Melvin Shortess was Voegelin's student in the Spring of his first year, 1955.

14. *Ex rel.* Melvin Shortess, over lunch with the author at O'Briens Icehouse, Baton Rouge.

15. Eric Voegelin, *Order and History*, Vol. III, *Plato and Aristotle* 114-15 (1957) [hereinafter *Plato and Aristotle*]:

(1) Human beings are chained in a cave, with their faces to the wall. Behind them the cave rises towards an opening, with a blazing fire at a distance. Between the fire and the prisoners is a low wall, behind which persons are passing, holding up vessels, statues, and figures of animals so that they protrude above the wall. The prisoners see nothing but shadows on the wall of the cave before them, their own shadows as well as the shadows of

who taught Melvin Shortess to come up to the light, to abide truth, to seek the *reality of justice*—these are life's ultimates.

Thence to "go down" again, to face life, to do one's duty for the good of our community and our law.¹⁶

Justinian issued the same guidelines for his judges: "[W]e order all our judges to follow the truth and the paths of law and justice."¹⁷

If I may judge him, and as Your Honors surely know him from the intimacy of the conference room, Melvin Shortess has achieved greatly in the law as Holmes sketched our Profession:

Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man

the objects protruding above the wall. To the prisoners truth would be nothing but the shadows of themselves and the objects.

(2) In the second part of the Parable one of the prisoners is released from his bonds and forced to stand up suddenly, to turn around to walk, and to lift his eyes toward the light. The experience is painful. The glare of the fire will dazzle him. And at first he will be inclined to consider the shadows true reality, and the real objects the distortions.

(3) In the third part the prisoner is dragged up to the mouth of the cave and has to face the upper world and the light itself. He advances in his power of vision from the shadows to the real objects, and further to the sources of light itself. And he finally recognizes the sun as the lord of the visible world and, in a sense, as the ultimate creator of all things which he saw in prison. Once he has seen the light, he is reluctant to return to the cave and to his fellow prisoners. They had the practice of conferring honors on those who best observed the sequence of shadows and who could, on the basis of their observations, guess the ones that would appear next. He no longer has the taste for such wisdom and such honors; and he endures anything rather than return to that miserable life.

(4) In the fourth part, however, the prisoner is taken back to his former seat among his fellow prisoners. He finds it difficult to adjust himself again to the darkness. He is a ridiculous figure among his companions who never left their places, for he no longer is as alert as they are at the game of shadows. They scoff at him because he has lost his sight in the ascent; they think it better not to ascend at all, than to return in such a condition. And if he tries to loosen others from their shackles they lay hand on the offender if they can, and put him to death.

The meaning of the Parable in general is clear and needs no elaboration. It is an allegory of the philosopher's education, as well as of his fate in the corrupt society, with a concluding allusion to the death of Socrates.

Id. at 114-17.

16. "When they have fixed the 'gaze of their soul' on the good itself (*to agathon auto*), they shall use it as a paradigm for the right ordering (*kosmein*) of the polis, the citizens, and themselves for the rest of their lives." *Plato and Aristotle, supra* note 15, at 112.

17. C. 7.45.13 (529 A.D.):

No judge or arbiter should suppose that he must follow opinions that he considers wrong and still less the decisions of eminent prefects or other notables (for if something was not decided well, it ought not to be extended so as to produce error by other judges, since decisions should be rendered in accordance, not with examples, but with the laws), even if the opinions in question are advanced in judicial inquiries of the most eminent prefecture or highest magistracy of any kind; but we order all of our judges to follow truth and the paths of law and justice.

John P. Dawson, *The Oracles of the Law* 123 n.3 (1968).

may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, drink the bitter cup of heroism, may wear out his heart after the unattainable.¹⁸

V.

I return to the cave. What is an appellate court if not a vital cave of sorts? Even above ground, even in this fine First Circuit art deco bunker, Your Honors still live in a cave. Plato, Melvin Shortess has taught us, must be kept in mind. I asked your Chief Judge how he seeks truth as a judge. His answer: "You dissent!"¹⁹

Melvin Shortess holds the Silver Beaver award from the Istrouma Council of the Boy Scouts of America.²⁰ He hunts treasures at garage sales on Saturdays.²¹ He

18. Oliver Wendell Holmes, Jr., *The Profession of the Law*, in *Occasional Speeches*, *supra* note 1, at 22-23.

19. "Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved." Oliver Wendell Holmes, Jr., *The Profession of the Law* (1886), in *Occasional Speeches*, *supra* note 1, at 30-31. Chief Judge Shortess in hope and despair has trusted his own unshaken will—and he has achieved greatly. His dissent in *Giles v. Cain*, 734 So. 2d 109 (La. App. 1st Cir. 1999) (Shortess, J., dissenting) discussed *infra* note 37, is exemplary. And more:

To fight out a war, you must believe something and want something with all your might. So must you do to carry anything else to an end worth reaching. More than that, you must be willing to commit yourself to a course, perhaps a long and hard one, without being able to foresee exactly where you will come out. All this is required of you is that you should go somewhither as hard as ever you can. The rest belongs to fate. One may fall—at the beginning of the charge or at the top of the earthworks; but in no other way can he reach the rewards of victory.

Oliver Wendell Holmes, Jr., *Memorial Day*, in *Occasional Speeches*, *supra* note 1, at 6.

Judge Shortess's penchant for dissent is, fortunately, catching on with his junior colleagues, even against His Honor Chief Judge Shortess himself. *See, e.g.*, *State v. Edwards*, 752 So. 2d 395 (La. App. 1st Cir. 2000) (per Shortess, C.J.). There, Judge Randy Parro dissented, Shortess-like, from the majority's holding that a statutory provision permitting seizure and sale of defendant's car when he pleads guilty to third offense DWI is constitutional. Not so at all, said Thibodeaux's studious Judge Parro, and very succinctly: "The Louisiana Constitution is very clear; personal effects shall never be taken. The only exception to this prohibition allows forfeiture and sale of property connected to illegal transactions involving contraband drugs." *Id.* at 400 (Parro, J., dissenting). "The question of whether or not due process was observed in the actual taking and sale is irrelevant." *Id.* at 401. Writs were granted, No. 2000-K-1246, 2000 WL 1724482 (La. Nov. 17, 2000) and it seems to Your Footnotist that Judge Parro has seen the light and that Homer nodded.

20. Melvin Shortess has been a father to many a young scout, over many trails and outdoor campfires, *viz.*, Webelos leader, Pack Leader, Manchac District Chairman and President of the Istrouma Area Council.

21. Especially cookbooks for Mama Shortess's limitless collection, but not, take note, in search of a judicial robe. Melvin Shortess proudly wore the *same* robe for *twenty-seven years!* "John Parker presented my first robe (March 28, 1967). I was forced to dispose of that robe last month (December 1994), by my staff and fellow judges—I can't understand why." Melvin A. Shortess, Address at the Baton Rouge Bar Ass'n Luncheon (Jan. 1995).

worships God and is a reader at mass at Our Lady of Mercy on Sundays.²² He watches his grandson Tyler play baseball at a World Series for eight-year-olds in Crowley. How can you not love him?

Chief Judge Shortess is a runner, as Chief Justice Dixon was a runner.²³ Succeeding John Dixon, *pro tem.*, on the Louisiana Supreme Court was a high water mark. While on Mount Olympus, as Justice Shortess explains it, he could "craft with both hands, rather than with one hand tied behind my back."²⁴

VI.

And what of our Chief's opinions?²⁵ What aims are evident in Chief Judge

22. "We all, the most unbelieving of us, walk by faith. We do our work and live our lives not merely to vent and realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving." Oliver Wendell Holmes, Jr., *Ipswich* (1902), in *Occasional Speeches*, *supra* note 1, at 137.

23. I never heard any one profess indifference to a boat race. Why should you row a boat race? Why endure the long months of pain in preparation for a fierce half-hour that will leave you all but dead? Does any one ask the question? Is there any one who would not go through all its costs, and more, for the moment when anguish breaks into triumph—or even for the glory of having nobly lost? Is life less than a boat race?
Oliver Wendell Holmes, Jr., *On Receiving the Degree of Doctor of Laws* (1886), in *Occasional Speeches*, *supra* note 1, at 32-33. Judge Shortess confesses, however, in his response to the Trial Lawyers judicial profile questionnaire, "What do you do to unwind" that "I run but am getting much slower." Louisiana Trial Lawyers Association, *Louisiana Advocates*, Judicial Profile Series 2 (1999) (copy on file *Louisiana Law Review*) [hereinafter Trial Lawyers Judicial Profile]. And, of course, like any civilized creature, Judge Shortess is a reader of books. He identified as his favorite book and the name of its author for the judicial profile series by responding—doubtless with a smile aimed at certain obfuscating lawyers: *Bleak House* by Charles Dickens. *Id.* at 3.

24. Like the prisoners in Plato's cave, at times trial judges and intermediate appellate judges have one hand, if not both, tied behind their backs by controlling law, however unjust it appears to them. See, e.g., *Succession of Mitchell*, 312 So. 2d 130, 131 (La. App. 1st Cir. 1975), where the First Circuit adopted the "excellent comprehensive Written Reasons for Judgment" of "Our learned brother below"—District Judge Melvin A. Shortess, *viz.*:

this court must hold that because the plaintiffs' mother was married to an absentee, Charles Connor, at the time the plaintiffs were born, they are the legitimate children of Charles Connor and because of their legitimate status, cannot be legitimated by the subsequent marriage of their biological father to their mother. In short, our law considers plaintiffs to be the legitimate children of the long-lost Charles Connor.

Id. at 133. On writs, the Louisiana Supreme Court, per Albert Tate, Jr., J., working with both hands free, broke the chains of injustice and reversed the court of appeal. "Article 198, as we have held, through its 1948 amendment requires that such legitimated status be accorded to these children." 323 So. 2d 451, 457 (La. 1975). This is not to slight the district court or the intermediate appellate judges who considered themselves bound by the jurisprudence. It is only to illustrate the marked difference between being "below" in Plato's cave and being on Mt. Olympus with Al Tate, a juristic sculptor of extraordinary talent.

25. I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic

Shortess's many decisions as duty obliges me to study them?²⁶ In a word, "Truth." In a word, "Justice." In a phrase, "Due Process."

Of course, like any mortal judge, Melvin Shortess has erred, as error is measured by reversals on high.²⁷ But what of it? If God were to ask Your Honors whether you wanted Truth or the Pursuit of Truth, am I wrong to say Melvin Shortess would take the pursuit?²⁸

Now, I hesitate to tell this Court of Judge Shortess's opinions. Your Honors know them better than I. Instead, let me invoke that venerable distinction between "the interesting cases," and "the other fellow's cases." What I mean is that I will rehearse only a few of Judge Shortess's opinions that are interesting to me, if not to this audience.

A hernia case interests me. Why is that? Because right in the middle of my study of Judge Shortess's opinions, Dr. Benton Dupont sliced right into the middle of my abdomen to fix one. Sitting as a Justice *pro tem.*, Melvin Shortess reversed his Brothers of the Fourth Circuit Court of Appeal and held that a security guard's malpractice claim for a botched hernia repair at a hospital in New Orleans where he worked was not barred by Louisiana's Worker's Compensation Law.²⁹ This makes eminent good sense to me. Would you not agree with His Honor Justice

exposition, setting forth the whole corpus with its roots in history and its justifications of experience real or supposed!

Alas, gentlemen, that is life.

Oliver Wendell Holmes, Jr., *Speech* (at Boston Bar Ass'n Dinner) (1900), in *Occasional Speeches*, *supra* note 1, at 123.

26. One begins with a search for a general point of view. After a time he finds one, and then for a while he is absorbed in testing it, in trying to satisfy himself whether it is true. But after many experiments or investigations all have come out one way, and his theory is confirmed and settled in his mind, he knows in advance that the next case will be but another verification, and the stimulus of anxious curiosity is gone. He realizes that his branch of knowledge only presents more illustrations of the universal principle; he sees it all as another case of the same old ennui, or the same sublime mystery—for it does not matter what epithets you apply to the whole of things, they are merely judgments of yourself. At this stage the pleasure is no less, perhaps, but it is the pure pleasure of doing the work, irrespective of further aims, and when you reach that stage you reach, as it seems to me, the triune formula of the joy, the duty, and the end of life.

Id. at 124.

27. See, e.g., *Aetna Cas. & Sur. Co. v. Nero*, 425 So. 2d 730 (La. 1983) (per Calogero, J.), *rev'g* 415 So. 2d 390 (La. App. 1st Cir. 1982) (per Shortess, J.) (*Baumgartner* negligence *vel non* of automobile driver hitting a drunk); *Boyle v. Board of Sup'rs*, 685 So. 2d 1080 (La. 1997), *rev'g* 672 So. 2d 254 (La. App. 1st Cir. 1996) (per Shortess, J.) (slip and fall; whether depression of one-half inch to one inch on LSU sidewalk created an unreasonable risk of harm); *Smith v. Toys "R" Us, Inc.*, 754 So. 2d 209 (La. 1999) (per Lemmon, J.; Victory and Traylor, JJ., dissenting), *rev'g* 715 So. 2d 1231 (La. App. 1st Cir. 1998) (whether circumstantial evidence sufficient to prove negligence in falling merchandise case). These cases suggest to the reader that, as fallible mortals, judges view the facts and the law from varying angles of vision.

28. "It was of this that Malebranche was thinking when he said that, if God held in one hand truth, and in the other the pursuit of truth, he would say: 'Lord, the truth is for thee alone; give me the pursuit.'" Oliver Wendell Holmes, *Speech* (at Boston Bar Ass'n Dinner) (1900), in *Occasional Speeches*, *supra* note 1, at 124-25.

29. *Wright v. State*, 639 So. 2d 258 (La. 1994).

Shortess that the poor fellow was in the operating room not as an *employee*, but as a *patient*. Sometimes, we all know, judges miss the obvious.

By way of connecting Melvin Shortess's delicate touch to the past, let me mention a case reported under the law of the Twelve Tables, which gives plaintiff an action against defendant for injury to his "trees."

But what of "vines"? Gaius was justly critical, may I say, of a *judex* who held there was no recovery.³⁰ Melvin Shortess is not that kind of *judex*.

What a loving father, what sympathy, what tender courtesy is evident in Melvin Shortess's oral reasons, rendered as a district judge, . . . in a *dog* case!

On appeal, this court quoted the trial judge's gentle remarks to all concerned—including the dog! Listen to this:

I don't think Mrs. Smith or Jan was guilty of any negligence because they didn't know that this dog had any dangerous propensities and from the facts that I have heard, I don't believe John had any dangerous propensities. I don't think Mrs. Atkins was guilty of negligence either. That same four year old of mine, Mrs. Adkins, if I was walking down that same path would have been very curious like three and four year old boys are and he would have wanted to be into everything and I think if you over protect a boy you probably ultimately may have more problems than if you let him sort of vent his curiosity a bit. You were with him a normal distance from him. . . . The boy, out of an abundance of friendliness towards the animal heard John bark and went over to him and unfortunately he was bitten.³¹

This is a fine example of Judge Shortess's painstaking attention to the smallest of details, another Shortess hallmark.³²

30. A man lost his suit because he had described the wrong committed by the defendant as what it was—i.e., a cutting of his vines—while the XII Tables envisaged only cutting of trees as a cause of action. He might, however, have won his case, Gaius says, if the *judex* had interpreted the word "tree" to include vines. Hans Julius Wolff, *Roman Law* 63 (1951).

31. *Adkins v. Fireman's Fund Ins. Co.*, 313 So. 2d 328, 330 (La. App. 1st Cir. 1975). At the time of Judge Shortess's ruling from the district court bench, *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), was not yet in the reports. Under the strict liability holding of *Holland v. Buckley*, the Louisiana Supreme Court on writs, 303 So. 2d 184 (1974), vacated the First Circuit's affirmance of Judge Shortess's judgment, and the First Circuit, in turn, imposed liability upon Mrs. Smith, owner of the dog John, and her insurer for past and future medical bills in the full sum of \$1,750.00 and for disfigurement and pain and suffering in the total sum of \$5,000.00. 313 So. 2d at 332.

32. Judge Shortess's attention to small details of fact and law rescued 72-year old Alcee Pierce from a denial of equal protection under art. I, § 3 of the Louisiana Constitution of 1974, which prohibits unreasonable discrimination on account of age. Judge Shortess's opening sentences are crisp and microscopic:

On September 20, 1994, 72-year old Alcee Pierce (plaintiff) was injured while in the full-time employment of the Lafourche Parish Council (defendant). As a result of the accident, he was unable to earn 90% of his pre-employment wages and thus received workers' compensation supplemental earnings benefits (SEB). Because he was receiving Social Security old-age benefits, however, his SEB payments were limited to 104 weeks by Louisiana Revised Statutes 23:1221(3)(d)(iii). Injured workers who are neither retired nor receiving old-age Social Security benefits can receive SEB payments for 520 weeks.

A polio case broke Judge Shortess's heart. But the law chained him to reverse a jury verdict on a malpractice claim finding that the law's "reasonable person" would have consented to the immunization even knowing of the risks.³³ "Although we sincerely and most deeply sympathize with plaintiff's plight, a contrary holding places too great a burden on physicians and the public at large."³⁴

No one who knows Judge Shortess can doubt his sincerity, his deep sympathy for humanity. This, too, is why we love him.³⁵

And what of due process? This was the *motif* for Melvin Shortess running for his first judicial office, City Court. The trial lawyers in their profile of Louisiana's judiciary ask, "Why did you want to be a judge?" I quote Judge Shortess's reply:

Pierce v. Lafourche Parish Council, 739 So. 2d 297 (La. App. 1st Cir. 1999). Judge Shortess's recital of the law of equal protection under article I, § 3 is commanding. Thus, "the lack of any commonality of purpose between the Social Security old-age benefits and workers' compensation benefits sapped the statutel] of rationality." *Id.* at 300. *Held*: "We find that Louisiana Revised Statute 23:1221(3)(d)(iii) arbitrarily, capriciously, and unreasonably discriminates against persons age 62 and older and unconstitutionally denies them equal protection of the laws under article I, section 3 of the Louisiana Constitution." *Id.* at 301. On the merits, the Louisiana Supreme Court unanimously affirmed the judgment of the court of appeal declaring that portion of La. R.S. 23:1221(3)(d)(iii) (1999) which states "begins to receive old age insurance benefits under Title II of the Social Security Act, whichever comes first" unconstitutional. *Pierce v. Lafourche Parish Council*, 762 So. 2d 608 (La. 2000). In short, if I may judge him, Judge Melvin A. Shortess is "the master of both the microscope and telescope." The figure is Chief Justice Hughes's, his description of Louis D. Brandeis:

Mr. Justice Brandeis is—if I may use another figure—the master of both microscope and telescope. Nothing of importance, however minute, escapes his microscopic examination of every problem, and, through his powerful telescopic lens, his mental vision embraces distant scenes, ranging far beyond the familiar worlds of conventional thinking.

Charles Evans Hughes, *Mr. Justice Brandeis*, in *Mr. Justice Brandeis* 3-4 (Felix Frankfurter ed., 1932). This is very high praise, but those who know Judge Shortess from the intimacy of the conference room and from the angle of his opinions would, I am sure, concur.

33. *Boyd v. Louisiana Med. Mut. Ins. Co.*, 593 So. 2d 427, 431 (La. App. 1st Cir. 1991), *writs denied*, 594 So. 2d 877 (La. 1992):

According to the Center for Disease Control the risk of a recipient contracting polio from the Sabin vaccine was approximately one in 8,000,000 doses. In light of the un rebutted testimony mentioned above and after balancing the great benefits received from the Sabin vaccine against the slight chance of adverse consequences, and overall cost to society, we feel constrained to hold that a reasonable person made aware of the risk would have consented to the immunization.

34. *Id.*

35. And of course Chief Judge Shortess sports a delightful funnybone beneath his aged judicial robe. The Trial Lawyers Association Judicial Profile Series asks for a recital of "Something funny or unusual that happened in your courtroom." M.A.S.'s reply:

In 1968 I tried my first law suit in Judge Calvin Lindsey's court. Mr. D'Amico told me on the way to court to be sure to move for a sequestration of the witnesses. I did so but when the def[endant] remained in court I told the Judge that I particularly wanted the D under the rule. The Judge in his benevolent way looked at me and said, "Now, Mr. Shortess, if I did that the D wouldn't be able to defend himself from your allegations could he." I stumbled, "No, your Honor, I remove the D from my request." In 1978 while presiding over a case in the 19th JDC I was favored with the identical motion from a brand new lawyer. My ruling was the exact quote I got from Judge Lindsey. By coincidence I had taken his place on the bench in 1969.

Trial Lawyers Judicial Profile, *supra* note 23, at 2.

"I didn't get due process in traffic court and felt that maybe I could give more than I got."³⁶

His defense was hampered, or so young Melvin Shortess believed, when the traffic court judge refused to let him put on any evidence. The police officer, the judge told Shortess, was highly reliable. What good would evidence or cross-examination do? I invite you to compare this sorry judgment with Chief Judge Shortess's lonely due process dissent only the other day in a prisoner's case. Say it softly, the Louisiana Supreme Court peremptorily reversed this Court saying only: "See *Giles v. Cain* . . . (*Shortess, J., dissenting*)."³⁷

The Trial Lawyers' survey asks: "What is the most challenging aspect of being a judge?" Our Chief's answer: "Finding the truth and it seems to be getting even harder." Again, "What is the most enjoyable aspect of being a judge?" "Writing an opinion that really accomplishes justice."

In addition to ultimate aims, let me say Judge Shortess's opinions are of the highest craftsmanship.³⁸ In the tightest paragraph he can sum up the clash of

36. *Id.* at 1.

37. *Giles v. Cain*, 734 So. 2d 109 (La. App. 1st Cir. 1999), writ granted in part, 762 So. 2d 1116 (La. 2000) (emphasis added). Said Judge Shortess, dissenting on due process grounds:

Under the Disciplinary Rules at issue here, a prisoner may be disciplined, and thus lose privileges and good-time, based on nothing but hearsay, and may be found guilty of being "a threat to security" when that offense is nowhere defined in the Disciplinary Rules. In my opinion, these Disciplinary Rules cannot pass constitutional scrutiny.

734 So. 2d at 115. As to the Disciplinary Board's reliance on confidential informants' statements, a close eye on the facts convinced Judge Shortess that, "There was no evidence that defendant was actually involved in the 'dope deal' or that he ever threatened anyone." *Id.* at 116.

38. "The mark of a master is, that facts which lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit." Oliver Wendell Holmes, Jr., *The Use of Law Schools* (1886), in *Occasional Speeches*, *supra* note 1, at 36. For a radiant Shortess example, see *Thoreson v. Department of State Civil Serv.*, 433 So. 2d 184 (La. App. 1st Cir. 1983), which Judge Shortess considers his most important appellate judgment. *Thoreson* involved a State Civil Service Commission's disparate pay plan for two categories of state civil service engineers: "Because of the complexity of the issues involved herein, we feel compelled to examine the historical background of the Civil Service System, the purposes for which Civil Service was established in Louisiana, and the Commission's constitutional duty to provide a uniform pay plan for public employees." 433 So. 2d at 188. Judge Shortess cut "to the real heart of this controversy," *id.* at 192, in condemning the Commission's denial of parity in the pay plan and the Governor's tinkering with constitutionally required uniformity, resulting in plaintiff engineers suffering "a particular injustice in being denied parity." *Id.* at 194. "It is a fundamental notion that employees who perform equal work should receive equal pay." *Id.* at 195. "The most glaring injustice from minimum implementation is the fact that persons with the least time in the system reap [the] full benefits, while long service employees are reduced in steps and at the same time are deprived of those benefits which others are receiving." *Id.* at 201. *Thoreson* held the Governor's orders unconstitutional; Civil Service Rule 6.12, "which allowed implementation of a pay plan in the manner discussed, is unconstitutional as violative of the basic premises of a merit system." *Id.* at 202. "Nowhere do we find authority for allowing variations in pay schedules between employees in the same classification, simply because they are employed in different departments. This notion violates the Constitutional establishment of a unified and comprehensive classification and pay plan." *Id.* at 204. The Louisiana Supreme Court denied writs. 440 So. 2d 726 (La.), *reconsideration denied*, 442 So. 2d 452 (La. 1983). *Thoreson* is not only an epitome of Judge Shortess's mastery as a judge and of the magnetic current of his thought, but it also proves him a judge of sturdy backbone, no doubt about it. And judicial backbone, *nota bene*,

interests between the Public Records Doctrine and Louisiana's community property law.³⁹ His exemplary handiwork, his plain English, his lean prose are all over the reports.⁴⁰

The Trial Lawyers ask: "Your judicial philosophy?" "The blindfold Statue of Justice very graphically depicts my Judicial Philosophy."

This brings to mind another statue of mutual interest to Judge Shortess and me. When he mounted the steps in front of the Louisiana Supreme Court in 1958 to take his oath as a lawyer—this was on Royal Street in the *Vieux Carré*—Melvin Shortess reached his hand up to touch the great bronze statue of Chief Justice White, a prayer for the future. May I report to you that Chief Justice White and Chief Judge Shortess have the same sturdy sense of civilized society. They are of the old school of dignity, duty, and decorum, models for all the talk of professionalism these days.⁴¹ They believe that neither litigants nor newspapers are free to push their First

is vital to the life of the law itself.

39. *Camel v. Waller*, 515 So. 2d 611 (La. App. 1st Cir. 1987), *viz.*:

The Supreme Court has determined that the preservation of the security of title to immovables prevails over protection of a spouse's interest in community property, absent fraud or forgery, where the spouse has failed to take legally available measures to protect his or her interest. We agree that in a case such as this the equities favor innocent vendees. Although certain inequitable situations may arise as a result of this rule, even greater inequities might occur were prospective purchasers required to check all possible family court records for marriages and separations at the risk of losing title to their property if a declaration of marital status later proved to be false.

Id. at 614, *affirmed*, 526 So. 2d 1086 (La. 1988) (per Calogero, J.).

And in a Sunday closing law case brought by a car dealer claiming a denial of equal protection, Justice *Pro Tem*. Melvin A. Shortess's opinion for a unanimous Louisiana Supreme Court is exemplary judicial scholarship. *Lakeside Imports, Inc. v. State*, 639 So. 2d 253 (La. 1994). As to his extrajudicial scholarship and keen insight as to the our federalism, see Melvin A. Shortess, *State Courts and Federal Elections* (with Charles G. Douglas, III), 62 A.B.A.J. 451 (1976).

40. But as life has but a short number of working hours, we have to choose at our peril; we have to act on the presumptions afforded by our present knowledge as to what paths are most likely to lead to desired goals. If we investigate Mohammedanism, or Spiritualism, or whether Bacon wrote Shakespeare, we have so much less time for philosophy, or church, or literature at large. So in deciding a question of law, one has to consider this element of time. One has to try to strike the jugular and let the rest go.

Oliver Wendell Holmes, Jr., *Walbridge Abner Field* (1899), in *Occasional Speeches*, *supra* note 1, at 114. Striking at the jugular is a Shortess speciality, especially in dissent. Thus, Judge Shortess's dissent in *Eldon Cheramie's* retaliatory discharge case exclaims pointedly, with no ifs, ands, or buts: "Cheramie was fired because he exercised his constitutional right to free speech by telling his supervisor and employer that the activities they were about to engage in were illegal." *Cheramaie v. Plaisance, Inc.*, 583 So. 2d 921 (La. App. 1st Cir. 1991). Precisely. The Louisiana Supreme Court unanimously reversed the court of appeal and quoted Judge Shortess's jugular sentence in its *Shaker* entirety. 595 So. 2d 619, 623-24 (La. 1992).

41. *Cf.* Melvin A. Shortess et al, *Barbarians at the Bar*, in *In Our Own Words: Reflections on Professionalism in the Law* 69 (Roger A. Stetter ed., 1998). As for his own professional mentors, Judge Shortess answered the Trial Lawyers Judicial Profile question, "Individuals who influenced your career and why" this way: "By their example lawyers like Ashton Stewart, Buck Kleinpeter, Bob Vanderworker and Calvin Hardin showed me what professionalism is." Trial Lawyers Judicial Profile, *supra* note 23, at 1. In a luncheon address to the Baton Rouge Bar Ass'n, January 1995 (copy on file, *Louisiana Law Review*), Judge Shortess added, apropos his mentors: "Louis was an early mentor of

Amendment freedoms beyond the bounds of right and wrong.⁴² What I have in mind is an old thorn in Judge Shortess's side, a carpet maker who claimed a First Amendment right to advertise, and not too subtly, his lawsuit against the Better Business Bureau by putting up neon signs on Laurel Street. Protective orders issued forthwith⁴³ to prevent the trial from becoming a circus.

Ultimately on the merits, Justice Dennis annulled the orders by applying Holmes's clear and present danger test and by quoting the words of Old Holmes himself.⁴⁴

Now this is the old *Toledo News-Bee* case that I know well enough. What Justice Dennis's reversing opinion fails to tell the reader, however, is that Holmes's words were uttered in *dissent*. The *majority* opinion was written by Chief Justice White. I take leave on the occasion of Chief Judge Shortess's retirement to quote Chief Justice White's reaction to such First Amendment claims:

We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong.⁴⁵

One more "interesting" case and my Shortess survey is through. I mean *Baier v. Woman's Hospital*.⁴⁶ This was the plea of a married couple to share the birth of their child together in the delivery room at Woman's Hospital. It was this legal flash point that brought Melvin Shortess into my life. He judged the case at district court. I was new to Baton Rouge, new to the Law Faculty, and had never laid eyes on him. This was a quarter of a century ago as time flits by. Dean Hebert told me he would support all his Law Faculty in asserting their own legal rights in court. But he added, like a father to a rambunctious son, "You will have to be a magician to win that suit." Dean Hebert was right.

mine. I never saw a man who could greet people in a room more efficiently and quickly than Louis Curet."

42. Must society in general, and the inherent authority of the courts in particular, be trashed by Rambos asserting "chilled" rights? We think not! Our system of justice must maintain its vigor and aggressive stance consistent with the need to maintain order and decorum in our courts. A delicate balance is involved here, and perhaps it is time to reset the scales.

Shortess, et al., *supra* note 41, at 78.

43. Too hurriedly, I fear, without Judge Shortess hearing any evidence of record. The Louisiana Supreme Court annulled Judge Shortess's orders on its first encounter with this case. See *Economy Carpets Mfrs. & Dist., Inc. v. Better Bus. Bur. Etc.*, 319 So. 2d 783 (La. 1975).

44. *Economy Carpets Mfrs. & Dist., Inc. v. Better Bus. Bur.*, 330 So. 2d 301, 307 (La. 1976).

45. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419-20, 38 S. Ct. 560 (1918).

46. 340 So. 2d 360 (La. App. 1st Cir. 1976), *writ refused*, 342 So. 2d 224 (La. 1977). Justices Dixon and Dennis were of the opinion that the Baiers' writ should be granted. *Id.*

All I will say about the matter here is that I was deeply impressed, as a young idealist, with Judge Melvin Shortess's courtesy, his sensitivity, his probity, his keen eye. He struck me a model judge in his Laurel Street courtroom. He found as a fact that my presence in the delivery room would not likely infect babies at the hospital, although it was claimed I would. Judge Shortess allowed me to introduce a survey showing the results of some 87,000 cases of husbands in the delivery room.

I had boxes and boxes of the survey's original data in court. This was necessary by way of laying a foundation under the rules of evidence. All of which data were introduced "in globo," as my dear colleague Ray Lamonica taught me to say. He was in the courtroom holding my hand so to speak.

Judge Shortess and I made it into the delivery rooms at Woman's Hospital, scrub suits and all, under Wigmore's doctrine of "View" as I read about it in his treatise. It was ironic, said the Judge, that the Baiers could rely on *Roe v. Wade* in support of their legal claim involving the miracle of birth and the very coming of their family.

Win or lose, I hope Judge Shortess saw in me the same youthful conviction that was his in Traffic Court. The goal is not always reached, but I hope he sensed the same sincerity in my quest for truth.

May I report to Your Honors that today Woman's Hospital gladly welcomes husbands into the delivery room. My daughter Erika once asked me whether her name is mentioned in the law reports. She was *in utero* at the time, but had grown up and was old enough to inquire as to Papa's legal doings. I am sure that as fathers Your Honors know the joy of a child's taking any interest in your lonely work.

VII.

I want to wind up my remarks by sharing with Your Honors the sound recording of Justice Oliver Wendell Holmes's radio address to the Nation on his 90th birthday, March 8th, 1931. This, as I hear it, is a retirement speech of extraordinary beauty and force. And then, as a bookworm called to your Court, I have brought along a book as a small gift to our beloved Chief Judge. First Holmes:

In this symposium my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task. But I may mention one thought that comes to me as a listener-in. The riders in a race do not stop short when they reach the goal. There is a little finishing cantor before coming to a standstill. There is time to hear the kind voice of friends and to say to one's self: "The work is done." But just as one says that, the answer comes: "The race is over, but the work never is done while the power to work remains." The cantor that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.

And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago:

"Death plucks my ear and says, 'Live—I am-coming.'"⁴⁷

IF THE COURT PLEASE: My gift to Chief Judge Shortess is Piero Calamandrei's *Eulogy of Judges*. Calamandrei was both a teacher of law at the University of Florence and a lawyer of high ideals. If not a bible, surely this is a book of most uncommon legal prayer. His first chapter is *On Faith in Judges, The Prime Requisite of a Lawyer*: "But you, young lawyer . . . when you take a case that seems just, work fervently with the conviction that by faith in justice you will succeed in changing the course of the stars, regardless of the astrologers."⁴⁸ Another chapter speaks *On the Sorrows and Sacrifices in the Life of the Judge*:

The judge is denied the hour of spiritual relaxation which other men may find in the conversation of friends at mealtime, for the law which forbids him to dine regularly with the person who may appear before him, compels him to take his repasts in ascetic solitude.

* * *

But above all, the drama of the judge is habit which, insidious as a disease, wears him down and discourages him so that finally he feels that passing on a man's life or his honor has become an ordinary act of administration.

The judge who becomes accustomed to rendering justice is like the priest who becomes accustomed to saying mass. Fortunate indeed is that country priest who, approaching the altar with senile step, feels the same sacred turbulation in his breast which he felt as a young priest at his first mass. And happy is that magistrate who even unto the day of his retirement experiences the same religious exaltation in rendering judgment which made him tremble fifty years before, when as a young praetor he handed down his first decision.⁴⁹

IF YOUR HONORS PLEASE: It is a high honor for me to appear before this Court on this occasion. The First Circuit is my home appeals court. I have the highest regard for each of you and take special pride that one of your number is my former student John Weimer.

I humbly pray that this Court and Judge Shortess's shining example may live immortally, as the law lives immortally. His own thought is everlasting:

A judge should always seek the truth and when the truth is known he must rule with courage and compassion. I pledge to devote all of my energy

47. Oliver Wendell Holmes, Jr., *The Race Is Over* (Mar. 8, 1931), in *Occasional Speeches*, *supra* note 1, at 178.

48. Piero Calamandrei, *Eulogy of Judges* 3 (ALI/ABA 50th Anniversary Edition, 1992).

49. *Id.* at 96, 100.

and strength in the pursuit of truth. All of my judgments will be made only after serious and sober reflection.⁵⁰

Chief Judge Shortess, may I say for all gathered in your courtroom to honor you as reach the goal, that you have fulfilled your pledge nobly.⁵¹

May God bless you, Marna, and your family.

50. *Melvin Shortess to Campaign for City Judgeship*, State Times, Dec. 14, 1966, at A1.

51. "We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done." Oliver Wendell Holmes, Jr., *Speech* (at Boston Bar Ass'n Dinner) (1900), in *Occasional Speeches*, *supra* note 1, at 123-24. And more:

To see so far as one may, and to feel, the great forces that are behind every detail—for that makes all the difference between philosophy and gossip, between great action and small . . . —to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised.

Oliver Wendell Holmes, Jr., *The Class of '61* (1911), in *Occasional Speeches*, *supra* note 1, at 161.

