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Hallows Lecture: Ambition and Aspiration: Living Greatly in the Law

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AMBITION AND ASPIRATION: LIVING GREATLY IN THE LAW

HON. LEE H. ROSENTHAL*

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I. INTRODUCTION

It is a great pleasure to be here, and I thank Dean Joseph Kearney and the faculty for the honor. Visiting Marquette University brings the particular pleasure of being in a law school committed to the Jesuit ideals of education, including *cura personalis*, care of the entire person. That is in keeping with what I want to talk about. I was intimidated when I looked at the glittery roster of prior Hallows Lecturers, and I am moved by the presence of so many distinguished judges and lawyers. I did not want to be in the position of the woman who left a dinner party apologizing for dominating the conversation. “Don’t worry,” replied her host, like mine today a renowned law school dean. “You didn’t say anything.”

It has been almost 150 years since the most famous observations on what I hope to say something about today. In the 1880s, Oliver Wendell Holmes, Jr., spoke and wrote about what we should be ambitious for, and what we should aspire to, as law students, as lawyers, as law teachers, and as judges. Although it is hard to overstate how much practicing, teaching, and deciding legal disputes have changed from 1880 to 2019, his words and question remain fresh. What does it mean today to have ambition and aspiration to “live greatly in the law”?¹

* Chief Judge, United States District Court for the Southern District of Texas. This is an edited version of the 2019 Hallows Lecture at Marquette University Law School.

1. Oliver Wendell Holmes, The Profession of Law, Lecture to Undergraduates of Harvard University (Feb. 17, 1886), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 471, 472 (Sheldon M. Novick ed., 1995).

Justice Holmes approached this question in a context far different from the experiences most of us in this room share—informed by what he had seen and endured as a soldier in the Civil War; by his studies of law and philosophy, religion, and history; and by his work as a lawyer, scholar, and judge. Holmes nonetheless asked what sounds like the right question for us to ask now. He called it the “main question”: “How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers’ arts, the mannerless conflicts over often sordid interests, make out a life?”² Is it ambition, or some other driver, that can provide the best direction for a good and satisfying life in the law?

This talk looks at how to define ambition and aspiration in this context, and the roles that they might play in different stages and aspects of our professional lives. Through examples of judicial opinions, the ambitious aspects of judging are compared to the aspirational. The same questions will in turn be applied to law students, law professors, and lawyers, to ask how, in 2019, ambition and aspiration can help make out a life—to help us live greatly—in the law.

II. AMBITION AND ASPIRATION

What is ambition? Ambition, as I think Holmes used it, matches my understanding. It is the desire for external validations that you already know you want. For law students, it can be ambition to win the approval of parents, or professors. For lawyers, to win the approval of more-senior associates, partners, and clients—those with power to promote and reward. For academics, it can be to win the approval of those hiring, making decisions to publish, to promote, to grant tenure, and perhaps to confer that oh-so-coveted named chair. For judges, it can be the desire for appointment or nomination; then, high rankings in bar polls; being cited and affirmed; and reelection, retention, or promotion. Ambition for all but sitting judges can include the desire to make money, to accumulate wealth, not just to attain financial security. For all, ambition includes the desire to have a secure reputation for excellence and influence in the profession. We all have ambition. We all need it. It got you all where you are; it made Dean Kearney “Dean”; it made me “Judge.”

Is ambition enough for a satisfying and gratifying life in law? Holmes didn’t think so. He recognized the economic realities of the profession, and he

2. *Id.* at 471.

did not denigrate the “wish to make a living and to succeed.”³ He recognized that “we all want those things.”⁴ But he also saw that financial success was not enough. “[H]appiness cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars,” he said.⁵ “An intellect great enough to win the prize needs other food beside success.”⁶ Holmes thought that there was something more to the study and the practice of law, and that it is the something more that lets one studying law, practicing law, teaching law, or judging legal disputes to “live greatly in the law as elsewhere.”⁷

Holmes gave us only a general description of what the “something more” might be. Inadequately summarized, it seems to amount to striving to see the broader principles and ideas in the quotidian facts and problems of specific matters, disputes, or cases. The key is to see the general beyond the particular, to search for the “remoter and more general aspects of the law.”⁸ This is what allows the law student, lawyer, law professor, and judge to “connect [their] subject with the universe and catch . . . a hint of the universal law.”⁹ To do this requires “complex and intense intellectual efforts,”¹⁰ but it is those efforts, and the insights they bring, that provide the hope of personal fulfillment. Holmes explained:

Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence, although the name as used in English is confined to the broadest rules and most fundamental conceptions. One mark of a great lawyer is that he sees the application of the broadest rules.¹¹

And Holmes’s rhetoric, in various speeches and writings, went beyond lofty. Viewed in this way, in “the [l]aw . . . as in a magic mirror, we see reflected, not

3. Oliver Wendell Holmes, Speech at a Dinner Given to Chief Justice Holmes by the Bar Ass’n of Boston (Mar. 7, 1900), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 1, at 498, 498–99.

4. *Id.* at 499.

5. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 478 (1897) [hereinafter Holmes, *Path of the Law*].

6. *Id.*

7. Holmes, *supra* note 1, at 472.

8. Holmes, *Path of the Law*, *supra* note 5, at 478.

9. *Id.*

10. Holmes, *supra* note 3, at 499.

11. Holmes, *Path of the Law*, *supra* note 5, at 474.

only our own lives, but the lives of all men that have ever been! When I think on this majestic theme, my eyes dazzle.”¹²

Interestingly, Holmes did not prescribe going out to do good as the best way to achieve the “something more,” although he acknowledged there is nothing wrong with efforts to improve social justice. But he found “altruistic and cynically selfish talk” to be “about equally unreal.”¹³ And pro bono work, no less than other work, has its tedium, stresses, and its mannerless conflicts over what can be sordid interests, and it, too, requires the practice of some of the “shopkeepers’ arts.” Like other legal work, pro bono matters do not routinely require the lawyer or professor or judge to look beyond the specifics to find the connections to the larger principles, to where the “something more” may live.

I think that the search for this “something more” is aspiration, and it is different from ambition. I credit the philosopher Agnes Callard of the University of Chicago for her articulation of aspiration, which is both enlightening and illuminating. Aspiration is a distinctive form of purposeful action directed at acquiring new values,¹⁴ and these values are not abstract, but deeply practical and active. Ambition, by contrast, does not seek to acquire a new value or the knowledge necessary to do so. Ambition tries to acquire what we already value—whether money, praise, publication, tenure, or promotion. Ambition helps propel us down a path we already want to travel. It does not help us explore a new path or go to a new place. Callard describes aspiration as a “form of agency in which one acts upon oneself to create a self with substantively new values . . . by allowing oneself to be guided by the very self one is bringing into being.”¹⁵ It can be an aspiration to expand understanding or knowledge into a new area. It can be an aspiration to become a more effective counselor, a gifted teacher, a wise judge. This is not because it will bring material reward or external praise but, rather, because it will change oneself.

A law student whose final target is money, the approval of her parents, or social status would not count as an aspirant; these targets are marks of “ambition,” not aspiration. The ambitious law student does not seek to acquire a value: even before entering law school, she knows that she values wealth, her parents’ or teachers’ approval, and professional or social status. She does not

12. Oliver Wendell Holmes, Address at Suffolk Bar Association Dinner: The Law (Feb. 5, 1885), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 20, 21 (Mark DeWolfe Howe ed., 1962).

13. Holmes, *supra* note 3, at 499.

14. AGNES CALLARD, *ASPIRATION: THE AGENCY OF BECOMING* 2–3 (2018).

15. *Id.* at 183.

hope that law school will teach her the value of these things. She hopes that law school will help her satisfy these values that she already has.

Nor can our law student be aspirational by generally hoping to help people or to improve social justice, because she does not have a firm grip on what she would be realizing. Aiming at this goal with such limited knowledge of the goal is a matter of trying to learn what that goal amounts to. The aspirational law student first comes into contact with, and aims at, the value by learning about it. This learning can change what she values. The experienced lawyer, by contrast, knowing that she is entering a conference room or court with a client who has difficult legal choices to make, can better possess the relevant aim. She may think to herself, “I want to help this client make a good decision without telling her what to do, but by ensuring that she understands how others in similar situations have fared and what alternatives she has, with what benefits and disadvantages.”

We aspire by doing things, and the things we do change us so that we are able to do the same things, or things of that kind, better and better. As aspirants, we try to see the world through another person’s eyes, especially through the eyes of the person who has the value we aspire to acquire. In aspiration, it is this created self, the self with the desired values, that can make intelligible the path this person wants his or her life to take.

The word *aspiration* is sometimes used to describe any kind of hope or wish or long-term goal to bring about some result.¹⁶ This is not aspiration in my sense. Aspiration is not merely a vague hope or wish, although it often begins that way. It is “rational, purposive value-acquisition.”¹⁷ In order to value something, we must engage with it in a way that takes time, effort, and practice. Given our limits, we cannot devote ourselves to valuing all of the things we see as valuable, personally or professionally. How to choose? And how can we have time and energy to be both ambitious and aspirational?

III. THE CONTEXT: JUSTICE HOLMES’S OWN PATH

It is useful first to look at the context that started this set of questions, the life and background of the lawyer, professor, and judge who framed the topic before us. Holmes was born in Boston in 1841 and lived until two days short

16. See *Aspiration*, CAMBRIDGE DICTIONARY (2019), <https://dictionary.cambridge.org/us/dictionary/english/aspiration> [<https://perma.cc/964K-8NLE>] (last visited Oct. 9, 2019).

17. CALLARD, *supra* note 14, at 8.

of his ninety-fourth birthday.¹⁸ His father, Oliver Wendell Holmes, Sr., was a physician, a professor of medicine at Harvard, and an author of novels, verse, and humorous essays. Holmes grew up in a literary, and prosperous, family. He attended private schools in Boston and then, like his father, Harvard. He was not overly impressed with the Harvard of that time, finding the curriculum stultifying. He was already a gifted writer and found satisfaction as a senior editor of the *Harvard Magazine* and as the author of many essays. His graduation was in some doubt; after the faculty publicly admonished him for “disrespect” toward a professor, Holmes decamped to train for the Civil War.¹⁹ His unit was not immediately sent to the front, so Holmes returned to Cambridge to get his college degree, in June 1861.²⁰

Holmes saw his first military action in October 1861. Within the first hour of battle, he was severely wounded in the chest. He took months to recover. On his return in September 1862, he was promptly wounded again, and while recovering, fell victim to a common soldier’s ailment—severe dysentery. He recovered in time to be in Virginia at the Battle of Chancellorsville in May 1863, where he was again wounded. He finally returned as a staff officer, out of the infantry line of fire. He joined because of a sense of duty toward the antislavery cause, but he left the Union Army when his three-year enlistment expired.²¹ Holmes apparently, and justifiably, felt that he had done his duty—and that he had survived one battle too many to continue tempting fate.

Holmes went back to Boston, decided to study law, and entered Harvard Law School in 1864. He was admitted to the Massachusetts bar in 1867.²² By the 1870s, his peers were writing that Holmes “knows more law than anyone in Boston of our time, and works harder at it than anyone.”²³

For the next fourteen years, Holmes practiced law in Boston.²⁴ He appears to have been fully aware of the realities of private practice. He noted in his

18. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 7 (1993) [hereinafter WHITE, LAW AND THE INNER SELF]; RICHARD L. WILSON, AMERICAN POLITICAL LEADERS 209 (2002).

19. WHITE, LAW AND THE INNER SELF, *supra* note 18, at 9, 25–26, 33, 45.

20. G. Edward White, *Holmes’s “Life Plan”: Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1421 (1990) [hereinafter White, *Holmes’s Life Plan*].

21. *Id.* at 1421–22.

22. WHITE, LAW AND THE INNER SELF, *supra* note 18, at 91, 103.

23. White, *Holmes’s Life Plan*, *supra* note 20, at 1426 (quoting Letter from Arthur G. Sedgwick to Henry James (Jan. 30, 1870)); MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841–1870 273 (1957).

24. WHITE, LAW AND THE INNER SELF, *supra* note 18, at 103.

diary when he was admitted to the bar that, on his first day as a lawyer, “[t]he rush of clients postponed on account of weather.”²⁵ Although Holmes extolled the possibility of living greatly in the practice of law, his happiest time in practice was in the activities close to legal scholarship, such as drafting briefs and arguing cases.²⁶ And, in not too much time, his focus shifted to scholarship.

Holmes’s most famous work, *The Common Law*, published in 1881, grew out of a series of twelve lectures trying to explain the fundamentals of American law.²⁷ Holmes questioned the historical underpinnings of much of Anglo-American jurisprudence. The work contains Holmes’s most famous quotation, “The life of the law has not been logic: it has been experience.”²⁸ Holmes had come to believe that even outdated and seemingly illogical legal doctrines survive because they find new utility. Old legal forms are adapted to new social conditions.

Shortly after publishing *The Common Law*, Holmes took a teaching job at Harvard Law School. But after teaching only one semester, he resigned to accept an appointment to the Supreme Judicial Court of Massachusetts, the state’s highest court. Holmes’s departure from Harvard caused some consternation, as he was one of only five full-time professors and an endowment had been specially raised to fund his professorship. Why leave the academy, and so abruptly? Holmes had quickly concluded that his opportunity for generalization—moving from the specific to the universal, from the meaningless details to the animating principles—inside the academy was small. “[T]he day would soon come,” he wrote, “when one felt that the only remaining problems were ones of detail.”²⁹ He was concerned that he could not be a great scholar of law within the legal academy, and at age forty, he did not think he had enough time to go into another field, achieve the recognition he was ambitious for, and still make a living.³⁰

He ended by expressing dismissive feelings about the legal academy. It was a “half life,” a “withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister.”³¹ He also had

25. SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 118 (1989) (quoting Oliver Wendell Holmes Diary (Apr. 4, 1867)).

26. See WHITE, *LAW AND THE INNER SELF*, *supra* note 18, at 209.

27. See O. W. HOLMES, JR., *THE COMMON LAW* iii–iv (1881).

28. *Id.* at 1.

29. WHITE, *LAW AND THE INNER SELF*, *supra* note 18, at 205 (quoting Letter from Oliver Wendell Holmes to James Bryce (Dec. 31, 1882)).

30. *Id.* at 205 (quoting Letter from Oliver Wendell Holmes to Harold Laski (Nov. 17, 1920)).

31. *Id.* at 206 (quoting Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913)).

ambivalent feelings about the practice of law. On the basis of fourteen years of practice, he acknowledged that it may be “unhappy, often seems mean, and always challenges your power to idealize the brute fact—but it hardens the fibre and I think is more likely to make more of a man [or woman] of one who turns it to success.”³² For Holmes, as summed up by one of his biographers, “Not to engage in ‘the practical struggle for life’ is to choose ‘the less manly course’; to engage in the world of affairs with success is to become ‘more of a man.’”³³

But what did he think it would be like to be a judge? More like a businessperson, engaged in a “practical struggle for life”? Or more like the academic and only aspect of practice he really liked—writing briefs and arguing them? Or, to use his word, was the bench “merely” enough?

Off our hero went to find out. He served on the Massachusetts Supreme Judicial Court for twenty years, becoming its chief justice.³⁴ He loved the legal research and what he called the “writing up”³⁵ of cases, and he found the work easy, which amazes me. But Holmes was never accused of modesty, especially about his superiority to his fellow judges. Holmes said of his colleagues that they “are apt to be naïve, simple-minded men, and they need . . . education in the obvious—to learn to transcend [their] own convictions and to leave room for much that we hold dear to be done away with . . . by the orderly change of law.”³⁶

Though Holmes was happy on the Massachusetts Supreme Judicial Court, he wanted greater fame and challenge. He was a famously, and obviously, ambitious man. In 1902, Holmes was appointed by President Theodore Roosevelt to the United States Supreme Court.³⁷ Holmes was often at odds with his fellow justices and wrote eloquent dissents, often joined by Justice Louis Brandeis.³⁸ In many instances, their views became the majority opinion

32. *Id.* (quoting Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913)).

33. *Id.* at 206.

34. *Id.* at 253.

35. *Id.* at 295–96.

36. Oliver Wendell Holmes, Speech Given at a Dinner of the Harvard Law School Association of New York: Law and the Court (Feb. 15, 1913), in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS* 387, 390 (Max Lerner ed., 1989).

37. WHITE, *LAW AND THE INNER SELF*, *supra* note 18, at 296, 304–06.

38. *See, e.g.*, *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes J., dissenting) (Justice Brandeis joined in dissent).

in a few years' time.³⁹ Holmes resigned due to ill health in 1932, at age ninety, after serving on the Supreme Court for thirty years. He died in 1935.⁴⁰

In his time, Holmes was considered a “liberal” because he wrote opinions reinforcing the right of free speech and the right of labor to organize, but he was what we might call “conservative” in personal-injury cases.⁴¹ He was a champion of “judicial restraint,” deferring to the judgment of the legislature in most policy matters.⁴² That put him on what we now clearly view as the wrong side of some issues. He upheld with enthusiasm sterilization of the disabled, famously saying that “[t]hree generations of imbeciles are enough”⁴³ and noting that “establishing the constitutionality of a law permitting the sterilization of imbeciles . . . gave me pleasure.”⁴⁴ He opposed women’s right to vote, stating that it would take “more than the Nineteenth Amendment to convince me that there are no differences between men and women.”⁴⁵ But his personal biases did not often find expression in his judicial opinions. “I loathed most of the things that I decided in favor of,” he wrote.⁴⁶ His justification was hardly self-deprecating: “[I]f my fellow citizens want to go to Hell I will help them. It’s my job.”⁴⁷

Holmes embodied both ambition and aspiration. He hungered for external recognition. He was hypersensitive to criticism, and he never achieved the external recognition he craved. Approaching age sixty-eight, on the Supreme Court, he wrote, “I have not as much recognition as I should like.”⁴⁸ He extolled

39. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923)).

40. WHITE, *LAW AND THE INNER SELF*, *supra* note 18, at 458–59, 467, 471.

41. *Id.* at 291, 412; *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting); *Vegeahn v. Guntner*, 44 N.E. 1077, 1079–82 (Mass. 1896) (Holmes, J., dissenting). See HOLMES, *supra* note 27, at 90–95.

42. See *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

43. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

44. Letter from Oliver Wendell Holmes to Lewis Einstein (May 19, 1927), in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–1935*, 266–67 (James Bishop Peabody ed., 1964).

45. *Adkins*, 261 U.S. at 569–70 (Holmes, J., dissenting).

46. Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 23, 1921), in *HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934*, 133 (Robert M. Mennel & Christine L. Compston eds., 1996).

47. Letter from Oliver Wendell Holmes to Harold Laski (Mar. 4, 1920) (on file with Harvard Law School Library Digital Suite), <http://library.law.harvard.edu/suites/owh/index.php/item/42885056/1> [https://perma.cc/2XL9-LTYT] (last visited Oct. 24, 2019).

48. White, *Holmes’s Life Plan*, *supra* note 20, at 1462 (quoting Letter from Oliver Wendell Holmes, Jr. to Clara Stevens (Mar. 6, 1909)).

the joys of thinking about the law, but his own experience of those joys was apparently diluted by what he saw as the lack of attention to “what one [read ‘Holmes’] thinks most important.”⁴⁹ As a biographer observed, Holmes’s life was colored by his fear of “powerlessness” and his intense “power-seeking.”⁵⁰ He was ultimately powerless to achieve his ambition of ensuring that others would adequately appreciate the quality of his achievements. That’s a big problem with the dependence on external validation that characterizes ambition. The goals of professional recognition and eminence—position, advancement, wealth, and reputation—are determined by others and are beyond our own power to control. But Holmes also aspired to understand the fundamentals of the law, to figure out if studying jurisprudence, history, and philosophy would show that law was the record of the struggles for supremacy among powerful interests or of gradual efforts to improve the rationality of judicial decision-making. He wanted to replace vague moral-sounding phrases and instead figure out what does, or should, make for liability, fault, or guilt, and what remedies or punishments do or should follow. He was both ambitious and aspirational.

Learning from the combination, I want to look at ambition and aspiration first in the world I know best—the world of judges and judging. All judges I know have both. The difference between a judge who bases reasoning or result, or both, primarily on ambition, and one who rules based primarily on aspiration, when they point different ways, is a useful way of examining two related parts of judging. Both are important. The first helps measure the quality of judicial performance. And the second helps explain the relationship of judicial independence and judicial accountability.

IV. THE AMBITIOUS JUDGE AND THE ASPIRATIONAL JUDGE

There are many ways to be ambitious as a judge, and some, if not most, of them can be found in all of us. One is to want recognition as a jurist of distinction or impact, as someone who is developing the law in ways he or she hopes will be recognized as novel, creative, and even profound. This part of a judge may count ambition as realized by the number of citations the judge’s opinions receive, whether in other decisions, law review articles, or treatises, or by the number and kinds of requests to give speeches in law schools, conferences, or symposia.

49. Letter from Oliver Wendell Holmes to Canon Patrick Augustine Sheehan (Apr. 1, 1911), in *HOLMES-SHEEHAN CORRESPONDENCE: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN* 41 (David H. Burton ed., 1976).

50. White, *Holmes’s Life Plan*, *supra* note 20, at 1474.

Another way is to be ambitious for promotion. This aspect of a judge may count ambition as realized by achieving a nomination to be an appellate judge from the trial court, or by the state or federal brass ring: a nomination to the Supreme Court. One negative type of ambition in a judge, as Judge Carolyn Dineen King, an esteemed Fifth Circuit judge, noted in 2007 in her own Hallows Lecture, is to rule with one eye on the obituary and retirement announcements, and one eye on judicial promotion and vacancy lists.⁵¹

A third way is to seek the satisfaction that one deeply committed to an overarching political, philosophical, or moral set of beliefs might get from opportunities to reach results that will entrench or expand these beliefs. I count this as ambition in a negative sense when the judge strives for this preferred outcome where the facts, or law, or both, do not justify it. I count this as aspiration—even if serendipitous, an unintended good deed—when the facts, the law, and the context converge with the judge’s preferred outcome, and that preference is based on a sincerely held belief that it, and it alone, is the right outcome in the larger and more fundamental framework.

All of these aspects are present to some degree in all judges. Ambition can be on both ends of the political spectrum; it is not more on the left or the right. I want to give you an example of judging that might show ambition at work. I want also to give examples that may demonstrate how judges may use aspiration, which we also share, to better understand and even improve the law.

It is no accident that some of these cases involve difficult and sensitive issues, topics such as abortion, sexual orientation, and the extent of civil and constitutional protections. These cases require judgments that challenge any judge. Before I begin, please let me be clear that I am not commenting on the merits, but only on the judges’ rhetoric and approaches in their opinions, to try to explore the roles of ambition and aspiration.

One example is from *Whole Woman’s Health v. Smith*.⁵² In this case, Texas had enacted new regulations for disposing of fetal remains; these required third-party vendors to bury or scatter the ashes of embryonic or fetal tissue. Several Texas-licensed abortion providers challenged the regulations in a suit under 42 U.S.C. § 1983, seeking an injunction on the ground that the required method was so expensive as to unduly burden the rights of women seeking abortions. The case was before a highly experienced district judge. The judge had granted

51. See Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 776–77 (2007); Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, MARQ. LAW., Summer 2008, at 48, 55.

52. 896 F.3d 362 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1170 (2019).

a preliminary injunction against the state regulations, finding both vagueness and burdensomeness. Texas appealed, and the Texas legislature passed similar legislation, which the plaintiffs again moved to enjoin. After entering a preliminary injunction, the judge set a bench trial date. The judge ordered some discovery from the Texas Conference of Catholic Bishops in preparation for the trial. The conference took an interlocutory appeal from the discovery order. The Fifth Circuit panel majority found that, in ordering the discovery, the district court had abused its discretion in a number of ways, including violating the conference's First Amendment rights.⁵³

I want to focus on the concurrence in the Fifth Circuit. In this concurring opinion, one of the two members of the panel majority wrote again, and separately, both to agree with himself to reverse the district judge, and to accuse—not too strong a word—the district judge of compelling the discovery “to retaliate against people of faith for not only believing in the sanctity of life—but also for wanting to do something about it.”⁵⁴ In other words, the district judge must have been motivated by animus, by personal prejudice, against religion and against those who opposed abortions for religious reasons.

The third and dissenting panel member did not let this go quietly. In an elegant opinion, the dissent took the majority to task for ignoring the limits on appellate-court review and the usual rule against any interlocutory review of discovery orders. The dissent then took on the concurrence's accusation that the district judge had been biased in his discovery management:

Even more troubling are the potshots directed at the district court, and the concurring opinion then piles on. That the pecking order of the system allows appellate judges' view of the law to ultimately prevail should be satisfaction enough for us. While vigorous disagreement about the law is part of the judicial function, there is no need to go beyond the identification of legal error by questioning the motives of our district court brethren. That is especially true when the legal issue is one that the majority opinion concedes is novel, and when the ill motives are pure conjecture. What is one of the sins of the trial court according to the majority opinion? Working and issuing orders on a weekend.

Our district court colleagues deserve most of the credit for the federal judiciary being the shining light that it is. They work under greater docket pressures, with greater time constraints, yet with fewer resources. And unlike appellate

53. *Id.* at 365–67, 376.

54. *Id.* at 376 (Ho, J., concurring).

judges on a divided panel who can trade barbs back and forth, a district judge has no opportunity to respond to personal attacks in an appellate opinion. They deserve our respect and collegiality even when, or especially when, they err as we all do at times. Among the exemplary group of trial judges who serve our circuit, the one handling this case stands out: with over three decades of service, he is now essentially working for free as a senior judge, and volunteering to travel thousands of miles outside the district of his appointment to help with the heavy docket in the Western District of Texas. Speculating that malice is behind his decisions seeking to expedite a high profile case with a rapidly approaching trial date is not the award he is due.⁵⁵

The dissent is by an aspirational judge. The dissent stresses the institutional and precedential constraints, not evident in the concurrence. This opinion seeks to strengthen the integrity and respect that judges earn by being aspirational, not ambitious. District judges everywhere stood up and cheered. Fortunately, aspirational appellate-court defenders of aspirational lower-court judges are not often needed. It is reassuring to see one willing to take on the burden, because that is what it is.

Another example shows that the ambitious side of judging covers both ends of the political spectrum. In *SmithKline Beecham Corp. v. Abbott Laboratories*, the Ninth Circuit held that the Equal Protection Clause forbids a party from striking a juror based on the juror's sexual orientation.⁵⁶ The court concluded that heightened scrutiny applies to equal protection claims involving sexual orientation under the Supreme Court's decision in *United States v. Windsor*⁵⁷ and based on a history of discrimination demonstrating the need for this heightened scrutiny.⁵⁸ The lower court, according to the appellate court, had therefore erred in not applying *Batson v. Kentucky*,⁵⁹ which held unconstitutional using a venire member's race to exercise a peremptory strike and keep that member off the jury.⁶⁰ The appellate court opinion has a feature characteristic of using ambition to reach a particular result, in that the appellate court challenged the district court judge's finding without acknowledging the

55. *Id.* at 382 (Costa, J., dissenting).

56. 740 F.3d 471, 475–76 (9th Cir. 2014).

57. *Id.* at 481 (citing *United States v. Windsor*, 570 U.S. 744 (2013)).

58. *Id.* at 480–81, 486.

59. *Id.* at 486, 489 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

60. *Batson*, 476 U.S. at 90.

unsettled nature of the law in this area and of the assumptions used in finding a *Batson* violation.

Let's set forth the particulars. During voir dire, a venire member referred to his "partner" and used the male pronoun in reference to the partner several times. The defense attorney did not ask questions about whether this venire member could be a fair and impartial juror, but peremptorily struck the juror. Opposing counsel raised a *Batson* challenge, which the district judge rejected because it was unclear whether *Batson* applied to sexual orientation. The judge explained that "there is no way for us to know who is gay and who isn't here," but she also noted that if the party struck other venire members based on apparent sexual orientation, the ruling might change. In its opinion, the Ninth Circuit immediately proceeded to the *Batson* analysis and found a prima facie case of discrimination and a failure by the striking lawyer to provide an explanation. The result: a *Batson* violation.⁶¹

But the Supreme Court's opinion in *Windsor* was not as clear on heightened scrutiny as the Ninth Circuit opinion suggested. The appellate court at bottom disagreed with the district court's findings, including those findings ordinarily afforded considerable deference. I would call the district judge's ruling in that case aspirational in the cautious approach to this novel legal question and the frank acknowledgment of the murkiness of the law in this developing area. The judge was willing to state on the record her deep uncertainty about this area of the law. Cases showing ambition often show judges stating with complete confidence a particular interpretation of facts or reading of the law that many would find debatable. The judge here knew what she did not know, and she had the honesty to say it. The appellate majority, by contrast, was confident.

This recognition of uncertainty, of indeterminacy, and of limited knowledge—all this is a sign of aspiration. Judge Learned Hand said it most eloquently, in remarks known as the "Spirit of Liberty" speech.⁶² This speech, given in 1944, during the Second World War, is a one-page poem about what is perhaps the law's most fundamental aspiration—to the spirit of liberty, the freedom from oppression, the freedom to be ourselves. Learned Hand explains this spirit of liberty as "the spirit which is not too sure that it is right."⁶³ The spirit of ambition, unalloyed by aspiration, is either sure that it is right, or

61. *SmithKline*, 740 F.3d at 474–78.

62. Learned Hand, Speech Given at "I Am an American Day": The Spirit of Liberty (May 21, 1944), in *OUR NATION'S ARCHIVE: THE HISTORY OF THE UNITED STATES IN DOCUMENTS 658* (Erik Bruun & Jay Crosby eds., 1999).

63. *Id.*

uncaring. Judge Hand's spirit of liberty is "the spirit which seeks to understand the minds of other men and women."⁶⁴ Aspiration seeks to do this; ambition without aspiration either assumes that it knows the minds of others or, worse, does not care.

I do not mean to end on a note of pessimism about the judiciary. Instead, I will conclude with a salute to an aspirational judge's opinion. In *Thomas More Law Center v. Obama*, in pages 27 to 53 of a 64-page ruling, this Sixth Circuit judge broke a one-to-one tie on the three-judge panel.⁶⁵ One panel member had maintained that the Affordable Care Act⁶⁶ represents a valid exercise of congressional power under the Commerce Clause of the Constitution.⁶⁷ Another member reached the opposite conclusion.⁶⁸ The tie-breaking, aspirational judge broke ranks with fellow conservative jurists and, on Commerce Clause grounds, endorsed the constitutionality of the law against the facial preenforcement challenge.

No matter where you stand on the Affordable Care Act as policy or law, the tie-breaking judge gifted us, on many levels, with a remarkable piece of judicial writing. The opinion was both legally cautious and definitely nonpolitical. It defies pigeonholing as "liberal" or "conservative." It was thorough, careful, and based on coherent, workable principles of institutional integrity and soundness.

Why does this balanced, technical exposition shine as the work of an aspirational judge? For this reason: When this judge wrote it, he was on every short list for a Republican president's Supreme Court nomination. He is brilliant, highly respected, and schooled in the classrooms of Justice Scalia and other "conservative," textualist judges; he is a former Hallows Lecturer.⁶⁹ When this judge voted to reject the constitutional challenge to the Affordable Care Act, I assume he knew that he would likely be off or way down on the list. And that is just what happened. This is judicial courage along the lines shown decades ago by trial judges such as Judge Frank Johnson in Alabama and appellate judges such as Elbert Tuttle and John Minor Wisdom in the Fifth Circuit, who enforced desegregation rulings despite shunning in their communities, crosses burned on their front yards, and other personal attacks.

64. *Id.*

65. 651 F.3d 529, 549–66 (6th Cir. 2011) (Sutton, J., concurring in part) (page numbers in text refer to the original slip opinion).

66. 26 U.S.C. § 5000A (2012).

67. *Thomas More Law Ctr.*, 651 F.3d at 541–49.

68. *Id.* at 566–73 (Graham, J., concurring in part and dissenting in part).

69. See Jeffrey S. Sutton, Barnette, *Frankfurter*, and *Judicial Review*, 96 MARQ. L. REV. 133 (2012); Jeffrey S. Sutton, Barnette, *Frankfurter*, and *Judicial Review*, MARQ. LAW., Fall 2012, at 13.

The tie-breaking judge in the Sixth Circuit Affordable Care Act case worked hard to be careful, precise, and respectful of institutional integrity, despite a high and known personal cost. An ambitious judge might, I think, have been tempted to reach a different result. This judge reached past ambition to aspiration.

V. FOR LAW STUDENTS, PRACTITIONERS, ACADEMICS, AND JUDGES

Justice Holmes lit this fire. Does it provide warmth or light today? How can we, in our different roles and work in the law, aspire to aspiration and use ambition to help? What might this look like on the ground for a law student, a lawyer in practice, a scholar and teacher, or a judge?

First, the law student. Ambition will help you have the driving force to get good grades; a coveted position on a journal, on moot court, as a research assistant or judicial intern; a judicial clerkship; a desired summer job; a permanent offer. These all depend on external validation. These can be so difficult and consuming to achieve that they seem enough. But they don't let you answer the Holmes questions. What do I aspire to in becoming a lawyer? What am I learning to value, through a rational and purposive process of working to learn and care about something new, something more than I came to law school already valuing?

Some may find new and great value in doing good work in the law, meaning pro bono work. That may be all or part of the answer, though Holmes was skeptical. In law school, this goal is perhaps more likely to contribute to learning a new value because it allows the law student to see some of the broader principles that animate Anglo-American common law, an essential quality of aspiration. But there can be still more to aspiration than a hope, or even a plan, to work for a notion of public good.

Let me give you an example. When I chaired the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure, we held public hearings on proposed amendments to the rules. Some of the amendments were controversial. One of the witnesses to testify at one such hearing was a law student. He emanated excitement and enthusiasm. He described how he loved civil procedure and the civil rules. This is not the way most law students, or lawyers, describe this part of the curriculum or the practice. This student had come to see American civil procedure as a set of answers to a set of fundamental questions that every civil justice system must answer. Who gets access to the court system? (Pleading sufficiency.) Who gets what information to pursue a claim or a defense, and how? (Discovery.) Who gets the public resource of a judge, or a jury, in a trial? (Motions, summary disposition, or trial.) And who pays lawyers for all this? These are universal and permanent questions. The

student had come to see the civil rules in this framework, as one solution, with rules for pleadings, pretrial information-exchange and motions, and trial. Simple. Elegant. And again, universal in some ways. Seeing these overarching connections made civil procedure and the procedural rules come alive to this student. I also still feel that way.

So my unsolicited advice for the law student who aspires to aspiration? Push yourself to learn new values beyond what brought you to law school in the first place. Look beyond grades and jobs and other external validations. Take doctrinal courses that will school you in the law's basic principles, the building blocks, the larger questions the law grapples with. Don't just take a bunch of super-specialized esoteric electives that will get you out the door with a diploma and a crazy-quilt of disassociated information. Learn the basic vocabulary and language of the law—not its jargon, but the words used to express basic, fundamental concepts that connect the particular subjects and problems to the larger framework that created them in the first place. Learn to write clearly about legal subjects in a way that helps you think about them clearly. In short, focus on learning the institutions of our system of law. These will allow you to learn what values you want to work to learn, and they can be the stuff of aspiration; this will add meaning to the products of ambition.

For the practicing lawyer, what does aspiration look like? In some ways, it looks the same as for a law student, although that can seem harder to achieve in the face of the daily demands of the “shopkeepers’ arts.” But there are many ways to aspire in the practice. One way is not only to look to the larger framework to identify, analyze, and answer specific assigned questions or do specific assigned tasks, but also to develop a lawyer's skills, whether as a trial or transactional lawyer. Skills are portable. Skills are the mother of internal confidence in one's own competence. The value of developing the skills of a fine craftsman in the practice of law can be an aspiration, or it can at least support aspiration. And it can also support the ambitious pursuit of external recognition and success.

For the academic, ambition is perhaps most evident in the focus on publications, promotion, and tenure. I worry that ambition, not aspiration, accounts for some of the esoteric, hyper-specialized subjects of these publications. And I worry about the broad, sometimes seemingly reflexive, academic hostility to justices and lower-court judges appointed by a president of a certain political party, about an incentive to take this position because it is popular in the academy and perceived as enhancing the likelihood of publication. I worry about the divide between the academy and the bench. We are natural allies. We are united in having the luxury of the ultimate aspiration: of having the duty only to be right, fair, and just, free of any duty of advocating

for a client's interest. And with both the academy and judiciary under what can feel like a siege, I urge that both aspire to understand one another and speak to, and if possible for, each other's concerns and fears.

And what is aspiration for judges? Here, I can speak with almost three decades of experience. A judge who appears ambitious to the extent of excluding aspiration can lend credibility to the perception of judges as politicians in robes. Of course, most of our cases have nothing political, at least in the partisan sense, about them. But there are cases that do intrude into vigorous and divisive public policy and political debates and fuel this perception.

Reasonable minds can, and certainly do, disagree legitimately about many issues. If an ambitious judge is one willing to reach a particular result, or follow a particular approach, even if the record and law do not support it, this can weaken the primary constraints on judges—the constraints that keep us from reaching a result we might personally prefer, but that the facts, and the law applied to those facts, do not support. These constraints include the specific facts and the record of each case and the precedents that bind or limit the court. Ambition of this sort can undermine these sources of judicial constraint and accountability. Judges without accountability can be unmoored and unchecked. Judicial independence is vital, but without the constraints that are important to accountability, ambitious independence may be accurately viewed as political.

As one thoughtful academic has recently reminded us, we cannot have judicial independence without judicial accountability. Nor can we have accountability without independence.⁷⁰ An accountable judiciary without the aspiration to be independent from seeking the external validation of praise or favor from those politically aligned is weak. An ambitious judiciary without the accountability that the constraints of aspiration provide can be unmoored. Judicial independence unchecked can look like ambition. What checks it most? Aspiration. Only when we judges are aspirational do we deserve, and are we likely to get and to keep, “the consent of the governed,” which Richard Arnold, a wonderful court of appeals judge and nearly a Supreme Court justice, identified as the key to the judiciary's legitimacy and therefore its independence.⁷¹

When, as now, Congress does not act to resolve recurring, foreseeable, and controversial issues, leaving them inevitably to arise in the courts, it is more

70. See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 909 (2007).

71. POLLY J. PRICE, JUDGE RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH 352 (2009).

challenging to be, and be perceived as, independent and accountable—that is, aspirational. Congress’s reluctance to use its policy-making authority at least licenses—and sometimes requires—courts to resolve issues left unaddressed by democratically accountable policy-makers. But that does not make those decisions undemocratic. Nor does it make the judges deciding the issue unaccountable. The judges are constrained—by precedent, by the facts and record, and by concerns for institutional integrity and independence.

My best lessons in aspirational judging came from my work on the rules committees and at the American Law Institute. The group effort to wrestle with the large issues, like those identified by the enthusiastic student, to improve the quality of how a justice system answers the questions those large issues present, is among the most gratifying work I have done as a judge. It can be, and is, done by judges, lawyers, and academics working together, and law students can participate. One of the reporters to the civil rules committee, and a great judge, law professor, and writer, Benjamin Kaplan, said it best and with the honest acknowledgment of what could not be done: “No one, I suppose, expects of a Rule that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.”⁷² Meeting that duty is for me, the stuff of aspiration.

So for law students, academics, lawyers, and judges, Justice Holmes generally got it right. We should look for the larger themes, the larger questions, the acquisition of skills and competence to understand what those questions are, to give meaning to the specific problems we are all asked to help resolve.

So, at the end of the day, aspiration and ambition may meet. They seem to have done so for Justice Holmes. And for me, after twenty-eight years as a judge? I am ambitious, and I aspire, to work on interesting and important issues, with people whom I respect and admire because of how and what they aspire to be and do. Being here, working with Dean Kearney, fits that bill. So I thank him, and all of you, for the chance to think about why I love my work—my aspiration—and to share my hope that you love your work as well, and that you bring aspiration to all you do.

72. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 500 (1969).