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Symbols, Slogans, and Cymbals of Criminal Justice: Where's the Substance?

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SYMBOLS, SLOGANS, AND CYMBALS OF CRIMINAL JUSTICE: WHERE'S THE SUBSTANCE?

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St. Thomas Aquinas,[1] quoting Cicero and drawing on the great Roman Senator and orator, as he often did, reiterated that a skillful speaker must combine three essential goals for any audience: *docere* (to teach), *movere* (to arouse moral fervor), and *delectare* (to have a little fun together).[2]

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This article derives from a speech delivered at the *CONVOCATION FOR JUSTICE AND PEACE* at Niagara University, April 4, 1995.

[1] Tommas d'Aquino (hereinafter Aquinas) was born in Southern Italy in 1225. As a master of Theology at the University of Paris, Aquinas composed expositions and commentaries on Aristotle. In addition, he wrote his *Summa Theologiae*. Aquinas was introduced to and studied Aristotle at a time of great intellectual turbulence in the Western world. He received criticism for his attempt as a theologian to understand and interpret such intellectual and philosophical works as Aristotle. RALPH MCINERNY, ST. THOMAS AQUINAS 13-22 (1977).

[2] EDWARD K. RAND, CICERO IN THE COURTROOM OF ST. THOMAS AQUINAS 13

I am gratified to be at this Convocation and to be granted the opportunity to share a perspective on peace and justice in relation to the equally sweeping subject of criminal justice. Shaped in part by my Vincentian educational experience, I will try to touch discreetly on a few current topics, remaining ever conscious of my judicial ethical obligation not to commit or predispose myself in advance of ruling on pending or likely-to-occur cases and issues.

I beg your indulgence in advance for inflicting a cascade of words on you—an unfortunate affliction of a disproportionate number of lawyers, judges, and other public officials—even a few academics I know. My family gently and humorously, but ever so pointedly, reminds me of my dread strain of this tendency to prolixity. So let me please, as a preface, summarize a simplified version of my remarks. With no sense that I have composed an exclusive or comprehensive list, I propose five theses for our consideration this evening:

1. Human law has human limits.

2. The judicial role in criminal jurisprudence is limited, not ultimate.

3. Government functions better with built-in checks and balances to offset abuses, incomplete knowledge, and bad judgment.

4. Dignity, tolerance and respect for individuals are what law and religion, working together, ought to try to inculcate and deliver. The *Summa Theologica* of St. Thomas Aquinas, for example, need not be pitted against the Constitution.

5. While oath-bound and eager to protect and respect individual rights as important and fundamental in American jurisprudence and tradition, I recognize and emphasize that individual rights are not inherently antecedent to or pre-eminent over the common good. A good, just and fair society needs a concordance of both.

As this Lenten Season draws to its penitential yet affirming conclusion and in this special Convocation setting at Niagara this evening, I will attempt to sharpen our focus on the universality of the high human vocation and obligation for providing equality of treatment and of opportunity to all people. This de-

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(1946) (discussing rhetoric "No better recipe for a good speech has ever been proposed").

sideratum may be summed up in the simple word and virtue called justice. To me, the geometric rendition of love, justice, and peace may be seen as a perfect triangle. I also like a scriptural appreciation of this concept drawn by the Prophet Daniel: "[T]hose who lead *the many* to justice shall be like the stars forever."[3] Note that the emphasis is on the plural, not the egocentric singular.

The actualization of justice, however, is so much more nuanced and complex. It seems to me, therefore, that this community tonight ought to start with a recognition that only a synergistic alliance between spiritual and secular powers can begin to approach, though never fully grasp, this ideal we call justice. Peace flows as naturally from justice–occasionally even turbulently in a "messy" democratic form of government–as water over the nearby beautiful Falls. As to ontological first things, however, I respectfully submit and will try to amplify that love must set the first angle if the triangle is to be perfect.

As part of my preparation for this Convocation Address, I wrote to Monsignor Diarmuid Martin, the Secretary of the Pontifical Council for Justice and Peace, in Rome after reading a quote attributed to him in *Time* magazine's "Man of the Year" issue on Pope John Paul II.[4] I inquired about this Convocation's theme and topical issues of moral concern from Monsignor Martin's world and Vatican perspective. He offered us this insightful reflection:

> In the light of the ethical principle stressed by the Church of "a preferential option for the poor/love of the poor," [we must] look, more generally, at the situation of the underprivileged in the face of the law and the difficulties they face in being effectively equals.
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> The lack of equal and effective access to the institutions of the State is a serious problem in many countries, not least in those countries which are emerging from totalitarian regimes and where adequate juridical mechanisms are far from being in place. Assistance to such States must not only be in terms of economic and financial aid. They have a great need of the assistance and solidarity of those who could help *to enshrine "the rule*

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[3] *Daniel* 12:3 (St. Joseph) (emphasis added).

[4] John Elson, *Empire of the Spirit*, TIME, Dec. 26, 1994, at 64 (focusing on importance of prayer in life and decisions of Pope John Paul II).

of law" for the good of all.[5]

Monsignor Martin also commented on a lecture I delivered at Pace Law School in 1993 that was published as a Law Review article entitled *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession.*[6] The article is about lawyers' ethical obligations in *pro bono publico* representation in death penalty cases and about disproportionate representation and resources in death penalty cases. It appears to have acquired some contemporaneous relevance—if I may say that with some understatement—in view of recent legislative-executive branch events back in Albany. Monsignor Martin stated: "I was struck by your article on the disproportionality of resources between government and the defense in death penalty cases."[7]

Of course, I am ethically constrained from implying any views on the validity or constitutionality of any death penalty statute or case, or any of the efforts to anticipate and incorporate balance wheels into the enacted version of Chapter 1 of the Laws of New York of 1995. I am also obligated to wait and see and decide cases based on what we call the neutral magistrate principle, under objectively applied standards of constitutional law, when and if the circumstances develop and warrant in a given case yet to be tried and appealed. It is, thus, a "frolic and detour" for press and pundits to propound pseudoscholarly theories, opinions and predictions of judges' votes and the outcome of issues or cases before the evidence is even presented and deliberated upon. These free speech and free press exercises, nevertheless, play right into the vices of the first prong of my title, "Symbols, Slogans, and Cymbals of Criminal Justice." They appear, sound and are hollow.

A comment on a case from over 100 years ago helps direct our way to something of greater substance. *People ex rel. Kemmler v. Durston*[8] dealt with the New York Legislature's amendment in 1888 of the Code of Criminal Procedure (§505) which provided that "'[t]he punishment by death must, in every

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[5] Letter from Monsignor Diarmuid Martin, Pontifical Council for Justice and Peace to Joseph W. Bellacosa, Judge of New York Court of Appeals (Feb. 7, 1995) [hereinafter Letter] (emphasis added) (on file with author).

[6] Joseph W. Bellacosa, *Ethical Impulses From the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 PACE L. REV. 1 (1994).

[7] Letter, *supra* note 5.

[8] 119 N.Y. 569 (1890).

case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death .. .."[9] This statute, the first of its kind in the nation, was challenged on the ground that execution in the electric chair was cruel and unusual punishment under the State Constitution.[10] A unanimous Court of Appeals acknowledged that the new form of punishment was *"certainly unusual,"* but concluded that it was not proven to be *"cruel"* because the statute provided that the "application of electricity ... must result in *instantaneous* and consequently in *painless death.*"[11] Statutes may say many things and may even pretend to command some things that nature does not abide. Remember King Canute's frustration when his royal command for the tide to go out and stay out was not obeyed? In any event, since the 1888 statute, the experience of hundreds of electrocutions and fresh knowledge and insight have caused New Yorkers and Americans to be at least a tad more skeptical or circumspect about handy conclusions and justifications of "instantaneity" and "painlessness."

I am certain that a hundred years from now—or much sooner—someone or some group, even from my court, will be criticizing one or more of my judicial utterances for not getting some issue, some articulation, or some decision quite right. No one and no case is immune because this human judicial process, though committed to achieving the ideal of justice, never quite gets there. It is never really final, never quite done and can never be accepted as completely correct. That is one reason I emphasize that even with checks and balances, final judgments, in the sense of being immutably certain, are reserved for some transcendent or spiritual order. In the human sphere, however, decisions can be quite final in some senses, as William Kemmler's departure from this life conclusively demonstrates.

Now I will try to interweave some substantive perspective with the aid of philosophers, who have struggled to understand and describe the beautiful concept of justice. Aristotle offers a classic, idealized version:

> [J]ustice is regarded as the highest of all virtues, more admirable than morning star and evening star, and, as the proverb has it, "In justice every virtue is summed up." It is complete virtue

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[9] *Id.* at 575 (quoting N.Y. CRIM. PROC., LAWS OF 1888, ch. 489, §5.505).
[10] N.Y. CONST. OF 1846, art. I, §5 (amended 1888).
[11] *Kemmler*, 119 N.Y. at 579 (emphasis added).

> and excellence in the fullest sense, because it is the practice of complete virtue. It is complete because [they] who possess[] it can make use of their virtue not only by [themselves] but also in [their] relations with [others]; for there are many people who can make use of their virtue in their own affairs, but who are incapable of using it in their relations with others.[12]

For Aristotle, the virtue of justice, like other moral virtues, is a habit of conduct.[13] For this reason, opinions vary about the adequacy of justice to establish peace in a society. The words of the Prophet Isaiah, on the one hand, illustrate the exhortation that "[j]ustice will bring about peace."[14] St. Thomas Aquinas, however, who built so beautifully on Aristotle and surely knew all the Scriptures, including Isaiah, held the view that justice was necessary but insufficient. He wrote, "Peace is the *work of justice* indirectly, in so far as justice removes the obstacles to peace; but it is the *work of charity* directly, since charity, according to its very nature, causes peace."[15] For Aquinas, love is the unitive force. The bonds of love and friendship *unite* men and women where justice merely *governs* their interaction.[16] Saint Thomas' magnificent and comprehensive *Summa Theologica* teaches that what people do for one another out of the generosity of love far exceeds the commands of justice.[17] That is why, he postulates, mercy and charity are called upon to qualify and transcend justice.[18]

Where, then, does the blend of secular and spiritual justice fit into the human judicial institutions designed to deliver some form of it? And how, if at all, do mercy and charity fit in?

In the second half of this century, some ferment and tension developed with respect to the distribution and execution of governmental powers. The branches of government tug-of-war is intensified by the ever-mounting public law dockets of courts, and the ever increasing avenue of recourse trodden by citizens and governmental entities themselves. They virtually leap—or are

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[12] ARISTOTLE, NICHOMACHEAN Ethics 114, Martin Ostwald trans., 1962) (quoting, with slight varaition, *Theoguis* line 147).

[13] 2 THE GREAT IDEAS: A SYNTOPICON OF GREAT BOOKS OF THE WESTERN WORLD 853 (Robert M. Hutchins et al. eds., 1952) [hereinafter GREAT IDEAS].

[14] *Isaiah* 32:17 (St. Joseph).

[15] 2 GREAT IDEAS, *supra* note 13, at 853.

[16] *Id.* at 853.

[17] *Id.*

[18] *Id.*

dragged—into the courts as forums of first resort, seeking solutions to disputes and sweeping public policy problems. One theory suggests that sub-entities and subdivisions of the hierarchical state itself and individual citizens turn to the courts for redress because those other branches, all too frequently of late, seem paralyzed, unresponsive or indecisive. If there is one thing upon which all may agree, it is that courts are at least decisive—deciding is what we do! We are paid, and are bound by oath, to decide.

But there should be recognition, too, of the inherent, practical, theoretical, and even procedural limits to what a judge knows, and what courts are allowed to know by evidentiary limitations, in making informed, societally sweeping decisions at any given moment or on any given dispute. This is often maddening and frightening, I can assure you, because most judges soon realize, as they toil through their daily tasks, how minuscule their contribution to the big ideal of justice may be—drops of water in raging rivers or vast oceans. But they are necessary drops, nevertheless.

No judge or court, therefore, can allow the limitations of process or less-than-grandiose achievements to deter them from plugging away one case and one day at a time, inching towards the ideal. The law's brooding omnipresence, after all, is a roving spirit reflecting a pervasive uneasiness and a restless quest for equity. Equity accepts, weighs and decides, amidst uncertainties on all sides, peripheries and the margins of every case all the time. Equity ultimately resolves each matter with as much of a sense of conscience, right or wrong and good or evil, as is epistomologically discoverable, in fact and in individual, judicial, human judgment, up to the moment of decision.

Ever present to judges, I can assure you, is the realization that not very long after their rulings, experience and belated wisdom might refract the prism of understanding, support changed nuances, or even compel or justify an occasional deviation or outright rejection of a rule. Nevertheless, change and stability somehow coexist. The paradoxical swings, tensions and realities in law and jurisprudence assuage the agony of decision and of having to rule in cases without the benefit of perfectly clear vision and knowledge. To offset and balance individual weaknesses, personal vanity and officious arrogance, judges and society reach for and rely on checks and balances, recognizing

that judicial rulings are final only in this human dimension and only for their own time. Comfort levels are sought in institutional strength.

At this juncture, I would like to briefly illustrate the doctrine in our jurisprudence that we call stare decisis—standing by prior decisions and building on the wisdom of predecessors. It is one of the firmest pillars of Anglo-American legal process. How, nevertheless, does the law adjust to reflect changes in society and fresh insights? Oliver Wendell Holmes,[19] for example, warned against rules that persist for no better reason than that they were "laid down in the time of Henry IV."[20] Chief Judge Cardozo's preeminent work, *The Nature of the Judicial Process*,[21] describes the calibration in this way: "If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."[22]

One of the most trenchant expressions and applications in a full, nuanced dimension comes to us from the late, brilliant Chief Judge Charles D. Breitel, who invited me to leave teaching at St. John's University School of Law to become Clerk of the Court of Appeals in 1975. Chief Judge Breitel stated in *People v. Hobson*:[23]

> The nub of the matter is that *stare decisis* does not spring full-grown from a "precedent" but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel.[24]

Experience has taught us to appreciate that the law needs

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[19] Oliver Wendell Holmes (1841-1935) is most noted for his accomplishments as a legal historian, philosopher, and justice of the United States Supreme Court. Holmes is acknowledged as one of the greatest Anglo-American legal minds. He strongly advocated judicial restraint, and has been called "The Great Dissenter." THE NEW ENCYCLOPEDIA BRITANNICA 6, 12 (15th ed. 1986).

[20] Oliver W. Holmes, *The Path of the Law*, *in* JURISPRUDENCE IN ACTION 275, 290 (The Association of the Bar of the City of New York Committee on Post-Admission Legal Education eds., 1953).

[21] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1991).

[22] *Id.* at 152.

[23] 39 N.Y.2d 479 (1976).

[24] *Id.* at 488.

stability and reliability; however, it must also be dynamic, not static. In Robert Bolt's famous play, *A Man for All Seasons*,[25] the Chancellor-later-Saint, Thomas More, explains a dilemma of law to his son-in-law in these words:

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal .... I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester .... What would you do? Cut a great road through the law to get after the Devil? ... And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? ... This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down ... d'you really think you could stand upright in the winds that would blow then?[26]

The concerns I mentioned earlier on the role of the judicial branch reflect philosophical or turf considerations that properly distributed governance may be compromised by seemingly too powerful or over-eager federal and state courts. This notion is fueled, perhaps, by the realization that in their adjudicative function, courts rule with a last word or, shall I say, the last three little words—"ordered, decreed, adjudged."[27] Cases, after all, end with the command reflected by these familiar words. In law and governance, these three little words stir big controversy and tension among the separate branches of government, especially when the public purse is implicated so fundamentally and when power is redistributed or altered in a seeming tug-of-power struggle.

Remember, for example, when the United States Supreme Court—which, like the Holy Father, commands no armies, as Stalin once mockingly stated—ordered, adjudged and decreed that the Commander-in-Chief of the most powerful government of the world turn over his tapes![28] Remarkably, he quietly complied out of respect for our longstanding and fragile tradition regarding the judicial branch and became the only President ever

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[25] ROBERT BOLT, A MAN FOR ALL SEASONS (Heinemann Educational Books 1963).

[26] *Id.* at 38-39.

[27] Joseph W. Bellacosa, *Judicial Process: Three Little Words*, N.Y.L.J., Nov. 19, 1991, at 2.

[28] United States v. Nixon, 418 U.S. 683 (1974) (upholding district court order directing President Richard M. Nixon to produce tape recordings of conversations with government officials prosecuted for conspiracy to obstruct justice).

to resign from office.

Another and different illustration of this governmental branches' distribution of power is the recent case of *People v Thompson*.[29] In *Thompson*, Angela Thompson committed a first-offense sale of slightly over two ounces of cocaine to an undercover police officer. She was a seventeen year-old, low level violator, an urchin-like youngster under the dominance of her Fagin-like uncle, a kingpin Harlem drug entrepreneur. The trial court, after a jury verdict, and the Appellate Division imposed a sentence of half the legislative mandate on Angela Thompson—eight to fifteen years. Her uncle, the kingpin, received fifteen years to life on a guilty plea. Angela Thompson, however, also eventually received the same mandatory sentence as her uncle did, because the Court of Appeals, on a final appeal by a four-to-two vote, reversed the lower courts and imposed a fifteen year to life sentence. This ruling re-trenched the primacy of the more than twenty year-old Rockefeller Drug Law regimen—the sentence had to be fifteen years to life, no judicial exceptions nor discretion allowed. That set of laws, ballyhooed in the early seventies as the Rockefeller "solution" to drug and recidivism problems in criminal justice, has failed miserably. And yet they continue to wreak individualized, disproportionate and societal damage, while malapportioning the finite public purse in the billions.

From then-Governor Franklin D. Roosevelt's tenure in New York in the late 1920's until the 1970's, New York State incarcerated about 12,000 inmates—"steady as she goes" for about five decades. Since the Rockefeller Drug Laws, the number of inmates has leaped to over 60,000 and—the last I looked or asked my dear Mom—society does not appear to feel any safer and has not licked the drug epidemic and its criminal offshoots.

Some of the same histrionics that accompanied the Rockefeller Drug Laws are going on across this great land as bully pulpiteers shout three strikes, they are in or out. A recent *New York Times* editorial discussed the California criminal justice experience.[30] All the slogans have done, in the end, is overwhelm the courts, the prisons, and the public purses to pay for this one-dimensional, draconian, sloganeering approach.

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[29] 83 N.Y.2d 477 (1994).

[30] *Strike One for 'Three Strikes,'* N.Y. TIMES, Apr. 4, 1995, at A24; *see also California Judges Ease 3-Strike Law*, N.Y. TIMES, June 21, 1996, at 1.

So much, therefore, for symbols, slogans and cymbals. St. Paul in Corinthians puts this in a scriptural, theological perspective by declaring that people are like "sounding brass or a tingling cymbal" if they pretend to act without love.[31] I would add the corollary 'so does the law,' when it pretends to act without proportionality of sentencing judgment and without substantive content, deliberation, and long-view solutions.

Americans, generally, are a people with a long history of innate suspicion, resistance and hostility to fiats, ukases and injunctions of any kind, regardless of whether they are the "do this" variety or the "cease and desist" kind. They crave substance, not pandering sound bites. Their pilgrim, pioneer, even puritan spirit of individuality—or perhaps it is an adolescent incorrigibility, for we are still such a young nation—may be the priceless gift of a democratic society. Our jurisprudence must, however, accommodate to and live in harmony with the goals and objectives of the common good. This country is far more communitarian by history, tradition, and governance than the relatively more recently lionized hype of individuality is willing to admit.

Media and pundits propagandize individuality and seem to demonize communitarian values. They subvert the union and harmony of individuality in conjunction with the common good by a simplistic either/or dichotomy. They forget—as society itself does not—that this nation's overarching governing engines start with "We, the People,"[32] not "I, the Sovereign" or "I, the Me." The ultimate source of secular power in our 200+ year experiment is the "We," not the "I," and while Americans as a nation value and protect individual rights, they simultaneously *retain*—or should be educated to *regain*—a healthy sense of levelling perspective on behalf of the common good from atop the Olympian Acropolis gazing down on the Elysian plains and fields.

Next, I would like to discuss how the judiciary fits into the secular governance with respect to the broad spectrum of issues and in the constellation of individual cases. Chief Judge Cardozo continues to teach all that judges are neither permitted nor expected to be "knight[s]-errant" wandering the countryside looking for cases and issues of their personal concern, liking or

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[31] *Corinthians* (St. Joseph) 13:1.
[32] U.S. CONST., preamble.

disliking.[33] The varieties and volume of cases tumble into the courthouses anyway, on their own terms and in their own good time, from adoption to zoning (civil) and from loitering to murder (criminal). The combatants are all seeking justice and peace. Or are they really? Is the adversarial system of adjudication of disputes more reflective of the desire for victory at any cost, as exhibited all too graphically and even painfully in the public spectacle of the *State of California v. O.J. Simpson*?[34]

In this context, Professor Mary Ann Glendon's excellent new book, *A Nation Under Lawyers*,[35] confronts these troubling questions and challenges, among many other fascinating ideas:

> To what extent will future Americans be able to count on practitioners to subordinate self-interest to client representation and public service? On judges to resist the temptation to be wiser and fairer than the laws enacted by their fellow citizens? On legal educators to promote those upright habits and attitudes along with an array of useful problem-solving skills?
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> What influence do the new ways of lawyers have on the ideas, habits, and manners of their fellow citizens? Is the adversarial culture of real and fictional litigators even now "working in secret" to transform the "body social?"[36]

Inescapably, as de Tocqueville declared when writing about American democracy over a century and a half ago, all the social and political issues of the day end up at courthouse steps and in their libraries and their deliberation and decision rooms.[37] These issues—such as the death penalty, mandatory life sentences without parole, drugs and Family Court matters, including the 1994 Domestic Violence and Intervention Act—and their multifaceted permutations end up mostly in state and, increasingly, in federal courts.

Some critics have even dared to inquire as to where one finds the check and balance against a potentially tyrannical judiciary itself. For the most part, it resides in the constitutions themselves, federal and state. But they are not self-executing and must be reinforced by fallible, human judges who try to

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[33] CARDOZO, *supra* note 21, at 141.
[34] California v. Simpson, No. BA097211 (Cal. App. Dep't 103 Super. Ct. 1995).
[35] MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).
[36] *Id.* at 13.
[37] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., 1945) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

practice—faithful to their oaths—a personal and institutional discipline and a dynamic attentiveness to a fair, open process that grows and adjusts, hopefully, for the better. This approach respects limitations over pretense to omniscience or, worse perhaps, to omnipotence. Subordination of personal views and biases, even the deeply suppressed and hidden ones, is part of the judicial, decision-making struggle and obligation. Judges are not allowed to work their own "agendas," and they have no constituents, save the law itself and the duty to serve society and the litigants before them with intellectual and personal integrity and stubborn neutrality. The search for objectivity, for externally tested standards of fairness, and for the actuality and appearance of detached impartiality must be maintained.

Is that too idealized? I suggest not. Realism and the human condition we will always have with us, like the poor and defenseless, but there can never be too much idealism. Holmes, a realist by philosophical bent and hardened by thrice having been wounded in the Civil War, described any "measure of success" in a letter to Judge Cardozo, which the latter declared to be a private treasure: "[N]ot place or power or popularity makes the success that one desires, but the trembling hope that one has come near to an ideal."[38]

I suppose, like most people, I am a mix of pragmatist and idealist—if that is not an oxymoronic union. I am also a bit of a curmudgeon about speculators who try to label and pigeonhole courts and judges. Their spin-doctoring exercises, a tad disingenuous, are a reflection of the insatiable contemporary craving and obsession for "instantaneity." Judges should not listen to such self-promoters, who are engaged in a form of lobbying, pre and post-decision. Instead, judges should remain open to the arguments and persuasions of the parties' lawyers, their judicial colleagues and their individual consciences; then they should decide—never beforehand—based on deliberation of the whole and best collection of authorized advice and evidence. That makes for a thoughtful process, for pragmatism and realism and for considerable unpredictability. That is the way things should be and, in fact, are for the most part. That process, in my view, more truly contributes some substance to justice.

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[38] BENJAMIN N. CARDOZO, *Mr. Justice Holmes*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 77, 86 (Margaret E. Hall ed., 1947).

Because, in my combined secular and spiritual view, I agree with St. Thomas that pure justice without love is not attainable, you may conclude that I sound hard-bitten or self-contradictory when I say that judges are simply not privileged or authorized to rule by cries for compassion or based on personal philosophy and beliefs, no matter how strongly held or felt. The passion of the moment must be eschewed and kept at a safe distance from the courthouse. Judges who are faithful to their oaths, thus, may not act disguised in the tunic of Mother Teresa or in the armor of Attila the Hun. Otherwise, each one doing his or her "own thing" would contribute to shrunken justice, uneven justice, or just plain injustice—a form of anarchy. The trick and genius in judging is finding the balance of principle, intellect, tolerance, understanding and, yes, some sweetness of heart, but in the calculus of fallibly knowable and uniformly articulable rules of law—evenhandedly applied to all.

In this regard, therefore, I tell you that judging is very private, very quiet—in the eye of society's and people's storms, as in Holmes' great aphorism and metaphor.[39] Most essentially, I plead for your understanding that with all the privilege and honor aplenty, judging is also a weighty, nondelegable, intensely personal responsibility.

The substance of human justice, I respectfully submit, is discovered in diametric contradiction to waving banners, marching populists, and the pretenses of those who preach or surrender to mere symbols, slick slogans and tingling cymbals. Where is the substance? In each of us and in all of us.

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[39] OLIVER W. HOLMES, *Law and the Court, in* COLLECTED LEGAL PAPERS (1920). "We are very quiet there, but it is the quiet of a storm centre, as we all know." *Id.* at 292.