Judging Cases v. Public Opinion

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REMARKS

JUDGING CASES

v.

COURTING PUBLIC OPINION*

Joseph W. Bellacosa**

A n old adage suggests that when people do not like the news they hear, they should go out and make their own.¹ Thus, I decided to present a description of key features of the judicial process with my “take” and later some “give” by the audience on illustrative news items and news clips about the judiciary. Where my effort goes afterwards is up to others. This is notably so because judges do not call or hold press conferences about decisions, nor do they promote judicial opinions. Their adjudicative work, in the main, is supposed to simply speak for itself—when it is fully and fairly read and reasonably considered and appreciated.

A particularly apt audience is assembled at this Conference to receive some judicial perspective. Most particularly, I will try to describe some of my direct experiences with how cases are truly judged and provide some context to the subject of your training programs. I also wish to take the opportunity to register my profound disappointment and personal frustration on how superficial statements about courts, judges, and judicial decisions are opportunistically churned to “court” public opinion.

The subject matter of your special three-day Conference warrants this overview at this time. You may even share or, at least, be interested in my attempt to deflate and mitigate some false impressions and assumptions about judges and the judicial process, to question some shallow methodologies, analyses, and statistical manipulation, to counter swirls of cynicism wrapped in simplistic characterizations, and, last but not least, even to worry aloud and openly about some possible lapses of professional propriety and probity. If the menu of dissatisfaction sounds tough and depressing concerning the negative energy being expended and expelled by some critics, it should.

* This article was adapted slightly for publication, with footnotes added, with the very able assistance of my law clerk, Anthony J. Albanese, to whom I acknowledge appreciation. Essentially, it constitutes my keynote address at the Statewide Conference on Capital Prosecution for the New York Prosecutors Training Institute in Cooperstown, New York, on September 30, 1996.

** Judge of the New York State Court of Appeals.

Let me further explain the reasons for expressing a complementary espousal and defense of the judicial process, as I know it and have experienced it:

(1) Acquiescing, with stiff-upper-lip silence, in the face of persistent criticisms, feels intuitively weak and pretty foolish;\(^2\)

(2) Debunking unfounded prognostications could be fun and even constructive;

(3) Making a record of a countervailing point of view should be a neat way to contribute to the public discussion and provide eventually an available, citable counter-resource;

(4) Offsetting spin games, intentionally or unwittingly used by self-anointed meisters, to predispose and pigeonhole courts and judges, could be an educational public service announcement;

(5) Offering some direct validation of the excellent features and positive qualities of the judicial process, on personal knowledge and verification, might nicely and cogently contradict negative observations often rooted in sheer speculation, wispy information and belief, and rank provocation;

(6) Venting some frustration “in re” clever sideline and frontline critics is balm for any disquieted judicial spirit; and

(7) Documenting fundamental differences between judging people’s cases, as contrasted to courting public whim, is an intrinsically worthwhile endeavor.

Thus, I tender the provocative caption form and adversarial title tension.

There are, of course, some prudential factors affecting my conversation and comments. I suppose some people might perceive this effort as somewhat self-serving or defensive, and I risk elevating questionable viewpoints into unworthy prominence by even acknowledging their existence and, then, boosting the rank and status of the utterers.

On balance, the stakes are too high and the turf too valuable for judges to sit by silently and complacently cede the discussion field to a few populists with challengeable methodologies or debatable agendas. Within the guidelines and encouragement of the Code and Rules governing extrajudicial commentary,\(^3\) I resolved my internal quandary and decided to project my private ruminations, rumblings, and obser-


\(^3\) Code of Judicial Conduct Canon 4, reprinted in N.Y. Jud. Law app. (McKinney 1992 & Supp. 1997) (titled “A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice” and stating that a judge “may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice”).
vations, which I intend to try to make instructive and constructive, but in a forthright, plain-spoken manner.

The chagrin and fretfulness that stir this effort, by the way, stem equally from pundits of different professional callings and polemicists at all edges of the spectrum and of all labels. Where is the particular relevance, a listener might inquire, justifying my talking back and speaking out in this fashion? Well, in part, I think the Court of Appeals and its members, and the whole judiciary for that matter, are being used and set up as scapegoats and poster targets for a lot of ills that belong in the docket and accounting books of other responsible entities, and a lot of special interests that ought to mind their professional manners and quips. Courts, admirably performing their duties under constitutional guidance and direction, are also being taken undue advantage of on a variety of hot-button issues of fundamental jurisprudence, policy, and distribution-of-power and governance dimensions. And, for the most part, and at least as to specific cases and issues, judges are not privileged, nor would it be prudent or productive, to respond. This program, however, affords an excellent opportunity and appropriate forum for joining some issues and encouraging you and others to engage in a fair and thoughtful debate and consideration of serious and complex issues.

The daily controversies and institutional challenges shaping up for the last decade of this century and the speedy leap towards the millennium promise continuing and accelerating turbulence. So everyone ought to watch his steps and his lips, me included. Yet, special interests, serious commentators, and provocateurs from many walks of public life and the legal profession seem variously to be striving to tilt the neutrality and independence of the decisionmaking process. I worry about the decibel level and skewed substantive content of that phenomenon and do not much like some of the twists and turns that can come from maneuvers seemingly or sometimes actually designed to gain an ear or unfair edge. It is prudent to appreciate that such questionable activity should not be viewed as coming from *amicus curiae*, authorized by court leave or not, for many of these overtures are quite unfriendly and designed to dilute or diminish objective neutrality. Besides, even "friendly fire" can be dangerous to a sensitive, fragile, and vulnerable process like judicial decisionmaking. I hope I am wrong about the intentions behind some of these dubious efforts I hear and read about from time to time. But just in case my anxieties are real and justified, even in part, I decided to take this important invitation and opportunity to assert my case against the range of some of the criticisms out there, especially the ones I consider unfounded, unwarranted, and largely unanswered.

My endeavor will include simultaneously offering what I hope are positive and affirming explanations and counterweights on related aspects and important concerns of the judicial branch, the profession,
and the public's stake in the preservation of objectivity and neutrality in, and respect for, the decisionmaking process.

As one more important prefatory point, I emphasize that my expressions should not be construed as disguised predispositions on the legality or constitutionality of any recent cases, statutes, or upcoming issues in any case or potential class of cases within my judicial adjudicative responsibility. My personal options and ethical prerogatives in that regard are tightly circumscribed. I am obligated to restrain myself to anticipate and avoid the necessity of recusal against the possibility that I may have to rule on specific issues as a member of the Court of Appeals, within the framework of a real case and controversy. Fortunately, in a sensitively balanced intellectual and professional tension, judicial ethical norms do allow and encourage judges to speak out and write with the objective of the general improvement of the administration of justice.4

I will not, therefore, examine line-by-line the twenty-five-page, single-spaced text of Chapter One of the Laws of New York in 1995 and its associated Bill Jacket materials and increasingly vast published commentary.5 I leave that to others, who will speak and publish thoughtful works, and to each one's own industrious, considered study. I must wait and discipline myself to decide any and every case with all the pertinent materials, evidence, nuances, and intricacies, based on a neutral magistrate principle. One of the preeminent values of the judicial process is to protect and foster that canon of neutral adjudication by objective tribunals. Courts and judges should never be enticed into formulaic camps or corners, therefore, lest they appear or be expected to be for or against poorly delineated classifications or loosely labelled alliances. They must simply and steadfastly stand for justice and against injustice, in each different case.

Besides, I was taught by a distinguished mentor, the late Chief Judge Charles D. Breitel, that it is a "frolic and detour" and a "hardening of the categories" for press, pundits, public officials, and even former judges and former staff personnel to propound "insider," guru-like prognostications and theories of a court's or any individual judge's likely outcomes on votes in forthcoming issues or cases.6 To

4. Id.
do so before the evidence is even presented in a court of law and deliberated upon at any level of the judicial process seems to me to be an unwise encroachment. That kind of adventurism lessens public confidence and responsible education about how courts really decide cases, and deeply saddens me.

Make no mistake, however, of my meaning: Propagandists are fully entitled to espouse their free speech and free press opinionating. But I wonder if they recognize the extent to which such opportunism plays right into the modern vices of superficial sound biting and sloganeering, especially on extremely complicated and sensitive subjects. I view it as a disservice when they presume to publicly pre-position courts by their predictions of where a court or a majority of a court may be in the future, based often on fanciful musings and questionable assumptions and methodologies about past practices.7

Commentators' views enjoy the luxurious freedom to be casually, even carelessly quick, while those of jurists must be studiously deliberative. Judges ultimately must moor their oath-bound work steadfastly to lasting principles. Observers' views can be simplistic and superficial, while the judiciary's must be informed, nuanced, and long-viewed. Judges must ponder history and experience and weigh particular decisions because they become a precedential Triptik for a misty journey into the future, governing masses of people and cases. Every judge is expected to exert the maximum professional discipline to avoid personal predispositions, prejudgment, or preferences, and inappropriate or ex parte interference or extrajudicial dissonance. At the same time, judges—and everyone else, I suppose—might wish to be realistically mindful of the wise caution of New York's greatest Chief Judge, Benjamin N. Cardozo, that judges will find it humanly impossible to shed entirely the lifetime values formed by each one's experiences and inner being.8 These features are part of what make judges who they are as individuals, as they strive to fulfill their weighty responsibility and public authority with intellectual honesty and neutrality, ever faithful to their constitutional oaths and consciences.

Let me now, please, specify a handful of 1996 exertions, as illustrative or questionable troublespots:

(1) Former New York City Police Commissioner Bratton, while in office, branded the Court of Appeals "screwballs" when he disagreed with the outcome of a case or two.9 His

7. See supra note 6.
9. See Clyde Haberman, State Courts Found Guilty by Jury of Peers, N.Y. Times, Mar. 8, 1996, at B1 ("Let New York courts operate under more police-friendly rules laid down by the United States Supreme Court, [Bratton] said, 'rather than the screwball system that we have in this state with the screwball Court of Appeals that we have in this state.'").
name-calling was widely reported and repeated with whipsawed glee. This kind of rude rhetoric diminishes respect for the Court and for its authority. Ironically, it erodes respect for line officers or for anyone else trying to responsibly exercise authority. I consider this kind of "pop off" as a gross manifestation of bad leadership and a terrible example from any high-ranking, responsible public official.

(2) The head of a crime victims advocacy group, "Take Back New York," said recently he "remains frustrated by the snail's pace of death penalty cases. 'The most outrageous aspect of it to me is that you still have to jump through hoops, go through years and years of appeals and red tape, before justice can be served.'"10 The abstraction of the word and concept of "justice" and the imagery of "jumping through hoops" are troubling and plainly miss the importance of particularized rights, the constitutional source of their power in our system of government, and how they must be attended to and applied in actual cases by deliberative, neutral courts and judges.

(3) Media headlines and scathing, persistent, tabloidial "Junk Justice" editorials and stories abound.11 Frankly, the alliterative cliche has lost its kick and might be countered by what I would call "Jerky Journalism," for a variation in perspective. I suspect some of these stories and editorials are, to some extent, induced by statements of political and public officeholders, and would-be officeholders, sometimes through the back channel strategies of pollsters, public information officers, and press relations operators reacting to Court decisions and trying to capitalize on and shape public opinion. With all due respect to their critical views and right to speak out in the discharge of their discrete responsibilities and agendas, whether they be governors, judges, mayors, attorneys general, professors, or other professionals, pundits, or media scribes who have opinions in or about the courts, I

10. Stashenko, supra note 6, at B10 (quoting Joe Diamond) (emphasis added).
respectfully submit that it is not enough to mouth respect and then churn disdain for the judicial process and the judges who try to deliver its only product: justice. Actions speak louder than words, and some words even speak louder than other words. I also skeptically wonder whether most of these brickbatters read—really and thoroughly read—the decisions they so publicly denounce.

(4) The problems are not just with tabloidal publications, public figures, and media types. To demonstrate the deficits exhibited by purportedly serious commentary, I point particularly to a portion of an exertion by Evan Davis, a former Counsel to Governor Cuomo.\footnote{12} Mr. Davis declared that judges should not “trade” votes in cases.\footnote{13} Well, we don’t trade votes. Yet, inferences of judicial logrolling of this kind, and improper motivation to boot, are floated for popular professional consumption. The suggestion that writings and votes of any individual, majority, dissenting, and even unanimous judges are predicated on surrender of conscientiously-held judicial views, based on fear of another judge’s forthright views or based on speculation of intent to whip up public or political opinion, is false. In my view, it also demonstrates a lack of sensitive professional responsibility and understanding. In my experience as a Judge and as Chief Clerk of the Court of Appeals now spanning over twenty-two years, no logrolling of cases or votes has ever been done, certainly not at the Court of Appeals. To suppose that such a practice might be insinuated to serve, intentionally or unwittingly, some invidious machinations is spurious and injurious to the judiciary’s institutional reputation and respect. That hypothetical balloon should not be allowed to fly without at least this rebuttal.\footnote{14}

(5) Lastly, though I do not want to dignify some recent law-review-type excursions, I feel as a matter of personal privilege that I should note that I believe that some recent techniques and populist presentations have a peculiar tendency to engender their own brand of disrespect, too. In a special Albany Law Review issue, for example, a trendy personality-style format was used in 1996 to profile the Judges of the

\footnote{12} Evan A. Davis, Prosecutorial Misconduct, Voir Dire Conditions, N.Y. L.J., July 11, 1996, at 3.
\footnote{13} Id. at 7.
\footnote{14} See Evan A. Davis, The Exclusionary Rule, N.Y. L.J., Nov. 14, 1996, at 3, 4. In response to my objection of Mr. Davis’s earlier commentary, he stated that he “pleads guilty to a lesser offense,” a tad disingenuously and self-righteously, in my view. See id.
Court of Appeals and some of their views.\textsuperscript{15} For example, a sarcastically framed title opened an article on me,\textsuperscript{16} capped by an Epilogue oddly and singularly concentrating on an ad "hominization" of my judicial work and views.\textsuperscript{17} Serious and selective distortions abound in these pieces.

I respect that responsible criticism of the judicial process and judges must be accorded its place under the First Amendment, and I am quite content to welcome it—and suffer its fair ventilation and consequences—from those sharing collective public and professional responsibility and viewpoints. Courts are public institutions, after all. Informed criticism should be encouraged so that public tribunals and all their ministers of the law—me included—are appropriately accountable. I have consistently said that fishbowl examination, reform, and improvement are surely in order, and I still believe in and abide by that principle.\textsuperscript{18} My plea, however, is also for sound analysis, tested methodologies, informed judgment, tempered prudence, intelligent moderation, and true respect for long-term interests and values that tend to serve the improvement of the tone and quality of the critiques. Judges can take criticism, I am very confident, but whether the public interest can stand and absorb malinformed, drumbeaten, and heated attacks on the judicial process is worth pause and reflection.

To lightheartedly illustrate part of this point, I tender a case with a symbolic and substantive message: \textit{Parkview Associates v. City of New York.}\textsuperscript{19} I had the privilege and responsibility to author the opinion for a unanimous Court that ordered twelve redeveloped stories lopped off a thirty-one-story building on fashionable and expensive upper Park Avenue in Manhattan, restoring it to its original nineteen-story height. When I occasionally drive past the site and look up at the restored open-air space, I marvel that the decree was actually fulfilled. Indeed, I facetiously muse that courts may leap, as it were, over tall buildings, and when they are found to be too tall, they can be cut down to size.

\textsuperscript{15} See High Court Study: New York's Court of Appeals, 59 Alb. L. Rev. 1761 (1996).


\textsuperscript{19} 71 N.Y.2d 274 (1988).
For me, this concrete realization strengthens my belief that the judicial process stands tall with respect. Indeed, the Parkview imagery gives me confidence that courts and their three little decretal words (ordered, adjudged, decreed) will, in the end, survive shabby and shallow criticisms. In the meantime, however, damage to the delicate infrastructure may make the rebuilding much harder. It is easier to knock down than to build up. An important lesson I draw from Parkview and countless other cases is the refrain that everyone should always choose respect for the rule of law over cynicism, construction over deconstruction, deliberation over kneejerkiness, nuance over oversimplification, and a sotto voce over high-decibel concatenations from boomboxes, of the mechanical and human type, too.

To be sure, judges have to watch their own steps and words, too, because the judiciary is not accustomed to being in public brouhahas and frays of recent kind. What I mean is that as a branch of government and as an independent, individual-yet-collective body of public officers, courts cannot form a circle of bunkered wagons. Nor can judges remain entirely aloof either, as though in an ivory tower or sanctuaried monastery. Neither can courts demand only the constructive and truly scholarly commentary that is intended to help reform or transform, where appropriate, what courts do and how they do their work, nor dare try to enjoin any kind of criticism with an arrogant or noblesse oblige cease-and-desist ukase.

Skeptical examinations from within (respectful and frank dissents) and from without (respectful and informed commentary) are healthy and should never be squelched. But judges and everyone else are entitled to expect, or at least yearn for, assessments and surveys undertaken without hyperbolic huckstering, misleading epithets, and skewed analysis.

Part of the lesson I stitched together and resolutely asserted during 1996 before a series of diverse audiences is the need for honest and responsible education and opinion-shaping about the judicial process. Such a deliberative attitude would well serve the public interest and public policy formulation, and should contribute to progressive growth and reform of the law and fair accountability.

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22. See, e.g., Bellacosa, Boomerangs of Dissonance, supra note 18, at 2 (suggesting that “prudence, responsibility, and long-term interests and values ought to temper” criticism of the judicial process). This essay was synthesized from separate presentations made before the Louis J. Lefkowitz Associates, the Academy of Matrimonial Lawyers, the District Attorneys' Association, the Queens District Attorney's appellate advocacy program, and the State Attorney General's writing seminar.
Plenty of constructive commentators are also out there, but they garner little notice or publicity, beyond the tight professional community, because they do not seek or generate controversy for its own sake. There are internal and external people—really knowledgeable, honest, tough-minded, and professional people from all points of the spectrum of opinions. They earn their reputations knowledgeably and authoritatively, along with the right to be listened to based on quality, credible endeavors. They are trying to make a constructive difference.

They emphasize, as I see it, the educational component of thoughtful comment. They recognize the public's absorption screen and attention span as somewhat narrow and easy to manipulate—understandably, because the public is busy living and tending to their lives and priorities and day-to-day responsibilities and concerns. Thoughtful commentators do not take advantage of that, with self-aggrandizing oversimplification of a complicated process and its delicately sensitive issues.

I want to emphasize a recognition of the inherent, practical, theoretical, and even procedural limits to what any judge knows, and what courts are allowed to know, by evidentiary limitations and rules when they seek to make informed, societally sweeping judgments at any given decisional moment or on any given dispute. There are many anxious moments, I can assure you, because most judges soon realize, as they toil through their daily tasks and dockets, how minuscule their contribution to the big ideal of justice may be—drops of water in overflowing streams or vast oceans. Yet, the drops count heavily in people's lives. 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 and straining towards the ideal, oblivious as much as humanly possible to the external passions.

At this point, I wish to interweave a glimpse of the superbly professional decisionmaking process of the Court of Appeals, designed for fairness, intellectual honesty, plenary participation, random neutrality, avoidance of specialty interests and agendas, and prompt, efficient case management.

The seven judges decide each year about 300 full appeals, close to 1300 motions for leave to appeal in civil cases, and over 3000 applications for leave to appeal in criminal cases. That is close to 5000 cases a year. The hallmark in each category of work is random assignment and collective, institutional responsibility and obligations. The judges

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work very significantly and closely as a team and get along quite well, within the framework of ordinary and usual human and professional differences in personality and perspective. The differences—really valuable diversity of backgrounds, experience, perspective, and judgment—meld into a common commitment, unifying work enterprise, social dining engagements, and amiable conversations and relationships with one another. It is a professionally intimate and rewarding enterprise.

Two weeks out of every five, or roughly on a monthly basis from the end of August through early July, the Court hears oral argument on about thirty-five to forty appeals. No one knows which judge will have the reporting responsibility on any given case until after the completion of all arguments on a given day. Each judge then picks randomly among index cards carrying the names of each case, and that initiates the responsibility to re-prepare the appeal—beyond the pre-Session, individualized preparation of all appeals for the oral argument phase—for presentation to the full Court in Conference the very next morning. This re-preparation means each judge works on his or her assigned appeal that night to make a recommendation to the colleagues the next morning, in addition to reassessing how he or she will vote in the appeals reported by the other members at Conference. The full oral discussion and debate proceeds from the Reporting Judge through each other judge, starting with the junior member around to the Chief. If a majority or, most often, a unanimous consensus emerges, then the Reporting Judge will write the opinion to reflect the agreed-upon decision and rationale. In the relatively exceptional number of instances when there are differences of view warranting a dissenting expression, the first judge to the right of the Reporting Judge holding a differing view will undertake that role. That is a fairly recent modification to the full array of “hot bench” case-processing techniques inaugurated by Chief Judge Breitel in 1974. If the Reporting Judge has not garnered at least three other concurring votes, then he or she will undertake the dissenting expression, if there is to be one. It may surprise most people to know that not every instance or case where there is initial differences of views results in external dissents. Consensus, unanimity, and settlement of the rule of law are powerful and paramount considerations of institutional concern, effort, and quiet achievement. No judge writes in fields of particular interest or specialty, so all must work and serve as random generalists, and each vote is, therefore, more than merely mathematically equal.

This initially oral exploration system of skeptical analysis, testing of theory and practicality, and of listening is outstanding. Further verification and validation then comes in the writings and reconferencings of every one of the cases at the next regular Session of Court. These features very well serve the litigants and public, and the development
of New York's jurisprudence and common law leadership role in the nation. They also help keep the Court extremely current (decisions for almost all argued appeals are rendered in back-to-back Sessions) by internal peer discipline, accountability mechanisms, and by shared shouldering of all the categories of decisional work.

Needless to say, one of the large, looming concerns is the effect on the management of the Court's docket and work by the inevitable and not-too-far-distant emergence of the death penalty direct appeals with plenary and exclusive direct appellate review responsibility. The experience of other states' highest courts, according to studies and their justices' reports, is not encouraging in this respect. Of necessity, there must be a considerable displacement of the Court's other very important civil and criminal cases—A(doption) to Z(oning) and Fare Beating to Noncapital Murder and everything in between each category—in order to attend to the time demands and nature of capital case appeals. For a court like the Court of Appeals, already extremely busy with a high volume of appeals and significant matters in all categories of our work, this is a daunting prospect, a significant worry and challenge, and an enormous unique role. The proud history of this Court gives me firm confidence that the tasks will be attended to with superb leadership, professional excellence, and with the greatest sense of fairness and high quality of performance as they bear on so profound a public responsibility.

Ever present to judges is also the realization that not really very long after any of their rulings and after their tenure is concluded, experience and the wisdom of hindsight might refract the prism of understanding and support a change of direction. They might even compel or justify an occasional deviation or outright rejection of a rule. Change and stability thus coexist in the development and appli-

25. N.Y. Const. art. VI, § 3(b).
26. See William C. Vickrey, Opinion Filings and Appellate Court Productivity, 78 Judicature 47, 49-50 (1994) (noting the negative effect of capital appeals on the California Supreme Court's annual production of written opinions and on the profile of the court's opinions); State v. Marshall, 613 A.2d 1059, 1147 (N.J. 1992) (Handler, J., dissenting) ("The complexity of our capital jurisprudence and the sheer volume of the records in capital trials compel appellate courts to expend inordinate energy on capital cases."); Ellen Simon, Death Be Not Cheap, Conn. Law Tribune, Nov. 29, 1993, at 1 (noting the negative effect of capital litigation in Connecticut); see also David Von Drehle, Among the Lowest of the Dead (1995) (discussing the effects of Florida's death penalty).
27. See Vickrey, supra note 26, at 49-50 (stating that where "the average number of capital cases decided each year increased five times between 1970-76 and 1987-93, . . . the average number of 'all other' cases decided each year during 1987-93 dropped by half").
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cation of evenhanded justice. The paradoxical swings, tensions, and realities in law and jurisprudence temper the necessity of having to rule in cases without the benefit of perfectly clear vision and knowledge. To offset and balance matters, judges and society, too, 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, and only with a calibrated system of diffused and shared distribution of power. Comfort levels and peace of mind and heart are sought and found in institutional strength, drawing on diversity of experience, talent, and personal qualities.28

In this respect, it is useful to place the doctrine of stare decisis in perspective to understand better how it impacts decisionmaking. Adhering to prior decisions and building on the wisdom of predecessors is a great strength. It is a pillar of the Anglo-American decisional tradition. But so, too, are growth and epiphanies of clearer understanding. They encompass a special strength and vision, ever willing and ready to recognize the need for change and in-house error correction based on internal reevaluation, not on externally generated pressures or heat. This is a legitimate self-help tool for enhancing the judicial process and building and maintaining respect for it. That is how law adjusts to reflect society's evolution and appreciation of its new needs and conflicts.

Justice Holmes, for example, warned against rules that persist for no better reason than that they were "laid down in the time of Henry IV."29 Chief Judge Cardozo's preeminent work, The Nature of the Judicial Process,30 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 sub-


During Judge Richard Wesley's visit to Court of Appeals Hall last week, after the Governor announced his nomination, your resident Judge welcomed him on behalf of his new colleagues. I showed him the Conference Room and described the perfectly round deliberation table as symbolizing the strength of a circle—the institutional bond and connectedness that transcends the assertion of individualized personalities—a phrase taught to me by Judge Christ. I added for Judge Wesley—as I have been reminded repeatedly myself over the years—that the circle of chairs around that decision table—the very place where peoples' cases are decided—also symbolizes the equality of the seven votes and the importance of individualized, conscientiously-held and expressed views, ultimately subordinated and fitted, however, to the larger societal good and institutional purpose.

Id. at 7.


mission, the hands of their successors.” One of the most trenchant expressions and applications in a full, nuanced dimension comes to us from former Chief Judge Charles D. Breitel, who invited me to leave teaching at St. John’s Law School to become Clerk of the Court of Appeals in 1975. Chief Judge Breitel, when faced with a *stare decisis* Hobson’s choice, wrote:

> 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.

He disagreed three times in earlier right-to-counsel cases before the opportunity emerged in *People v. Hobson*, by which time he had become Chief Judge and was able to persuade a majority of the Court to overrule the prior “errant footprints.” Make no mistake of his meaning. He is the same judge who, in another context shortly after he became a Judge of the Court of Appeals, emphasized in *Simpson v. Loehmann* that judges do not scuttle precedents just because of a change in personnel at a court. Thus, he refused to cast a fourth vote for a view with which he agreed, and explained why *stare decisis* won the day there.

*Stare decisis* is, therefore, dynamic—an empirically tested and principled doctrine of institutional legitimacy, stability, continuity, definiteness, and predictability, as well as a measure to control volume of decisional work and to avoid unnecessary redundancy. It preserves and apportions finite resources and allows them to be allocated more wisely and effectively. It is also an important feature of intra- and extrajudicial branch independence and integrity of process. *Stare decisis* should not be, however, a zipper of institutional interdiction, designed to suppress differing viewpoints and votes. I believe that perceptions of the need for change and course correction that come

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31. *Id.* at 152.
34. 39 N.Y.2d 479.
36. *Id.* at 316 (“... I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed.”).
from within an institution are healthy, and that squelching them is a distinctly unhealthy measure which inevitably engenders troublesome extrajudicial fire.

Moreover, the doctrine in its full richness should not be restricted only to constitutional and common law readjustments. I do not understand the logic and am not persuaded by the policy reasons for a more confining attitude and application of the doctrine that would preclude its liberating error-correction potentiality entirely from statutory construction cases and precedents. 38

Some respectable authority exists for the narrower approach, as recently collected and pointedly explored in an excellent chapter of Professor Michael Mello’s fine new book, Against the Death Penalty: The Relentless Dissents of Justices Brennan and Marshall. 39 But there are also countervailing authority and more cogent reasons for the view I hold: that statutory interpretation precedents should not be categorically exempted or immune from the self-correcting power of the stare decisis doctrine and corollaries, taken in their full, rich, and embracing meaning. 40

The branch independence and integrity of the judicial process are decidedly weakened when the judiciary’s power is subjected to self-abnegation and when deference is ceded to the exclusive province of the other branches. I think the judiciary and its process are stronger when they attend to certain corrections themselves, rather than merely and repeatedly encouraging the legislature to overrule judicial precedents one after the other with public fanfare, as the recent history of the last couple of years has shown. 41 An institution self-confident enough to disagree respectfully yet forthrightly within itself manifests dynamism and strength when it also shows itself ready to adjust as empirical data and fresh insights may suggest. 42

Not to be overlooked—and it often is by media and commentators alike, seemingly straining and searching for divisiveness to promote and churn stories—is the overwhelming unanimity and real effort at achieving consensus in an institution like the Court of Appeals. The


40. See Damiano, 87 N.Y.2d at 490-506 (Bellacosa, J., dissenting in part).


Court remains acutely aware and vigilant of its unique collective responsibility in this respect to decide and state a full majority rule of law, as opposed to projecting personal auras and expressions through multiple and plurality opinions. The external misemphasis on and portrayal of division disproportionately skews and distorts the Court and its work. This aggravates the perceptual troubles already inherent in an age of fifteen-minute fame—or infamy. Devaluing important institutional and procedural goals to headline perceptions of division is flat wrong.43

Some of these concerns on the role of the judicial branch reflect philosophical or turf considerations that raise the question whether properly distributed governance may be unbalanced by seemingly too powerful or overeager federal and state courts. This notion is fueled, perhaps, by the realization that in their adjudicative function courts rule with familiar last words: “Ordered,” “Decreed,” “Adjudged.”44 In law and governance, these three little words can generate big controversy and tension among the separate branches of government, especially when the public purse and public safety are implicated so fundamentally, and when authority is redistributed or altered in a seeming tug-of-power struggle.

Remember, for example, when the United States Supreme Court ordered, adjudged, and decreed that the Commander-in-Chief of the most powerful government of the world turn over the White House tapes.45 Courts command no armies, as Stalin once mockingly stated about popes. Yet, remarkably, the Chief Executive simply complied, based on the longstanding tradition and respect enveloping the judicial process. He then became the only President ever to resign from office in the wake of this compliance.

I tender another distinct but aptly relevant illustration of the tension ever-present in governmental branches’ distribution of power: People v. Thompson.46 Angela Thompson committed a first-offense sale of two ounces, thirty-three grains of cocaine to an undercover police officer.47 This seventeen-year-old youngster was under the dominance of a Dickensian, Fagin-like uncle, a big-time drug operator.48 The trial court, after a jury verdict, and the Appellate Division imposed a sentence of eight years to life imprisonment—half the legislative mandate.49 Her uncle got fifteen-to-life on a guilty plea.50 Angela Thompson eventually had her sentence upped to the same mandatory sentence as her uncle got because the Court of Appeals,

43. See Bellacosa, Trembling Towards Olympus, supra note 28, at 3.
44. Bellacosa, Three Little Words, supra note 20, at 2.
47. Id. at 479.
48. See id. at 489 (Bellacosa, J., dissenting).
49. Id. at 479.
50. Id. at 484.
on a final State appeal and by a four-to-two vote, reversed the lower
courts' sentence and imposed a fifteen-years-to-life sentence.\textsuperscript{51} I dis-
sented with Judge Ciparick against the disproportionality, the per se
mandatoriness, and the virtually total deference to the legislative
branch in this particular sentencing decision.\textsuperscript{52} The majority and dis-
senting opinions, in a sense, speak for themselves on the relevant con-
cepts of sentencing and constitutional principles.\textsuperscript{53}

The majority ruling acknowledged a primacy of the twenty-five-
year-old Rockefeller Drug Law regimen—the sentence had to be fif-
teen-to-life, nothing less. Not even the rare, recognized judicial ex-
ception of \textit{People v. Broadie}\textsuperscript{54} was allowed to apply here. The
legislation, ballyhooed in the early 1970s as the Rockefeller "solution"
to drug and recidivism problems in criminal justice matters and adju-
dication, has proven by almost universal accounts to be a major failure
based on experience and recognition of the enormous penological,
policy, and fiscal consequences. Lessons spring out of all sides from
this twenty-five-year history of an executive "solution," which in-
cluded severe restrictions on judicial discretion generally and on sen-
tencing specifically. How ironic that this kind of development and
tension engenders more and louder criticisms of judges—for not doing
more about crime, even as statistics show it generally dropping dra-
matically. The judicial opinions (majorities and dissents alike) in
cases like \textit{People v. Broadie},\textsuperscript{55} \textit{People v. Jones},\textsuperscript{56} and \textit{People v. Thomp-
son}\textsuperscript{57} present significant challenges yet to be fully appreciated and an-
swered in certain aspects of the debate yet to come. Society and
politicians have to appreciate an understandable and improved frame-
work of governing legal principles and competing policies. The bench
and bar and public officials must continue to think deeply about these
matters and their ramifications. And all must worry together and then
act on them, in our respective, sometimes inherently tension-tugged,
responsibilities.

I have arrived at the point at which I must turn to another serious
feature of concern, and direct implementation and application in crim-
inal justice matters and your particular field of interest and study at
this Conference. I wrote on an aspect of this subject some years ago
in a \textit{Pace Law Review} death penalty article in a professional ethics con-
cept, and before New York restored the ultimate sentencing op-

\begin{itemize}
\item \textsuperscript{51} See \textit{id.} at 485, 500.
\item \textsuperscript{52} See \textit{id.} at 488, 493-95 (Bellacosa, J., dissenting).
\item \textsuperscript{53} Compare Bob Herbert's \textit{A Great Injustice}, \textit{N.Y. Times}, Nov. 25, 1996, at A15,
\item \textsuperscript{54} 37 \textit{N.Y.2d} 100 (1975).
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} 39 \textit{N.Y.2d} 694 (1976).
\item \textsuperscript{57} 83 \textit{N.Y.2d} 477 (1994).
\end{itemize}
tion. The Code of Professional Responsibility imposes upon all attorneys the obligation to "assist the legal profession in fulfilling its duty to make legal counsel available." Indeed, it is a "basic tenet of the professional responsibility of lawyers ... that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." The principle that a lack of funds should not deprive any individual of the right to effective counsel and related representational services should not be hollow rhetoric. The Code instructs attorneys that "[t]hose persons unable to pay for legal services should be provided needed services."

In addition to lack of funds, it is also all too common that court-appointed attorneys lack experience with capital cases. The American Bar Association has cited incompetent trial defense counsel as the reason that so many cases are reversed on federal habeas corpus review. The Court of Appeals has dealt with a whole range of implementing rules in this new universe, because the rulemaking task was delegated by the statutory package comprising Chapter One of the Laws of 1995. Some standards have been promulgated and the fee structure piece has now been put in place, though some controversial aspects continue to swirl and will generate challenges and disputes for years to come.

Public officials and media critics cannot, however, have matters both ways. If the other branches choose not to exercise responsibility in this rulemaking aspect themselves and opt for the protective mantle and expertise of the courts to do this important work, as part of their traditional judicial function, by express delegation and by inherent power and, ultimately, even by adjudicative authority, then everyone will have to respect a responsible, deliberative judicial implementation.

During the civil rights movement of the 1950s and 1960s, many inspired attorneys—not all idealistic neophytes—travelled, often at great personal expense and real risk, including their own deaths, to make a professional and societal difference. There are loose but generous and valuable parallels for instruction here. It is important to

58. See Joseph W. Bellacosa, Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession, 14 Pace L. Rev. 1 (1994) [hereinafter Bellacosa, Ethical Impulses].
60. Id. EC 1-1.
61. Id. EC 8-3.
63. See Daniel Wise, Pay Rates for Capital Counsel Adopted by Court of Appeals, N.Y. L.J., Nov. 22, 1996, at 1; Daniel Wise, Capital Case Assistants Refused Pay by Pataki, N.Y. L.J., Jan. 14, 1997, at 1; Gary Spencer, Judiciary Budget Left Intact by Governor, N.Y. L.J., Jan. 15, 1997, at 1 (discussing "promised legislation to roll back the 'exorbitant fee structure' the Court of Appeals set last fall for assigned counsel in capital cases").
appreciate in the capital punishment adversarial context that well-mo-
tivated, well-qualified, capable, and reasonably experienced lawyers
will help fulfill the weighty prosecutorial responsibilities in a more as-
tute, thoughtful manner. It will even sharpen the effectiveness and
performance of both sides and, thus, help the courts and the process.
A higher level of defense adversarial engagement should be wel-
comed, rather than adopting the foolish, short-sighted stance that ben-
efits will accrue from inferior, resource-starved opposition.

This interaction can be illustrated with the story of the epic struggle
of Sammy Bice Johnson. In 1982, the State of Mississippi convicted
Johnson in the fatal shooting of a highway patrol officer on New
Year's Eve, 1981.64 Johnson and three other men had been stopped
by the officer for speeding.65 A struggle ensued, during which the of-
licer was stabbed, shot, and killed.66 Two of Johnson's cohorts, includ-
ing the shooter, received life sentences.67 The third pled guilty to a
lesser charge in exchange for his testimony against the others.68 Only
Johnson was sentenced to death after trial.69

One of the aggravating circumstances used to impose the death
penalty on him was a 1963 New York predicate felony conviction for
assault with intent to commit rape.70 In 1986, represented pro bono
by the New York law firm Cahill Gordon & Reindel, Johnson sought
to have this New York predicate overturned on collateral review in
New York.71 He argued that he had not been advised in 1963 of his
right to appeal the New York felony and that his counsel rights had
been violated.72 By 1986, the records of his trial were no longer avail-
able. In addition, the court reporter, prosecutor, and trial judge were
all deceased.73 Only the sentencing minutes were available. They suf-
ficiently supported Johnson's claim that he had not been advised of his
right to appeal.74 The Court of Appeals unanimously granted relief

65. Id.
66. Id.
67. See Rita Ciolli, Convict, and NY, vs. Mississippi, Newsday, May 5, 1988, at 4,
41 [hereinafter Ciolli, Convict].
68. Id.
69. Id.; see also Rita Ciolli, New Death-Row Sentencing, Newsday, June 14, 1988,
at 5 (explaining that Johnson was the only one of the four convicted of the murder to
receive the death penalty); Shirley Armstrong, May Save Miss. Inmate: High Court
Mississippi, 486 U.S. 578 (1988); see also E.J. McMahon, A Matter of 'Aggravating
Factors,' Nat'l L.J., Feb. 8, 1988, at 6 (noting that Johnson's sentence was based in part
on his felony record).
71. See People v. Johnson, 69 N.Y.2d 339, 341 (1987); Ciolli, Convict, supra note
67, at 41.
72. See supra note 71; Rita Ciolli, Where Guilt Is a Side Issue, Newsday, May 4,
1988, at 17.
73. Armstrong, supra note 69, at B10.
74. Id.
and held that the necessary remedy was vacatur of the twenty-four-year-old conviction and dismissal of the indictment.\textsuperscript{75}

Johnson’s lawyers filed a petition for reconsideration in Mississippi. They argued that since his New York conviction was a nullity, it could not serve as an aggravating circumstance for sustaining the death penalty.\textsuperscript{76} By a six-to-three vote, the Supreme Court of Mississippi disagreed.\textsuperscript{77} It held that the “foreign” State of New York “cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.”\textsuperscript{78} The Mississippi court went so far as to opine that there was “no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial.”\textsuperscript{79} I am sure this surprised the New York District Attorney who argued so forcefully before the Court of Appeals. In dissent, Mississippi Supreme Court Justice Robertson called his own court’s majority to task, stating: “[T]he Court of Appeals of New York has enjoyed a reputation as one of the [nation’s] premiere state courts. I am not for a moment prepared [to] indulge in the cynical assumption that the New York Court did less than its duty when it ordered Johnson’s 1963 conviction vacated.”\textsuperscript{80} I have never met Justice Robertson, but I sure like his kind of respect and sense of comity.

Johnson got a chance—increasingly rare these days in capital and any other kind of case—to go to the United States Supreme Court.\textsuperscript{81} The argument was that Mississippi had failed to honor the Full Faith and Credit Clause of the United States Constitution. New York had a stake and interest rooted in our constitutional history and protective balances—respect for the integrity of its judgment from the sibling State. The Mississippi Assistant Attorney General summed up his State’s argument by declaring: “New York doesn’t have the death penalty, so I guess they don’t understand how the law works.”\textsuperscript{82} I wonder what argument he would come up with today, now that we do have a death penalty statute. He opined, at that time, that “the Mississippi Supreme Court ‘certainly got the message’ that New York was

\begin{footnotesize}
\begin{enumerate}
\item Johnson, 69 N.Y.2d at 342.
\item Id. at 1339, 1342.
\item Id. at 1338.
\item Id.
\item Id. at 1344 (Robertson, J., dissenting).
\item The total number of cases granted certiorari by, argued before, and decided by the United States Supreme Court has steadily declined in recent years. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1996, at 214 (116th ed. 1996).
\item Ciolli, Convict, supra note 67, at 40 (quoting Mississippi Assistant Attorney General Marvin White, Jr.).
\end{enumerate}
\end{footnotesize}
trying to block executions" and labeled the $1.5 million in legal fees expended by Cahill Gordon "ludicrous."\textsuperscript{83}

Ludicrous or not, a unanimous decision for Johnson from the United States Supreme Court was won\textsuperscript{84}—quite an achievement in its own right. The option for the Mississippi Supreme Court was to order a new sentencing hearing or to decide on the appropriate sentence itself.\textsuperscript{85} In 1989, the Mississippi Supreme Court remanded the case to the County Court to impanel another sentencing jury,\textsuperscript{86} and Johnson was resentenced to life imprisonment.\textsuperscript{87}

It is worthwhile pondering what the prosecution-side costs, direct and indirect, added up to in the whole saga of Sammy Bice Johnson's adversarial journey through the courts. This lesson in federalism and our dual judicial tracks, triangulated in Johnson's circumstance (United States Supreme Court and two states' highest courts), illustrate one of the aspects with which everyone will have to contend sooner or later: the arguable disproportionality of resources between the government and the defense sides in death penalty cases.

One more reality check that some critics may pose is worth noting. Where, then, does one find the check and balance against a potentially too-powerful judiciary itself?\textsuperscript{88} For the most part, it resides in the constitutions themselves, federal and state. But they are not self-executing documents and must be enforced and energized by fallible, human judges, who must practice a personal and institutional discipline and a dynamic attentiveness to a fair, open process that grows and adjusts. This approach respects limitations over pretense to omniscience or, worse, omnipotence. Subordination of personal views and biases is part of the judicial decisionmaking struggle and obligation—even the deeply suppressed and hidden ones must be guarded against somehow. Judges are not allowed to work their own "agendas," and they have no constituents, save The Law itself. Their duty is 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 appearance and actuality of detached impartiality must be maintained.

\textsuperscript{83} Id.
\textsuperscript{84} Johnson v. Mississippi, 486 U.S. 578, 579 (1988).
\textsuperscript{85} Id. at 591 (White, J., concurring).
\textsuperscript{86} Johnson v. State, 547 So. 2d 59, 61 (Miss. 1989), overruled by Clemons v. State, 593 So. 2d 1004, 1006 (Miss. 1992).
\textsuperscript{87} See Letter from P. Kevin Castel, Partner, Cahill Gordon & Reindel, to Joseph W. Bellacosa, Associate Judge, N.Y. St. Ct. App. (Nov. 9, 1993) (on file with author); Bellacosa, Ethical Impulses, supra note 58, at 11.
\textsuperscript{88} See, e.g., Robert H. Bork, Slouching Toward Gomorrah: Modern Liberalism and American Decline 96-119 (1996) (arguing that the American people are without the political strength to fight against a strong judiciary and strong radical individualists).
Is that too idealized? I believe not. Realism and the human condition we will always have with us, but there can never be too much idealism. Oliver Wendell Holmes, a hardened realist by philosophical bent and by thrice having been wounded in the Civil War, described the measure of success in a letter to his friend and successor, Benjamin Nathan Cardozo: "[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." Cardozo called this letter a private treasure, and so should everyone treat its message and exhortation.

I like to think of myself as a mix of pragmatist and idealist—if that is not an oxymoronic union. This very exertion decries speculators who try to label courts and peg judges to the observer's ideological contours. Judges should remain aloof from such outside pigeonholing. The passion of the moment and streets must also always be kept a safe distance away from the courthouse. Judges must be open instead only to the work product and persuasions of the parties' lawyers, to their judicial colleagues, and to their individual consciences. THEN they should decide—never beforehand, and never based on their own prejudicial or extrajudicial paper trails or the superimposed straitjackets of spin merchants and opinion shapers. Overall, our culture and tradition enjoys and benefits from a thoughtful process that makes for considerable unpredictability. As one long-time litigator and astute observer of the Court of Appeals stated, with the license of my paraphrase: The votes of all the Judges of the Court of Appeals are all up for grabs in any given case. I like the sound and imagery of that, and I believe Professor William Hellerstein has captured a gem of realism and truth based on extensive experience and deep study that is plainly lacking and studiously overlooked by too many other so-called experts.

Judges, in the end, are not privileged or authorized to rule by pleas for compassion or based on personal philosophy and beliefs, no matter how strongly held or felt. Judges who are faithful to their oaths, thus, may not wrap themselves in the soft tunic of Mother Teresa or in the hard armor of an Avenging Attila. Nor should they believe, adjust to, attorn to, or act on their media or commentators' clippings and reputations. Otherwise, each one doing his or her "own thing" might contribute to shrunken justice, uneven justice, or just plain injustice—

89. 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).
90. Id.
a form of lawlessness. The trick and genius in judging is finding the epistemological balance of principle, intellect, tolerance, and understanding, and some sweetness of heart. There is room for all. Then this amalgam must be applied under principles and rules of law, even-handedly to all. Paradoxes may emerge, but an occasional anomaly or ironic twist is acceptable in a far-from-perfect human enterprise that nevertheless aspires to and yearns for ideals.\footnote{92}

In this regard, therefore, I must inform you that judging is very quiet—in the eye of society's and people's storms, as in Holmes's great aphorism and metaphor in answer to the question, “What is it like up there?”\footnote{93} I, like every judge, would especially appreciate your understanding. But I have no need of and dare not look for your applause. With all the privilege and honor wrapped in our judicial robes and process, judging cases constitutes a weighty, nondelegable, intensely private yet public responsibility. This usually also includes a conscientious agony of decisions made against a dimly lit, fortuitous future; but the rulings are necessary to be gavelled down when the critical mass and moment of decision arrive in any given case. So judges proceed steadfastly, knowing that there are more cases in an endless stream awaiting attention.

The substance, process, and pursuit of human justice, I respectfully submit, are found in quiet nooks and crannies of careful thoughtfulness, far away from marching fields of populists waving banners, who propagandize a brand of truth through lazy symbols, slick slogans, and quick fixes.\footnote{94} For the most part, judges do their jobs superbly and diligently. In doing so, they trust and rely on a proven verity: Acceptance and recognition of how respected, valuable, and indispensable judicial services are rests principally on the general fine reputation of the judicial process and its ministers and the reasonable and high expectations of the public. Those who upset that balance by tarnishing the good name and essential services of the justice dispensers do so at their own risk and at some peril to the process. They also skate carelessly close to serious breaches of public and professional responsibilities, as recently and cogently warned by Michael Cardozo, President of the Association of the Bar of the City of New York, in the \textit{National Law Journal}.\footnote{95}


\footnote{93. Oliver W. Holmes, \textit{Law and the Court}, in Collected Legal Papers 291 (1920).}


In sum, judging cases is complicated and takes time, study, and care. Shaping public opinion requires corresponding attentiveness and responsibility. Neither should be a twenty-four-hour headline-grabbing, labelling, or statistical tabulation exercise, nor a bottom line, result-oriented process. Before anyone engages in either, he should read records and opinions, pause over sources of authority, especially the constitutions, and think more than once about the short- and long-term consequences of what he says and does. If that happens, I would be willing to drop the "versus" in the title of this article, embrace a cease-fire in the competition for public attention and understanding, and declare victory for the joint enterprise of working together for the common good and the preservation of a jewel of America's system of government: the judicial process. 96

96. See Kaye, supra note 2, at 9.