

1987

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## Recommended Citation

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# The John Dewey Memorial Lecture

## Education, Intelligence, and Character in Judges

The Honorable John T. Noonan, Jr.\*

In memory of a philosopher who exercised such a strong influence on American life in the first half of this century, I address a topic that reflects themes dear to John Dewey's heart. The key role of creative intelligence, the encompassing power of education, and the importance of character are familiar to any student of Dewey. Above all in Dewey there is concern that knowledge be translated into action—into action solving the problems of society. Judges are precisely such solvers of problems, precisely such translators of knowledge into action. It is no accident that John Dewey saluted Justice Holmes's work as "a pattern of the liberal mind in operation."<sup>1</sup>

I propose to approach this subject in Deweyite (or Aristotelian) fashion, empirically, but not in the manner of much social science research that seeks the typical or average. I am interested in what makes the best. I plan to focus my data on a single question: What are the constituents of judicial greatness? To put it another way: What makes a judge great?

I hold that an answer to this question is more instructive than finding out the place of education, intelligence, and character in an average judge. I believe

Lives of great men all remind us  
We can make our lives sublime.<sup>2</sup>

To answer my question I shall look at the lives of seven famous men who were judges—six who were great, one who was an imposter. A philosophical premise underlies this way of proceeding.

*The Premise.* Interpretation is still the question of the day.

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1. J. DEWEY, *Justice Holmes and the Liberal Mind*, in 3 *THE LATER WORKS*, 1925-1953, at 178 (J. Boydston ed. 1984).

2. H.W. LONGFELLOW, *A PSALM OF LIFE* (1838).

How you interpret the Constitution is the issue that divides justices and political camps and scholars. How you interpret the Bible was once and still is a crux in religious controversy. How you interpret any text has been made a puzzle not only for professional epistemologists but for critics and teachers of literature. It has become a question whether you can interpret any text without dissolving what you interpret into your own re-statement that is no longer an interpretation but a new text. Controversy has created a hermeneutic morass.<sup>3</sup>

Texts, it is evident to anyone who has confronted them, do not speak for themselves. A will that is supposed to speak for the dead is found on close examination by lawyers for the living to have more than one meaning. Statutes that represent the intentions of lawmakers do not exist without uncertainties in their sense. The Constitution itself is full of phrases—"due process of law" is the best known—patient of exegesis in different and sometimes unexpectedly wayward ways.

Notations on pieces of paper, texts do not resist manipulation by those minded to manipulate them. Gross glosses can be and are written on them. A modern director can turn the divine duke of *Measure for Measure* into a sadistic tyrant.<sup>4</sup> A Supreme Court can turn the protection of privacy into an escape hatch for criminals.<sup>5</sup> Mute and uncomplaining, a text cannot retort, "I'm misunderstood."

Texts are inert. Persons are resistant. If a person is speaking to you and is misunderstood, no hermeneutic hiatus develops. No infinite interpretive regress is permitted when living persons are in dialogue. Correction is instantaneous. "You missed my meaning. You haven't got the point. You didn't hear what I said." The person's own interpretation of his meaning is definitive—definitive at least if the persons have respect and affection for each other. Quarrelling, one may seek to impose his meaning on another's speech. In ordinary conversation the speaker defines the sense he intended.

In respect and affection for persons lies the path out of the hermeneutic morass. Texts are after all only the memorial of a person's thoughts. The person is not there to offer instantane-

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3. See, e.g., Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983).

4. Such, I am informed by Professor Hugh Richmond, was the interpretation of the play at Ashland, Oregon, in the early 1980s.

5. See *United States v. Leon*, 468 U.S. 897, 907-08 (1984).

ous correction. Absent, he or she can be disregarded as brutally as a text. But behind the words the person can be glimpsed, seen, appreciated. The person did have a meaning. Whoever loves him or her will not try to replace that meaning with someone else's.

In this perspective, it does not matter whether the author of a text is alive or dead. The text can be that of a contract written yesterday or that of a will written twenty years ago for a testator now deceased. The effort respectful of persons will attempt to determine what the person meant. The task is similar if more difficult in the case of legislation or the Constitution. The difficulty is caused not so much by the antiquity of a document as by the multiplicity of authors. Many persons have pooled their thoughts. A single legislative or constitutional text has resulted. Still, concrete persons speak through the text.<sup>6</sup>

Humanistic hermeneutics does not stop at the text as an artifact free to be pushed or pulled, shaped or misshaped as suits the interpreter. Conscious that every word is the work of a fellow human being, the humanistic interpreter seeks to respond to that person or persons. The text is not the interpreter's thing. The text is the trail left by the other.

Much can be made of the difficulty of understanding those who spoke at another period, who were unfamiliar with our inventions, our practices, our problems. The difficulty is parallel to understanding those who speak to us as contemporaries out of a different culture. Anthropologists, insisting on the difference, still communicate with that culture. Historians, insisting on the uniqueness of the past, do not despair of understanding it. Cultural chasms can be crossed if we choose.

We are indeed coming closer to past cultures. Our techniques have been refined, our empathy enlarged. To take one illustration, it was the contention of nineteenth and twentieth century scholarship that the ancients—Hebrews, Greeks, Saxons—did not distinguish between intentional, negligent, and accidental killing. Today we see, thanks in particular to the work of David Daube, that the ancient world possessed as well as we the concepts of the intentional, the accidental, and the negligent.<sup>7</sup> The fundamental elements determining human responsibility have been constant for over 3,000 years. Across the chasm, out of the morass, we encounter the common humanity

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6. See J. NOONAN, *PERSONS AND MASKS OF THE LAW* 164-65 (1976).

7. D. DAUBE, *ANCIENT JEWISH LAW* 49-69 (1981); D. DAUBE, *ROMAN LAW: LINGUISTIC, SOCIAL, AND PHILOSOPHICAL ASPECTS* 157-75 (1969).

of human beings. With empathy, with tact, with wisdom, we can share their meanings. My philosophical premise is that interpretation is possible if persons, not texts, are what we seek to understand.

*The Experiment.* If my premise is accepted, we have, in studying or practicing or declaring law, reason to take more than casual notice of the persons who speak to us in precedents. Judges are not fungible. It is my habit, and I suspect that of many of my colleagues, to take into account the author of each opinion on which I rely. We cannot know all the authors. But of all the authors of opinions those with the most amount of interest for us are the great judges.

Judges to whom common agreement accords the denomination "great" are the equivalent in the legal world of those in the religious world who are acknowledged as saints by popular acclamation. Great judges speak more clearly than the act of any legislature because they are single individuals. They speak more distinctly than lesser judges because we know more about the great, because they have more to teach, and because they themselves more successfully integrated their lives with their judging. They speak to us with force and power. Perceptible as persons, they cross the chasm of cultures. They make us confront the persons of the past.

For experimental purposes here, to answer the question, What makes a judge great?, I select seven famous judges: Bracton, Coke, Bacon, Marshall, Holmes, Cardozo, and Brandeis. From Bracton to Brandeis they span seven hundred years of Anglo-American law. They wrote in a feudal society, in a centralized monarchy, in an infant republic, in a mature democracy. Six were truly great judges; one, as I have indicated, was a pretender. I propose to review the part their education, their intelligence, and their character played in making them great.

*Education.* To begin with the first of the seven, Bracton, I must confess that on inspection he turns out to be two men. "Bracton" is the traditional author of *De legibus et consuetudinibus Angliae*, the greatest treatise on English law before Blackstone. The true author of this work, modern scholarship suggests, was William of Raleigh,<sup>8</sup> Chief Justice of England under King Henry III. Raleigh wrote the work. Henri de

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8. See Thorne, *Translator's Introduction* to 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (BRACTON DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE) xxxvi (S. Thorne ed. 1977) (Raleigh "the prime mover"); cf. Maitland, *Introduction* to 1 BRACTON'S NOTE BOOK 14 (F. Maitland ed. 1887) (discussing

Bracton, his law clerk, edited it and neatly reversed the ordinary process by which the judge is credited with his clerk's productions. The clerk became the acknowledged author. Taking Raleigh as the truly significant figure, I find that his formal education was in the elements of canon law and Roman law, probably at Exeter; the more important part of his professional education came by serving at least a decade, from 1218 to 1229, as law clerk to another royal justice, Martin Pateshull.<sup>9</sup>

Some formal schooling but mostly on-the-job training characterized Raleigh's education. The same is true of Coke, Bacon, and Marshall. Coke and Bacon were both students at the Inns of Court, the practical professional training ground of English barristers. Bacon attended Trinity College, Cambridge, from the age of thirteen to sixteen, leaving without a degree,<sup>10</sup> and at the age of eighteen began to study law at Gray's Inn, where education was "by personal emulation."<sup>11</sup> Without benefit of formal education, John Marshall went to law school at the College of William and Mary, where George Wythe was the sole professor of law. His attendance was at the most for six weeks.<sup>12</sup> He began with the study of the "A"s—"Abatement" and "Abutters"—and in his short stay actually reached L for "Legacies," admittedly with "Juries" left blank.<sup>13</sup> Marshall received his completed education in law only by practice as a solo practitioner in Richmond.

Holmes actually graduated from college and then attended law school. The Harvard Law School of his day, with its three professors of law, could cover only a fraction of a modern curriculum, and Holmes himself dropped out after not much over a year of study.<sup>14</sup> Brandeis attended the same school, slightly enlarged, a generation later. A graduate of a German gymnasium, he skipped college and completed his formal legal education under Langdell in the then standard two years.<sup>15</sup> He was ready to graduate at the age of twenty.<sup>16</sup> Cardozo was a graduate of Columbia College and left Columbia Law School after

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"the William Raleigh whose judgments Bracton has made immortal" and noting that "Bracton may have been his pupil").

9. See Maitland, *supra* note 8, at 5, 60.

10. C. BOWEN, FRANCIS BACON 33-37 (1963).

11. F. COWPER, A PROSPECT OF GRAY'S INN 25 (2d rev. ed. 1985).

12. 1 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 154 (1916).

13. *Id.* at 174-76.

14. M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS—1841-1870, at 184, 189, 204 (1957).

15. A.T. MASON, BRANDEIS: A FREE MAN'S LIFE 33-34 (1946).

16. *Id.* at 47.

two years' attendance.<sup>17</sup>

It is perhaps painfully apparent that an enriched academic curriculum, a wide variety of courses, and a prolonged immersion in academic legal culture were not necessary to these judges attaining greatness. Marshall's few weeks under Wythe seem to have stood him in as good stead as Brandeis's two years in a more sophisticated school. To do very well at law, one might generalize from these cases, one must be socialized in the basic concepts and the professional ethics. After that, a powerful mind will develop itself by professional endeavors.

This conclusion, it might be added, would not have surprised John Dewey, whose basic creed was that "all education proceeds by the participation of the individual in the social consciousness of the race," with the added caveat that formal education "cannot safely depart from this general process."<sup>18</sup> All seven judges, as their writings show, were soaked in the social consciousness of their periods and the legal profession of their day. Their education was achieved by their intelligent participation in this consciousness. Their academic training merely provided them with a few tools. Their true education preceded and accompanied their formal training and continued after that training was completed.

*Intelligence.* As their writings demonstrate, all seven judges were highly intelligent. Their intelligence was not of the theoretical order of a Spinoza or a Kant. All had an interest in philosophy; none found its abstractness entirely congenial. Even Bacon, who had the strongest philosophical aspirations, had too concrete a mind to be entirely at home in the austere domain of metaphysics or epistemology.

All seven were good, even excellent writers, acutely conscious of style. Raleigh's alliterations, assonance, and figures of speech, for example, give charm to his book; Holmes's succinct prose is deliberately compressed to make an impact. Their talent of expression has been essential to their greatness. None, however, was a literary genius. Their ambitions were not primarily aesthetic.

Their intelligence was manifested in their sense of style and in retentive memories, keen perceptions, the ability to analogize, to make distinctions, to marshal data, to grasp rela-

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17. Kaufman, *Benjamin Cardozo*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 2288 (L. Friedman & F. Israel ed. 1969).

18. Dewey, *My Pedagogic Creed*, reprinted in TEACHERS MANUALS 3 (1897).

tionships, and to bring fact and theory together. In short, their intelligence as manifested was that peculiarly appropriate to the legal profession.

In any society, in any role, their intelligence would have fitted them for positions of prominence. Put to service in the law and honed by practice, their intelligence became adept at a lawyer's tasks. Operating within bounds set by society, their intelligence was such that they were not unaware that beyond those bounds lay other realms and mysteries. "Once turn into the fields and you will hardly stir a step . . . without finding yourself face to face with queries that are ultimate," Cardozo wrote apropos of Holmes.<sup>19</sup>

*Character.* Exceptional intelligence, informal education achieved through that intelligence, but the most important factor has yet to be taken into account—character. The assessment of character, we have been judicially informed, is a parlous enterprise.<sup>20</sup> For statutory purposes—admission to the bar, for example, or admission to the country—a single bad act is held to destroy good character while an absence of evidence of evildoing suffices to establish good character.<sup>21</sup>

I shall not employ so arbitrary a standard here, and I enter with trepidation on the work of assessment, believing that there is only one true Judge, and that Judge one who judges judges postmortem. Consider those virtues that Saint Paul treated as a trinity: faith, hope, and charity.<sup>22</sup> As to faith, Raleigh was a Catholic priest; he died the Bishop of Winchester.<sup>23</sup> Coke was a devout defender of the Anglican establishment;<sup>24</sup> Bacon was a worshipper in the same church.<sup>25</sup> Marshall was an Arminian, that is, a Christian who did not accept the full divinity of Christ.<sup>26</sup> The moderns are not conveniently classified by church membership. Holmes was a declared agnostic.<sup>27</sup> He was also capable of writing that the master of law would "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."<sup>28</sup> The

19. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 684-85 (1931).

20. *United States v. Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975).

21. *See, e.g.,* *Konigsberg v. State Bar*, 366 U.S. 36, 40-41 (1961).

22. 1 *Corinthians* 13:13.

23. Maitland, *supra* note 8, at 47.

24. *See* C. BOWEN, *THE LION AND THE THRONE* 264 (1956).

25. *See* C. BOWEN, *FRANCIS BACON* 1 (1963).

26. *See* 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 69-71 (1919).

27. *See* M. HOWE, *supra* note 14, at 105, 239.

28. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).



ghost of God underlies this paean to purposeful order. The case is analogous with Cardozo and Brandeis, far as they were from traditional Judaism. Brandeis was brought up by parents who were culturally, not religiously, Jewish; he never attended synagogue.<sup>29</sup> Espousing no religion, he acted with a sense that facts mattered, that ideas mattered, that people mattered.<sup>30</sup> His sense of purpose was scarcely reconcilable with a universe of chance. Cardozo, disavowing orthodoxy, expressed his belief through reflection on Albert Noyes's lines:<sup>31</sup>

You and I  
Have watched too many constant stars to  
dream  
That heaven or earth, the destinies of men  
Or nations, are the sport of chance.<sup>32</sup>

I venture the hypothesis—it is nothing more—that for each of the seven, faith in the ordered nature of the universe gave them the confidence necessary to do their own work of ordering a corner of the cosmos.

Such confidence was a species of hope beyond the hope that orthodox believers may derive from their religious faith. If the whole business of judging is not to seem sisyphian, one has to have the hope that humanity is helped by what one does. One has to hope that one's words do not disappear in an abyss filled with paper. One has to hope for a response. Holmes in words eschewed such hope, although he could write, "I say to myself man also may have cosmic destinies beyond his ken."<sup>33</sup> In Holmes's famous words in *Abrams*<sup>34</sup> on the experiment our Constitution is making,<sup>35</sup> there is expressed a confidence in the

29. A.T. MASON, *supra* note 15, at 441.

30. *See id.* at 640-44.

31. *See* CARDOZO, *Values: Commencement Address*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 4 (M. Hall ed. 1947).

32. A. NOYES, TYCHO BRAHE, *reprinted in* A. NOYES, *THE TORCH-BEARERS* 91 (1922).

33. HOLMES-SHEEHAN CORRESPONDENCE 59 (D. Burton ed. 1976) (letter of Jan. 31, 1913).

34. *Abrams v. United States*, 250 U.S. 616 (1919).

35. Holmes believed that

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

*Id.* at 630 (Holmes, J., dissenting).

power of ideas—a confidence meaningless unless there is expectation of a response to ideas. John Dewey acutely diagnosed the *Abrams* dissent as expressing hope.<sup>36</sup> A similar hope animates Cardozo on liberty of thought<sup>37</sup> and the unflagging pedagogy of Brandeis's opinions.<sup>38</sup>

Charity, in the American sense of giving abundantly to the needy, was most abundantly demonstrated by Brandeis. In his lifetime he gave over \$1,496,000 to persons or causes.<sup>39</sup> Generosity of this sort is a valid sign of charity in the basic sense of love of neighbor. Holmes is a more difficult case. On occasion he was profoundly selfish.<sup>40</sup> But who can doubt his kindness when he makes a friend of a young Chinese correspondent John Wu or when he writes his friend, the Irish priest, Patrick Sheehan, "I think of you a great deal and am always hoping that you may not be suffering."<sup>41</sup>

Coke was a curmudgeon. His treatment of his wife and daughter Frances marks him as a sexist by modern standards and a domestic tyrant by earlier ones.<sup>42</sup> But must not his charity, that is, his love of neighbor, be also measured by his *Reports*, those eleven volumes of learned struggles to apply the law? Is not a judge's unselfish, scarcely remunerated labor the best evidence of charity? Without a strong desire to be of service, would vanity alone account for the care Coke and the others lavished on their cases? I abstain, then, from any final judgment on the degree of our seven's faith, hope, and charity. I suggest but do not prove that without these basic virtues their work would have withered.

With more confidence I turn to the four cardinal virtues recognized by Aristotle's *Ethics*: justice, temperance, prudence, and fortitude. I begin with justice. Aristotle in the *Ethics* said that the ideal judge, in a manner of speaking, is justice personi-

36. J. DEWEY, *supra* note 1, at 177.

37. *See, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (discussing the fundamental principles of liberty which lie at the heart of our civil society).

38. *See, e.g.*, *Liggett v. Lee*, 288 U.S. 517, 541, 578-80 (1933) (Brandeis, J., dissenting) (discussing the broad right of Americans to establish and preserve those social and economic institutions that they deem desirable and concluding that "[t]o that extent, the citizens of each State are still masters of their destiny").

39. A.T. MASON, *supra* note 15, at 692.

40. *See, e.g.*, M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS—1870-1882*, at 265-68 (1963) (the view of James Bradley Thayer).

41. HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 33, at 60 (letter of Feb. 5, 1913).

42. A. FRASER, *THE WEAKER VESSEL* 12-18 (1984).

fied.<sup>43</sup> "Justice and justice alone shall you pursue" was God's message to Israel when instituting the judges of Israel.<sup>44</sup> A judge without justice is no judge at all.

One of our seven must now be unmasked as a pretender, as, in fact, an unjust judge. Francis Bacon, Lord Chancellor of England under James I, was a taker of bribes. One of the brightest and wittiest men in England in a bright and witty age, a brilliant essayist, a pioneer and patron of science, Bacon possessed extraordinary intellectual abilities that did not prevent him from being a corrupt chancellor. His fault lay not in a single slip, a solitary temptation to which he yielded; it consisted in a robust course of bribe taking pursued in office, with lawyers employed as go-betweens and his own staff as bagmen, making Chancery a money-making ring so that his take at least tripled his lawful income, already high, to make it one of the highest in the kingdom.<sup>45</sup>

When caught, Bacon was overwhelmed by a mountain of testimony as to his acts. His defenses were several. Others did the same. He gave "little regard" to the bribe in one case.<sup>46</sup> In five other cases, he took from both sides.<sup>47</sup> These futile excuses were unavailing in his trial before the House of Lords<sup>48</sup> and are unavailing now. Criminals always have a custom to appeal to; custom is no defense to crime. A judge who takes from both sides is merely a judge who does not stay bought. A judge who pays little regard to a bribe is guilty of deceit as well as of infidelity to his office. Bacon lacked justice. Lacking justice, he had already ceased to be any kind of judge. His ultimate punishment fitted the crime; he was declared incapable of holding office.<sup>49</sup> His essays are still read in schools. Scientists still sing his praise. As an intellectual he commands respect. Among lawyers, his name is, as he himself expressed it,

All as the chaff, which to and fro  
Is toss'd at mercy of the wind.<sup>50</sup>

Removing one from our list of seven, I find each of the

43. ARISTOTLE, *Ethics*, in 9 THE WORKS OF ARISTOTLE, bk. 5, ch. 4 (W.D. Ross trans. 1925).

44. *Deuteronomy* 16:20.

45. J. NOONAN, BRIBES 360 (1984).

46. *Id.* at 357.

47. *Id.*

48. *Id.* at 360.

49. *Id.*

50. F. BACON, *The Translation of the First Psalm*, in 7 WORKS OF FRANCIS BACON 277 (J. Spedding new ed. 1872) (translated when he was sick in 1624).

others did, to the extent of his powers, personify justice in his time. Justice and justice alone was what each sought.

As for temperance, understood narrowly as moderation in bodily pleasure, none were excessive eaters or drinkers. As to sex, Raleigh and Cardozo were celibates, the other four married men. Holmes's attraction, past the age of sixty, to Lady Castletown is apparent in his letters to her;<sup>51</sup> more than platonic love is arguably suggested. If temperance is taken in a broader sense as moderation in all things, Marshall, Cardozo, and Brandeis are especially notable for their simple styles of life.<sup>52</sup> Coke was a man who wanted to be rich and became rich by marrying a rich widow.<sup>53</sup> Raleigh litigated six years to sustain his right to the richest see in England.<sup>54</sup> In short, the temperance of our six is not as conspicuous as their justice. Yet no intemperate act or desire is known to have deflected their devotion to justice in cases they judged.

Prudence, a virtue reduced in bourgeois parlance to calculation, is classically understood as a sense of the means necessary to achieve an end. At the heart of prudence is a sense of proportion. The means vary with the end in view. The prudent person strikes the right proportion. So Raleigh's great sprawling treatise on the laws and customs of England was proportionate to his end of instructing "the lesser judges"<sup>55</sup> of England in the law. Coke's commentary on Littleton<sup>56</sup> was similarly proportionate to the task of educating seventeenth-century Englishmen in the common law of property. Marshall's sweeping declarations on fundamental power relations<sup>57</sup> were proportionate to the jurisprudential challenges at the beginning of our judicial system. Holmes's pithy analyses<sup>58</sup> were usually, if not always, proportionate to his presentation of the

51. See Monahan, *The Love Letters of Justice Holmes*, BOSTON GLOBE MAG., Mar. 24, 1985, at 15.

52. See 4 A. BEVERIDGE, *supra* note 26, at 61-63; Kaufman, *supra* note 17, at 2287-88; A.T. MASON, *supra* note 15, at 77.

53. C. BOWEN, *supra* note 24, at 117, 123.

54. Maitland, *supra* note 8, at 46-47.

55. *Introduction to 2 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND* (BRACON DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE) 19 (S. Thorne ed. 1968).

56. E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: OR, A COMMENTARY UPON LITTLETON* (3d ed. 1633).

57. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

58. See, e.g., *Messenger v. Anderson*, 225 U.S. 436 (1912); see also Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 799 app. II (1931) (list of opinions delivered as an Associate Justice and Chief Justice of the Supreme Judicial Court of Massachusetts, January 1883 to December 1902).

common law. Cardozo's elegant prose was proportionate to the elucidation of developing legal doctrine.<sup>59</sup> Brandeis's massively documented judgments were proportionate to judgments rooted in social facts.<sup>60</sup> Each judge was a prudent person.

Fortitude, like prudence, is often degraded. It is identified with mere strength of will, steadily expressed; it is treated the same as stubbornness. In this degraded form of stubbornness, it is a vice—perhaps the besetting vice of judges. In Dewey's terms, stubbornness is the willful foreclosure of the exigency of logic understood as inquiry. For Dewey, a judgment is "grounded" only when it is the product of "inquiry."<sup>61</sup>

That each of our six was stubborn on occasion, I find hard to deny. Stubbornness, as I have just said, is the constant temptation of a judge. The office requires resolve, determination, firmness; the impatient ending of inquiry is easy. True fortitude is patient, indeed expressed as patience, as Dewey suggests in his essay on Holmes.<sup>62</sup> True fortitude is courageous, indeed expressed as courage in adversity. True fortitude is the mean between stubbornness and vacillation. Each of our six showed true fortitude.

Cardozo grew up in the shadow of a great family disgrace. His father, Albert Cardozo, was a Supreme Court judge in New York and a sachem of Tammany when Tammany was ruled by Boss Tweed. Scorned by virtuous members of the bar, the senior Cardozo finally resigned when the New York legislature began to investigate his conduct. Never convicted, he was generally believed to have been guilty of corruption. An old and proud family name became a by-word. Benjamin N. Cardozo's whole judicial career may be read as a struggle to establish the opposite reputation; to show, in his own actions as a judge, justice in the most unalloyed, incorruptible form.<sup>63</sup> Patience in adversity—fortitude—was Cardozo's conspicuous virtue as he successfully undertook this mission.

Louis Brandeis practiced law in a Boston notably unsympa-

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59. See, e.g., *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921) (negligence, personal injury case).

60. See, e.g., *St. Joseph Stockyards v. United States*, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring).

61. See J. DEWEY, *LOGIC: THE THEORY OF INQUIRY* 122 (1938). Judgment for Dewey is "the settled outcome of inquiry." *Id.* at 120. Strikingly, as a central illustration of his logic, Dewey put the judgment of a case by a court. *Id.* at 120-21.

62. See J. DEWEY, *supra* note 1, at 179.

63. J. NOONAN, *supra* note 6, at 143-44.

thetic, both professionally and socially, to the son of Jewish immigrants. Brandeis bore this anti-Semitism with fortitude.<sup>64</sup> "I suppose eighteen centuries of Jewish persecution must have ensured me to such hardships," he wrote his brother in 1916 as opposition intensified to his nomination to the Supreme Court, "and developed the like of a duck's back."<sup>65</sup> Intensely active in political reform, he bore with fortitude the attacks his political zeal provoked.

Fortitude is the virtue Brandeis praised in his defense of Louis Glavis before the Senate investigating committee: The government, he said, wants employees who "add to the virtue of obedience some other virtues—the virtues of manliness, of truth, of courage, of willingness to risk positions, of the willingness to risk criticisms, of the willingness to risk the misunderstandings that so often come when people do the heroic thing."<sup>66</sup> As a judge, that same courageous indifference to the pressures of judicial collegiality marked him as a principled dissenter. Fortitude animated a dissent such as his in *Casey v. United States*,<sup>67</sup> where Holmes wrote the majority opinion<sup>68</sup> and Brandeis wrote that "to protect the Government" a court should not accept evidence obtained by entrapment.<sup>69</sup>

Holmes, whose fortitude was proved in his youth by the three wounds he suffered as a soldier,<sup>70</sup> also exhibited the virtue most markedly in dissent. Not for him easy acceptance of the views of his class, his party, or his colleagues. Willing to see the temporary triumph of views he personally thought pernicious or puerile, he could, unlike less patient judges, refrain from injecting his personal preferences into the due process clause of the fourteenth amendment and so was capable of enunciating that modern bill of rights for the people against oppressions by a federal court:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.<sup>71</sup>

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64. A. GAL, *BRANDEIS OF BOSTON* 31, 41, 115 (1980).

65. *Id.* at 115.

66. A.T. MASON, *supra* note 15, at 281.

67. 276 U.S. 413 (1928).

68. *See id.* at 416.

69. *Id.* at 425 (Brandeis, J., dissenting).

70. M. HOWE, *supra* note 14, at 103, 125, 154.

71. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

The same quality of firm acceptance of a place within our political system for the expression of views that he found wrong animated the *Abrams* dissent, which Brandeis joined. In Holmes's words, "truth is the only ground" upon which human wishes "safely can be carried out."<sup>72</sup> No one has put the matter better, or with greater fortitude.

John Marshall, like Holmes, developed fortitude in war as a young officer and, like Brandeis, established it in political campaigns in the face of savage political attacks.<sup>73</sup> His thirty-four years as chief justice must by length of service alone be counted an exercise in fortitude. The single moment when he most needed the virtue came when he wrote the most important of all Supreme Court decisions. Marshall wrote at a time when a political enemy, who considered him a crafty schemer, held office as President, and when that President's administration had already begun to tame the judiciary by repealing the Judiciary Act of 1801 and reducing the sitting of the Supreme Court to a single session, postponed for fourteen months from the date of the act.<sup>74</sup> In the teeth of this threat to the independence of the Court, Marshall wrote *Marbury v. Madison*,<sup>75</sup> created the institution of judicial review, and asserted the supremacy of the Supreme Court.

Marshall risked political reprisals, even impeachment, with fortitude. Coke risked his liberty and perhaps his life in asserting the independence of the judiciary against James I. Accounts of the scene do vary, it must be admitted, not all of them flattering to the fortitude of Coke. I accept his own version. Coke told James to his face, "[T]he King in his own person cannot adjudge any case . . . ."<sup>76</sup>

Finally we reach the roots, where judicial independence was first asserted, and where the greatest fortitude was essential to its assertion. In the day of Raleigh and Henry III, one's head was the price to be paid for what the king might see as contumacious conduct. In words, as a major point in *The Laws and Customs of England*, Raleigh maintained the supremacy of law over royal whim. [*S*ub deo et sub lege—"under God and

72. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

73. 1 A. BEVERIDGE, *supra* note 12, at 77-115; 2 *id.* at 379-80.

74. See 1 *id.* at 3, 50, 75, 92, 97.

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

76. *Prohibitions del Roy*, 12 Co. Rep. 63, 63-64, 77 Eng. Rep. 1342, 1342 (K.B. 1793).

the law"—was his formulation.<sup>77</sup> Or again, no *rex* without *lex*—no ruler without rules.<sup>78</sup> The monarch was constituted by a legal system; he could not transcend it. When one thinks of the enormous struggles that have attended acceptance of this principle, not only in the developing nations of Africa, the Near East, Latin America, and Asia, but also in more sophisticated European countries such as twentieth-century Germany, one is led to praise above all Raleigh's forceful insistence on this truth, that the ruler is subject to the law.

In his great treatise, Raleigh did not devise a writ for making this subjection of the king judicially controllable. He urged example—the submission of Jesus and of Mary to the law.<sup>79</sup> He pointed to divine punishment of all evil kings.<sup>80</sup> He pointed to a political sanction for royal lawlessness—foreign invasion.<sup>81</sup> He even devised a political "bridle," as he put it, on a monarch's will. The king, he wrote, was not alone; he had partners—his council; and "he who has a partner has a master."<sup>82</sup>

In his actual practice, Raleigh went one step further. In 1234, sitting as chief justice (the only legal professional), joined with Edmund, Archbishop of Canterbury, and other bishops and earls of the realm, he sat on the case of a former chief justice, Hubert de Burgh, who had revolted against the king and had been declared an outlaw by the king. Peace had now been made between Hubert and the king. There was no great risk to Raleigh in according the reconciled Hubert legal rights. Nonetheless, there was a real question as to how these rights should be accorded. Could a royal act of outlawry be declared a nullity for lack of due process to the outlaw? So it was thought by Raleigh. "And it was judged," so the report reads laconically, "that the outlawry was null."<sup>83</sup>

A judgment such as this expressed fortitude. Here, as normally in a judge's life, courage was the crowning virtue.

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77. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (BRACTON DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE) 33 (S. Thorne ed. 1968).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 110.

82. *Id.*

83. 2 BRACTON'S NOTE BOOK, *supra* note 8, at 667 (Case 857). The chronicler, Matthew Paris, explicitly states that Raleigh pronounced the judgment. *Id.* at 667 n.1.



