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A SHARED SPIRIT OF JUSTICE

THE UNION OF LAW AND EQUITY, JUSTICE'S BODY AND SOUL: CANON AND COMMON LAW'S "COMMON GROUND"

JOSEPH W. BELLACOSA*

In beginning our quest and examination of the superlative virtue and essential value of justice, we turn first to the Greeks, who supplied the building blocks for ensuing civilizations to climb upon and ponder. They have given us one particular treasure which elucidates the concept. In the *Nichomachean Ethics*,¹ Aristotle rhapsodizes over an idealized version of justice: "[J]ustice is regarded as the highest of all virtues, more admirable than morning star and evening star, and, as the proverb has it, 'In justice every virtue is summed up.' It is complete virtue and excellence in the fullest sense"²

According to an observation by Father John Coughlin,³ our own St. Thomas Aquinas has taught us the relationship of equity and law to justice. St. Thomas

recognized equity as an aspect of the virtue of justice, by which the overly stringent application or interpretation of some positive law might be measured and, if necessary, corrected. To be

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¹ ARISTOTLE, *NICHOMACHEAN ETHICS* 114 (Martin Ostwald trans., 1962).

² *Id.* (quoting, with slight variation, *Theoguis* line 147).

³ John J. Coughlin, O.F.M., *Canonical Equity*, 30 *STUDIA CANONICA* 403 (1996).

sure, he valued the intention of the legislator, and did not consider equity an abrogation of the law. ... [H]e would invoke equity for the common good, and not for the sake of an individual alone.⁴

An anecdotal exchange between two 20th Century secular judicial icons sprinkles some realism and wordplay into our appreciation of the great virtue. Judge Learned Hand, who served on the Second Circuit Court of Appeals, is supposed to have urged his friend, Justice Oliver Wendell Holmes, to "Do justice", as he bade him farewell one day on the steps of the United States Supreme Court; Holmes smartly responded, "Justice? All we do here is apply the rules of the game!"⁵

From countless additional sources, I could assemble lessons about law as a measurement of an ordered state; equity as a fair, individualized application of principles of law; and justice as the blend of the two, and the key benchmark of a good society. If we search for justice, then, as though through a prism, it often seems to be a kaleidoscope of oscillating dots, shimmering and shifting from Aristotle's lofty idealism to St. Thomas's ever-ready balancing act and then on to Holmes' frank realism. Quite a sweeping spectrum! The rub with idealized justice, however, is its administration and delivery by fallible human ministers, inescapably through human institutions and instrumentalities. It is, thus, very hard to catch, connect and pin down those elusive, bouncing dots.

As civil courts contend with increasing volumes of cases and strain to achieve the desideratum of universal justice, they would be foolish, even arrogant, to ignore the obvious limitations of the human condition and human methods which exert a powerful counterforce against and away from the ultimate and idealized goal. Unlike obscenity (and I doubt the aphorism even applies there), we cannot simply say we know justice when we see it.⁶ The exploration to locate its epistemological purity, core and reality, then, is undertaken with ceaseless yearning by philosophers, canonists, jurists, lawyers, students and society itself, but the destination is always out on a misty horizon and beyond full

⁴ *Id.* at 414.

⁵ WILLIAM H. HARBAUGH, *LAWYER'S LAWYER, THE LIFE OF JOHN W. DAVIS* 264 (1973).

⁶ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting the difficulty in defining obscenity, Justice Stewart stated "I know it when I see it.").

or perfect human attainment.

So what is the experience I can share with you, from my Court of Appeals world, about the judicial process that has emerged as a jewel of the American democratic experiment—a centerpiece in the struggle to conquer injustice? What are its methods, its commonly-rooted principles and practices, and the Holmesian “rules of the game” that are the fragile foundations on which the delivery of justice is built and launched? Where do we find the motivation and will to persist in the daunting, sometimes dispiriting, and endless struggle for equal justice, mired in empirical realism and human weakness? How do secular courts earn and keep society’s respect and admiration for what we do and how we do it, recognizing that the respect of the people is the only true coin of Caesar’s realm and the Judicial Branch’s only real, residual power?

My illustrative answers to these posed questions are tendered first through a summary description of New York’s Court of Appeals - an adjudicative body of last resort and a court of law that struggles every day towards the delivery of justice, sometimes paradoxically in view of its limited factual review powers under the State Constitution,⁷ except for the revived death penalty cases, where our review powers are plenary.⁸ Justice Oliver Wendell Holmes (a bountiful source of one-liners), when asked, “[w]hat is it like up there,” meaning in the United States Supreme Court, answered “[w]e are very quiet there, but it is the quiet of a storm centre.”⁹ Never has that aphorism been as apt as now in many courts throughout the land, including my own.

On the civil side of the docket, the cases run from A to Z—Adoption to Zoning—and on the criminal side, the gamut of cases is from the mildest offense to the severest—Loitering to Homicide—and now, again, Capital Punishment Murder. We deal with everything in between, too. All types of controversies thus swirl about with hurricane-like force and with direct impact on

⁷ N.Y. CONST. art. 6, § 3(A) provides in part:

The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered . . .

Id.

⁸ See *supra* note 7.

⁹ Oliver W. Holmes, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292 (1920).

countless people and society in general. In recent decades, courts are looked to and turned to, sometimes as a source of solutions of first resort, to help control and repair the damage that diverse disputes and people inflict on one another. We must, first, decide the cases and, equally importantly, declare the precedential principles of law for future guidance, under reasonably definitive and reliable rulings.

The New York State Court of Appeals currently handles close to 5,000 cases a year.¹⁰ In 1996, over thirteen hundred civil motions for leave to appeal were considered by the full Court;¹¹ two votes equal a grant of leave, akin to the United States Supreme Court's four votes for its certiorari grants. We also entertained close to 3,000 applications for leave to appeal on the criminal docket in 1996.¹² These are allocated one-seventh individually for each of us seven Judges to decide. In this category of our work, each of us is randomly assigned over 400 distinct criminal cases to handle personally each year.

The full Court hears argument and decides about 300 matured appeals each year.¹³ This part of the work reflects our most well-known, visible tip of the iceberg—the opinions. The percentage breakdown of these full-dress appeals is about two-thirds civil and one-third criminal. We handle and decide these appeals *en banc*, all seven collectively, collegially and sitting only in Albany at Court of Appeals Hall—our magnificent 1842 edifice on Eagle Street. We are a non-resident Court, except for me, so my six colleagues work, when we are not in formal Session, in separately maintained, local Chambers in the counties of their residence around the State. Our conferences and oral arguments, however, take place only in our historic building, where we all assemble for two weeks out of every five, or on approximately a monthly basis for the plenary sessions of the Court.

Let me also describe, with confident pride, the superbly professional decision-making process of the Court of Appeals. Our modern case management system, not quite 25 years old, is designed for rule settlement, fairness, due process, intellectual honesty, plenary participation, neutrality, avoidance of specialty interests and agendas, and efficient case movement towards

¹⁰ See COURT OF APPEALS OF THE STATE OF N.Y., ANN. REP. OF THE CLERK OF THE COURT 4-5 (1996).

¹¹ See *id.* at 5.

¹² See *id.*

¹³ See *id.* at 4.

prompt decisions. It is the handiwork, principally, of the creative genius of the late Chief Judge Charles D. Breitell, the last elected Chief Judge in 1973. The hallmark in each category of our work is random assignment and collective, institutional responsibility and obligations. We work very closely as a team and get along quite well, despite ordinary human and professional differences in personality and perspective. The personal differences are substantially subordinated and absorbed into the common commitment and unifying enterprise of a higher institutional purpose. Of course, we occasionally dissent publicly and forthrightly on matters of principled differences, or out of concern for the future development and change in the law.

From the end of August through the beginning of July of the following calendar year, the Court hears oral argument on about 35 appeals for two weeks each month at 2:00 p.m. each day. No one knows which Judge will have the primary reporting responsibility on any given case until after the completion of all arguments on a given day. We are what is called a "Hot Bench," orally probing each lawyer and each case, and psychologically motivated to pay close attention to every word in every case since there is no pre-conferencing among us. We do not know which way any Judge may be leaning, or what may be bothering any one or more of us in any case. The first hint comes when we hear each other's questions and concerns at oral arguments, and the lawyers' responses. At the end of the afternoon, we then pick our assignments randomly from among face-down index cards carrying the names of each case.

That initiates the next step of responsibility. Each Judge then re-prepares the drawn case assignment for presentation to the full Court in conference the very next morning. This re-preparation means each Judge works on his or her assigned case on the night of oral argument and the next early morning of conference to formulate a recommendation of result and rationale to be orally presented to the colleagues at the daily 10:00 a.m. formal conference. Each Judge must, in addition, reassess how he or she will vote in the other appeals to be reported by the other colleagues. Additionally, we deal with other conference agenda matters (for example, motions and administrative rule and policy issues, and opinions from the preceding session's argued appeals). No Judge writes in fields of particular interest or specialty; rather, we all serve as generalists. Each vote and the

workload are, thus, reasonably equalized and meaningful.

Our discussion and debate, which is entirely oral except for personal notations and handwritten outlines, begin with a presentation by the Reporting Judge, followed by statements from the Junior Judge and the other Judges, continuing in reverse seniority finally to the Chief Judge. If a majority or, most often, a unanimous consensus emerges, then the Reporting Judge will undertake the responsibility to write the opinion for the Court to reflect and capture the essence of the tentatively agreed upon decision and rationale. If the Reporting Judge has not garnered at least three other concurring votes, then he or she may prepare a dissenting expression, if there is to be one. In the proportionately few 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 assume that task and role. It may surprise you—as it does many lawyers and judges and journalists who seem to relish and emphasize disharmony—to know that not every instance or case where there may be initial differences of views results in external dissents. We are constantly on the lookout for consensus, unanimity and settlement of the rule of law for more reliable guidance to the Bench and Bar and society. These are powerful incentives and paramount considerations of institutional concern and effort, encouraged and led by the Chief Judge, Judith S. Kaye, as an equal participant and as the Chairperson and presiding officer of the conference.

Judge Richard Wesley of Livonia, New York, is the newest member of the Court of Appeals. As the resident Judge and on behalf of his new colleagues, and since the Court was not in full, formal Session in Albany, I welcomed Judge Wesley during his first official visit to the Court of Appeals Hall in December, 1996, after Governor Pataki announced his nomination.¹⁴ I showed Judge Wesley the Conference Room and we talked about the round deliberation table symbolizing the strength of a circle, similar to the symbolism of a Rota, with which canon lawyers would be familiar. I emphasized to him the institutional bond and functional connectedness that transcends the assertion of individualized personalities. I added that the circle of chairs around that secular sacred place—the Conference Room decision

¹⁴ The rest of the Judges on the Court of Appeals have 14 year term, tenured appointments going back to former Governor Mario Cuomo.

table and the actual place where we cast our votes in peoples' cases, confidentially, until the decisions are externally and publicly reported—also symbolizes the equality of the seven votes of the Judges who temporarily occupy those seats, for 14-year terms or until constitutional mandatory retirement at 70 years of age.¹⁵

This initially oral system of skeptical analysis and plenary exploration, testing of theory and practicality, are exhilarating and exhausting exercises. It requires a lot of careful listening and suppleness of judgment and humility of intellect. Listening is not a passive act or exercise. It is a vigorous, invigorating, interactive hospitality, a welcoming embrace of shared and sometimes competing wisdom from others with diverse experiences and backgrounds. Further verification and validation of what has been tentatively agreed upon around our Conference Room table comes later, by close scrutiny of the circulated proposed written opinions and at the re-conferencings of every case at the next Session of Court, a mere four to five weeks after argument and after those first rounds of oral conferencings. All these initial and final discussions are, thus, tested in personal eyeballings at the Conference table, poring over writings and signing on or off, as the case and conscience may dictate. We fastidiously fuss with one another on language and principles, and even on punctuation and footnotes.

We also extensively use the technological wonders of impersonal communication—e-mail, computers and faxes—but the person-to-person human engagement is a critical dynamic and wonderful discipline and psychological reinforcement in the actual decisionmaking. These personal protocols serve the refinement of the process, the litigants and the public, and the development of New York's jurisprudence and common law leadership role in the Nation. They contribute to the positive benefits of cooperative civility and mutual respect, and they also help keep the Court extremely current in dealing with the caseloads. Decisions are rendered in back-to-back sessions for almost all argued appeals, on average in 41 days—a self-imposed tyranny. We maintain this pace and pressure purely by internal peer discipline, our own accountability mechanisms, and by shared shouldering of all the categories of decisional work.

One of our currently disquieting concerns is the effect on the

¹⁵ See N.Y. CONST. art. 6, § 2(a) (providing 14-year terms).

management and quality of the Court's already heavy and complex docket of the seemingly inevitable arrival of death penalty direct appeals in the not-too-distant future.¹⁶ Plenary appellate review responsibilities are reposed exclusively in our Court with direct appeals from the trial court judgment and sentence of death.¹⁷ Chapter One of the Laws of 1995 thus guarantees a change from a business-as-usual attitude.¹⁸ Changes have already begun involving rulemaking and preliminary litigation skirmishes.¹⁹

The experience of highest courts of other states in this respect, according to studies, is not encouraging.²⁰ Of necessity, there will be a considerable displacement of time from adjudicating regular, but also very important civil and criminal cases, in order to attend to the time demands and nature of capital sentence appeals. This is a disconcerting prospect and an enormous challenge. Notably, some sibling jurisdictions have dealt with the seemingly singular and exceptional American phenomenon of death penalty adjudication. I am quite confident that the proud history of this Court, on which I am privileged to serve, will also be up to the challenge of handling all the new weighty tasks with

¹⁶ See *id.* art. VI, § 3(b) (providing that in criminal cases, appeals to the Court of Appeals may be taken directly from a court of original jurisdiction when the judgment is of death).

¹⁷ See *id.*

¹⁸ 1995 N.Y. Laws ch. 1, vol. 1 (providing the procedures for assigning counsel in capital cases and imposing capital sentences).

¹⁹ See 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"); Daniel Wise, *Capital Case Assistants Refused Pay by Pataki*, N.Y. L.J., Jan. 14, 1997, at 1; Daniel Wise, *Pay Rates for Capital Counsel Adopted by Court of Appeals*, N.Y. L.J., Nov. 22, 1996, at 1.

²⁰ 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 she[er] volume of the records in capital trials compel appellate courts to expend inordinate energy on capital cases.") (citing Stephen Maganini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at A1) (reporting that the California Supreme Court "spends more than half its time reviewing death cases"); Andrew H. Malcolm, *Capital Punishment Is Popular, but so Are its Alternatives*, N.Y. TIMES, Sept. 10, 1989, at A4 (reporting that the Florida Supreme Court spends one-third of its time 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).

superb leadership, professional excellence, and with the greatest sense of the need for high quality of performance. Frankly, we must, because these obligations spring from a profound public trust—to decide all the cases that come before us promptly, thoroughly, seriously, fairly and justly.

There is, however, another permeating nuance of our process. Ever present to secular judges is a stark realization: that not long after any of their rulings hit the books or computer screens—and after the gavel symbolizing their tenure is passed on to successors—experience and the wisdom of hindsight are likely to improve or clarify the understanding of a problem or case. *Stare decisis* notwithstanding, fresh insights may often support at least an altered focus or different spin, if not altogether a change of direction. Civil courts sometimes bluntly call this epiphany an overruler; canonists might classify it as confession or acknowledgment of error, even a plea for forgiveness of past mistakes, as the Holy Father has been consistently characterizing some major historical events. Whatever our discipline or calling, however, people with power occasionally also resort to semantic euphemisms and squeamish face-savers, and sometimes, instead, they wrap themselves in hubris, dig in, and hug the error that is just aching for correction. But the truth is that from time to time everyone has to acknowledge very simply and directly that they have missed a call. Human beings seem, too often, so afraid to admit frailty though, and decision-makers rationalize that frankness and humility might somehow weaken the legitimacy of the law and tarnish respect for the pertinent process. They are wrong and confession is truly good for the soul and for truth.

Change and stability must be blended to coexist in the development and application of evenhanded justice, seasoned with what some of us know as “*epikeia*.” The paradoxical swings and tensions in law and jurisprudence temper the harsh realization of having to rule in cases without the benefit of perfectly clear vision and with the candid acknowledgment of our impoverished and incomplete knowledge. In *Reaching Out*,²¹ and in a different but relevant context, the late Father Henri Nouwen refers to the principle of *docta ignorantia*, learned ignorance. This is the notion of a humble poverty of mind set, needed to season and soften

²¹ HENRI J.M. NOUWEN, *REACHING OUT: THE THREE MOVEMENTS OF THE SPIRITUAL LIFE* 74 (1975).

intellectual arrogance and haughtiness, regardless of whether we operate in secular or ecclesiastical tribunals and universes.²²

To offset and balance inherently imperfect exercises of profound responsibility, judges and society, too, reach for and rely on checks-and-balances. They recognize that judicial rulings are existentially flawed and final only in this human dimension and only for their own time and only with a calibrated system of shared power. Justice Robert Jackson of the United States Supreme Court, renowned for his extraordinary interlude of special service as Chief Prosecutor at the Nuremberg Trials of the Nazi Regime, taught that the Supreme Court is not final because it is infallible; rather, its work appears infallible because it is usually so final.

The New York Court of Appeals knows that principle well. Since barely 1 of our 5,000 cases gets to the United States Supreme Court each year, we are overwhelmingly final, but also no more infallible than any other human institution. In Justice Jackson's dissent in *Korematsu v. United States*,²³ involving the internment of Americans of Japanese heritage during World War II, that Nuremberg Prosecutor, as a Justice of the United States Supreme Court, powerfully reminds the world that: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if [the Supreme Court] [or the Court of Appeals] review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image."²⁴ His magnificent dissenting voice found its vindication decades later by the historical confession of error by the government of the United States.

Judges, therefore, must seek comfort levels and conscientious repose in institutional strength, trial and error, testing and course correction-always drawing on breadth of experience, and diverse talent and personal qualities of all the members of a final tribunal, offering justice, very humbly and modestly, through collective wisdom.

Our decision-making process interweaves a spirit of equity into decisions, so as to moderate and humanize the strict letter

²² See *id.* at 104-05.

²³ 323 U.S. 214 (1944).

²⁴ *Id.* at 246 (Jackson, J., dissenting).

of the law. Father Coughlin's article, to which I alluded earlier,²⁵ aptly describes this beneficial influence in the canonical universe as follows:

The first constituent of canonical equity is the natural law. It appeals to those universal and transcendent principles of reality that render a common morality possible. Another vital factor is evangelical love, compassion and mercy. An authentic use of canonical equity recognizes the harmony between gospel justice and love. A third aspect of canonical equity, historical consciousness, implies a keen awareness of the past and profound respect for tradition, in order that justice may be rendered in the here and now. At the same time, it recognizes that cultural shifts often beckon new and imaginative solutions to legal problems.²⁶

I was encouraged and emboldened in my thesis to you today, too, by Father Coughlin's added documentation that:

Paul VI described canonical equity as "the fruit of benignity and charity" which informs canon law. To paraphrase John Paul II, canon law is intended to create a juridical structure that fosters the life of the Church, and the individuals in it, by assigning primacy to evangelical love, grace and charism. The two Roman Pontiffs seem to suggest that authentic canonical equity possesses a significance which serves to protect and elucidate the *logica* of ecclesiastical law.²⁷

These observations seem nicely to identify a common ground (if I may borrow that grand phrase and enterprise, in the happy memory of the late Joseph Cardinal Bernardin) joining us as civil and canon law specialists. I cannot overstate or overemphasize the wonder in the search and achievement of commonality, despite realistic and sometimes sharp conflicts and contrasts inherent in respective disciplines and particular responsibilities. An illustrative sampling, a mere taste, from representative cases and contemporaneous dockets in my experience provides us with illustrations where religious issues are inescapably intertwined in our secular decisions and process.

One example is our Court's most recent decision in *Grumet v. Cuomo*.²⁸ The repeated legislative effort to authorize a sepa-

²⁵ See Coughlin, *supra* note 3.

²⁶ *Id.* at 421.

²⁷ *Id.* at 406 (citations omitted).

²⁸ 90 N.Y.2d 57 (1997). *But see* 1997 N.Y. Laws ch. 390, v. 6 (authorizing the creation of certain union free school districts by municipalities); *see also* Raymond

rate school district for the Village of Kiryas Joel, a religious enclave of Satmar Hasidism, which is a strict form of Judaism, has produced repeated judicial challenges.²⁹ This is an amazing story and ongoing First Amendment saga. Our Court unanimously struck down the latest statute, which allowed municipalities meeting certain criteria to form their own school districts.³⁰ It was held violative of the Establishment Clause.³¹

The Supreme Court's decision in *Agostini v. Felton*³² offers another intriguing conundrum involving the Federal Reargument Rule³³ in the context of *stare decisis* (and in relation to the

Hernandez, *Albany Vote Defies Courts Again to Back a Hasidic School District*, N.Y. TIMES, Aug. 5, 1997, at A1; Somini Sengupta, *Pataki Signs New Bill Allowing Hasidic Public School District*, N.Y. TIMES, Aug. 12, 1997, at B5 (discussing legislation that would create a special public school district for a small community of Hasidic Jews in Orange County).

²⁹ See, e.g., *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (holding that a statute passed to give the village of Kiryas Joel its own school district was unconstitutional, as Kiryas Joel did not receive its new governmental authorization as one of many eligible communities under a general law, but rather under a statute specifically tailored for that village); *Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174 (1988) (holding that Education Law § 3602c does not mandate that a Board of Education must provide special services to private school handicapped children exclusively in programs and classes of the public schools, and that state and federal statutes do not mandate provision of special services to private school handicapped children on the premises of the schools they normally attend).

³⁰ See *Grumet v. Cuomo*, 90 N.Y.2d at 57 (discussing the court's invalidation of chapter 748 of the laws of 1989 which carved out a separate school district for the village).

³¹ See *id.* at 64 (holding that chapter 241 violates the establishment clause by effectively singling out the village of Kiryas Joel for special treatment and thereby demonstrating impermissible governmental endorsement of a religious community).

³² 117 S. Ct. 1997 (1997) (5-4 decision) (overruling the Court's earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985)). In *Aguilar*, the Court held that the establishment clause barred the New York City Board of Education from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressional program mandated by Title I of the Elementary and Secondary Education Act of 1965. The *Agostini* Court determined that *Aguilar* was not consistent with subsequent establishment clause decisions and declared that *Aguilar* was no longer good law. See *Agostini*, 117 S. Ct. at 2003; see also *Board of Educ. of Kiryas Joel Village*, 512 U.S. 687 (holding that the New York statute, 1989 N.Y. Laws ch. 948, which created the Kiryas Joel Village School District to serve a village exclusively populated by the Satmar Hasidim religious sect, violated the establishment clause). In concurring opinions, Justices Kennedy and O'Connor urged reconsideration of *Aguilar*. See *Board of Educ. of Kiryas Joel Village*, 512 U.S. at 717 (Kennedy, J., concurring); see *id.* at 731 (O'Connor, J., concurring). Justice Scalia, in dissent, urged that *Aguilar* be overruled "at the earliest opportunity." *Id.* at 750 (Scalia, J., dissenting).

³³ FED. R. CIV. P. 60(b) (providing that the court may grant relief from a final judgment for one of the following reasons: (1) mistake, inadvertence or surprise; (2)

Court's opinion in *Planned Parenthood v. Casey*³⁴ on *Roe v. Wade*.³⁵) From the many opinions, we must re-assess the substantive question of aid to students attending religious schools, because *Agostini*³⁶ overruled *Aguilar v. Felton*.³⁷ Equally important, as the differing opinions of the Justices of the Supreme Court illustrate, are the procedural implications of belated rearruments and potential overrulers, as they clash with the doctrine of *stare decisis*.

*New York State Employment Relations Board v. Christ the King Regional High School*³⁸ is another interesting case. Christ the King is a Roman Catholic secondary school in Middle Village, Queens County.³⁹ In the 1980-81 academic year, the school employed a teaching staff comprised of over 90% lay teachers and some religious faculty, and offered instruction in both secular and religious subjects to approximately 1,800 pupils.⁴⁰ Lay faculty were employed without regard to their religious beliefs.⁴¹ The lay faculty had been represented by the Lay Faculty Association since 1976.⁴² Prior to 1976, the Roman Catholic Diocese operated the school.⁴³ The union went on strike after the last collective bargaining agreement expired in 1981.⁴⁴ Sixty lay teachers were discharged from the school and have not been re-

evidence discovered beyond the time for granting a new trial under Rule 59(b); (3) fraud, misrepresentation or other misconduct; (4) void judgment; (5) judgment has been satisfied or otherwise discharged, or judgment on which it was based has been reversed, or it is no longer equitable that the judgment should apply prospectively; (6) any other reason justifying relief). In *Aguilar*, 117 S. Ct. at 2003, the Court granted the petitioners' relief from a permanent injunction, concluding that it was inequitable that the injunction should apply prospectively. *Id.*

³⁴ 505 U.S. 833, 854-69 (1992) (relying on the doctrine of *stare decisis* to uphold the essence of *Roe v. Wade*, 410 U.S. 113 (1973), which held that the Fourteenth Amendment guaranteed a woman's right to terminate her pregnancy).

³⁵ 410 U.S. 113 (1973) (concluding that a woman's right to an abortion is a fundamental, albeit qualified, right).

³⁶ 117 S. Ct. 1997 (1997).

³⁷ 473 U.S. 402 (1984) (barring New York City public school teachers from providing remedial education to parochial school students within the confines of the parochial schools).

³⁸ 90 N.Y.2d 244 (1997).

³⁹ See *id.* at 247; *Christ the King Reg'l High Sch. v. Culvert*, 644 F. Supp. 1490, 1491-92 (S.D.N.Y. 1986) (rejecting the school's contention that the New York State Labor Relations Act was preempted by the National Labor Relations Act).

⁴⁰ See *Christ the King Reg'l High Sch.*, 644 F. Supp. at 1492.

⁴¹ See *id.*

⁴² See *New York State Empl. Rels. Bd.*, 90 N.Y.2d at 247.

⁴³ See *id.*

⁴⁴ See *id.*

instated.⁴⁵ After an informal investigation, the New York State Employment Relations Board charged the school with violating the New York State Labor Relations Act by discharging its employees due to union activities and by refusing to bargain collectively with the union.⁴⁶ A state administrative law judge found that the school violated the Act and recommended that the board issue an order directing the school to bargain collectively and reinstate the discharged teachers.⁴⁷ The board adopted the recommendation, and brought an action for judicial enforcement under the New York State Labor Relations Act.⁴⁸ The question was whether the exercise of jurisdiction by the New York State Employment Relations Board violated the Religion Clauses of the Federal and State Constitutions.⁴⁹ The Court of Appeals agreed with the courts below that the application of the New York State Labor Relations Act to a religious school did not violate the religious freedom and establishment protections.⁵⁰

In *Avitzur v. Avitzur*,⁵¹ a husband was granted a civil divorce from his wife.⁵² Under Jewish law, she was not free to remarry until a Jewish divorce decree, a "Get," was granted by the Beth Din, the rabbinical tribunal.⁵³ When her former husband refused to appear before the Beth Din, she sued in New York courts, seeking a declaration that her husband had breached the Ketubah, the Jewish marital contract.⁵⁴ She also sought to compel the husband to appear before the Beth Din.⁵⁵ The husband sought to dismiss the complaint on the ground that the court lacked subject matter jurisdiction, arguing that resolution of the dispute would require the civil court to engage in "impermissible consideration of a purely religious matter".⁵⁶ By a 4-3 majority, the

⁴⁵ See *Christ the King Reg'l High Sch.*, 644 F. Supp. at 1492.

⁴⁶ See *New York State Empl. Rels. Bd.*, 90 N.Y.2d at 247; see also N.Y. LAB. LAW § 700 (McKinney 1988) (protecting employees in the exercise of freedom of association, self-organization, and designating representatives for the purpose of collective bargaining).

⁴⁷ See *New York State Empl. Rels. Bd.*, 90 N.Y.2d at 248.

⁴⁸ See *id.*; see also N.Y. LAB. LAW § 707 (McKinney 1988) (providing for judicial enforcement of an order pursuant to an unfair labor practice).

⁴⁹ See *New York State Empl. Rels. Bd.*, 90 N.Y.2d at 247.

⁵⁰ See *id.* at 250.

⁵¹ 58 N.Y.2d 108 (1983).

⁵² See *id.* at 112.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* at 113.

⁵⁶ *Id.*

Court of Appeals denied the husband's motion to dismiss.⁵⁷ The majority tiptoed through some dicey concerns and precedential implications.⁵⁸

The Court of Appeals also recently decided a heart-rending intra-family adoption case that involved a Get, which was part of a quid pro quo settlement of a divorce, support and custody agreement reached in 1986.⁵⁹ Prior to the birth of the child, the biological father agreed to give the petitioner-biological mother a Get on condition that the child be adopted and he be relieved of any future financial responsibility.⁶⁰ Eventually, a bitter challenge by the biological mother erupted against the adoptive parents, the 10-year-old child's grandparents.⁶¹ The biological mother's goal was to unravel the adoption and gain custody of her daughter-sister.⁶² The Court of Appeals held that the surrogate's failure to inform the biological mother that she was entitled to counsel of her choice did not invalidate her consent under the circumstances presented.⁶³

In *Griffin v. Coughlin*,⁶⁴ an inmate in the Shawangunk Correctional Facility in Ulster County sought excusal from the facility's Alcohol and Substance Abuse Treatment Program.⁶⁵ Participation was required to maintain eligibility in the Family Reunion Program.⁶⁶ Griffin declared himself an atheist or agnostic.⁶⁷ He asserted that the program was coercive, was based on religious principles, and incorporated the "twelve steps" and "twelve traditions" of Alcoholics Anonymous which, he claimed, were religiously oriented.⁶⁸ Supreme Court and the Appellate

⁵⁷ See *id.* at 111, 116.

⁵⁸ See *id.* at 114-115 (stating that because the case involved "neutral principles of contract law," and did not require the court to pass on any issue of doctrine or religious duty, the court enforced the secular provisions of the contract, even though "entered into as part of a religious ceremony").

⁵⁹ *Chaya S. v. Frederick Herbert L.*, 90 N.Y.2d 389 (1997).

⁶⁰ See *id.* at 393.

⁶¹ See *id.* at 394.

⁶² See *id.* at 394-95 (noting that following the biological mother's remarriage, the adoptive parents cut her off from all access to the child, prompting her to seek to void the adoption).

⁶³ See *id.* at 397-98; see also N.Y. DOM. REL. LAW § 115-b(2)(b), as amended (McKinney 1988) (requiring the court to inform biological parents of their right to be represented by legal counsel of their choice during adoption proceedings).

⁶⁴ 88 N.Y.2d 674 (1996), *cert. denied*, 117 S. Ct. 681 (1997).

⁶⁵ See *id.* at 678.

⁶⁶ See *id.* at 677.

⁶⁷ See *id.* at 678.

⁶⁸ *Id.* & n.1 (quoting the Twelve Steps). See also ALCOHOLICS ANONYMOUS

Division⁶⁹ had concluded that the evidence did not establish a church-state violation of the Establishment Clause.⁷⁰ The Court of Appeals reversed by a vote of 5-2.⁷¹ I dissented and agreed with the lower courts that the use of the Alcoholics Anonymous methodology in this prison program did not violate Establishment Clause principles, as it was not religious or coercive in this context.⁷²

*United States v. Lynch*⁷³ presents a fascinating scenario in Federal Court. George Lynch and Christopher Moscinski, a bishop and a monk, had been enjoined by order of the United States District Court for the Southern District of New York from violating, or aiding and abetting the violation of, the Freedom of Access to Clinic Entrances Act of 1994⁷⁴ in any way.⁷⁵ Notwithstanding the injunction and the statute, the defendants sat in the driveway of the Women's Medical Pavilion (the Clinic) in Dobbs Ferry and blocked vehicles from entering the Clinic's parking lot.⁷⁶ They acknowledged police warnings that they were violating the law, but they remained seated in the driveway.⁷⁷ Ultimately, they were arrested by the police, who carried them off the scene.⁷⁸ The government charged the defendants with criminal contempt of the permanent injunction.⁷⁹ After trial, Judge John Sprizzo found that the defendants "acted out of a sense of conscience and sincere religious conviction."⁸⁰ The court, first, found that neither defendant acted with the willfulness

WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS 59-60 (3rd ed. 1976) (listing the "Twelve Steps" and "Twelve Traditions" utilized by members of Alcoholics Anonymous to achieve sobriety).

⁶⁹ Griffin v. Coughlin, 211 A.D.2d 187 (N.Y. 1995).

⁷⁰ See 88 N.Y.2d at 679-80.

⁷¹ See *id.*

⁷² See *id.* at 112 (Bellacosa, J., dissenting).

⁷³ 952 F. Supp. 167 (S.D.N.Y. 1997).

⁷⁴ 18 U.S.C. § 248. The statute prohibits physically obstructing or threatening to use force against a person for the purpose of preventing that person from entering a reproductive health services clinic. The statute has been upheld against constitutional challenges in several circuits. See, e.g., Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996) (holding the statute did not exceed Congress' Commerce Clause power, *id.* at 1417-18, and prohibited conduct, not speech, and was therefore not violative of the First Amendment, *id.* at 1418), *cert. denied*, 117 S. Ct. 2431 (1997).

⁷⁵ 952 F. Supp. at 168.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ *Id.* at 169.

that criminal contempt requires.⁸¹ Second, however, the court added that it would have found the defendants not guilty of criminal contempt, even assuming the government's proof established the requisite willfulness.⁸² Judge Sprizzo explained that the facts called for "that exercise of the prerogative of leniency which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict."⁸³ The government is seeking to appeal the acquittal in this non-jury bench trial, an intriguing procedural twist of its own.

These few illustrations show how overlapping the common law and canon jurisprudential universes often are. We cannot pretend to truly separate identities and isolations in the discharge of our respective, complex responsibilities. The secular and the religious, the common law and canon law (or its functional equivalents in other religions) are part of a shared cosmos, connected by moral or ethical gravity. We have our separate orbits, to be sure, but occasionally the satellites bump into one another, or come very close to one another's spheres of pull, tug and centrifugal force. In our pluralistic society, we have mutually dependent, or at least mutually related, experiences that must be respected, even when they sharply differ. Tolerance levels have to be very high. With this awareness and realistic appreciation, I view the First Amendment as insurance for a healthy, respectful co-existence. The so-called metaphor of the Wall of Separation of Church and State is often seriously misunderstood. A wall can join, even while it partitions.

Ultimately, history is a great and important teacher for all of us in this respect. Secular lawyers and judges need only look to *Dred Scott v. Sandford*,⁸⁴ *Plessy v. Ferguson*⁸⁵ and *Korematsu v. United States*⁸⁶ for remarkable lessons in intellectual and ju-

⁸¹ See *id.* at 170. The court stated that willfulness "when used in the criminal context, generally means deliberate conduct done with a bad purpose either to disobey or disregard the law." *Id.* (citing BLACK'S LAW DICTIONARY (5th ed. 1979)). The defendants' sincere belief, the court held, did not meet this definition. See *id.*

⁸² See *id.* at 171.

⁸³ *Id.* (citing *United States v. Barash*, 365 F.2d 395, 403 (2d Cir. 1966)).

⁸⁴ 60 U.S. 393 (1856) (holding that slaves were property and descendants of African-born slaves were not citizens of the United States).

⁸⁵ 163 U.S. 537 (1896) (upholding a Louisiana statute which mandated segregated train carriages for whites and blacks against Thirteenth and Fourteenth Amendment challenges).

⁸⁶ 323 U.S. 214 (1944) (holding constitutional an order evacuating those of Japanese ancestry from part of the West coast during World War II and excluding them from their homes, with their subsequent relocation in detention camps).

risprudential humility. You and I may also jointly wince at the lessons of the Crusades, Inquisition, and Galileo's experience (his coerced recantation and the quintessentially Italian *sotto voce* sidebar, "*E pur si muove*").⁸⁷

The recent public exposition of the church annulment process is the latest perplexing occasion, certainly in the American experience, for forthright, attentive and constructive evaluation and education. The perception of favoritism by rank, privilege and monetary advantage has reemerged and again been splashed across our awareness and consciences. Some may argue the issue is misportrayed and exploitive. But the charges blare forth that the process is unfair, unequal, intellectually ambiguous, hypocritical or unfaithful to principle.⁸⁸ These are deeply disturbing accusations and generate an atmosphere of skewed reality and ecclesiastical frustration that must somehow be dealt with, not defensively but with honest discussion, education, fundamental re-examination perhaps, and eventually appropriate reform in fact and in perception and attitudes. I was struck by references in an essay in *Time Magazine* entitled *Should Annulments Be So Easy?*, containing quotes, relevant to this reference and overall theme, from the Holy Father and Bishop Thomas Doran:

[I]n 1994 Pope John Paul II warned the Roman Rota ... against a 'mistaken idea of compassion and mercy' that might cloud true justice. Thomas Doran, who served on the Rota until he was made Bishop of Rockford, Ill., understands both sides. American Catholics live 'with a divorce mentality,' he says, and are bound to be affected by it. But they are also subject to Catholic canon law, which has always strictly carried out Jesus's teaching against divorce. Doran and his colleagues are in the middle. They would like to stem the annulment tide. "But the trouble," he sighs, "is that saying no is never an easy thing to do."⁸⁹

⁸⁷ See ROBERT S. MCELVAINE, MARIO CUOMO: A BIOGRAPHY 393 (1988) ("Recounting Galileo's whisper after being forced by the Church to deny that earth orbits the sun, '*E pur si muove*' (But still it moves), Cuomo said that despite the outcome of the 1984 election, he would continue to say of the Democratic principles, '*E pur si muove*'.").

⁸⁸ See Pamela Schaeffer, *Shattered Faith: A Woman's Struggle to Stop the Catholic Church from Annuling her Marriage*, NAT'L CATH. RPTR., May 30, 1997, at 14 (reviewing Sheila Rauch Kennedy's *Shattered Faith*); Sharon Seitz, *Annulment Divides Divorced Catholics*, USA TODAY, Oct. 30, 1997, at 8D.

⁸⁹ David Van Biema, *Should Annulments Be So Easy?*, TIME, May 12, 1997, at 45.

Adhering to principle while applying equity proves to be a very tricky combination in our striving for justice.

When the Holy Father, as I noted earlier, inspiring, and now seemingly in regular refrain, acknowledges certain manifest errors in some of the Church's history, and openly and humbly begs forgiveness for past wrongs, as he did again in April, 1997, in Prague,⁹⁰ he sets an extraordinary personal and institutional example for our respective disciplines, too. Pope John Paul II's 1996 measured message to the Pontifical Academy of Sciences referred to and reiterated his 1992 message, which I quote in part:

This unitary character of culture, which in itself is positive and desirable even in our own day, was one of the reasons for Galileo's condemnation. *The majority of theologians did not recognize the formal distinction between sacred Scripture and its interpretation, and this led them unduly to transpose into the realm of the doctrine of the faith a question that in fact pertained to scientific investigation.*⁹¹

He closed this nuanced yet frank acknowledgment with a quote, ironically, from Einstein about the "comprehensib[ility]" of the cosmos.⁹² This, to me, is very instructive. It is a humble awareness of epistemological ambiguity and uncertainty, yet of evolving knowledge. Though we are, to be sure, people of faith, we believe and work in the realm of reason, not chaos. We also believe in the persistent pursuit of truth and the ever-unfolding potentiality and purification that comes from the correction and admission of mistakes or from newly discovered knowledge or refined truth. Faith need not be lessened or weakened by such frank acknowledgments.

Another part of the American jurisprudential tradition in this regard is worthy of mention. It is found ingrained in Supreme Court Justice Louis Brandeis' view that "[s]unlight is ... the best of disinfectants."⁹³ There is an American brashness and

⁹⁰ See *Pope Urges Christians to Forgive Past Wrongs*, THE RECORD, Apr. 28, 1997, at A1 (noting Pope during Prague visit reiterated his 1995 apology "for the wrongs inflicted on non-Catholics").

⁹¹ *Origins*, CNS Documentary Service, v. 26, no. 22, Nov. 14, 1996, at 351 (emphasis added) (quoting Pope John Paul II, *Origins*, CNS Documentary Service, v. 22, Nov. 12, 1992, at 369ff (Message to the Pontifical Academy of Sciences on Galileo on Oct. 31, 1992)).

⁹² See *id.* at 352. "What is eternally incomprehensible in the world is that it is comprehensible." *Id.*

⁹³ *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (validating as constitutional the dis-

a quintessential oversimplicity to his quotable quote, but it typifies our preference for openness and, correspondingly, for the exhilaration of churning change. Opponents to this view may seem to draw themselves up into a King Canute-like pose, that would defy the laws of nature and the tides, and dare to insist on acceptance of and adherence to views by ukases. We recognize from the Canute imagery alone how foolish that is. Instead, the power of reason, time, reflection and, ultimately, faith, infused by the grace of spirit and inspiration, brings people and history to epiphanies of clearer understanding and more meaningful adjustment among themselves.

The more we human beings seem to know, even with the gush and onrush of instantaneous technological overload and the litter of e-mail messages, the more aware we should become of the distractions from absorbing or sorting or fully computing what is relevant and relatively more important. Cocky individuals find course corrections counter-intuitive. Some entities exude an overly confident pose of self-assurance based on a wrongheaded sense that examination and need for regular change and refreshment are counter-tradition.

On the other hand, Blessed Mother Church has survived rather well for almost 2,000 years not only because of some bed-rock principles and operating policies that I have barely touched upon, but also because of an institutional belief in continuity through reasonable, not absolute, stasis or stability. The point is sometimes missed or insufficiently appreciated how She undergoes and undertakes major, massive changes, too, as part of her dynamic, albeit divinely, protected growth and survival. Some of these historical shifts are reactive and some are self-initiated—gracefully inspired by the Holy Spirit, many of us still firmly believe.

Magnificently, the brilliant comet of Vatican II, launched by Pope John XXIII, proves in the most demonstrative way how dramatic change and openness to fresh air, to use the late, revered Holy Father's imagery along with that of Justice Brandeis, can reform and self-revolutionize Church thinking and transform the people of God. I am as proud of that ability and actualization for hospitality to new ideas in our Church, frankly, as I am of the

closure provisions of the Federal Election Campaign Act of 1971, requiring disclosure of source and amounts of campaign contributions) (citing LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914)).

secular Judicial Branch's role in our sometimes messy, raucous social experiment of participating in a democracy. The very recent canon law recodification is yet another manifestation of a similar willingness to risk exploration, re-examination and change, when time and careful study prove right and move the spirit to action.

To return, then, to my essential theme, I restate that whatever we do in our respective disciplines with the Letter of the Law, the Spirit of Equity—that special kind of *epikeia*—serves as the Great Leveler. As Pio Cardinal Laghi has said in a more general context, “Nuance, it is everything.”⁹⁴ Equity's rich historical development and application in the individualization of law precepts, as applied to people and cases, is what propels us and our processes towards realistic justice and as close to the philosophically idealized version as we dare expect as human beings. I find it a fascinating irony—or perhaps a wonder-filled coincidence—that the equity component of Anglo-American common law grew out of and was borrowed from the ecclesiastical courts.

A few words of caution and special alert are worth interspersing here. The clash of narcissism and the common good, particularly exemplified in American jurisprudence, with its emphasis on individual rights, presents a paradox and perplexity for the harmony I seek to encourage and discern between canon and common law. While I am surprised at how often variations ultimately blend into commonalities among the various codices, common law and constitutions (written and unwritten), I am acutely aware also of fundamental differences in essence, ontology, substance, style, procedure and goals between the two disciplines.

Yet, when I revisit the documents of Vatican II merely as an interested lay student, I am buoyed by the general principles of religious freedom, tolerance and ecumenical spirit that uplift and illuminate our goals and purposes, both as individuals and as community. These concepts parallel secular law exaltations of freedom and due process (synonyms for fairness, notice, opportunity to be heard and equity and justice from neutral tribunals). I work with these concepts in my official capacity and judicial role, yet I perceive one major divergence in the Church and State

⁹⁴ Paul Wilkes, *The Popemakers*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine), at 62.

approaches to these lofty precepts and their application. In canon law, these same sorts of values, virtues and principles are deemed and declared to be not ends in themselves; rather, they are in service of and subordinate to the responsibility to fulfill duties in community life, albeit as a means to every individual's higher purposes, and rooted in the human dignity of the person, the individual—our “soulness,” if I may use that distinctive characteristic. A comparison might be drawn in the merging of seven personalities and sets of values, the Judges, serving their higher, common institutional purpose of the tribunal called the New York Court of Appeals. The American experience as to these core values, on the other hand, seems overridingly driven by a kind of secular theology and adoration, sometimes even idolatry, of the individual. At times, this emerges as a separation from the common good overarch. Individuality and its virtually sacred enclave in our civil law universe seem freestanding and are all too often treated as ends in themselves.

It should not be surprising, therefore, that our worlds are sometimes ill-fitting and ill-suited to one another, especially in the latter half of this 20th Century. Yale Professor Stephen Carter, in his provocative book *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*,⁹⁵ decries this unfortunate dichotomy and phenomenon. I also worry about it, sometimes and somewhat.

Make no mistake about a feature you often see over-emphasized: secular judges also occasionally disagree among themselves in result and expression over important societal concerns and disputes within our own universe. Confronted with competing claims that often implicate society's most treasured freedoms, judges externalize the experience, intellect, reason and passion that they use to reach and articulate their votes in the reasoned decisions of their courts that are then cloaked with the seeming imperturbability of *stare decisis*. For the now, judges decide the particular dispute; and, for the future, they promulgate a *ratio decidendi*, a principle that binds and guides, until experience, fresh insight or new learning point to change. As preoccupied as judges sometimes are or seem with the individual as such, I believe that their minds' eyes rarely lose sight of the repercussions on the larger whole of the community.

⁹⁵ See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

The marvelous marriage of the letter of the law and the spirit of equity in the individualized application is undergoing some strain with "statutification," the present enormous legislative activity, codification and regulation by Congress, state legislatures and countless agencies at all levels of governance. This multiplication is a phenomenon, or a plague some might say, that may translate into a kind of Teilhardian diminishment of the true judicial process, an ironical reduction of the full promise of justice. The reason is that the theory and practice of excessive legislative activity and limitations on judicial discretion and authority, which constitutes a bureaucratization of the administration of law, reduces the likelihood or opportunities for the moderating infusion of equity and dispensation of *epikeia*.

The paradoxical process of deciding cases remains dynamic and stable, personal yet collegial and individualized in application and generalized in consequence. The reason is that people and government require harmony even while they operate in varying degrees and kinds of continuing disagreement and dizzying flux over so many facets of life. Equity is also relatively dynamic, while law, common and canonical, operates through relatively static dictates. This is where the letter meets the spirit. This is where humanity, rather than hubris, reigns. This is where Law and Equity, the body and soul of Justice, join forces to give people that highest of virtues—Justice. This is where canon law may meet common law with similar challenges and accomplishments.

So what might we look for together as an overarching measure of success in the fiduciary discharge of our secular or canonical responsibilities? Justice Holmes, again, offers us a template through a letter to then Chief Judge Cardozo, that the recipient treated as a personal treasure: "[N]ot place or power or popularity makes the success that one desires, but the trembling hope that one has come near to an ideal."⁹⁶ That measure-of-success standard reverberates across the decades and through the voice of the hardened, Civil-War-wounded veteran and realist. It sounds as though Holmes bought into the Aristotelian ideal of justice as "The Highest Virtue."⁹⁷ It may be unattainable, but it is worthy of the rules of the game and the stretch to reach for its

⁹⁶ Benjamin N. Cardozo, *Mr. Justice Holmes*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 77, 86 (Margaret E. Hall ed., 1947).

⁹⁷ See *supra* notes 1-2 and accompanying text.

Olympian prize, he teaches us, or at least so he wrote to his friend and eventual successor on the United States Supreme Court.

My favorite Old Testament quote is from *Daniel*, Chapter 12, Verse 3: "[T]hose who lead the *many* to justice shall be like the stars forever."⁹⁸ Emphasis on the many, not on the self, is key. It seems to me that community goals, not individual narcissism, gain a powerful joint launch from the lesson of the Prophet Daniel to that of Justice Holmes, with the Philosopher Aristotle thrown in for good measure. The fusion of their fuels is magnificently synergistic.

One of Chief Judge Cardozo's astounding teaching exertions is his essay simply titled *Values*.⁹⁹ In it, Cardozo invokes a beautiful parable about the Danish astronomer Tycho Brahe, a 16th Century contemporary of Galileo within the same Copernican influence. Brahe's work was observing the heavens. A new King's advisors informed the monarch that Brahe's work was a waste of time and money. The King's court and courtiers felt they could not afford Brahe and did not respect or value his work. He was dismissed—"downsized" in 20th century terms. Cardozo echoes Brahe's plaintive poem about the lost value to future generations of his or any astronomer's service in counting and charting a bunch of stars:

Yes, I still hope in some more generous land
To make my thousand [stars] up before I die.
Little enough, I know—a midget's work.
[Those] that follow me with more delicate art
May add their tens of thousands; yet my sum
Will save them just that five and twenty years
Of patience, bring them sooner to their goal,
That Kingdom of the law I shall not see.¹⁰⁰

This set the stage and context for Cardozo's interpretation of Tycho Brahe's baleful experience.¹⁰¹ Cardozo, a nonpracticing

⁹⁸ *Daniel* 12:3 (emphasis added); see also Joseph W. Bellacosa, *Symbols, Slogans, and Cymbals of Criminal Justice: Where's the Substance?*, 36 CATH. LAW. 375, 377 (1996).

⁹⁹ Benjamin N. Cardozo, *Values: The Choice of Tycho Brahe*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 1 (Margaret E. Hall ed., 1947).

¹⁰⁰ See *id.* at 4 (quoting a poem by Alfred Noyes, entitled "Watchers of the Skies").

¹⁰¹ I cannot help being reminded again of Galileo's almost contemporaneous canonical interdiction. See *supra* note 87 and accompanying text.

Sephardic Jew and a nonreligious person by his own declaration, was nevertheless a profoundly spiritual, even ascetic, individual, as his powerful yet sweet portrait overlooking our courtroom in the Court of Appeals Chamber depicts. He applies the poignant lesson of Brahe's being cashiered, in this beautiful summary:

The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble, spend oneself one knows not why—some of us like to believe that this is what religion means. ... Let us not make the blunder of supposing that to live in communion with these ineffable values of the spirit, to spend oneself utterly in sacrifice and devotion, is a lot reserved for a chosen few, for an aristocracy of genius, for those that will be ranked in history among the mighty or the great. ... To the glory of our humanity, the lowly equally with the mighty may be partakers in this bliss. ... They had made it in humbler forms, by love, by gentleness, by sweetness, by devotion, by sacrifice of self We may not always have been conscious of its beauty. The end comes, and behold it is illuminated with the white and piercing light of the divinity within it. We have walked with angels unawares.¹⁰²

This was not some early 20th century preachment of ancient Aristotelian idealism. It was Judge Cardozo's description of a practical, real life role and lessons set in a 16th century parable, and a perspective for his and our times throughout this 20th century, looking towards the imminent 21st. It dedicates daily, ordinary work to Law, Equity and, ultimately, Justice. Judge Cardozo, on another occasion, sweetly and self-deflatingly seasoned the serious, mystical point with a lighthearted reference to Charles Francis Adams' measuring rod, that no matter who you are and what you do, if at the end of a day or year you had not made a "conspicuous ass" of yourself, you are doing "okay." How disarmingly refreshing that is. I could live with that kind of an "okay," at the end of any day's work.

¹⁰² Cardozo, *supra* note 99, at 4-5.

