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THE REALIZATION OF IDEALS IN LAW†

MARIO M. CUOMO*

When I was appointed Secretary of State on January 1, 1975, I discontinued the active practice of the law after having done very little else for more than eighteen years. I've learned that it is not an easy thing to give up. We all know Blackstone was right when he said the law is a jealous mistress. I've learned now that, difficult as that mistress may be to live with, she is perhaps more difficult to live without. You have to leave her for a while to realize that.

I remember reading Holmes' observation about the law putting you into a black gulf of solitude more isolating than that which confronts a dying man. Well, let me tell you, you can feel almost as isolated when you are forced to leave the practice of the law. It's a curious thing the way it gets into your blood; how important a part of your life it becomes; how addicted you can become to the daily grind; how you come to miss even the parts of the practice that used to torment you. The impatience with the first presentation by a client when he buries you under a mass of irrelevancies which conceal those few cogent facts which you need to make a case. The tedium of struggling through material to cull from it what's legally meaningful. The pure hell of groping for ideas and theories and trying to tie together those few strands of plausible argument that you can find to produce a worthwhile case. The thrill of discovering the good idea—all at once—in a flash. The light snaps on. Maybe it happens over a cup of coffee while you're talking to one of your associates. Or on the way home in the car while you're biting your lip trying to listen to the radio, but really still thinking through the problem. Maybe even just before you fall asleep at night while you're tossing in bed with the problem still gnawing away at you.

And how you remember the anger in reading your adversary's pleadings or his brief and knowing that he's lied or gone beyond the record; that he's distorted or miscited cases. And knowing that if he were there before you, you would ring his neck! Then, in half a frenzy—because of the outrage that's in you—rushing to dictate your response.

And how you come to miss the feeling in the pit of your stomach in the courtroom before it all starts. And the real high—the excitement of the

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trial or oral argument. You're totally immersed. You don't feel a thing. It's like spraining your ankle in the middle of a ball game and not knowing how badly hurt you are until the "timeout" is called.

The suspense of waiting for verdicts or decisions. That great rush of pride that comes in winning. The frustration of losing. But every case is a new battle. A new contest. A clean slate. A whole new world to conquer. And knowing you are helping, even if only occasionally, to see to it that real justice is being done between real flesh and blood people. Right here. Right now. Touchable. That's an awful lot to give up. And for those of you who are still in the practice, I congratulate you and envy you more than a little bit.

Yes, it's a great deal to give up. It's an awful lot to try to replace, even with the excitement of political campaigns and what can be the all-consuming burdens of having a reasonably high policy position in the government of a State as great as ours. In fact, what one does in such a situation is to cling as much as possible to involvement in the law and to try to justify one's existence by seeing oneself as still an integral part of that glorious mechanism which is the machinery of our law.

So you reach out and you construct your new rationale. Alexis De-Tocqueville did say that "[s]carcely any political question arises in the United States which is not resolved sooner or later into a judicial question." And that's true. The Pentagon Papers. Executive Privilege. Impounding Funds. Before that, "one man one vote." And even in lower level matters it's true. The expansion of judicial review in the area of administrative law makes even questions like the selection of sites for governmental projects, traditionally legislative or quasi-legislative in nature, more and more vulnerable to the court's power. If you try really hard, you can even regard entry into the political or the governmental life as not so much a giving up of the law, but rather a working at it from a different angle—in some ways even a more fundamental one.

As practicing lawyers, after all, you're in a sense bricklayers, laying down rules of law and theories of law in forms and shapes strong enough to build sound arguments. But those bricks you find readymade. And you have over their size and shape only the smallest control. To enter government at a policymaking level is to adopt rules and regulations, to propose laws, to help rush them through a sometimes reluctant legislature. In a very real sense it is to fabricate those bricks which the practicing lawyer finds readymade. It can mean in some cases to have a voice in the very remodeling of the judicial system itself. To be able to push for the appointment of judges instead of their election or oppose that direction if you wish.

Maybe it was this kind of involvement that Oliver Wendell Holmes had in mind when he said, "Thus only can you gain the secret isolated joy of the thinker who knows that a hundred years after he's dead and forgotten men who never heard of him will be moving to the measure of his thought." That nice possibility is perhaps a presumptuous one for those

who perform only one small portion of the governmental operation, but it's a worthwhile one to cling to and it helps to energize.

So seen, government is a real challenge. A chance to affect thought, to perform. To innovate from inside the locus of power, where power ideally can be transformed into reality. To make new bricks. It is, in short, a chance to help do something good.

And isn't that the challenge that all of us, as lawyers, accepted when we set out from St. John's so many years ago? No matter how hard we struggled against it, weren't we all taught a vision of reality based on the Judeo-Christian tradition which is nothing more than the highest reverence for pure ideals and a commitment to the proposition that perfection, while perhaps never fully attainable, is always worth pursuing. And that our moral progress was to be measured more by our direction than our location. Weren't we all taught to see potential good in every man, potential integrity in every institution? That it's better to look up toward the light than down into the pit?

All of us are, or should be, believers. Believers in right and wrong. Good laws and bad laws. And believers mostly that the ultimate justification for our existence is the constant pursuit of the ideal, whether that existence be as practicing lawyer, politician, or statesman—bricklayer or brickmaker.

Nice words. Pure truths. But generations of scarred lawyers and politicians smirk just a little at the utterer and respond: "You are naive, remote, unreal. Nothing works but compromise." Idealism brings with it the stigma of innocence and impracticality. If you keep your eyes fixed on the light above, you will fall into the pit below. Winning is all. Principles are negotiable quantities which must always be bargained down to be usable. Idealism is for the very young, the professor, or the poet.

It is a real danger, this reverence for practicality, a real and a very subtle one because government and the making of laws, indeed, constantly involve weighing competing considerations and adjusting to the realities. That's perhaps as it should be, or at least as it must be. But there is a difference between compromising on issues and compromising on basic principles. It is one thing to agree to settle for a campaign financing law that goes only a small way toward reducing our obscene dependence on wealth in the selection of our leaders because nothing else was possible. It is another thing entirely to retreat from the proposition that the end does *not* justify the means, and to capitulate to the kind of sophistication that produced dirty tricks, lies, frauds, pandering, and seduction because the object of those devices is to keep a "good" man in power or get a "good" bill passed.

And even where compromise is appropriate—and decent—if it becomes so regular and so easy that we come to confuse it with the ultimate desideratum instead of recognizing it as the temporary, pragmatic solution that it is, then again we are in danger. Even in the area of permissible

compromise, if we are forced to accept a lesser standard as a temporary expedient, let us while doing so restate the ideal, so that we will not develop a permanent contentment with a mediocre brand of morality and will continue to be goaded by the realization that we have settled for something less than the best.

These are real principles with very real application. Lobbying is illustrative. Lobbying is, of course, a constitutional right and one which cannot be prohibited and should not be unduly impaired. But lobbying by powerful, paid, professional advocates must be regulated. This is so both because there is a potential for perversion, in its crudest form the winning of votes by corrupt means, and because if not controlled it may give certain segments of our society, certain special interest groups, a disproportionately loud voice. This latter consideration is especially significant when you see the legislative process, as I do, as being akin to the judicial system. Both are essentially adversarial proceedings in which competing philosophies and points of view vie for acceptance by the judgment makers: the judge in the case of the judicial system, the legislator in the case of the legislature. The legislative system, like the judicial, works best when all views receive the fullest possible ventilation. This necessarily requires that all sides have the fullest possible knowledge as to all arguments being used by their competitors. Seen in this light, disclosure is not simply a response to the reality that corruption grows best in the dark, but also the means by which we enhance rational decisionmaking by assuring the fullest display of all arguments.

The principles are simple and unarguable ones. In a democracy the people ought to be heard as fairly and as equally as possible. In a democracy the lawmaker ought to make his judgment on the merits, after hearing all views, and while remaining as free as possible from corrupt and irrelevant influences.

This produces two recommended changes.

1. Lobbying provides legislators with much valuable assistance by making available to them considerable expertise and well-rationalized positions. This is an obvious good. But if the positions and arguments advanced by lobbyists are private and unknown to the public at large, it deprives those holding competing views of a full and fair opportunity to be heard. A lobbyist's argument, persuasive on its face, but actually vulnerable, may go unanswered simply because it has not been heard by those who might have been able to point out its vulnerability. The privacy therefore may not only produce unfairness, but may at the same time impair rational decisionmaking. Therefore, it has been recommended that the law be changed to limit the lobbyist's efforts to statements at public hearings or to written communications—in the nature of legislative programs, briefs, and position papers—each of which is to be kept on file in the same way that legislative bill jackets are preserved. Spontaneous or chance communications should be permitted. But every such communication should

be memorialized if only by way of a post factum notation. Presumably, any argument which a legislator would deem worth considering should be deemed worth preserving. And it is no more appropriate for the legislator to receive a single side of a case secretly from a paid agent than it would be for a judge to do so in the midst of a trial!

This rule presents some problems in enforcement. It certainly will be discomfiting to some. But while hard and discomfiting it is neither impossible nor intolerable. And it seems to me clearly right.

2. So too with the matter of payments, loans, or gifts by lobbyists to representatives of the legislature or the executive. Surely, substantial "gifts" like the blanket use of a credit card, a gratuity disguised as a "fee" for services rendered, or elaborate "remembrances" would be universally condemned. But would not a blanket prohibition be more effective in reaching such concededly undesirable practices than a controlled regulation which seeks to cut fine distinctions? Why should *any* gift or payment be permissible? Is it essential to our system that a lobbyist have a cocktail party for legislators or others whom they seek to influence? Will their opportunity to make an intelligent presentation be minimized if they cannot take a legislator or agency head out to dinner? Are these things done for any purpose other than to seek—by the subtle workings of "good will" or a friendly predisposition—to help produce a statute or rule or decision that will affect large numbers of people, some of them no doubt adversely? And isn't there the danger that these gifts may in the end—however innocently, however inconspicuously—operate to affect the judgment of the beneficiary in a way that is not truly related to the pure merits of the issue? Why permit that possibility, no matter how slim? And today, when perhaps the most dangerous enemy of effective democracy is the cynicism of that vast public whose alert and intelligent involvement makes democracy work, should we not avoid anything which feeds that cynicism unnecessarily?

I personally see no reason why the legislature, *as well as the executive* for that matter, should not adopt for its own solemn deliberative functions the same kind of simple proscription which the lawyers of this State have taken upon themselves. It should read: "A lobbyist in the statutory meaning, shall not give or lend anything of value to a member or employee of the legislature, or of an executive department with which he is lobbying."

This question of lobbying perhaps is not today's most important issue. But it is an illustrative one. These are good rules and the principles upon which they rest are ones which ought to be neither diluted nor compromised. But the voice of sophistication responds, "We have to be realistic. The practice of lobbyists developing relationships with legislators has gone unregulated in this State for nearly seventy years. These are powerful people involved; they're the representatives of bankers, insurance companies, and huge public utilities. We don't want to offend them unnecessarily. We need their votes and their campaign contributions. It's too hard to

control. The paper work is burdensome. Don't rock the boat."

And so for seventy years there has been no real regulation and we have had government which is very open to the few and not so open to the many. And the many—you and I and the vast majority of the government's subjects—sit and watch and muse and grow more cynical.

And the sad song of public corruption becomes a refrain, sometimes louder than at other times but always there. A refrain which lulls most of us into disinterest in politics and government or a refrain which some of us find so grating that it produces in us even a hostility. The losers in the end are all of us. All of society. Because, in fact, the system which governs us depends for its effectiveness and excellence on the meaningful involvement of the governed. And when involvement lags, the system becomes less effective, less excellent, less responsive, more a discouragement, and less an energizer. And the "realization of ideals" becomes more and more just nice words to be spoken only by the very young, professors, and poets.

That must be wrong. I believe it *is* wrong. And I believe that, like it or not, this school which we honor today taught us it is wrong. St. John's has no reason for existence if all it had achieved is to make us experts at the U.C.C., masters of pleading and practice, and professionals skilled at making a living and getting by. If that is all it has done, it would be better to tear down its crucifixes and turn the pictures of St. Thomas More to the wall.

I'm sure that we are all grateful to the great men and women who have sustained this excellent institution for so long. They have left us, in all of our imperfection, with the consolation and the sustenance of this vision: the highest reverence for pure ideals and the conviction that while there always will be more problems than solutions, more to be done than has been done, more quests than conquests, the game is lost only when we stop trying.

St. John's, we are, all of us—bricklayers and brickmakers all—grateful to you for preserving at least our aspirations. May we learn to disappoint you less.