

From the Judge's Side of the Bench

by Hon. Michael R. Panter (ret.)

"Justice, Justice Shall You Pursue," our Decalogue mission, taken from Deuteronomy 16:20. So clear and so clearly right. Could we imagine anyone thinking justice irrelevant, or worse, actually hating it? Hating justice?

"There is a story about Holmes [Oliver Wendell Holmes Jr.] and Judge Learned Hand, in which they had lunch together and afterward, as Holmes headed off in his carriage, Hand spontaneously ran after him and yelled, 'Do justice, sir, do justice!' Holmes instructed the driver to stop the carriage, and he turned back to Hand and said: 'That is not my job. It is my job to apply the law.'" From an article by Colin Rule in *Mediate.com* called, "Justice."

Holmes wasn't kidding. He also wrote, "I have said to my brethren many times that I hate Justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms." Oliver Wendell Holmes, Jr., Letter to C.H.Wu (July 1, 1929).

Holmes meant that law and justice are entirely different concepts. Many other judges have written similarly.

Over the years, judges who swore to uphold the law, ostensibly the same oath our judges take today, upheld laws to enforce segregation, suppress women's rights, and sanction all sorts of terrible discrimination. Regardless of the manifest injustice, judges have followed the law. Pursuing justice would have violated their oaths.

I thought about this as I recently read that the Colorado Supreme Court had reviewed the conviction of a fifteen-year-old boy for exchanging erotic photos with two girls ages seventeen and fifteen. He was sentenced to register as a sex offender for at least twenty years. The law was then changed—now the same acts would result in a \$50.00 fine—but the judges followed the law then in place. The sentence was upheld. *In re T.B.*, No. 17SC66, 2019 WL 2495514 (Colo. June 17, 2019). Illinois judges may face similar challenges with the legalization of cannabis.

Judges have struggled for years with the "three-strike" rule. Upholding convictions requiring 25 years to life following a petty offense, Justice Stephen Reinhardt of the 9th Circuit Court of Appeals wrote, "I concur under compulsion of the Supreme Court decision...I believe the sentence is both unconscionable and unconstitutional." *Rico v Terhune*, No. 01-56692, 2003 WL 21186323, at 1 (9th Cir. May 19, 2003). Defendants' rights have been an unending struggle for judges who would want to pursue justice.

Women's reproductive rights have been a battleground for many judges' conflicting sense of justice and duty. Among the emotional examples are *MKB Management Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), and *Planned Parenthood v Casey*, 505 U.S. 833 (1992). In a case last year, the 11th Circuit reviewed a ruling striking a ban on "dismemberment abortion." *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018). The opinion described the medical procedures in graphic detail to make it abundantly clear how the judges felt. "I am bound by my oath to follow all of the Supreme Court's precedents, whether I agree with them or not," wrote Judge Joel Dubina, concurring. Obviously we have not heard the last of this debate.

In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court followed precedent to uphold an antitrust exemption for baseball only and no other sports although it is "unrealistic," "inconsistent," and "illogical."

Justice has no unanimity. No one is recognized as having insider information. It isn't written anywhere. It's not clear. It's not consistent. Law, more or less, is. But law makes distinctions that slice through a complicated world and turn on razor thin facts, one tiny gram of a drug, one short moment before or after an eighteenth birthday, one little inch on one side or another of a state boundary, and countless other incredibly arbitrary lines. A nation of laws will always have unjust results. But the alternative is worse. That would be a system where every judge decides as they personally believe.

Rule's article continues with this, "One's concept of justice is shaped by one's self-interest. As Mel Brooks puts it, 'Tragedy is when I cut my finger; comedy is when you fall into an open manhole and die.'"

Which exactly illustrates Holmes's point. Everyone has a different sense of what is just. No matter what we do, no matter how big or small, people rarely act in ways they believe "unjust." Even in everyday life, whether it's cutting in line or taking a questionable tax deduction, we always think we're justified for one reason or another. We, all of us, think we're pursuing justice most of the time.

Fortunately, our legal system does not charge judges with trying to reach such a lofty end as pursuing justice. Judges do not take an oath to be just. They follow the law or they don't.

Arguing justice to a judge, Holmes says, is not usually effective. You must prove your case under the law.

Decalogue lawyers, by all means pursue justice!

If that's your best argument though, don't get your hopes up when you go to court.

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