

THE JUDGE'S COMMON BOOK

Justice John Henry Meagher was the senior justice of the Massachusetts Superior Court when first I came to the bench. His simple admonition, “*This is a trial court. Trial judges ought go on the bench every day and try cases,*”¹ is the best advice I ever received as a judge because it reminds me that whatever our other obligations, our major efforts ought be directed to the trial of cases. This is actually a variant, adapted to the judicial role, of Lord Nelson’s tactical instruction that “[n]o captain can do very wrong if he places his ship alongside that of an enemy.”² It has, for thirty-five years, been the lodestar of my own judicial practice.

I am told that Justice Meagher’s grandfather was a color bearer in the 28th Massachusetts, an Irish regiment and part of the famed Irish Brigade. When I look at Don Troiani’s “Faugh-a-Ballaghd,” I like to think it is Justice Meagher’s grandfather carrying that great green flag with the gold harp up against Longstreet’s men along the stone wall on Marye’s Heights. It reminds me that all our constitutional precedents are but a great experiment in human arrangements, and each generation must learn anew the values served by the language of our written constitution.

While Justice Meagher’s admonition is the first and most important of the principles that have governed my judicial practice, there are a number of others. I set them out in full below.

Have the courage of your own error.

~ Hon. Vincent Brogna, Justice, Massachusetts Superior Court (1978).

This statement is more profound than it sounds. Of course, we must do our best to get it right and, of course, we must not hesitate to correct our errors. We must, however, *decide*. Failure to act is oft-times as injurious to justice as judicial error.

You have to go out on the bench and listen to the bastards, Austin. They just might have something.

~ Hon. Francis H. Ford, United States District Judge, District of Massachusetts, to Austin W. Jones, Courtroom Deputy Clerk (1969).

Judges are society’s teacher of law.

As Professor William Christianson has said, “[t]eaching is a very special kind of caring.” In everything we judges do and say, society expects us to epitomize and articulate its most basic values.

The working judge is not and never has been a philosopher. He has no

¹ Hon. John Meagher, Senior Justice, Massachusetts Superior Court (1978).

² C.S. Forester, *Lord Nelson* 324 (1929).

coherent system, no problem solver for all seasons, to which he can straightaway refer the normative issues. Indeed, if he could envision such a system for himself, he would doubt that, as a judge, he was entitled to resort to it; he would think he must be less self-regarding.

~ Hon. Benjamin Kaplan, Justice, Massachusetts Supreme Judicial Court, in *Encounters with O.W. Holmes, Jr.*, 96 Harv. L. Rev. 1828, 1849 (1983).

Judging is choice. Choice is power. Power is neither good nor evil except as it is allocated and used. Judging in a legal system is professional. Professionals, including judges, represent interests other than their own. One who accepts a professional role in a legal system accepts an obligation to confine the exercise of power within the limits of authority. For each professional role the limits of authority are defined by law. One cannot fully understand the conduct of a professional without fully understanding the defined professional role. The quality of judging in a legal system depends on commitment. It depends first on commitment to the aim of justice; second, it depends on commitment to professionalism. The declared beliefs of all professionals in the system, including advocates, counselors, and the academic critics, as well as the judges, affect the quality of judging in the system. Third, the quality of judging depends on commitment to method. Judicial choice at its best is reasoned choice candidly explained.

~ Hon. Robert E. Keeton, United States District Judge, District of Massachusetts, in *Judging in the American Legal System* (1990).
A trial judge bears the unique obligation of providing the fairest possible trial, hearing, and decision.

He will have acquired the power of analysis, of determining the issues -- often quite other than what the parties think these to be. He will have learned to heed the imperative of going to the sources; experience will have taught him, if wisdom has not, never to rely on a characterization or on memory of what a witness has testified, a document stated, an opinion ruled, a statute commanded. He knows how to find these sources with speed and accuracy, and how to deal with them once they have been found. He understands how to pick evidence apart, to determine the inferences that may reasonably be drawn, to weigh one piece of testimony against another. He will have acquired some skill in the understanding of decisions and their precedential value; he will have learned something also about the reading of statutes. He will have trained himself to test his conclusions by essaying to put them in writing, and to express them fairly, clearly, and cogently.

~Henry J. Friendly, *Reactions of a Lawyer – Newly Become Judge*, 71 Yale L.J. 218, 222-223 (1961).

Appellate courts set minimum requirements. This is where we start. It is our special challenge to go much further and conduct the fairest possible proceedings humanly possible.

Go at your own pace and do not allow yourself to be rushed.

More injustice and error can be traced to misplaced attempts at speed and cutting corners than any other single cause.

As a District Judge, you possess within yourself a portion of the very sovereignty of the United States. Above all, do no harm.

Two ideas coexist here. First, while our whole concept of justice requires us faithfully to declare the law and in keeping with the views of the Congress and the appellate courts, frequently you must act interstitially without controlling law or precedent. In such cases our duty to construe the Constitution and the laws is identical to that owed by a Justice of the Supreme Court. Second, in making judicial decisions, avoiding or minimizing harm is an appropriate guiding principle.

A new and valid idea is worth more than a regiment, and fewer men can furnish the former than command the latter.

~ Hon. Oliver Wendell Holmes, Jr., Justice, Supreme Court of the United States, in *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 181 (Harry C. Shriver, ed.) (1936).

Judicial temperament is a lack of arrogance born of self-confidence, of a sense of self; it is an intuitive respect for all who appear before you; it is both measured restraint and measured intervention; it is fairness; it is equal treatment and open consideration of all participants in the process.

~ Hon. Rya W. Zobel, United States District Judge, District of Massachusetts (May 11, 2005).

There's not too much to this judging business, Bill. You find out what cases you have. You get them to trial as soon as you reasonably can. You try cases the best you know how. You decide what you need to decide as fairly as you can – and you keep moving on.

~ Hon. Owen Panner, United States District Judge, District of Oregon.³

There has to be a safe place, and we have to be it.

~ Hon. Richard S. Arnold, United States Circuit Judge, Eighth Circuit Court of Appeals (Aug. 8, 2002).

³ As quoted in *In re Sloop. "Flash II,"* 517 F. Supp. 2d 546, 556 n.5 (D. Mass. 2007).