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Constitutional Dignity and the Criminal Law

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CONSTITUTIONAL DIGNITY AND THE CRIMINAL LAW

November 21, 2002

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UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Address Before the Twenty-Sixth Criminal Law
New Developments Course**I. Introduction**

Thank you for inviting me to the JAG school today to share with you some thoughts on the criminal law. I appreciate the opportunity you have given me to look at the larger canvas. This is the first time I have done so regarding the criminal law since joining the court.

I also appreciate that I am given this opportunity at a first-class school. When I was at the State Department and at the National Security Council, I came to have great confidence in the JAG school's output—its students, its teachers, and its publications. You do not just teach doctrine here; you encourage students to step outside their experience, their service, and their culture to test theories and look over the horizon. That is what lawyers are supposed to do; and that is one of the missions of a great school.

But be careful what you ask for. I was told I could speak about “anything,” and anything is what you are getting. The title of my presentation is “Constitutional Dignity and the Criminal Law.” I will start with a few

1. Judge Baker has been a judge on the United States Court of Appeals for the Armed Forces since September 2000. He previously served as Special Assistant to the President and Legal Adviser (1997-2000) as well as Deputy Legal Adviser (1994-1997) to the National Security Council (NSC). Judge Baker has also served as Counsel to the President's Foreign Intelligence Advisory Board and Intelligence Oversight Board, as an attorney adviser in the Office of the Legal Adviser, Department of State, as a legislative aide and acting Chief of Staff to Senator Daniel Patrick Moynihan, and as a Marine Corps infantry officer. He is the author, with Michael Reisman, of *Regulating Covert Action* (Yale University Press: 1992). Judge Baker was born in New Haven, Connecticut, and raised in Cambridge, Massachusetts. He is a graduate of Yale College (1982) and Yale Law School (1990), where he is currently a visiting lecturer. Judge Baker is married to Lori Neal Baker of Springfield, Virginia. They live with their daughter, Jamie, and son, Grant, in Virginia.

comments about the importance of the criminal law to national life in real terms and in how Americans perceive the law.

Lawyers like us can never forget that we are part of something bigger than we are and that every act counts in an incremental way. An encounter with the criminal law from any perspective might be the most important event in someone's life, or forever shape how someone perceives the law and those who profess it. As a result, how we conduct ourselves can be as important as the results we reach. This is as true for you as it is for me.

My point of reference is the Court, and therefore, I have chosen to spend the majority of my time considering the way in which courts operate, or perhaps should operate, in upholding the criminal law and its constitutional foundation. The credibility and viability of a court stems in part from the public's perception that it is indeed honorable, impartial, and just. Therefore, it matters not only what courts say, but also how they say it. Some call this judicial dynamic collegiality, but I think "constitutional dignity" is a more appropriate descriptor for a process that is integral to the constitutional framework. If credibility is the capital of courts, constitutional dignity is interest accrued.

My comments are necessarily incomplete. I say that for three reasons. First, when I was appointed to the court, a distinguished judge I knew kindly told me that it had taken her three years before she fully appreciated appellate judicial practice; judges must learn as well as teach. This means that I come here today as a student of judicial practice and not its master.

Second, much of our popular understanding of how courts operate is based on observation of the Supreme Court. That is certainly how judicial practice was taught at my law school. Such an approach is inherently inductive. Conclusions drawn from the Supreme Court, with its relatively stable membership of nine, may not apply to the lower courts with fluid composition.

Finally, my own observations are inherently inductive, drawing as they do on my practical experience on but one Article I court of limited jurisdiction. With that in mind, I have left plenty of time for questions and discussion, as I really hope to gather your views, as much as to tell you mine.

A. Criminal Law

Let me start with a seemingly obvious comment—criminal law is foundational law in America. Along with property law and the structural fundamentals of the Constitution, I cannot think of an area of law that has more impact on how our society is ordered. (By criminal law I mean not just the law in an elements sense, but the criminal continuum from crime to confinement.)

Now this observation should not strike anyone as particularly insightful. You may wish to get your money back. But in the context of military justice, where criminal law is statutorily conceived as part of the disciplinary process—a commander’s supporting arm—it may be useful to step back and consider just how important criminal law is to our society and our way of life. It is part of our social fabric, which is demonstrated alone by the sheer number of persons directly affected.

Let me give some examples, which I present solely for illustrative purposes:

- In 2001 there were 5.7 million violent victimizations,² including 248,000 rapes and sexual assaults in the United States.³
- A 1999 NIH study concluded that for the years 1983-1991 homicide was the leading cause of death by injury in children under one.⁴

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 194610, NATIONAL CRIME VICTIMIZATION SURVEY (NCVS) 1, 3, tbl.1 (Sept. 2002), available at <http://www.ojp.usdoj.gov/bjs/abstract/cv01.htm>.

3. *Id.* at 3, tbl.1. The British Crime Survey (BCS) measures the level of crime using interviews with individual members of the public. According to the BCS, “This approach of using interviews rather than official records is generally considered to give a more accurate picture of the level of crime in the country, as some people will be a victim of crime but not want, or bother to report the incident to the police.” CrimeReduction.gov.uk, *British Crime Survey 2001/2002*, at <http://www.crimereduction.gov.uk/statistics18.htm> (last modified Dec. 4, 2002). The 2001/2002 BCS includes conclusions drawn from questionnaires completed in 1998 and 2000 by men and women ages sixteen to fifty-nine. The survey concluded that “[a]round 1 in 20 women (4/9%) said they had been raped since age 16. About 1 in 10 women (9.7%) said they had experienced some form of sexual victimisation (including rape) since age 16.” Andy Myhill & Jonathan Allen, *Rape and Sexual Assault of Women: Findings from the British Crime Survey*, 159 HOME OFFICE RESEARCH FINDINGS 1 (2002), available at <http://www.crimereduction.gov.uk/sexual06.htm>. I have not found a comparable lifetime survey for the United States, but the UK figures suggest the extent to which society as a whole may be affected in a permanent way by crime.

- Nationwide the criminal justice system employs the same number of people as the automotive industry.⁵
- There are over 15,000 names of law enforcement officers killed in the line of duty on a memorial across the street from our court, including forty-three military policemen.⁶
- At year end in 2001, 1.4 million persons were incarcerated in America and another 6.6 million persons were on probation, 3.1% of all U.S. adult residents.⁷
- In 2001, more black men were incarcerated than attended college.⁸ Some studies estimate that anywhere from twenty to thirty percent of black males between the ages of twenty and twenty-nine have served, or are serving, time for felony convictions.⁹

In short, criminal law directly impacts millions of Americans. For victim and accused, contact with the criminal law may be the most consequential experience of a lifetime.

1. Impact on Lives

There is also a less empirical and more visceral truth about the impact of criminal law. For juror, witness, spectator, participant, observer, as well as victim and accused, exposure to criminal law profoundly influences how they perceive the law generally, their place in society, and the law's ability to provide order and equity to society at large. The criminal law affects where we let our children play and where we feel comfortable walking.

We cannot forget this when we practice our profession. Every act counts. Every word matters. These acts and words collectively shape America's perception of the law as the most fundamental of our institutions that hold democratic society together.

4. NIH News Alert, National Institute of Child Health and Human Development (NICHD), Major Causes of Early Childhood Death from Injury Identified (May 3, 1999), at <http://www.nichd.nih.gov/new/releases/deaths2.cfm>. A 2002 study by the NICHD concluded that for children ages one through four, unintentional injuries, in particular motor vehicle traffic accidents, were the leading cause of death, followed by cancer, birth defects, and homicides. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2002, at 32 (2002), available at <http://www.childstats.gov/americaschildren>.

5. The Bureau of Labor Statistics (BLS) produces Occupational Employment Statistics (OES) for over 700 occupations, further divided into twenty-two broad categories. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics*, at <http://www.bls.gov/oes/home.htm> (last visited Dec. 5, 2002).

In 2000, over three million Americans were employed in "Protective Services" jobs. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2459, OCCUPATIONAL EMPLOYMENT AND WAGES 3 (Apr. 2002) (actual number 3,009,070). These include police officers, corrections officers, and firefighters, as well as private security guards. *Id.* tbl.1, at 12. "Legal" jobs are a separate category, including lawyers (civil and criminal), judges, mediators, paralegals, and law clerks that account for an additional nearly 900,000 jobs. *Id.* at 10 (actual number 890,910).

In comparison, this is twice as large as the number employed in the "Community and Social Services" category (1,469,000), which includes counselors, social workers and members of the clergy, and slightly larger than those employed in the "Computer and Mathematical" category (2,932,810). *Id.* at 8-10. A mere 460,700 jobs are categorized as "Farming, Fishing, and Forestry." *Id.* at 13.

That year, there were more "Police and Sheriff's patrol officers" (571,210) than Postal Service Mail Carriers (354,980). *Id.* at 12-13. Patrol officers (571,210), "Correctional Officers and jailers" (405,360), "Detectives and criminal investigators" (87,090) and their supervisors (Police and detective supervisors (113,740) plus Correctional officer supervisors (29,380) equal 143,120 Total Supervisors) combined accounted for over one million jobs. *Id.* at 12 (actual number 1,206,780).

While the OES categories do not permit a precise comparison between the number of people working in criminal justice and in automotive work, one can extrapolate the following numbers.

Automotive installation, maintenance, and repair: 1,303,720

Automotive repairers, service technicians, and mechanics and their supervisors

Auto body and related repairers	168,170
Auto glass installers & repairers	21,240
Auto service techs & mechanics	692,570
First-line supervisors	<u>421,740</u>

Total 1,303,720

6. National Law Enforcement Officers Memorial Fund Inc., *Police Facts*, at <http://www.neomf.com/FactsFigures/polfacts.html> (last updated Apr. 22, 2002).

7. Bureau of Justice Statistics, *Corrections Statistics, Summary Findings*, at <http://www.ojp.usdoj.gov/bjs/correct.htm> (last revised Apr. 10, 2002).

8. JASON ZIEDENBERG & VINCENT SCHIRALDI, JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 9-10 (2002), available at <http://justicepolicy.org/coc1/main.htm>.

2. *Insight into Society*

Americans are fascinated by the criminal law. During prime time there are two crime shows on network television every night. Television reflects our tastes, and some suggest, contributes to those tastes by fostering the very violence depicted.

For sure, as Stanford University law professor Lawrence Friedman has pointed out, there is an element of prurient interest to this fascination.¹⁰ The criminal law allows us a look at the lives of the rich and famous, and perhaps, in the fall from fame or wealth of a Claus von Bulow or an O.J. Simpson, we may gain confidence that happiness is not found in wealth or fame alone, if at all. Lizzy Borden and Charles Manson remain a revolting part of America's culture, and not because of the legal importance of their trials.

But as you all well know, and as I first learned when I studied the police blotter at Marine Corps Base, Camp Lejeune, North Carolina, criminal law is more mundane, relentless, and tragic than all that. It is not specific to a particular socio-economic class or profile. It is more plea bargain (ninety-five to ninety-six percent)¹¹ than Perry Mason. It is human frailty and failure, and everyday lives broken. The importance of criminal law is not found in its hold on popular imagination, but on its window into the

9. MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* (1990), at <http://www.druglibrary.org/schaffer/other/sp/ybm1.htm>.

10. LAWRENCE M. FRIEDMAN, *LAW IN AMERICA* 94-96 (2002).

11. See U.S. SENTENCING COMM'N, *2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS* 24, tbl.5.31 (2001), available at http://www.albany.edu/sourcebook/1995/ind/DEFENDANTS.Federal_courts.Method_of_conviction.2.html (noting that 95.5% of defendants convicted in U.S. district courts for U.S. Sentencing Commission guidelines cases were convicted as a result of guilty pleas); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 194067, *COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2* (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs00mt.pdf> (reporting that "the proportion of defendants who pleaded guilty [in the federal system] increased from eighty-eight percent during 1990 to ninety-five percent during 2000"); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *STATE COURT PROCESSING STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES IV* (1998), available at <http://www.ojp.usdoj.gov/bjs/abstract/fdluc98.htm> (explaining that ninety-six percent of convictions obtained in the large urban counties "during the 1-year study period were the result of a guilty plea").

fragile side of society. As military historians and officers study behavior under fire, lawyers study behavior on the margin of the human condition.

3. *Constitutional Values—Liberty with Order*

But if we see what is worst in America, we also see what is best. Criminal law is important because it helps to define who we are as a constitutional democracy. There is much that distinguishes our form of government from others, but certainly much of that distinction is found in the Bill of Rights and in two simple words: due process. All of which help to affirm the value and sanctity of the individual in our society. Broadly then, criminal law helps to define who we are as a nation that values both order and liberty.

That is what many of the greatest judicial debates are about, like those involving Holmes, Hand, Jackson, and Douglas over the application of the First Amendment to potentially criminal contexts in *Debs*,¹² *Dennis*,¹³ and *Terminiello*.¹⁴ These debates reached across courts and across generations of jurists. The Alien and Sedition Acts, McCarthy's use of the contempt statutes, and seminal Supreme Court cases such as *Miranda v. Arizona*¹⁵ and *Gideon v. Wainwright*¹⁶ involved historic applications of criminal law. But they were also about much bigger issues regarding liberty and the relationship between government and the individual in democracy. Likewise, the "Scottsboro boys" rape case, *Powell v. Alabama*,¹⁷ is a right to counsel case, but it is also a touchstone moment when the societal ship began its long turn from lynch law to rule of law. And that is why one-hundred percent of Americans support the war on terrorism, but there is less agreement on the whether, how, when, and where of military tribunals. This is criminal law, but it is also about constitutional values and duties.

12. *Debs v. United States*, 249 U.S. 211 (1919).

13. *Dennis v. United States*, 341 U.S. 494 (1951).

14. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1948).

15. 384 U.S. 436 (1966).

16. 372 U.S. 335 (1963).

17. 287 U.S. 45 (1932).

4. *Criminal Law and National Security*

Finally, as the military tribunal debate shows, criminal law is part of national security. We all know this in the wake of September 11, but this has been the case for decades.

(1) My first job as a lawyer was in the office of Law Enforcement and Intelligence at the State Department. Our daily bread was mutual legal assistance treaties, extradition, and rendition, all of which became the stuff of national security when terrorists were involved or acts of espionage.

As recent events involving the snipers suggest, the line between crime and societal security can be a thin one, if there is a line at all. I also recall circular debates over whether cyber hacking should be treated as a criminal or national security event. Whatever the motive of the hacker, cyber security is both when a critical infrastructure or government computer is involved. In such cases, all the relevant tools in each kit bag should be brought to bear on the problem.

(2) The law of armed conflict is U.S. criminal law.¹⁸ And, whether we like it or not, increasingly U.S. military conduct will be evaluated not just by [Non-governmental Organizations], but also ad hoc tribunals like the [International Criminal Tribunal for the Former Yugoslavia] and, perhaps, the International Criminal Court.

(3) Third, the U.S. military has played a tangential, but important role in the so-called war on drugs. Increasingly it will also play a vital role in homeland security, perhaps not taking a direct role in arrest, but certainly playing an integral role in what must become a seamless intelligence-law enforcement-military mesh. Putting aside constitutional arguments, there already exist numerous exceptions to the Posse Comitatus Act,¹⁹ which together form a coherent framework for military participation in homeland defense.

18. See 18 U.S.C. 2441 (2000).

19. 18 U.S.C. § 1385.

In short, criminal law is not a JAG specialty; it is an essential component of national security; it reflects who we are as humans; it is the most important event in too many lives; and it helps to define who we are as a constitutional democracy. This is worth remembering the next time you are bogged down in a “new matter” debate, reading the Code Committee report, deciding whether to read another case to prepare for argument, or a colleague finds fault with your blue booking. What you do matters and how you do it matters.

B. Constitutional Dignity and the Courts

Whereas criminal law is not the primary mission of the military, it is your primary mission, and it is the sole mission of our Court. If I have made the case that the criminal law is foundational, then it should follow that we should also care about everything we do as lawyers and judges.

When I was at the National Security Council, I was surprised to observe how fragile our constitutional system is. I came from schools that seemed to teach American history and government every year. If there is one thing I knew when I left high school, it was the certainty that the federal government is comprised of checks and balances, which apparently were on some sort of constitutional autopilot. But there is nothing automatic about the separation of powers or constitutional government.

It turns out that constitutional government is hard work, comprising an endless series of informal and formal contacts between branches, and a willingness on the part of participants to show equal devotion, if not more, to constitutional design as they do to policy objective, or in some cases, political objective. The political branches often want to “win,” and short-term advantage often takes precedence over long-term constitutional perspective, unless, and even when, there is someone to remind about the constitutional balance. Justice Jackson captured this thought in *Youngstown Sheet & Tube Co. v. Sawyer*²⁰ when he reflected on his experience as the Attorney General: “The tendency is strong to emphasize transient results

20. 343 U.S. 579 (1952).

upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic."²¹

To illustrate with the war power, in any given context there may be policy and legal arguments why the President should not share information with the Congress, or consult with the Congress on the use of force. But if the exceptional case or hypothetical becomes the norm, constitutional design is undermined with little in the way of remedy. Similarly, a two-thirds majority of the Congress could overwhelm constitutional design by not funding inherent presidential functions. The balance of power between the political branches may shift; but if either branch ultimately wins, and can dictate its own constitutional terms, we all lose.

Courts are most fragile of all. Courts have little tangible power. They do not control budgets. They do not command armies. All of which is captured in Andrew Jackson's (hopefully) apocryphal comment regarding the Cherokee Indian cases: "[Chief Justice] Marshall has made his law, now let him enforce it."²² The law was not enforced.

Courts are limited to cases and controversies brought by the parties, or in the case of criminal law, by local, state, or federal government. Their capital is credibility; their power is persuasion. Ultimately, their viability in the constitutional system stems from the respect of the American people for the law and, by extension, those institutions most identified with its preservation. We don't expect popular decisions, but we do expect decisions worthy of respect.

Washington Post newspaper columnist Andrew Cohen writing in the wake of the Ninth Circuit's Pledge of Allegiance case²³ struck this theme. Cohen stated,

It's hard to remember a time in our recent history when federal judges were subjected to so much disrespect and vitriol from virtually every corner of America. . . . The judiciary has helped create this lamentable state. Judges sometimes disparage each other, and even the process itself. . . . [T]his offensive against the

21. *Id.* at 869.

22. Rennard Strickland & William Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 114 (1994); Stephen Breyer, *For Their Own Good*, NEW REPUBLIC ONLINE (Aug. 7, 2000), at http://www.tnr.com/080700/breyer080700_print.html.

23. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002).

sensibility of judges is clearly shaking the trust and confidence that people have in the ability of the judiciary to render fair and honest decision.²⁴

Whether one agrees with Cohen or not, the judiciary certainly depends on long-term incremental reputation. This is not increased by debates over judicial nominations that may be cast in political terms by the political branches. This may give the impression to some that some or all cases are decided, in part or in whole, on the basis of partisan political factors, rather than neutral principles of law applied to facts.

Courts cannot help how others characterize their actions, but judges surely can take care to expend their own finite capital with care. As a result, when courts act, they must act with constitutional dignity.²⁵

C. Constitutional Dignity

Constitutional dignity is about the grace with which we perform our duties and the spirit in which we apply the law. It is judicial *esprit de corps*. Constitutional dignity can be as simple as dissenting with respect, rather than just dissenting. More significantly, it is careful consideration of how judges address their colleagues and their world. Let me address three facets of this dynamic: independence or consensus, name-calling, and perspective.

24. Andrew Cohen, *The Dangers of Holding Judges in Contempt*, WASH. POST, July 2, 2002, at B2.

25. I have adopted the phrase "constitutional dignity" from an article by Judge Kenneth F. Ripple of the Seventh Circuit, in which he describes the special role that law reviews play in critiquing the work product of the judiciary with "special constitutional dignity." Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANN. SURV. OF AM. L. 428, 440 (2000).

1. *Independence or Consensus*

Courts are oligarchies. In the executive branch, both in theory and practice, there is a unitary executive. The Congress is something of a hybrid—an oligarchy to the extent anything with 535 Senate and House oligarchs can properly be viewed as such. But there is also a chain of command in the form of the leadership and system of committee chairs. Ultimately, like courts, the legislature comes down to one vote per member.

But where members of Congress ultimately vote “yea” or “nay,” judges are offered every conceivable variation of vote. On our court, the computer voting system lists over 125 different voting options, like “Separate Opinion/Concur in the Result Dubitante,” or “Separate Opinion/Concur in Part and Result/Dissent in Part.” Clearly, we have a lot of opportunity to express our different views. When and how we do so will help define how we are perceived, as well as the public’s perception of the law.

Professor Robert Post from Cal Berkeley has documented the great pressure Chief Justice William Howard Taft applied to the Supreme Court to find common ground and speak with one voice.²⁶ Taft, and others, thought unity essential to the institutional strength of the Court, the judiciary, and also to the law, which depends in part on the clarity and predictability of decision rooted in the doctrine of stare decisis. Post identified a twenty- to forty-percent disparity between conference votes expressing disagreement, and opinion votes resulting in consensus.²⁷ The post-conference paper trail includes missives like: “I think this is woefully wrong, but do not expect to dissent;”²⁸ and “I incline the other way. . . . If he is silent, I probably shall . . . shut up.”²⁹ Mind, we are not talking about backbenchers, if there is such a thing on the Court. These are quotes from Brandeis and Holmes.

On the other hand, there are few judicial values as important as that of independence. A court is comprised of equal voices with equal status. That is a bedrock of judicial process. If judges (particularly with life tenure) won’t speak their conscience, then who will. And there is value in dis-

26. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1312-13 (2001).

27. *Id.* at 1345.

28. *Id.* at 1341.

29. *Id.* at 1342.

sent. It preserves principles and can help to clarify issues for legislatures and Presidents to address. I feel better about our system of justice knowing that at least two Supreme Court Justices dissented in *Dred Scott*.³⁰

Based on my brief experience, it is possible to agree with both Justice Cardozo and Justice Jackson regarding the dissenter. First Justice Cardozo:

For the moment he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant.³¹

Now Justice Jackson:

It is said they clarify the issues. Often they do the exact opposite. The technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess. So the poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant. . . . [T]here is nothing good, for either the Court or the dissenter, in dissenting per se. Each dissenting opinion is a confession of failure to convince the writer's colleagues, and the true test of a judge is his influence in leading, not in opposing, his court.³²

Courts have collectively balanced independence against consensus differently. On the D.C. Circuit, one percent of cases include a dissent.³³ On our court, during the two years in which I have sat, there have been dissents in thirty-eight percent of cases. Admittedly, there may be more opportunity to dissent on a court of limited jurisdiction where variations of the same issue may be repeated. Fixed membership will also tend to incrementally increase dissents over time. But there is more to it.

Having decided to dissent, or write separately, a judge must also decide on how long to carry the dissent. Our court seems to have a tradi-

30. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 529, 564 (1856) (McLean & Curtis, JJ., dissenting).

31. Justice Benjamin N. Cardozo, *quoted in* GLENDON SCHUBERT, *DISPASSIONATE JUSTICE (A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON)* 20-21 (1969).

32. Justice Robert H. Jackson, *quoted in* SCHUBERT, *supra* note 31.

33. Benjamin Wittes, *Too Smart to Be a Judge*, WASH. POST, June 11, 2002, at A25.

tion of the lingering dissent. On the one hand, this seems to buck the concept of stare decisis and diminish the value of finality. And, there would be something more than perilous afoot, for example, if the four dissenting justices in *Bush v. Gore*³⁴ held to their dissent by not recognizing the validity of presidential acts subsequently addressed in future cases. The dissenting Justices in *Miranda*³⁵ moved on and applied *Miranda* as binding law.

On the other hand, there may be questions of law that are sufficiently fundamental so as to always bar consensus. Regardless of one's substantive view, there seems something qualitatively different about holding to a dissent in *Roe v. Wade*³⁶ and its progeny, or *Gregg v. Georgia*,³⁷ ending what was in effect *Furman's*³⁸ constitutional moratorium on state death penalty statutes.

2. *Judicial Activism as Name-Calling*

The tone of the separate opinion can be as important as the content. It is tempting to get carried away because in most cases, for us at least, there is no apparent cost to doing so. Relative to lead opinions, separate opinions are carefree; they do not bear the burden of precedent or the need for consent. And on our court, they are rarely subject to the intangible restraint of academic review and press inquiry.

I sense reading opinions at every level and in every forum that some people think that the worst thing you can call a judge is a "judicial activist." But I haven't been able to figure out exactly what that is or why the term is so often suggested as derogatory. I rather thought I was lacking something in analytic judgment, so I was relieved when Judge Noonan, who sits on the Ninth Circuit, recently published his book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*,³⁹ which analyzes some of the Rehnquist Court's decisions on federalism. Noonan calls the opinions new, unprecedented, and surprising.⁴⁰ His point is not that they are right or wrong. (Chief Justice Marshall's opinions, he notes, were also

34. 531 U.S. 98 (2000).

35. *Miranda v. Arizona*, 384 U.S. 436 (1966).

36. 410 U.S. 113 (1973).

37. 428 U.S. 153 (1976).

38. *Furman v. Georgia*, 408 U.S. 238 (1972).

39. JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER* (2002).

40. *Id.* at 9.

“new, unprecedented, and astonishing to many of his contemporaries.”)⁴¹ What is noteworthy, Noonan argues, is that the decisions “do not depend on any words in the Constitution,” notwithstanding their origin with a majority of the Court heretofore identified as historical literalists.⁴² This leads Noonan to conclude that the terms “[a]ctivist judge’ and its polemic counterpart ‘strict constructionist’ probably should be banished from the political lexicon . . . because they cannot distinguish one set of judges from another.”⁴³

Justice Stevens recently accepted Judge Noonan’s invitation to dialogue.⁴⁴ He made a number of points. First, like Noonan, he noted that many important developments in the law that are generally accepted today were once criticized for their activism.⁴⁵ In this category he places cases involving coerced confessions, voting rights, and most notably the line of equal protection cases leading up to *Brown v. Board of Education*.⁴⁶ Second, he makes an important distinction. “Even though not compelled by unambiguous language in the Constitution,” Stevens said, “each [of these cases] was supported by a permissible reading of constitutional text. Second, each protected an interest in liberty that seems more important today than it may have seemed in 1789.”⁴⁷ In contrast, like Noonan, Justice Stevens argued, the Court’s opinions on sovereign immunity are “without any support whatsoever in the text of the constitution.”⁴⁸

I bring this matter up today, not so that I can join the substantive debate, but because I believe that constitutional dignity requires judges to eschew name-calling. My concern is two-fold. Labeling a court or judge as “activist” usually implies or is accompanied by words that allege that the judge or court is operating outside the bounds of democratically prescribed law. This represents far more than a difference of view on law. It suggests that the judge or court is acting *ultra vires*, outside the law. My point is not that this can’t happen, or hasn’t, but that we better really mean it if we use such language. Such language, if it is read at all, cannot but contribute to lack of respect for the law. If judges don’t follow the law,

41. *Id.*

42. *Id.*

43. *Id.*

44. See Justice John Paul Stevens, Address at the Third Annual John Paul Stevens Awards Dinner 8 (Sept. 25, 2002).

45. *Id.* at 4-8.

46. 347 U.S. 483 (1954); Stevens, *supra* note 44, at 4-8.

47. Stevens, *supra* note 44, at 8.

48. *Id.* at 9.

why should we? If judges do not seem to respect the system in which they serve, which permits and encourages honest difference of view, is this a system that others should respect.

Second, for some, such terms have come to be crude euphemisms for “liberal” and “conservative,” whatever that means, which for some have also become crude euphemisms of political outlook. Whether any of this is actually true or not, name-calling of this sort lacks constitutional dignity; it suggests that courts make their decisions based on personal and political views, rather than on neutral principles of law over which reasonable people can disagree as they are applied to each case or controversy.

Some of our great moments in legal history involved the active use of the law, anchored in constitutional text. Some of our great judges are rightfully praised as judicial activists, not because they invented the law, but because they lived up to the law and the promise of the Constitution. While judges can and have operated outside accepted principles of law, there is a difference between disagreements about the proper method of interpreting the Constitution and statutes and the usurpation of the democratic process by judges who invent law from whole cloth. The first is the business of courts. The second should rightfully undermine our confidence in courts. We should not confuse the two. There are serious consequences in doing so.

3. *Keeping Perspective*

Finally, constitutional dignity is about keeping perspective. Appellate courts can isolate and elevate small issues to greatness, or hide great issues behind small debates.

For me, perspective includes distinguishing the great debate from the important, but ordinary, case. The Constitution is not at risk because the CAAF opinion, *United States v. Powell*,⁴⁹ is cited for the proposition that plain error requires error. Such citation is not ultra vires, but I would forgive you if you thought otherwise after reading a few of our cases. The Constitution *is* at stake if you follow the great and educational debate

49. 49 M.J. 460 (1998).

between Justice Scalia and Justice Breyer over the role of text and context in constitutional interpretation.⁵⁰

Perspective is understanding that you are part of a system of justice that is part of the greatest democracy in history. The issues are more important than oneself; ego must get checked at the door. A lower court will be overturned. That happens in a system of tiered appellate review. That should not cause one to lose respect for the law, our system of law, or to deride those who apply the law in good faith; not if you believe in the rule of law. Justice Jackson said it well: "Reversal by a higher court is not proof that justice is thereby better done. . . . We are not final because we are infallible, but we are infallible only because we are final."⁵¹

II. Conclusion

This may all seem to you a bit like a discussion about judicial collegiality. But as I said earlier, collegiality seems a bit too much about judges and how they get along and not enough about the Constitution getting along or how Americans perceive the law. That is what I hope to suggest by using the term "constitutional dignity." There are no right answers, only a duty in each case to balance the needs of consensus against the imperative of dissent and to consider how one's individual voice may affect collective perceptions about the law, and to do so with the law alone in mind.

Nor is constitutional dignity for judges alone. Judge Craven has nicely observed that "[n]o appellate court can ever be much better than its bar. The bar of our court is the source of the raw material with which we sort: facts, inferences, ideas, insights, and prior decisions."⁵² You and I are linked. We share a common mission and duty to the Constitution, and to the criminal law which is a foundational element of constitutional order.

50. Compare Justice Stephen Breyer, *Our Democratic Constitution*, Address at the New York University School of Law James Madison Lecture (Oct. 22, 2001), with Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16-17 (Amy Gutmann ed., 1997).

51. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

52. *Jones v. Superintendent*, 465 F.2d 1091, 1093 (4th Cir. 1972), *cert. denied*, 410 U.S. 944 (1973).

In fulfilling this mission, we also share a common duty to do so with dignity.

I appreciate that it may not ultimately matter whether a case is decided unanimously or with dissent. And it may not matter what is said in a dissent and with what tone. The rule of law has survived many courts and many Supreme Courts where colleagues would not talk. And we on United States courts certainly have the luxury of worrying about refinements in substance and form that others do not. Just ask CAAF's newest member, Judge Erdmann, who served on a court comprised of two Serbs, two Croats, and two Muslims. On such a court, consent and dissent can take on life and death meaning.⁵³ And if you want profiles in constitutional dignity, think about the incredibly courageous judges in Bogota, Colombia; Sicily; and Sri Lanka who call it as they see it in the hopes of seeding a permanent legal plant. They might well trade some judicial dignity for a safe ride home at night in their armored car.

But law is incremental. It adds up. And if you believe as I do in the importance of criminal law to our society, every act we take deserves our best effort draped in dignity. Criminal law is integral to national security, not a separate stove pipe; in pure statistical form it deeply affects the lives of many in lasting manner; it tells us a great deal about the human condition; and it defines who we are as a constitutional democracy, which Constitution all of us in this room have sworn to uphold and defend.

53. *Hearing on Nominations Before the Senate Armed Services Comm., in Hearing of the Senate Armed Service Comm.*, FED. NEWS SERV. (Sept. 27, 2002).