Justice as a Coiled Spring

(A sermon delivered at Immanuel Baptist Church, Portland, Maine, January 22, 1978)

To be asked to speak from this pulpit as part of the half century celebration of this church is, for a layman, an honor. And to be asked by one's own minister, particularly when that minister is Edward Nelson, is an honor one cannot refuse.

But to try to say something fresh or inspiring to you on the subject of "Justice" in a few minutes is a very ambitious undertaking. For just as love is the very heart of the Christian religion, so is justice the very core of western society.

The Bible did not readily suggest a theme. The Old Testament, of course, is strong for justice; but it deals with concepts of a just God and a just person. It says very little about how society should go about providing secular justice for all. It was natural for me to turn to the Book of Judges. This, however, is a rather bloody account of the Israelites from about 1120 B.C. to 1050 B.C., at a time when they had no king but were ruled for some 200 years by ten leaders who were called judges and rescued the people time and time again from marauding bands. The only judicial-type judge, interestingly enough, was a woman, Deborah. As the book relates, "It was her custom to sit beneath the Palm-tree of Deborah between Ramah and Bethel in the hill-country of Ephraim, and the Israelites went up to her for justice." (4:5) Not being in the business of rescuing from marauding bands and not having my own palm tree to sit under, I must look elsewhere.

In the New Testament, at least in a quick survey, I found only one instance where Jesus uses the word "justice"; It is when he is giving the lawyers and Pharisees a good dressing down and says, "Alas for you, lawyers and Pharisees, hypocrites! You pay tithes of mint and dill and cumin; but you have overlooked the weightier demands of the Law, justice, mercy, and good faith. It is these you should have practiced, without neglecting the others. Blind guides! You strain off a midge, yet gulp down a camel!" (23:23-4) So justice is a good, but we are not told what it is. As we shall later see, I draw more from some of his parables than when he talks in these very broad terms.

So the soundest and humblest approach for a theme in this house is for me as one parishioner to tell his fellow parishioners some things he thinks are important for them to know about his work. Recently, when we were in the company of a minister in another town, he asked me whether the people of my church supported me in my ministry. This was a new thought to me . . . that I had a ministry, that you should know about it, and that I should care for your understanding and support. Yet is it not part of our concept of ourselves and church that not merely Dr. Nelson and Ruth Morrison have a ministry to attend to, but all of us?

In my case there is another reason to tell you some things of my work. It is that this work cannot succeed without understanding, commitment, and even sacrifice on the part of citizens in general. When we speak of justice in the large, we are speaking of the way our society works in distributing to the able opportunities to learn, work, and live in comfort, and to those less able the opportunities, goods, and services which add up to security. And of course on you and your elected representatives and officials, city, state, and national, this kind of justice must depend. But you have a vital role even when we talk about the kind of justice that centers about the courts. Wholly apart from the funding and support you give the institutions of society, I have the profound conviction that in the long run the quality of the stewards of the justice system --

police, prosecutors, wardens, judges -- will respond to the strongly felt expectations of the people. On their discriminating and knowledgeable praise and censure do the development of better role models and public institutions depend. The recent use by the President, Senators, and Governors of committees to propose names of qualified judgeship candidates seems to me to reflect such expectations.

In the time we have today, I want to do three things: to sharpen your perceptions of the kinds of justice dispensed in the different levels of our court systems and the different qualities demanded from the judges of these courts; to observe how the area of freedom to decide changes as we go from trial to appellate courts; and, finally, to see how in that area of freedom is a tension which comes from the Constitution itself. If we achieve this much, it will be a big step beyond the assumptions of many people, that justice is merely a mechanical matching of a given set of facts to the right law or rule.

To begin with, Americans have a fuzzy idea of their courts and judges. People say to me, "I hope I don't have to appear before you", or, "Now I know where to go if I get a parking ticket." These people have placed me at the wrong level in the wrong court system. All we need to know right now is that there are two systems, one for each state to deal with questions of state law, and one for the nation, to deal with questions of federal law. Each state has a district or municipal or "police" court through which those accused of speeding, assault, or petty thievery flow in a large, rapid, and never-ending stream. This in a real sense is the people's court, where justice is defined for most people. Here is where we need judges who are compassionate, whose knowledge of human nature is deep, and who have an uncommon share of common sense. These qualities, more than mere learning in the law, are the relevant ones, for these judges come closest to Deborah sitting under her palm tree; their decisions, often made on a moment's deliberation dozens of times a day, are at their best not rough but finely tailored justice fitting the individual like a hand-crafted suit.

The higher up the ladder of courts we climb, the more room is taken by the rules of law, and the less remains for a judge's personal sense of justice. There's an old story about Judge Learned Hand bidding farewell to Mr. Justice Holmes and saying, "Do justice." Holmes called him back and said, "That's not our job. Our job is to apply the law." While, like any other memorable quip, this is only partly true, the truth bears repeating for those who would judge judges fairly. A state or federal trial judge may throw out an indictment. He is labeled "soft on criminals". Or an elderly pedestrian is cruelly injured by an automobile and the judge does not let the case go to the jury. He (or she) is thought to be hard-hearted and defense minded. In both cases the judge, wishing he could punish the criminal defendant and reward the injured oldster, is acting as the law compels him to act.

Yet if the trial judge is often straitjacketed by the law, he still has more freedom in some important ways than the courts of appeals. He has a wide discretion to sentence convicted criminals, to make findings of fact, to stimulate compromises, and to frame remedies. These judges must have a wide knowledge of law sufficient to make fair decisions on the spot; they must be calming and dignified managers of a trial; and they must have a sense of the practical, an ability to handle people, patience, courage, and decisiveness.

The appellate courts in the two systems are the Supreme Court of each state and eleven federal courts of appeals, of which my court is one . . . and of course the United States Supreme Court, which reviews a very small number of both state and federal cases. We do not see the parties, juries, or witnesses. We miss out on the drama. By the time we get a case, all suspense is over. We deal only with the cold, printed record, and the lawyers' argument in their written

briefs. Although so called, they often run from 70 to 100 pages long. Unlike the trial courts, appellate judges work in panels of three or more. And unlike decisions at trial, decisions on appeal are not made on the spot, but only slowly, over time, after briefs are read, arguments heard, the case discussed among the judges, the opinion researched and written by one judge in consultation with his law clerks, and, finally, the draft opinion circulated for reaction to the other judges. This incremental, collegial process of decision resulting in an opinion which must be put in writing is one of the best guarantees against arbitrariness which man had devised.

Now the appellate judge is quite a different animal from the trial judge. What he needs is the ability to suspend judgment as he ploughs through thick records, to work well with colleagues, to give and take suggestions, to listen, to take the long view, to see a decision in the light of where the law has been and where it is likely to go, and to express complex thoughts clearly through the written word. It also helps if he has a philosophical bent and can adapt to a cloistered life.

While I have said that appellate courts have less freedom in some ways than trial courts, they do have a freedom on occasion to make law. Indeed, in one sense, whenever an appellate court decides a case, it is making law even if it is deciding only that a portable cement mixer is a "motor vehicle" when it takes to the highway. Before the decision, one could argue either way, but not after. This kind of freedom to make law is as old as the English common law itself, more than half a millenium.

Nine-tenths of the cases decided by a state or federal appellate court, other than the Supreme Court, are of this kind. This is what scholars would call interstitial or gap-filling law making, adding something the legislature would have added had it given thought to all possible applications of a law. The remarkable thing is that in this overwhelming majority of cases, even though good lawyers make a strong case for both sides, and trial judges may decide both ways, the appellate judges, despite different backgrounds in practice, experience, and politics, will, after their drawn-out, collegial process of decision making, agree. They will do so because, after they take into account the hard facts in the record, the applicable statute and its legislative history, the relevant case law, and logical reasoning, there is virtually no room for reasonable judges to disagree.

I refer not to such cases but to the true area of freedom, where it is possible for reasonable judges to disagree. This is small, if it exists at all, when the law is static and individual rights are narrowly defined and rigidly confined. Through the nineteenth century and the early part of this century, judges decided cases in the field of private law -- contracts, torts, property -- pretty much as did their ancestors on the bench. But look what has happened in the past forty years: the administrative agency and law development of the 30's and 40's; the school desegregation cases of the 50's; the civil liberties expansion of the 50's and 60's; the range of civil rights litigation of the 60's; and the sweep of over 40 major federal statutes in the 70's thrusting the courts deeply into issues concerning the environment, energy, health, safety, information, consumer protection, and age and sex discrimination. This has been a justice revolution unequalled in our country or anywhere else at any time in history.

The result is that courts have found themselves deeply involved in public law issues, issues which, because new or undefined, permitted broad options of decision. Each new statute affecting welfare, housing, safety, or environment carries with it a hunting license for a decade before all open questions of interpretation are settled. The deeper source of freedom is found in the less precise clauses of the Constitution. "Due process" and "equal protection of the laws", in the Fifth and Fourteenth Amendments, are the principal examples. Under the spur of civil rights

lawsuits based on these words, courts have for almost a decade found them selves called upon to monitor public institutions to see that they act fairly toward and without discrimination among individuals. Jails, hospitals, mental institutions, universities, school systems, welfare programs, housing projects . . . all these have felt the impact of court orders.

At this point people wake up and say, "Where do courts get the power to do this kind of thing? I thought we were a democracy. Yet these judges who aren't elected or responsible to anyone are running our schools, prisons, elections, and just about everything." With this question this generation must wrestle anew -- as does every generation -- with the basic constitution-building problem faced by the Founding Fathers as they sought to create a structure that would serve the values they held dear.

While their dominant goal was to create a government of, by, and for the people, they avoided the over simple device of providing for an absolute, Greek-style democracy. They wrought a representative democracy, with the Senate being considerably less democratic than the House, and the President through his veto being given the power to nullify legislation desired by a clear majority. And while laws are passed, taxes raised, and monies spent in accordance with the majoritarian principle, the Constitution also, through its Bill of Rights, recognizes rights in individuals to speak, to assemble, to worship, to due process and equal protection. It is in effect saying, while we run ourselves by majority vote, there are some things that not even an overwhelming or unanimous majority can do. If Congress unanimously passed, and the President signed, a law barring Edward Nelson from this pulpit, no one would contend that this law would be worth the paper it was written on. More realistically, it is entirely conceivable that legislators of a state would balance their budget by drastically cutting appropriations for the state prison, necessitating housing two or three prisoners in each tiny bathroom-sized cell. In both cases, the single, non-elected, life-tenured judge would declare the action of the majority void, not because this is "democratic" but because ours is a democracy wedded to certain individual rights.

This is not a formula of repose. Nor is it a formula of simplicity as it would be if, like continental countries, we were willing to make the parliament supreme in everything. It is a formula calculated to create tension. This is why, in thinking about our Constitution, I do not see justice as accurately represented by such a static, inert symbol as a set of scales. I think the appropriate metaphor is a coiled spring whose tension limits the pressures of a majoritarian government on one side and the demands on behalf of individual rights on the other.

This dual purpose Constitution owes much to the ages. The idea of democracy comes from Periclean Greece. To Rome we owe the majestic idea of the rule of law. But somehow into the crucible was poured also the sense of worth of an individual that we find in the New Testament. The scriptural passage about the one lost sheep from the ninety-nine comes just before the parable, in Luke, of the prodigal son, a young man who many might say was not worth worrying about. Our law books are full of cases of such individuals; occasionally they prove worth worrying about, and in any event, we worry about them because tomorrow we might stand in their shoes.

It is now pretty well accepted by most Americans that in this kind of mixed government, it is entirely fitting, as Chief Justice John Marshall announced in Marbury v. Madison, that judges and not the majority determine when the majority has exceeded its powers or rightful exercise of its duties. But this still leaves plenty of tension. Some feel that the individual rights should be confined to precisely what they were understood to mean in 1789, when the Constitution was ratified, or in 1866, when the Fourteenth Amendment was passed.

This argument suggested our second scriptural passage, being reminiscent of the Pharisee's chiding Jesus for allowing his disciples to pluck ears of corn in the cornfield on the Sabbath. Jesus, acting like a latter day Supreme Court Justice, hesitated not in telling his inquisitors, "If you had known what that text means, 'I require mercy, not sacrifice', you would not have condemned the innocent."

If judges and particularly the Supreme Court could not similarly interpret for their times the meaning of old phrases, the Fourth Amendment, which bars unreasonable searches of one's person, papers, or house, could not be interpreted as covering wiretapping, since the Founding Fathers could not have had in mind this kind of intrusion. Yet to the extent that a freedom to interpret is accorded to judges, there will be unanswerable questions as to the source and extent of their reading. There will be running debate over judges' views of society, their weighting of values of the individual as posed against those of society, their conclusion that individual rights were violated, and, particularly, their framing of a remedy if this involves not merely the abolition of the chain gang, or the third degree, but a long range plan for the restructuring of a prison or school system.

I see no simple way to avoid this kind of tension in a society which values both majority rule and individual rights. Appellate courts and the Supreme Court exist to check rash or irresponsible judges. But when judges seem intrusive, it is often only because lawmakers or executive officials have neglected or refused for too long a time to take action clearly indicated to reach constitutional standards. To the extent that citizens persuade their elected leaders to cure obvious problems, they lessen the likelihood of confrontation. While our government has been durable, I think it is also fragile. What I may mistake for fragility may be the resiliency and flexibility of the willow which withstands all winds. But I think it wise not to push even the willow to its limits.

When all is said and done, just as love is the ineffable mystery in our religious life, so the workings of justice remain something of a mystery in our secular life. But something all the more to cherish and nourish.