

President Levi: Well, to get us somewhat back on track and because Lee Rosenthal is such a wonderful speaker, and we're really in for a treat, I will briefly introduce her, although I think for our group here, she truly needs no introduction.

She is our First Vice President of The American Law Institute, and that means that if I get hit by a truck, and many of you might be driving that truck, (*laughter*) she will take over. That's

not intended as an incentive to get rid of me. You just have to ask, actually.

So Lee is my very great friend. She is a judge. She is the ideal of a judge. She is exceptional. She was appointed in 1992. She is universally admired as a judge, and this is her life's work. It's very important work. She does it so incredibly well.

She is, to quote one of the news sources, "fair and balanced," and she truly is. She's also courageous. She is a worker. I have worked with her on many things, and she is a worker. She works at the top, and she works at the bottom. She's a worker bee. She's a leader. She's just really perfect.

She's a teacher. Apparently, she's not much of a sleeper because she gets so much done. She's a mother. She's a daughter and a spouse. She has a wonderful family, and she's very dedicated to them.

She is a reader. She's been sending me titles of books to read, and they are—she has a very eclectic and wide-ranging intelligence. And she is a friend. She is a good friend. And she is a dedicated and devoted friend.

And she is a friend to this organization, and she's done so much for us. And what an honor for your class to have Lee Rosenthal as our speaker today.

So, Lee, we're ready. (*Applause*)

Chief Judge Lee H. Rosenthal (TX): Thank you, David. Thank you all.

By your presence here, you have clicked "I consent" (*laughter*) to the box that indicates your willingness to hear what I have to say, and this is not subject to termination. But I do very much thank you, and I thank David for that nice introduction.

And because we are such proven experts at multitasking, I have urged the wait staff, and now I urge you, to keep right on with the business of lunch so that we can progress with our business this afternoon in something approaching on time.

It really is a great pleasure to be here. It's an honor. And I thank President Levi. I thank you all for that.

Having said that, I was completely intimidated when I looked at the roster of the prior speakers at this event. I really did not want to be in the position of the woman who left a dinner party apologizing to her host for dominating the conversation.

"Don't worry," her host assured her. Now he was, himself, a renowned law-school professor, a scholar, an ALI member, and the father of David Levi. "Don't worry," he said, "you didn't say anything." (*Laughter*)

It has been almost 150 years since the most famous observation, on what I do hope to say something about today, took place. In the 1880s, Justice Oliver Wendell Holmes wrote about what we should be ambitious for and what we should aspire to as lawyers, as law teachers, and as judges.

Now it's hard, admittedly, to overstate how much practicing law, teaching law, and deciding law have changed since the 1880s, much less the 1980s. But what Justice Holmes called "the main question" I think remains very fresh, and I can't improve on his words.

"How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a

life?” And he didn’t even sit through Consumer Contracts. (*Laughter*)

What does it mean today, as we celebrate 25 years and beyond, 50 years? What does it mean for us to have ambition and aspiration to “live greatly in the law”? And how should we, at this stage in our lives as ALI members, describe our ambitions and our aspirations for the ALI and for the roles that we want to play in it?

So that’s what I want to talk about today. And like all good ALI members, my first task is to define my terms. What is ambition? I think of ambition as the desire for external validation, for what we already know we want. For law students, it’s grades. It’s the approval of parents or professors. It’s the law review. It’s the job.

For lawyers, you guys know what you want. It’s to win the approval of, as we start, the more senior associates in the firm, the partners, the clients, anybody with the authority to promote and reward.

And for academics, not much different. It’s to win the approval of those who hire, who make decisions about publishing our work, your work, whether to promote you, to grant tenure, perhaps to confer that coveted chair, and apocryphally, how many windows your office will have and whether you will have a parking place that is near the building.

And for judges, of course, the desire to be appointed as a judge in the first place or elected or nominated, then for high rankings in the bar polls, to be cited approvingly and affirmed, and then for reelection, retention, or best of all, promotion. Ambition for all, but for judges can be the desire to make money. Not just to be secure financially, but to accumulate wealth.

And for every member of—practitioner, teacher, or decider of law, ambition includes the desire to have a secure reputation for excellence and for influence in the profession. We all have ambition. It’s not to be ashamed of. We all need it. It got all of us where we are today. It got David Levi the title of first judge, then Dean, then President. It made me judge, and I’m grateful.

But what do I do with it now? Is ambition enough, at any time, for a satisfying and gratifying life in our chosen path, law? Holmes didn’t think so. He was pretty clear about that.

He recognized the economic realities of the profession and the “wish to make a living and to succeed.” Fine with him. We all want these things, he recognized. But he also saw that financial success was not enough. “[H]appiness,” he wrote, “cannot be won simply by being counsel for great corporations and having an income”—he was a little off—“of fifty thousand dollars.”

Holmes thought that there was something more to studying and practicing law, and that it was that something more that lets one engaged in that to “live greatly in the law,” as “greatly in the law as elsewhere.” So he gives us only a general description of what that something else, that something more might be. And to inadequately summarize what I think he said, it is the striving to see the broader principles, to see the broader ideas, the more fundamental ideas in the quotidian facts and the problems of specific matters, disputes, or cases.

The key is to see the general that lies beyond, and animate shapes is the particular. And to reach for and search for the remoter and more general aspects of the law. This is what allows us, whether we practice, whether we profess, whether we decide to “connect [our] subject with the universe and catch . . . a hint of the universal law.”

To do this requires complex and intense intellectual efforts. But it is just these efforts, and we saw some of them this morning, that provide the hope of personal fulfillment. Holmes

explained that “[j]urisprudence, as I look at it, is simply law in its most generalized part. . . . One mark of a great lawyer is that he sees the application”—or she—he didn’t say that, but we know that’s what he meant. “[T]he application of the broadest rules.”

And Holmes’s rhetoric soars. It’s just gorgeous. It’s downright purple. Viewed in this way, in “[t]he Law, . . . as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have [ever] been! When I think on this majestic theme, my eyes dazzle.”

Now he didn’t prescribe, interestingly enough, going out to do good as the best or sufficient way to achieve this something more. Although he didn’t think there was anything wrong with trying to improve justice or improve the betterment of all mankind. That was fine with him.

But he did find “altruistic and cynically selfish talk . . . about equally unreal.” Pro bono work, no less than other work, has its tedium. It has its stresses, and it has its mannerless conflicts over what can be sordid interests, and it, too, requires the practice of shopkeepers’ arts.

Like other legal work, pro bono matters don’t routinely require of us or, unless we search for it, give us the opportunity to look beyond the specifics, to find the connections to the larger principles where the something more may live.

I think that this search for something more is aspiration, and that’s different from ambition. I credit the philosopher Agnes Callard—or Callard—I don’t know how she says it, and I apologize if I got it wrong. I think I credit her, and she’s at the University of Chicago, for her articulation of aspiration. It’s a distinctive form of purposeful action. It’s directed at acquiring new values, and those values are not abstract, but deeply practical—not political—and active.

Ambition is different. It doesn’t try to acquire a new value or the necessary knowledge to do so. Ambition tries to acquire what we already know we value—money, power, publication, tenure, promotion. Ambition helps propel us down the path we already know we want to go down.

Aspiration is different. It helps us explore a new path, to get to a new place. Professor Callard describes it as a form of agency in which one acts on one’s self to define and create a self with substantively new values. It can be an aspiration to expand your understanding or knowledge into a new area or to become better as a more effective counselor, a more gifted teacher, a wiser judge. Not because it’s going to bring us material reward or external praise, but because it will change who we are and what we want.

So after 14 years, Holmes, having spent those years practicing law, has ambivalent feelings about whether that will provide what he knows is something more that he wants. He acknowledged that it may be “unhappy, often seems mean, and always challenges your power to idealize the brute fact” that your day job, at the same time, “it hardens the fibre,” he said, “and I think [it] is more likely to make more of a man of one who turns it to success.”

In the words of the day, to engage in the world of affairs with success is to become more of a man. I assume that he would allow us to have that distinction as well.

So he goes to the academy. He leaves the practice, and he spends all of one semester teaching at Harvard. (*Laughter*)

That was enough, and he was quite dismissive about the academy, at least the legal academy. It was a “half life,” “a withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister.” You are all monks.

He left because he concluded that his opportunity for that generalization inside the academy was just too small. “[T]he day would soon come,” he wrote, “when one felt that the only remaining problems,” academic problems, “were [ones] of detail.”

Holmes then gets to the Massachusetts Supreme Judicial Court, and he spent 20 very happy years there. But he was never accused of modesty, and he was a famously ambitious man. So in 1902, he gets the brass ring for the ambitious among judges, the Supreme Court. It can also be a state supreme court, anything with the word “supreme” in it is pretty good. (*Laughter*)

And he lives there for 30 years, finally resigns at the age of 90 because he had to for health, and he doesn’t live long after that.

And despite this incredible lifetime of achievement, he hungered for more external recognition. At age 68, a young man on the Supreme Court, he wrote, “I have not as much recognition as I should like.” Give me a break, hmm. (*Laughter*)

He extolled the joys of thinking about law, but his own experience of those joys was apparently and somewhat sadly diluted by what he saw as the lack of attention to what one, and here read Holmes, thinks most important.

One of his biographers, G. Edward White, has observed that Holmes’s life was colored by his fear of powerlessness and his intense power seeking. He was ultimately powerless to achieve his ambition of ensuring that others would adequately appreciate the quality of his achievements. And that’s a big problem with depending on external validation, the validation that characterizes ambition.

The goals of professional recognition and eminence, position, advancement, wealth, and reputation, they are determined by others. They are beyond our power to control. But Holmes also aspired, aspired to understand the fundamentals of law, to figure out if studying jurisprudence in history and philosophy would show that law was just the struggles for supremacy among powerful interests—maybe Amazon—of gradual efforts such as we engaged in this morning to improve the rationality of judicial and human decisionmaking.

He was both ambitious and aspirational. So I want to learn from that combination, and briefly, I want to look at both ambition and aspiration in the world that I know best. And please, eat dessert while I talk. (*Laughter*)

And the world that I know best most recently is the world of judges and judging. And every judge that I know has both ambition and aspiration.

So what do they look like, this ambitious judge and this aspirational judge? There are a lot of ways to be ambitious as a judge, and I’ve talked about some of them, but let me talk about different aspects. One is to want recognition as a jurist of distinction or impact, someone who’s developing the law in ways that he or she hopes will be recognized as novel, creative, profound, and if we’re lucky, wise. Citations of the judge’s opinions and the number and kinds of requests to give speeches can matter here, as signs of ambition achieved.

Another way is to be ambitious for promotion. We’ve talked about that. Viewed negatively, as Judge Carolyn King, an esteemed Fifth Circuit judge, grader of my papers and esteemed ALI member, has noted, that would involve ruling with one eye on the obituary and retirement announcements and the other eye on what appeals to those who, at the time, control judicial promotions.

A third way is to seek the satisfaction that one who is really deeply committed to an overarching political, philosophical, or moral set of beliefs might get from reaching a result that will entrench or expand those beliefs. I count this as ambition in a negative sense when the judge strives for this particular outcome, this preferred outcome, when the law or the facts don't support it, or both.

I count this as aspiration, even if it's serendipitous, when the facts, the law, and the context converge with the judge's preferred outcome and that preference is based on a sincerely held belief that it, and it alone, is the right outcome in a larger and more fundamental framework.

So all of these aspects, we've all got them to some degree. And I want to offer a couple of examples that might show ambition or aspiration or both at work. I'm not commenting on the merits of any of these cases, just to make this narrow point.

I'm going to start with Texas because I can. Several Texas licensed doctors providing abortions challenged a regulation that was recently enacted in Texas for disposing of fetal remains. They challenged it under § 1983. They wanted an injunction because the required method, they argued, was so expensive that it would unduly burden the rights of women seeking a procedure.

The case went before—and it was highly publicized, as you can imagine—a highly experienced district judge. This judge had granted a preliminary injunction and had set a bench trial, firm date, ordering some discovery from a third-party religious organization. This party took an interlocutory appeal from the discovery order. The panel majority found that in ordering this discovery, the district judge had abused its discretion in a number of ways. And I want to focus on the concurrence and the dissent.

In the concurring opinion, Fifth Circuit reversing, one of the two members of the panel majority wrote again and separately to agree with themselves and in reversing the district judge to accuse that judge, and that's not too strong a word, of compelling the discovery “to retaliate against people of faith for not only believing in the sanctity of life—but also for wanting to do something about it.”

In an elegant dissent, the judge took on the concurring opinion's accusation that the district judge had been biased in his discovery management. And I'm going to quote here, “Even more troubling are the potshots directed at the district court, and the concurring opinion then piles on. That the pecking order of the system allows appellate judges' view of the law to ultimately prevail should be satisfaction enough While vigorous disagreement about the law is part of the judicial function, there is no need to go beyond the identification of legal error by questioning the motives of our district court brethren. That is especially true when the legal issue is one that the majority opinion concedes is novel, and when the ill motives are pure conjecture.”

District judges have no opportunity to respond to appellate attacks, personal attacks in an appellate opinion. They deserve our respect and collegiality—I sound like Justice Kennedy; that's a compliment to myself—even when or especially when they err, as we all do at times.

Speculating that malice is behind this decision seeking to expedite a high-profile case with a rapidly approaching trial date is not the award the district judge is due. Yippee. This dissent is aspirational. It seeks to strengthen the integrity and the respect that judges earn by demonstrating respect for institutional values and by being aspirational.

And I will tell you that district judges everywhere stood up, kissed him on both cheeks, and cheered. It is really reassuring to see a judge willing to take on the burden of defending other

judges when they could not do so.

So the ambitious side of judging can cover all ends of the political spectrums. A Ninth Circuit case of some years ago held that the Equal Protection Clause forbids a party from striking a juror based on the juror's sexual orientation, concluding that heightened scrutiny applies and reversing the lower court for an error in not applying *Batson*. And we all know what *Batson* did, right? Right.

The appellate-court opinion has a feature that I think is characteristic of ambition to reach a particular result in that the appellate court challenged the district-court finding without deference and, most importantly, without acknowledging the fact that the nature of the law in the area at that time was quite unsettled.

The Supreme Court precedent was just not as clear, nowhere near, as the appellate court characterized it as being. So I would credit the district judge and characterize its ruling as aspirational in its cautious approach to what was a novel and sensitive legal question, and the frank acknowledgment of the murkiness of the area, and the lack of the judge's confidence that the judge knew what the right answer was.

The cases showing ambition often include judges stating, with complete confidence, a particular interpretation of the facts or reading of the law that others would find quite debatable. The district judge here knew that the judge didn't know and had the courage to say so.

This recognition of uncertainty, I think, is a sign of aspiration. And Judge Learned Hand said it most eloquently in a 1944 speech entitled "The Spirit of Liberty," which he described as "the spirit which is not too sure that it is right." The spirit of ambition, unalloyed by aspiration, I think is too often sure that it is right or uncaring.

Judge Hand's spirit of liberty is, and I quote, "the spirit which seeks to understand the minds of other men and women." Ambition does not seek this. Ambition without aspiration either assumes that it knows the minds of others or views it as not as important.

But I don't mean to end on a note of pessimism about the judiciary. I'm going to instead salute an aspirational judge's opinion, the subject—the Affordable Care Act. The issue was whether it represented a valid exercise of Commerce Clause power. Two panel members disagreed on the answer to that question in a pre-enforcement challenge to the law. This third judge writes a deciding opinion that is legally cautious. It is not political. It defies pigeonholing as liberal or conservative.

And why do I say that this technical exposition shines as the work of an aspirational judge? He upheld the constitutionality of this statute against a pre-enforcement challenge. Because when this judge wrote it, he was on every short list for a Republican President's Supreme Court nomination. And when he voted to reject the constitutional challenge, the deciding vote, he must have known that he was likely to drop way down on that list or fall off.

And that is what happened. That is judicial courage.

(Bell ringing in background.)

Chief Judge Rosenthal: I agree. Bells should ring. *(Laughter)* An angel got her wings, and I'm no Jimmy Stewart.

This is judicial courage along the same lines shown decades ago by trial judges like Frank

Johnson in Alabama, appellate judges like Elbert Tuttle, John Minor Wisdom, who enforced desegregation despite knowing that they would be shunned in their communities, that there would be crosses burned on their front lawns, and that they would be subject to personal attack in many ways.

Only when we judges are aspirational do we deserve and are we likely to get and to keep the continuing consent of the governed, which Richard Arnold, already referred to with gratitude appropriately, a wonderful court-of-appeals judge and nearly a Supreme Court Justice himself, identified as the key to a judge's legitimacy and independence—aspiration with that ambition, independence constrained by accountability. Both are essential.

So my best lessons in aspiration have come from my work on the Rules Committees and with you all here at the ALI. This kind of group effort to wrestle with the large issues in very specific words, to improve the quality of how a justice system answers the questions that these large issues present, is among the most gratifying work I have done as a judge, as a lawyer, as a teacher, as a student. It can be and is done by people in every aspect of the law.

One of the Reporters to the Civil Rules Committee and a great judge, law professor, and writer, Benjamin Kaplan, said it best and with the honest acknowledgment characteristic of aspiration of what cannot be done. He said, “No one, I suppose, expects of a Rule [or a Restatement] that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.”

Meeting that duty, for me, is the stuff of aspiration. So now I want to end with some brief thoughts about ambitions for the ALI, aspirations for the ALI. Because at the end of the day, I think aspiration and ambition may meet. They seem to have done so, by and large, for Justice Holmes, who I think got it, by and large, right.

Whether we practice or we teach or we judge, looking for the larger themes, looking for the larger questions, acquiring the kind of skills and competence to understand what those questions are is the best way to give meaning to the specific problems that we are all asked to resolve. And that will happen again when we go back across the hall after lunch.

So my ambitions and aspirations after 25 years with the ALI? I've been a district judge now for 28 years. I'm not getting any promotions, I promise. I'm not getting any raises. I can promise you that, too. I have a good parking place.

So what do I do with my ambition? It doesn't just vanish. It's a habit. It's a friend. It's my evil twin Skipppy, not so evil. I am ambitious, but I also aspire—and here, they combine—to work on really interesting and important issues. Issues that matter, with people who are smarter than I am, who I respect and admire.

I'm home. The ALI completely fits this bill. You all are the prescription for what does not ail me.

And what do I want the ALI itself to be ambitious for and to aspire to? So ambition, well, we all know, it means that we survive and we prosper, financially strong. It means that we attract the best new members of our profession. It means that what we produce is adopted and cited and used, that it does shape and, we say breathlessly, become the law.

Ambition and aspiration together mean that our work deserves that, that it does merit influence over legislators and law interpreters. Together, ambition and aspiration mean that our

members are not only paying dues and occasionally writing a check when John Beisner and others call, but also that they are engaged in our work, that they are in the rooms where it happens—the MCG, the Advisers, the Annual Meeting rooms, and those virtual rooms where we have emails and conference calls and written exchanges all year.

My hope, in short, is that the ALI stays the ALI, only stronger and better. That we resist, continue to resist being political or politicized. It must continue to be one of the few places where bench, bar, and academy come together to debate the hard issues, united implicitly in the ultimate aspiration that we share, to be right, to be fair, to be just, free of any duty of advocating for a particular narrow or client interest. It has to steadfastly resist the lure of what’s popular or trendy, while staying firmly anchored in the realities and the practicalities and the limits of the feasible.

Now I don’t like fashionable words du jour, words like “cabin,” “curate,” “bespoke,” and the most recent that I’ve heard, “rearchitected.” (*Laughter*)

I know, wince. But I do have a good invented word that I think sums up my aspirations for the ALI. It is “recombobulate.” This word is on a sign at the Milwaukee airport, just after you clear security.

It refers to recovering from the discombobulation of whatever you had to do or remove to get through security. So perhaps after taking on, with bravery, some of the most difficult and important subjects—sex, policing, the death penalty, consumer contracts, who knew? Liability insurance, the treats that lie ahead—after passionately exchanging passionately held different views in the civil exchange we saw across the hall, God bless you, we and the ALI perhaps could stand some recombobulation.

Now I’m going to leave it to Bryan Garner to decide if we can make “recombobulate” a real word, meaning that Bryan Garner approves. But in the meantime, it’s really not a bad way to say what I mean. I want the ALI to stay the ALI, but tuck back in, all clothing restored and really well turned out to meet the stresses of travel down our next, shared 25-year road.

So I congratulate you all, particularly our 50-year member, with gratitude for his and your presence here today. And I thank all of you just for the chance to think and speak too long about why I love my work, my aspirations, and to share my hope that you do, too. That you love your work, especially for and with the ALI, and that you bring aspiration to it and to all that you do.

Thank you all. (*Applause*)

Chair of the Council Roberta Cooper Ramo: Well, Lee, let me say two important thank yous. First, to Lee. And I have to tell you, Lee, it’s a little hard for me to say thank you to you. This is the woman who, as we were going to the museum yesterday said, let’s take a little walk. Two-point-six miles later—(*Laughter*)

Which tells you something about her. Lee, you are everything that I hope to be in an American lawyer, and that is you are a patriot. You understand the depth of the importance that your work as a judge brings. And you understand and live every day with the knowledge and the action that just doing your own work isn’t enough as an American lawyer or judge. We have to do the work of the law. And for that and your thoughts, we thank you deeply. (*Applause*)

And let me just say one more thank you, on behalf of the Institute, before we go back to our work just a few minutes late, and that is thank you to this class. Part of the reason that The American Law Institute retains the incredible vibrancy and the incredible respect and that the

quality of our work is so superb is that thanks to the class gift, we are able to ensure that being able to afford to participate in our work is not a problem for any member.

I know well, from my state, how little state-court judges make, how little district attorneys make, how little public defenders make, and I know also that many academics are not at places that support doing the work of the ALI financially. And it's the class gift that makes us not just the great American institution that it is, but the great legal institution that it is. Because of your contribution, we have, as you heard today, all kinds of voices, from every part of the profession and from every point of view, taken into consideration as we restate the law.

Thank you, and let's go on to what I'm sure will be not a controversial matter at all.
(Applause)