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The Mind Counts

Roger J. Traynor

Commentary

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I take as my thesis three words of one syllable, *The Mind Counts.* I am moved to do so because of all the overt and subtle forces at work against our traditionally civilian and open society. We cannot even take for granted that there is sufficient access to official information to enable us to make our minds count in resolving the many problems that attend the expanding conglomerate merger of war and peace. The problem of constraints on information is matched by an age-old problem, the constant befuddlement of available and reliable information by calculating or addled word-mongers. They are a motley crew, running the gamut from A as in Antebellum, to Oom as in Moo, to Z as in Zonking-out or Zeroing-in, the crazed alternate routes to destruction. These word mongers are often at war among themselves, but they have one objective in common, to put to death the minds of reasoning people.

Unfortunately, many a normally reasoning person tends to lose his mind in times of crisis as his chills give way to fever. When he is besieged by public troubles that grow and grow, compounding the rate of interest that fanatics take to exploit them, when troubles close in him in a storm of placards on the street or a welter of televised news in his modest Lebensraum, he is inclined at last to hear voices that promise him peace or promise him war if only he will stop thinking and take up a grenade or a bomb to fight either the war or the peace to a finish.

As a member of the class of 1970, which has taught me much this spring, as well as a member of my generation, which has taught me much over the

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** Former Chief Justice of California, presently James Monroe Professor of Law at the University of Virginia.

years, I plead with each of you, no matter where you are situated in time, not to lose your mind to loss leaders. Instead, you can make your mind count against them; and if you do you may learn that mind is the best four-letter word there is for freedom, for your own and that of your country.

What we can do with our minds, at best, will be little enough, given the patently grave ills of our time and the complications of patent remedies. We have at hand the proliferating assets of reading and writing and the new math in addition to natural resources, but we also have at hand the proliferating liabilities of ancient courts and prisons, of hospitals and schools and dwellings that are like nightmares out of a pre-Gutenberg world. Few of us can become babysitters in the dwellings or all-purpose teachers in the schools or social workers in the hospitals. We cannot even provide law wholesale to rescue these beleaguered centers from bedlam. We cannot at once make a clean sweep, even in our own domain of law, of ancient courts and prisons.

Nevertheless we can be much more active than we have been to implement the thesis that the mind counts, in a world appallingly more dulled than horrified by statistics that keep book on body counts, but lose track of the grim reapers. We can act more firmly than we have to mitigate the irony that although education is on the rise, new guards as well as old use words with increasing skill to put minds to death. We can insist as lawyers that when we say the mind counts, counts is an action verb, not a noun for the tolling of the dead. Each lawyer has an obligation to use his head to keep the law on a forward course, if only in whatever niche of the law he occupies. In the process he must be on the alert to clear the air of whatever word-pollution he encounters. Each time he does so, he declares anew his faith that the mind counts.

I make here my own declaration of faith in the simplest way, in the limited area of my own experience and reflection. I want to clear the air of the growing befuddlement of information, calculated or addled, about the courts of the United States, which represent perhaps the fairest system of justice the world has ever known.

Befuddlement there has always been about our judicial system, but it was once a consequence of public indifference rather than of irresponsible attack. I learned early the depth of that indifference. The year was 1940, when I became a judge. The date is of some significance. It was a time when people in other countries had lost independent courts and had learned too late that they had lost the last sanctuary of their freedom. Their tragedy was remote from our own country, however. In this fortunate land, people could still be recklessly indifferent to their courts. The Dust Commanders that won the horse races of the day commanded public attention, not the advance sheets of judicial decisions.

The day after my appointment a radio quiz programmer posed a series of questions on people in the news. There was quick identification of a movie star, a jockey, and a baseball player. Then came the question that riddled everyone: Who was the newly appointed Justice of the Supreme Court of California? The news had been on the radio intermittently for two days, but plainly the average citizen was well tuned out of such information. Nor did he read editorials; had he done so, he would have read that it was highly unusual, and certainly to be regretted, that the judicial appointment had gone to a man who was virtually unknown except as a teacher of law. The editorial did take note of some optimistic predictions that the unknown would prove satisfactory, but somberly concluded that this remained to be seen. The public could not have cared less.

For years I cherished the hope that the public would take a real interest in its courts. I came finally to understand the skepticism of Chief Justice Vanderbilt of New Jersey, who once observed that the courts and the continuing process of judicial improvements were of little concern to anyone save such stalwarts as the League of Women Voters and the Boy Scouts. Even today there is little interest in learning about courts except as stops on commercial bus tours. In recent years the public has proceeded from indifference to hysteria about its judicial system, without ever understanding that what we become as a nation in the next generation depends in no small measure on what becomes of our still predominantly independent courts.

So it is not only timely but urgent that we take a look at the current hysteria and in the process at our own souls. We can concede real grievances: widespread delays in courts, antiquated procedures in some states, and the plague of politics in others. Such grievances could be readily remedies whenever bar associations and judicial councils impelled legislatures to set reform in motion. There would be need of only one help more, the sustained support, and I emphasize sustained, of editors and reporters.

It is one thing to identify a court procedure as archaic and another to remedy it. It is not so easy to counter the irrational attacks upon courts, particularly when they serve to divert public attention from all the ills that attend perennial warfare and from all the growing pains that attend the increasingly rapid succession of one revolutionary age after another.

Every troubled age has its scapegoat, but none thereby escapes its troubles. This country, in a universally troubled time, would do irreparable injury to itself if it continued to make a scapegoat of its courts, whose open and rational procedures are among the brightest of its achievements. The hue and cry has focused on rules of procedure in criminal cases that afford generous protection to the accused. Some cases generate publicity that feeds upon it-

self, begetting irresponsible charges either that the courts have a predilection for coddling criminals or that the courts have a predilection for depriving those suspected of crime of whatever due process is due them. The word-mongers have found a ready audience. A sensational diatribe following upon a sensational case is a double play at public expense that can run for months to packed homes.

There are few signs of any public understanding that judges themselves may have objective differences on some of the rules governing criminal cases as well as on some of the rules governing noncriminal cases, but that they are bound by their office to enforce established rules if there is not to be anarchy in the interrelated judicial system. Likewise there is little public awareness of the continuing revision to which time and experience subjects all rules. With each new judicial rule that strengthens guarantees against oppressive procedures, alarmists charge the courts anew with criminal-coddling. An atmosphere thick with coddling charges is rendered even thicker by the counter-irritating paeans in praise of courts as if they were embarked on a crusade to enlarge a variety of liberties ambiguously described as civil, as a bulwark against any and all incivilities of an imagined police state. Nothing could be more misleading, for the courts take no such initiative. Far from being crusaders, they must remain passively at attention, though clamor surround them, though it reach their very windows. A court has no authority to mix in any melee between those suspected of lawbreaking and the police. Only when others take the initiative in submitting a case to it can it focus its attention on the details of a particular problem. Only then can it utter words that become a rule, and even then, only within the severe constraints of law and custom that control jurisdiction.

In sum, no court can say what it pleases, let alone do what it pleases. It cannot even speak at all unless it is spoken to. One can hence note with some misgivings that the thin ranks of court defenders include zealots who ignore the sober reasoning of judicial opinions in their zeal to inflate judicial rules into soapbox slogans not only for liberté, egalité, fraternité, and the spacing or denial of paternité, but also for any other imaginable rights, privileges, immunities, and recreations of freewheelers with a bent for taking all the liberties they can.

A redeeming feature about such noise is that at least it suggests, in however addled a manner, that there are two sides to the question of judicial rules bearing upon trial procedures, in a debate still largely dominated by those who hurl diatribes against the courts. All too many in this dominant group are aware of how defenseless are their targets. Lawyers at least, and well-informed journalists, know that a judge cannot engage in a verbal free-for-all. He is reluctant to make even the most dispassionate answer to even

the most irresponsible diatribes. He can only hope that they may expend themselves in time. In any event their rabid phrases, defying legal analysis, lend themselves most appropriately to dissection by psychologists and semanticists.

The responsibility rests with lawyers less to join issue with irrational attacks than to clear the air for intelligent and well-reasoned critiques that are as essential to the development of the law as the judicial opinions themselves. Although that responsibility has been borne nobly by a small company of legal scholars, it is high time for reinforcements.

It is ironic that courts and police officers have been assaulted on opposite fronts in carrying out their common responsibility to keep the peace through law. Police officers have in recent times been indiscriminately denounced in odious terms, even when they have been enforcing the law with scrupulous lawfulness as to lawless conduct at large. Judges have likewise been indiscriminately denounced when they too have been enforcing the law lawfully as to outlawed conduct in police procedures. It is no tribute to the urbanity of the denouncers on either front that, for obscure reasons, their urban speech seems to be up against the walls of the barnyard.

There is more of an urban gloss in the recurring published attacks that are often patently well-financed, and at times anonymous. The attacker may do no more than insinuate that courts are to be thought of in the same paragraph with thieves and murderers. He may take an excerpt from a judicial opinion out of context, as a dog might bite off the head of an alphabet cracker. He may shave away crucial words. He may merely denounce the opinion as a cardinal sin. He may represent himself as an expert in law and egregiously misspell the name of the judge he attacks. He may count up to thousands of dollars to advertise his attacks in newspapers that monger his words without qualm on the basis of so much per line count. He will calculate the cost in terms of the mind counts, and in his book *counts* is a noun.

In contrast to such calculated attacks, there is understandable concern about crime among truly innocent bystanders. A judge has a responsibility, like others alert to the well-being of the law, to explain to the righteously indignant why they might become the ultimate victims if ever they succeeded in removing due process from traditional concepts of justice. Judges share the concern about crime. They are all too aware of the possibility that the guilty may occasionally go free when, for example, illegally obtained evidence against them is excluded. They are, however, also aware that our whole criminal law, however neglected in the past, is now in the process of a profound revision that should ultimately serve both justice and safety far better than either is now served. Thus the American Bar Association has embarked

on a thoroughgoing survey of the whole field. The American Law Institute is at work on a Model Code of Pre-Arraignment Procedure. Several states are already re-examining their criminal laws in the light of the Model Penal Code, one of the Institutes finest achievements.

Judges are aware that what is currently at stake in the enforcement of a rule is not the advantage to the accused in a particular case, an advantage that usually comes to naught upon retrial, but the security to be preserved for every one in the enforcement of constitutional guarantees. The understandably impatient law-abiders, who approve official retribution without restraint against wrongdoers, do not visualize themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history. It is for the judges, through the enforcement of judicial rules, to remind law-abiders that courts stand not only between them and the excesses of law-breakers, but also between them and the excesses of government. Thus the rule directed against unreasonable searches and seizures gives assurance to every law-abider of first-class protection for his first-class mail. He may take the right to such protection for granted, but it required trial and a judicial rule to vindicate it. A law-abider can grasp the significance to him of such rules by imagining how precariously situated he would be without them. Officers of the state could then lawlessly break open his mailbox as well as his mail; they could break down his door as lawlessly as his mailbox; they could seize his records and other belongings as lawlessly as they made entry; they could lawlessly install hidden microphones in his bedroom. More than one judge dismayed by the excesses of lawbreakers has also had reason to be dismayed by the excesses of government.

Articulate comment about the *Mapp* rule directed at unconstitutional searches and seizures was drowned out in the din about handcuffing the police. At best, complained the foes of the rule, it was "misguided sentimentality." Usually they denounced it as much worse, as a danger to "social safety" or even as an aid to a "predatory army." A relatively charitable comment that no "intelligent human being in all the world except a judge" would subscribe to such a rule, seems at least indirectly to concede that a judge can have intelligence, leaving to the reader the innuendo that it is occupationally warped.

There has been a great deal of woofing about that occupational warp. There is loud dismay that judges far removed from the jungle of crime are in earnest that the mantle of the Constitution falls becomingly even on the creatures who roam the jungle. There should be fewer tirades that in enforcing legal procedures as to creatures who have shown no respect for the rights of others, the judges have not only left the side of the angels but have

taken sides with the apes. There should be less assurance that the best way to deal with apes is to ape them.

Meanwhile, the conscientious judge, unlike a public oppressor or private evildoer or self-appointed avenger, continues to make haste slowly, fortunately for us all. Some who grow impatient with his painstaking concern in the conduct of a trial, however base the accused appears, dream of a high time for law-abiding citizens to take justice into their own hands and dream of thus stamping out evil. Were they to think twice, however, they might ask themselves which ordinary citizens they would select to take justice in hand. What courthouse procedures would they dispense with in the interest of being speedily brought to justice? If indeed there were speedy justice, would it hasten the end of all evil or in turn generate more?

Even in simpler times crime was a problem complicated enough to resist solution. Since the early days of the Republic alarmists have described the crime of their day as a wave, without any reminder that where there's a wave there's an ocean. Waves have been pounding against domestic tranquility since the Founding Fathers, aware of how lively a deadly sin could be, began the alphabet of undomesticated crime with the Scarlet Letter A. The gluttonous among them, the prideful, the covetous, the angry, the envious, the slothful, all these deadly sinners went on record against lust. This righteous company proceeded from flaming A's to firedoomed W's, and for the witches punishment was swift and severe enough to satisfy the most vengeful law-abiders. One can imagine that even the slothful who would bestir themselves for no other entertainment, would not miss the closing night of a witch who would go up in smoke.

Generation after generation the waves of crime went on pounding. The nineteenth century was no less violent than the eighteenth. In the relatively tranquil years of the early twentieth century, still tinged with mauve, crime regularly made headlines to break the peace. World War I came and went, but crime continued. The years of Prohibition from 1920 to 1933 put criminals in business and brought home the sorry lesson that crime pays when it consists of supplying prohibited goods or services to self-styled law-abiding citizens. When the era of Prohibition ended, crime continued, highlighted now by the dubious activities of those who had flourished on a law that purported law-abiders mocked. They were now as well able as the latter to hire legal counsel and they became the first-class citizens of crime, paying for buffer lawyers to counter police and prosecutors as no penniless or ignorant wretch could do. Another generation would pass before we recognized a right to counsel for all, and even then it took additional litigation to extend it to appeals.

Meanwhile the depression thirties came and went, and crime continued. World War II came and went, the Korean War came and went, and crime continued. The fifties ushered in the beginnings of an affluent society, but not the end of crime. We learned that it attended affluence as it had attended depression and the years of so-called normalcy.

Amid the vociferous and often irresponsible castigation of courts for their zealous watch on due process across the vicissitudes of time, we would do well to remember what a void the United States Supreme Court's rules have filled. There is some poetic justice in compelling state courts to resolve in more than provincial terms the problem of policing the community without oppressiveness. Solicitor-General Erwin Griswold, in a notable essay on The Long View, observed that if all state courts had taken the initiative in that regard there would have been less need for the United States Supreme Court to become involved in policing the police. There might have been little need at all, had state legislatures undertaken to formulate modern standards of police procedure, or had all police departments undertaken to raise their own standards. We could wish that modern legislatures, often abundantly equipped to carry the main responsibility for lawmaking, would undertake a massive modernization. Instead we must rue with Judge Friendly: *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't.* He laments that "the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed." Certainly courts are helpless to stay the maddening sequences of triumphal entry and sit-in. The cases that were fought all the way to Washington brought us slowly to the realization that the highest court in the land was moved to act, for better or worse, only after others failed to turn their minds to the problems that cried for remedy.

The most ironic attacks against courts are those that bemoan their lawmaking, sometimes as an encroachment upon the legislative function and sometimes as a departure from the doctrine of stare decisis. It is not easy to make sense out of these attacks, since a judge is bound to make law whenever he decides a case. Judicial lawmaking is a phrase woolly enough to torment any semanticist. If we agree that it should not shrink too much, as it may be doing in England, and that it should not stretch too much as it seems far from doing anywhere, how should we establish its most appropriate range?

After some thirty years on the bench, I find little ground for worry that judges, any more than lawyers or teachers, will become zealous to reach out for more responsibility than they now have. Judicial office has a way of deepening caution, not diminishing it. As judges analyze issues that have been

disputed every inch of the way, they learn to guard against premature judgment. Entrusted with decisions, bound to hurt one litigant or the other, they come to understand the court's responsibility in terms not of power but of obligation. The danger is not that they will exceed their power, but that they will fall short of their obligation.

Many forces constrain review within extremely narrow limits. The most immediate constraint is the controversy itself that calls for decision; even the unprecedented controversy automatically precludes any ambitious excursion beyond its own context. The normal controversy is so involved in precedent as to preclude the most timid flight of fancy. The judge's most serious problem is which of competing lines of precedent to follow. Far from having the freedom of the skies where plane the test pilots of the legislature, he is limited to the hardly delirious choice of plodding along one well-dug ditch or another—reflecting as he meekly plods that what he has inherited is indeed a narrow piece of the earth.

As if these constraints were not enough, tradition is also at work to insure caution. Thus a judge makes haste slowly to reveal when a ditch has come to a dead end. Thus also, he abides by the tenent that the law must lag a respectful pace back of popular mores not only to insure its own acceptance but also to delay legal formalization of community values until they have become seasoned.

The tenet of lag, strengthening the already great restraints on the judge, is deservedly respected. It bears noting, however, that it is recurringly invoked by astute litigants who receive aid and comfort from law that is safely behind the times with the peccadillos of yesteryear and has not caught up with their own. At the slightest sign that judge-made law may move forward, these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from antiquated legal lore.

A judge needs no more than forthrightness to make an overdue statement of the obvious. He may be deterred, however, by the prospect of also having to explain why it was not always so obvious, or if it was, why it failed of earlier recognition. Never forget that his explanation must persuade his colleagues, make sense to the bar, pass muster with the scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it. It is understandable when a judge faced with running such a gantlet marks time instead on the line of least resistance and lets bad enough alone.

Regardless of whether it is attended by abundant or meager materials, a case may present competing considerations of such closely matched strength as to create a dilemma. How can a judge then arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what?

He is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that anyone entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception. Disinterest, however, even disinterest envisaged on a higher plane than the emotional, is only the minimum qualification of a judge for his job. Then what more?

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented, an honest term to describe the stubbornly rational search for the optimum decision. Would we have it otherwise? Would we prefer the toss of the two-faced coin to the judgment of a judge who has made his mind count?

As one who has long seen the judicial process at close range, I have some basis for confidence in the sturdiness of its procedures. I also know, however, how hard it is to stand with reason as your only weapon against extremists on all sides. Moreover, though extremist camps appear temporarily at war with each other, their common scorn for the law might in time impel them to join forces to destroy it and so put our minds to death. At the moment they are in the limelight. Countless bystanders are silent, and no one knows whether they will in time marshal their strength for or against one extreme group or another. Come what may, it remains with independent judges to make their minds count by keeping vigil over fair procedures. They will succeed in that vigil only if we make our own minds count against the ene-

mies of reason, the worst enemies a free country could have. It is for the lawyers to take the lead on high roads or lowlands against the mongers of confusion and fear, the ugly substitutes for law and freedom, and to reason why every inch of the way.