(hereditary and otherwise) in the House of Lords), for *four full centuries* have largely beneficially influenced British religious (Anglican), political, moral, cultural, and social life greatly to the present day. A brief sketch of the more prominent of those descendants may suffice to put something into his credit ledger, in an effort to salvage at least something of the spirit of the maxim, *de mortuis nihil nisi bonum*,[172] which (it must be confessed) has not been honored very well here.

The *second* Baron,[173] the *elder* son (by Mary Cheke), was made *Earl of Exeter*[174] in 1605 by the Stuart King James I of England and VI of Scotland. His senior descendant (in the eighth generation) by male primogeniture, Henry Cecil (1754–1804), was made *Marquess of Exeter*[175] in 1801 by the Guelph (or Hanoverian) King George III of the United Kingdom of Great Britain and Ireland, largely for his acts of charity. The first Marquess's senior descendant (in the fifth generation) by male primogeniture, Lt. Col. Sir David George Brownlow Cecil (1905–1981), the *sixth* Marquess, was a great athlete, being the first person ever to run around the Great Courtyard of Trinity College, Cambridge, in the time it takes the Trinity Clock truly to strike 12:00,[176] a feat shown in *Chariots of Fire*[177] (but falsely credited, with full knowledge of the error—perhaps out of invidious class prejudice—to Olympic champion Harold Abrahams), and who once raced entirely around the upper promenade

172. I.e., "speak not ill of the dead," or, more literally, "speak only well of the dead." Unfortunately (for him, anyhow), a similar "family credit" may not be given to Lord Essex, *see supra* note 161, great-great-great-uncle of the dark and icy rebel, usurper, regicide, and tyrant, Oliver Cromwell (1599–1658), betrayer both of his King and his Country, and *quondam* "Lord Protector" of England, Scotland, and Ireland, the memory of whose depredations, massacres at Drogheda (whose governor (Sir Arthur Aston), for example, savagely was beaten to death with his own wooden leg) and at Wexford, and gratuitous inhumanity are unlikely to perish "Now and in time to be, / Wherever green is worn." W.B. YEATS, *Easter, 1916*, *in* THE COLLECTED POEMS OF W.B. YEATS 207, 209 (1933). Still, the Earl (Cromwell) bests the Baron (Burghley) at least in that *he* is known actually to have performed one sincere act; i.e., one act not motivated by lucre or calculated to curry political favor. *Pace* the incongruous mention of Thomas as a martyr for Protestantism in John Foxe's screed, *see* JOHN FOXE, ACTES AND MONUMENTS (1563), *available at* http://www.hrionline.ac.uk/johnfoxe/index.html, and the depiction of him on the massive and austere 1909 *Mur des Réformateurs* in Geneva's *Parc des Bastions*, Thomas Cromwell at the last publicly confessed his Catholicity from the scaffold (July 28, 1540), much to the annoyance of the Protestant King Henry VIII, who had engineered his execution.

173. Sir Thomas Cecil (1542–1623).

174. Peerage of England.

175. Peerage of the United Kingdom.

176. Sir Walter Borey Fletcher's seemingly successful run in the 1890s, of course, must be discounted because it occurred when the old clock took five seconds longer to strike 12:00.

177. (Warner Bros. 1981). The accomplished actor, Mr. Nigel Havers, plays the role of a fictitious "Lord Andrew Lindsay," which is based loosely on the life of the sixth Marquess.

deck of the *Queen Mary*, in street clothes, in just under sixty seconds.[178] Under his courtesy title of Lord Burghley, he competed in the 1924 Paris Summer Olympic Games in the 110-meter hurdles, won a gold medal in the 400-meter hurdles on July 30, 1928, in the Amsterdam Summer Olympic Games,[179] and, in the 1932 Los Angeles Summer Olympic Games (while a Member of Parliament), finished fourth in the 400-meter hurdles[180] and helped to win a silver medal in the 4 x 400-meter hurdles relay. Among his many offices, he was elected to the House of Commons (1931–1943), served as Royal Governor of Bermuda (1943–1945), and was Vice President of the International Olympic Committee (1954–1966).

Sir Robert Cecil (born in 1563)—dwarf, hunchback, and immensely able *younger* son of the first Lord Burghley,[181] than whom he was, perhaps, *slightly* less sinister—was the Crown's principal minister from 1598, holding several offices until his death in 1612, and was created *Baron Cecil of Essendon* in 1603 by King James I and VI, of whom he was a favorite and who created him *Viscount Cranborne* in 1604 and *Earl of Salisbury* in 1605.[182] His senior descendant (in the sixth generation) by male primogeniture, Sir James Cecil (1748–1823), the *seventh* Earl, held several public offices, for which King George III created him *Marquess of Salisbury* in 1789.[183] *His* senior descendant (in the second generation) by male primogeniture, Robert Arthur Talbot Gascoyne-Cecil (born February 3, 1830), the redoubtable *third* Marquess, served brilliantly as Prime Minister of the United Kingdom three times,[184] and as Foreign Secretary thereof four times,[185] and held a

178. *See Hurdler in a Hurry*, TIME, Sept. 6, 1943, http://www.time.com/time/printout/0,8816,802951,00.html.

179. Setting an Olympic record at 53.4 seconds.

180. Besting his own 1928 record at 52.2 seconds.

181. By his second wife, Mildred Cooke, whom he married after the death of Mary Cheke, his first wife.

182. All three in the Peerage of England. This last title was bestowed upon him in the morning of the day his half-brother was created Earl of Exeter.

183. Peerage of Great Britain.

184. June 23, 1885–January 28, 1886; July 25, 1886–August 11, 1892; and (with an intervening general election in October of 1900, popularly known as the "Khaki Election," in which his (Conservative) party obviously won) June 25, 1895–July 11, 1902, for a total of 13 years, 252 days—the fourth-longest total period of service of any British Prime Minister. Andrew Roberts concludes that Lord Salisbury is the model for Mr. Trollope's Prime Minister Lord Drummond, who appears in his works *The American Senator*, *Phineas Redux*, *The Prime Minister*, and *The Duke's Children*. Roberts, *supra* note 144, at 13; *see generally* ANTHONY TROLLOPE, THE AMERICAN SENATOR (David Skilton ed., The Trollope Soc'y ed. 1994) (1876).

The longest twentieth-century tenure for a British Prime Minister (11 years, 209 days; having led her Conservatives to victory in three consecutive general elections) was that of Margaret

string of other high public offices.[186] During Lord Salisbury's tenures as Prime Minister some *six million* square miles and *one hundred million*

Thatcher, whose name (for some reason, unfathomable to the author) is frequently given incorrectly. When Miss Margaret Hilda Roberts married Mr. Denis Thatcher in 1951, she assumed her husband's name as "Margaret, Mrs. Denis Thatcher" (or "Margaret Thatcher," for short). Upon being admitted to the Privy Council in 1970 (and being a Member of Parliament), she became known legally as "The Right Honourable Margaret Thatcher, MP." In 1991, Mr. Thatcher was created a baronet, and she (having retired from the House of Commons and received the Order of Merit) thereupon became legally "The Right Honourable Dame Margaret Thatcher, OM, PC" (and, less formally, "Lady Thatcher"), as wife of Sir Denis Thatcher, Bart., MBE. Following her elevation by Her Majesty to the peerage of the United Kingdom of Great Britain and Northern Ireland in 1992, she acquired the legal style "The Right Honourable The Baroness Thatcher of Kesteven, OM, PC" (less formally, "The Lady Thatcher," or "Baroness Thatcher," or simply "Lady Thatcher"), in her *own* right (i.e., without reference to her late husband's baronetcy), which style remains hers today (other than for "LG" before the "OM," which she obtained in 1995, when she was made a Lady Companion of the Order of the Garter). Some, perhaps unfamiliar with British usage, mistakenly refer to her as "Lady Margaret Thatcher," a style to which (of course) she is not and never has been entitled, not being the great-granddaughter, in the male line, of a sovereign; or the daughter of a duke, or of a marquess or an earl (by right or by courtesy).

185. April 2, 1878–April 21, 1880 (under Prime Minister Benjamin Disraeli (i.e., the first Earl of Beaconsfield)); June 23, 1885–January 28, 1886; January 1887–August 11, 1892; and June 25, 1895–November 12, 1900 (these last three, obviously, when he was also Prime Minister).

Over and above his long catalogue of written witticisms, Lord Beaconsfield was a master of the riposte. Although the (apparent) non-written character of these witticisms makes their authenticity (and, sometimes, their precise wording) difficult to establish conclusively, the sayings widely attributed to him (which occasionally are also attributed to others, *see, e.g.*, THE YALE BOOK OF QUOTATIONS 281–82 (Fred R. Shapiro ed., 2006); in any event, he may have re-coined them), seem to ring essentially true. For example, a heckler's catcall—"Vote for you! I'd rather vote for the Devil!"—when he was on the hustings, standing for election to Parliament early in his career, being met with the unfazed: "Quite so. . . . And if your friend is not standing?" Or, after a large public banquet at which all the solid fare had arrived cold at table, his comment on first tasting the just-poured champagne: "At last, something warm." Or his droll reply to a political opponent's "I predict, Sir, that you will die either by hanging or of some vile disease": "That all depends, Sir, upon whether I embrace your principles or your mistress." Or his observations about his archrival, Sir William Ewart Gladstone of the Liberal Party: "If Gladstone fell into the Thames, that would be a misfortune; and if anybody pulled him out, that, I suppose, would be a calamity," and "William Gladstone has not a single redeeming defect." Or his bland pronouncement: "The most dangerous strategy is to jump a chasm in two leaps."

The author could extend the foregoing list indefinitely, but declines to do so, lest he distract the gentle reader from the topic of this work. *Cf.* ERNEST BRAMAH, KAI LUNG'S GOLDEN HOURS 200 (1972) ("But however entrancing it is to wander unchecked through a garden of bright images, are we not enticing your mind from another subject of almost equal importance?"). Nor (of course) does the author wish otherwise to lay himself open to a suggestion of lack of discipline in his writing or—still less—engage in what Professor Arthur Austin rightly calls "Footnote Skulduggery and Other Bad Habits." Austin, *supra* note 72, at 1016–21. Unfortunately—Christopher Wren's epitaph in St. Paul's comes to mind—it may be too late. *Compare id.* at 1024 (categorically describing the "worst manifestation" of one species of those Bad Habits), *with id.* at 1010 n.2 (a particular (and inspirational) example of the "manifestation"). *See also* Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L.J. 1093, 1116 n.☺ (2005) (herein used as a model).

186. Lord Salisbury was succeeded, the day after his last resignation as Prime Minister (on July 11, 1902), shortly before his death (August 22, 1903), by his own nephew, Sir Arthur James

subjects were added to the Crown. Additionally, Salisbury,[187] the capital of the former British colony of Southern Rhodesia,[188] was named after

Balfour (1848–1930), who served as Prime Minister until December 4, 1905, who (on May 5, 1922, the day of his retirement from the House of Commons) was created *Viscount Traprain* and *Earl of Balfour*, in the peerage of the United Kingdom, by King George V, and who received the further (extraordinary) distinction of a encomium from the great Msgr. Knox: "History will revere the name of one of our present statesmen, whose *obiter dictum* used often to be quoted, 'I never read the papers.'" RONALD KNOX, A SPIRITUAL AENEID 151 (new ed. 1958) (footnote omitted). As Foreign Secretary (1916–1919), he authored the fateful, so-called "Balfour Declaration," contained in a November 2, 1917, letter to Lionel, second Baron Rothschild (1868–1937), stating:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), *in* RONALD SANDERS, THE HIGH WALLS OF JERUSALEM: A HISTORY OF THE BALFOUR DECLARATION AND THE BIRTH OF THE BRITISH MANDATE FOR PALESTINE, at xvii (1984).

187. Now called "Harare." The peerage designation did not change when the official name of this city was altered. In connection with this almost-surprising observation (given the modern self-congratulating affectation that the *English* have for certain (often foreign) terms should change (or be spelled or pronounced differently) from traditional practice), the author can hardly improve upon Henry Watson Fowler's entry for "Mahomet, Mohammedan, &c." in his *A Dictionary of Modern English Usage*:

> The popular forms [in England] are *Mahomet(an)* . . . ; the prevailing printed forms are *Mohammed(an)*.
>
> The worst of letting the learned gentry bully us out of our traditional *Mahometan* & *Mahomet* (who ever heard of *Mohammed & the mountain*?) is this: no sooner have we tried to be good & learnt to say, or at least write, *Mohammed* than they are fired with zeal to get us a step or two further on the path of truth, which at present seems likely to end in *Muhammad* with a dot under the h; see DIDACTICISM, PRIDE OF KNOWLEDGE. The literary, as distinguished from the learned, surely do good service when they side with tradition & the people against science & the dons. *Muhammad* should be left to the pedants, *Mohammed* to the historians & the like, while ordinary mortals should go on saying, & writing in newspapers & novels & peoms & such general reader's matter, what their fathers said before them.
>
> The fact is that we owe no thanks to those who discover, & cannot keep silence on the discovery, that *Mahomet* is further than *Mohammed*, & *Mohammed* further than *Muhammad*, from what his own people called him. The Romans had a hero whom they spoke of as *Aeneas*; we call him that too, but for the French he has become *Énée*; are the French any worse off than we on that account? It is a matter of like indifference in itself whether the English for the Prophet's name is *Mahomet* or *Mohammed*; in itself, yes; but whereas the words *Aeneas* & *Énée* have the Channel between them to keep the peace, *Mahomet* & *Mohammed* are for ever at loggerheads; we want one name for the one man; & the one should have been that around which the ancient associations cling. It is too late to recover unity; the learned, & their too docile disciples, have destroyed that, & given us nothing worth having in exchange.

H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 338–39 (1926).

him. With the singular exception of Lord Home (October 19–23, 1963),[189] Lord Salisbury is the last British Prime Minister to date to have

188. Now officially calling itself "Zimbabwe," and originally named for Mr. Cecil John Rhodes (1853–1902), diamond-mining magnate, Empire builder, and founder of the Rhodes Scholarships.

189. The four-day tenure as Prime Minister of Alexander Frederick Douglas-Home (born July 2, 1903), from the House of Lords was very different from Lord Salisbury's, but quite noteworthy nonetheless: On July 11, 1951, when his father died, this Scots nobleman was dispossessed of his seat in the House of Commons (to which he first had been elected on October 27, 1931) by operation of law, and became, by right of succession, the fourteenth *Earl of Home* and fourteenth *Lord Dunglass* (both in the peerage of Scotland, by creation of King James I and VI in 1605), third *Baron Douglas* (peerage of the United Kingdom, by creation of the Hanoverian Queen Victoria in 1875), and twentieth *Lord Home* (peerage of Scotland, by creation of the Stuart King James III of Scotland in 1473), as well as (the author believes) *Lord Home* (or *Hume*) *of Berwick* (creation of King James I and VI in 1605; whether this peerage legally is an English Barony or a Scots Lordship is a matter of some dispute, although the latter appears to be more likely). Shortly after succeeding to these titles, by writ of summons he took his ancestral seat in the House of Lords, which seat he occupied, quite comfortably, for twelve years. This soon was to change. When Prime Minister Maurice *Harold* Macmillan's thitherto-firm grip on the electorate began slipping in late-1961/early-1962, on July 13, 1962, he sacked seven members of his own Cabinet in an effort to shore up his ministry. This dramatic effort, however (whose principal lasting consequence seems to have been Liberal Party opponent John *Jeremy* Thorpe's pitch-perfect quip about it ("Greater love hath no man than this, that he should lay down his friends for his life" (*cf. John* 15:13))), succeeded miserably. Thus, it was a weak and ill-braced government that received the body-blow, not long after, of the infamous scandal of forty-six-year-old Secretary of State for War John Dennis Profumo's adultery with nineteen-year-old Christine Keeler (and subsequent lying about it): In the wake of these events came the stunning October 18, 1963, resignation of the Prime Minister, followed the very next day by Lord Home's suddenly finding himself in that office. But the Left pronounced itself incapable of bearing a Prime Minister from the Upper House, and intense political pressure forced him to disclaim all of his peerages for life, which he did on October 23, so that he might govern from the House of Commons rather than the House of Lords. For fifteen days thereafter he was in the remarkable and unprecedented position of being Prime Minister, but having *no* seat in *either* House, until November 7, when he won a special by-election as a Conservative Party member for a seat from the constituency of Kinross and West Perthshire. He served as Prime Minister (being known as Sir Alec Douglas-Home) until October 16, 1964. On November 7, 1974, after his second retirement from the House of Commons (September 18, 1974), Her Majesty created him *Baron Home of the Hirsel* (in the peerage of the United Kingdom), for life, and thus restored him to a seat in the House of Lords until his death in 1995.

Mention having been made of the fifth Baron Profumo's tawdry scandal, simple justice requires mention also of his gallant service and distinguished bravery on the battlefront in World War II (while a sitting Member of Parliament) and of how he edifyingly spent the remaining near-half-century of his life. Filled with shame and remorse for his adulterous liaison (which lasted a few weeks in early 1961) and for falsely having denied the fact of it to his family, to Parliament, to the government, and to the public, he confessed all—first to his wife (the popular, talented, and exceptionally beautiful actress, Babette Valerie Louise Hobson, who played Edith d'Ascoyne in *Kind Hearts and Coronets*, *see supra* note 45, and to whom he was married from 1954 until her death in 1998), and then to the government. He then immediately applied for, and was appointed to, the purely nominal office of Crown Steward and Bailiff of the three Chiltern Hundreds of Stoke, Desborough, and Burnham, by which action he legally was able to resign his seat in the House of Commons (which he did on the same day), thereby leaving public life forever. Shortly after his humiliating disgrace, and seeking to atone for his actions, he quietly made his way to Toynbee Hall (the original settlement house, in London's East End, which serves drug addicts and the urban poor

governed from the House of *Lords*, rather than the *Commons*.[190] Four of his sons reached the House of Lords (only one by inheritance, and he arguably was the most able of them), two were elected to the House of Commons, and all seven of his children who lived to adulthood (and several grandchildren and great-grandchildren) are reckoned eminences in British religious (Anglican), public, military, literary, political, social, and academic life.[191]

and mentally ill) and volunteered specifically to clean toilets and floors, wash dishes, and do other menial work. He continued there in various capacities (but always as a tireless hands-on volunteer without any compensation whatsoever), several days each week, *for forty-three years*, until his death at ninety-one, greatly revered and loved by those who knew him (including his longtime friends, Lady Thatcher and Her late Majesty, Queen Elizabeth, the Queen Mother). For as long as he lived, the press and other media frequently and aggressively hounded him over the scandal, baying incessantly and playing it over and over again in the public eye. But never once in all that time did he or his wife (also an indefatigable volunteer for charity) ever speak of the matter in public or ask that it be dropped, or—still less—attempt any justification or defense or pitch for public sympathy, choosing instead to bear all in silence and with stoic dignity.

190. Of the thirty-two individuals who served as British Prime Minister from the first Lord Orford (i.e., Sir Robert Walpole) (served 1721–1742, and generally reckoned as the first Prime Minister, in the modern sense) to Lord Salisbury, *twenty-one* (including many of the most distinguished) served some or all of their tenures as Prime Minister from the House of Lords. "Never more, never more"—it seems. *Cf.* H. Belloc, *Tarantella*, THE CENTURY, Apr. 1921, at 767. The gratuitous violence (and incalculable injury) done to the British Constitution through Prime Minister Anthony Charles Lynton "Tony" Blair's repeated, unnecessary, and arbitrary (and, alas, all-too successful) attacks on the Crown, and on the independence and the very institution of the House of Lords—with no clear replacement contemplated, despite the ready availability of considerable scholarly, lucid, and careful reflection on the subject, *see, e.g.*, P.A. BROMHEAD, THE HOUSE OF LORDS AND CONTEMPORARY POLITICS: 1911–1957 (1958)—during his ten years in Downing Street, cannot fail to elicit sadness and worry in lovers of liberty, constitutional law, and structural checks on government power. *See* Quentin Letts, Editorial, *Lights Out for the Lords*, WALL ST. J., Mar. 9, 2007, at A15.

191. Several *other* sons in the two branches of the Cecil family also were created peers for their services to the Crown: e.g., *Baron Cecil of Putney* and *Viscount Wimbledon* (English peerages bestowed, respectively, by the Stuart King Charles I of England and Scotland, in 1625 and 1626, upon the Hon. Sir Edward Cecil (1572–1638), third son of the first Earl of Exeter); *Viscount Cecil of Chelwood* (United Kingdom peerage bestowed by King George V in 1923 upon Lord (Edgar Algernon) Robert Gascoyne-Cecil (1864–1958), third son of the third Marquess of Salisbury, and recipient of the Nobel Peace Prize in 1937); *Baron Rockley* (United Kingdom peerage bestowed by King George V in 1934 upon Sir Evelyn Cecil (1865–1941), eldest son of Lt. Col. Lord Eustace Brownlow Henry Cecil (1834–1921), third son of the second Marquess of Salisbury); and *Baron Quickswood* (United Kingdom peerage bestowed by the "Windsor" King George VI of the United Kingdom of Great Britain and Northern Ireland in 1941 upon Lord Hugh Richard Heathcote Gascoyne-Cecil (1869–1956), fifth son of the third Marquess of Salisbury). Also, through the 1885 marriage of Col. Lord William Cecil (1854–1943), second son of the third Marquess of Exeter, to the eventual *Baroness* (in her own right) *Amherst of Hackney* (i.e., Mary Rothes Margaret Tyssen-Amherst) (1857–1919), the Cecils acquired *that* United Kingdom peerage as well (created by Queen Victoria in 1892), in the person of William Alexander Evering Cecil, (1912–1980) (who, as the eldest son of the couple's eldest son (Capt. the Hon. William Amherst Cecil (1886–1914), killed in action in World War I), became the third Baron upon his paternal grandmother's death), and still hold it.

Anyhow, elaborating on Lord Coke's recollection of Lord Burghley's exchange with Queen Elizabeth, Dean Roscoe Pound, offered this explanation of the motto:

> The matter is very simple indeed. The "pro" goes both with the noun and the verb. The motto is taken from the commencement of a pleading in a proceeding by the Attorney-General at common law. . . . [U]ntil the reign of George the Second, all pleadings were in Latin. The Attorney-General began, "Now comes so and so, Attorney-General, who prosecutes on behalf of our Lord, the King." In the reign of Elizabeth, of course, this would have been "who prosecutes on behalf of our Lady, the Queen." Domina Justitia—our Lady Justice[192]—was substituted for our Lady the Queen, or our Lord the King. In other words, the seal asserts that the Attorney-General prosecutes on behalf of justice. This would seem a very appropriate motto for the Federal Department of Justice.

The foregoing catalogue does not include those who, on their own merits, were called to the House of Lords in one of their fathers' subsidiary peerage titles; for example, the current (seventh) Marquess of Salisbury (i.e., Robert Michael James Gascoyne-Cecil), whom the Queen created a peer in his own right (as the thirteenth Baron Cecil of Essendon (though he remained more commonly known by his courtesy title of Viscount Cranborne)), by writ of acceleration (April 29, 1992), conferring on him a second (life) peerage (as the Baron Gascoyne-Cecil (United Kingdom) on November 17, 1999), all before he succeeded to all of his father's peerages on the latter's death (July 11, 2003).

192. The Lady (or goddess of) Justice, whose administration was called by President Washington in his letter to Edmund Randolph, *see supra* note 18, "the firmest pillar of good government," and who is frequently depicted as a blindfolded woman carrying scales in one hand and a drawn sword in the other, is a Greek mythological character whose name is *Themis*, which means "right," "order," or "custom" (i.e., what is or is not done), and who personifies Divine (i.e., perfect) Justice. Hesiodic theogony (late eighth century B.C.) describes her as daughter of *Uranus* (meaning *Heaven*), and his mother *Gaia* (meaning *Earth*), and thus, of course, one of the *Titans* (meaning *elder/great/giant gods*); she was the wife, before *Hera* (probably meaning *the Lady*), of her nephew *Zeus* (meaning *God*), was his constant counselor, and by him was the mother of the *Horai* (meaning the *Hours*, one of whom was *Dikê* (meaning *Human* (i.e., *imperfect*) *Justice*, a figure sometimes confused with her mother)) and the *Moirai* (meaning the *Fates*). *See* FIFTIETH ANNIVERSARY, *supra* note 8, at 33; 22 NEW INTERNATIONAL ENCYCLOPÆDIA 177 (2d ed. 1930); Michael E. Gehringer, *Questions and Answers*, 73 LAW LIBR. J. 740, 744–46 (1980); John W. Heckel & Kathleen G. Farmann, *Questions and Answers*, 52 LAW LIBR. J. 232, 233–34 (1959); Lorraine A. Kulpa, *Questions and Answers*, 64 LAW LIBR. J. 246, 249–50 (1971); Letter from Rachel Hecht, Librarian, Tax Div. Library, to William French Smith, Att'y Gen. (Feb. 18, 1981) (on file at Dep't of Justice Main Library) (quoting Ivan Sipkov, Chief of the European Law Division in the Law Library at the Library of Congress). Interestingly, the *first* Congressional committee to devise the seal of the United States, *see supra* note 117 and accompanying text, proposed, as the supporter *sinister* of their device for the arms of the United States, "the Goddess Justice bearing a Sword in her right hand and her left a Balance." PAPERS NO. 23, *supra* note 57, at fol. 143; 22 JOURNALS, *supra* note 57, at 690 (transcription of *Papers No. 23*); HUNT, *supra* note 57, at 115.

> I remember reading Mr. Easby-Smith's account of this and it seemed to me very baffling on this point. The passage in Coke's Third Institute means that when the Lord Treasurer introduced Coke as Attorney-General to Queen Elizabeth he said in Latin, "Here is your Attorney-General qui pro domina regina sequitur", that is, who prosecutes for our Lady the Queen[.] Elizabeth, who was an excellent scholar, answered, "It should be, Attorney-General who prosecutes for our Lady the Truth."[193]

Alternative interpretations of the motto—some grammatically suspect, others more-or-less literal, but none inappropriate for the Department—have been advanced.[194] Following Dean Pound, however, and the Department's tradition, the most authoritative Departmental

193. Letter from Roscoe Pound, Dean, Harvard Law School, to Albert Levitt, Special Assistant to the Att'y Gen. (Oct. 2, 1933), *in* THE SEAL OF THE DEPARTMENT, *supra* note 3, at 3 (footnote added); *see* CUMMINGS & MCFARLAND, *supra* note 4, at 522b; *see also* 200TH ANNIVERSARY, *supra* note 14, at 36–37; FIFTIETH ANNIVERSARY, *supra* note 8, at 48; *The Story of the Seal of the Department of Justice*, *supra* note 159 (citing postscript signed "P.A.C." and dated Feb. 5, 1930, to "D.J. File 44-9-2," possibly a later version of Memoradum by James W. Baldwin, *supra* note 15, which contains no such postscript; the author did not find any copy of "D.J. File 44-9-2" in his personal, page-by-page search of the most likely Departmental files held by the Nat'l Archives and Records Administration); *Puzzled*, *supra* note 5, at B5 (recounting Dean Pound's explanation of the meaning of the motto); Thornburgh, *supra* note 1, at 1–2; *cf.* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940) ("a good prosecutor . . . seeks truth and not victims").

194. *E.g.*, 200TH ANNIVERSARY, *supra* note 14, at 37 ("[Who] prosecutes on behalf of justice."); EASBY-SMITH, *supra* note 2, at 14 ("Who sues for the Lady Justice" or "Who follows Justice for mistress."); FIFTIETH ANNIVERSARY, *supra* note 8, at 48 ("[W]ho pursues (justice) on behalf of Lady Justice (the Queen)."); OFFICE OF THE ADMIN. ASSISTANT TO THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE BUILDING, at app. (1960) [hereinafter JUSTICE BLDG.] ("[H]e who rules aids justice."); Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 545 n.31 (1996) ("Those Who Strive for the Sake of Lady Justice."); Robert J. DeSousa, *Opening Remarks*, 9 WIDENER J. PUB. L. 207, 207 (2000) (stating "He Who Does Justice in the Name of the Queen or in the Name of Lady Justice," although acknowledging it as "roughly translated" and stating that it shows "that government lawyers were thought to be pursuers of justice."); Sanches, *supra* note 7 ("Who prosecutes on behalf of the sovereign power" or "Who prosecutes on behalf of the people."); Letter from Rachel Hecht to Att'y Gen. William F. Smith, *supra* note 192 ("[I]n whole compliance . . . with the lady Justice . . . ." (quoting Ivan Sipkov, Chief of the European Law Division, Law Library, Library of Congress)); Letter from Arthur H. Leavitt to Att'y Gen. Homer S. Cummings, *supra* note 6, at 9 ("Who follows justice as his mistress."); Letter from Albert Levitt to Roscoe Pound, *supra* note 3, at 2 ("[W]ho strives after justice for the sovereign."); Thornburgh, *supra* note 1 ("[W]ho do 'follow justice for a mistress.'"). The "who" in all the foregoing, overall, refers to the Attorney General, and thus, by extension, the Department of Justice. *See* Thornburgh, *supra* note 1, at 2; *see also* Robert B. Troutman, Address to the Judicial Conference for the Fifth Circuit: The United States as a Litigant (May 30, 1952), *quoted in* Parr v. United States, 225 F.2d 329, 338–39 n.12 (5th Cir. 1955) (Cameron, J., dissenting) ("Liberally translated, 'The Department of Justice Prosecutes in Behalf Of Our Lady Justice[.'"]).

opinion[195] is that the motto refers to the Attorney General, and thus, by extension, to the entire Department,[196] "*who prosecutes on behalf of justice*" (or, more literally, "*who prosecutes for Lady Justice*")—an apt declaration of the Department's basic purpose and ideal.

The motto's conception of the prosecutor (or government attorney) as being the servant of justice itself finds concrete expression in English in a much-celebrated inscription—*THE UNITED STATES WINS ITS POINT WHENEVER JUSTICE IS DONE ITS CITIZENS IN THE COURTS*—in the above-door paneling in the ceremonial rotunda anteroom just outside the door to the Attorney General's office in the Department of Justice Main Building in Washington, D.C. Surrounding this inscription (despite its brevity) is a cloud of confusion as to its source, its text, its location or appearance, and its authority or weight. Before proceeding, the author stresses that he personally went to that anteroom at 3:35 p.m. on March 20, 2003, and copied the text above into his notebook; anything else aside, he attests that *that* text may be found, carved into plain, unpainted wood, all in upper-case letters (about four inches tall), immediately above the doors, at *that* location, starting on the south panel of the octagon and proceeding clockwise, literally as follows (including the mullets): (1) (south panel) "THE ★ UNITED"; (2) (south-west panel) "STATES ★ WINS"; (3) (west panel) "ITS ★ POINT"; (4) (north-west panel) "WHENEVER"; (5) (north panel) "JUSTICE ★ IS"; (6) (north-east panel) "DONE ★ ITS"; (7) (east panel) "CITIZENS ★ IN"; and (8) (south-east panel) "THE ★ COURTS[.]"

As with the motto on the Department's seal, the *source* of the inscription appears never to have been fully established. Solicitor General Simon Ernest Sobeloff said the inscription came from a *dictum* of Solicitor General Lehmann's that "the Government wins its point when justice is done in its courts," but he cites to no source.[197] Although

195. *See* 200TH ANNIVERSARY, *supra* note 14, at 36–37; CUMMINGS & MCFARLAND, *supra* note 4, at 522b; *see also* FIFTIETH ANNIVERSARY, *supra* note 8; JUSTICE BLDG., *supra* note 194; Letter from Roscoe Pound to Albert Levitt, *supra* note 193.

196. *See supra* note 194.

197. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 ABA J. 229, 229 (1955) ("The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."); *see also* Brady v. Maryland, 373 U.S. 83, 87 & n.2 (1963) (same assertion, citing Gen. Sobeloff); Trout v. Garrett, 780 F. Supp. 1396, 1420–21 & nn.59–60 (D.D.C. 1991) (same, and noting in passing the difference (otherwise uncommented upon by Gen. Sobeloff or the *Brady* Court) between the *dictum* and the carved

long associated with his beloved heartland State of Missouri, Gen. Lehmann was Prussian-born and a native speaker of German (a language whose verb conjugations are much more articulated than those of modern English), coming to English only as a formally learnt, second language. The author does no more than speculate, but the grammatical correctness of the verb conjugation and possessives in the dictum quoted by Gen. Sobeloff (unlike the grammatical state of carved inscription), coupled with its greater simplicity in comparison with the inscription, may argue for the accuracy of the dictum's attribution to Gen. Lehmann and as the original source for the text of the inscription.

Varying on this theme, some authors assert that "it was . . . Solicitor General . . . Lehmann[] who wrote" the text of the carved inscription.[198] Supreme Court Justice Felix Frankfurter was content to suggest merely: "I *believe* [that Gen. Lehmann] was the author" of that text.[199] The court in *King v. United States*[200] went further, asserting that Gen. Lehmann used the text of the inscription in a brief filed in the Supreme Court, and citing Justice Frankfurter's article for that proposition, although that article does *not* support it. Lincoln Caplan makes the same assertion the *King* court does, citing as apparent support an interview with "Mark Sheehan, Office of Public Affairs, Justice Department, on October 22, 1986."[201] James L. Cooper's *The Solicitor General and the Evolution of Activism*[202] echoes Mr. Caplan's assertion, and, in turn is followed by David M. Rosenzweig's note, *Confession of Error in the Supreme Court by*

inscription); Bresler, *supra* note 194, at 538–39 & nn.7 & 9, 545 n.31 (providing a short, but careful discussion).

198. 1 Op. Off. Legal Counsel 228, 231 (1977) (citing no source); Waxman, *supra* note 20, at 17 & 25 n.113 (same assertion, citing *Brady*—which does *not* support it—with some acknowledgment of paraphrase); *see also* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 17 & 287 n.43 (1987); Drew S. Days [Solicitor General], *The Interests of the United States, the Solicitor General and Individual Rights*, 41 ST. LOUIS U. L.J. 1, 1–2 (1996) [hereinafter Days, *The Interests of the United States*] (same assertion, but misspelling "Lehmann" as "Lehman" throughout); Drew S. Days III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 691 (1998) [herinafter Days, *Executive Branch Advocate*] (same); Jeremy L. Carlson, Commentary, *The Professional Duty of Prosecutors to Disclose Exculpatory Evidence to the Defense: Implications of Rule 3.8(d) of the Model Rules of Professional Conduct*, 28 J. LEGAL PROF. 125, 126 & n.13 (2004) (same assertion, citing *Brady*—which does *not* support it); James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 676 n.8 (1990) (which citations, though without much foundation, *do* support it).

199. Felix Frankfurter, *The Government Lawyer*, 18 FED. B.J. 24, 27–28 (1958) (emphasis added).

200. 372 F.2d 383, 396 n.10 (D.C. Cir. 1966).

201. *See* CAPLAN, *supra* note 198, at 17, 287 n.43.

202. Cooper, *supra* note 198, at 676 n.8.

the Solicitor General[203] and Judge William M. Hoeveler's *Ethics and the Prosecutor*.[204]

The author's own page-by-page review[205] of the ninety-four bound volumes containing the Department of Justice's filings before the Supreme Court in the October Terms of 1910, 1911, and 1912 (Mr. Lehmann was Solicitor General from December 1910 to July 1912), undertaken in an effort to clarify this matter, revealed no evidence of use of the dictum, or of the text of the inscription, or of any recognizable variant of either. Additionally, the author's review of Gen. Lehmann's more-prominent published obituaries yielded no mention of any authorship of the dictum or any variant of it.[206] Possibly, a review of this Solicitor General's papers, housed in the Special Collections section of the Washington University Library in St. Louis, Missouri, could dispel the mystery. On the other hand, perhaps *not*: a 1929 House of Representatives document, for example, quotes "a recent statement" by Attorney General John Garibaldi Sargent (apparently uttered without attribution to or mention of Gen. Lehmann) thus: "The idea is sought to be maintained in the Department [of Justice] that the United States is in a different position when litigating with its citizens than is an ordinary litigant, the Department proceeding on the theory that *the United States wins a case whenever justice is done one of its citizens in the courts*."[207]

Or one might as well turn to Supreme Court Justice Alexander *George* Sutherland, Jr., as possibly being the ultimate source of the inscription, given his 1934 dictum that

> [t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a case*, *but that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt should not escape or innocence suffer. He may prosecute with

203. David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2092 & n.84 (1994).

204. William J. Hoeveler, Essay, *Ethics and the Prosecutor*, 29 STETSON L. REV. 195, 198 & n.14 (1999).

205. November 6, 1999, at the Madison Building of the Library of Congress.

206. *See, e.g.*, *End to F.W. Lehmann*, KANSAS CITY STAR, Sept. 13, 1931, at 10A; *F.W. Lehmann Dies*, ROCHESTER DEMOCRAT & CHRON., Sept. 13, 1931, at 1; *F.W. Lehmann Dies*, ST. LOUIS POST-DISPATCH, Sept. 13, 1931, at 1A; *F.W. Lehmann Dies in St. Louis at 78*, N.Y. TIMES, Sept. 13, 1931, at 28; *F.W. Lehmann Is Dead at St. Louis*, WASH. POST, Sept. 13, 1931, at 1.

207. DODGE, *supra* note 52, at 78 (emphasis added).

> earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[208]

Or one could reasonably suspect Attorney General (and later Supreme Court Justice) Robert Houghwout Jackson, who, on April 1, 1940, addressed the Second Annual Conference of United States Attorneys in Washington, D.C., as follows:

> [Prosecutorial] authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.
>
> . . . .
>
> Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. *Although the government technically loses its case, it* [*really has*] *won if justice* [*is*] *done*. . . .
>
> . . . .
>
> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[209]

208. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added). For a thoughtful study of this brilliant but controversial Justice, from the perspective of a no-less-brilliant political philosopher, see generally HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994).

209. Jackson, *supra* note 193, at 3–4, 6 (emphasis added). Although the address post-dates the apparently circa-1934 carving of the inscription, it is reasonable to speculate that it may reflect the speaker's earlier thoughts.

Of course, the source of the inscription could be Attorney General William DeWitt Mitchell,[210] who (it has been alleged) "is reputed to have said, 'The government wins when justice is done.'"[211] Finally, one might be justified in reaching back to the 1908 ethical standard for attorneys that "[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."[212] This standard, of course, itself has very old antecedents.[213]

For reasons unknown, the *text* of the inscription—verifiable (surely) without too much difficulty—has been the occasion, marvelous to

210. Attorney General for the whole of President Herbert Clark Hoover's term (1929–1933), having been Solicitor General under President John *Calvin* Coolidge, Jr. (1925–1929).

211. Abram Chayes & Antonia Handler Chayes, Commentary, *Testing and Development of "Exotic" Systems under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1971 (1986) (unfortunately offering no source or citation). This interesting, but somewhat histrionic, doomsaying, and alarmist article has not worn well, given the collapse of the Soviet system after the wondrous fall of the Berlin Wall only three years after its publication.

212. CANONS OF PROF'L ETHICS Canon 5 (1908). The principle informing this canon happily still animates the rules governing the bar, as it has over time. *See, e.g.*, ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 150 (1936) ("The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done."); ABA STANDARDS FOR CRIM. JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); *id.* at EC 7-14 ("A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . ."); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); NAT'L PROSECUTION STANDARDS Standard 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."); RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 12-4.2 (2002) ("Furthermore, in criminal cases, the duty of a government lawyer is different than the ethical duty of a private lawyer. . . . The sovereign wins whenever justice is done.").

213. For example, the ancient *Petition de Droit* (i.e., *Petition of Right*), available under English law upon personal endorsement by the Sovereign: *fiat iustitia*, or *soit droit fait als parties* (i.e., let right be done to the parties). This endorsement by King Edward VII, on the face of the Petition drawn up by Sir Edward Carson (later Baron Carson, of Duncairn), permitted the latter's unfortunate and disgraced fifteen-year-old half-American client, George Archer-Shee, at last (July 27, 1910) to receive a proper trial on the accusation of having stolen a five-shilling postal order from fellow Osborne Royal Navy cadet Terence H. Back in October 1908—a four-day trial at which he was utterly vindicated and literally pronounced "innocent" (as opposed to merely "not guilty") of the charge, which seems to have originated in (or been aggravated by) anti-Catholic prejudice. These events, well reported by trial-attendee Edwin R. Keedy, in *A Petition of Right: Archer-Shee v. The King*, 87 U. PA. L. REV. 895 (1939), were recalled by Terence Rattigan (with some fictionalization) in his rightly celebrated 1946 play, THE WINSLOW BOY; and (in a different context), on February 8, 1999, by the late Rep. Henry Hyde of Illinois, in mesmerizing words on the floor of the U.S. Senate. *See* 145 CONG. REC. 2025 (1999) (statement of Rep. Hyde). Young Archer-Shee gallantly left the safety of his New York City home in 1914 to volunteer for the British Army in World War I; he was killed in action a few weeks later, on October 31, a nineteen-year-old Lieutenant, in the horrific slaughter at Ypres, shortly after arriving in France.

behold, of chronic inaccuracy. As has been said, the inscription reads: "*The United States wins its point whenever justice is done its citizens in the courts*." Of course, many sources get it *right*.[214] Somewhat bewildering, however, are those that get it *wrong*: at least one tweaks it into plural (". . . points . . ."); [215] another offers that the inscription reads ". . . wins its case . . ."; [216] in this vein, yet another amends it further to state ". . . wins its case when justice is done its citizens in *its* courts"; [217] and one, who got it right in 1996, later that year got it wrong when she said that ". . . *when* justice is done . . ." is what is inscribed.[218] Some—including the Department of Justice (twice) itself,[219] the author is mortified to say—have said it reads: ". . . wins its case whenever justice is done one of its citizens . . . ."[220] Without express reference to one

214. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 & n.2 (1963); United States v. Moreno, 991 F.2d 943, 953 (1st Cir. 1993) (Torruella, J., dissenting); Withers v. United States, 602 F.2d 124, 127 (6th Cir. 1979) (correctly noting that "the slogan [is] carved in wood at the entrance to the office of the Attorney General of the United States"); King v. United States, 372 F.2d 383, 396 n.10 (D.C. Cir. 1966); Trout v. Garret, 780 F. Supp. 1396, 1420–21 & n.60 (D.D.C. 1991); Koby v. United States, 47 Fed. Cl. 99, 106 n.6 (Fed. Cl. 2000); CAPLAN, *supra* note 201, at 17; Bresler, *supra* note 194, at 537, 539 & n.9, 545 & n.31; Days, *Interests of the United States*, *supra* note 198, at 1–2; Days, *Executive Branch Advocate*, *supra* note 198, at 691; Frankfurter, *supra* note 199, at 27 (emphasis added); Hoeveler, *supra* note 204, at 198; Panel Discussion at the Fourteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit: The Role of the Government Lawyer: Mission Impossible? (May 23, 1996), *in* 170 F.R.D. 560, 575 [hereinafter Role of the Government Lawyer] (comments of Deputy Att'y Gen. Jamie S. Gorelick); Kenneth W. Starr, *Christian Life in the Law*, 27 TEX. TECH. L. REV. 1359, 1359 (1996); Cooper, *supra* note 198, at 676 & n.8; Rosenzweig, *supra* note 203, at 2092; Janet Reno, *Legal Service for Poor Needs Vigilance*, THE CHAMPION, May 1998, at 32, 32.

215. Anabelle Rodríguez y Rodríguez, *Abogando ante el Tribunal Supremo: Deberes y Obligaciones de la Oficina del Procurador General*, 62 REV. JUR. U.P.R. 87, 94 n.23 (1993).

216. Rex E. Lee, Solicitor General, Address at the Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals (May 25, 1882), *in* 94 F.R.D. 388, 389 (1982) (qualifying that he *thinks* that is what the inscription says).

217. J.C. Collet, Judge, Address at the Missouri Bar District Meeting in St. Louis on the Federal Tort Claims Act (Feb. 27, 1948), *in* 8 F.R.D. 1, 6 (1948) (emphasis added).

218. *Compare* Role of the Government Lawyer, *supra* note 214, at 575 (comments of Deputy Att'y Gen. Jamie S. Gorelick), *with* Panel Discussion at the Fifty-Sixth Judicial Conference of the District of Columbia Circuit: Ethics and the Government Lawyer—Do the Rules Apply? (June 13, 1996), *in* 174 F.R.D. 142, 145 (1996) (emphasis added) (comments of Deputy Att'y Gen. Jamie S. Gorelick); *see also* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687 n.18 (1992) (also asserting (without citation) the inscription to say "when justice is done").

219. *See* 200TH ANNIVERSARY, *supra* note 14, at 37; JUSTICE BLDG., *supra* note 194, at app.

220. *See, e.g.*, *In re* Doe, 801 F. Supp. 478, 488–89 (D.N.M. 1992) (adding—erroneously, and just before misquoting the text—that "Attorney General Thornburgh would have done well to have taken a few steps from his office to contemplate the inscription on the rotunda wall *where it is cast in stone* . . ." (emphasis added)); EEOC v. New Enter. Stone & Lime Co., Inc., 74 F.R.D. 628, 632 (W.D. Pa. 1977); *In re* Howes, 940 P.2d 159, 169 (N.M. 1997) (citing *Doe*, to which it is a successor case); HUSTON, *supra* note 15, at 32; Michael M. Berger & Gideon Kanner, *The Need for Takings*

another, the court in *Barnes v. Mississippi Department of Corrections*[221] and Judge Eugene R. Sullivan, concurring in *United States v. Pomarleau*,[222] ventured that it reads ". . . wins its *case* whenever justice is done *to one of* its citizens in the courts"; but the truncating court in *Inslaw, Inc. v. United States* contemplated a shorter inscription, thereby extending it beyond the confines of the courtroom: ". . . wins its point whenever justice is done *to one of* its citizens."[223] Douglas Letter also shortened the inscription, but differently, to say ". . . done its citizens in Court,"[224] thus enabling Richard Zanfardino to assert the same.[225]

When, during closing argument, the defense counsel in *United States v. Schaffer*[226] suddenly (and illegitimately) impugned his integrity, the Department of Justice prosecutor—thinking quickly on his feet (and with commendable knowledge of Department lore)—recalled to the jury an inscription, "on the building of the Department of Justice in Washington . . . [, which] says: 'The Government wins when justice is done its citizens in the court.'" No less timid were Professor Michael Tigar, who advised the Colorado jury—in the sensational December 1997 trial of Terry Lynn Nichols for his monstrous truck bombing of the Alfred P. Murrah Federal Building in Oklahoma City—that "[t]he

Law Reform: A View from the Trenches—A Response to Taking Stock of the Takings Debate, 38 SANTA CLARA L. REV. 837, 870 n.131 (1998) (preceding its misquotation with words (apparently unintentionally ironic) critical of the Department of Justice: "[p]erhaps familiarity breeds disregard, but . . . ," and citing to *Brady* in support of the proposition, although that opinion does *not* support it); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 240 (2000) (citing *New Enter. Stone & Lime*).

221. 907 F. Supp. 972, 979 n.13 (S.D. Miss. 1995) (emphasis added).

222. 57 M.J. 351, 366 n.2 (C.A.A.F. 2002) (Sullivan, J., concurring) (emphasis added). Notwithstanding the judge's error, the author delightedly notes that in the space afforded by a single footnote in his four-paragraph concurrence, the judge cites to two wonderfully quotable equestrians who are not usually paired: Marcus Tullius Cicero's *De Legibus* (*On the Laws*) (begun in 52 B.C. but published soon after his decapitation in Rome on December 7, 43 B.C.) *and* Sir W.S. Gilbert's *The Mikado* (opened in 1885, twenty-six years before his May 29, 1911, drowning in his lake at Grim's Dyke, near Hertfordshire, England, while attempting to save a young lady who had lost her footing and cried for help). *See id.* at 365 n.1. Fr. Rutler, one thinks, would be pleased with Judge Sullivan here (which is very high praise). *See* GEORGE WILLIAM RUTLER, COINCIDENTALLY (2006) (discussing many amusing coincidences).

223. Inslaw, Inc. v. United States, 83 B.R. 89, 142 (Bankr. D.D.C. 1988) (emphasis added).

224. Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask for Is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1298–99 (1993).

225. Richard Zanfardino, *Leveling the Playing Field for Federal Prosecutors or an End Around Ethics? An Evaluation of the Thornburgh Memorandum and the Reno Rule*, 43 NAVAL L. REV. 137, 162 & n.178 (1996).

226. 266 F.2d 435, 443–44 (2d Cir. 1959).

government never loses when justice is done" were its "very words";[227] Professor Peter Strauss, who quotes "the government wins *its case in court* whenever justice is done";[228] and the defense counsel in *United States v. Battiato*, who, according to the court, informed the jury that inscribed on "the building which houses the Department of Justice, in the Nation's Capitol" (overlooking the obviously troubling implications on the separation of powers) were the words "The Government wins when justice is done."[229]

The very *location* of the inscription frequently is given erroneously, as is its *appearance*. For starters, no less an authority than Supreme Court Justice Thomas Campbell Clark, riding circuit, stated that, "[w]hile Attorney General of the United States [from 1945 to 1949, he] noticed an inscription that was carved in the oak panel of [his] anteroom and *embossed in gold* . . . ."[230] If the inscription ever *was* so "embossed," the author has no evidence of it, even as he has no evidence, *pace Doe*, of its ever having been "cast in *stone*" (assuming such a process to be physically possible).[231] Of course, one may not be looking in the right place: the *New Enterprise Stone & Lime* court suggests that a search of the "facade of the building housing the Department of Justice in Washington, D.C.," would be fruitful;[232] if the beset prosecutor in *Eley* be

227. Ray E. Moses, *Oklahoma City Bombing: Persuasive Defense Arguments from* Nichols, THE CHAMPION, April 1998, at 27, 33.

228. Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, LAW & CONTEMP. PROBS., Spring 1998, at 155, 170 (emphasis added); *accord* United States v. Eley, 723 F.2d 1522, 1526 (11th Cir. 1984) (quoting, from the trial transcript, a harried but quick-thinking U.S. prosecutor's words to the jury: "I can't quote it exactly, but [the inscription] says the United States wins whenever justice is done. . . . [W]e win whenever justice is done.").

229. United States v. Battiato, 204 F.2d 717, 719 (7th Cir. 1953); *see also* Henderson v. United States, 218 F.2d 14, 23 (6th Cir. 1955) (McAllister, J., dissenting) (discussing the reference to the motto in *Battiato*). As to the placement of formal executive-branch offices within the home buildings of other branches, see Waxman, *supra* note 20, at 3, 17 n.4.

230. United States v. Mele, 462 F.2d 918, 926 (2d Cir. 1972) (emphasis added). Of course, Attorney General Clark (not to be confused with his son, Attorney General William *Ramsey* Clark) does appear to have had a difficult relationship with the Department of Justice Main Building in Washington, D.C. A story still is told in the Department of his once finding himself, alone, and without his Departmental pass, outside one of the massive aluminum doors to the Building, at a time when it was guarded by Federal Bureau of Investigation agents. On being denied entry, he protested that he was the Attorney General; but the unrecognizing sentry saw his duty clearly: "Mister, I wouldn't let you into this building without a pass if you were J. Edgar Hoover himself."

231. *In re* Doe, 801 F. Supp. 478, 488–89 (D.N.M. 1992) (emphasis added). One must hope that the court intended no pun. *Cf. John* 8:7 ("Let the one among you who is without sin be the first to cast a stone . . . .").

232. EEOC v. New Enter. Stone & Lime Co., Inc., 74 F.R.D. 628, 632 (W.D. Pa. 1977); *accord* Green, *supra* note 220, at 240.

correct, that search should begin at "the front of [that] Building."[233] Should these endeavors fail, further exploration might be profitable either "on the wall inside the inner courtyard of the Justice Department in Washington, D.C."[234] or "in the lobby of the Solicitor General's office," where the *dictum* is "allegedly inscribed."[235] The effort to find the inscription may not be worth the inevitable soiling of hands or clothes, however, if there be truth in Professor James Joseph Duane's assertion that it is found on "an old[236] dusty[237] wall in downtown Washington."[238]

Finally, there is the issue of the *authority*, or *weight*, of the inscription. The prosecutor in *Eley*, forced (as his brother-at-law in *Schaffer* was) in trial to respond quickly to an unanticipated argument by the defense, assured the jury that the inscription (which he paraphrased, because he "c[ould]n't quote it exactly") was "the motto of the government, and . . . the motto of the [arresting federal law-enforcement] agents, and . . . the motto of my office also,"[239] an assurance partly confirmed by the court, which (mistakenly) implied it to be "the Department of Justice's motto."[240] This mistaken notion

233. *Eley*, 723 F.2d at 1526.

234. Moses, *supra* note 227, at 33 (quoting Professor Tigar, who appears then to have been under great strain, as, soon thereafter, he "is said to have shed a tear at the very end of summation when he put his hand on his client's [Terry Lynn Nichols's] shoulders and uttered the final word: 'Members of the jury, I don't envy you the job that you have. But I tell you that *this is my brother*. He's in your hands.'"). The Department of Justice Main Building has five separate courtyards, all roughly equidistant, *mutatis mutandis*, from Pennsylvania Avenue, 9th Street, Constitution Avenue, and 10th Street, NW, in Washington, D.C.; thus, it is unclear which courtyard (if any), fairly could be described as "the inner" one, and—regardless—none contains anything remotely like the text alleged.

235. David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 277 (1989) (citing Mr. Caplan's book, *supra* note 198, at 17, for the proposition; but that book (as far as the author can discern) makes no such allegation). In any event, in early 2005 the author searched the lobby outside the Solicitor General's office and found no evidence of any such inscription there.

236. The Department of Justice Main Building was constructed between March 1931 and September 1934. FIFTIETH ANNIVERSARY, *supra* note 8, at 16.

237. At least as of 3:35 p.m. on March 20, 2003, the author detected no dust on or about the inscription.

238. James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor's Supposed 'Right' to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in* Old Chief v. United States, 168 F.R.D. 405, 440 n.151 (1996) (footnotes added); *see also In re* Howes, 940 P.2d 159, 169 (N.M. 1997) (stating that the inscription is "on the rotunda wall in Washington, D.C.," without even attempting to specify of what building or which rotunda).

239. If the words of the inscription (or anything like them) are, in fact, the motto of the Office of the United States Attorney for the Northern District of Georgia, the author has unearthed no evidence of it.

240. United States v. Eley, 723 F.2d 1522, 1526 (11th Cir. 1984).

bedevils more than one person currently (or formerly) on the bench,[241] as well as some people never on it (or not yet, anyhow).[242] Other commentators remain satisfied with the assertion that the inscription is the motto of the Solicitor General,[243] or perhaps that of his office.[244] These last two, practically indistinguishable assertions actually may have the virtue of being true, though the author knows of no official or authoritative declaration of the same.[245] Lest there be any

241. *See, e.g.*, United States v. Moreno, 991 F.2d 943, 953 (1st Cir. 1993) (Torruella, J., dissenting); Starr, *supra* note 214, at 1359.

242. *See, e.g.*, Elizabeth Anne Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 COLUM. J.L. & SOC. PROBS. 169, 200 n.186 (1991).

243. *See, e.g.*, CAPLAN, *supra* note 198, at 17.

244. Rodríguez y Rodríguez, *supra* note 215, at 94 n.23 (asserting that the inscription is "*el lema de la Oficina del Procurador General de los Estados Unidos*").

If only for the sensible reasons indicated in KINGSLEY AMIS, THE KING'S ENGLISH: A GUIDE TO MODERN USAGE 67–68 (1998) (noting that because "feminist propaganda" is still a reality, he always uses "plural or passive constructions" rather than "face the chore of perpetually remembering to write 'he or she' in appropriate contexts," lest he find himself "the occasion of some feminist outburst about unconscious (or conscious) chauvinism"), the author wishes to clarify that the third provision of 1 U.S.C. § 1 ("words importing the masculine gender include the feminine as well") applies to this work. *But see* Rosenzweig, *supra* note 203, at 2080 (referring to the Solicitor General generally as "she").

245. Thomas A. Hagemann would give the inscription little, if any, weight, as he demonstrated in a hard-boiled but thoroughly commonsensical recent article, Thomas A. Hagemann, Essay, *Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151 (1996). Torqued at "Kenneth Bresler's . . . thoughtful, thought-provoking and profoundly naive essay," *supra* note 194, "on winning, losing, and why you should have a lobotomy," and thus also at "the Georgetown Journal of Legal Ethics [for publishing] another exemplar of a purportedly legal article about angels on the heads of pins, bearing scarce relationship to the practitioner's reality and scarce effects, too[, and] stand[ing] tall as another lighthouse to illuminate why practitioners have stopped reading law journals," Hagemann suggests that to follow Bresler's advice would be to "say hello to a lot of unmotivated bureaucrats muttering the infantile pablum, 'the government always wins when justice is done, the government always wins when justice is done . . .' as they bounce merrily along from acquittal to acquittal." Hagemann, *supra*, at 152–53, 157. In some sense at least, doubtless Judge Royce C. Lamberth would disagree, referring favorably, as he does, to "the old philosophy that . . . the government lawyer wins the case when he or she sees that justice is done, not winning at all costs." Role of the Government Lawyer, *supra* note 214, at 570 (comments of Judge Royce C. Lamberth); *see also* Starr, *supra* note 214, at 1359 (correctly and approvingly describing the motto as "morally-infused"). The author is careful to note, in fairness, that Hagemann's gimlet-eyed essay clearly rejects the notion that "winning at all costs" is or should be any part of a government attorney's business; perhaps his quarrel really has less to do with the motto itself than with its use by Bresler:

> [W]hen I was a federal prosecutor, I tried really hard to obtain convictions. There was a reason for that: the people I was trying to convict were, based on appearances, evidence, reasonable inferences, and my and my supervisors' best judgment, factually guilty of the crimes charged. So, in a fit of hubris, I thought it an important part of

misunderstanding, the author wishes to emphasize that he does not mean anything by the foregoing,[246] being as given to error, in this and most other things, as the next man.[247] "It's such a fine line between stupid . . . and clever."[248]

If, as indicated here, judges, law professors, and practicing attorneys—and even Department personnel—have found it difficult to state correctly the source, text, location, appearance, authority, and legal weight of an English-language inscription on a seventy-four-year-old public building in the nation's capital, small wonder ought there to be that doubt should swirl about the source, meaning, and adoption of a

> my job assignment to assist them in being found legally guilty as well. Therefore, I, on the government's behalf, sought convictions.
>
> Convictions, of course, were precisely what my fellow prosecutors and I were supposed to seek, and where Mr. Bresler's essay . . . has gone wildly astray is in the false dichotomy between justice on the one hand and seeking convictions on the other. Unless the government is consistently and randomly charging the wrong people with crimes, then obtaining a large percentage of convictions is an essential part of justice. Our justice system assumes, and confidence in our system rests on, a certain correlation with objective reality and truth: indicted, factually guilty defendants should usually lose, and factually innocent people (a) should not get charged at all, or (b) should not lose. To be sure, from time to time, the government loses and justice wins. But, just as often, when the government loses, justice loses, too, because "justice" must mean more than any outcome generated by the process we've designed. The quality of those outcomes, the correlation of those outcomes to something like reality, matters.
>
> While it is an answer (by prosecutors with precious little else to say) that "justice was done" when a factually guilty defendant walks, it's an incomplete answer that the system cannot afford too often. Most defendants who are indicted need to be convicted—convicted fairly, but convicted nonetheless—or there is something deeply wrong with the system itself.

Hagemann, *supra*, at 153.

246. The author leaves it to the reader to determine whether *this* work is itself a manifestation of the "two things" Professor Rodell famously thought "wrong with almost all legal writing," Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) ("One is style. The other is its content."), and thus yet another "link[] in a chain of causal calamity." Fred Rodell, Comment, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 288 (1962).

247. *Cf. In re* Haseldine, (1886) 31 Ch. D. 511, 517 (C.A. 1889) (Bowen, L.J.) ("I have the misfortune to differ from the Lord Justice *Cotton*, and I do so with a deep sense of the probability that he is right."); Q. HORATIUS FLACCUS, *Epistola ad Pisones* [i.e., *Letter to the Pisos*, commonly known as *Ars Poetica* (*The Art of Poetry*)], ln. 359, *in* SATIRES, EPISTLES AND ARS POETICA 477, 480 (H. Rushton Fairclough ed., Harvard Univ. Press 1936) (circa 10 B.C.) ("*quandoque bonus dormitat Homerus*" (i.e., "even the worthy Homer sometimes nods"), a reference to the perhaps-blind, classical epic poet, author of *The Iliad* and *The Odyssey*); [THOMAS (HAEMERKEN) À KEMPIS], THE IMITATION OF CHRIST 28 (Albert Hyma ed., Century Co. 1927) (published anonymously 1418) ("*Nam homo proponit, sed Deus disponit.*" (i.e., "For man proposes, but God disposes . . . .")).

248. THIS IS SPINAL TAP (Embassy 1983) (observation by actor Michael McKean (playing the role of "David St. Hubbins") to actor Christopher Guest (i.e., the fifth Lord Haden-Guest, playing the role of "Nigel Tufnel")).

similarly ordered *Latin* motto, nearly a hundred years older and with ancient roots in the common law. Who fashioned that motto into its present shape and bequeathed it to the Department of Justice, and when, are facts now utterly forgotten. Nor is it now known what *precise* English meaning the motto was intended to convey. *Perfect* knowledge being unavailable on this last point, one must be content with a likely meaning: the motto refers to the Attorney General (and those under him in service to the public weal) "*who prosecutes on behalf of justice*"—surely, a fine vocation, and entirely worth recalling. Divine, perfect justice can hardly be expected in this vale of tears; *human justice*, however, remains within reach, when the servants of the law seek diligently, humbly, and faithfully to pursue justice and prosecute their duty on her behalf. Let's roll.