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Editorial Office

University of Michigan Law School
Ann Arbor, Michigan 48109-1215
Telephone: (313) 763-0165
Fax: (313) 764-8309

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DEFENDING CORPORATE AMERICA IN A BET-YOUR-COMPANY CASE†

Finis E. Cowan*

Everything I know about defending a bet-your-company case I learned in the American Airlines pricing case. I have spent most of my life defending product liability and sore back suits and got involved in the American Airlines case as a stroke of luck. It was a wonderful opportunity, and through our client's efforts I think we did it right.

BACKGROUND

Let me fill you in on the factual aspects of the controversy. One of the first things I learned in working on this case was how stupid I had been over the years in buying airline tickets. Only about four percent of airline passengers pay the full fare; I had been paying the full fare for years and not known any better. I also discovered that airline pricing is one of the most frustrating and complicated things in the world. The price you pay for your ticket depends on a lot of factors: who you are; where you are going and how far you have to travel; who your travel agent is; when you want to travel; who your employer is. Airline pricing is a matter of enormous and kaleidoscopic complexity.

American Airlines, the defendant, developed "value pricing," the purpose of which was to put some simplicity and predictability back into airline pricing. The basic concept was to reduce the number of different fares between each "city pair" from about fifty or sixty to four—the first class fare, the full business fare that enables the passenger to travel any time, and two leisure fares depending on how far in advance the ticket was purchased. The full fares—which, according to our client, had been overpriced—would have been reduced by about forty percent. There were a lot of other features, but simplification of fare structure was the essential element.

The plaintiffs contended that value pricing was a violation of the antitrust laws. The essence of their complaint was that airline pricing is necessarily complicated because the various markets in which airlines operate are complicated. The smaller airlines can survive only by having sales in specialized situations for leisure travelers. Simplifying the entire fare structure would in-

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†Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 14, 1994.

* Baker & Botts, Houston, Texas.

hibit the ability of the smaller airlines to have sales in order to compete in smaller markets. The plaintiffs also argued that the airline industry has evolved in such a way that there are three major, relatively successful airlines and many weaker airlines that are in bankruptcy, have been in bankruptcy, or are on the brink of bankruptcy, and that value pricing was basically just a scheme to put the weaker carriers out of business and allow American (and perhaps the other major airlines) to create a monopoly in at least some markets.

There wasn't much controversy about the facts. American announced value pricing. Within a very short period of time, Northwest and Continental prepared to file a lawsuit alleging attempt to monopolize. And the race was on. The first thing that happened, as you might imagine, was a little venue shopping. American got wind that the case was going to be filed and attempted a preemptive strike in the form of a declaratory judgment case in Chicago (a step that I think they later decided was a mistake). Continental and Northwest then filed their lawsuits in Galveston.

I know, from personal experience, that many people in the east think that trying a case in Galveston will be like trying a case in Costa Rica or maybe Guatemala. That is not true. Galveston is a very fair place. We have a marvelous federal judge who leans over backward to give everybody a fair trial. Eventually our client was persuaded that Galveston wasn't a bad place to be; but in the initial stages there was a lot of jockeying about where the case was going to be tried, and about who the lawyers were going to be. Our firm, I'm not embarrassed to tell you, was not American's first choice. American's first choice happened to be disqualified, and we spent a few months hassling about that. Then we went to work on the process of getting the case tried.

ORGANIZING FOR TRIAL

I'd like to tell you a little bit about how we staffed the case, because it really was a team effort, the greatest team effort of my career. It had to be, and one of the reasons why it had to be such a team effort was that the case developed on a very fast track. Some of you might think that Galveston would be a rather sleepy, slow-paced place to try a case, but our federal judge operates what he calls a rocket docket. He doesn't want any case on his docket that's more than a year old. Toward that end, he has an ingenious way of scheduling his trials. He has a lot of routine personal injury cases, a lot of employment discrimination cases, and some big cases. He sets all his personal injury cases in the fall, on the theory that both insurance companies and plaintiffs get a little softhearted toward the end of the year and are more likely to settle their cases. He

sets all his employment discrimination cases in the spring, on the theory that people are interested in going back to work in the spring and therefore might settle their discrimination cases. And he sets his big cases in the summer.

We went from the beginning of discovery to verdict in a little under a year. I think that was a great benefit to American, and I don't think it hurt anybody. It made all of us focus on what the real issues were. Also, although it was an expensive case, it was much less expensive than it would have been if it had dragged on for years and years. The impact on the staffing was that we had to staff up in a way to deal with doing about three years worth of work in about a year.

American had defended big-time antitrust litigation before. They had had a case just a few years before, in California, in which the same two plaintiffs had sued them for alleged antitrust violations in connection with the development of the computer reservation system. So we had the advantage of representing a client who was already geared up and knew how to defend this type of litigation. Because of that, American made the decision at the outset that they would do anything they could and hire any help needed, regardless of cost.

In addition to our firm, in which American had no confidence, the defense roster included the Weil, Gotschal firm from New York and Gibson, Dunn and Crutcher from California, in which American had great confidence. Very quickly, with the client's help and instructions and direction, we stitched together a team of lawyers from the three firms plus David Beck, a fine lawyer from Houston who used to be with Fulbright & Jaworski and now has his own firm. You might wonder how a group of lawyers like that could meld into a smoothly functioning team. It wasn't entirely easy, but we did it because we had to do it and because our client required it.

Our client's in-house team was supervised by American's general counsel, Anne McNamara, and a couple of her staff who had been through the case in California and knew how to handle a case like this. On the rare occasions when we outside lawyers couldn't agree on something, the client would decide the issue for us. Our basic roles were these: Dave Beck was our point man for taking on Northwest; he took all the depositions of Northwest personnel and argued the Northwest issues. His job was to prove that Northwest couldn't be believed. Two of my partners, Irv Terrell and Paul Yetter, took on Continental. The Gibson, Dunn and Crutcher people had the jobs of developing the expert case and taking the laboring oar on the legal aspects of the case. In addition to selecting and working with our experts, they took the depositions of the other side's experts. I had the easiest job of all, that of preparing and presenting the American witnesses and getting the jury to believe them. Mine was an easy

task because they were telling the truth, and they were nice people.

One of the things I learned that might be helpful to you is that a case like this needs a "chief of staff," someone to keep everyone moving on the enormous amount of work in answering interrogatories, propounding interrogatories, scheduling depositions, and getting documents together. Irv Terrell handled that in our firm and did a splendid job. I could not have done it.

So we had a great team, and we worked together well. We had to work together well because the judge kept us on such a short schedule. Judge Kent did some wonderfully innovative things. I have already told you about his rocket docket. He also told us he did not want any discovery motions: "If you guys get into a dispute about discovery, call me on the telephone. We'll have a conference call, and I'll resolve the issue right then." We never had to call the judge. We did have a lot of disputes but we resolved them. Judge Kent limited fact witnesses' depositions to one day and expert depositions to two days. Frankly, with all respect to the judge, I think we could have done the expert depositions in one day. The judge gave us forty depositions to the side. Again, with all respect to the judge, I think that may have been overly generous. We probably could have done just as well with twelve depositions to the side. He gave each side twelve days to put on its case. Each side took nine days. He said the dispositive motions could not exceed thirty pages. We moaned about that, but the judge was able to pare down the case, remove some of the allegations, and get us to trial with a fairly concise set of facts to submit to the jury.

SELECTING THE JURY AND PRESENTING THE CASE

I can't talk much about jury research because our client understandably doesn't want to reveal all of its tricks in that area, but all of you know that there are some good companies that do that type of work. Our jury research consultant was Litigation Sciences, and they did a great job; I am free to say that. Because we were pushing from the start of discovery to trial in a little over nine months, we were tempted to skimp on jury research, but our client wouldn't let us do that, and the client was right. Every minute that we spent on jury research was well spent. We learned what would float, what wouldn't float, what was acceptable, what wasn't acceptable.

With the aid of our jury research, we were able to do what I think was the best thing we did in the case: We boiled our case down to thirty-two words. We had a chart that we used in our opening statement and in our closing argument; we put it up in our office; and we made sure every one of our witnesses virtually memorized it. The chart listed our basic points, which were very simple and very direct: First, American Airlines had earned its success by being an in-

novative company. Second, value pricing was an effort not to put anybody out of business but to make money by developing the market and selling more tickets. Those points sold. They were understandable. They were believable. If we had even hinted that we were instituting value pricing because we were great humanitarians, nobody would have believed us. Instead, we could say, in good faith, that we thought we would make more money with value pricing because we thought people were mad at the pricing complexity and we thought we were pricing ourselves out of the market for business people.

Putting those basic points together also told us how to make our opening statement. Our whole opening statement, and our whole final argument, centered around those points. We did something a little bit unusual in the opening statement. We had three lawyers open. I began and told the jury that I lived up in northern Galveston County and thought that my client was worthy of belief. Then Bob Cooper came in and explained the intricacies of predatory pricing and the law that we thought the judge would give to the jury. Finally, David Beck, who is an absolutely magnificent orator, came in and ripped Northwest Airlines up one side and down the other because, fortunately for us, Northwest had taken totally inconsistent positions. They had originally said value pricing was great. About a month later, they sued us for a lot of money, claiming that we were about to put them out of business by predatory pricing.

What kinds of decisions did we have to make about putting on our case? One decision had to do with the order of our witnesses. We had several basic types of witnesses. We had the mid-level managerial people who had gone through the detailed analytical process of determining whether value pricing would work. We had Bob Crandall, the chief executive of American Airlines, and Crandall's principal lieutenants. One of the really impressive things about American Airlines as an organization is that Bob Crandall is a very dynamic man who runs the company, but he has the good sense to surround himself with very strong people. I became persuaded that the jury had to see not only Crandall but his lieutenants as well.

Whom do you use as your company representative in a case like that? For us, that was a fairly easy decision because the officer who had been most directly involved with the value pricing plan was a fine man named Mike Gunn. It was easy to decide that Mike Gunn was going to be our company representative. He was going to be our first witness and sit with us through the trial. I believe that if you're defending a corporation, it helps to have someone from the corporation, someone to whom the jury can relate, sit with you, to personalize the corporation, although I have heard that lawyers in some parts of the country don't do that.

We had some trouble with where to put Crandall. Do you put someone like him at the end? If he doesn't do well, you're sunk. Do you put him at the beginning? The risk there is that everything after him will be anticlimactic. We decided to put Crandall, the chief executive of the company, in the middle.

How did we get Crandall ready to testify? More accurately, how did he get himself ready to testify? One of the reasons it was such a joy to represent this company was that, unlike a company that hasn't been through the litigation mill, American knew that the chief executive had to be heavily involved. Crandall began to prepare himself to testify the minute the case was filed. He studied and understood every single document that was even peripherally involved in the case. We gave him some help in doing that, of course, but he did a lot of it himself. He prepared himself to the nth degree. He also steeled himself not to show his inner anger at the plaintiff's counsel—he was really mad at him—and he did a masterful job of concealing it most of the time. On the second day, he broke down and showed his anger a little and consequently didn't do quite as well as he did on the first day, but he did a great job of preparing himself, and we worked very hard with him.

I did just one thing in this case that's of any real note, and it is not a very unusual thing, but I am proud of it so I will mention it. I thought a lot about how to put Crandall on. It would have been easy just to ask him to talk about value pricing and what a great idea it was, but one of the interesting aspects of American is that it has a lot of meetings. It is a very collegial company. They really try to act by consensus although Crandall's vote is the one that ultimately counts. Every time they have a meeting, someone is the presenter and puts together an outline of everything they talk about. There were numerous meetings and outlines of meetings where value pricing had been discussed. The most important one, or at least the one that proved pivotal, was the meeting at which Crandall had made a presentation to the board of directors and sought authorization to go ahead with value pricing. We had a nice, multipaged outline of Crandall's presentation to the board, and on the stand, through a question and answer approach, I had Crandall walk through his outline. Basically, he made the same presentation to the jury that he had made to the board of directors. The jury liked that, and Crandall was so sincere and enthusiastic that it would have been very difficult, in my judgment, for anyone to believe that he had a hidden agenda and was really trying to put all of his rivals out of business.

Between Mike Gunn and Bob Crandall, we put on the mid-level managers who were being accused of doing a fraudulent set of analyses. They were good people, and the jury could see that. I must also say that the Weil, Gotschal people, who had represented American for years and knew how the

company operated, and who had the confidence of the client, were of enormous help to us in the preparation of all of our American witnesses.

Still on the subject of witnesses, I want to add a comment on experts. Bob Cooper, the fellow from Gibson, Dunn who was responsible for the expert aspects of the case, had successfully defended American in the west coast litigation with Continental and Northwest and has had a vast amount of antitrust experience. His philosophy is that you don't win an antitrust case for the defendant with experts. He believes that the jury is smart enough to figure out that the experts on both sides are hired guns, advocates with degrees, and that generally the experts sort of balance each other out.

That might be true as a general matter, but it did not hold in this case. Partly by skill and partly by luck, Bob Cooper lined up for us the best expert I have ever seen. I would be willing to guarantee that no one has ever seen a better expert. His name was William Baumol.

William Baumol is 72 but looks about 90; he has no hair, and he's thin and ascetic. He is the only man in the world who has ever had permanent tenure at both Princeton and NYU. He is a man of eminent credentials, a great economist, and he didn't develop his views just for this case. He has done a great deal of scholarly work on predatory pricing and has written article after article expounding the thesis that one must be very careful not to confuse legitimate tough competitive behavior with predatory pricing. He really believed what he said and didn't just come to this position as a johnny-come-lately hired to testify in this case. The jury and the judge both loved William Baumol. They were captivated by him. He testified shortly after Crandall, and one mistake we made in the case was not quitting right after Professor Baumol testified. (Fortunately, the jury forgave us and held for us anyway.) The key lesson to be learned—although it may be a superfluous lesson because there are not many William Baumols around—is that the best expert is one who has previously published a position favorable to your case and really believes it.

Let me tell you a little more about our mistake, because there is a lesson to be learned from that, too. As I told you, I was convinced, and still am convinced, that one of the strengths of American Airlines is that its great chief executive is surrounded by other strong people. In my opening statement, I told the jury that we were going to bring to them everybody at the top of the corporation who was involved in making the value pricing decision. I committed us to call in all of American's top officers. I shouldn't have done that because it really tied our hands. Don Carty, the number two man, remained to be called after Professor Baumol, and we felt obligated to put him on because of my opening statement commitment. He is a fine man and he was a fine witness, but he was definitely an anticlimax after Crandall and Baumol. The judge didn't

help, either. The judge gave us a very fair trial, and I am a strong supporter of Judge Kent, but during Carty's testimony, the judge shuffled through his papers and showed obvious impatience and irritation that we hadn't quit after Baumol. The mistake was not fatal to our case, but it's one I won't make again.

JURY REACTION

How did the jury react to all this? And how do we know how the jury reacted? One of the reasons we know so much about how the jury reacted lies in the United States Constitution. Our local rules in the southern district of Texas do not permit the lawyers to talk to the jurors or the jurors to talk to the lawyers, so we could not get any information ourselves. The rules also do not permit lawyers to hire someone to go out and interview the jurors. Judge Kent wanted to go beyond this and protect the jurors from a lot of press interviews, so he told the jurors not to talk to the press, and he even entered an order that there be absolutely no communication between the jurors and the press. Well, that's unconstitutional. The *Wall Street Journal* and the *Houston Post* and representatives of every medium you can imagine came in, filing inquiries and trying to overturn his order. Naturally, their appetite was whetted, so when they did get the order overturned, they went out and spent a lot of time talking to the jurors. An especially thoughtful article appeared in *The American Lawyer* in October of 1993. It contained fairly detailed accounts of interviews with six of the twelve jurors. (The judge on his own gave us twelve jurors, for which I was grateful.)

Before I tell you how the jurors reacted, I should tell you a little bit about the jury and about Galveston County. Galveston County is predominantly a blue-collar area. We have a lot of refineries, a lot of big industrial facilities, and a little bit of agriculture. The United States District Court for the Southern District of Texas draws its jurors not just from Galveston County but from three adjacent counties. On our jury, there were nine men and three women. One juror probably had a college degree; the rest probably had a high school education or less. Most of the people who worked in refineries did have technical jobs of some kind where they used computers or fairly sophisticated equipment, and that was good for us. That was the kind of juror we wanted.

In hindsight, it was mistake for the plaintiffs to file their case in Galveston because the basic attitude of most people in south Texas is this: If I am in business and I want to price my product low, that's my own business; no one ought to come in and tell me that I ought to be charging more. That basic juror attitude was instrumental in our winning the case.

The plaintiffs did a good job, nevertheless. By the time they had completed

their case, they had some of the jurors with them. From the reported interviews, it seems that three or four of the mature, influential, smart jurors were leaning heavily toward the plaintiffs' side at the end of their case. One of those jurors, who finally became our advocate, was a fellow from my home town, the little town of Dickinson in northern Galveston County. He was quoted as saying that he had decided that what American did was pretty bad, and it was wrong for them to be trying to do what they were doing to these weaker carriers. This means that at the end of the plaintiffs' case, we were in a hole.

Frankly, that surprised me, and it still surprises me a little bit. I had the feeling right from the start that the jury as a group, while they were open-minded, really wanted to believe our side of the case. They did not want to believe that American Airlines had engaged in dishonest, conspiratorial conduct, and they saw all the evidence through those glasses. But the article in *The American Lawyer* says that Crandall and Baumol won the case for us. Crandall and Baumol persuaded the jury that American was right and had not engaged in bad conduct. One juror was still against us, but she gave in as soon as she found out she was alone. Fortunately, the judge polled the jury and got each of them to say in open court that they supported the decision.

QUESTIONS AND ANSWERS

Q: Were there any serious settlement talks?

A: No. American decided early on that it couldn't settle because if it did, everybody else in the industry would sue. America West, for example, was in bankruptcy right here in Arizona and got a court order that they could take all our depositions in order to decide whether to file a lawsuit. American couldn't afford to settle. The judge, during the trial, ordered the plaintiffs' lawyers to make us a settlement offer. Joe Jamail said, "Judge, I've never done that, and I'm not going to do it. You can ask [other counsel] to do it." And he did come back with a very large—we thought unrealistic—offer that was easy to turn down.

Q: What was the basis for the declaratory judgment action in Chicago? How was that case handled?

A: The declaratory judgment action was a request for a declaration that American was not guilty of predatory pricing. It was dismissed because there is strong law, in that circuit, that you can't forum shop by bringing a preemptive declaratory judgment case.

Q: What mistakes do you think the plaintiffs made?

A: Number one, not making their case simple enough. Number two, attacking the credibility of the American witnesses. The plaintiffs contended that the

analytical work done by the mid-level people at American was fraudulent. Those people, though, were honorable, honest people, wonderful people that I loved working with and loved putting on the stand. The jury was never going to believe that they were crooks. The plaintiffs could have tried their case by taking a noncommittal position on intent and saying, "We don't know what the intent was, but here is the effect of what you did. The effect is to damage competition and put people out of business."

Q: You mentioned the chart that you used. What other visual aids did you use for the jury?

A: We had so many lawyers on our side of the case that we used whatever a particular lawyer felt comfortable using. The folks from California were very sophisticated and used high technology equipment, and some of us just used charts. Honestly, the best tool of all was a simple overhead projector.

Q: How many final arguments did the defense make?

A: We opened with three lawyers, and we closed with three lawyers.

Q: Did you feel that having twelve jurors was favorable to you?

A: Yes, but that may just be a defendant's instinct. It's twice as many people for the plaintiff to persuade.

Q: Does the judge usually use six or twelve jurors?

A: I think he usually uses six, but he thought our case was a big one and gave us twelve on his own motion without our asking for it.

Q: Was there an appeal?

A: No. That's why I can talk so freely about the case.

THEY'RE PLAYING A TANGO†

John W. Reed*

As a law teacher, I have occasion to visit from time to time with a wide variety of lawyers—big town, small town; big firm, small firm; office lawyers, courtroom lawyers, both sides of the table—and no matter whom I meet with, no matter what kind of practice or specialty, the one common theme I encounter is uneasiness about change and the rate of change. Change in the applicable law itself. Change in the way law is practiced. Change in the society to which the law is applied. And, always, a pervasive sense of unease that the rules of the game are being changed in the middle of the game, usually to one's own disadvantage.

This is a different world from the one of your youth. It certainly is vastly different from the world of my youth even longer ago.

Technological changes are perhaps the most obvious. In one lifetime we have gone from the horse and buggy and the kerosene lamp to space stations, heart transplants, and the information superhighway (where, incidentally, many of us are stuck on the entrance ramp). Whether the information superhighway is a good thing depends, I think, on the quality of the information. I was struck by an item in this week's *New York Times* stating that in 1849 (145 years ago) Henry David Thoreau said, "We are in great haste to construct a magnetic telegraph from Maine to Texas, but Maine and Texas, it may be, have nothing important to communicate."

Social and cultural changes have been no less dramatic than the technological ones. I am reminded of the old-timer who said to a friend, "I can remember when it used to be that the air was clean and sex was dirty." One of the social changes that has particular implications for law and the administration of justice is what Kurt Luedtke spoke of so thoughtfully a few moments ago: the increasing tendency of people to consider themselves members primarily of cultural and ethnic subgroups, often at odds with one another and at odds with the community as a whole.[1] The common loyalty we once felt to the nation and its ideals is diminished if not destroyed by fierce loyalties to the particular clan, each of which considers itself the victim of another group.

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† Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 18, 1994.

* Thomas M. Cooley Professor of Law Emeritus, University of Michigan; Academic Fellow, Editor, and Administrative Secretary, International Society of Barristers.

[1] Luedtke, *It's Your Mother's Combat Boots: Race, Good Manners and Free Speech*, 29 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 311 (1994).

My law school publishes a weekly calendar of events, called The Docket. Its mid-November list of ten so-called "Multicultural Events" on the university campus for that week included the following: Issues Facing Native American Women (held in the Women's Studies Lounge); Puerto Rican Week Dance; Gay and Bisexual Men of Color Meeting; Asian-Pacific Lesbian Gay Bisexual Social Group. The Detroit Free Press publishes the delightful cartoons of Richard Guindon. A recent one portrays a flat, treeless wasteland on which are scattered a dozen or so crudely drawn clumps of people hunkered down behind low barricades of rubble, each displaying a small pennant on a pole. Two expressionless men are walking by, and one says to the other, "As a country, we seem to be breaking up into groups of hurt feelings."

Undeniably, you and I live in an era of enormous technological and cultural change. And because the law affects, and is affected by, all of life, there is concomitant change in our profession, including the trial bar. In particular, those changes threaten two legal institutions the preservation of which are charter objectives of the International Society of Barristers. I speak, of course, of the jury and of the adversary system. The many changes that threaten the jury and the adversary system are, individually, well-meant reforms. Each was intended as a change for the better. But I think most of us feel like the man who opened his fortune cookie and read the message: "A change for the better will be made against you." Let me offer a few observations about these two areas of change affecting trial lawyers and the public they represent.

THREATS TO THE JURY

The first change for the better being made against you is the steady, almost unremitting attack on the jury—in big ways and little ways. Let me count the ways:

First, for practical purposes the civil jury has shrunk from twelve to six. And though further shrinkage seems not imminent, the Supreme Court's endorsement of the reduction to six gives no principled basis for resisting a reduction to, say, three. And the Supreme Court's view to the contrary notwithstanding, there are significant values lost in shrinking the jury's size. There are provable differences between the deliberations of large juries and small juries. There are discernible differences between the verdicts of large juries and small juries. Moreover, nonunanimous verdicts are increasingly permitted, again modifying the jury's historic function.

Second, lawyers all around the country are losing the right to conduct voir dire, especially in federal courts. They are losing it because the judges have run out of patience. The lawyers think selecting a jury is equivalent to making an

opening statement, and they start off by making a speech to the panel members, while the judge on the bench is fuming. The response of the courts to these abuses is predictable: the judges take over voir dire. And lawyers have only themselves to blame. But the unfortunate consequence is inadequate probing for possible bias and interest. And so the character of the jury is affected again.

Third, in an attempt to eliminate racial prejudice in jury selection, courts are supervising the exercise of peremptory challenges, insisting that counsel establish a nondiscriminatory reason for exercising them. Announced first in a criminal case,[2] then applied to a civil case,[3] the principle has now been extended to gender-based challenges.[4] However laudable the concern, the courts' intrusion into motives for peremptory challenges means they are no longer truly peremptory. The "hunch" basis for exclusion of jurors has been partially preempted by a desire to minimize prejudice based on group stereotypes. And with peremptory challenges greatly diminished, jury trial is changed again.

Fourth, there are many who would deny a jury trial in complicated cases and in cases involving technology, on the theory that jurors will not be able to understand what is going on. And the right to jury trial is diminished once more.

Fifth, jury dockets commonly are allowed to fall relatively farther behind the nonjury dockets, thus forcing those in need of quicker resolution to waive the jury. There is no reason why judicial resources have to be allocated in such a way that jury trials are delayed much longer than nonjury trials. And the right to jury trial is diminished yet again.

Finally, the jury is under attack by those who charge that juries reach irresponsible results, both as to liability and damages, but particularly damages. Neil Vidmar, a professor of social science and law, points out that the statistical studies cited by critics to prove that deep pockets affect jury outcomes are fatally flawed—that, in fact, research yields no support for the existence of a deep pocket effect.[5] Yet the myth of oversympathetic, overgenerous juries thrives. Powerful interest groups exploit and misrepresent findings about jury malfeasance in order to further agendas of tort reform. The jury is used as a symbol of the so-called "litigation crisis." And Professor Vidmar states that "misleading data, and horrific anecdotes of a jury system out of control have been presented at legislative hearings and portrayed in stories and advertisements in the mass media."[6] This propaganda creates and reinforces beliefs about the irresponsibil-

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[2] Batson v. Kentucky, 476 U.S. 79 (1986).
[3] Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991).
[4] J. E. B. v. Alabama *ex rel*. T. B., 114 S. Ct. 1419 (1994).
[5] Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L. J. 217 (1993).
[6] *Id*. at 265-66.

ity of juries and the irrationality of the jury system not only in the general public but also in the legal, medical, and legislative communities as well.

In short, the jury is under seige.

THREATS TO THE ADVERSARY SYSTEM

The second change for the better being made against you is the diluting of the adversary system of justice.

We use an adversarial process to arrive at truth, based on the Greek concept of "dialectic debate." Over long years philosophers have argued about whether adversaries, arguing vigorously from opposite poles, are more likely to lead us to the truth than are investigators who use something akin to the scientific method of finding "facts" dispassionately. Although it has its flaws, I submit that the adversary system serves us extremely well. To paraphrase the familiar comment about democracy, the adversary system is the worst system of justice except any other. But I do not propose to argue at this moment and in this venue its philosophical merits and demerits. Instead, I want for our purposes to assume its usefulness and to discuss three changes underway that arguably diminish its function.

First is the discovery change effected by what I call "accidental Rule 26(a)."[7] I say accidental because until the very day it became law through congressional inaction, it was universally expected to be rejected on the ground that it is inconsistent with the adversary system. The new Federal Rule 26(a) calls for voluntary disclosure of sources of information "relevant to the disputed facts" and a list of witnesses who will be called at trial and of those who may be called if the need arises. Though the half-century-old federal discovery scheme muted the adversary system, discovery itself has functioned as an adversary proceeding (and, some would say, has replaced trial by ambush with trial by abuse). Under the new rule, however, counsel will have to make early judgments about some aspects of trial strategy and reveal them to the other side. And so the system is rendered less adversary.

Second, the nearly universal pressures for more efficient, business-like management of our courts serve to modify the adversary system. One cannot reasonably complain about attempts to eliminate waste in the judicial machinery. But manipulation of statistical information by efficiency experts, and counting the number of cases disposed of, does not guarantee that justice will be well served. Increasingly, judges are directed to play an assertive role in the

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[7] F.R.C.P. 26(a), *discussed in* Erickson, *Limited Discovery and the Use of Alternative Procedures for Dispute Resolution*, 29 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 333 (1994).

planning and control of the pretrial and trial activities of counsel, more like

the civil law judges of Europe than the common law judges of the Anglo-American experience. And again, the system is less adversary.

Third, the most severe challenge to the adversary system is the alternative dispute resolution movement. Its rise is, of course, an understandable response to the delay and high cost of traditional litigation and a rational response to the need in some situations for something other than an all-or-nothing outcome. I have some appreciation of how it works, having served on occasion as an arbitrator, and as a mediator to resolve matters that were bogged down in litigation. Nevertheless, I always am uneasy about the outcomes. Neither party seems to get his full say, and the outcomes seldom represent clean-cut victory or loss but rather a measure of compromise, which is often psychologically unsatisfying. I do understand that settlement may produce the same feelings, and the difference may be only a matter of degree, but I still have a feeling of disquiet. I suppose I'm a bit like Coach Bear Bryant, who said, "I'm a win man myself. I don't go for place or show."

Also, the terminology we use is telling. We speak of "the adversary system of justice," but we say "alternative dispute resolution." At the risk of overstating, the emphasis in litigation is on trying to achieve "justice," while the emphasis in the alternative system is on "resolving disputes." I submit that the difference in emphasis is fundamental. The ADR movement continues to grow, and it occupies territory formerly occupied by the adversary system.

LAWYERS AS PROBLEM SOLVERS

These changes, and countless others, represent challenges for us as individual lawyers and for us as a profession. I would pose to you the question whether as lawyers we have the necessary talent, the necessary creativity to solve them.

From the first day of law school, lawyers are trained to think in terms of precedent. On the basis of what *has* been decided, we tell clients what they may do and may not do. We are specialists in the past—professional antiquarians.

Carl Sandburg, in his poem that contains the familiar line "Why does a hearse horse snicker hauling a lawyer away," writes:

> The lawyers, Bob, know too much.
> They are chums of the books of old John Marshall:
> They know it all, what a dead hand wrote,
> A stiff dead hand and its knuckles crumbling,
> The bones of the fingers a thin white ash.
> The lawyers know

A dead man's thoughts too well.

Despite Sandburg, our role as interpreters of the past lends a certain steadiness, a stability, a calmness to our society, that has served us well through expansion and war, prosperity and depression. And it is especially important in individual cases. But I suggest that the rate of change in our world as we approach the end of the millenium is so dizzying that it will no longer suffice to apply the methods of the past when it comes to meeting the larger problems of society, and government, and, yes, the profession. Lawyers defend the status quo long after the quo has lost its status. All too often we fit Mort Sahl's definition of a conservative as one who believes that nothing should be done for the first time. Someone said *stare decisis* is Latin for "we stand by our past mistakes." We have a professional bias somewhat like that of the World War II tail gunner who fainted when he went up to the cockpit and saw the world rushing toward him at 300 miles an hour.

MEETING THE FUTURE WITH SOLUTIONS FROM THE PAST

All too often we try to meet the future with solutions from the past. A number of years ago when the Fifth Circuit included everything from Florida to Texas, the court was falling farther and farther behind in its docket. The remedy proposed was the traditional one: Add a judge to help shoulder the load. Now, in fact, there were already twenty-five judges on the court. (Imagine, incidentally, what it was like for appellate counsel to appear before the court sitting en banc, facing twenty-five judges sitting in two or three tiers at improvised desks. No wonder they called it the "Fifth Circus.") Experts in organization management studied the court's operations and discovered an interesting fact: The processes of communication within the court required so much of the judges' available time that for each of the twenty-five existing judges to communicate with one more judge would require more judicial time in the aggregate than would be gained by adding a new judge. In short, one more judge would decrease the court's capacity. And so the circuit was split to create two smaller courts—the Fifth and the Eleventh—in place of the larger one. It was a case in which a traditional response would have exacerbated the problem, not solved it.

The critical problems of court congestion require for their solution the invention of new mechanisms, not merely the creation of more courts and the appointment of more judges. If we try to keep up with a burgeoning workload by doing the same things as before, only faster and faster and faster, we fall farther and farther behind and, arguably, produce a less elegant result as well.

We are like the woman on the dance floor who knows only the old steps. "Waltz a little faster," says her partner, "they're playing a tango."

I could go on at length, suggesting other areas in which we as lawyers seem content to attack almost intractable problems with tools and habits of thought drawn almost solely from the precedents with which we are so familiar and so comfortable. There isn't time to discuss them in depth, but let me simply mention a few where new learning and new theories and new approaches are sorely needed but are in short supply.

Take complex litigation, for example. Just mentioning names suggests the magnitude of the problems: Johns-Manville, Agent Orange, Dalkon Shield. Yet many lawyers still think of litigation as involving simply a plaintiff and a defendant—of Helen Palsgraf suing the Long Island Railroad; of Hadley and Baxendale arguing over the measure of damages; of Pennoyer resisting eviction by Neff. The extent to which that simple, two-party, bi-polar model is ingrained in our thinking seems somehow to diminish our ability to fashion new modes of resolving complex disputes.

Neither have we learned well how to resolve disputes arising out of exotic or highly technical subject matters. We still use methods that were developed to decide who struck the first blow or who was on the wrong side of the road.

We live in a time when enormous wealth resides in intellectual property—software and electronic data. Vast sums of money are represented by computer impulses and are transferred around the world instantly by satellite. We try to apply to these matters property concepts from the time of Blackstone, and they do not fit very well.

The centuries-old law of the sea permits one to take whatever fish may be netted. But now we have fish "ranching," where fish are conditioned to respond to the sound of the owner's underwater transmitter, and so are kept together and fed by him and harvested by him—unless taken by others claiming free, open-sea fishing rights. Traditional concepts of the law of the sea and personal property are anachronistic in such a setting.

And on and on. You can add your own examples of areas in which the problems are new but the solutions merely traditional and often inadequate, in which lawyers, both individually and as a profession, simply waltz faster when the world in fact is playing a tango.

MANAGING CHANGE

And so I ask, how should you and I, as lawyers, respond to these changes and challenges?

As you would expect, I do not suggest that we rashly adopt a bunch of new

procedures, new laws, new institutions, new remedies simply because they are new and, often, touted by enthusiastic "true believers." Malcolm Berko said, "My dad would always say, 'Never buy a gold watch in the parking lot from a guy who's out of breath.'" And there *are* zany solutions to all kinds of problems in this world. I am reminded of a story I told some of you at one of these meetings several years ago. The setting was a graveside service in a Parisian cemetery. A woman had died, and all the mourners had left but two men. One had been her husband and the other her lover. The widower was grief-stricken, but controlled in his grief. The lover, on the other hand, was sobbing and keening and appeared about to collapse, when the husband came over to him, placed his arm about his shoulder reassuringly, and said, "Not to worry, M'sieur; I shall remarry." Not all problems are so easily solved.

I don't know whether you have ever thought about the fact that lawyers, as a class, are not notably creative. Andrew Watson, a professor of psychiatry and law at the University of Michigan, who spoke at our Florida meeting two years ago, describes the brain as a chaotic mass with only a veneer of rationality. He maintains that creativity exists only deep in that disorderly area of the brain, that rationality is the enemy of creativity, and that it is no accident that so many creative, artistic, inventive people are disorderly, iconoclastic, bohemian. The truly creative person delves into the chaos, finds new things, and then brings them to the surface to rationalize them and make them useful. Some creative types plunge deep but never make it back to the surface and end up in a kind of madness, as, for example, the poet Ezra Pound. But creativity requires to some extent that one dig deep beneath the rational. The problem with lawyers, Dr. Watson suggests, is that, by training and practice, we are so steeped in reason that the rational veneer is greatly thickened; and it is very hard for us to break through that veneer and to move into the creative chaos. Indeed, we are embarrassed even to try. And so we are not very imaginative, not very creative.

Our first task, then, is to try to overcome that barrier, by resolving to think more imaginatively about the problems our profession faces, and by enlisting the interest and efforts of thoughtful experts in other fields, whose creativity hasn't been suppressed by years of insistence on competency, relevancy, and materiality.

In meeting these changes and challenges, it is, paradoxically, more important that we be creative about the questions to be asked rather than the answers to be found. Identifying the question is vastly more important than the answer. The reason a child learns so much so fast is that he is full of questions. Though we think of knowledge as power, Thoreau said most of our so-called knowledge is "but a conceit that we know something, which robs us of the advantages

of our actual ignorance."[8] In similar vein, Hector Berlioz said of his fellow composer Claude Debussy, "He knows everything, but he lacks inexperience."

As an occasional teacher of the course in professional responsibility, I am often uneasy about my answers to student questions about particular ethical problems, but I believe that I have been of most use by being sure that my students see the existence of the question and understand the competing values involved. If, through the years ahead, those graduates continue to be alert to the existence of ethical questions, I am comfortably sure that on balance they will do the right thing. The problems come when lawyers become inured, little by little, to ethical concerns, to the point where they are scarcely aware that there is even a question.

Although my favorite lay theologian still is the *Peanuts* character Charlie Brown, Calvin, of *Calvin and Hobbes*, runs a close second. In a Sunday strip last fall, Calvin spoke at length to Hobbes, his imaginary tiger friend. He said:

> Today at school, I tried to decide whether to cheat on my test or not.
>
> I wondered, is it better to do the right thing and fail … or is it better to do the wrong thing and succeed?
>
> On the one hand, undeserved success gives no satisfaction … but on the other hand, well-deserved failure gives no satisfaction either.
>
> Of course, most everybody cheats some time or other. People always bend the rules if they think they can get away with it. … Then again, that doesn't justify *my* cheating.
>
> Then I thought, look, cheating on one little test isn't such a big deal. It doesn't hurt anyone. … But then I wondered if I was just rationalizing my unwillingness to accept the consequence of not studying.
>
> Still, in the real world, people care about success, not principles. … Then again, maybe that's why the world is in such a mess. What a dilemma!

Hobbes then interrupted Calvin's monologue to ask:

> So what did you decide?
>
> Nothing [said Calvin]. I ran out of time and I had to turn in a blank paper.

Hobbes again:

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[8] H. THOREAU, JOURNAL (1851), *cited in* Henderson, *No E-Mail from Walden*, N. Y. Times, Mar. 16, 1994, at A15 (nat'l ed.).

Anymore, simply acknowledging the issue is a moral victory.

Calvin:

Well, it just seemed wrong to cheat on an ethics test.

Indeed, recognizing the question *is* the beginning of wisdom.

A VISION OF THE FUTURE

I am reminded of another cartoon by Richard Guindon, showing five wispy men and women sitting around a table in what I call a quiche-and-fern cafe, drinking wine and looking bored. One says, "Is evolution still going on, or is this about it?" Well of course, evolution is still going on—in your personal life and in your profession. As I have said, we live in a time of almost overwhelming change. Change makes us uncomfortable, even angry at times. We have a natural tendency to resist those changes. But we cannot opt out. Disconnecting from change does not recapture the past; it loses the future. The question simply is whether we will be agents of change or its victims.

I suggest that, despite our tendency to be limited by the past, we lawyers, with gifts of intellect, training, craft, and station, are obliged, if we are to be faithful stewards of all those advantages, to offer to the republic and to society our most creative ideas for meeting that world that is rushing toward us at 300 miles an hour—or, in today's terms, at Mach 2.

Very late in his career, when his vaunted intellect had begun to slip, Justice Oliver Wendell Holmes was traveling by train. When the conductor came through the car calling for tickets, Holmes couldn't find his. He searched through all his pockets, his briefcase, his wallet. He searched high and low, but he couldn't find his ticket. "That's all right," said the conductor, "you look like an honest man, and I'm sure you have just misplaced it." "Young man," replied Holmes, "you don't understand. The question is not 'Where is my ticket?' The question is 'Where am I going?' " We don't ask that question often enough. You may recall the old conundrum: "Why did Moses wander in the desert for 40 years?" "Because, even then, men wouldn't stop and ask questions." Especially at the personal level, there is the strong possibility that one who neglects to reexamine his goals will come to that condition in late middle age where he's gotten to the top of the ladder only to find that it's against the wrong wall.

I do not suggest for a moment that we can afford to forget where we have been. Not to know history is to be always a child. But lawyers need little help with history. The question we neglect is the one of destination. Unless we keep posing that question, all of our reforms and changes will be nothing but

improved means to an unimproved end.

I pray, therefore, that you will address yourselves not only to the immediate problems of your clients and of the bar, but also to Mr. Justice Holmes' larger question: Where are we going? To which I add: And how do we get there? Do not commit the error, common among the young, of assuming that if you cannot save the whole of mankind, you have failed. All that is required is constant inquiry, and creativity, and unselfishness, in addressing the challenges that bear upon us. It may even mean actions that are costly to us personally. But it is essential that we address ourselves thoughtfully and intentionally to the future. We shall be overwhelmed by events if we do not anticipate them and if we do not invent new ways of coping with them. Like the woman on the dance floor, we'll merely be waltzing faster while the world is playing a tango.

JUDICIAL ELECTION REFORM†

John L. Hill*

Since the United States Supreme Court taught us in the *Buckley* case[1] that we cannot constitutionally place limits on individual campaign spending in judicial races, we have had serious problems. These problems have been exacerbated in our state of Texas because we still conduct partisan judicial races in which the candidates run as Democrats or Republicans. One consequence of our election system is that our minority lawyers are seriously underrepresented in the judiciary. So we have a dual problem, one created by the appearance of excessive spending on both sides and the other a serious underrepresentation of minorities, who have not fared well in these partisan, expensive elections.

THE TEXAS SUPREME COURT

The battle for control of the Texas courts is a fairly well-known story. It has been the subject of two *60 Minutes* exposés. The emphasis is normally on the Supreme Court of Texas so I will address that problem first, although the problem doesn't end there.

If you ask a plaintiff lawyer why he or she contributed to the campaign of *A* for the Texas Supreme Court, the usual answer is something along this line: "I believe *A* will be fair and independent of special interests and will follow the law without regard to personalities, without regard to which lawyers have contributed to his campaign, and without regard to whether the litigants are Democrats or Republicans." Then if you ask a defense lawyer why he or she supported *B*, *A*'s opponent, you get essentially the same answer. In my experience, the real explanations are that the plaintiff lawyer supports the person perceived to be philosophically attuned to plaintiffs' rights and to jury verdicts, and the defense lawyer favors the candidate who seems philosophically inclined to look closely at large verdicts and to be not unwilling to overturn them.

Every two years two judges on the Texas Supreme Court have to run for new six-year terms, so every two years in Texas we choose up sides, plain-

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* Liddell, Sapp, Zivley, Hill & LaBoon, Houston, Texas; Fellow, International Society of Barristers. Formerly Secretary of State and Attorney General of Texas, and Chief Justice of the Texas Supreme Court.

[1] Buckley v. Valeo, 424 U.S. 1 (1976).

tiff lawyers against defense lawyers, and have this ugly battle for the philosophical control of the court. Each race produces total campaign contributions of about five million dollars, most of it coming from large firms with cases before the court. The campaigns are conducted mainly on television in thirty-second spots filled with charges and countercharges attacking the ethics and bona fides of the other candidates. Very little positive campaigning is seen. The listening audience of Texans, expert in matters of politics (as in football), normally can filter through all this to determine which candidate is on the plaintiffs' side and which is on the defense side, and they vote along those lines.

This is war, ugly war. The newspapers decry the situation in almost daily editorials and charge that the state bar has done very little because the subject is too controversial—and it is. The battle rages on and gets more partisan and more expensive every two years.

THE LOWER COURTS

In the metropolitan area where many of us Texans here live and practice, we have just finished selecting Democratic and Republican nominees in over thirty races for positions in the district courts, where our civil trials are handled. If you run as a Democrat for the civil trial bench, it sure does help if you have the endorsement of certain special interest groups. If you run as a Republican, it is certainly helpful to have other special interest groups in *your* corner. The common denominator is money, lots of money. It is shocking to think of spending a couple hundred thousand dollars to run for a district trial bench, but that is not unusual. The candidates that spend the most money usually win. And again, most of the money comes from those of us who have cases pending in the courts.

You can see why *60 Minutes* said it's "justice for sale" in Texas, and you can see how thoroughly politicized our judiciary has become. Some would say that the most important business of a Texas judge is looking after his or her politics. It takes a lot of time, a lot of money, and a lot of energy.

At least half of our judges initially come to the bench through appointments when a vacancy occurs, but the situation there is not much better. The appointment process is through the governor. When Clements was governor, most of the appointed judges were conservative, and under Ann Richards, we've had appointments of what would be considered more liberal judges. The key is to find out which lawyer or lawyers have the ear of the governor. It's a very closed process.

REFORM OF THE SYSTEM

Texans are good folks, and we believe in doing right. We believe in justice and in a good judicial system. And we realize we have problems. I believe that no one, either plaintiff oriented or defense oriented, would take serious exception to what I have said.

Some time ago, I decided that the best contribution I could try to make would be in the area of judicial election reform. I recognize that this is a long-term venture, not one for the short-winded. I know enough about politics to know that if you're really going to change public policy in your state, you have to be prepared for a long educational process and a strong political fight. I want to share the approaches that those of us in Texans for Judicial Election Reform, of which I am president, are taking.

The first step under the plan we're promoting is to open up the appointive process to include the people in that process much more than they are now, so that there will be more confidence in appointments and more stability. The people who want to be judges and meet the minimal qualifications of our statute (and that's another subject—I wish we had more qualifications for our judges than we do—but I'll not digress) would have to present themselves to a commission. We propose different commissions for each level of courts, and the commissions are differently composed—including local input at the district court level, for example—but we have tried to make the commissions balanced and can fine-tune this. The commissions would screen the candidates at open meetings, through open hearings, and send three names to the governor, from which the governor would have to make the final selection.

We think that's a better process for appointing judges than we now have. After the last appointment of a judge in my area, I said to the husband of the appointee: "Congratulations on your wife's being appointed. By the way, how did that happen?" He said, "The senator from _____ was an old friend of mine." I said, "How does a senator from [there] have anything to do with appointing a district judge over here?" I'm not demeaning the judge. She's a friend of mine, a fine person, and I'm glad to see her on the bench. But I am disturbed by the process—that he was able by his relationship with a senator from another county to have an impact on the appointment, and all the public ever knew was that the name was announced. We think that it is better, generally speaking, for the possible appointees to be known ahead of time, to be screened and scrutinized.

Within two years after appointment, the people will have to run for retention, and that may be all right. The nearest thing to tyranny I have ever experienced has occurred in some federal courtrooms, so I'm not interested in life-

time appointments, but I do have some concern about stability. The tenure for Texas judges is down to six years now, and that's dangerous. We have an unstable judiciary, I think, as a result of it.

I will not take the time to describe the rest of our reform plan, but we hope to get it to the people for discussion and a vote, probably sometime in our 1995 election cycle. And, unless other plans surface, we believe the people will support this plan, not as a perfect plan but as one that will improve the reputation of our judiciary. After all, there is no Republican justice or Democratic justice. We all know that. The judge's role should be to apply the law to the facts and try to reach the right decision regardless of the parties involved, regardless of the lawyers involved, and without any fear or favor or political agenda. Judges simply do not have and should not have constituencies.

THE BROADER PERSPECTIVE

We have many things to be thankful for in our profession and in our courts, and as I get to the sunset side of the trip, the only thing that really disappoints me is that I'm not sure we're leaving our legal system better. I am a generational thinker. I believe life is based upon each generation making things better and building on the improvements of the preceding generation. I don't want to end on a somber note because I am basically optimistic, and I love lawyers and believe in lawyers; but there is so much we can and should be trying to do. We are not training our young lawyers to be trial lawyers. We're not going to have the strong advocates that we have, and have had, in this Society. I could name one after another giant of the trial bar who influenced and impacted my life. We need, as trial advocates, to strengthen advocacy. That's the best way to preserve our beloved jury system. That's the best way to preserve our free court institutions in this country. We need to strengthen the advocates, return to the professionalism through which we all can prosper, make meaningful the representation of folks who can't afford legal representation, make pro bono real in our firms. We need to be people who are again the leaders of the community and the conscience of the community. Above all, we must not let the confidence of our people in our system of justice be diminished.

THE MULLIGAN AT COMMON LAW AND ETHICAL IMPLICATIONS OF UNLIMITED VOLLEYING BEFORE TENNIS MATCHES†

Victor A. Fleming*

I have but one disclaimer to make this morning, and it is that I engage in no fiction whatsoever. I gave up fiction several years ago. Now I tell the *Truth* with a capital T. Every exchange I will relate is an actual excerpt from a deposition or trial transcript. Also, I gave up lawyer jokes in 1986 when I wrote a book, *Real Lawyers Do Change Their Briefs*, which is full of truth. (It is now available in a second printing.) Some of these transcript excerpts, however, might sound like lawyer jokes.

THE OATH

More than others, lawyers find themselves in the presence of people who are under oath to tell the truth. The oath varies a bit from jurisdiction to jurisdiction, but basically it goes like this: "Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth?" "I do." When children are involved, however, it goes somewhat differently:

Q: Ellie, what do you think God would do to you if you told a lie in court?
A: Send me to my room?

* * *

Q: Now, Bobby, if we let you put your hand on the Bible and swear to tell the truth and then you don't, what would happen to you?
A: Well, sir, I'd be kicked out of Cub Scouts.

* * *

A gruff old judge handled this one:

Q: Now, young man, do you attend church or Sunday school?
A: No, sir.
Q: Do your parents have a Bible in the house?
A: No, sir.

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†Address delivered at the Annual Convention of the International Society of Barristers, The Phoenician, Scottsdale, Arizona, March 17, 1994.

* Gill Fleming & Elrod, Little Rock, Arkansas.

Q: Do you know who God is?
A: I don't think so, sir.
Q: Do you mean you don't know who created the universe?
A: You?

* * *

Little Jenny was perhaps brighter than all the rest:
Q: Jenny, do you know what happens if you tell a lie in court?
A: Uh huh, you go to hell.
Q: Is that all?
A: Isn't that enough?

MULLIGANS

Once the oath is administered, lawyer and witness sometimes engage in the strangest of dialogue. Thus, the occasional need to tee it up a second time, to take a Mulligan. And thus, the occasional seemingly unlimited volleying with a witness. Here are some lawyer-witness exchanges that clearly illustrate the need for a Mulligan:

Q: Mrs. Jones, is your appearance here this morning pursuant to a deposition notice and subpoena that I sent your attorney?
A: No, this is how I dress when I go to work.

* * *

Q: Sir, have you had an opportunity to prepare for this deposition?
A: Well, I took a shower and changed clothes.

* * *

Q: Ma'am, were you wearing your seatbelt at the time of the accident?
A: No, but I had my girdle on.

* * *

Q: What did you do to try to prevent this accident?
A: I closed my eyes and screamed as loud as I could.

* * *

Often the need for this second shot at the witness comes up when ordinary folks testify about medical matters.

Q: Could you tell us how bad his legs were torn up?
A: Bad, real bad.
Q: Well, can you describe in your own words what his legs looked like?
A: Well, sir, have you ever seen a cow butchered with a chain saw?

* * *

I don't know whether the questioning lawyer had ever seen a cow butchered with a chain saw because there's an unwritten rule that lawyers don't answer questions asked by witnesses. I found one example, though, in which a male lawyer broke that rule and answered the question of the female witness:

Q: Let's break down the different problems that you're having now. The shoulder pain—can you give me some language to tell how that feels?
A: Well, have you ever worn a bra that was too tight on you?
Q: If I said yes, my mother would be quite embarrassed. No, I can't say that I have.

* * *

There should be a two-stroke penalty for that one. Here's another in which the lawyer was injured in the play:

Q: You broke your left ankle in this accident?
A: Broke both ankles, sir. Broke both ankles and the center bone.
Q: Well, I'm sorry, but I thought you only broke your left ankle.
A: Well, there's two ankles on the left foot—inside ankle and outside ankle. Broke my left foot—the center bone, the inside ankle and the outside ankle.
Q: Let me get this straight. Your testimony is that you have four ankles?
A: That's right.

MEDICAL TESTIMONY

As the examples just given already suggest, testimony by lay witnesses about medical problems gives rise to many Mulligans—and many hooks, slices, shanks, fouls, penalties, free shots, lobs, slams, and so on.

We will turn first to the deposition of Betty Fields, taken in Texas several years ago. Betty, a full-figured lady, suffered back pain, allegedly as a result of a fall on the job. By the time she gave her deposition, she had had breast reduction surgery, and the lawyer who was asking the questions plowed right in. This exchange can best be analogized to boxing; the lawyer was knocked out. After Ms. Fields had testified about the breast reduction surgery, the lawyer

asked, "Did the size of your breasts have any relation to your back pain?" She responded, "Sir, I did not have the pain before the fall, but I did have the breasts."

My next example will equalize the genders a bit. The witness was a male.

Q: When did you first experience pain after this accident?

A: Immediately. I was bruised and skinned pretty good, and my right tentacle had swollen to the size of a hard baseball.

* * *

I studied that deposition, and it is silent as to the condition of the other seven tentacles.

The casual and idiomatic question is often a danger to a lawyer. It's like serving up a lob, in tennis, to someone who's just waiting to slam it down your throat.

Q: Are you seeing anybody now, an ear specialist?

A: I saw one about a month and a half ago.

Q: Who was that?

A: Dr. Ripp … R-I-P-P.

Q: Does he have a first name?

A: Probably.

* * *

Sometimes the good faith with which a witness answers that casual question sort of jumps out and grabs you.

Q: When was the last time you saw Dr. Bryant?

A: 1953.

Q: What kind of things did he treat you for?

A: Tonsillitis and acute nosebleed.

[The lawyer should have stopped right there, but he asked one more question.]

Q: What caused the nosebleed?

A: I don't know, but it was a booger.

* * *

Q: Has there ever been a time in your life when you've considered yourself to have a drinking problem?

A: I really never considered it a problem. It was about the easiest thing I have ever done.

* * *

Our next story takes a little longer to tell. It is the story of Hardy Amy, a gentleman who was injured in an industrial accident. He was high aloft in a "cherry picker" sawing limbs when his saw came into contact with a live wire. He was injured very badly. He blacked out immediately and was unable to testify personally as to what happened to him; he could only relate what someone else had told him.

Q: Do you know what happened next?

A: Well, all I can tell you is what they told me.

Q: OK, fair enough. Tell me who it is that has told you.

A: Mr. Sistruck, the gentleman that was there with me.

Q: OK. What has he told you?

A: He told me that when it hit me, when the electricity hit me, it froze me up there. He in turn ran over to the machine. He hit the down button. The first time he hit it, it knocked him back about ten feet, he told me. Then he came back again, and I assume that he hit something right and it pulled me down—it let the main lift down which pulled me away from the wire. They drug me out of the bucket, and by that time I guess several people came out, and somebody called the paramedics. And once Mr. Sistruck got me out of the bucket, he gave me artificial insemination—you know, mouth to mouth … mouth to mouth whatever.

* * *

When I requested that transcript from the law firm that handled Hardy Amy's case, I received, in addition to the transcript, a couple of internal memoranda, one of which was from one lawyer to the other. It said, "Your cross-examination several years ago of Hardy Amy continues to provoke inquiries from disbelieving counsel around the country and to otherwise distract me … . I ask that you respond to Mr. Fleming's request."

On the subject of artificial insemination, one of the most classic instances of seemingly unlimited volleying occurred in a paternity case in which this medical procedure was tangentially invoked. The defendant, a reluctant and unhappy father, was a retired law professor and a very stuffy gentleman. He vehemently denied having had a relationship with the plaintiff, notwithstanding the 99.4% accuracy of the blood test that showed his paternity of her child. Some of the brilliant questions that the plaintiff's lawyer came up with would definitely qualify as aces on the tennis court.

Q: How is it possible that you could be the father of this child without having had sexual contact with Maryann?

A: There are a number of ways. One is artificial insemination.

Q: Did that happen in this case?

A: I don't know.

Q: Are you a donor at a sperm bank here in town?

A: No, I'm not a donor.
Q: How would Maryann artifically inseminate herself with your sperm?
A: I'm not quite certain that it did occur, but there was a possibility of it occurring.
Q: How would she get ahold of your sperm?
A: She cleaned my office from time to time … and there was some refrigerated sperm in the refrigerator during that period of time.
Q: And so your theory is that Maryann got into your refrigerator and inseminated herself with your sperm? That's your testimony?
Defense Counsel: I object to counsel's manner of asking the question. He's laughing. [For educational purposes, I must point out that neither the rules of civil procedure nor the rules of evidence, even under the new federal rules amendments, forbid laughter by the lawyers in the courtroom.]
Q: I'm trying not to be facetious. Is that your theory?
A: I don't have any theory. You're asking me how it's *possible* and that's what I told you, among other things. I don't know.
Q: What would the other things be?
A: I told you I don't recall having any sexual contact with Maryann and that's the truth. I don't have any recollection of it. If this could happen at a time when I was comatose, that's a possibility.
Q: Were you comatose in February or March of 1985?
A: Well, there was a period of time when I was under heavy sedation for something that has never been truly diagnosed but which prevented me from being able to walk.
Q: And you were sedated and Maryann had access to your body? So that's a possibility? She may have engaged in sex with you without your knowledge? Is that what you're telling us?
A: I'm guessing. If, in fact, I'm the father of that child, that's another way it could have happened.

PREGNANCY AND DEATH

I have concluded that pregnancy and death are the medical conditions that create the most confusion and evoke the fanciest footwork among both lawyers and witnesses. The first excerpt is an exchange with another witness who was not a happy father.

Q: In connection with the plaintiff's pregnancy, you've said you believe she cheated you. Would you elaborate upon that?
A: Yes, sir. I feel like she cheated me, because she said she couldn't get pregnant. She said she'd had an operation for cancer of the uterine or astigmatism or something like that. [My theory is that they just didn't see eye to eye.]

* * *

Q: And, Doctor, as a result of your examination of the plaintiff in this case, was the young lady pregnant?
A: The young lady was pregnant, but not as a result of my examination.

* * *

Q: When was the last time your wife was employed?
A: Several months ago. She's expecting at this time.
Q: I see. A child?
A: Yes, sir, I think that's what it is.

* * *

Here's one that makes you wonder why the lawyer didn't take a Mulligan:
Q: Do you know how far pregnant you are right now?
A: I'll be three months pregnant on November the 8th.
Q: I take it then that the date of conception was August the 8th?
A: Yes.
Q: What were you and your husband doing at that time?

* * *

On the subject of death, we have three classics:

Q: You've testified that Cecil Melis is dead now. Is that correct?
A: Yes, sir.
Q: Do you know when he died?
A: Well, it's been pretty recently. March, April, May. I don't recall the exact date.
Q: So he's not available to testify in this hearing, is that right?

* * *

Q: Now, Mrs. Johnson, how was your first marriage terminated?
A: By death.
Q: And by whose death was it terminated?

* * *

Q: When was the last time you saw Walter?
A: I saw him at his funeral.
Q: Did he make any comment to you at that time?

* * *

One final example here falls between pregnancy and death. This was the deposition of a woman who was being asked about her prior husband:

Q: Tell the court, if you will, what transpired between yourself and your previous husband.

A: I couldn't do a damn thing with him. He beat the hell out of me so I divorced him.

Q: And when did you divorce him, please?

A: God, I don't know. I closed that out of my mind. I mean I threw that S.O.B. in the garbage can, stomped it way down, took it in a helicopter, and dropped it in the middle of the ocean.

* * *

That's unsportsmanlike conduct, although he probably deserved it.

DID THEY REALLY ASK THAT?

In each of the following instances, the lawyer asking the questions needed to hit a Mulligan or go back to trial advocacy 101—or just think before speaking.

Q: What else did they take X-rays of other than your knees or your heads?

A: My heads?

Q: Your head. In fact, you have only one head, is that correct?

* * *

Q: Sir, how long have you lived on this land?

A: All my life.

Q: And where did you live before then?

* * *

Q: What is the nature of your relationship to Johnny Darrell Bailey?

A: I'm his mother.

Q: And you have been all his life?

* * *

Q: Do you recall how many times you had sex with Mrs. Johnson?

A: Probably six times over a period of six months.

Q: Where did you have sexual relations with her? What was the physical

location?
A: In my pickup.
Q: And was that the only place?
A: Yes.
Q: And were you parked?

* * *

Q: Doctor, when did you first have contact with this child?
A: I've been looking after him since birth.
Q: Since birth?
A: Yes.
Q: How old would the child have been at that time?
[This doctor did not miss a beat.]
A: At birth they're not very old.

* * *

Q: When was the building constructed?
A: 1980.
Q: When did you begin storing furniture in the building?
A: 1981.
Q: Did you store any furniture in it before it was built?

* * *

Q: What was the next thing that happened? What did he say to you?
A: Well, sir, he told me, "I have to kill you because you can identify me."
Q: And did he kill you?

* * *

Q: Can you tell us where you were born?
A: I was born in Memphis.
Q: And when was that?
A: August 20, 1953.
Q: Did you live in Memphis, or did you move somewhere, or did you just go there to be born?

* * *

My second-hand information is that when the question that concluded the following examination was asked, the court reporter blew her facepiece all the

way across the room.

Q: Do you have your own checking account?
A: No, I don't.
Q: Do you write checks?
A: Yes.
Q: Do you have a joint account?
A: Yes.
Q: Do you know how much is in that joint account?
A: No, I don't.
Q: Do you know how much money your husband makes?
A: No, I don't.
Q: Do you know what the name of your husband's company is?
A: No, I don't.
Q: Do you know how long your husband has been self-employed?
A: No, I don't know how long.
Q: How do you know if there is money in your checking account at the time you write a check?
A: My husband tells me.
Q: Do you ask your husband's permission before you write any checks?
A: Yes, I do.
Q:Will you marry me?

MEMORY

It has been said that you never know how much a person can't remember until that person is called as a witness. Sometimes the lack of memory can be highly selective. Here is one of my favorites:

Q: Are you sure that's the only time you met with this woman?
A: I have a little bit of memory loss since I was in this car accident in 1964, but I may have met with her another time.
Q: Well, did you lose your pre-1964 memory or do you just have a memory problem since then?
A: I may have a memory problem since then, but maybe not. I think I met her one other time, but I can't say for sure, you know.
Q: Have you taken any medication or anything like that for a memory problem?
A: No.
Q: Am I the first person that you've told about this memory problem?
A: I think so. Yeah.
Q: At least if you told anybody else, you can't remember, right?

A: That's right.

* * *

Often the arresting officer remembers things a bit differently than the defendant does. And those of you who have questioned an arresting officer know the language: They don't ever "see" anything; they "observe" it. No one ever "says" anything; they "indicate" it. And, of course, no one is ever a "person"; they're always a "subject." This is an officer testifying in a DWI case:

A: The subject was an elderly female. She was in her car with the motor running. The car was off the road and straddling a large log with all four wheels off the ground and spinning.

Q: Now, Patrolman Smith, what led you to suspect that the defendant was intoxicated?

A: Well, I climbed up on the log and knocked on the window, which was closed. She rolled the window down and gave me a strange look, then looked at her speedometer and said, "How can you be keeping up with me? I'm doing 40 miles an hour."

* * *

Sometimes the witness sort of forgets statements that he's made previously:

Q: You pretty much hate the defendant, don't you?

A: Not really. I just think he's a crazy kid, that's all.

Q: Didn't you describe him as a punk, liar, thief, cheat, murderer, and the lowest form of life that you know?

A: Yeah, that pretty well sums him up. But he's a crazy kid on top of that.

* * *

This is my personal favorite although I have trouble finding a sports category for it. This is the actual testimony in labor court of a former lampshade company employee who was discharged for allegedly having used profanity on the job. It appears that time was a great memory enhancer; he remembered very precisely what had happened even though a few months had elapsed since the incident.

A: My colleague was soldering some wires close to the ceiling and I was holding the ladder. He was not paying attention to the solder that fell, and I complained more than once. At a given point in time, on purpose, he let fall onto my shoulder a red-hot piece of metal.

Q: [From the judge] At that very moment, what did you say?

A: I said, "Look here, dear colleague, at the hole you just made in my shirt."

* * *

And, finally, we have the quintessential example of the witness—a pathologist—who would not be outdone.

Q: Do you recognize the person in Plaintiff's Exhibit 8?

A: Yes, it's Mr. Edgington.

Q: And do you recall the time that you examined the body of Mr. Edgington at the Rose Chapel?

A: Yes, it was in the evening. The autopsy started at about 8:30 PM.

Q: And Mr. Edgington was dead at that time, correct?

A: No, you dumbass, he was sitting there on the table wondering why I was doing an autopsy on him!"

LESSONS

What do we learn from all of this? We learn that fact is stranger than fiction and that what really happens is much funnier than any tacky lawyer joke. Law practice, the popular image in the media notwithstanding, is honorable and important—and not without levity. Those of us who practice law should never be guilty of taking ourselves too seriously.

The next time you hear a lawyer basher, walk up to him and invite him to go with you to court. Take him with you to court over and over again so he can walk a mile in your shoes. I would love to propose legislation requiring every young adult to spend one year working in the judicial system in some capacity, so they could see what really happens. Meanwhile, I encourage all of you to take pride, not just in the practice itself but in its diversity, in its richness, and in its fun.

PUBLISH AND PERISH: THE FATE OF THE FEDERAL APPEALS JUDGE IN THE INFORMATION AGE†

Bruce M. Selya*

The legal career of one of my most distinguished colleagues, Bailey Aldrich, has very nearly spanned a legal millennium. His name first appeared in the *Federal Reporter* in 1939,[1] and I have every hope and expectation that his opinions will grace the corresponding pages of the third edition of the *Federal Reporter*—a milestone which is fast upon us. The next legal millennium, at current rates of publication, will fall about the same time that my grandson, Brad Sherman, now still in diapers, will be pondering the decision to attend law school. And if recent trends continue, the time is not too far distant when the partnership track at major law firms will exceed in duration one full iteration of the *Federal Reporter*.

Of course, this development is not new. Reservations have been voiced for many years about the proliferation of judicial opinions, legal commentary, and the like. In 1962, a prominent attorney announced with horror that if all the law books in Harvard Law School's library were aligned in a single row, they would require a shelf thirty-nine miles long.[2] The mind boggles at the calculation of how long that shelf would be today. If these millions of printed pages illuminated vistas, or if their sheer bulk served some other useful purpose, I would gladly suffer the indignities of wading through them. But I question whether the game is worth the candle.

At the risk of being called parochial, I confess that I am concerned both about the contribution of the federal appellate judiciary to the oceans of paper that have emerged and about the toll that producing that paper exacts. (I write today in terms of the federal appellate judiciary—but the phenomena that worry me are, I suspect, indigenous to most American appellate courts.) Perhaps the most damning assessment of the output of the federal appellate bench is that of Dean Roscoe Pound, who concluded as follows:

> After reading upwards of fourteen hundred double-column pages of judicial opinions, carefully sifted from many thousands of pages in the National Reporter System, one is impelled to ask why paper, printer's ink, labor, and shelfroom should be devoted to the perpetuation of what

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* Judge, U.S. Court of Appeals, First Circuit.

[1] *See* Stewart v. Connecticut Mut. Life Ins. Co., 102 F.2d 147, 147 (1st Cir. 1939).

[2] Eugene M. Prince, *Law Books, Unlimited*, 48 A.B.A. J. 134 (1962), *excerpted in* APPELLATE JUDICIAL OPINIONS 309, 310 (Robert A. Leflar ed., 1974).

> for the largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious.[3]

Dean Pound put the point rather sharply, but the object of this essay is not so much to answer his question as to echo the sentiments—rhetorical, in any event—that prompted the question, and to make it clear that, in the years since Dean Pound voiced his lament, the situation has deteriorated rather than improved.

To be sure, the glut of appellate opinions can be viewed as just another casualty of the litigation explosion. Complaints of a case load crisis are commonplace,[4] and they seem well-founded. Despite creative attempts to prove that this crisis is a figment of our collective imagination,[5] the everyday experience of sitting federal judges and the best statistical analyses available amply confirm the urgency of the situation.[6] And while cases are proliferating everywhere, they are multiplying most rapidly at the appellate level. The pressure from beneath is building, with a growing base of district court cases, and an even more drastically increasing rate of appeal. At the same time, the top of the pyramid is unable to absorb any of the structural stress; the number of cases heard by the Supreme Court remains at best constant, and the ratio of appellate court dispositions to granted petitions for certiorari has dropped to an all-time low. The remaining blocks of the pyramid, the circuit courts, are, literally and figuratively, caught in the middle.

By accident or design, the federal appellate judiciary's institutional response has mirrored what transpired earlier at the district court level. We have resorted increasingly to case management techniques: settlement programs, screening programs, "rocket" dockets, and the like.[7] Many of these innovations are laudable, but, like using one's fingers to plug a holed dike, they have two shortcomings. First, we have only a limited number of fingers at our dis-

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[3] APPELLATE JUDICIAL OPINIONS, *supra* note 2, at 309 (quoting Roscoe Pound).

[4] *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985) (discussing increase in federal judicial business since 1960).

[5] *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

[6] For an intriguing example of the judicial perspective, *see* Abner J. Mikva, *The Lester W. Roth Lecture: For Whom Judges Write*, 61 S. CAL. L. REV. 1357 (1988). For an excellent, relatively recent statistical survey, *see* Vincent Flanagan, Appellate Court Caseloads: A Statistical Overview (Sept. 14, 1989), *in* 2 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS, pt. II-D (July 1, 1990). The best recent compendiums of the conventional wisdom may be found in THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY (Federal Judicial Ctr. ed., 1989) [hereinafter JUDICIARY] and FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April 2, 1990) [hereinafter FCSC REPORT].

[7] Because the reversal rate has dropped sharply, it can also be argued that the courts of appeals have responded to increasing workloads by growing more deferential. I do not agree. I think the lower reversal rate more likely reflects the fact that a greater percentage of unmeritorious appeals are now being prosecuted. In the federal system, the appeal from the district court to the court of appeals has become, regrettably, the best bargain in the supermarket of modern litigation.

posal. Second, the inserting of fingers merely delays the adverse effects of, rather than repairs, the structural weaknesses that caused the damage in the first place. For the cases that reach the writing stage (of which there are far too many), we are reduced to greater and greater dependence on the starry-eyed post-adolescents whom we call law clerks. This system—if we can call it that—lends itself to uncertainty, contradiction, and disuniformity. It also has a tendency to transform judges from thinkers to managers. In the process, we risk losing that precious commodity once thought to be our hallmark—the opportunity for "the sober second thought."[8] Little wonder that the eminent scholar, Paul Bator, devoted the last essay of his life to a plea for reform, driven by the conviction that "at the court of appeals level, the appellate system is malfunctioning."[9]

All this is troubling, but, at least, it offers the small comfort of having a familiar ring. There is, however, a less remarked aspect to the case load crisis: the crisis of information overload.[10] If the case load crisis is descriptive of the effect of more cases on the justice system, the "infoload" crisis limns the effect of more cases on the vocation of the law.

In 1962, thirty-nine shelf miles of books was a noticeable but bearable weight on the shoulders of the profession. Three decades later, the weight of the law is oppressive. Even with pinpoint subspecialization, it has become a half-time job for a lawyer to keep track of all the cases emerging on a daily basis in his or her small corner of the law. Federal appellate judges, who, like it or not (and most of us relish the role), are compelled to function as generalists, can do little more than read what they can (in-circuit slip opinions, Supreme Court opinions, and *United States Law Week* alone absorb a high percentage of the available hours), then pray that they have chosen dependable clerks.

Much-heralded advances in technology have done little to ease the burdens. A prominent economist has made the intriguing point that, historically, household appliances advertised as "time-saving" have not saved time.[11] When laundry became easier to do, standards of cleanliness rose concomitantly, and consumers began to wash clothing at more frequent intervals.[12] Computer assisted legal research is much like laundry equipment in this

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[8] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (2d ed. 1986) (noting that "[t]heir insulation and the marvelous mystery of time give courts . . . the opportunity for 'the sober second thought.' " (quoting Stone, *supra*)).

[9] Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 678 (1990).

[10] The few who have remarked upon the phenomenon include Judge Mikva and, especially, Judge Gibbons. *See* John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Courts*, *in* JUDICIARY, *supra* note 6, at 22, 22-28; Mikva, *supra* note 6, at 1360.

[11] JULIET B. SCHOR, THE OVERWORKED AMERICAN 87-88 (1992). The one exception to the rule is the microwave oven. *Id*. at 88.

[12] *Id*. at 88-89.

respect. As cases remotely on point become ever easier to find, the expectations for research rise, courts crank out more opinions, lawyers write more briefs (citing more opinions), and opinions cite more opinions. The cycle then begins anew. All too often, the judges are drained.

To make matters worse, the quality of legal argumentation sometimes seems to vary in inverse proportion to the rate of citation. There is a vicious feedback effect between the infoload crisis and the case load crisis in its more familiar aspect, for one exacerbates the other. Information overload unsettles legal rights, because the assiduous associate can find support for any claim, no matter how tendentious. One result is that attorneys bring more actions and take appeals in a larger percentage of cases. Another result is that attorneys seed their briefs with more reasons for appeal, each complete with a compendium of authorities arguably in support of it. Judges proceed to decide the appeals and, in conscientious turn, address more and more issues per appeal. They then dutifully publish the resultant opinions, thereby contributing to the surfeit of information.

Many solutions have been proposed to the case load crisis in its various aspects, most being in the nature of structural reform. An American Bar Association commission recommended various forms of subject matter specialization, revitalized en banc procedures, and screening techniques.[13] The Federal Courts Study Commission paid special attention to proposals for administrative streamlining and jurisdictional limitation.[14] Many of these proposals are promising, but they will require time, money, and, in some instances, legislative action. It seems to me that, while such reforms are in gestation, there is a change we can bring about quickly and inexpensively, through greater self-discipline. I believe that if the appellate judiciary were to take a harder look at restricting publication, it would be a step in the right direction.

Limited publication has several advantages. Most importantly, like other demand-side solutions, it strikes directly at the infoload crisis. By contrast, structural reforms improving the capacity of the courts to handle current loads would serve to deepen the infoload crisis. Moreover, some of these structural reforms will merely delay the inevitable. Add a few notches to his belt, and the fat man will eat more; print more money, and the government will spend more; make appellate judges specialists in narrow areas and, over time, there will be more judges, who will, as a group, write more about their pet topics.

What makes curtailed publication one of the more appealing of the demand-side solutions is that it takes effect at the source. Whereas limiting ju-

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[13]American Bar Association Standing Committee on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth* 41 (1989).
[14] FCSC REPORT, *supra* note 6, at 171-86.

risdiction merely puts a lid on the steam pipe, generating pressure that will inevitably express itself in different forms of social conflict, limiting publication amounts to limiting fuel production—reducing the amount of coal with which the engine of litigation is stoked. Shortening published opinions, even assuming that such a step is desirable and feasible, would refine the fuel, but would not reduce the volume of its production.

When I speak of curtailed publication, I do not limit myself to conventional print. If an opinion should not be published, it should not be published either manually or electronically. To make an opinion available electronically defeats the whole purpose of the enterprise. If citation is permitted, then the infoload crisis worsens, and unfair advantage is bestowed on more affluent litigants. If citation is not permitted, then the transmission of the opinion is at best a tease and at worst an invitation to violate or evade the prohibitory rule. By now, every legal researcher has experienced many times the allure of the forbidden. In my view, then, the judiciary could take an important step in the right direction by ceasing electronic dissemination of any opinion not released for routine publication. The decision against electronic publication, after all, is (or should be) based on exactly the same criteria as the decision against publication altogether.[15]

By advocating self-imposed limits on publication, I do not mean to suggest that most cases should be terminated without opinion or by means of judgment orders. Rather, I envision more cases being decided in one of two ways. First, a far greater number of cases can be decided by means of full-dress opinions intended specifically and exclusively for the eyes of the parties, in a form that is most commonly called the memorandum opinion. Memorandum opinions are no less thorough in their probing of the parties' assertions, but they need not rehearse the facts at great length, they need not collect cumulative citations for the sake of completeness, and they need not take three steps backward to survey the legal landscape, in the style of the great law reviews. In addition, I fail to grasp why appellate courts so often feel compelled to reinvent the wheel. In many cases, the district court has handed down a clear, complete opinion (whether written or *ore tenus* does not matter) that cuts to the heart of the matter. In most of those situations, it serves no purpose for a court of appeals merely to rephrase the district court's words. In my estimation, many more appeals can be concluded satisfactorily by affirmance substantially on the basis of the district court's opinion.

It may be useful to conceive of these approaches in terms of the three standard judicial functions. Memorandum opinions and "based-on" affirmances

[15] A more radical step may merit consideration: the "depublication" of all existing opinions that have been published only in electronic form. Similar action has been taken on a large scale, for published opinions generally, in the California state court system.

serve equally well the function of review for correctness, but they abandon (or, better put, dismiss as unsuited for the particular case) the function of developing the law in favor of the function of maintaining uniformity. Because there exists a large class of cases that provide little opportunity for the development of the law, increased use of memorandum opinions and based-on affirmances would not entail a sacrifice of judicial effectiveness along any of its three dimensions. In the short term, there would be a perceptible easing of the Briarean task of keeping current in the law. Eventually, perhaps, there would be an easing of the case load burden as well. And, as a by-product, appellate judges would gain more time for study and contemplative thought in respect to those opinions which will serve as beacons in the law.

There are four basic objections to limited publication, which double in brass as arguments in favor of universal publication. First, there is a tendency to sanctify publication as integral to the individual litigant's traditional "right to full adjudication."[16] Second, some contend that nonpublication gives unfair advantage to chronic suitors or other parties who take the trouble to obtain and cite unpublished slip opinions, with the result that courts are misled as to the weight and trend of existing precedent.[17] The third objection is that all opinions must be in plain view, for the public eye polices the quality of judicial craftsmanship. Knowing that their opinions will be scrutinized, as this thesis holds, judges who publish are less likely to succumb to ennui or to ignore complexities for the sake of convenience.[18] They are also less likely to rest their decisions on normative grounds lying outside the broad social consensus.[19] Finally, it is supposed that the vast majority of cases argued are genuinely precedential—either because situations that make their way up to appellate tribunals are by definition novel, or because the profusion of appeals may be traced to the need for elaboration in new areas of the law. Even if there exist some cases utterly lacking in precedential value, it is argued that judges and their staffs lack the capacity to identify those cases before formulating their views on paper.[20] I find none of these objections persuasive.

Flag-waving aside, publication rarely has been perceived as part and parcel of our jurisprudential heritage. Although a number of states in the nineteenth century passed statutes mandating publication, this development appears to have been driven by short-term political considerations and by resentment at

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[16] *See* Mikva, *supra* note 6, at 1360.
[17] FCSC REPORT, *supra* note 6, at 130.
[18] *See* POSNER, *supra* note 4, at 122-23; *cf.* KARL LLEWELLYN, THE COMMON LAW TRADITION 313 (1960) ("The candor which in a full opinion forbids ignoring an uncomfortable authority must scorn equally its disregard in silence by way of a Per Curiam.").
[19] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 124-57 (1990).
[20] *See* POSNER, *supra* note 4, at 122-23.

the extreme practice of issuing reversals without opinion.[21] In any event, the development has long since been arrested. The overwhelming majority of courts have found those provisions to be nonbinding, objectionable, unconstitutional, or otherwise undesirable.[22]

The fairness concern, too, has little basis in reality. Differential access to opinions deemed unworthy of publication could easily be blocked by a refusal to release "not-for-publication" opinions to database proprietors, or by a hard and fast rule against citation, rigorously enforced. Zero access is the most evenhanded policy of all. Indeed, fairness may cut in the opposite direction. Universal electronic publication would create a new fairness problem of unimagined magnitude, because, for the foreseeable future, electronic databases are available in practice only to relatively well-heeled litigants.

The remaining two objections are weightier. While openness and public scrutiny are to be prized, I am not suggesting that opinions be issued in a dark room at midnight, and immediately placed under seal. Unpublished opinions would remain public records. Quality would be adequately assured by professional pride, the vigilance of colleagues, and the possibility of further review. Even now, these, rather than some hypothetical mass public, furnish the primary checks on a judge's discretion. Moreover, if gains in quality result from publicity—and that is debatable, for judges concerned about publicity are often at risk of jeopardizing the detachment and impartiality that are so much a part of the judicial role—those gains are overwhelmed by the losses attendant to feeding the fires of the infoload crisis. The first premise of judicial reform of any kind must be that justice on an individual basis has greatly diminished value if it impairs the delivery of justice systemwide.

That leaves only the objection that the class of cases lacking precedential value is tiny to nonexistent. I cannot rebut this point scientifically, and many jurists might beg to differ, yet my decade on the bench has persuaded me that there exists a sizable class of such cases. Few appeals that fall within that category will be utterly devoid of worth. But for every instance in which such a case sheds light, there may be ten or twenty in which it obfuscates. To paraphrase Judge Gibbons,

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[21] Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486, 487, 490 (1930) (discussing California experience).

[22] The seminal case is Houston v. Williams, 13 Cal. 24 (1859) (Field, J.) (striking down statute mandating publication and statement of reasons, appropriately enough, without detailed statement of reasons). *See also* Vaughan v. Harp, 4 S.W. 751 (Ark. 1887); City of Miami Beach v. Poindexter, 119 So. 136 (Fla. 1928); Baker v. Keff, 13 Iowa 384 (1862); *Ex parte* Griffiths, 20 N.E. 513 (Ind. 1889); Farwell v. Laird, 51 P. 284 (Kan. 1897); McCalls Ferry Power Co. v. Price, 69 A. 832 (Md. 1908); Turner v. Anderson, 139 S.W. 180 (Mo. 1911); State *ex. rel.* La France Copper Co. v. District Court, 105 P. 721 (Mont. 1909); Stevens v. State, 76 N.W. 1055 (Neb. 1898); Horner v. Amick, 61 S.E. 40 (W. Va. 1908). *But see* Ayres v. United States, 44 Ct. Cl. 48 (1908); Mestetzko v. Elf Motor Co., 165 N.E. 93 (Ohio 1929); Hartford Fire Ins. Co. v. Galveston, H. & S.A. Ry., 239 S.W. 919 (Tex. 1922).

the accumulated wisdom of the ages took ages to accumulate—not two weeks.[23] I submit that, in the era of the infoload crisis, the burden of persuasion should be on those who perceive pearls of wisdom in every oyster.[24]

I recognize that proposing reduced publication of judicial opinions is likely to prove simpler than accomplishing the goal. The suspicions of harried lawyers to the contrary notwithstanding, judges are human. Each of us, after committing our views about an appeal to paper, may well be struck by the deathless quality of the prose, or convinced that the most humdrum rendition of well-settled authority constitutes a landmark in the law. Fortunately, keen legal minds have grappled with the problem since the early years of the century and have developed several serviceable sets of guidelines to assist judges in deciding when to refrain from publication. There are two basic approaches. One looks to the nature of the decision reviewed; the other to the inherent value of the reviewing decision.

The earliest set of guidelines I have encountered takes the first approach. In a 1915 essay, Chief Justice John Winslow of the Wisconsin Supreme Court advocated a strong presumption ("absent exceptional importance") against the publication of affirmances in general, and a per se rule against publication of routine affirmances, that is opinions involving only questions of fact, or repastinating ground covered by existing precedent.[25] The former Chief Judge of the Third Circuit, Judge Ruggero Aldisert, has updated this approach to take into account the existence of the administrative state and draws out the approach's logic. In Judge Aldisert's view, an opinion should be published when the judgment of the trial court is reversed (or, in the same vein, when a petition to review an administrative agency action is granted). Conversely, an opinion should not be published when the decision does no more than carry out the appellate court's error-correcting function and affirms the judgment (or enforces the order of an administrative agency).[26]

The alternative approach places greater emphasis on the attributes of the reviewing decision itself. For instance, the Federal Judicial Center suggested two decades ago that no appellate opinion should be published unless it lays down a new rule of law, alters or modifies an existing rule, criticizes existing law, resolves an apparent conflict of authority, or involves a legal issue of continuing public interest.[27]

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[23] Gibbons, *supra* note 10, at 27.

[24] In deciding questions of publication *vel non*, it makes sense to err on the side of caution. A decision not to publish is easily correctable. If experience proves the initial judgment to be faulty, then the court may rectify the mistake by publishing the opinion at a later date. But once the djinni is out of the bottle, it cannot readily be confined.

[25] John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 161 (1915).

[26] *See* RUGGERO J. ALDISERT, OPINION WRITING 21 (1990).

[27] ADVISORY COUNCIL OF APPELLATE JUSTICE, REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (FIC Research Series No. 73-2, 1973), *excerpted in* APPELLATE JUDICIAL OPINIONS, *supra* note 2, at 314-19.

The Seventh Circuit's current policy, which may be taken as the state of the art, synthesizes the two approaches. On one hand, it adopts much of the Federal Judicial Center's paradigm, while broadening the concept of intrinsic value; on the other hand, it incorporates elements of the Winslow-Aldisert approach, while modulating that approach to take into account the peculiar institutional status of an intermediate appellate tribunal. In the Seventh Circuit:

> A published opinion will be filed when the decision
> (i) establishes a new, or changes an existing rule of law;
> (ii) involves an issue of continuing public interest;
> (iii) criticizes or questions existing law;
> (iv) constitutes a significant and non-duplicative contribution to legal literature
> (A) by a historical review of law,
> (B) by describing legislative history, or
> (C) by resolving or creating a conflict in the law;
> (v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or
> (vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.[28]

One can quarrel with these guidelines, but it is surpassingly difficult to quarrel with the principle for which they stand. Stringent guidelines, meticulously followed, coupled with a presumption against publication, would go a long way toward reducing the infoload crisis. Unfortunately, as Judge Gibbons accurately notes, even in circuits with strict rules on the books, the practical criterion for publication is the amount of time that the judge puts into an opinion.[29] The trick, of course, is self-discipline, for the most thoughtful set of rules will not slow the stream of published opinions unless judges take the rules to heart and pay them more than lip service.

To recapitulate, curtailing publication will do no harm—and it promises to do some good. It will be welcomed by a diverse constituency, ranging from the bleary-eyed to those who yearn for greater clarity in the law. It will also ensure the quality of our developing jurisprudence. And it may be the last, best hope of the appellate judiciary. Opinion writing is far from an exact

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[28] 7TH CIR. R. 53, *reprinted in* ALDISERT, *supra* note 26, at 15-17.
[29] Gibbons, *supra* note 10, at 26.

science, and good opinions, like well-made suits of clothes, are best when custom tailored. The work is labor-intensive. Because published opinions require extra pains, reducing the number of published opinions will allow judges to devote more time and energy to the elucidation of important legal principles in cases that warrant great care and contemplative thought.

Two centuries ago, Lord Mansfield lived by the following heroic maxim: "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it."[30] In these more hectic times, judges are faced with the choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. The better choice is clear. Unless we are to defenestrate the ideal of Lord Mansfield—and I think we all agree that we should cling to it—judges must begin to think more and write less.

[30] Rex v. Wilkes, 98 Eng. Rep. 327, 339 (K.B. 1770).