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Editorial Office

University of Michigan Law School
Ann Arbor, Michigan 48109-1215
Telephone: (313) 763-0165
Fax: (313) 764-8309
E-mail: reedj@umich.edu

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John W. Reed, *Editor*

LEARNED HAND—THE MYTH AND THE MAN†

Gerald Gunther*

I spent more than two decades working on the first biography of Learned Hand. The biography has now been published, and I want to speak about some of the things I learned while writing it, and about the complex human being who was my subject.

Learned Hand is a name well known to all lawyers. Recent reviewers have referred to him as "the most distinguished lower court judge" in American history and as "*the* dominant figure," and such accolades are in a long and distinguished tradition. Benjamin Cardozo, for example, was once asked who among his Supreme Court colleagues was the greatest. Cardozo replied: "The greatest living American jurist is not *on* the Supreme Court." He was speaking, of course, of Hand, who served as a federal judge for fifty-two years, from 1909 to 1961, and who handed down nearly four thousand opinions—opinions that continue to be cited today, opinions that appear in casebooks and treatises in every field of law.

The law normally changes too rapidly to assure vitality to decades-old opinions, but many of Hand's remain influential today, in part because of his remarkable gifts of lucid literary expression, in part because of his sheer analytical abilities. Moreover, especially in the last decades of his life, he wrote glittering prose in a large body of essays, eulogies, and lectures, prose that reached an ever larger audience. In those final years, Hand's distinctive craggy face, with its bushy eyebrows and penetrating eyes, represented for many Americans the personification of what a judge should look like. But above all, his impact stems from his devotion to craftsmanlike work, his ability to analyze with care every case—large or small, in every area of law, from admiralty and patents and copyrights to corporate problems and negligence suits and tort actions and constitutional law—and from the model he provided of the creativity that is possible even within his kind of restrained, modest judging.

In the limited time I have this morning, I want to focus on three themes. I want to speak about some aspects of Hand's work and life that seem especially pertinent to contemporary aspects of the judicial function. I want then to turn to some choices I made in writing the Hand story, to explain why my book is

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Wailea, Wailea, Maui, Hawaii, February 23, 1996.

* William Nelson Cromwell Professor of Law, Stanford Law School; author, LEARNED HAND: THE MAN AND THE JUDGE (1994).

not primarily a legal tome but rather a very personal one that seeks clues about what made the individual tick and how his personal traits related to his manner of judging. And before this audience, I want also to share with you some of Hand's thoughts about the conduct of trials—and about trial lawyers.

HAND'S RELEVANCE TO CONTEMPORARY JUDGING

Learned Hand's major legacy to us probably lies in his advocacy and performance as the model restrained, modest judge. It may seem odd to view his model of restrained judging as a continuing legacy—odd because, over recent decades, there has been much skepticism that human beings wearing robes can indeed restrain themselves, question themselves, doubt themselves when they have the power of judging; odd because, repeatedly in recent years, there has been far greater enthusiasm among many for more activist, ideological judges.

Hand himself viewed his judicial role as a quite limited one, but it was hardly paralyzing. He did not think it was the judges' business to infuse their personal notions into the vague phrases of the Constitution, but he opposed that kind of activism mainly because he thought that such judicial behavior would only get judges into political trouble, and he wanted to preserve the reputation and independence of the courts for their very important role of interstitial law making, the task of filling the gaps that judges find when they interpret statutes or confront uncertainties in the common law.

From the days of the legal realists of the 1930s to those of the deconstructionists today, attacks have been launched at the notion that judges can indeed be restrained and modest, on the ground that everyone *knows* that human beings have emotions and ideological preferences, and it is myth and facade to claim that judges can be modest, detached, impersonal, and fair-minded in truly listening to both sides of an argument.

Hand was not the only great judge to preach that much maligned kind of restraint. Holmes, too, stands in that tradition, and Frankfurter preached restraint far more often than Hand, and at much greater length. But, in my view, no one has better demonstrated by example, by performance, that this supposedly mythical, unattainable model is humanly achievable than Hand. Holmes was so detached from real world disputes that he was truly Olympian: He hardly cared about the outcome of the conflicts in which the mass of mankind engaged. And Frankfurter was so passionate personally that, again and again, his emotions made adherence to the principles he preached well-nigh impossible. Among the three great advocates of modesty and restraint we have had on the bench in the twentieth century, then, it seems to me that Hand, though not perfect, came the closest to realizing in his work the ideal that so many claim to be myth.

Hand's life is surely also relevant to contemporary concerns because of his failure to be appointed to the Supreme Court despite his towering reputation. Hand's fate may shed light on some aspects of the appointment process.

Hand was seriously considered for the Court three times in his career, but he never made it. In the early 1920s, Hand, though still a district judge (until his promotion to the Second Circuit Court of Appeals in 1924), was already talked about for the Supreme Court. His name was on some pretty well-known lips, but they were the wrong lips. The people who wanted Hand on the Court then were people such as Holmes and Brandeis, the great dissenters of the day. Unfortunately for them (and for Hand), the presidents in power were Harding and Coolidge, and the politically active Chief Justice of the day was William Howard Taft. Harding and Coolidge had little use for Hand, no more than Hand had for them. Hand voted in seventeen presidential elections, eight times for a Democrat, eight times for a Republican, and once for an Independent—hardly the record of a loyal follower of one Party. And Taft, better than most, knew all about that. In repeated letters to the White House and to the Attorney General when Supreme Court vacancies arose, Taft was outspoken: "Don't name that man Hand," he would advise. "He is a maverick; he is unreliable. He will most likely herd with Holmes and Brandeis." Taft was, of course, correct on the last point. Hand's first major law review article, published a year before he became a judge, was a very strong attack on the *Lochner* decision.[1] Even more important to Taft, Hand had been an enthusiastic supporter of Teddy Roosevelt's Progressive Bull Moose Campaign in 1912; he advised T.R. regularly, participated in the drafting of the third party's platform, and even, in the interest of helping the party, ran, *while sitting as a federal judge*, for the chief judgeship of New York's highest court. And Taft well remembered that he had come in a poor third in the 1912 presidential election, well behind Wilson's plurality and Teddy Roosevelt's strong second-place showing.

Hand had a considerably better shot at the Court when Taft's tenure ended in 1930. The President was Herbert Hoover, whom Hand knew, admired, and indeed had voted for in 1928. In thinking about filling the seat vacated by Taft, Hoover initially wanted to promote his close friend, then Associate Justice Harlan Fiske Stone. That move would have left a vacancy for a new associate justice, and Hoover, according to the most credible story, was persuaded to name Hand to it. At the last minute, someone suggested that Hoover should avoid insensitivity to the GOP's leading elder statesman of the day, Charles Evans Hughes, who had after all given up his seat on the Court in 1916, in a sacrifice to his party, in order to run for the presidency against Wilson.

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[1] L. Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908); *see* Lochner v. New York, 198 U.S. 45 (1905).

Hand supporters thought that this would be merely a formal gesture, for Hughes would presumably not take the chief justiceship just months after his son, Charles Evans Hughes, Jr., had become Solicitor General, for it would be intolerable for the Chief Justice and the Solicitor General, who handles the government's cases in the Supreme Court, to be related. A White House emissary was sent to Hughes in New York, and the emissary returned to the Oval Office the next day. Hoover asked what the result of his mission had been. The emissary replied: "The son-of-a-bitch never thought of his son! He accepted on the spot!" And that ended this fine opportunity for Hand.

Hand had one more chance for a Supreme Court appointment, in 1942, when Justice Jimmy Byrnes resigned to become Director of War Mobilization. Franklin D. Roosevelt was besieged with pleas that he name Hand, requests particularly from Frankfurter and Augustus Hand, Hand's cousin and colleague on the Second Circuit. F.D.R. almost chose Hand but changed his mind at the last minute. 1942, after all, was just five years after F.D.R.'s Court-packing plan, which rested on the proposition that people over seventy were too old to serve and that this justified the appointment of added justices if the incumbents refused to retire. The prospect of naming Hand in '42 proved too embarrassing to F.D.R., for Hand had turned seventy at the beginning of that year. Instead, Roosevelt decided to go to a younger man, Wiley B. Rutledge. (Rutledge died seven years later, in 1949; Hand continued to sit actively, with a superb record as a judge, for nearly twelve years after that.)

Well, I suppose all this reminds us, among other things, that appointment to the Supreme Court is not and has never been a merit system.

Another question pertaining to contemporary dimensions of the judge's proper role and behavior is raised by Hand's engagement with political issues throughout his life, even while he was committed to apolitical, dispassionate judging. I have already mentioned his significant involvement with Teddy Roosevelt's Progressivism. Moreover, Hand also took a public role in the founding of *The New Republic* magazine, of which his friend Herbert Croly was the long time editor. Indeed, Croly wanted Hand to leave the bench and become an editor! Hand declined but frequently contributed essays—occasionally under his own name, most often anonymously. And whether public or not, Hand, unlike Holmes, never ceased to follow public affairs closely.

At the end of World War I, however, Hand decided to limit expression of his political views solely to his private correspondence. He was prompted most importantly by Holmes, who advised him to "avoid heated issues" while a judge. And so Hand ceased the active political life he had led, a life that would be quite unthinkable for a modern federal judge. Still, in the 1950s, when McCarthyism became a national phenomenon, Hand spoke out early and courageously against it, especially between 1951 and 1955. The fact that

he spoke out against McCarthyism well before almost all establishment figures helped a great deal to move the nation beyond that dark era.

True, Hand returned to public expressions of his feelings on such issues only after he stepped down from "regular active service" in 1951, but this did not solve the problem of judicial propriety entirely, for he continued to sit actively on the Second Circuit for the final ten years of his life, and a good many McCarthy-related cases came before him.[2]

CHOICES MADE IN THE WRITING OF THE BIOGRAPHY

I had better move on to my second theme, my choices in doing the kind of judicial biography I wrote. Almost all the judicial biographies I knew when I began were in large part works of intellectual history, tracing the subject through his or her public record. Studies of character and personality, and the relation of these traits to a judicial output, are a great deal more rare. At the outset, then, I thought I would write a primarily intellectual biography, and that I would have chapters on "Hand on Contracts" and "Hand on Torts" and "Hand on Admiralty" and "Hand on Intellectual Property" and so forth. I thought, too, that I would intersperse brief chapters on his personal life and his wide-ranging nonjudicial activities.

But that is not the kind of book I ended up writing. I changed my course from an intellectual history to a study of the human being and his make-up as well as a depiction of the rich political and social context, the history through which Hand lived. What changed my course was, above all, my reading through the hundred-thousand or so manuscripts in the Hand papers that the family made available exclusively to me. Hand did not like the telephone, did not like commuting to meet acquaintances in other states, and detested dictating letters. Largely because of these distastes, he was one of the great correspondents of the century. He *liked* writing letters, typically thoughtful and revealing ones, and he spent much time each day keeping in touch with a wide range of friends and acquaintances, including (and especially important to him) people outside the law. Thus, his correspondence contains not only his more than fifty-year-long exchange of letters with Felix Frankfurter but also his extensive correspondence with Bernard Berenson, the expatriate art historian and connoisseur, and his exchanges with Walter Lippmann, the editor and columnist.

As I steeped myself in those letters, I realized that the far more intriguing task was to convey a sense of the complex human being that was the judge. The book still contains, selectively, references to many of his opinions, but I

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[2] *See, e.g.,* United States v. Remington, 208 F.2d 567 (2d Cir. 1953).

used these largely to illustrate the distinctive traits that made the human being I describe such a fine judge and to explicate how he went about the task of judging.

What I wrote, then, is mainly a story of a human being, a remarkably agonized human being. Most people who know of Hand only from his opinions and his portraits think of him as an urbane, literate, self-assured, and serene man. What I depict is a strikingly anxiety-ridden, self-doubting individual, a renowned public man beset by pervasive private doubts—doubts that were stirred in his childhood by a loving but often suffocating mother and by his relationship with his father. Hand's father died when Hand was only a teenager and left him with a larger-than-life ideal that Learned, the only son, was pressed to emulate, a task he always believed he could not carry out successfully. These doubts were reinforced at Harvard College, where the rigid social structure of the day convinced Hand that he was an uncouth outsider. They were reinforced still more by his experience in law practice in Albany, to which his family successfully pressed him to return after he completed Harvard Law School, instead of pursuing graduate study in philosophy under William James, George Santayana, and Josiah Royce. Hand's legal work in Albany proved to be dull and uninspiring, and he never felt that he was any good at it.

After his marriage to Frances Fincke in 1902, he escaped Albany at last and moved to New York City. His law practice there did not enhance his self-esteem any more than his lawyering in Albany had, but he did become known for his intellectual talents in a circle of lawyers who were interested in ideas and in political reform, and that renown bore fruit. Indeed, it was largely responsible for his appointment to the federal bench in 1909, at the age of thirty-seven.

All of Hand's anxieties and bouts of melancholy, traits that contrast so sharply with the usual image of the judge, make for a fascinating story, I think. But what do they have to do with the work for which Hand is best known, that of a judge? In my view, a great deal. Hand's self-doubts permeated all aspects of his adult life: his marriage, his friendships, his surprisingly frequent forays into public affairs. And they at least paralleled, if not determined, his approach to judging as well: The self-questioning, open-minded human being could not help acting that way as a judge. The man who once defined "the spirit of liberty" as "that spirit which is not too sure that it is right"—a definition that describes the essence of this agnostic's faith—was marked by personal qualities that were precisely those traits for which he was admired as a judge—disinterestedness, nondogmatic evenhandedness, open-mindedness, and incessant, skeptical probing.

HAND ON TRIAL PROCEDURES AND LAWYERS

Let me conclude with some words about Hand as a trial judge, and what he had to say about trial procedures and trial lawyers. During Hand's dozen or so years in private practice, he sought to become a fine trial lawyer. As he would say throughout his life and as the record supports, he was not very successful at it. He never overcame his nervousness in the trial courtroom; indeed, his frustrating lack of success at the bar was the major impetus for his quest for a judgeship. When he began presiding over trials in 1909, he was not much more comfortable at first, agonizing over decisions even when the task, such as ruling on a motion, required shooting from the hip. Yet, before long, he gained some confidence and within a few years was recognized as the outstanding judge of his district, eliciting special admiration for his superb command of such federal specialties as copyright, patent, bankruptcy, and admiralty law—all fields in which he had no experience at all when he became a judge.

Only once in his years on the trial bench did he seek to collect his thoughts about trials and lawyers systematically. That occasion came in 1921. By then, he had sat on the district court for twelve-and-a-half years. He was invited to participate in a decade-long series of lectures sponsored by the Association of the Bar of the City of New York. His assigned topic was "The Deficiencies of Trials to Reach the Heart of the Matter." Most of the judges who participated in the lecture series delivered extemporaneous, rambling talks, or spoke with dull detachment. That was not Hand; his lecture was a carefully prepared, engaging, and polished presentation, an eloquent example of his vigorous and distinctive style, drawing not only on his trial experience but also on his readings in history and literature and on his wisdom, and characteristically including references to Rabelais, his favorite author, and to Gilbert and Sullivan, his beloved comic opera writers. That lecture contained one of his most quoted lines: "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[3] Most of the lecture dealt with problems of pleading and of evidence, and he concluded with a powerful appeal for self-restraint by lawyers: "The truth is that no rules in the end will help us. We shall succeed in making our results conform with our professions only by a change of heart in ourselves."[4] He deplored "the atmosphere of contention over trifles, the unwillingness to concede what ought to be conceded, and to proceed to the things which matter."[5] And, although he acknowledged that "[i]t is hard to expect lawyers who are half litigants to forgo the advantages

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[3] L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter,* in LECTURES ON LEGAL TOPICS 87, 105 (1926).
[4] *Id.* at 104.
[5] *Id.* at 105.

which come from obscuring the case and supporting contentions which they know to be false,"[6] he ended with this admonition:

> [A]t times I can have the hope that in America time may at length mitigate our fierce individualism, may teach us the knowledge we so sorely lack that each of us must learn to realize himself more in our communal life. . . . If through some such conversion we can be taught to abate the intensity of our own wills, to subject our desires to what has been laid down for us, even when we dislike and distrust it, then in this which seems so trivial and minor a detail, the management of our private disputes, we may [yet] succeed. But not, I fear, short of something like that; we are made all of a piece, and the cloven hoof will show however well the bestial heart be covered.[7]

That lecture was delivered more than seven decades ago, but, as we continue to hear about proposed reforms in trial practice, his remarks strike me as remarkably timely.[8] The lecture, like so many of his opinions, can teach us valuable lessons as we prepare to enter the third millenium.

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[6] *Id.* at 104.
[7] *Id.* at 106.
[8] I discuss the lecture briefly at pages 145 to 148 of my book, but the full text is well worth reading by trial lawyers. [It is reprinted immediately following. *Ed.*]

THE DEFICIENCIES OF TRIALS TO REACH THE HEART OF THE MATTER†

Learned Hand

In a 1921 lecture before The Association of the Bar of the City of New York, Learned Hand, then a United States District Judge, stated his views about trials and trial lawyers. In a recent address to the annual convention of the International Society of Barristers, published in this issue, Gerald Gunther, Hand's biographer, quoted from the lecture and, noting its contemporary relevance, recommended the reading of the full text. Because copies are hard to find, it is reprinted here.

I have no doubt that if the records of the time of that ancient and apparently earliest of lawgivers, Hammurabi, could be completely restored, we should learn that in the third millennium before Christ men were complaining about the inefficiency of legal procedure, and I fancy that if any of you are destined in the year 7000 A. D. to revisit the glimpses of the moon to examine and write a monograph for the celestial choirs upon the condition of human law courts, you will be obliged to report to some Seraphic Commission that mankind still exhibits the same discontentment with its methods of adjusting human differences that you know today. I must therefore ask you to believe that in the course of a half hour I do not hope to lay my finger on the cure for a condition which is probably so inherent in our human imperfections as to be persistent as long as the need for litigation itself endures. We shall, I fear, be scarcely satisfied with our settlement of disputes until we have so purged and purified our natures as to bring down the dove of domestic peace to be a permanent sojourner amid the haunts of homo sapiens.

And yet, like other such problems, while we may not hope for a solution, we can, and indeed we must, press toward at least some understanding of our difficulties, for a sound diagnosis is a necessary condition not only to a cure but also to any palliation of our social diseases. And if we cannot hope to reach a formula which will prove the key to the lawyer's paradise, at least it will serve us to know in what directions we can best move and for what success we can hope.

Now a lawsuit is an undertaking designed to settle a dispute; therefore it implies that there is a dispute, and that there is some means of reaching a con-

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† Reprinted, with permission, from Lectures on Legal Topics of the Association of the Bar of the City of New York, 1926.

clusion. It would seem pretty clear, then, that the first requisite is to know what the dispute really is about. Let us at the outset disabuse ourselves of the notion that we are engaged in an impartial and disinterested inquiry into objective truth. We have no right to the fine detachment of spirit of the scientist. Our inquiry must stop as soon as the litigants are, or under the rules must be, satisfied on their differences. Our results have no general significance whatever; we merely reach a passing accommodation which may be altogether foreign to any permanent answer.

Yet though we are relieved from emulating the austere and devoted spirit of searchers after enduring results, it is apparent that to any success in what we do attempt a simple system is necessary to learn what the contest is. A priori, that ought not to be a difficult matter. The aggrieved party comes demanding that his opponent be forced to make redress; he appeals to the law which may be found laid down in general written rules. These rules attach consequences to specified conduct and he need only show that the defendant's conduct is of the kind there described. In the name of Heaven then, let him say once and for all that the defendant has done the things which everyone knows will subject him to the prescribed consequences. And for the defendant, let him too admit that he has done what the plaintiff says, or if he has not, let him deny it. Again, if he means not to deny anything, but has some facts which will excuse him, let him tell us those and we will see whether the plaintiff will admit or deny them. For while the rules do profess to speak generally and unconditionally, they really do not do so, for there are circumstances in which they abate, and if the defendant can show these, he can escape. If the parties will only do so simple a thing as this, all will become easy, but if not we shall be philogrobolized like the Pundits in Rabelais and six hundred bags of papers and testimony will accumulate with no results but to parboil our brains and throw us into such interminable a welter of confusions, doubts and suspicions as never in the course of thirty years we can unravel.

Well, there have been, as you know, all sorts of efforts to do this easy thing and still the learned practitioner sits down with his fair shorthand writer beside him and dictates the chapter of his client's wrongs with all the rhetoric of passion and the efflorescence of literary imagination. Here is no effort to pare down to an unmoving skeleton of relevant facts a tale of villainy. It is not that the theory or plan of pleadings is so hard, but that nobody will follow it. Men either will not think out what they mean to rely upon or they have not enough training to do so. The most comprehensive effort to compel them to do it was, I suppose, under the Hilary Rules of which the great champion was Mr. Baron Parke. And yet, such is the mischievous perversity of fate, that, as you will remember, when the learned Baron allowed himself to preen his wings before Charles Austin upon the volumes of Meeson & Welsby in which like flies in

amber his enduring contributions were preserved, he was churlishly met with the rejoinder: "And do you think, Baron, that it would have made a particle of difference if all the cases had been decided the other way?"

It must be owned, therefore, that past experience is not encouraging. Yet there are a few things which it seems to me might be done that would go some way to make the issues clearer. All rules of law necessarily terminate in facts which contain no shred of law. Indeed they must, because the incidence of the law must depend upon events in nature, and it is the occurrence of those events that can alone be relevant. But all rules are by no means phrased in that form; many terminate in words which carry in their kernels legal implications, what we like to call mixed questions of law and fact. Possession and seisin are such words; ownership is another. "Reasonable," "duly," "malice," are all double-faced "weasel" words, capable of treachery. Moreover we have inherited our pleading from times when we were confined within the words of some historic writ that was not itself drawn to avoid the vice of legal terms.

Besides, a good deal of the resulting confusion we cannot avoid because the law will not descend to the concrete. "Reasonable care," "reasonable notice," are purposely vague phrases, and properly too, since the rule must be fixed in each case. Yet I think that by far the worst vices in pleadings can be traced to the use of words which are not the final terminals of the rules of law even as we have them. A good deal could be done by a more unsparing attitude toward such allegations. In theory the present rules require us not to plead law, but the decisions are by no means as rigid as they might be, and the practice is not rigid at all.

There are cases, as for example in pleading ownership, where the result would undoubtedly be cumbrous, and yet I think even there it would in the end pay us to insist unless the allegation were merely by way of inducement. We might well afford to treat as no allegation at all, all propositions in a pleading which did not state the occurrence of events in terms strictly purged of legal phrases. If the legal consequences are merely added, no harm is done; they are now ignored. The evil arises when there is no allegation into which there does not enter some color of legal phrase which cannot be excided leaving a statement of bare fact. This destroys the whole purpose of the pleading.

The second difficulty is in pleading evidence, a vice quite as common. Now evidence is made up of facts, but not the facts in which the rules terminate. These too I believe might with profit be cut out from a pleading. The right of amendment is now so free that in the case of any but the most obtuse practitioners no injustice would be done.

You will observe in what I have said that I do not mention changes at trial. I must own that it appears to me one of the least creditable things in the whole subject that we should atavistically cling as apparently our appellate courts

still insist upon doing to distinctions which can have no practical significance but to interpose ancient formalities in the path of justice. Just what conceivable purpose is served by refusing at the trial to allow a man to change from one cause of action to another when the difference is merely in the two theories which the same facts will support, I have never seen. The notion is quite at variance with any scientific theory of pleading, which should concern itself with facts only. Of course, if there are two possible legal roads from the facts to the same result the opposite party should be given time to reform his lines of defense, but to interpose an absolute bar which depends merely on the legal theory which he adopts is illiberal, unjust and unintelligent.

Nor do I in what I have said mean that at the trial technical objections to pleadings of any kind should be allowed to defeat the case even of a poor pleader. My argument is directed altogether to the purging of the pleadings in advance, so that the case may be laid bare to its bones in advance. That in my judgment might be more insisted upon than it is, but I do not believe any more than did the reformers of the early nineteenth century that the cause should finally depend upon formal rules if objections are reserved as a surprise, nor should anyone refuse amendments with the utmost freedom if the other side be not taken off its guard.

It is hardly fair to repeat to you these platitudes and I do so, not of course because I suppose they are not altogether familiar, but because it serves to bring out what I want to say about the problem as a whole. The courts, as you know, have long since given up, or have never tried, to proceed on any such plan, and they have done so because they have thought that the attempt was hopeless. To be constantly badgered with motion on motion to correct pleadings, only to be met again with one equally bad in its place, would they think in the end cumber them beyond endurance and result in worse delays than if they let it all go jumbled together as it comes.

I must own that in my salad days, when the lust of combat still raged within me, I rather welcomed the opportunity afforded by the meandering trickle of a sloppy pleading. Here was indeed an occasion to teach practitioners that unless they had learned their craft they should have a short shrift and a long rope. Even yet at times the breath of war will fill my nostrils, though now usually despair itself is mild, and I make no effort to disentangle from the junk pile presented to me those structural pieces which, had they been properly chosen and erected, would have made a fair building.

And so it goes. We leave, and perhaps we must substantially leave, to that filter of the trial, the real nub of the dispute; nobody, not even the pleader himself, knows exactly what are the relevant facts on which he means to rely. Indeed, I have known men who quite deliberately preferred to leave the case as confused as possible, partly because they had not the courage to take their po-

sitions in advance, and partly because, like the Lord Chancellor in Iolanthe, they were not above hoodwinking a judge who was not overwise and because past experience had taught them that in the exercise of that gentle art a bad pleading was a very present help in time of trouble. And yet I dare say that an ingenious actuary might find upon irrefragable computation that in general loss of time, misprision of judges, consequent appeals, discouragement of suitors and the like, the annual loss to our country through bad pleadings equalled the cost of four new battleships, or a complete refashioning of primary education. If, then, the difficulties are insuperable to obtaining a really accurate practice in pleading, economical though it would be, so far as any basic solution exists, it must depend upon the general improvement in education and intelligence of bench and bar. Yet still I insist something would be gained by a stiffer attitude toward bad pleadings objected to in advance. At least we should set a standard which might become an inducement to those who could, if they would, show that they were worthy descendants of a learned profession. Judge Gaynor in this respect deserved more credit than he ever got even though when the appellate courts had done their perfect work too often he was found biting the dust.

At present there is little inducement, or at least there is thought to be. For myself, I doubt even now that good pleading does not pay. I believe that there is an inestimable advantage in paring your case down to its essential structure and facing your antagonist with the very facts, unadorned by an egregious rhetoric or by a declaration of legal theory. But even if that be not so, let us in the common interest establish an inducement. In spite of the trouble we should in the end be the gainers, for preliminary delays are better than mistrials; and since the loose pleader we have always with us, it is better to deal with him in advance than when at the trial each side finds itself beating the air blindfold.

I shall, however, now assume that we have a case reduced by some angelic practitioners to the fair outline of specific issues, alleged without conclusions of law, and that the day for trial has come and the evidence is going in. How, if at all, in this stage of the case, does fair promise go awry? If you lead your client into the court room with you and for your sins are compelled to let him sit by while the scene unrolls, you will, if you have the nerve to watch him, see in his face a baffled sense that there is going on some kind of game which, while its outcome may be tragic to him, in its development is incomprehensible. I have a friend, a layman, who to his sorrow has been at times engaged in litigation. He is keen-witted, observant and independent, and his description to me of his experience on the stand was this: "It is like driving a horse on a jerky rein. I would just get a fair start and be in train of telling my story when jerk—my head was pulled up and I was stopped dead. After a wrangle which I did not at all understand I was al-

lowed once more to get into a fair trot, saying what I really knew. Jerk again on the rein—and I was back on my haunches. How could I possibly say my say, when they treated me like that?"

My old master, James Bradley Thayer, a great scholar, a patient teacher, and a noble Puritan, gave the course in evidence when I was in the Harvard Law School. We used to say that the greater part of it lay in teaching us what was not a part of the law of evidence; and that was largely true. The custom of attributing to the rules of evidence the relevancy or irrelevancy of the proof is certainly an inversion. An issue is a proposition of fact, asserted by one side and denied by the other. The canon for its proof is not, prima facie anyway, legal at all, but rational, and in a courtroom men's minds should operate no differently from outside. That evidence is relevant which human beings would think to prove the issue, if they had never heard of a court, and the test of its relevancy depends altogether upon what the proposition truly is. Now of course a judge may misunderstand what the issue is, and the poor wretch is lucky if he can find it at all amid the usual pleadings as they are drawn, but if he has found it, his ruling is right or wrong, not as he is a learned lawyer, but a sensible man. If he keeps out what would prove or disprove the issue, of course he has gone wrong and he must be righted by the wells of wisdom in such case made and provided, but he has not gone wrong in the law of evidence. Similarly, if he lets in what does not prove it, while generally speaking little harm is done, such as is, it arises from a mistake of reasoning.

These mistakes no rational system of any kind could overlook, and there is nothing to be said about them beyond what appellate courts have already said. But as we all know, the matter does not stop there and we are subject in our trials to a very different set of regulations. While we ought never to forget, I fear we far too often do forget, that, with I believe a single exception which I shall come to in a moment, all these rules were in their origin purely practical. A trial must be completed in reasonable time, and be decided by men who are not trained in discursive reasoning. Too much should not be interjected into it, even though indirectly probative, or it will be dragged into intolerable length and result in extreme confusion. And so the judges very early in their handling of juries assumed the prerogative of cutting out matter which did not pay for the time and trouble of its proof. A familiar example to us all is the denial of the right to dispute the testimony of witnesses on irrelevant matters brought out on cross-examination. The rational value of such proof often stands high in impeaching the credibility of a witness, but obviously it would go too far afield for control. Another instance is a former instance of the same kind, offered as proof of the disposition of the defendant toward the conduct which is the issue in chief. The exclusion of such proof a layman finds it very hard to accept and naturally enough for its probative force is strong.

Again consider the rule, especially annoying in its constant invocation, that a witness shall not be allowed to testify to his conclusions. I know of none more baffling to a witness, who has been accustomed to proceed exactly in that fashion in proving his points outside of court. Nor does there seem to me generally any sound objection to let him in measure state his conclusions. It is of course true that such testimony is of less value, but it must be remembered that all so-called facts are inevitably inferences from experience and the question is always one of the degree where one should stop. Besides, it is nearly always far more convenient to leave to cross-questions an analysis of the basis for the witness's conclusions. Whatever its logical justification it is the most annoying rule in its application that I know.

Both in origin and in application all such regulations are properly discretionary and nothing more. They belong rather to the general supervision of the trial like the limitation on the right of cross-examination or the examination voir dire, and depend, as success in trials must in the end always depend, upon the wisdom and firmness of the trial judge. It is indeed true at present that the appellate courts have so established the law very nearly, though there are still some absurd exceptions which invert the whole theory of evidence. I am thinking, for instance, of the rule which leaves it to a jury to say whether they shall consider a piece of evidence, dependent upon whether they find another fact or not. The State rule as to accomplices is one such and some trial judges adopt the practice in other cases. Such inquiries are totally beyond the capacity of juries, or for that matter of most judges, and ignore the whole purpose of rules of evidence which is to exclude some kinds of evidence absolutely in aid of simplification. It is absurd to ask jurors to decide a question after excluding a part of what they hear. At any rate, whatever may be said of the courts, the bar, at least the forensic bar, continue to act in accordance with the theories of the nineteenth century, when the rules of evidence were regarded as an essential part of the rights of litigants. Much of the delay and bickering which does more than deface a court room would be avoided by a recognition that the rules of evidence are practical and discretionary.

In 1750 Mr. Baron Gilbert wrote a treatise, I think it was the first, on the Law of Evidence. In accordance with the prevailing habits of mind of the eighteenth century he attempted a simplification of it all under one great rule, that the law only required the best evidence available, and would be content with it if produced. At that time the rules as we now know them had by no means been crystallized and there was excuse for the error, though error still it was even then, but before fifty years had passed no one would have thought of so writing. I told you a moment ago that there was one exception to the discretionary power of the court and I dare say that you have already anticipated

that I had in mind the great exclusive rule against hearsay. I shall not take up with you the exceptions to that rule which especially in relation to the proof of documents are still expanding with a good deal of rapidity, until, at least in the Federal Courts, the suitor is in nearly as favored a position as Baron Gilbert's canon would have placed him. I shall rather ask you to consider the basis of the great rule itself and whether it is not perhaps now time when it should be made to yield to more rational considerations.

I shall argue that though often so considered it is not rational at all, at least in application. We must remember that the law which we inherit did not originally attempt to apply rational rules to the determination of causes. Trial by battle was frankly a judgment of God, compurgation was a trial by oaths, and even a verdict, while from the outset there were implicit in it rational processes, was a trial on oath, the oaths of those who knew the facts and could swear to them, that is, the jurors. All these tests were essentially sacramental in character; the decision depended not so much on the fallacious results of mere discursive reasoning, but in a mysterious way upon an appeal to divine judgment. And so when witnesses came to be called before the jury to some extent the idea still prevailed. Just as jurors must swear to the facts, so the witnesses must do likewise, not only because the oath would prevent them from speaking falsely, but also because all trials should be on oaths.

Now I think you will agree with me that today we should rid ourselves of any such remnants. We profess to deal with these matters rationally; let us do so in fact. Let us require an oath when we can get one, and for the logical reason that most men are less likely, a little less anyway, to speak falsely than if they are not sworn. But when a witness is not available at all or available only with a disproportionate expense of time, let us hear what he has said on the matter, just as we do in every other concern of life, even in affairs which may involve our lives or the safety of the state. You will perhaps, with the instinct of lawyers, recoil at what seems so far-reaching an innovation. I do not complain; I agree that it involves chances, but in answer I argue that as the law now stands the party who has only such proof, is deprived of any chances at all. It would of course be undesirable to open the doors to hearsay evidence when better was available, but I ask you whether Baron Gilbert was not right in saying that men should use in their disputes the best means they can get to reach the truth? Again, I ask you to remember that every reform of the law has been met by precisely the same scruples; that for example the incompetency of parties and their wives, and of convicts, was for long regarded as the cornerstone of liberty and property. Juries do not now believe everything that such witnesses say and no one would go back to the old tests of incompetency. Would they be immune, too, to skepticism arising from the fact that what they heard had come through another mouth?

If I may assume for the purpose of argument that you agree with me so far, it will follow that in this, as in other rules of evidence, the admissibility of such testimony will necessarily rest in the discretion of the trial judge. The question will be not whether the testimony falls within the recognized exceptions to the rule against hearsay, but whether the witness who knew the facts is available at all, or if theoretically available, whether he can in fact be produced without difficulties quite beyond any added corroboration which his presence would give. Had he any motive at the time which might have induced him to falsify; was the matter within his knowledge and immediate memory; was it a mere routine? The judge would exercise judgment before allowing the party to introduce his statement at all and must, if you like, caution the jury in its use, but let it in he might, and his discretion, unless abused, would be sustained. And however much we may insist upon its exclusion before juries, *pur pleur del lay gents,* is it not absurd to exclude such proof in suits in equity? What possible danger can there be in such case? And even before juries, if we trust them at all, can we hope to obtain satisfactory results while we deprive them of the kind of proof to which they would have recourse in every other inquiry they undertake? I am by no means enamored of jury trials, at least in civil cases, but it is certainly inconsistent to trust them so reverently as we do, and still to surround them with restrictions which if they have any rational validity whatever, depend upon distrust.

I think perhaps I hear a low mutter of disapproval: "This man though but a lowly person seeks to arrogate all power to himself and his fellows. He is continually harping upon the discretion of the trial judge; he would absorb all justice into the hands of a set of inferior officials. Has he not read the Constitution of Massachusetts; does he not know that this is a government of laws, not of men? Will he gather to himself and his puny fellows the right to dispose of ourselves and our fortunes without appeal to the learned, the austere, the wise, and the good, who are appointed to correct their mistakes?" Well, my friends, I must acknowledge that soft impeachment. I suppose every judge is subject to it, and it was a judge, no doubt, who first said that every good judge extends his jurisdiction. Yet I must ask you to consider the other horn of the dilemma. When Samuel Adams wrote those words into that constitution, he lived in the century of Rousseau, Jefferson, and Tom Paine. People believed that laws were automatic and self-executing, the fewer the better. Society was a machine which, properly designed, worked of itself, and men, though collectively only a little lower than the angels, specifically at least in the role of officials were evil. Are you prepared to accept that doctrine to-day? If you agree, so be it; devise your self-executing system and we will watch it work without the touch of human hands. But for myself I do not believe that you can; a government of laws without men is as visionary as a government of men without laws; the solution will always be a compromise based on experience.

We derived our system from a people who made the nisi prius judge the last word in those incidents about which I have been talking. It has worked immensely better there than with us, when he is strait-jacketed and gagged and told to walk this slack rope today and climb that pinnacle tomorrow. Go into a court room and see him baited and excepted to, till you wonder who is on trial. Well, you will answer, it serves him right nine times out of ten. Perhaps so, but we are discussing, I suppose, not that unhappy mortal, but the best way to settle disputes. With all his sins upon him, his self-importance, his ignorance, his bad manners, his impatience, he is all you have got, and I believe he will produce better results if you give him a little more room to roam about. At least let me say, with such discount as you may choose to insist upon, that for myself, taking us even as we are, I believe we should get through the day's work with better satisfaction to you all, if in the conduct of these incidentals we were left to muddle it out alone, and you were to forego that supernal clarifier, the appellate court, saving only our more serious errors, whose correction is alone worthy the august atmosphere of their wisdom and their learning.

In connection with evidence I cannot help riding a hobby. He is really only a pony, not a full-grown hobbyhorse, but I love him very much; I mean the expert witness. The expert is indeed a sinner, but like many another he is more sinned against than sinning. His position is essentially a false one in that he should not properly be a witness at all. The tribunal, whether it be judge or jury, charged with the decision of an issue, is necessarily dependent upon its own acquaintance with the way things happen in order to formulate those general rules which constitute the major premises in its conclusion. When the questions are of common experience there is no difficulty; they draw upon it freely and rightly. But when the natural laws under which things behave are outside the experience of the ordinary man, they need help. My thesis is that that help should come to them from an assistant who can inform them and not from one who inevitably or nearly, must take on the attitude of a partisan, for partisan they surely become. No great change would be necessary. The parties could still call their own experts if they wished and have them testify. They would normally, however, argue from the standard sources of information upon the subject, such as books of reference, compilations, technical monographs and the like. Nothing is more ridiculous than the way in which such sources are now treated in a court room. For constitutional reasons it would be necessary that juries should be free to decide upon the atomic weight of antimony from their own inspiration if they wished, but they would be advised at least as to what a disinterested expert really thought and they would be in better position than now to reach the truth. As it is, on difficult questions quite beyond their possible comprehension they are left between the conflicting opinions of partisans. May I also in passing hold up to you a prize of great

value, the abolition of the hypothetical question, the most horrific and grotesque wen upon the fair face of justice?

Strangely enough a technique not wholly dissimilar has recently developed in constitutional cases. The reasonableness of a law, and so its conformity with due process, often involves questions of considerable technical complexity, quite out of the range of the judges' knowledge. Such questions are of fact; at least they are not questions of law. As to them courts inform themselves by recourse to the best written sources available, and in recent times briefs are submitted which have appendices, elaborate compendiums of gathered information. Is this not analogous to what I have suggested? May I also call to your memory the practice in the English Admiralty, where a judge still has the assistance of Trinity Masters, and of the Continental practice of lay experts in patent courts?

In what I have said I have not tried to go beyond two subjects which seem to me at the heart of much of our difficulty. The truth is that no rules in the end will help us. We shall succeed in making our results conform with our professions only by a change of heart in ourselves. It is hard to expect lawyers who are half litigants to forego the advantages which come from obscuring the case and supporting contentions which they know to be false. I do not mean to say that we should abandon the right of the lawyer to make his fee vary with his success, even to the extent of an aliquot share of the recovery. That is a question far beyond the outline of what I have here to say, and I have myself no clear ideas about it. It is important nevertheless that we should realize the price we pay for it, the atmosphere of contention over trifles, the unwillingness to concede what ought to be conceded, and to proceed to the things which matter. Courts have fallen out of repute; many of you avoid them whenever you can, and rightly. About trials hang a suspicion of trickery and a sense of a result depending upon cajolery or worse. I wish I could say that it was all unmerited. After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death. You may very properly rejoin that my conclusion is a comment upon my fellows and myself, and I must in part acknowledge the truth of your charge if you do. But I will not acknowledge it all; you cannot, if you will forgive me, make a silk purse out of a sow's ear, and while I am willing to admit that we upon the bench are lacking in firmness, in learning, in industry and in acumen, you cannot lay it all to us. The administration of justice is a good test of the civilization of the people where it exists; it shows their interest in equity, their freedom to adapt themselves to new conditions and their courage in protecting the weak and controlling the rapacious. It measures the point they have reached in education and in virtue, and how far they are serious in the formal expression of their will. Because, gentlemen, it is not merely in the

making of laws that law resides. You can have the wisdom of a Solon and there will be anarchy no less, if you rule a people in whose hearts there is no regard for the laws they make. Among the Banderlog I have no doubt there is an admirable code of laws, but they forget today what they said yesterday, and they never really mean what they say at all.

Success in these matters is, as mathematicians would say, a function of the advance we have made in civilization. Without a bar which is willing to cooperate, a bench more virtuous and wise than any we are ever to get would do very little. We must not expect too much from formal changes; we may put our finger on this or on that which may be amended, and if it is done, it may help, but the fundamentals lie elsewhere. You get out of a community what there is in it, out of a bar, which now at any rate is nearly a cross-section of that community, what the character and capacity of that bar contains, and neither laws nor principalities nor powers will in the end help you one jot or tittle.

And so I must finish with very little tangible to suggest to you. I did not promise you an answer, for I knew very well at the outset I had none to give. But we must in one way or another live by faith, and perhaps the highest test of it is when it is stricken by a doubt that after all it may be mistaken. We build our visions as we have spiritual strength to hold fast to them and we stand or falter as our constancy rises and falls. And still at times I can have the hope that in America time may at length mitigate our fierce individualism, may teach us the knowledge we so sorely lack that each of us must learn to realize himself more in our communal life whose formal expression is and as I believe will continue to be the law. If through some such conversion we can be taught to abate the intensity of our own wills, to subject our desires to what has been laid down for us, even when we dislike and distrust it, then in this which seems so trivial and minor a detail, the management of our private disputes, we may succeed. But not, I fear, short of something like that; we are made all of a piece, and the cloven hoof will show however well the bestial heart be covered.

PRO BONO WORK—AMERASIAN CHILDREN OF U.S. SERVICEMEN†

Joseph W. Cotchett*

In flagrant disregard of the convention that we do not talk about cases at Barristers meetings, I want to do just that. I want to talk cases. Not the cases where you get billion-dollar awards, but the cases where you help some people, on a responsibility basis.

In this beautiful place, it is difficult to remember the real world, but for a few minutes, I want to bring some reality into your life. The fact of the matter is we're living in some very difficult times, and I want to talk to you this morning about the value and importance of what you can do in this changing world. I want to talk about the history of what is happening today in our country and how it relates to you and to the cases that you should take, that you have an obligation to take.

The history of our country is different in the eyes of each of us, so you need to understand something about me if you are to understand my view of it. First, I am not a Socialist. (You'll understand later why I think it is important to establish that.) We live in the greatest country in the world, and I would fight and die for it. You are listening, folks, to one of the great capitalists. You are hearing someone who believes very strongly in our system.

I traveled an interesting road to get where I am today. I grew up in a little fishing community called Brooklyn, New York, where you learned life on the streets and the boss was a local cop (usually named O'Shaughnessy or O'Brien) who would kick you in the ass so fast your head would swim—after your mother or father asked him to do it. That was the responsibility we learned as children growing up on the streets of New York.

At age sixteen, I was fortunate to go to North Carolina State, to play a little basketball. I was promptly arrested, at age sixteen, because I had the audacity to walk up and drink out of what was then called a colored fountain. I was taken to a state magistrate judge, who dismissed the charges when he found I went to North Carolina State.

I have practiced law for thirty years, and I had a stint in the U.S. Army. I jumped out of sixteen airplanes with an AR-16 on my back and passed up a one-star general to retire with a colonel's eagle in the reserves. Now I represent everything from banks to the National Football League. I am very fortunate;

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* Cotchett & Pitre, Burlingame, California; Fellow, International Society of Barristers.

my wife is very fortunate; our children are very fortunate. Now, let me tell you what we owe to society.

A COMMITMENT TO HELPING PEOPLE

We are living in a time when the disparity between the rich and the poor is so great that it is off the charts, and it is growing. The rich are getting richer and the poor are getting poorer. People in our inner cities do not live; they exist. There are now two governments in our country—an economic government and a public government. All of us as leaders of the Bar have an obligation to step forward and do something about this.

What happened to the four freedoms that F.D.R. talked about—freedom of speech, freedom of worship, freedom from want, freedom from fear? What happened to that City on the Hill that Ronnie Reagan talked about? Bill Clinton talks about a society that puts people first. Where is that, my friends? AT&T just announced 40,000 layoffs. Every day a local gasoline dealer is closing down because the major oil companies have decided they're going to own their stations (and you're going to be paying $2.50 a gallon for gas in another two years). Every day in America three local newspapers close. Every day in America a pharmacy closes. Even doctors are closing their offices.

Recently, I went to Modesto, California, to meet with sixty doctors who were just let go from their HMO. One doctor said to me, "Mr. Cotchett, I don't understand how I can be let go from the health maintenance organization. I'm a professional. I don't know how they can do this to me." I said, "Doctor, to the HMO you're no different than any of the 40,000 at AT&T that are about to get their pink slips." That's true; the only thing the HMO cares about is that bottom line: profitability. That's where this country is going, even in medicine. I would like to represent those sixty doctors, but not on the ground that they are professionals who can't be fired. They need representation on behalf of the patients who signed up for that program because they wanted those doctors and then had the doctors taken away from them. Can we win that case? I don't know. But we can try, just as I am going to represent the local gas dealers that are getting squeezed out.

We also need to represent bank tellers and fast food workers who are being hired to work nineteen hours a week. Do you know why it's only nineteen? If they pass the twenty-hour mark, the employer has to provide health benefits. Do you realize where the nation is headed? In another ten years, no one except the privileged will have a health plan. Is that the way it should be in this country?

Only we, the lawyers, can do something about this. The doctors can't do it, the accountants can't do it. And if you are not committed to doing something to help people and to correct some of these problems, you don't belong in this profession. You don't belong in the legal profession if you're not committed.

Do I sound like an angry young man? I feel like one; I feel young and energetic because I want to go out and take on some of these monsters.

THE AMERASIAN CHILDREN

Now let me tell you about the so-called "Amerasian Children's Case." I was reading the paper one day and saw that Bill Clinton had said something like this: "It is time to demand that people take responsibility for the children they bring into this world. Each day we delay making a commitment to our children carries a dear cost." It was at about that time, in 1993, that I had the audacity to sue the U.S. Navy for leaving more than 8,000 little Amerasian children outside the base we closed in the Philippines—Subic Bay.

How did I get into this suit? I got a call from a marvelous Catholic priest, Shea Cullen, who, along with another priest in the Philippines, takes care of these children right outside Subic Bay. Father Cullen asked if we might be willing to talk to him about something we could do for these children. I sent my investigator and a lawyer to the Philippines. They came back and reported, "Joe, it's a horror story—beyond a horror story." There were 8,600 children, fathered by our military personnel, living basically in mud huts.

Subic Bay used to be one of our great naval centers. We sent troops there for rest and rehabilitation. There's nothing wrong with that. But we did create tremendous environmental problems and human problems. When Subic Bay was closed, the United States decided to spend $50 million to clean up the jet fuel that we left on the tarmac, but we didn't do anything about those children who were peering with the most beautiful big eyes through the cyclone fence.

As I told the court, I was not filing the suit in an attempt to make moral judgments. What I was seeking was a statement of responsibility; and if we were going to spend $50 million to clean up jet fuel at the base, I thought we should spend some money to build these kids a hospital and a school. What possible basis did I have for suing the Navy? Each one of the mothers had an identification card, issued by the U.S. Navy, that meant they could "entertain" in local towns. That little card authorized the women to go onto the base for medical and other benefits. So I sued the United States government in the Court of Claims, quoting Bill Clinton's statement that we have to take responsibility for the children we bring into the world.

The day I filed that suit our office received a bomb threat. I was called a Socialist for wanting to take care of these kids. We also, however, started getting letters containing five dollar bills and ten dollar bills, which we passed on to Father Cullen.

I drew Strom Thurmond's former chief of staff as the judge. I thought I was in deep trouble but when I walked into court the first morning, I met a most

wonderful man, a true Southern gentleman. The Navy brought in some officers, bedecked in all that stuff they wear (stuff I used to wear), and they thought they were going to intimidate me. I stood before the judge on a motion to throw out the case, and I took out one of those little cards and said, "Your Honor, this is the card their mothers were given, issued by those gentlemen over there." The judge looked at that card and didn't dismiss the lawsuit. He had no more questions of me. "Mr. Cotchett, you may sit down now." He wanted to talk to the counsel for the government, who had the audacity to say, "Mr. Cotchett will search in vain for a Navy official or anyone, your honor, with proof that the Navy promised to continue to provide the services. We may have provided services in the past, but we had no continuing responsibility."

Eventually, this is what happened: The judge did dismiss the case, but he commented on the role of the Navy and in the dismissal he said this was a case that could be solved only by Congress. I went to Congress. Today, those kids have money for assistance and a little hospital is to be built. That isn't much, but it's something, and it exists because we had the guts to file that little piece of paper asking the government to be responsible.

It is the responsibility of all of us to look at cases like these. We cannot just say, "Wait a minute. How am I going to pay the overhead with this?" There are much bigger principles involved. Unless we embrace those principles and champion them without regard to the financial return, we are lost as a profession. That is not rhetoric, friends; that is fact.

THE "BOSTON MASSACRE" CASE

I want to leave you with what I believe to be *the* "trial of the century" and a dramatic example of a lawyer acting on principle in an unpopular cause. The trial took place in 1770. It was not the trial of our century. It was the trial of all centuries, and it was the trial of our profession.

In the 1760s, tensions between the Massachusetts colonists and the Crown had escalated, especially because of taxes under the Stamp Act and the presence of British soldiers sent to protect the tax collectors. In March of 1770, a crowd of Bostonians marched on the customhouse, defended by eight soldiers. The soldiers fired into the mob, allegedly on order of their captain, and five colonists were killed.

Under colonial rule, Massachusetts was allowed to have a system of courts and a jury system. Through political and popular pressures, warrants of arrest were issued for the eight soldiers and their captain—an unheard of thing in 1770—and a grand jury indicted them for homicide.

As you can imagine, representing those eight soldiers was not a path to popularity or prosperity for any lawyer. But one lawyer with much to lose had the

courage to step forward and defend them. The jury was chosen in four hours. No person from Boston was allowed to sit on the jury; the jurors came from the surrounding area. The prosecution's case took a week and the defense case took another week. Counsel were given only one day to argue, and they argued eloquently. This trial of the millennium ended after only twelve trial days. The captain and six of the soldiers were acquitted; the remaining two were found guilty of homicide but were granted benefit of clergy, which permitted them to be released after a branding of their right thumbs.

The courageous lawyer who stepped forward was John Adams, who later became President. He had commitment and guts. And if John Adams were around today, I'm sure he would be here with us.

LOVE, LIFE, AND MARRIAGE†

James R. Becherer*

My topic used to be one that would be put on the "women's program" at conventions because we assumed men weren't that interested in marriage, but increasingly men do care about marriage. No matter what's going on in the world or in your business or professional life, your marriage is still the heart of it all. The two go hand in hand, or should, although there are a lot of people who are very successful in their professional life but not in their personal life and others who are quite successful in marriage but not in other parts of life.

Before I move further into my topic, however, I will address the question that I know is always in the minds of those in my audiences: How can a Catholic priest talk about marriage? I have not been married, but I have listened to marriage problems for twenty-one years (and it has made me glad to be celibate). The Catholic church owned marriage because we considered it a sacrament, so priests became involved in marriage. Years ago, Catholics were told that if they wanted even to think about getting divorced, they had to see the priest, so the marriages were already in trouble when the couples came to me. Also, I heard confessions of those who had wronged their spouses.

I don't want to bore you with our canon law, but one change in that law illustrates, to me, an important change in marriage. The Catholic divorce is called annulment. It used to be that the principal basis for an annulment was that the marriage had never been sexually consummated. Today, marriage has been elevated to a much higher level, and the Church recognizes that sexual consummation doesn't mean you have much of a marriage. We have delved into deeper spiritual, emotional, and intellectual aspects of the relationship, and now, to put it quite simply, the reason for annulment often is that the marriage wasn't spiritually consummated; there was no intellectual union; there wasn't an emotional union. This truly represents an elevation of marriage to another level.

CHANGES IN MARRIAGE

We have witnessed all kinds of changes in the world. We are told that more has happened since you and I were born than happened between the time of

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* Catholic priest, marriage counselor, writer, and lecturer, Cleveland, Ohio.

Caesar or Jesus and the time of our birth. The only constant is change. We might as well embrace it. This is our world, a great, crazy world with all the changes, all the moving on, even though we aren't sure where we are going and we aren't too certain about what we were taught. And so the Church and the meaning of marriage have changed dramatically in our lifetime.

The Catholic church, I think, was always embarrassed by sexuality and could not put spirituality and sexuality together. If you really loved God, you wouldn't do *that;* you would take vows of poverty, chastity, and obedience. So we didn't celebrate married peoples' lives very much. In the old days, out of reverence and respect for the sacrament of Holy Communion or the Eucharist, Catholics went to confessional on Saturday afternoon, abstained from any sexual activity the rest of that evening and night, and also abstained from food and drink until they went to Communion. While that did show great reverence, it also reflected a belief that sexuality and spirituality were mutually exclusive. Today, in another of our many changes, we try to unite everything. A young couple approached a priest and said, "Father, we understand everything has changed now, and we don't have to fast and maybe even sex is all right before going to Holy Communion. Would it be all right if we had intercourse before going to Communion?" The priest thought for a minute and said, "Well, it's okay if you promise not to block the aisles."

Most of you are probably familiar with Alvin Toffler's book *Future Shock.* I love that book; it has been almost a bible for me. Toffler predicted that by now, in the 1990s, many people, especially Americans, would have four marriages, not just one. He said the first one would be for passion, the second would be for children, the third would be in the middle years to recapture youth, and the fourth would be for companionship in old age. The challenge of marriage is to telescope all those experiences into one marriage. A lot of people are surprised at the number of divorces in the world. I am almost more surprised at those who keep going with one marriage. I'm not trying to encourage divorce; we're never going to have love between the children, love between nations and races, if we don't have love between a man and a woman who commit themselves to love each other and to stay together until death. That's where it starts. But love is something like fresh bread—you need to bake it every day. That's the key "helpful hint" you might take home with you about your marriage: You need to work at it; there's an effort involved.

Here's a big point: We've added twenty-five years to life expectancy this century. At the time of Christ, people lived to be about thirty-five. At the turn of our century, life expectancy was around fifty-two. When I was born in 1925, my life expectancy was sixty-four. Now we're up to seventy or eighty. Does this have an impact on marriage? You bet it does. In the old days, marriage was insoluble mainly because couples wanted to raise a family of at least

eight children, and by the time they had done that, they were old and had the courtesy to die. Today, couples don't have eight children, and they don't die shortly after their children are grown. Couples are likely to spend most of their marriages without their children. Therefore, I want to encourage you to work at being married, to value it, to be enthusiastic about your marriage. So many people are so busy making money and making sure the children have straight teeth and go to the right schools that they do not give time and attention to the quality of the marriage itself. If you cannot take the time for your own sake, remember that your children would love you to be well married. Anyone whose parents divorced or were noticeably unhappy can verify that children want their parents to be happy together. It's wonderful when you succeed.

One time I was giving a retreat for married couples, and one of the couples had ten children. On Friday night we got to the retreat house, and I learned that they were very reluctant to be away for a whole weekend. On Saturday morning I saw the two of them in a different posture. They were holding hands as they went in for breakfast. I tiptoed up behind them and said, "You sure do look happy," and they replied, "Oh, Father, we're so glad that we decided to make the sacrifice and come here for a whole weekend. This is the first weekend we've been away from all our children since we began to have them twenty years ago, and are we having a good time!" I am certain that their children were glad their parents went away and renewed their happiness, too.

A lot of people like falling "in love," with its newness, its freshness; so when love gets old, they start over. The challenge is to see if we can go from being "in love" to loving behavior. Many of you, when you got married, heard something like this: "Love is patient and kind, seeks not its own, is not arrogant, bears all things, believes all things, hopes all things, endures all things." That is virtuous love. We need to try to apply virtue to sensuality and grow beyond falling in love to being loving friends. One of the beautiful things that has come into the new kind of marriages is friendship, and the equality of friendship, for a friend either finds or makes the friend an equal. You can't have friendship where there's no equality.

Now, for contrast and context, I need to outline the traditional Catholic explanation of marriage, the three purposes of marriage as we used to perceive and teach them. The first purpose of marriage was procreation—the more the better. The second purpose of marriage was mutual support. I need to spend some time on this, because it has been an area of great change. This used to mean that the husband and wife fulfilled their traditional roles. You can find support for this in scripture: The man was the head of the house, and the woman was the heart of the home. Increasingly, however, this is what I would see as a marriage counselor: The couple would come in, and the woman would say she wasn't happy. The husband, who never had any problems,

would respond, "I don't know what she wants. We're eating well. We have a roof over our heads and indoor plumbing. She's got all the clothes you can imagine. She has much more than her mother ever had. What more does she want?" The wife would answer, "I didn't marry you for food, shelter, and clothing." What had happened, speaking very generally, was that the woman had gone out and gotten her own "head"—she went to school and got an education, then she got a job and had some money. When she had money, she gained power, so she became a new woman. (The sad thing was that she often was also becoming the very man she hated, but that's another problem.) What we had, in the wife, was a whole person, if she had kept the heart while getting a head, and she was looking at her husband and saying, "You don't have heart." It was really hard to explain that to some men; they just didn't know what she meant.

I'm going to tell you what she meant. She wanted her husband to be more intimate, more personal—not just a provider but a human being. For that reason, I don't think everybody is good at marriage today; it is now so personal. It involves personality and communication skills and embarrassing disclosures of who you really are. You get beyond illusion (and sometimes to disillusionment), and you stand there and say, "Does anyone love me as I am, with all my faults?" (Unfortunately, we lose a few right there.) We live in a rather impersonal time in history and an impersonal society, with all the technology. People often are dehumanized and depersonalized. Marriage could be a wonderful place, a wonderful relationship in which a man and a woman are really persons to each other for thirty, forty, fifty years. But for some people, that's just asking too much.

Let's address briefly the third purpose of marriage, traditionally. That was sex, but sex in the Catholic viewpoint was a duty. I will verify that with an example. In the old days we had confessions every weekend. I would be hearing confessions on Saturday night, and a woman would come and say, "Bless me, Father, for I have sinned again. I missed my morning prayers, got mad at the kids, and denied my husband." "You what?" "Denied my husband." Then I grilled her: "Really? What was it? Cake? Whatever did you deny him?" She would say, "You know—his rights." A right and a duty. I would say, "How many times?" Then there was a little pause, and she would say, "I think it was eight times Tuesday night."

THE VITAL MARRIAGE

For whatever this is worth, I would ask you to think about your own wedding. You remember the day: "I take you for better, for worse, for richer, for poorer, in sickness, in health, in good times, in bad times, until death." (Those are not multiple choice.) Then at the reception, what did you do? You danced

and then you cut the cake. That's the symbol I want you to think about for a moment. What do couples do today? They often push the cake into the face of their beloved. That is so gauche, but they don't know it, and nothing else entertaining is happening at the time, so they do it. But it should be a gentle, caring gesture because it should mean: I love you, I will love you all my life, and I will feed you all my life; and then it is reciprocated.

You are not finished being created when you are born or when you get married. You are finished being created when you die. In relation to the subject of love and life, love is what brings forth life, and not just in the obvious way. When you think of your marriage as a life-giving experience—not just bringing forth children but continuing life in the creation of the one you love—then you have it. You are creating your spouse; you are creating your beloved for the rest of her or his life. When you look at each other, you think or say, "You know, I wouldn't be what I am if it weren't for you. This is what I became, living with you." I think it's God's plan that you are to be created by each other.

So marriage is a creative process. As an aide, what can I contribute to that process? I can feed you spiritually, for we know that no one can give what one has not got. If you're looking for someone to marry, you want to marry someone who is rich spiritually, at least if you want to continue your interior life. And you want to enrich yourself spiritually. Your marriage cannot sustain you or fulfill all your needs. I think you are wrong if you think that finding the right person will make you totally happy and enable you to make that person completely happy. I think our happiness has to come from within, and somehow I believe that we need something beyond human love. And so I think that God's plan was that divine love would be translated into the carnal, human experience called marriage. In the musical *Les Miserables,* I think a line in one of the songs says, "To love another person is to see the face of God." That's what I would like you to believe: that divine love is coming to you, through you, to each other. It's a dynamic, not a static, relationship.

What could you do to bring about that kind of dynamic, loving relationship? Well, you could worship. It's interesting that when we talk about love we use terms of worship: I adore you; I worship you; you are my special angel. We use that kind of terminology because love somehow is of God. You could pray together. Find a way to be spiritual together.

You also need to praise each other. I felt sorry for a woman who was insecure. She kept tugging at her husband to ask, "Do I look all right? Will I fit into that group? Will I be okay? Honey, do you love me?" Her husband answered, "Yeah, yeah, yeah. How many times do I have to tell you? I told you the day we got married. If things change, I'll let you know." He didn't realize how important little words of praise can be. If I praise you, I tell you that I

love you, and I think it is essential that we do that with our husbands, with our wives, with our children; we need to tell people we love them. Secondly, we should thank them. I think thanks and gratitude are wonderful. Thank each other and never take each other for granted.

Third—and here's a big one—you ask and give forgiveness. I couldn't get over the number of women who would come in for counseling with long lists of everything their husbands had ever done wrong. They hadn't forgiven anything and therefore carried an enormous load of anger and resentment. You must learn to forgive and move on without that baggage. I can't tell you exactly how to do it; I can only tell you that when you do it, it feels wonderful. No matter what, no matter who you marry, you're going to have conflict. It's the way you resolve the conflict that determines whether you and the relationship are healthy. You fight, but then you forgive.

I was talking at a country club in Cleveland years ago, and a very smartly dressed woman stood up and said that her husband had fathered a child outside of the marriage. When she found out, she had to make a decision about how she would react. "I chose to forgive him and to help raise the child, financially." She added, "That was the beginning of our marriage."

The fourth thing is to ask for help from each other. None of us can do it all alone. We need to admit that we need each other.

We are building a diagram of a vital marriage. Marriage should be intellectually alive. It should be emotionally alive. What a great thing it is to live with someone who has a sense of humor, who laughs and gets mad and gets sad and gets scared. Most of us men are scared, but we're not supposed to be, or we're not allowed to show it. A wife who is in tune with her husband knows he's scared and stands by him and encourages him when he goes out to do whatever he does. Her husband also encourages her because she faces a new world, she's creating a new life for herself. So we need to encourage each other. How wonderful it is if you are emotionally alive and share your feelings. I know you have heavy responsibilities, and sometimes the job can be overwhelming so that you become more the lawyer perhaps than the man or woman—but try not to neglect the personal and the human dimension. We need people who have feelings, who care and share and commit and say so.

Let's end with the role of sex in the vital marriage. What is sex for? Its most fundamental purpose, of course, is to produce new human life; nearly everyone in this room got here through sex. It also is nervous relief, and fun or pleasure. Is it more? Can you believe that sex is mainly love? During the second world war I lived in Reims, France, across the street from a house of prostitution. At the beginning of every month I would see the GIs standing in line, waiting to go in to spend a few minutes with a woman they didn't know, whose language they couldn't speak, whose name they couldn't pronounce—just to have sex. ("Have

sex" is a very common phrase now; it's like having a Big Mac or a beer.) It was so impersonal. Prostitution is not love, rape is not love, and just doing your duty is not love. Tina Turner sings the question, "What's love got to do with it?" I ask, "What's love got to do with sex?" Everything.

If you love each other, you want to be one, you want to share your lives and your selves. If you have spiritual intercourse, as we discussed earlier, you believe that you are a gift from God and a gift to each other, and you pray and you worship, and you become a channel of God's love. If you have intellectual intercourse, you talk and you listen—especially listen. Who listens to you on a personal level? Who hears your heart? Who shares your dreams and your hopes and your sadness and the death of things and the necessary losses in life? You want to share all of that with somebody, so you have emotional intercourse. You laugh and cry and get mad and sad and make up, and you encourage each other. There are eleven emotions that make us human, and I hope you have all of them. Are you sensual together? Sensuality involves what you see, what you hear, what you smell, what you taste in one another, what you touch in one another. This is getting close to being one with another person. To be sensual, you want to take care of yourself and present yourself as well as you can on all the sense levels, so you don't neglect any of those aspects of yourself. You try to be pleasing, pleasant, and attractive to your mate on the sensual level. If you share all these things and then come together in a final sexual embrace, and the two do become one, it isn't just a union of bodies but also a union of souls, a union of minds, a union of hearts and senses, and passion, and feelings, and memories, and hopes, and pasts, and futures.

On a theological level, I view it this way: There are two people who love each other, and there is a love that is somehow created by the love between them, a love connecting them somehow, drawing them into oneness. Thus, the two do become one and share a trinity and a unity. That's called life, that's called love. And I hope it is not just something you heard; I hope it is what you in fact experience.

COMMON THEMES IN THE PRACTICE OF LAW AND PROFESSIONAL SPORTS†

Carmen A. Policy*

As I speak to you today, I hope to bring you a little closer to the industry I am part of, and perhaps surprise you with the similarities between the practice of law, especially trial work and advocacy, and the operation of a professional sports franchise. If I were to give a pedantic title to my talk, it would be that the quest for the ultimate trophy lies at the end of a paradoxical road. I believe that is true for the practice of trial law as well as for professional sports, and I think we can learn from each other.

To make it clear that I do know something about what you face in trial work and to establish how far back my ties to John Lancione go (which explains why he invited me to talk to you), I want to tell you about something that happened in the '70s when I was a youngster practicing law in Youngstown, Ohio. John Lancione referred me to a law firm in Cleveland that was looking for a nice, clean-cut, not-too-smart-but-not-too-dumb lawyer to represent an elderly gentleman who had run into some difficulty with the U.S. Department of Justice's anti-racketeering group. I got a call from a member of the firm, who said, "Mr. Lancione has referred you to us as an honest, talented, smart, and practical lawyer. We want you to come up here to represent a gentleman [and I will change the names to protect the guilty] named Mr. Fortuno Protopapa." I am slightly embarrassed to say that my response was to start talking about money. At that point in time, I was somewhat preoccupied with fees, especially since I had just bought a new car and a new house on a street by the country club. The Cleveland lawyer said, "Money's no problem, young man. Just show up on time."

I arrived, on time, and met my client, a kindly, sweet, magnificently self-effacing elderly gentleman. I fell in love with him immediately. His white-haired lawyer followed and told me that the government lawyers, perhaps through some misinformation, believed that this gentleman had knowledge of certain activities including people getting blown up and labor unions being corrupt and politicians not living by their oaths of office. The government lawyers had gotten the federal bench to grant Mr. Protopapa immunity, and he

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* Member of the Virginia Bar; President, San Francisco 49ers.

was about to appear before a grand jury. His regular lawyers thought he needed to have counsel there when he testified, to lend him support and make sure that his constitutional rights were protected. I felt honored to defend this poor, innocent senior citizen, and I took the job (and the fee) with a high degree of optimism.

We went over to the federal courthouse, where I, of course, waited outside the room since the lawyer is not permitted inside the closed doors during grand jury proceedings. I kept hearing laughter and yelling and all kinds of ruckus going on behind those heavy oaken doors. Finally, huffing and puffing and angry, the government attorney opened the door and brought out my grandfatherly client. A court reporter came, too. The government attorney, starting to sputter, said, "Mr. Policy, I've lost my patience with your client. You need to advise him as to his legal responsibilities." I asked, "What seems to be the problem?" He pointed a finger at Mr. Protopapa and said, "Did I not ask you, Mr. Protopapa, what was your relationship with Carmine Stompanato, and did you not say you don't know who Carmine Stompanato is?" "Yep." "And did I not remind you that you're under oath and that you have also been granted immunity by the U.S. District Court for the Northern District of Ohio and that you had an obligation to answer honestly, and then ask you again what your relationship with Carmine Stompanato is, and did you not say again that you do not know Carmine Stompanato." "Yep." The government lawyer then asked, "Are you saying in front of your lawyer under oath that you do not know your son-in-law Carmine Stompanato?" The old man looked at him and said, "Oh, that Carmine Stompanato."

COMPARISONS OF LAW AND PROFESSIONAL SPORTS

As I analyze professional sport as an industry, as an occupation, I keep thinking of examples of how my skills and experiences as a trial lawyer have stood me in good stead in almost everything I now handle on a daily basis, whether it's on the local level in San Francisco or on the national level, or whether it's dealing with the media from the smallest town to New York City. I came to the job well equipped. There could have been no better training to prepare me for a job for which there is no college course or curriculum. As I thought about trying to explain to you what my life entails day in and day out, I realized it is very similar to yours, so I really don't need to explain that. I can turn to some of the larger issues.

Let me tell you some of the paradoxes that we have to face on a regular basis when we try to manage this unmanageable amoeba that we call professional sport. Is it a business or is it a profession? (Does that sound familiar to you?) We are faced with the fact that fan loyalty is crucial. It's our basic asset.

Forget about TV; forget about the sweatshirts; forget about everything else. The basic asset is fan loyalty. That's the very soul of our industry. The team must become part of the fabric of society and part of the identity of the community. When you think about San Francisco, you automatically think about the Golden Gate Bridge, cable cars, Coit Tower, Ghirardelli Square, and the San Francisco 49ers. And yet there are business considerations that have to be part of our focus and part of our efforts, if we are to ensure that we have a viable organization; but God forbid if we admit that we are operating with some eye on profit. Profit becomes a dirty word.

That's what you face, too. Is law a business or is it a profession? You are part of the fabric of society. What you do has an impact beyond your obvious daily activities. You certainly are entitled to earn a living for what you do, and, as a practical matter, we all seek the good life—but if an attorney stands up and suggests that he deserves a fee, he's charged with greed. The balance is difficult to maintain. We're having more trouble with this now than ever before in our industry, and it is causing difficulty both within and without.

To a great extent, what's happening to us is that we are now being forced to deal with realities that you've been dealing with for decades. We have had to come into the real world, the world where we have to deal with people who have real problems and face real issues. We can no longer remove our people from reality and treat sport as a separate world. We're facing the same problems as every other business and walk of life today. Our industry now has to step up and try not only to face the problems but to help solve some of them.

Another paradox that keeps popping up—and it doesn't matter whether you're wearing the mantle of a sports executive or the suit of the trial lawyer—is that you are supposed to play by the rules and engage in sportsmanlike conduct, but you also must win. Now that the end of the century is approaching, people are talking about what phrase or sentence or question will capsulize the century. Leonard Koppett, a sports writer who is in the writer's wing of the Baseball Hall of Fame and also the Basketball Hall of Fame, sat down with me one day and opined that the phrase or question will be, "Who's in first place?" That does seem to characterize everything that is happening in society today. Yes, we must play by the rules and be good sportsmen, but when anyone analyzes which is the best organization in professional sport, he doesn't look for good sportsmanship or community service or even profit but for the organization that wins. You just hope and pray that there is some equation between class and a winning organization, between character and integrity and a winning organization.

Again, you've been facing this for decades. You have been judged not by your great cross-examination or wonderful effort or integrity. You may earn the respect of all the judges, jurors, and people who work against you, but if

you lose every case, you go down in ignominy. It's sad but it's true, and as a profession you have dealt with it well and with dignity. Now that this reality is confronting professional sport, I'm not sure we're going to be able to handle it as well. I protest oftentimes that instead of bashing lawyers, sports organizations should study how you, as a profession, have handled this problem and possibly learn from your example.

Another paradox: Teamwork equals victory—there is no "I" in the word "team"—but people pay to see the stars. Try to imagine what it's like when you're operating a football team. Your coaching staff, your medical staff, and all of the support personnel gear their entire teaching effort to the concept of "we." When a play is to be called on the football field, a team of coaches signals an offensive play, which is transmitted to eleven men, each of whom understands that the success of the play is dependent upon whether he does his specific job. When the game is over, however, the entire process is broken down by the media that immediately start changing the focus from "we" to "I." They start focusing on the star performance; and that has the effect of undermining the team spirit you worked so hard to build.

I think you face that in your law firms. Litigating a case requires a team, but there's no question that the star quality of the individual who addresses the jury is a necessary ingredient in the success of your office. In that are the seeds of destruction; yet, somehow, you have dealt with it for decades. Again, we can learn from you.

Similarly, free agency is like an ebola virus. It invades the body of a team and starts eating away at the capillaries and tissues, and before you realize it, you're rotting from within. I would like to tell you that the 49ers are a family, that we care about our own, that we do what's necessary to make a player feel good about himself, his teammates, and his organization, that we want them around for a long time. I would like to tell you that—and that's the way it was back in the Camelot days when the drawbridges were always up and everyone wanted to live behind the walls of the castle. But we left Camelot and entered the age of the British Empire, and again reality set it. We have had to face major changes and challenges that no one had anticipated.

For example, I spent all day Tuesday on the phone trying to keep a young defensive back in San Francisco. He's a wonderful human being; he fits well on the team and works in the community. His wife is expecting triplets, and they like the Bay Area. He is what the 49ers are all about, and he really doesn't want to leave. But his agents chummed the waters and worked several other teams into a frenzy, suggesting that they could grab a piece of the 49ers' luster by grabbing this young man. The other teams were told that the only way they could get him was to offer him so much money that he couldn't say no. When I talked to the player, I had to tell him that we couldn't match the resulting offer—and we

both felt very sad; but we understood that it was an offer he couldn't refuse.

I believe you've been facing that aspect of reality for decades. You have faced "materialism" (I don't want to use the term "avarice") and you've handled it well, as well as it can be handled. Again I feel we can look to you as a profession and learn from you.

When you analyze what's happening in the National Football League and in professional sport today, it appears as though the fan is being forgotten. There is a frightening reality in our industry today: We are so visible—everything we do is reported on daily—that perception has become reality. The perception of the public and the media has an immediate impact on our day-to-day operations. When we make decisions, we cannot consider only business judgment, sound personnel principles, and common sense; we also must think about the public perception. Imagine going through your daily lives with the media working in your building, in space and at desks that you provide, so that they're on hand to critique everything that you do daily. What I'm concerned about is that we may be focusing too much on appearance and compromising too much on substance and integrity; and the fan feels that we are forgetting him. Professional sport is being driven by a crazy spiral that involves economics and an "I-must-make-more-to-compete" mentality, which drives prices above the amount many fans can afford.

Again, at least some of you have dealt with intense media coverage, and I think you've handled it quite well, somehow managing to maintain a sense of professionalism and ethics. All of you are facing the pricing problem, vis-a-vis the "fans"—the poor and middle class. Perhaps we can learn about that together.

To summarize a few similarities between what we do before I turn to questions, I suggest that the following things are true: First, what we are doing is much bigger than the games we play. Second, although we are all part of show business (I think most of you would agree that you are part of show business), what we do and how we do it has real-life ramifications. Third, as long as we maintain a level of performance that's fueled by passion and not lip service, none of us will lead a boring life.

QUESTIONS AND ANSWERS

Q: I am a fan of the Seattle Seahawks. What do you have to say about planned relocation to Los Angeles?

A: I happen to think that moving the Seahawks would be a tragedy. First of all, the northwest market is a great market and the fans have been wonderful; you've supported the Seahawks even though their win/loss record hasn't been thrilling. I also believe that there is a bit of hypocrisy about the condition of the stadium in which the Seahawks play. It is not an ideal stadium; serious im-

provement or perhaps even a new stadium is needed. All the talk about earthquakes and seismic concerns and "moral obligations to the fans" seems insincere, however, when the Mariners are going to be playing in that stadium for another two or three seasons, with eighty or more events a year. I think that the National Football League should take a stand not only to protect the Seattle market, but to maintain the integrity of the L.A. market, which we need to develop in a sane and sensible fashion.

Q: To continue your analogy between law firms and sports teams, regarding fans or the poor and middle class feeling forgotten, do you think that the skyboxes and the high cost of a family outing to a ballgame are causing animosity from the fans?

A: Yes, but here again we face a paradox or a dilemma. The American public truly has changed. Think about shopping for a moment. We won't shop the way we used to shop. We insist on comfort; we insist on security; we insist on a variety of products presented in a variety of ways with a variety of competitive factors. Similarly, people won't take a bus to a stadium, buy a hot dog, and sit on a bench seat to watch a game; they want more than that. A key demand is parking space, and a lot of it, close to the stadium. Fans also want security and more comfort. Those desires or demands of the fans, along with owners' desires to generate more revenues, have spurred the building of new stadiums. The problem is that most communities can't afford $200 million to build these facilities, so innovative means of financing construction have to be found. Thus you have the premium seat licenses and the special seats and the suites. The result is that families either can't afford to go to the stadiums and see their teams play or don't even have seats available to them. They're relegated to watching their teams on TV (or, worse, to watching other teams on TV), and I'm worried that we are shutting out the fans who have the most passion.

Q: What type of guidance and support do you give the 22-year-old athlete who is going to come into a million dollars or so on his first contract?

A: That really is scary. I don't think it's a secret that many of the young professional athletes come from poor backgrounds and have little training for handling life, let alone millions of dollars. Oftentimes, too, the moment money comes in, the grandmother wants a house, the father wants to buy the bar down on the corner so that he can have his own business, and the cousin needs a little extra money so he can go to school. The pressures to take care of everyone that suddenly descend on the 22-year-old kid can become overwhelming. Our advisors tell us that some of the drug use in professional sport stems directly from those pressures.

I think the guidance and support have to be provided before we get these young athletes; they need advance preparation. Here, a good college coach is

worth his weight in gold. If he spots the kids that are likely to go on to professional sport and puts them in touch with the right advisors—advisors, not agents—and if the kids are capable of learning from the advisors, I think they will be all right. We are getting a little smarter about this advance preparation. The 49ers do continue to work with the new players, and I think other teams in the NFL do so, as well. Also, the kids are starting to learn from the experiences of those who precede them.

Q: Following up on the college coach theme, what is being done to help support university programming and to keep these young men in college until they get their degrees?

A: The best thing that could happen to the NFL would be to have every athlete finish every year of eligibility available to him, because they are better trained and more mature, mentally and emotionally as well as athletically; they are able to handle the NFL much better with that extra year or two. Our problem is that we have been advised that antitrust concerns preclude us from saying, "We are not allowing you in our draft until your eligibility is concluded." In fact, we did say that; we were challenged; and we concluded that we could not maintain that position. We would like the colleges to join with us and seek some relief from Congress, if that's possible.

Indians Rose for the Judge†

Michael Kelley

The Barristers well know Judge Warren Urbom, who has spoken twice at the Society's meetings. On one of those occasions he movingly described the Wounded Knee trials but spoke modestly of his own role. A tribute to Judge Urbom at the 1995 Nebraska State Bar Association convention gave rise to the following newspaper account.

Lawyers who attended the recent Nebraska State Bar Association convention in Lincoln are still talking about a stirring tribute to Senior Judge Warren Urbom. "There wasn't a dry eye in the room," one attorney said.

Urbom, appointed a federal judge in 1970, was chief judge of the U.S. District Court in Nebraska from 1972 to 1986 and has been a senior judge, with a slightly reduced caseload, since 1991.

The impromptu tribute, saved on videotape, came from Albert Krieger of Miami, who owns a Lifetime Achievement Award from the National Association of Criminal Defense Lawyers.

"It's over 21 years since I last saw Judge Urbom," said Krieger, an orator of the first rank who speaks in booming, measured phrases.

Turning to the judge, the lawyer said dramatically: "I would walk across a tundra if you asked me to."

And then Krieger told 135 lawyers attending a symposium at the Cornhusker Hotel a story from some of the 1974 cases that arose from the American Indian Movement's 1973 occupation of Wounded Knee, S.D.

Krieger was the lead defense counsel in the Sioux Falls, S.D., courtroom. On the first day of trial, a sensitive issue arose—the Indians attending made it known that they would not stand when the judge entered and the bailiff said, "Please rise." The attorneys asked to meet privately with Judge Urbom in his chambers.

To stand for a federal judge, the lawyers explained apologetically, the Indians felt would be an acknowledgement of the hated Treaty of 1868.

"Judge Urbom blinked once or twice," Krieger said, "and told his bailiff to delete 'please rise' from the opening proclamation."

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† Reprinted, with permission, from the Omaha World Herald, Thursday, November 2, 1996.

Minutes later, Urbom entered the courtroom. Non-Indians stood. Indians sat. The trial began without incident and went on for weeks, Urbom daily demonstrating his judicial fairness.

Six weeks into the federal trial, a related case was to begin in state court in Sioux Falls. The judge in that case warned defense attorneys that they would be held in contempt if their clients and supporters didn't rise.

When many failed to stand, Krieger said, the judge ordered deputies to "make them rise." They refused.

"A riot ensued," Krieger said. "Three Indians were badly bruised and battered, and one lost an eye. The courthouse was pretty well wrecked."

The federal case in Judge Urbom's court reconvened two days later with tension in the air; Indians arrived wearing rabbit fur in their braids and porcupine quills in their vests.

"Not a seat was empty," Krieger said, "and terror was deep in the heart of every white person in that courtroom. The marshals radioed for help. I turned to my client, Lorelei Means, and said, "Lorelei, what is happening?"

"For the first and only time, she used my first name. She said, 'Don't worry, Albert.'"

With that, the judge entered. And the Indians who packed the courtroom rose.

"They stood as one," Krieger said. "We at counsel table looked at each other, astonished and stunned. Judge Urbom realized what happened, and returned to the robing room.

"When he returned three minutes later, they rose again. There were tears in his eyes. . . . Within a framework of genocide that occurred over 200 years of our history, the most militant of the American natives stood for a federal judge who had demonstrated to them courage, integrity and honor.

"Never in 47 years of practice have I seen our system of justice reach such a point of fulfillment as it did on that day."

Krieger said he has told that story to "tens of thousands" at meetings and symposiums over the years, but this was the first time in Urbom's presence. He embraced the judge.

The Nebraska lawyers gave a 30-second standing ovation to Urbom, whose many awards include a recent national honor, the 1995 Lewis Powell, Jr. Award for Professionalism and Ethics.

"The Wounded Knee trials were one of the great experiences of my life," Urbom said. "You know, sometimes when you're confronted with these unusual, previously wholly unexperienced events, you react. You don't really know how to react. Sometimes you guess right and sometimes you guess wrong.

"This time I guessed right, and I'm delighted it turned out that way."