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LAW IN TIME OF WAR[†]

James J. Brosnahan*

Today I am going to talk a little bit about John Walker Lindh, whom I represented, but I'm also going to talk to you more broadly about law and war. John Lindh returned to the United States in chains in January of last year, having come from Afghanistan. The saga known by the American people started on December 1, 2001, at the Qala-i-Jangi prison fortress in Afghanistan. The last group of prison rebels had surrendered, and among the prisoners taken was a wounded person with a bullet in his right thigh. He couldn't walk, and he hadn't eaten for several days. Suddenly, the camera people who were there realized that he was an American. They really saved his life, because if he had not been on camera, he probably would have suffered the same fate as a lot of other people at Qala-i-Jangi: they died.

Lindh's father called me the following day and asked if I would represent his son. I told him that I would have to think about it, and I certainly would have to talk to my partners. I did talk to them, and they all thought that I should do it. And I am glad I did; at no time, for example, did Lindh ever say to me, "Why me?," as so many other clients have done.

That was, however, the beginning of the media frenzy. We received 250 calls a day from the press. Larry King and Barbara Walters and George Stephanopoulos each spoke to me on the telephone one Friday night, and I heard myself saying, "No, I'm not going on your show." Larry King called me "Sweetie." Katie Couric wanted to be my best friend. I did not go on those shows, with a few exceptions, but I did appear occasionally on television. And in our culture that meant that I was an expert. This is frightening to me: When you're on television, not only are you an expert on something you might know something about, but you are also an instant expert on anything else that the talking heads choose to ask you—and they ask almost anything. You feel compelled to give an answer because you're on camera. Still, I wouldn't have missed the experience for the world. I had a seat in the front row to watch America. Some of it was great, and some of it was not so great, but I wouldn't have missed it for the world.

[†] Address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 10, 2003.

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A BRIEF HISTORY OF LAW AND WAR

With that introduction, I give you the history of law in time of war. What is the law in war? It struck me when I was thinking about this talk that law anywhere and at any time is courageous, idealistic, and amazing. In one current project, we are taking the law to East Oakland where the gangs are fighting over drugs. Judges do that every day. Lawyers do that every day. It is amazing. The law in time of war is just the most extreme end of an amazing spectrum. When you say, "What is the law in time of war?," you are saying, "Who would stand up in the middle of a war and say 'this is the law, this is what we believe, and this is what you should do even in the heat of battle'?" The complete history of law and war spans some twenty-five hundred years; if you don't pay the closest attention, you will miss the entire Middle Ages.

The Greeks had law of sorts, and they had city-states, but, at least in my mind, they didn't contribute much to this area of law. Demosthenes, a trial lawyer, did speak out for the preservation of the liberties of Greeks, but his was the last voice heard in that democracy. (In fact, until the American Revolution the widespread view was that a democracy would not work because it would involve too much input by too many people, including the rabble.) The Romans contributed much more than the Greeks. It was the Romans who insisted on order. It was their engineering instinct and penchant for order that built roads, developed a water system, organized an empire, and developed a legal system that covered the known world and gave them some basis other than force for deciding issues. For example, they had a rule that no one could bring troops within a certain distance of Rome, because a commander who brought troops to Rome could dictate politics and prevent the senate from acting freely. Julius Caesar was the first to violate that rule when he crossed the Rubicon. The lawyer who spoke out against Caesar's action—Cicero—was a great friend of Caesar.

Cicero had an ego greater than the sum of all egos in this organization. (Dare I say that's a *large* ego?) Yet, he was even greater than his ego. He was the number one trial lawyer in Rome, and, at the same time, he was the number one poet. He had been a consul and had won military victories. He wrote a short piece on rhetoric that is one of the best things ever written. (If you know someone who wants to be a trial lawyer, give that person this amazing lesson by Cicero.) On top of all that, he was the only Roman, or at least the leading Roman, who is now remembered for writing anything philosophical. This was the guy who spoke out against Caesar's violation of the law in time of war.

Then, of course, Caesar was killed by those who had thought that the suspension of their law was only temporary. Cicero had realized that the suspension would not be temporary. He also realized that murder would not

restore law, and he was right on both counts. Caesar's successors got tired of the cranky old man who kept talking about the good old days when Romans had rights and law, and those successors put out a death warrant on Cicero. Cicero tried to sneak out of town, but they caught him. According to one of the stories (there are two or three versions of this), a former client of Cicero, a man named Popillius, was the head of the mob sent to execute the death warrant. Cicero had gotten Popillius acquitted of the murder of his father, so supposedly when Cicero saw Popillius at the head of his execution squad, he said, "Ah, Popillius, have you come to thank me for your acquittal?" With that they struck off his head and his hands and took them to be displayed at the Forum.

Clearly, war and law don't always mix *successfully*, but the effort was made by a lawyer, stubborn in his idea that law should apply to everything. He so strongly believed he might be able to make a difference that he tried against great odds. That's our starting point.

Skipping ahead to the late sixteenth century (because, frankly, I don't know anything about the years in between), we go to a place in Holland named Delft, where a genius was born in 1583. One of the kings of France later described this man as a gift to the world. He was so smart that at seven he wrote sonnets in Latin. His name was Grotius.

I actually own a book by Grotius, and I want to explain how I happen to have it in my library. About thirty-five years ago, my wife, Carol, and I had lunch in the Tenderloin in San Francisco, and I had nothing else to do that day so I wandered around and bought a book. It was on Ireland and it had to do with a trial. It cost just two bucks, and I thought, "This is great; there may be other old books out there that have to do with law and trials." So Carol and I started to collect; we now have four thousand books. We are so deeply ill with regard to this compulsion that we deceive each other. (The deceptions that you have with each other are some of your favorite things!) At an antique bookstore or show we say we'll go in and we'll look but we won't buy anything. One day when we said we would look but not buy, I bought a book by Grotius on the law of war and peace. It is a translation that was put out in 1682, after Grotius had died.

Hugo Grotius actually wrote three books dealing with war and peace: whether any war is just; the causes of war, both just and unjust; what in a war is unlawful, that is, punishable. He was a practicing lawyer in Delft, doing whatever lawyers in Delft did at the time to earn a living, but at night he wrote about what kings could do and could not do. He did it so wonderfully and with such erudition that kings who had to decide whether to go to war would say, "He's pretty good." Grotius recognized that when war was going on, it was awfully hard to insist on any particular nation's law, so he some-

times referred to natural law, which everyone would honor. In a particular example, with regard to enemies who have been captured, he thought there were things one should not do; one should not punish them unmercifully. He based this on Christianity and quoted the *Bible*, so there was a religious component to the question of law and war, especially in those days when most people saw God as the source of law.

He also talked about when it is lawful to make war and when it is not lawful to make war. I am a child of World War II, and I don't think there was much choice about that war. I don't think Grotius would have thought there was much choice there, either. One relevant consideration, according to Grotius, is what promises another country has made and then violated. It is not enough, he said at one point, if others pretend to make war on just and warrantable grounds, if upon thorough examination the grounds are found to be unjust. He said it is not enough if your neighbors are making warlike sounds—which meant it was not enough if they hadn't actually attacked you.

My main point here is not to espouse a particular view of war but rather to express appreciation for the lawyers who, throughout history, faced the toughest circumstances and said, "Guess what, the law will govern the government"—not my law particularly or your law, but *some* law will govern the government. These lawyers faced emperors and kings; they acted with great courage.

The years go by and we shift to the United States. We had the Revolution and established a viable democracy. Then in the Civil War we had an important case called *Ex parte Milligan*.[1] The background of the case was this: During the Civil War there were people in Indiana who strongly supported the South. Some of them, including Lambden P. Milligan, were charged with such crimes as conspiracy against the government of the United States, affording aid and comfort to rebels against the authority of the United States, inciting insurrection, disloyal practices, and violation of the laws of war. They were tried before a military tribunal, which sentenced them to death (and some were executed). Milligan's appeal got to the Supreme Court after the Civil War ended. The Supreme Court held that a civilian who was not connected with military service and who resided in a loyal state where he was arrested could not be tried by a military commission if the courts in the state were open and operational. Although the decision came too late to change the federal government's actions during the Civil War, it still established a strong precedent that law and civil rights are for war as well as for peace; they apply during war as well as peace. (It is interesting to note how often in our history the judges have somehow waited until after a war is over to come in and start writing decisions about what *would have been* good to do.)

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[1] 71 U.S. 2 (1866).

World War II gave rise to a contrasting decision by the Supreme Court. In June of 1942 German soldiers, in their uniforms, landed on Long Island and Ponte Vedra Beach in Florida. They took off their uniforms and buried them in the sand, then proceeded in civilian clothes. They were saboteurs who planned to blow up defense plants and key transportation arteries, but they were apprehended. They were tried by a military tribunal. (In connection with this case, there was some scandal having to do with J. Edgar Hoover, but that has nothing to do with our point here.) This time, the Supreme Court upheld the use of the military tribunal.[2] The basis for distinction was that the German soldiers were unlawful combatants, particularly due to the fact that they snuck into the country out of uniform, with the intent of destroying property.

Another occurrence in 1942 has a strong connection with my home state of California and my home city of San Francisco. If I said "Fillmore in San Francisco" to you, you might think about jazz; it *is* a jazz center. But in the early months of 1942, a large Japanese-American community lived in the Fillmore area. Then General DeWitt overcame many objections, including the objections of Mrs. Roosevelt and others, and secured the general removal of West Coast Japanese-Americans from their homes to a series of camps. (Some of our current leaders should think about this; nobody cheers for General DeWitt today. American history has never been kind to the leaders who take away our liberties in time of war.) The Japanese-Americans, many of whom were citizens, did receive a certain amount of notice. They had to sell what goods they could, and they were picked up and transported over the Sierras north of Yosemite to, among other places, Manzanar, a lonely and desolate place where they were kept for the duration of the war. One hundred fourteen thousand Japanese-Americans were relocated, without any charges and without any proof that they were guilty of anything.

During World War II, someone who had a child in the service could put a little flag in their window, and the flag would have a star for each child in the service. My grandmother had one with four stars. In the windows of the tar paper shacks in Manzanar were many little flags, each with a star, sometimes two. The Japanese-American mothers at Manzanar put the flags there because their sons were fighting for the United States in Europe—the most wounded group of soldiers in the war. I have heard a lot about life in Manzanar; one of the little boys who was hauled off to Manzanar became a partner of mine and is now on the Ninth Circuit Court of Appeal.

I spoke to a group of Japanese-Americans in 1987. The occasion was a dinner for six hundred people, to honor those who had been in the camps. I

[2] *Ex parte* Quirin, 317 U.S. 1 (1942).

was warned to be very careful about what I said because they still felt the shame of it, a whole generation later. *They* felt shame even though *they* had been wronged. Except in one limited instance, our law and our Supreme Court had not stepped in to protect them.[3]

THE REST OF THE LINDH CASE

I return now to John Walker Lindh. The background to John's capture at Qala-i-Jangi is this: John had become a Muslim and had joined the Taliban Army, which he saw as part of his religious commitment. (In preparing this case, I was astounded to learn that there are more than a billion Muslims in the world. It behooves us to learn about their religion and customs.) On September 6, 2001, John had landed in northern Afghanistan to fight the Northern Alliance, which was the remnants of the old Russian occupational force in Afghanistan. He was there fighting the Northern Alliance when the United States moved against the Taliban in the wake of September 11. That is how he ended up at the Qala-i-Jangi prison fortress.

When there was an uprising at Qala-i-Jangi, a bullet went into John's right thigh, made a groove about three inches long, and came to rest an inch below the skin; he could not walk. He was taken into U.S. custody on the first of December and interrogated, as you would expect. He couldn't tell them very much because he didn't know very much, but he was interrogated. They left the bullet in his leg for fifteen days. He was given food just twice a day. At one point he was interrogated by *one* FBI agent. Now, those of you who do any criminal work know that they always send two interrogators, but here they sent one, and that one had a scandal in his background that I don't have time to tell, so you will have to guess at what it might be. It would have been interesting to have the chance to get into that at trial.

Finally, John was returned to the United States and was put on the docket in the eastern district of Virginia, famous (or infamous) for its "rocket docket." This is the distinguished legal process in which you go to ask when your trial will be, and the answer is: "You missed it; it was last week." I quickly moved for a change of venue from Virginia to San Francisco, but I did not win that.

That motion was just one of many; we brought a lot of motions. Finally the government did something I thought they would never do: They folded.

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[3] Once again, the Supreme Court, for the most part, failed to take action it could have taken to right the wrongful assaults on civil liberties while war was ongoing. In three cases, the Court upheld various aspects of the actions against Japanese-Americans. Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); Korematsu v. United States, 323 U.S. 214 (1944). In only one case did the Court take corrective action, holding that a woman who was known to be a loyal citizen could not be kept in the camp after she applied for leave. Endo v. United States, 323 U.S. 283 (1944).

Why? Not because they weren't tough (which they were) but because John Lindh was not a terrorist. I probably will never convince anyone who was not involved in the case of that, but it is true. We hired one of the top experts in the world, who met with John for eight hours and then said, "He's not a terrorist, he's a Taliban soldier." So, on a Friday evening, the prosecutors said, "We have something to offer you." We worked until eleven o'clock that night, to reach this result: They would drop the charges that Lindh conspired to kill Americans. They would drop the charges that he was in a terrorist organization. They would drop the three life sentences they had requested. They would drop the thirty years for carrying a gun in connection with all of that. John would enter a plea that he had given services to the Taliban, which is not a terrorist organization, and had carried explosives while serving them. Thus, the case ended.

Concern about national security did not end. National security is everyone's issue, not just an issue for the big shots in Washington. You feel threatened, and so do I. In my family we have talked casually about where we would go if we had to escape. This issue doesn't divide us the way gender and race and economics can. We all need to feel safe. Knowledge is one key to safety, and one important bit of knowledge is an understanding of the difference between the Taliban, a bunch of soldiers fighting something called the Northern Alliance, and Al Qaeda, a terrorist organization whose members are trained and dedicated to blow us up. We must keep our concentration on Al Qaeda, not the Taliban.

We also need to call the Saudis to account. There were a lot of Saudis in Afghanistan; there were very few Iraqis, and the Iraqis who were there did not like Saddam Hussein at all, to my knowledge. Again, we need to focus on the real sources of our security problems.

CONCLUSION: THE CONSTITUTION

Two days after John entered the plea, the members of the defense team were relaxing in Virginia and decided to go down to Jefferson's home. We walked around Monticello, looked at the memorabilia, and imagined him living there, thinking his great thoughts. His library was moved to the Library of Congress, but we know that he was fanatical about books, and I naturally had to wonder what books he had owned. Then we went to Madison's house, which isn't that far down the road. Madison, of course, had a lot to do with the Constitution. Who were these people? Were they conventional people? No, they were all traitors to George III; they all would have swung if the Revolution had not succeeded. But what were their ideals and ideas, and are those ideas still relevant to us? I say that they are. They knew what Rousseau

had written, they knew what Montesquieu had written, they knew what John Locke had written. Those men had written that you can have a government that treats individuals individually, that respects individual rights. Putting this into practice is the great contribution America has made to civilization.

At Jefferson's house, somebody bought me a copy of the U.S. Constitution, and I stuck it in my pocket so that I could read it from time to time, because there are parts of it that I don't know. I happened to have it in my pocket, facing out, when I was in Las Vegas and about to play poker with some serious looking fellows. You know the type—the men who retire and have nothing to do but play poker every morning, so they know all the moves and they take it seriously. One tough guy sitting next to me suddenly noticed the booklet in my pocket and said, "What the hell is that?" I said, "Oh, that's the U.S. Constitution. Are you for it?" He hesitated for a minute, and then he said, "Yeah, I am, actually."

This incident inspired me. I bought a number of these copies of the Constitution and brought them with me. I'm going to leave them up here for anybody who wants one, but I am going to make a deal with you first: If you take one of these copies of the Constitution, you have to carry it around with you. Put it as close to your heart as you can, because the truth is that for the last twenty-five hundred years, whenever the ruler said, "I'm sorry, we're going to suspend all those rights," it was the lawyers who came marching out one after the other to resist the ruler—sometimes at enormous personal cost. And the end result has been that America has flourished, with freedom of thought and freedom of religion. Let a person be whoever or whatever he chooses to be.

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES, AUSTRALIA— A COURT FOR THE UNITED STATES?

Dennis A. Cowdroy*

Twenty-three years ago a specialized court concerned solely with environmental law was created in Sydney, Australia. The establishment of the court, known as the Land and Environment Court of New South Wales ("the Court"), was a unique experiment, and one which has proven to be outstandingly successful. This article is intended to provide a basic understanding of the Court and insight into its potential as a model for other jurisdictions.

Overview of the Court

In the years before the establishment of the Court, the New South Wales government faced mounting dissatisfaction with the existing regime dealing with planning and environmental issues. A plethora of disparate environmental and planning statutes was administered by various courts and administrative tribunals, which generally did not have exclusive jurisdiction; jurisdiction was duplicated in some instances. Growing calls for reform revealed that the laws of New South Wales regulating planning and the environment were inadequate to meet the demands of the community. The rapid population growth brought with it challenges to the existing system of land development and the need for more intense utilization of city and urban areas. Accordingly the government introduced a package of radical legislative reforms that included the creation of the Court, which has the same status as the Supreme Court of New South Wales.

The Court is a superior court of record and has exclusive jurisdiction over environmental and planning matters throughout the state of New South Wales, the most populated state in Australia. The creation of the Court was an innovative idea that sought to consolidate and centralize the various jurisdictions relevant to environmental and planning law. It provided one forum to develop environmental jurisprudence sought by councils, the development industry,[1] and environmental groups. The existence of the Court sends a

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[1] Second Reading Speech, NSW Legislative Council, 21 November 1979, Hansard, at 3346.

"strong message that . . . planning and the environment [are] of the highest importance."[2]

THE JURISDICTION OF THE COURT

The Court has three distinct functions. It acts as an administrative tribunal by conducting merit appeals in planning and development matters. Secondly, it can remedy breaches of planning and environmental law in its civil jurisdiction and conduct judicial review of administrative decisions made in these areas. Thirdly, the Court can exercise criminal jurisdiction in the prosecution of environmental offenses arising under environmental statutes.

Significantly, the Court's jurisdiction is exclusive. No other court in New South Wales has power to hear any matters that are vested in the Court. It is the only court in the state[3] that may administer all forms of legal redress in respect of matters arising under environmental and planning laws, including laws related to the prevention of pollution.

For administrative convenience the Court's jurisdiction is divided into seven classes as follows:[4]

- *Class 1* principally concerns environmental planning appeals;
- *Class 2* deals with local government and other miscellaneous appeals;
- *Class 3* concerns valuation and compensation for compulsory acquired lands;
- *Class 4* concerns environmental planning and protection, civil enforcement, judicial review of administrative decisions, and applications for declarations and injunctions;
- *Class 5* is the summary criminal jurisdiction for environmental offenses. The Court exercises summary criminal jurisdiction in the prosecution of pollution offenses and other breaches of environmental and planning law;
- *Class 6*, which is rarely used, concerns criminal appeals from convictions in the local court; and
- *Class 7* encompasses appeals from informants—who include a complainant, the Director of Public Prosecutions, and any other person responsible for the conduct of a prosecution—against any conviction or order made, or sentence imposed, by a magistrate.

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[2] The Honorable Justice Terry Sheehan, *Environmental Law—Present and Future—Lessons Learned and Visions for the Future—The Experience of the Land and Environment Court of New South Wales, Australia,* 23 International Seminar on Environmental Law (Brasilia, 9-11 May 2001).

[3] Appeal of the Land and Environment Court's decisions still lies to the state appellate courts, namely the New South Wales Court of Appeal and New South Wales Court of Criminal Appeal.

[4] Land and Environment Court Act 1979.

Composition of the Court

The Court is comprised of six judges who are appointed on merit having regard to their standing in the legal profession. Ten technical assessors, entitled commissioners, assist the judges in their understanding of technical issues and are appointed for a term of seven years. Section 12 of the Land and Environment Court Act 1979 requires that persons appointed as a commissioners have "special knowledge of and experience in . . ." or "suitable qualifications and experience in . . ." matters involving local government, town planning, environmental science, land valuation, urban design and heritage, or architecture, engineering, or building construction.

Commissioners usually adjudicate classes 1, 2, and 3 although a judge sitting alone, or with a commissioner, may determine more complex matters in these classes. Class 4 to class 7 matters inclusive can be determined only by a judge. Aboriginal land claims and disputes regarding Aboriginal land councils must be heard by a judge and two Aboriginal commissioners.

Unique Features of the Court's Jurisdiction

A unique feature of the Court concerns open standing in respect of breaches of environmental statutes. Such provisions are a significant means for removing barriers to access to justice by allowing any person to come to the Court to enforce any breach or potential breach of the law. Principle 10 of the Rio Declaration[5] acknowledges the desirability of public participation. The open standing provisions serve such purpose and have not been abused by the instigation of unmeritorious cases.

The Court's jurisdiction is concerned primarily with public law, that is, citizens enforcing their rights against governmental authorities and the authorities enforcing the law against citizens. Matters relating to private rights of citizens and the claims made against each other do not generally come to the Court. However, the Court does hear and take into account the concerns of objectors in respect of developments which become the subject of appeals. Such objectors may be called as witnesses by the relevant authority. However, objectors have a right to appear individually if the proposal has a substantial environmental impact.

[5] The Rio Declaration is a statement that was formulated at the Earth Summit in Rio de Janeiro in June, 1992.

EXAMPLES OF THE COURT'S WORK

Planning and Development

The Environmental Planning and Assessment Act 1979 grants a consent authority (usually a municipal council) the power to approve development. Development may consist of subdivision of land, new construction, and the adaptive use of existing developments. In the event the authority refuses approval, a developer may appeal to the Court. The developer is entitled to call any evidence that may be relevant to the issues on appeal, including expert evidence. The consent authority may also call expert evidence, and any objectors to the development can testify. Such appeal may be determined by a commissioner of the Court if the appeal is confined to merit issues. In the course of a hearing before a commissioner, any question of law arising incidentally may be referred to a judge.

A dissatisfied litigant may challenge the decision of a commissioner upon an issue of law, and such appeal is determined by a judge of the Court. A judge will also be allocated to determine issues concerning the interpretation of statutory instruments such as local environmental plans or statutes. An appeal lies to the New South Wales Supreme Court of Appeal from the decision of a judge of the Court, but only on questions of law.

The Court is empowered to grant declarations and orders restraining breaches of environmental laws. The Court has wide powers to enforce its orders, and may impose fines or imprisonment for disobedience of its orders.

An illustration of the Court's power is demonstrated by the decision in *Meriton Apartments Pty. Ltd. v. Minister for Urban Affairs and Planning*.[6] The applicant sought to develop a major apartment complex in a former industrial area of Sydney. A local environmental plan required a developer to provide, as a condition of consent, a substantial number of apartments, at no cost to the local council, to be used as "affordable housing" for disadvantaged persons. The Court determined that such condition was for a purpose which was not contemplated by the Environmental Planning and Assessment Act 1979 and also amounted to acquisition of property without compensation. It was accordingly held invalid.

Another example of the Court's planning work is the decision in *Misra v. Campbelltown City Council*.[7] In that decision the Court was required to consider a challenge to an order made by a local council requiring the applicant to cease using a residence for the purpose of a Hindu temple. The applicant claimed that the use of the residence involved incidental activities associated

[6] [2000] 107 L.G.E.R.A. 363.
[7] [2001-2002] 118 L.G.E.R.A. 301.

with the religion, including worship of an icon donated by the head priest of the late King of Nepal. The Court determined that the nature and extent of religious gatherings at the residence constituted "public worship" and upheld the validity of the council order.

Heritage

The protection of heritage has become of great significance in Australia. The Court administers the Heritage Act 1977, which is primarily responsible for the regulation of heritage conservation in New South Wales. The state of New South Wales possesses the oldest architectural heritage items in Australia, and the Court strives to achieve a balance between modern development and the preservation of those items.

This dilemma was exemplified in *Winten Property Group v. Campbelltown City Council*.[8] In this decision the Court was required to determine whether a subdivision of land intruding upon the curtilage of a fine colonial farm house should be permitted. Although the house itself remained untouched, the subdivision would have had adverse impacts on the views and vistas to and from the house. The Court, refusing the application, stated:

> . . . the Court considers that the integrity of the House and of its setting is in such a precarious position that any development in close proximity to, or which is inconsistent with its preservation would be likely to destroy its heritage significance.

Pollution Control

Prosecutions by public authorities for breach of environmental laws frequently come before the Court. In *Fillipowski v. Fratelli D'Amato*,[9] the Court was required to determine the penalty for marine pollution. On the night of 3 August 1999, an Italian oil tanker, the Laura D'Amato, permitted 300,000 liters of crude oil to discharge into Sydney Harbor. The discharge apparently resulted from the deliberate act by crew members who sabotaged the valves of the ship. The Court imposed a fine on the owner of the vessel exceeding $AUD600,000 ($US368,826). No fine was imposed on the Master although he was equally culpable by virtue of the strict liability provisions contained in the Marine Pollution Act 1987. Since this decision the legislature has substantially increased the maximum penalty for such offense from $AUD1,100,000 ($US676,174) to $AUD10,000,000 ($US6,147,080).

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[8] 2000 N.S.W.L.E.C. 90.
[9] 2000 N.S.W.L.E.C. 50.

In *Environment Protection Authority v. J.K. Williams Contracting Pty. Ltd.*,[10] the Court was concerned with a prosecution arising from the contamination of land. The defendant had entered into a contract with the Australian Department of Defence to remove from a rifle range earth mounds that were heavily contaminated with spent lead bullets. Instead of disposing of the contaminated soil, the defendant used it as fill on a residential subdivision, thereby causing a potential risk to occupants. Remediation work was undertaken by the defendant at a cost of $AUD336,497 ($US206,847). A further sum of $AUD1,000,000 ($US614,708) was paid by the defendant to the owners of the subdivision to be distributed among potentially affected residents. A fine of $AUD52,000 ($US31,964) was imposed upon the defendant.

In *Environment Protection Authority v. Capral Aluminium Ltd.*,[11] the Court was required to assess the penalty in respect of pollution of the atmosphere by an aluminum smelter. The defendant held a license which authorized it to pollute the atmosphere with a limited emission of fluoride. On two occasions the "never to be exceeded" limits were breached. The Court imposed a penalty of $AUD100,000 ($US61,470) and costs.

National Parks

The state of New South Wales covers an area of 802,000 square kilometers and encompasses a range of natural environments from desert to rainforest, coastal to alpine, and mangrove to forest. Abundant flora and fauna are included within these diverse environs, many of which possess spectacular scenic beauty. One area included in the World Heritage List,[12] for example, is the Blue Mountains, which lie approximately seventy miles west of Sydney.

The National Parks and Wildlife Act 1974 ("the NPW Act") is the statute which regulates national parks. The Court determines cases arising under its provisions, which include those relating to national parks, nature reserves, historic sites, and Aboriginal areas.

The Court is also invested with jurisdiction with respect to the protection of Aboriginal relics and significant places under the NPW Act. Aboriginal relics are any deposits, objects, or material evidence tied to indigenous and non-European habitation of New South Wales. It is, for example, an offense punishable by severe penalty to engage in the willful destruction of such relics.

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[10] 2001 N.S.W.L.E.C. 13.

[11] N.S.W.L.E.C., 18 December 1998, unreported.

[12] The World Heritage List was established under the terms of the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in November, 1972, at the 17th General Conference of UNESCO.

RECOGNITION OF THE SUCCESS OF THE COURT

The success of the Court has been recognized in Australia and internationally. The author has addressed public gatherings at Oxford University and in Hong Kong concerning the operation of the Court, and other judges of the Court have given similar addresses in Israel, India, and Brazil. The Right Honorable The Lord Woolf, the Lord Chief Justice of England and Wales, recently commented about environmental law reform in the United Kingdom:

> A more radical solution would be to follow in the footsteps of Australia. In the administrative field, this country has a lot to learn from the interesting developments which have taken place in the Antipodes. Among these initiatives is the establishment of the Land and Environment Court in New South Wales. I have long been in favour of a one-stop emporium. A court centre where environmental criminal and civil issues can be resolved. Where the need for judges to have the benefit of technical assessors is recognized. A situation where the divide between inspectors who conduct inquiries and judges who sit in courts is bridged. A situation where an appropriate team of decision-makers can be deployed depending upon the nature of the dispute.[13]

Professor Malcolm Grant of the University of Cambridge conducted a comprehensive review of the Court as part of a major research project investigating the viability of introducing an environmental court in England and Wales. The findings of that study are contained in a report entitled *Environmental Court Project—Final Report*.[14] Professor Grant praised the example set by New South Wales in the establishment and implementation of the Court. In respect of the Australasian experience generally, he said:

> The Australasian experience demonstrates that a better integrated, more democratic and more effective approach to environmental and planning enforcement is possible in an environmental court.[15]

With respect to the Court, Professor Grant concluded:

> In a series of important rulings, the Court has shown itself willing to use its unique combination of a merits appeal jurisdiction and its status as a superior court of record, to give direct effect to the precautionary principle, by

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[13] The Right Honorable The Lord Woolf, *The Court's Role in Achieving Environmental Justice,* 4(2) ENVIRONMENTAL L. REV. 79, 86 (2002).
[14] M. GRANT, ENVIRONMENTAL COURT PROJECT—FINAL REPORT (2000) (Department of The Environment, Transport, and the Regions, London).
[15] *Id.* at 422.

> developing a cautious approach to situations involving scientific uncertainty where harm to the environment is likely, and balancing it against the advantages of proposals which could make some claim to constituting ecologically sustainable development.[16]

SIMILARITY WITH THE EXPERIENCE OF THE UNITED STATES

The United States of America has been politically committed to establishing comprehensive environmental programs, especially since the 1960s.[17] Yet the separation of legislative and executive powers, notably the independently elected Congress and President, has led to the formulation of extremely complex American environmental legislation.[18] Numerous trial and appellate courts interpret American environmental legislation and mediate disputes and have an important influence in American environmental politics and policy.[19] Both the United States of America and Australia have an abundance of environmental statutes, and their respective modern laws have evolved from the English common law tradition. Both countries have acknowledged the need to conserve and protect the environment from exploitation. Creation in the United States of a court solely concerned with environmental and planning law might assist with the improvement of environmental policy in the United States by increasing the consistency and power of environmental precedent. A specialist court with exclusive jurisdiction can operate with great efficiency, reduce costs, and promote the implementation of environmental laws.

CONCLUSION

The law of the environment is now firmly entrenched in Australia's legal system in recognition of the public demand for its protection and regulation. Similarly the United States has been active in developing environmental law and policy, having an important influence in the past on the direction of Australia's environmental jurisprudence. The successful experience with the establishment of the Court in Australia may prove to be a worthwhile model for other nations, especially those with a similar heritage. It must not be forgotten that Chief Seattle made what is known as the most profound statement about the environment. In response to an offer made by the President of the

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[16] *Id.* at 424.
[17] ENVIRONMENTAL POLITICS AND POLICY IN INDUSTRIALIZED COUNTRIES 23 (U. Desai ed. 2002) (MIT Press).
[18] K. Murchison, *Environmental Law in Australia and the United States: A Comparative Overview – Part 2*, 11 ENVIRONMENTAL AND PLANNING L.J. 254, 265 (1994).
[19] ENVIRONMENTAL POLITICS, *supra* note 17.

United States of America to purchase Indian lands in 1854, Chief Seattle is reported to have said:

> How can you buy or sell the sky, the warmth of the land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them? . . . This we know: The earth does not belong to man; man belongs to the earth. All things are connected.[20]

Chief Seattle's words should inspire us to search for the ultimate institutions for maintaining the balance between development of our natural resources and preservation of the environment.

[20] A statement by Chief Seattle to the President of the United States of America in 1854, in reply to the President's offer to buy Indian lands that had been their ancestral home.

THE INDEPENDENCE OF THE BAR

Richard C. C. Peck*

The ideals of ethics and professionalism are inextricably bound. They are interdependent—one cannot exist in the absence of the other. An ethic relates to a moral principle or a rule of conduct. Professionalism involves a vocation, or calling, and taking a vow when being admitted to that order—a vow that binds us to the ethics of our calling. When we were called to the Bar, we swore an oath. Included in the incantation were words similar to the following: ". . . in all things conduct yourselves truly and with integrity; and . . . uphold the Rule of Law and the rights and freedoms of all persons according to the laws of Canada . . . ."[1] These words bespeak the notion of a noble calling and an honorable profession. They also dictate that the advocacy of a cause is premised on one essential presumption, namely, the existence of a bold and independent Bar. This is the first ethic, for without independence we have no utility.

In 1792, speaking in the defense of Thomas Paine, the great Erskine articulated the highest statement of principle ever rendered on the ideal of an independent Bar:

> I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which, impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will, or will not, stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or the defence, he assumes the character of the Judge; nay, he assumes it before the hour of judgement; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.[2]

With those simple words, spoken in a controversial and highly unpopular defense, Erskine etched the annals of our law with the notion of an independent Bar—a notion that resonates to this day.

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[1] From the *Barristers and Solicitors Oath*, taken by Articled Students upon their being called to the Bar of British Columbia.

[2] R. v. Thomas Paine, 22 St. Trinity 357, 412 (1792).

What is an independent Bar and why did Erskine believe it to be so profoundly important to liberty or freedom? In *Attorney General of Canada v. Law Society of British Columbia*,[3] a unanimous court stated:

> The independence of the Bar from the State in all its pervasive manifestations is one of the hallmarks of a free society. . . . The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.[4]

An independent Bar implies the existence of a professional body of advocates with a right of audience before the courts of the land, charged with the duty of boldly representing even the most unpopular cause or the most reprehensible client. This is an ideal that is both ethereal and real. It calls to mind a devotion to a calling which transcends the daily vagaries of business. At the same time, it is manifested by the daily works of lawyers concerned about the potential for injustice through the actions of the state, the machinations of the Crown, and the decisions of the courts. It means, to paraphrase the language of one of the historic canons of ethics, "to take without hesitation, and if need be, without fee or reward, the cause of any person, and to exert one's best efforts on behalf of that person."[5]

HISTORICAL DEVELOPMENT OF THE BAR'S INDEPENDENCE

As might be expected, this ethic did not prevail during the early history of the Bar. Indeed, the road to barristerial independence was fraught with travail. Its existence did not crystalize until, at least, 1701, when by the Act of Settlement, the judiciary itself was made independent of the executive branch of government.[6] As near as can be determined, the independence of these two institutions, the Bench and Bar, appears to have come into being virtually at the same time.

It is safe to say that the early days of our profession would yield us little pride. In 1176, in England, an abbot sought legal assistance in a case where he was opposed to a man of considerable power and influence. The first advocate consulted by the abbot declined the brief because he might bring disfavor upon himself for opposing a person whom he considered to be his "master."

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[3] [1982] 2 S.C.R. 307.
[4] *Id.* at 313-14 (Estey, J.).
[5] R.H. Tupper, Legal Ethics.
[6] Act of Settlement, 1701, 12 & 13 Will. 3, ch. 2.

Two other lawyers also declined the brief. Eventually, the abbot was directed to a lawyer who was coming to England from a foreign country. Upon arrival, this lawyer also declined the brief, because he did not wish to incur the displeasure of the "King or the great men of the realm."[7]

This sorry situation of advocates being timorous continued for centuries. The evolution to an independent Bar was slow and wrought at great cost. Arguably, one turning point in this process was the resolute stance taken by Sir Thomas More on the subject of the status of his monarch, Henry VIII, as head of the Church of England, in 1535. More regarded the matter as one of religious and legal principle. While not simply a lawyer at the time—More was Lord Chancellor—the position he took remains, to this day, a gemstone in the crown of the independence of the Bar. More was not prepared to surrender the inner citadel of his being, his conscience as he termed it, by taking an oath with his tongue in his cheek. He thus refused to sacrifice his "selfhood." For his obstinacy, More lost his head.[8]

More's greatest contribution comes to us from the language attributed to him by the playwright Robert Bolt. In response to his daughter's suitor, Roper, who advocated striking down the law in order to get at the Devil, More's reply was apt and timeless:

> And when the last law was down, and the Devil turned around on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[9]

These words, even if apocryphal, represent a succinct, verbal expression of the rule of law. The American journalist Edwin Yoder, Jr., interpreted these words in the following way: "The law will protect the good man and the righteous cause only if it also extends an even hand to the evil and iniquitous as well. That lesson, hard to grasp and still harder for most of us to embrace, is the heart of the rule of law."

Some 200 years later, shortly after the French Revolution, Gracchus Babeuf also lost his head for the beliefs he propounded. Babeuf's fulminations against government restrictions on expression of thought, in speech and writing, ran at cross-grains to the will of the ruling body, the Directory. After being refused the right to counsel of his choice at trial, Babeuf defended himself. His three

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[7] COHEN, A HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450 (1929).
[8] E. E. REYNOLDS, THE TRIAL OF ST. THOMAS MORE, xii (1964).
[9] R. BOLT, A MAN FOR ALL SEASONS (1962).

day speech in his own defense remains a paean to the ideals of liberty and equality.[10]

Susan B. Anthony, one of the great suffragettes, stood trial in 1873 for having registered to vote in the presidential election of the previous year. In what has been described as "a remarkable act of judicial tyranny," the trial judge directed the jury to enter a verdict of guilty. When the jury sat mute, the judge directed the clerk of the court to record a guilty verdict. When asked by the judge if she had anything to say as to why sentence should not be pronounced, a recalcitrant Ms. Anthony replied:

> Yes, your Honor, I have many things to say; for in your ordered verdict of guilty, you have trampled under foot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored. Robbed of the fundamental privilege of citizenship, I am degraded from the status of a citizen to that of a subject; and not only myself individually, but all of my sex, are, by your Honor's verdict, doomed to political subjection under this, so-called, form of government.[11]

Yet another remarkable example of defiant, forensic oratory is to be found in the speech of Nelson Mandela from the prisoners' dock at the Rivonia trial, in South Africa, on April 20, 1964. Mandela, a lawyer, was well aware that at worst he faced the death penalty and, at best, a jail sentence of woefully long years. His speech remains a living testament to courageous advocacy:

> During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.

In one of the most remarkable examples of human perseverance, Mandela emerged from prison some three decades later and became President of South Africa.

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[10] *See generally* THE DEFENSE OF GRACCHUS BABEUF BEFORE THE HIGH COURT OF VENDOME (J.A. Scott trans. and ed. 1967).

[11] THE TRIAL OF SUSAN B. ANTHONY (1997) (reproduction of the 1874 first edition of *An Account of the Proceedings on the Trial of Susan B. Anthony*, for members of The Notable Trials Library, with introduction by Alan Dershowitz).

Countless others, both advocates and those self-represented, have contributed to the panoply of actions and words that have paved the way to the existence, and maintenance, of the independent Bar.

THE NECESSITY OF AN INDEPENDENT BAR

In the context of liberty, an independent Bar is indispensable. To understand why, one must first examine the concept of liberty, or freedom, as a fundament of democracy.

The history of western civilization, when reduced to its essence, is nothing more, and nothing less, than individuals' courageous and indefatigable quest for justice, personal freedom, and self-fulfillment—three inextricably interwoven ideals that flourish at the core of every truly free society. The link between justice and personal liberty is undoubted. The American theologian Reinhold Niebuhr observed that: "Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary."[12] The French poet, Charles Peguy, said that freedom is a system based on courage. This must be the most confirmed adage in history. Freedom, at its essence, means unshackled self-fulfillment. Our society must exist in such a state as to permit people to develop individuality and creativity as fully as possible, given each person's ability to reason and to achieve.

In his *Divine Comedy*, Dante referred to "freedom of the will" as God's greatest gift to humankind.[13] Samuel Adams referred to freedom of thought, and the right of private judgment in matters of conscience.[14] Louis Brandeis opined that those who won American independence viewed liberty as the secret of happiness,[15] and the renowned Professor Chaffee of Harvard equated it with opportunity.[16] Freedom, at its core, involves an acknowledgment of the private domain of the individual. It requires the separation of the individual from the state, and the maintenance of that essential border, where the state has no right to intrude upon the individual,[17] and the individual, in turn, exercises autonomy responsibly.

Democracies seldom fail through overt force. Rather, it is the gradual erosion of individual liberty by state authorities that achieves this end. And it is here, at this confluence, that the existence of a bold and independent Bar is of such great import.

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[12] R. NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS foreword (1944).
[13] DANTE ALIGHIERI, DIVINE COMEDY: PARADISO, canto V, lines 19-24.
[14] From a speech on American independence delivered in Philadelphia (August 1, 1776).
[15] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[16] Z. Chaffee, *The Press Under Pressure*, NIEMAN REPORTS (Apr. 1948).
[17] *See, e.g.*, J. S. MILL, ON LIBERTY 26 (1859).

The sentiment that a bold and independent Bar is essential to the existence of democracy is deeply rooted in Western society. In Shakespeare's *Henry VI*, Dick the Butcher utters these infamous words: "The first thing we do, let's kill all the lawyers."[18] These words bespeak the historical fact that, in times of revolution, it is the lawyers, those who uphold the rule of law, who are first to be executed. As one author has noted: "'Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.'"[19]

The modern emanation of Dick the Butcher's lethal utterance may well be certain legislative endeavors that have taken place in North America since September 11, 2001. In the wake of the tragic events of that day, governments have embarked upon legislative initiatives which, while being well-meaning, contain aspects that are an anathema to an independent Bar, and a free society. While superficially attractive as crime fighting tools, some of these legislative initiatives are subtly pernicious and have the qualities that Louis Brandeis decried decades ago when he stated that: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.[20]

Let there be no doubt that we live in a time when the independence of the Bar is as important as it has ever been. It has been said that hard facts make bad law. The events of September 11 are hard facts, indeed, and it remains our duty to scrutinize, criticize, and, where necessary, assail proposed legislative responses to those events, where such responses present an affront to the dignity and worth of the individual—in a phrase, an affront to liberty.

In the days that lie ahead, the Bar's attack on doubtful legislation will be a task which we must embrace with vigor. However, there is another task that we will inevitably have to face, and that is far more basic to our role as lawyers. This will involve undertaking the defense of those accused of crimes of terror. In this regard, it is useful once again to invoke the words of Louis Brandeis, quoted in a recent article by Michel Proulx:

> There is a long tradition within the criminal bar of providing legal counsel to those in need, regardless of the consequences which may accompany the acceptance of a particular case. Mr. Justice Brandeis was once asked by an attorney for his opinion as to whether he should accept the case of a most unpopular and apparently a most guilty client. Brandeis' reply is noteworthy:

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[18] W. SHAKESPEARE, KING HENRY VI, part II, act IV, scene 2.

[19] D. J. KORNSTEIN, KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL 28 (1994), quoting footnote 35 in Justice Stevens's dissent in Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985).

[20] Olmstead v. United States, 277 U.S 438, 479 (1928) (Brandeis, J., dissenting).

> "Before you reject this case, I suggest you consider resigning from the bar. On further consideration you might even resign from the human race."[21]

[21] Michel Proulx, *The Defence of the Unpopular or Repugnant Client: Some of the Hardest Questions*, 5 CANADIAN CRIM. L. REV. 221, 227 (2000).

ENRON: LESSONS LEARNED[†]

Bethany McLean*

As a journalist, I'm generally more comfortable hiding behind my computer in a dark room than speaking to real, live human beings; I thought I'd talk for about twenty minutes and then open the floor to questions. I will talk about my involvement with the Enron story, about some of the ramifications in corporate governance and on Wall Street, and then about the question that is probably most interesting to everybody, which is why a year and a half into the saga we've seen very little progress on the legal front. Sure, there have been some guilty pleas and some indictments of junior Enron executives—most recently of a couple who worked in Enron's broadband division. But for Ken Lay, who sold hundreds of millions of dollars of Enron stock right up until almost the date of its bankruptcy—nothing. For Jeffrey Skilling, Enron's former CEO, whom most people view as the evil mastermind behind Enron's schemes to defraud the public of some ninety billion dollars—nothing. Andrew Fastow, Enron's CFO, has been charged with some ninety counts (I lose count, maybe it's seventy-nine) of bribery, wire fraud, conspiracy, everything under the sun; but he says he's not guilty.

My Involvement in the Enron Story

I'm not a beat reporter at *Fortune*; I cover everything from Prozac to horse racing. When I first heard about Enron, the company was coming off a fabulous year. Its stock was trading at a price/earnings multiple of about sixty times and the stock had actually increased ninety percent over the previous year. (This was late 2000 or early 2001.) I was having a casual conversation with a good source of mine who specializes in selling stocks short—one of those people looking to knock the air out of things. He said, "Maybe you want to take a closer look at Enron. I'm just not sure this company is everything it's cracked up to be."

My magazine, *Fortune*, had named Enron the most innovative company in the country six years running. And it *was* innovative, we just didn't know *how* innovative. I pulled out Enron's financial documents and began to go through them. One of the interesting points about the Enron story, and one of the important lessons, I think, is that the problems really were right on the

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[†] Address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 14, 2003.

* Writer, *Fortune Magazine*, New York, New York.

surface. For example, when you calculated Enron's return on capital, you found that it was around seven percent. That's about what treasury bills were yielding at the time. Why would you put your money in a very risky company that was earning just a seven percent return on its capital?

Also, the company produced no cash flow. As those of you who read financial statements know, there are earnings and then there are cash flows. You can't take earnings to the bank; you need cash. When you looked at Enron's financial statements, you saw that there was no cash. Further, the company was extraordinarily complicated. Its financial statements mentioned odd dealings with a related-party company that was run by its CFO. That immediately raised a red flag. Why would you want to do something like that?

And then there was the hype. At its conference for analysts and investors in early January of 2001, Enron's CEO Jeff Skilling said that the stock should sell for $126 a share. It was then trading for about $80 a share. Now, in my experience, corporate America is not known for its modesty, but that level of hype is pretty remarkable—especially given that Skilling himself was *selling* shares at the time. If you think your investment is going to go up fifty percent, why would you want to get out?

So I began to look further into this company. At the time all the analysts who rated the company, all the Wall Street brokerage firms, had "buy" ratings on the stock. Although it is sort of perverse, this fact made me more interested in the story rather than less interested. If the analysts had been skeptical, I would have thought, "Oh, everybody knows this already; it's out there." The fact is that the financial press has not done a very good job of telling people that analysts' "buy" ratings don't mean anything at all, and if an analyst says "hold," that actually means "sell." In other words, if analysts say "buy," and especially if they are really hyping a stock, there might be a great story there because the rating really has no relation to reality.

Upon doing my homework, I found that right under the surface of the Enron story, it wasn't hard to find skepticism. I would call a portfolio manager, who would say, "It's a great company; there are such opportunities in the deregulated energy world; what a fabulous management team." But if I kept asking questions, the portfolio manager would say, "You know what, I'm really scared of this company. I don't understand it. I have to own it because everybody else owns it, because it's part of the S&P 500, because I'm scared not to own it—but I don't really understand it."

I called Enron to talk to corporate officials about some of my conclusions, to discuss some of the numbers I had calculated, and to see what their response was. I wasn't expecting that they would be pleased; after all, corporate America employs a whole army of people called public relations specialists whose sole job is to make sure that what appears in the press about a

company is all shiny and happy with never a hint of negativity. Still, Enron's reaction was far more extreme than I expected. Jeff Skilling became very irate on the telephone, and told me that people who criticized Enron were only throwing rocks at the company and hadn't taken the time to understand it and that it would be unethical of me to publish a story about Enron without having taken the time to understand it fully. That's a frightening thing for a journalist to hear because it could be true. You always could do more homework; you always could be missing something.

Skilling also had Enron's CFO, Andy Fastow, get on a plane and come up to New York to see me and tell me why I was crazy to think that Enron could have any problems. The meeting was fairly amusing. I had two of my editors sit in on it just to make sure that I wasn't crazy; when you get wrapped up in a story, at some point you can close your ears and not hear things that you need to hear, so I wanted to make sure that there were other people in the room. Right after the meeting my editors said, "Let's make this story even tougher." The Enron people basically refused to answer straightforward questions. At the end of the meeting, Andy Fastow said something interesting that I think is relevant today: "I don't care what you say about the company; just don't make *me* look bad."

So I wrote a story that was published in the Spring 2001 issue of *Fortune*, when Enron stock was still about eighty dollars a share, and the title of the story was: "Is Enron Overpriced?" In retrospect, I think I could have come up with a better title—perhaps "Houston, We Have a Problem." The story basically examined Enron's lack of financial strength and the fact that the people who were analyzing the company didn't understand it. I did not write about the partnerships run by Andy Fastow even though I knew about them, and that was a major failure of judgment on my part—but I knew that the accountants had signed off on them, and the board of directors had signed off on them, so I thought there might be something I didn't understand about those.

The story came and went, and nothing much happened for awhile. Enron's stock was continuing to slide, but there was no big furor over it. Then in August of 2001, Jeff Skilling abruptly resigned. After that, Enron posted a third quarter earnings report that took all sorts of write-offs for all sorts of odd things involving related-party entities. The fur started to fly. The *Wall Street Journal* and the *New York Times* did a great job of exposing what was going on behind the partnerships, and soon Enron was bankrupt.

I think everybody knows a lot of what came next. Arthur Andersen, one of the nation's largest accounting firms, is now effectively out of business. Interestingly, the Department of Justice charged it with obstruction of justice, *not* with aiding and abetting Enron's accounting fraud. That's an important point that I will come back to a little bit later.

There has been a huge fuss over brokerage firms, over analysts' independence (and *now* people realize that when an analyst tells you to buy a stock, it really doesn't mean anything). There has been a hue and cry about boards of directors. Over a dozen congressional committees have investigated Enron. At one point, I heard that some sixty Enron-related pieces of legislation had been introduced in Congress. It has been quite a year and a half. But I think the solutions are not quite as simple as some people want to believe.

EXPLANATIONS AND RAMIFICATIONS

We can start with the accountants. I think what they did wrong is pretty simple. The accountants thought their job was just to keep the client happy. They forgot that part of their job was to tell the truth and to make sure that public investors were told the truth; they forgot the word "public" in CPA. (This debacle spawned a lot of jokes about accountants. My personal favorite is that CPA should mean "Certified Public Accomplice.")

Journalists bear some responsibility here, too. Enron has caused a lot of self-questioning on the part of journalists, and I think that's fair. Many financial journalists during the decade of the 'nineties thought they didn't really have to understand finance to be business journalists. On the face of it, that seems absurd to me. Would you send someone to cover Mexico if he couldn't speak Spanish? Would you send someone to cover Washington, D.C., if she didn't understand the way the political system worked? Nonetheless, during the 1990s many top magazines and top newspapers assigned journalists to business stories without regard to their understanding of finance.

There is another factor with respect to journalists as well. I *have* been trained in finance, but if my editor had come to me and asked me to write a profile of Jeff Skilling, I don't know that I would have gotten out my spreadsheets and worked through the numbers. There is a little bit too much compartmentalizing in business journalism. The view sometimes is that the numbers aren't the story, that instead the person is the story or company strategy is the story. We now realize that we can't know whether the numbers are the story unless we look.

Of course, a lot of scrutiny has been directed at Wall Street analysts. In particular, there's been a lot of fuss about the degree to which Wall Street analysts' compensation is not derived from what their job is supposed to be—analysis, and advising investors when to buy and sell—but rather from the investment banking fees they are able to generate for their firms. That was a huge factor in the case of Enron. The company was close to the largest (if not the largest) fee payer in corporate America, to the tune of at least one

hundred million dollars a year and perhaps even a couple of hundred million dollars a year. Also, Enron officers were extraordinarily aggressive about letting it be known that if an analyst did not give the stock a "buy" rating, that analyst's firm would not get any of the investment banking business.

Here, too, there is a second component, and one that is not so easy to fix by legislative initiatives. In general, people want to be liked, and the analysts who covered Enron wanted the Enron management to like them. Jeff Skilling had a very simple way of dividing the world: There were people who "got it" and people who "didn't get it." And everybody wanted to "get it." So if the analysts heard Jeff Skilling say something incomprehensible, instead of asking questions, they nodded and said, "I get it." (The short seller who originally brought Enron to my attention has told me that he has great difficulty getting people to come work at his shop because it is hard to find people who want to be disliked, who are willing to be wrong, and who want to be thinking something contrary to what everybody else is thinking for a period of time.) This psychology is hard to change. How can you legislate independence of thought?

I think the same psychology is at work in boards of directors. It's absolutely shocking what Enron's board accepted or overlooked. If you were going to do something as absurd as allowing your CFO to run an outside partnership, wouldn't you insist on keeping very close tabs on the whole arrangement, particularly on what the CFO was paid? But the Enron directors never asked, until everything started falling apart. Even when they finally decided, after the furor had begun in the fall of 2001, that they needed to know how much Fastow had made, they worked out an elaborate script for approaching Fastow without offending him. So again we come back to this issue: How can you force people to ask questions? How can you legislate independence of thought and make people willing to say, "I don't agree with this"?

THE LEGAL PROCESS

Let's move on to the case, which is interesting. In the big picture Enron clearly was a fraud. There is no question about that. Its financial statements completely misrepresented reality. People have called it a Ponzi scheme, and in a way it was. Enron has existed since about 1985 in its current form. I went through the financial records and added up all the cash the company had produced from operations and then invested over its fifteen- or sixteen-year life. This was an overstated number because Enron's financial statements were manipulated, but even on their own financial statements they *lost* a total of seven billion dollars. This was a company that never made money—part of

the definition of a Ponzi scheme. It was also a fraud within a fraud because Andy Fastow, the CFO, came up with a way to steal from the company while helping the company meet its financial goals. It was symbiotic in an ugly way. Andy Fastow was using the company to make money for his own personal enrichment, and the company was using Andy Fastow to create all these devices so that it could misrepresent itself to outside shareholders; and then the officers were selling stock.

The government has been extremely aggressive about going after Andy Fastow. They have indicted him on dozens of counts. He is pleading not guilty. Where that will go is an open question at this point. But in an odd way it's almost irrelevant. In total, Andy Fastow stole some sixty million dollars from Enron, but that is not what bankrupted Enron. The larger issue involves that first level of fraud, affecting investors. That is the interesting one and the one we want to prevent in the future. Unfortunately, I think that one is much trickier. Although Enron in the big picture clearly was a fraud, when you delve into the details, it is very difficult to pinpoint where the company went wrong. Accounting, perhaps a little bit like law, has a lot of gray areas, and Enron operated in the dark gray areas. It is difficult to discern when they stepped over the line from the dark gray areas into the black ones. Interestingly, I have spent the last year talking to a lot of former Enron employees, and they don't think they broke any laws. They admit that they were aggressive and stretched or manipulated the laws, but they don't think they broke the laws.

If the government can prove that the Enron officers broke laws, and especially if Jeff Skilling and Ken Lay go to jail, that will be good, because one of the few things that can force the independence of thought I talked about earlier is fear. The two main motivating factors on Wall Street are fear and greed. And if there is enough fear to offset the greed, then people will perhaps think a little bit more about what they're doing. After all, no board of directors wants to be the Enron board of directors; no other accounting firm wants to be Arthur Andersen; and if Ken Lay and Jeff Skilling go to jail, no CEO will want to be in those shoes. On the other hand, though, punishment will fall on a few people for what really were the crimes of many. Arthur Andersen looked the other way. Enron's investment banks made more in one year from Enron fees than Jeff Skilling made in his entire career at Enron. For a long time investors were perfectly willing to look the other way because the price of the stock was rising.

In the end there will be no simple fixes to the Enron problem. And I'm afraid that in the next bull market, we are likely to have another Enron. Actually, that may be a good thing, because it offers full employment for journalists like me.

QUESTIONS AND ANSWERS

Q: Did you have an "ah-ha" moment when you realized what you had uncovered with Enron? If so, can you describe that?

A: Yes. One of the glories of being a business journalist is that there *are* numbers and documents that you can examine; so much of journalism involves relying on what people tell you, and trying to cross-check and corroborate that in as many places and ways as you can. It is always comforting when you can open up a company's documents and find numbers that clearly reveal a problem. In Enron's case, the tip-offs were the lack of cash flow and the incredibly low return on investment. Actually, the relative transparency of the problems is why I say that the Enron case is complicated. Had Enron been a company that completely broke the rules, those clues would not have been there. Enron did disclose enough that anyone willing to look closely could have said, "What is going on here? This is clearly a mass delusion."

Q: What is the next company you are going to cover?

A: I was starting to work on Tyco when I got sidetracked by Enron, but I think it's a little too late for Tyco now. I will work on my book about Enron for another couple of months and then take a little break. After that, maybe I'll come back and write some pleasant stories about good things that are going on in the world!

WHAT NEXT?[†]

John W. Reed*

After all the stimulating and provocative and richly varied presentations of the week, this little homily seems a bit of an anti-climax, not unlike Ann Landers's description of Niagara Falls as "the second greatest disappointment of every bride's honeymoon."

A month and a half ago your program chairman said the convention programs were about to go to press and I had to provide a title for these remarks immediately. Not yet knowing what I wanted to say to you, I impulsively gave him the title that appears in the program: "What Next?" I'm sure that what suggested it to me as a title was the fact that on that very day I had seen those words in newspaper headlines not once but in three different papers: the *New York Times*, the *Detroit Free Press*, and the *Ann Arbor News*. Titling a speech before it has been composed is dangerous business since the title becomes a kind of straitjacket into which one's thoughts must be forced. But you will have to admit that the title "What Next?" does open many doors.

On the one hand, the question "what next?" can suggest dread; on the other it can suggest expectancy. It can suggest happenings that are forced upon us, as helpless victims, or it can suggest happenings that we, with some degree of free will, choose to bring about. "What next?" can be a personal question for you or me as individuals, or a corporate question for the Barristers Society or the legal profession or our nation. One thing I do not mean for this title to imply is a description of future events, since I, like you, claim no prophetic power.

"What next?" seems most often to connote a foretaste of something dreadful. The Columbia disaster, the nightclub panic in Chicago, the nightclub fire in Rhode Island, the hundred-car pileups on foggy freeways, acts of terrorism around the world, corporate fraud and meltdowns impoverishing thousands of employees and pensioners—tragedies that seem to come with numbing frequency, and we say, "What next?" The impact of some of these events involving just one or two people is magnified by media coverage, such as the videotape of the use of a Mercedes sedan as a device for running over and killing an unfaithful husband caught *in flagrante delicto*. That was so Texas. Love is grand, but divorce is a hundred grand—and possibly vehicular homicide.

[†] Address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 14, 2003.

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And, of course, the "what next?" of infinitely greater magnitude is the apparently imminent attack on Iraq. The Barristers arranged to meet here at La Quinta twelve years ago and the Gulf War broke out. We had not returned until this year, and again the government is preparing to go to war. In college we learned about the logical fallacy known as *post hoc, propter hoc*—after this, because of this—that it is a fallacy to conclude that because one event follows another, the second event was caused by the first. I suggest it is a *post hoc, propter hoc* fallacy to blame the Barristers for the two Gulf wars, but I'm still not sure that we should ever meet here again.

What I really want us to think about for these few minutes together is what's next for us as lawyers, as trial lawyers, as Barristers, who are committed to embodying the highest ideals of skilled, ethical, respectful advocacy in the service of justice.

A primary ministry of the International Society of Barristers is these annual meetings. We come here from stressful lives, with pressures both professional and personal; and after a week of eclectic programs and recreation and rest and fellowship, with no personal agendas, we are refreshed and prepared to return home to resume our chosen tasks. So when I ask "what next," I really ask with what attitudes, what frame of mind, do we go forth from here? How do we continue to fight for justice, case by case?

Indeed, how do we find hope in a cynical world? Heaven knows, there is enough to be cynical about. Let me remind you of four things that impinge on our profession, that can well produce pessimism, if not cynicism. I call them tort reform redux, the disappearing jury trial, the continuing decline of professionalism, and the assault on civil rights.

TORT REFORM REDUX

Once again the proponents of weakening tort responsibility are in full cry. They long ago captured the terminology high ground. Characterizing their proposed changes in liability rules as "reform" makes them sound like the good guys. They have had widespread success in the state systems, and now, with a sympathetic administration, they are poised to achieve so-called reform in the federal courts. Indeed, the House of Representatives passed such a bill only yesterday.

The prime target at the moment, of course, is medical malpractice. Doctors' strikes over high insurance premiums have fueled a popular belief that overgenerous juries and frivolous lawsuits are the principal cause of expensive health care and shortages of specialists, driven out by insurance costs. The spotlight of the media has created the impression that the few runaway juries are the norm, without covering the corrections; the media ignore the fact that

the system almost always works in that the courts modify the extreme verdicts and dismiss and chasten those who use the system for blackmail.

But the doctors themselves, their medical societies, and the insurance companies arguably account for much of the so-called malpractice crisis, which Congress is preparing to "fix" at the expense of the consumers of medical services, that is, the patients. Just last week, Dr. Sidney Wolff, director of the Public Citizen Health Research Group, published an essay in the *New York Times* charging that a major cause of the malpractice problem is the failure of state medical boards to discipline doctors. Here are a few of the dramatic figures: In the dozen years from 1990 to 2002, just five percent of all doctors were involved in fifty-four percent of the malpractice payouts.[1] Of the 35,000 doctors with two or more payouts in that period, only eight percent were disciplined by their state medical boards. If that doesn't surprise you, how about this figure: There were 2,774 doctors involved in *five* or more payouts; only one in six (463) had been disciplined.

It seems no coincidence that states least likely to discipline doctors are among those with insurance crises. Pennsylvania, where the governor had to intervene to keep doctors from striking over insurance costs, has disciplined only five percent of the 512 doctors who had made payments in malpractice suits five or more times. It gets worse. While Pennsylvania has 5.3% of the doctors in the United States, they make up 18.5% of American doctors with five or more malpractice payments. And finally, one Pennsylvania doctor paid twenty-four claims between 1993 and 2001, totaling more than $8 million, yet was never disciplined by the Pennsylvania medical authorities. (The next worst state for doctors with five or more payouts is West Virginia, where doctors went on strike last month.) It seems not unfair to say that the malpractice problem arises in significant part because there is malpractice and because the medical profession is unwilling to police itself.

As for the insurance companies, many have been forced to increase premiums because of bad marketing decisions, unwise investment strategies, and the general decline in the value of their invested reserves.

But the blame is cast on the tort system and on us, the lawyers; and the draconian remedies fall against the patient-victim, particularly when the victim has no market value, that is, one with little or no income, such as a housewife or a retired person. When I see these so-called reforms, I think of my favorite Chinese fortune cookie message: A change for the better will be made against you. And placing the blame on the lawyers is reminiscent of the mechanic who said, "I couldn't repair your brakes, so I made your horn louder."

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[1] I concede that there is not a perfect correlation between payouts and negligence. Surely there are some payouts where there is little evidence of wrongdoing. But the gross figures have great relevance.

THE DISAPPEARING JURY TRIAL

The second thing to be pessimistic about is the decline of the civil trial and the civil jury. The many modes of resolving disputes have changed the face of litigation, with real, honest-to-god trials declining in frequency and importance. There are both pros and cons in that decline, but its magnitude is suggested by a few figures from the Administrative Office of the United States Courts. In the thirty years from 1970 to 2000, the federal court workload, civil and criminal, increased 146%. But look at how those cases were resolved. In 1970, ten percent of the civil cases were tried, to the bench or to a jury. By 2000, the number of cases tried had dropped from 10% to a mere 2.2%, a decline of more than three quarters. The number of cases tried to a jury dropped from 4.3 % to 1.5%, a decline of two-thirds. Is the civil jury an endangered species? Indeed, is the civil trial an endangered species? The term "alternative dispute resolution" seems increasingly to cast the civil trial itself as the alternative. Judge Patrick Higginbotham, of the fifth circuit, writes that "We are creating a whole new culture where a trial is perceived as a failure of the system."[2]

To those of us who are of a certain age, the things we learned in law school classes in torts and civil procedure bear increasingly faint resemblance to today's landscapes.

THE DECLINE OF PROFESSIONALISM

Third, of course, is the daunting problem of the continuing decline in the commitment to an ideal that we call professionalism. Our internal discomfort as we see the changes in our profession's character is shared by the general public, which sees our role as extreme partisan zeal on the client's behalf and moral nonaccountability for the consequences. We are in an era in which everybody is urged to be creative, to "think outside the box." But, as noted by the ethicist Michael Novak, thinking outside the box "is interesting when you are thinking about technology, but when you are thinking about ethics, it's deadly."[3]

I need not belabor the point, only mention it; we've all talked about this time after time at these meetings. But I leave the subject with one encouraging statement about people like you. At our meeting last year, federal judge John Coughenour said of you, "I firmly believe that a higher percentage of trial

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[2] Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24, 25.

[3] Novak, "The Moral Heart of Capitalism," remarks at President Bush's Economic Forum in Waco, TX (August 13, 2002) (reported in *National Review Online*, Aug. 16, 2002).

lawyers consider their profession to be a calling than is true of people who write wills and draft articles of incorporation."[4]

THE ASSAULT ON CIVIL RIGHTS

The three concerns I have mentioned are, none of them, particularly new—growing, perhaps, but not new. We have been discussing them at these meetings for some years now. But the fourth and last concern I want to call to your attention has an alarming new intensity. I refer, of course, to the assault on civil rights embedded in the fight against terrorism. I understand that it is all too easy for me, and perhaps you, to sit back and criticize the steps taken by a presumably well-meaning government to protect our security. The late night comedians are having a field day with duct tape and plastic sheeting. Maureen Dowd satirizes the term "homeland," hearing echoes of "the Fatherland" and *Deutschland uber alles*. And how many television anchors wear a shirt color to match the alert level of the day?

But as trial lawyers, we know that those superficial idiocies are not the issue. The issue is the whole arsenal of investigative, arrest, detention, prosecutorial, and procedural weapons assumed by or given to the government, by both congressional and administrative action. Invasion of privacy, with almost all aspects of one's life open to electronic snooping; detention incommunicado; wholesale deportations; disregard of lawyer-client confidentiality; closed hearings—the list goes on and on. Disregard of civil rights in time of war is not unknown, with our treatment of Japanese-Americans in World War II only the most recent example (until now). But scarcely ever before have we so broadly set aside the hard-won individual protections that characterize our system of justice. Lost in the current hysteria are fair hearing, due process, presumption of innocence—the very foundations on which everything rests, the foundations of the work you and I do.

I do not lightly fault our government for this frontal attack on our civil rights. I know that terrorism is new to the United States, and our leaders are trying frantically to contain it. It is infinitely easier to be a critic than to be an actor. In times like these, assigning blame becomes popular. You may remember the fellow who said, "I didn't say it was your fault. I said I was going to blame it on you." Politicians, especially, are adept at identifying somebody else's mistakes. They are painting our emotions in primary colors: love, fear, anger, patriotism—a dangerous mix, especially when there seems to be a lack of self-criticism and perspective.

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[4] Coughenour, *The Collapse of Bogle and Gates*, 37 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 413, 415 (2002).

That is why, even if our leaders' actions are well intended, we must be alert to overreaching. Of all people, trial lawyers have the responsibility, case by case, to stand for the civil rights, the human rights, of our people. Given our oaths as lawyers—and more, given our commitment to the rule of law–each of us has a profound obligation to challenge every disregard of those crucial rights that I mentioned: fair hearing, due process, presumption of innocence. That obligation overrides the undoubted personal costs that come with those challenges. That's why we applaud people like Jim Brosnahan, who over the years has undertaken unpopular causes, and Bill Gray, who received the Courageous Advocacy Award from the American College.

AS WE LEAVE

These, then, are four of the many challenges with which you and I go forth from our time here together: tort reform, the disappearing jury, the decline of professionalism, the assault on civil rights. They are only four of many, but they are among the most important. You already know about these things, of course. I merely have been refreshing your recollections, not informing you for the first time. In the aggregate, these and countless other problems are enough to make us want to stay in bed in the morning, or at least to remain in this lovely retreat of sunshine and flowers. So, once again, I ask, with what attitude, in what frame of mind do we go out of here to face "what's next"? How do we find hope in a cynical world? Let me presume to offer some guidelines.

First, I submit, we've got to remind ourselves, daily, that what we're about is justice. That's our professional goal, of which we sometimes lose sight because of the minutiae and annoyances of practice, of dealing with clients and courts and, dare I say it, partners. Over our office doors we must inscribe, if only figuratively, Judge Learned Hand's famous dictum, "Thou shalt not ration justice."

Second, we need to see our problems as opportunities, opportunities for creativity and selfless service. It was Mother Teresa who reminded us of the saying of the ancients: "Tribulation is the forge of virtue . . . and not a momentary inconvenience."

Third, we've got to band together with those of like mind, as in this true fellowship. No one accomplishes much alone: If you see a turtle on a fence post, you know she didn't get up there all by herself. Though the Society of Barristers historically has not been an activist organization, mounting programs and issuing position papers, it has reinforced the professionalism of its members and armed them to serve in the various lawyer organizations to which they invariably belong. Whether corporately here or in our other

groups, you and I *must* band together to confront the issues facing the profession and the public which we serve. We have no right to be mere spectators in a troubled world.

Fourth, we cannot allow ourselves to be deterred by the difficulty, if not the impossibility, of complete success. We will be tempted to wait for the great moment to do that "one great thing." If we wait for that impossible challenge, we will hold the possible hostage to the perfect, and thus, because we cannot do everything, we will be content finally to do nothing.

Fifth, all of this requires a degree of optimism. I know that some are naturally more optimistic than others; it must be in the genes. But optimism can be cultivated, particularly if, like poets and philosophers, we take the long view. Hope has an agenda but no timetable. Perhaps you have heard of the epitaph on a woman's tombstone in a rural New England cemetery: "She lived with her husband for 46 years, and she died in the hope of a better life." Take the long view!

Finally, we must not think that it is too late to board the train. There is still time to affect the outcomes of our profession's problems. You and I are not too old, and it is not too late. I say this with particular reference to myself, as likely the oldest person in the room.

Some years ago, New York's Museum of Modern Art mounted a retrospective exhibit of Picasso's works. Nearly a thousand of his works were displayed in chronological order, beginning with works done when he was a young boy. The early works were traditional landscapes and still lifes. Then, as he advanced in age, brilliant colors began to emerge, and the still lifes were no longer very still. Finally, of course, the works turned into the kind of bold, zesty abstractions for which Picasso is best known.

I am told that an art critic who saw the show recalled that once, when Picasso was eighty-five, he was asked why his earlier works were so solemn and his later works so ecstatic and exciting. "How do you explain it?"asked the interviewer. "Easily," Picasso responded. "It takes a long time to become young!"

So there is yet time in which to do our part.

If these remarks of mine had been a sermon (which of course they are not!), I would have concluded with a benediction that would have run something like this:

> Deliver us from sourness and premature despondency. We are grateful for the past, we rejoice in the present, and we are eager for the future. Make us aware of the vulnerability of precious things. And help us to go forth from this place with dignity, greatness, and courage. Amen.