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John W. Reed, *Editor*

AN OPEN LETTER TO U.S. DISTRICT JUDGES[†]

William G. Young*

Dear Colleagues,

Friends have suggested that I write to you in this format. I am hesitant to do so, for what I have to say is somewhat cross-grained and perhaps unwelcome. Moreover, in a letter of this nature, my conclusions necessarily seem more stark and absolute than I desire, as they are bereft of meaningful reasoned argument and nuance. Still, I hope the issues here raised will at least provide a starting point for discussion. In any event, unwelcome truths are nevertheless true; so here's the thesis:

> The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic.
>
> As district judges, we ought to be in the forefront of a national debate concerning this matter. We are not. In fact, we operate as though we don't much care.
>
> As a result, we have lost focus on our prime mission; our status as the grassroots guardians of constitutional values is threatened as never before, the business community is no longer supportive of federal district court adjudication, and Congress is marginalizing our functions and may soon significantly reduce our resources.

Do you care? If so, consider:

The American jury "is the purest example of democracy in action that I have ever experienced."[1]

The American jury must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy.[2]

No other legal institution sheds greater insight into the character of American justice. Indeed, as an instrument of justice, the civil jury is, quite

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[†] Reprinted, with permission, from THE FEDERAL LAWYER, July 2003, at 30.

* Judge, United States District Court for the District of Massachusetts.

[1] Juror letter to Hon. Raymond J. Brassard, quoted by him in *Juries Help Keep Our Democracy Working*, Boston Globe, May 1, 2003, at A19.

[2] H. Zeisel, *The American Jury*, in FINAL REPORT: THE AMERICAN JURY SYSTEM 72 (Roscoe Pound & American Trial Lawyers Foundation eds. 1977) (quoting the last paragraph in H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966)).

simply, the best we have. "[T]he greatest value of the jury is its ability to decide cases correctly."[3] We place upon juries no less a task than discovering and declaring the truth in each case. In virtually every instance, these twelve men and women, good and true, rise to the task, finding the facts and applying the law as they, in their collective vision, see fit. In a very real sense, therefore, a jury verdict actually embodies our concept of "justice." Jurors bring their good sense and practical knowledge into our courts. Reciprocally, judicial standards and a respect for justice flow out to the community.[4] The acceptability and moral authority of the justice provided in our courts rests in large part on the presence of the jury. It is through this process, where rules formulated in light of common experience are applied by the jury itself to the facts of each case, that we deliver the very best justice we, as a society, know how to provide.

The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government. "[T]he jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial."[5] Through the jury, we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed.

One could scarcely imagine that the Founders would have created a system of courts with appointed judges were it not for the assurance that the jury system would remain. In a government "of the people," the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville so elegantly put it, "[t]he jury system . . . [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."[6] Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet there can be no universal respect for law unless all Americans feel that it is *their* law.[7] Through the jury, the citizenry takes part in the execution of the nation's laws, and, in that way, each citizen can rightly claim that the law belongs partly to him or her.

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[3] Joiner, *From the Bench,* in THE JURY SYSTEM IN AMERICA 146 (R. Simon ed. 1975).
[4] *See* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power,* 56 TEX. L. REV. 47, 59 (1977).
[5] P. D'PERNA, JURIES ON TRIAL 21 (1984).
[6] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 29 (H. Reeve text 1945).
[7] Kaufman, *A Fair Jury—The Essence of Justice,* 51 JUDICATURE 88, 91 (1967) (emphasis in original).

Only because juries may decide most cases is it tolerable that judges decide some. However highly we view the integrity and quality of our judges, it is the judges' colleague in the administration of justice—the jury—that is the true source of the courts' glory and influence. The involvement of ordinary citizens in a majority of a court's tasks provides legitimacy to all that is decreed. When judges decide cases alone, they are still surrounded by the recollection of the jury.[8] Judicial voices, although not directly those of the community itself, echo the values and the judgments learned from observing juries at work. In reality, ours is not a system in which the judges cede some of their sovereignty to juries, but rather it is one in which the judges borrow their fact-finding authority from the jury of the people.[9]

The American jury system is dying—more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts—but dying nonetheless.[10]

In fact, "the civil jury trial has all but disappeared."[11] For some time now, circumstantial and anecdotal evidence has been mounting that jury trials are, with surprising rapidity, becoming a thing of the past. Judge Patricia Wald started her tribute to professor Charles Alan Wright with this striking sentence: "Federal jurisprudence is largely the product of summary judgment. . . ."[12] Judge Wald is right—and note the compelling inference—that we are today more intellectually concerned with the procedural mechanism that blocks jury trials than we are with the trials themselves. Levels of civil and criminal litigation in the federal courts continue to rise,[13] and, on the civil side, the ratio of trials to settlements and pretrial adjudications remains roughly constant.[14] Yet, the simple fact is that, with ever more work to do in the federal courts, jury trials today are marginalized in both significance and frequency.

Hard evidence confirms this observation. Over the ten years concluding in 1999, the number of civil jury trials declined twenty-six percent, and the number of criminal trials was down twenty-one percent. During the five most recent years of this same period, overall jury trial days went down twelve

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[8] A. DE TOCQUEVILLE, *supra* note 6, at 297.
[9] *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1004-06 (D. Mass. 1989).
[10] United States v. Reid, 214 F. Supp. 2d 84, 99 n.11 (D. Mass. 2002).
[11] Clermont & Eisenberg, *Litigation Realities,* 88 CORNELL L. REV. 119, 142 (2002) (citing statistics of the Administrative Office of the United States Courts).
[12] Wald, *Summary Judgment at Sixty,* 76 TEX. L. REV. 1897, 1899 (1998).
[13] *See* Rehnquist, *The 1999 Year-End Report on the Federal Judiciary,* THE THIRD BRANCH, Jan. 2000 Special Issue.
[14] *See* Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,* 113 HARV. L. REV. 924, 928 (2000).

percent.[15] Furthermore, funds budgeted for jurors in the federal system FY 2001 declined by nearly six percent, compared to FY 2000, in order to adjust to the declining number of jury trial days.[16]

Institutionally, federal courts today seem little concerned with jury trials.[17] Moreover, the federal judiciary has been willing "to accept a diminished, less representative, and thus sharply less effective civil jury."[18]

On the criminal side of our federal courts, manipulation of the U.S. Sentencing Guidelines has the consequence of imposing savage sentences upon those who request the jury trial guaranteed them under the U.S. Constitution—sentences that are 500 percent longer than sentences received by those who plead guilty and cooperate.[19] Small wonder that the rate of criminal jury trials in the federal courts is plummeting.[20]

Remarkably, the press today blandly refers to "military detention" as simply a "parallel track" to being "indicted in the federal court system."[21] Indeed, the very act of creating the apparatus for trials before military tribunals, even though it has not yet—so far as the public has been told—been engaged, has the effect of diminishing the American jury, once the central feature of American justice, to nothing more than a "parallel track."[22]

This is the most profound shift in our legal institutions in my lifetime, and—most remarkable of all—it has taken place without engaging any broad public interest whatsoever.[23]

Our willingness, as a society, to drift from the use of juries reflects a failure in the understanding of the jury's essential function in our American democracy. The jury system is direct democracy at work. It is, in fact, the most vital expression of direct democracy in America today. It is the New

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[15] *See* D. Williams, Decline in Petit Juror Days table 2 (Sept. 2, 1999) (unpublished Dist. Ct. Admin. Div. document, Admin. Office of the U.S. Courts, Washington, D.C.).
[16] *See* THE JUDICIARY: CONGRESSIONAL BUDGET SUMMARY FISCAL YEAR 2000, at 50 (2000).
[17] *See* E. Ludwig, *The Changing Role of the Trial Judge,* 85 JUDICATURE 216, 216-17 (2002) ("Trials, to an increasing extent, have become a societal luxury . . . [although] when cases are handled as a package or a group instead of one at a time, it is hard, if not impossible, for the lawyers or the judges to maintain time-honored concepts of due process and the adversary system.") (Judge Ludwig is a member of the Court Administration and Case Management Committee of the U.S. Judicial Conference.)
[18] Ciulla v. Rigny, 89 F. Supp. 2d 97, 102 n.6 (D. Mass. 2000) (citing Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging,* 49 ALA. L. REV. 133, 137-52 (1977) (decrying the failure of the Judicial Conference to restore 12-person juries in civil cases), and *Developments in the Law—The Civil Jury,* 110 HARV. L. REV. 1408, 1466-89 (1997) (same)); *see also* AM. COLL. OF TRIAL LAWYERS, REPORT ON THE IMPORTANCE OF THE TWELVE-MEMBER CIVIL JURY IN THE FEDERAL COURTS (2001), available at www.actl.com/PDFs/Importance12Member-Jury.pdf.
[19] Berthoff v. United States, 140 F. Supp. 2d 50, 67-68 (D. Mass. 2001), *aff'd,* 308 F.3d 124 (1st Cir. 2002).
[20] *Id.* at 69 & n.34.
[21] Cambanis, *New Federal Security Act Remains Largely Unused,* Boston Globe, June 23, 2002, at B1.
[22] *See* Liptak, *Accord Suggests U.S. Prefers To Avoid Courts,* N.Y. Times, July 16, 2002, at A14.
[23] United States v. Reid, 214 F. Supp. 2d 84, 99 n.11 (D. Mass. 2002).

England town meeting writ large: the people themselves governing. In fact, the very processes of our judicial system themselves vindicate and strengthen democracy by involving litigants with standing in the application of our laws.[24] Our juries are the ultimate realization of our people working together, under law, to do justice. De Toqueville recognized with masterful clarity that, in our jury system, Americans had embarked on a stunning experiment in direct popular rule.[25] Studies show that, when people have recourse to a jury trial, inequalities in economic resources are minimized, most potential litigants avoid staking out patently unreasonable positions, and the great bulk of cases ultimately settle.[26]

Whenever Congress extinguishes a right that heretofore has been vindicated in the courts through citizen juries, there is a cost. It is not a monetary cost. It is a cost paid in rarer coin—the treasure of democracy itself.[27]

When people recognize that they have been cut off from their opportunity to govern directly through citizen juries, the sense of government as community—as a shared commonwealth—is severely diminished. Jury service is the citizen's only direct experience of government at the federal level. Severing that shared bond, of course, leaves citizens with their right to vote but, inevitably, as the government draws away from its citizenry, that right seems less valuable. It is not too much to say that, as our government is the ultimate teacher,[28] its devaluation of direct citizen participation carries the implicit message that communitarian efforts are simply not worth very much in an age of individual self seeking.[29]

Nor is this all. As those institutions that empower and reinforce community efforts fray at the edges and fall into desuetude, economic powers to which the law grants an advantage naturally tend to use that advantage, unchecked by the jury's common sense.[30]

Without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite, in jargon whose elegance is in direct proportion to its unreality. Juries are the great leveling and democratizing element in the law. They give it its authority and generalized acceptance in ways that imposing buildings and sonorous openings cannot hope to

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[24] *See* Peters, *Adjudication as Representation,* 97 COLUM. L. REV. 312 (1997).
[25] *See* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337-39 (Schocken 1st ed. 1961).
[26] Galanter, *Viewpoint—How to Improve Civil Justice Policy,* 77 JUDICATURE 185 (1994).
[27] Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1977).
[28] L. BRANDEIS, TRUE AMERICANISM: BRANDEIS ON DEMOCRACY 25, 27 (P. Strum ed. 1995).
[29] *See* Roberts, *Alone in the Vast Wasteland,* N.Y. Times, Dec. 24, 1995, at D3.
[30] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 355, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) (Rehnquist, J., dissenting). Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271-72 n.3 (D. Mass. 1998); *see* Subrin, *On Thinking about a Description of a Country's Civil Procedure,* 7 TUL. J. INT'L & COMP. L. 139, 150-52 (1999). *See generally* Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1997).

match. Each step away from juries is a step that ultimately weakens the judiciary as the third branch of government.[31] Indeed, it may be argued that the moral force of judicial decisions—and the inherent strength of the third branch of government itself—depends in no small measure on the shared perception that democratically selected juries have the final say over actual fact-finding.[32]

It is the saddest irony that the government offers the protection of jurors within the United States as one of its justifications for the creation of secret military tribunals sitting in remote locations[33]—precisely at the moment after the 9/11 tragedy that average Americans were turning out in record numbers to perform the sole civic duty prescribed in the Constitution: jury service.[34]

Indeed, it is not too much to say that the greatest threat to America's vaunted judicial independence comes not from any external force but internally, from the judiciary's willingness to allow our jury system to melt away.[35]

The district court judiciary is losing (has lost) focus on its primary missions.

Ours is a dual mission. First, we preside over the largest, most daring, and most successful experiment in direct democracy ever attempted in the history of the world—the American jury system. The continued vitality of that system depends, in no small measure, on the skillful management and warm inspirational support of U.S. District Court judges.

Second, alone among democracies of the world, we commit first-instance constitutional interpretation to U.S. district judges. In contrast, most countries reserve constitutional adjudication for a special appellate court. The result is plain—the U.S. Constitution is the most vibrantly living written governmental framework and guarantee of individual liberties ever seen—precisely because reasoned, case specific, written interpretation of the fundamental law is as close as the nearest federal district court.

That's what we do. A bit of the very sovereignty of the nation is committed to our charge, and, with this as our trust, we make the jury system flourish so that this dimension of direct democracy works well in tandem with our federal system of representative democracy. At the same time, we provide reasoned explanations of the rule of law (ultimately constitutional law) to our citizens.

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[31] See E. HENNESSEY, H. CLAY & T. MARVELL, COMPLEX AND PROTRACTED CASES IN STATE COURTS (1981) (National Center for State Courts).
[32] *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1006 & n.23 (D. Mass. 1989).
[33] *See* Bumiller & Johnston, *Bush Sets Option of Military Trials in Terrorist Cases,* N.Y. Times, Nov. 14, 2001, at A1 ("White House officials said the tribunals were necessary to protect potential American jurors from the danger of passing judgment on accused terrorists.").
[34] Cambanis, *Juror Scrutiny Reaches New Level,* Boston Globe, July 12, 2002, at B1.
[35] *See* Resnik, *supra* note 14, at 1003.

Do our institutional actions reflect the burden and glory of these monumental challenges? You know they do not. Our processes are too costly and too slow, yet we were not even included in the last major discussion of these issues and had to scramble to catch up and prevent unwise micromanagement. Today, our processes are slower still and even more costly, yet we can hardly be considered proactive on these issues. We express concern that our jury system is withering, study the matter, discover that much of the decline is statutorily driven, so—ho hum—there is nothing we can do about it. In fact, the demise of our jury system is the single most significant development in American law in our history—and we district judges are uniformly silent. It is today unfashionable, somewhat déclassé, certainly old-fashioned and out of step to extol the systemic virtues of the American jury and carefully reasoned written adjudication.

Don't get me wrong. Whenever I start off like this, some of my most thoughtful colleagues hear me suggesting that cases ought be forced to trial or ranting against case management. Not so. Not so at all. One of the difficulties inherent in raising these issues is that the debate seems to fall into extreme positions. Those who argue that the district court judiciary ought evolve frequently disparage the trial process itself, while, on the other side, some commentators argue that to engage in case management somehow diminishes the judicial function.[36] Small wonder the hardworking majority of judges is silent.

My point is more modest. Of course, most cases ought settle. Of course, we must embrace all forms of voluntary ADR. Of course, we must be skilled managers. But to what end? To the end that we devote the bulk of *our* time to those core elements of the work of the Article III trial judiciary—trying cases and writing opinions. We ought to remember, as the RAND study and all of its progeny confirm, the best case management tool ever devised is an early, firm trial date.

The truth of the matter is that good management and traditional adjudication go hand in hand. We ought to confirm that basic truth, study how it is done, trumpet it, budget for it, and fight for it. The district court judiciary ought to be the nation's most vigorous advocates of our adversary system and the American jury. We fail at our own peril. Here's why.

The business community—throughout American history the most vigorous advocate of a strong federal judiciary—has lost interest in us.

We are too slow, too costly, too unpredictable, say global (and local) busi-

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[36] Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982).

ness leaders. Sadly, the indictment has much merit. Yet how vigorously are we addressing these legitimate concerns?

For decades, our civil juries have been incessantly disparaged by business and insurance interests, without the courts offering any defense of the single institution upon which their moral authority ultimately depends,[37] with the predictable result that bipartisan majorities in the Congress have severely restricted access to the American jury.[38] These interests know what they are doing. The most sophisticated recent analysis has led one commentator to conclude, "a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests."[39]

More ominously, for the first time in our history, business has a good chance of opting out of the legal system altogether. Today's expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation. Coupled with today's expansive preemption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever-diminishing role for the federal district courts. This is never overt, of course. It coalesces around specific issues with specific "reforms" advanced. The Private Securities Litigation Reform Act is a prime example. Yet bit by bit, issue by issue, the doors of our district courts are closing to ordinary citizens. Business once was the strongest supporter of the federal court system. Today, save in the area of intellectual property, it sees itself as having little stake in our continued vitality and chooses instead to fight its battles directly with the regulatory state.

The Congress is increasingly marginalizing the district court judiciary—and we are complicit in our own sidelining.

When was the last time the district court judiciary protested a diminution in our jurisdiction? Can anyone remember? We didn't do it before the adoption of the Sentencing Guidelines and, other than vigorous objections to the conversion of the guidelines into a system of case-specific mandatory minimums, we've rarely done it since. We are today, largely because of Ralph Mecham's brilliant administration,[40] the best housed (huge court building and renovation program), finest supported (ninety-two support personnel to one judge), most fiscally independent (budget decentralization) judiciary in

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[37] *But see* Ciulla v. Rigny, 89 F. Supp. 2d 97, 100-03 (D. Mass. 2000) (offering such a defense).
[38] *See, e.g.,* Employee Retirement and Income Security Act, 29 U.S.C. § 1001 *et seq.*; Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1997); Private Securities Litigation Reform Act, 15 U.S.C. § 78u *et seq.*; Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998).
[39] V. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 226-27 (2000).
[40] Leonidas Ralph Mecham is, and has been since 1985, the director of the Administrative Office of the U.S. Courts.

history. And what is our policy? Other than general platitudes, at the district court level we're all too often unclear what we do, we frequently engage in disparaging it and minimizing its importance, and by the way, dear Congress, we'd like to do less. Our official position is that we'd like to give away diversity jurisdiction. We made no protest over the creation of the redundant and fiscally wasteful Bankruptcy Appellate Panel program, and the presently proposed bankruptcy legislation further restricts our review of bankruptcy court decisions. The President's panel on the Social Security System proposes replacing the district judge review of Social Security decisions with an expanded Article I hearing officer (ALJ) program within the executive branch. AEDPA and IIRIRA strip away rights that were traditionally vindicated in the district courts and crowd them onto the already overburdened dockets of the courts of appeal, confident that, as a practical matter, the exercise of these rights will be markedly diminished.[41]

And what about us? We are utterly supine in the face of our ever-shrinking jurisdiction. After all, these are matters of "policy." Indeed, when Congress asks us how we feel about the diminution of the role of the jury, the Judicial Conference response pallidly explains that we are aware of the modern techniques of juror utilization and promises vigorous support of the jury system. Of course, we don't really mean the last. That would require that we take a position on patients' rights legislation, on amendments to the Federal Arbitration Act to return it to its original purposes, and on a host of proposed legislation that pre-empts state consumer protection but affords no federal remedy that can be vindicated in the courts.

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[41] AEDPA, the Anti-terrorism and Effective Death Penalty Act, and its cousin IIRIRA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of the U.S.C.), are recent examples of "jurisdiction stripping" legislation, a legislative technique that descends directly from bills proposed in the 1980s to strip federal courts of jurisdiction over abortion and busing, Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review,* 114 HARV. L. REV. 1551, 1552 (2001). As commentators have noted, "jurisdiction stripping" is, in effect, "rights stripping," Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts,* 16 HARV. C.R.-C.L. L. REV. 129, 129-30 & n.1 (1981) (arguing that such measures unduly burden constitutional rights); *contra* Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary,* 36 U.C.L.A. L. REV. 233, 261-69 (1988) (discussing a study on parity of state and federal courts), because it removes, in a single stroke, the nuanced views of the 674 federal district judges from the rich common law tradition of evolutionary statutory interpretation and leaves the matter solely to 12 circuit courts of appeal and the Supreme Court. Although society—acting through Congress—recoiled from thus rights stripping women and African-Americans, it had no such hesitancy concerning felons and aliens. It is likely that resorting to this technique will become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect. Circuit judges who argue for the primacy of the courts of appeal in first-instance adjudication—though this is not their intent—strengthen the chance that Congress will again turn to this maneuver to reduce individual liberties. *See, e.g.,* McConnell v. Federal Election Comm'n., 2003 WL 21003103, at *1 n.1 (D.D.C. May 1, 2003) (Henderson, J., concurring in part, dissenting in part) ("[T]he Circuit court is far more familiar with, and far better equipped to handle, the briefing-and-argument mode of judicial decision-making than is the trial court").

Although we effectively, even superbly, lobby for our budgets, we otherwise are utterly passive in the face of forces that marginalize the strength of our democratic adversary system and the jury's role in it. We are, of course, risk-averse, and so we ought to be in the face of partisan politics. Yet it is highly ethical to speak out on matters of judicial administration, and we will have only ourselves to blame when Congress realizes that it is spending more and more on an ever-shrinking jurisdiction—one that is increasingly divorced from the touchstone of common sense supplied by the nation's juries. In sum, if we don't use our courtrooms, we will lose them—and much more besides.

The Europeanization of American law.

This is a lousy title—I'm trying to think of a better one. It does, however, encompass what I am trying to say—that all these many points, taken together, have an increasing tendency to blur the distinctions between the American adversary system and the European civil justice system. In the latter, trial judges are professional civil servants, roughly equivalent to upper-level bureaucrats. Constitutional adjudication is performed by a specialized, centralized multijudge court. Trial judges are often specialized by task because, in such a system, the advantages of judicial bureaucratization seem overwhelming. In our own system, OSHA hearing officers are a good example. Can't happen here? Don't bet on it. The evidence is all around us. It is the Article I, not the Article III, trial judiciary that is today expanding, vital, and taking on ever more judicial responsibilities. The Federal Long Range Study Committee Report, in contrast, largely written by and protective of the functions of the heavily burdened courts of appeal, opts for a steady-state federal judiciary—saving itself for the really big federal case.

But what of the district court judiciary? Once civil juries are gone, I suppose we can continue to try the few criminal cases the executive cannot force to plead. I am not sanguine about the public funding support for such an enterprise. Surely the fate of the state criminal courts does not hold out much solace for us. Beyond that, let's face it—there's then little jurisprudential difference between us and the immigration law "judges," whose decisions now go straight to the court of appeals. And, sooner or later, Congress and the public will catch on as well. If, absent a jury, hearing officers are truly judges, aren't district judges then nothing but hearing officers?[42]

"This is a trial court. A trial judge should go on the bench every day and try cases."[43]

I am the thirty-first U.S. district judge to sit on a bench whose first occu-

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[42] *See* Resnik, *supra* note 14, at 1015-20.

pant was appointed by President George Washington. If you count my prior state judicial service, I have been privileged now to serve for more than a quarter of a century—and I earnestly pray that I have a number of good years left in me. While I hope it is too soon to start thinking about my successor, this much is certain: he or she will be younger, stronger, and much smarter than I am. Will he or she have the same opportunity to participate judicially in the life of our nation that has been my happy and sustaining privilege and duty? I hope so.

The choice is for us to make. Either we will take up the burden of defending our nation's juries and make our voices heard whenever and wherever the right to a jury trial is at issue (and in so doing will secure the core values of the district court judiciary)—

Or we will not.

History will not judge kindly that generation of jurists that allows this "purest example of democracy in action,"[44] this "stunning experiment in direct popular rule"[45] to wither away.

Respectfully,

William G. Young
U. S. District Judge

[43] Hon. John H. Meagher, senior justice of the Massachusetts Superior Court, to the Court in 1978, shortly after I entered upon judicial service. I have never forgotten these words and have tried to live up to them. Everything said above just follows naturally.

[44] *See* juror letter, *supra* note 1.

[45] A. DE TOCQUEVILLE, *supra* note 25.

FROM MEDIOCRITY TO VIRTUOSITY: THE THEME'S THE THING†

Charles L. Becton*

A Trial Lawyer Without a Theme Is a Warrior Without a Weapon

From the rocking cradle to the rocking chair, each of our unique experiences has a distinct beginning, middle, and end that can be capsulized in ten words or less. We can briefly summarize these life experiences with apt, witty phrases that are, in essence, themes. For example, we all know about the "terrible twos," "sweet sixteens," and "golden years."

Themes usefully describe all of our sensory perceptions. Whether we see a play or movie, hear a lecture or sermon, taste an entrée or dessert, touch a fiber or fabric, or smell a flower or bouquet, we can summarize the event or experience in a few seconds. These summaries thematically convey the gist, the substance, and even the melody of all our encounters.

Themes are used in every form of communication. Ministers, for example, select a passage from scripture, decide on a topic or subject, and then pick a theme. Similarly, artists, authors, and musicians,[1] and playwrights, politicians, and performers utilize themes in all their works. Even in our social interactions, we try to get "our point"—our theme—across. "In every instance, [the] theme serves as a logo or a billboard to announce, clarify, and constantly remind the audience of the purpose of what is being communicated."[2] In short, themes are, and have always been, a central part of our lives.

Lawyers who do not understand the awesome, persuasive power of themes are doomed to mediocrity. Only when lawyers fully appreciate how themes

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[1] In art, literature, and music, expressionists (early Matisse, Rouault, Kirchner), impressionists (Cezanne, Manet, Monet, Debussy, and Ravel), and romanticists (Schubert, Mendelssohn, and Chopin) focused on discrete themes that characterize a distinct period of time. Romantic writers were preoccupied with the French Revolution and individualism. They wrote meditative poems that often focused on emotional problems or personal crises. Consider Samuel Coleridge's "haunting ballad-narrative of sin and retribution" in *The Rime of the Ancient Mariner* and William Wordsworth's musing that "the mind of man" was his "haunt" in *The Recluse*.

> And in almost all Wordsworth's poems . . . the words "single," "solitary," "by oneself," "alone" constitute a leitmotif. . . . [Coleridge, Byron, and Shelley] introduced what became a persistent theme in many Victorian and modern writers—the theme of exile, of the disinherited mind that cannot find a spiritual home in its native land and society or anywhere in the modern world.

2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 13 (M.H. Abrams gen. ed. 5th ed. 1986).

[2] D. BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 193 (2d ed. 1997).

motivate people can they transcend from mediocrity to virtuosity. To help lawyers make that transformation, a detailed discussion of themes in daily life follows.

THEMES IN DAILY LIFE

The pervasiveness and power of themes underscore every aspect of daily living. The theme has been variously referred to as the advance organizer, anchor, catch phrase, common thread, grabber, hook, impact phrase, label, logo, motif, punch line, refrain, skeletal framework, storyline, telegraph, title, and word-picture. The referring noun is often preceded by one or more of the following adjectives: coherent, cohesive, credible, compelling, integrating, quick, quintessential, simple, succinct, and unifying. But without regard to appellation or descriptive modifier, a theme allures, attracts, captivates, coddles, enchants, entices, mesmerizes, motivates, tantalizes, and titillates.[3]

As vehicles of persuasion, themes drive us. We pay attention, stay tuned, keep reading, remember key points, and buy products because of themes. We craft themes for high school proms. Each holiday has its unique theme. Theme songs bring joy. Theme parks bring thrills. And it is no accident that Ringling Brothers' Barnum and Bailey Circus bills and themes itself as "The Greatest Show On Earth." Even signature items—e.g., Gucci, Nike, Alexander Julian, Tommy Hilfiger—become encoded themes in our desire-to-purchase psyche.

Themes are mementos and keepsakes. They are everywhere remembered. Nicknames, monikers, and epithets (e.g., Richard the Lion-Hearted, Stonewall Jackson, and Billy the Kid) are more deeply embedded, and often more instructive and illustrative, than given names. To the extent they describe or characterize people, or present a compelling image, they are themes. "Handles,"[4] tags, and titles provide equally vivid examples. You don't have to be a basketball fan to know that "His Airness" flies, the "Mailman" delivers, and "Dr. J" operates. Older aficionados can still visualize Magic, Clyde the Glide, Earl the Pearl, and Wilt the Stilt. And what sports fan does not recognize Flo-Jo, Smokin' Joe, Stan the Man, Dandy Dan, Hammering Hank, The Tank, the Big O, and The Bambino.

Those who wish to "katch . . . keep . . . and konvince"[5] us cast their lines and hooks our way each day. These tempting lures dangle in our faces and echo in our minds, even in our dreams. Consider what you read in the newspaper and what gets you past the headlines. Reflect on the television programs

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[3] *See generally* M. FRANK, HOW TO GET YOUR POINT ACROSS IN 30 SECONDS OR LESS, 40 (1986).
[4] Names by which many citizen band radio owners were known.
[5] *See* M. FRANK, *supra* note 3, at 50.

you watch or the radio programs you hear. Think about why you buy any product.

Television and Theater

First it's the title. Next it's the theme song. Then it's the preview of coming attractions. All are grabbers. Movie producers highlight their themes at the outset. And when the movie starts, it invariably begins "in medias res," right in the middle of things. In today's cinematic world, all movies, not just adventure movies, begin with power, action, and one or more viscerals—blood, gore, violence, high speed chases, sex, betrayal, dishonesty, suspense, or horror. Hollywood knows that viscerals motivate us and play a significant role in every decision we make.

Movie titles themselves sometimes hook us. All are short. And they entice even when the theme is not readily apparent. Playwrights follow Aristotle's prescription and evoke the required emotion. It's hard to sell tickets to *A New England Village under Attack by a Shark*. *Jaws,* however, sells.[6]

To show the suspense that themes transmit, consider the Perry Mason television series. Most of the stories featured alliterative titles—for example, "The Case of the Restless Redhead" (the premiere show), "The Treacherous Toupee," "The Bountiful Beauty," "Final Fade-Out," "The Grimacing Governor," and "The Killer Kiss."[7] Even the titles of the episodes on *People's Court* show how well a theme highlights the issue and captures the imagination—e.g., "The Case of the Hutch with a Hitch."[8]

Alfred Hitchcock's witty remarks introduced his colorful titles—e.g., "Premonition," "Momentum," "Anniversary Gift," "Party Line," "A Piece of the Action," "The Dividing Wall," and "The Sorcerer's Apprentice."[9] These descriptive titles tell us much about the show, even given Hitchcock's penchant for the unusual ending. The same can be said for *The Twilight Zone, Tales From the Crypt,* and horror movies in general, even though they have surreal titles that beguile, bemuse, and bewitch us.

Little needs to be said about theme songs in movies. The music—ranging from the horrid, harrowing sounds of horror to the sensuous sax sounds in sex scenes—can be captivating. Like themes in general—whether aural, visual, or oral—theme songs are memorable. Movie buffs easily recognize theme songs

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[6] J. A. Burgess, Persuasion Techniques, North Carolina Academy of Trial Lawyers Convention (Jan. 1978) (manuscript).

[7] T. BROOKS & E. MARSH, THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS 1946-PRESENT (6TH ED. 1995).

[8] *Id.*

[9] *Id.* Note also, this title recalls Walt Disney's *Fantasia,* in which Mickey Mouse was the Sorcerer's Apprentice.

from the following shows: *Batman, Superman, Peter Gunn, The Man From U.N.C.L.E., Rawhide, Bonanza, Dragnet, Rocky, Butch Cassidy and The Sundance Kid, Deliverance, Summer of '42, Star Wars, 2001: A Space Odyssey, The Lion King, The Dick Van Dyke Show,* and *M.A.S.H.*

Radio

Those of us who can remember a time before television recall being transfixed by stories on radio: *The Shadow Knows, The Green Hornet, Boston Blackie, Sergeant Preston of the Yukon.* Those radio programs were known by their descriptive themes—e.g., "Who knows what evil lurks in the hearts of men? . . . The Shadow knows." Similarly, few who heard it can forget Orson Welles's doomsday theme in his chilling radio version of H.G. Wells's *War of the Worlds*. Even when we fast forward to the present, the descriptive power of themes is evident. Garrison Keillor's "It's been a quiet week in Lake Wobegon," and Paul Harvey's signature line or theme "And now, the rest of the story" are but two examples.

Newspapers and Other Printed Material

Newspaper headlines are crafted to attract our attention, to get us to read the entire article. The first paragraph in newspaper articles is a summary expansion of the theme. Columnists, political cartoonists, and even those who write letters to editors thematically express their point of view.

Hawthorne knew what he was doing when he themed Hester Prynne with the scarlet "A." So do other authors. Every title and every chapter heading is designed to fascinate and to accentuate a book's salient points. Articles and stories in magazines have a similar alluring quality. Magazine producers compete for subscribers just as they compete for hoodwinking advertisements. Circulars, newsletters, billboards, and store-front signs are crafted for the same purpose.

Marketing

Madison Avenue and other advertising agencies spend billions each year researching psychological appeal. They decide what to say, who should say it, what visual and auditory accompaniments to supply, what color schemes to use for the participants and product, and what signs, symbols, and other nonverbal communication to employ. They tell us all about a product and when and where to buy it. Their themes, with or without jingles or theme songs, work. The fact that advertisers spend hundreds of thousands of dollars per thirty-second prime-time-television commercial, or millions of dollars per Super Bowl minute is proof enough that themes persuade.

Local television stations also bait us. They break in with a teasing snippet about the 11:00 news—e.g., "Late Breaking News: The House Judiciary

Committee Votes to Release Sex Scandal Tapes. Details on the 11:00 News." This alert is designed to make us stay tuned.

Themes are the primary marketing device in commercials. Advertising agencies know that "the theme's the thing." Themes sell. It is, therefore, not surprising that television's embryonic $9 black and white Bulova ad in 1941 has spawned a $40 billion-a-year industry.[10] Consider even now the "appeal" of the top ten commercials:[11]

1. The Energizer: He's kept going and going for eight years with an annual budget of $50 million.
2. Federal Express: "Fast-paced world" in which John Moshitta spewed out 450 words per minute.
3. American Tourister: They proved the durability of a suitcase by having a gorilla jump all over it.
4. Alka Seltzer: "That's a spicy meatball."
5. Wendy's: "Where's the beef?"
6. Joe Isuzu's lie about the Isuzu car getting 94 miles per gallon.
7. Mean Joe Green's Coke commercial in which he finally bonds with the little boy offering a Coke.
8. Partnership for a Drug-Free America's public service announcement: "This is your brain. This is your brain on drugs."
9. The Cracker Jack commercial in which a train passenger steals Cracker Jacks from riders in the sleeper car.
10. Rice Krispies: My tears won't stop till I hear some snap, crackle, and pop.

Although brief, commercials are complete communiqués. Their messages contain themes that have common-sense appeal. Good themes, like mottos,

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[10] *See* S. FRANK, BUYER'S GUIDE TO FIFTY YEARS OF TV ON VIDEO 323 (1999).

[11] ENTERTAINMENT WEEKLY, MAR. 22, 1997 (Special Channel Surfer Edition). Other unforgettable commercials include Kentucky Fried Chicken's "finger-lickin' good," Maxwell House Coffee's "Good to the last drop," Alka Seltzer's "I can't believe I ate the whole thing," "You'll stop paying the elbow tax when you start cleaning with Ajax," Bill Cosby's Jello commercials, the California raisins dancing to and singing "Heard It Through the Grapevine," Tony the Tiger's "They're grrrreat," Spike Lee's Mars Blackman's hang time with Michael Jordan, McDonald's "You deserve a break today," Alka Seltzer's "Plop, plop, fizz, fizz, oh what a relief it is!," Dr. Pepper's "Wouldn't you like to be a pepper too?," Mounds/Almond Joy's "Sometimes you feel like a nut, sometimes you don't. . . ," Coco-Cola's "I'd like to teach the world to sing," Campbell Soup's "Mmm-mmm good," Life cereal's "He likes it! Hey, Mikey!," "I want my tuna" by the singing cat for Meow Mix, the image of Cree-Cherokee Iron Eyes Cody weeping about pollution in the "Keep America Beautiful" spot, Spud McKenzie, Brylcreem's "A little dab'll do you," Bartles & Jaymes wine coolers commercial, Mr. Whipple's "Don't Squeeze the Charmin," Chiffon margarine's "It's not nice to fool Mother Nature."

Obviously, some themes work better than others in their effort to persuade: Twinkies works better than the name originally given—"Little Short-Cake Fingers." Pepsi-Cola works better than "Brad's Drink." Kool-Aid works better than "Fruit Smack Flavored Syrup."

simplify messages. "Where's the beef?" conveys a simple message: We should get what we pay for.[12]

Consider how the following advertising mottos work as themes:

The relentless pursuit of perfection—Lexus
We are driving excitement—Pontiac
It just feels right—Mazda
I love what you do for me—Toyota
Quality is job one—Ford

Advertisers even figure out how to market the viscerally unattractive. "Pillsbury brilliantly gave corporate size a nurturing quality in marketing their Jolly Green Giant products. It's hard to believe that a gentle giant, who says 'ho, ho, ho,' could be sinister. Since size either intimidates or comforts people, it is important to create a large, wholesome, nourishing image."[13] Pillsbury did the same in its Doughboy commercials with the finger of an off-camera human pushing into Doughboy's fat stomach.

Themes are the quintessential motivators in all aspects of day-to-day living. Themes are the gold-standard currency of communication. Those who seek to persuade should invest heavily in themes. And, as they say in the American Express commercial, "[d]on't leave home [or go to court] without it."

THEMES IN JURY TRIALS

Importance of Themes

A trial is a story—the retelling, in court, of something that happened to the litigants. But the lawyer must do more than simply tell the story. The lawyer must make sure the jury knows what the case is about and why that lawyer's client should win. In short, the lawyer must develop both a winning theory of the case and a compelling theme.

Some purists draw "fine lines" to distinguish theory, theme, and thelema.[14] The theory of the case is the one-sentence legal justification of the claim or the defense. It explains how and why something happened to the litigants. As a shorthand statement, the theme is the explanation of facts showing *why you should win.* Thelema is the empathetic underpinning that compels the jury to favor a particular litigant. For our purposes, theme and thelema are combined

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[12] Specter, *Use of a Theme*, TRIAL, May 1985, at 92.
[13] T. SANNITO & P. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS 188 (1985).
[14] Weltner, *Thelema: The Desire to Help,* in MASTER ADVOCATES' HANDBOOK 6 (D. Lake Rumsey ed. 1986).

since a good theme gives the jury a goal and a reason to vote a particular way. The following examples, however, may satisfy the purist.

> Theory: Shrackle's truck crashed into Kathy Potter in the safety zone (crosswalk) because Shrackle was careless.
> Theme: "Too Busy." Shrackle never saw Kathy Potter anywhere at anytime—even when she was like an ornament on his hood—because Shrackle was thinking about Shrackle Construction Company business.
> Thelema: The jurors desire to help Kathy Potter's estate because of her attractiveness and promising career. After all, if Kathy Potter had been a husband-killer who was fleeing from prison when Shrackle's truck ran over her, the empathy vanishes.

The virtuoso of advocacy develops a theme with common-sense appeal that compels jurors to interpret facts in a certain way. The lesson is to craft themes that appeal to jurors' life experiences, common sense, and concern for fairness.

A great theme grabs and sustains attention. More important, it points out the injustice in the case. It gives jurors an equitable reason for voting in your favor. In outline form, themes demonstrate *why* you should win by:

- Simplifying facts and issues;
- Resolving differences in the evidence;[15]
- Requiring that no credible person be disbelieved;
- Globalizing the claim or defense;
- Illustrating the logic of your arguments;
- Undermining the opposition's case without ridicule or rancor;
- Evoking noble human qualities of fairness, hard work, morality, or personal responsibility; and
- Embracing the law.

Crafting Trial Themes

Themes are magical, but they are not the exclusive handiwork of those who have been touched by the wand of genius. Every lawyer can craft a winning theme. All it takes is a little imagination. In fact, themes are limited only by the lawyer's creativity.

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[15] Consistent with what Michael Tigar calls the "theory of minimal contradiction," a good theme explains away the greatest number of facts in the case and thereby resolves major differences in the evidence.

Fruitful sources of themes abound. Adages, axioms, the *Bible*,[16] children's rhymes, comic strips, fables, fairy tales, greeting cards, literary works, lyrics, maxims, movie titles, proverbs, parables, slogans, and song titles are sources of magical themes. Even current and local events can be translated into themes by use of analogy or comparison. The value of a life can be explained by reference to the enormous energy and expense devoted to the rescue of "Little Jessica" or the Oklahoma City bomb victims.

In crafting the right theme—the one that fits, that works—consider the characteristics and qualities inherent in good themes. A good theme includes motive. Jurors want to know "why." So, your theme, or at least your subtheme, must answer that question. Use this test:

(1) Does the theme summarize the story?
(2) Does the theme have factual as well as emotional appeal?
(3) Does the theme paint a visual image for the jury?
(4) Does the theme blend with the life experiences, values, and perceptions of jurors?
(5) Does the theme embody classical rhetorical principles of ethos, pathos, and logos?
(6) Does the theme guide the jurors' decision-making process?
(7) Does the theme treat jurors as thinking adults?
(8) Is the theme consistent with the applicable legal instructions?
(9) Does the theme point out the injustice in the case and allow jurors to view a victory for the client as somehow advancing community interests? For example, it isn't a "broken leg" case; it's a "speeding through a school zone" case.
(10) Does the theme have universal application?

Themes that pass this test are forceful and memorable. They involve jurors, create alignment, and send compelling messages. They also permit jurors to use personal frames of reference.

In short, the trial lawyer without a theme is a warrior without a weapon,[17] or, to mix metaphors, an artist without color. Consequently, the skilled trial lawyer starts theming the case after the initial interview. Themes and subthemes are fine-tuned during discovery.

The theme should be implemented throughout the trial. It must be evident in the voir dire, opening statement, direct examinations, cross-examina-

[16] Among other things, the *Bible* is a book of themes. Every Biblical scene contains themes of good versus evil, pain, wisdom, or unconditional love.
[17] Source unknown.

tions,[18] closing argument, and even in the judge's instructions. Your theme, as a motif or common thread, should make jurors focus on the crux of your case from beginning to end.

A great all-inclusive theme is a must! However, in some cases several themes may be necessary—factual themes, legal themes, liability themes, damage themes, and philosophic themes.[19] In the Karen Silkwood case, for example, Gerry Spence pushed at least two well-known themes: (1) "If the lion gets away, Kerr McKee must pay" (strict liability) and (2) "Married to cancer" (damages). Further, every case has secondary, supplemental, or subthemes. Michael Ciresi's all-inclusive theme, "Legal Products, Illegally Sold" in his Minnesota tobacco trial was highlighted with empathetic subthemes: exploiting the youth market, creating dependence, and making fraudulent promises.[20] Moreover, the skilled advocate has a theme for each witness and each piece of evidence.

Finally, don't underestimate the importance of suspense. In crafting the theme consider the most unusual, the most interesting and exciting, the most dramatic, and the most humorous part of your case, and then reduce all of that to one sentence or question.[21] The more dramatic the hook, the more effective

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[18] Jim McElhaney gives this example:

Q. When Minicom placed their second order with BMI, things were different, weren't they?
A. What do you mean?
Q. They called your office on January 5?
A. Yes.
Q. But you weren't in?
A. No, not at that time.
Q. Your secretary handled the call?
A. Yes, that's right.
Q. Then they sent a follow-up letter?
A. Yes.
Q. Addressed to you?
A. Yes.
Q. It came to your office on January 12?
A. Yes.
Q. But you weren't in?
A. No.
Q. So your secretary handled the order?
A. That's right.
Q. Now you know that letter asked that the order be handled "per our usual agreement"?
A. Yes.
Q. But you weren't in when the order was filled?
A. No.
Q. So you didn't check to see whether the "usual agreement" called for insurance, did you?
A. No.
Q. You were not in and the shipment was not insured, was it?
A. No.

[19] J. W. JEANS, LITIGATION 1321-23 (2d ed. 1992).

[20] *See* Oliver, *Two Steps Forward: Structure, Function and Delivery of Case Themes,* NEWS FROM THE MENTAL EDGE, Winter 2000, at 11.

the total message becomes. Sometimes the best hook is visual rather than verbal. Milo Frank, for example, sometimes begins a presentation by putting two chairs in the middle of the room with an empty pair of shoes under each chair. He then says, "Where are the people to fill these shoes?"[22]

General Themes

Every case involves life, liberty, or property interests or rights. The conflict results in either tragedy, unfairness, or injustice, and the dispute in court centers on duty, obligation, or responsibility.

In civil and criminal cases, general themes involving life, liberty, and property abound. Their refrains are well known: quality of life, value of life, joy of health, pricelessness of health, value of freedom, preciousness of rights, importance of safety, security of personal property, and the sanctity of home. And the advocate, as creative genius and arranger, could begin any case with one of the following thematic scores:

- This case is about a tragedy.
- Needless! Senseless! And, as we now know, endless![23]
- This case is about fairness. It is not fair! It is not just! It "ain't" right that . . .
- With every job comes a responsibility. With every opportunity there is an obligation. With every trust there is a duty.

In contract or commercial cases, the plaintiff's theme may be articulated as "the debt" or "the obligation." Human notions of fairness demand that debts be paid, that obligations be honored. Consider how early this theme surfaces if you condition jurors with the following jury selection question: "How do you react to the statement, 'A promise made is a debt paid'?"

Equally compelling defense themes come to mind: "honor," "the promise," "the handshake," or "your word is your bond." Although the following refrains have long been sung successfully by plaintiffs' attorneys, their appropriateness as defense themes is clear: reneged, weaseled out.

For the plaintiff's personal injury case, commonly employed one-word themes include, "haste," "impatience," "prevention," "indifference," and "recklessness." Defendants typically counter with one- or two-word themes: "greed," "personal responsibility,"[24] "dart-out."

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[21] *See* M. FRANK, *supra* note 3, at 42.
[22] *Id.* at 46.
[23] J. M. PERDUE, WHO WILL SPEAK FOR THE VICTIM? (1989).
[24].Note: This theme is equally availing to a plaintiff, who can effectively argue that the defendant refuses to accept "personal responsibility."

In medical negligence cases, claimants thematically characterize the health care professional's action as rushed or botched because "the doctor was too busy." For the defense, "inherent risk of surgery" or "it was a judgment call" may be appropriate themes.

In product liability cases, standard themes contrast corporate greed and consumer or workplace safety. Few can doubt the heart-rending power of a theme showing that faulty products kill and maim—e.g., "children should outlive their toys."[25] Product liability defendants often respond with a theme that places blame on, or shifts the focus to, the consumer or worker—e.g., abuse of product.

Prosecutors in criminal cases frequently highlight their themes with provoking viscerals: evil, greed, the love of money. Criminal defense lawyers have a series of "mistaken identity," "power of suggestion," and "power of immunity" themes.

Apart from the general themes suggested above, each case creates its own unique theme. For example, the prosecutors in the O.J. Simpson criminal trial were convinced that their pre-trial "domestic violence" theme was a winner.[26] Similarly, the defense team had great faith in its general themes—"rush to judgment;" "slipshod police work;" and "prosecutorial overreach." However, the unique "if-it-doesn't-fit-you-must-acquit" theme that exploded during the trial[27] sealed the not guilty verdict. And the evidence-specific theme, unearthed when a photographer surfaced with photographs of O.J. Simpson's footwear, crowned the civil liability verdict. Jurors had to say to themselves: "With those Bruno Maglis on his feet, this is a case O.J. can't beat."

CONCLUSION

Thread the hearts of jurors with a cohesive, coherent theme. A great theme will not only help the jury focus, but it will also help you focus.

"The Theme's the Thing"! It's the hub that launches all facts. It's your weapon, Warrior.

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[25] Specter, *supra* note 12.

[26] At trial, the prosecutors were unable to abandon their "O.J. is a wife beater" theme even though mock jury results suggested that that theme would not fly with the jurors who were selected.

[27] The "if it doesn't fit, you must acquit" theme that burst into jurors' minds when the prosecution's glove demonstration blew up was also part of the defense's general theme that in the "rush to judgment" many pieces of evidence, including blood, did not fit. The glove was merely symbolic of the prosecution's entire case, argued the defense team.

tions,[18] closing argument, and even in the judge's instructions. Your theme, as a motif or common thread, should make jurors focus on the crux of your case from beginning to end.

A great all-inclusive theme is a must! However, in some cases several themes may be necessary—factual themes, legal themes, liability themes, damage themes, and philosophic themes.[19] In the Karen Silkwood case, for example, Gerry Spence pushed at least two well-known themes: (1) "If the lion gets away, Kerr McKee must pay" (strict liability) and (2) "Married to cancer" (damages). Further, every case has secondary, supplemental, or subthemes. Michael Ciresi's all-inclusive theme, "Legal Products, Illegally Sold" in his Minnesota tobacco trial was highlighted with empathetic subthemes: exploiting the youth market, creating dependence, and making fraudulent promises.[20] Moreover, the skilled advocate has a theme for each witness and each piece of evidence.

Finally, don't underestimate the importance of suspense. In crafting the theme consider the most unusual, the most interesting and exciting, the most dramatic, and the most humorous part of your case, and then reduce all of that to one sentence or question.[21] The more dramatic the hook, the more effective

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[18] Jim McElhaney gives this example:

Q. When Minicom placed their second order with BMI, things were different, weren't they?
A. What do you mean?
Q. They called your office on January 5?
A. Yes.
Q. But you weren't in?
A. No, not at that time.
Q. Your secretary handled the call?
A. Yes, that's right.
Q. Then they sent a follow-up letter?
A. Yes.
Q. Addressed to you?
A. Yes.
Q. It came to your office on January 12?
A. Yes.
Q. But you weren't in?
A. No.
Q. So your secretary handled the order?
A. That's right.
Q. Now you know that letter asked that the order be handled "per our usual agreement"?
A. Yes.
Q. But you weren't in when the order was filled?
A. No.
Q. So you didn't check to see whether the "usual agreement" called for insurance, did you?
A. No.
Q. You were not in and the shipment was not insured, was it?
A. No.

[19] J. W. JEANS, LITIGATION 1321-23 (2d ed. 1992).

[20] *See* Oliver, *Two Steps Forward: Structure, Function and Delivery of Case Themes,* NEWS FROM THE MENTAL EDGE, Winter 2000, at 11.

[21] *See* M. FRANK, *supra* note 3, at 42.

the total message becomes. Sometimes the best hook is visual rather than verbal. Milo Frank, for example, sometimes begins a presentation by putting two chairs in the middle of the room with an empty pair of shoes under each chair. He then says, "Where are the people to fill these shoes?"[22]

General Themes

Every case involves life, liberty, or property interests or rights. The conflict results in either tragedy, unfairness, or injustice, and the dispute in court centers on duty, obligation, or responsibility.

In civil and criminal cases, general themes involving life, liberty, and property abound. Their refrains are well known: quality of life, value of life, joy of health, pricelessness of health, value of freedom, preciousness of rights, importance of safety, security of personal property, and the sanctity of home. And the advocate, as creative genius and arranger, could begin any case with one of the following thematic scores:

- This case is about a tragedy.
- Needless! Senseless! And, as we now know, endless![23]
- This case is about fairness. It is not fair! It is not just! It "ain't" right that . . .
- With every job comes a responsibility. With every opportunity there is an obligation. With every trust there is a duty.

In contract or commercial cases, the plaintiff's theme may be articulated as "the debt" or "the obligation." Human notions of fairness demand that debts be paid, that obligations be honored. Consider how early this theme surfaces if you condition jurors with the following jury selection question: "How do you react to the statement, 'A promise made is a debt paid'?"

Equally compelling defense themes come to mind: "honor," "the promise," "the handshake," or "your word is your bond." Although the following refrains have long been sung successfully by plaintiffs' attorneys, their appropriateness as defense themes is clear: reneged, weaseled out.

For the plaintiff's personal injury case, commonly employed one-word themes include, "haste," "impatience," "prevention," "indifference," and "recklessness." Defendants typically counter with one- or two-word themes: "greed," "personal responsibility,"[24] "dart-out."

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[22] *Id.* at 46.

[23] J. M. PERDUE, WHO WILL SPEAK FOR THE VICTIM? (1989).

[24].Note: This theme is equally availing to a plaintiff, who can effectively argue that the defendant refuses to accept "personal responsibility."

ADVOCACY

George K. Macintosh*

The presence of advocates in our courts readily prepared to advance unpopular and unusual causes is one of the critical supports for the rule of law. It would be impossible for a jury or a judge, even a fiercely independent one, to achieve anything of substance without the underlying contributions of counsel. The court requires matters to be brought before it for adjudication, and advocates serve as the gatekeepers to the litigation process. It is the advocate's role to proffer worthwhile material for the court's consideration.

The essence of greatness in an advocate is difficult to know, although its presence, or the lack thereof, is clear enough to observe. A chief justice of Ireland once said that a great advocate is someone who can win a bad case in front of a good judge.[1]

I once saw the other side of the performance ledger, demonstrated at an inquest by an aggressive prosecutor, seeking to prove that the villain of a fatal accident was the careless operator of a forklift. A stevedore testified in support of the operator and said that he had handled his machine well. Having established that the stevedore had never operated a forklift, the prosecutor condescendingly inquired how the stevedore could possibly shed light on the skills of the forklift operator. The stevedore paused and then answered, "Well, I've never been a lawyer either, but I know whether you are doing a good job."[2]

The Honorable Sir Malcolm Hilbery, a former justice of the High Court in England, in his book *Duty and Art in Advocacy*, described an opportunity he had had many years earlier to observe the fine advocacy of Sir Edward Clarke. Even as a young boy he knew instinctively, as did the stevedore, whether he was witnessing advocacy as it should be practiced:

> I remember the occasion when . . . I was taken by my father, for the first time, into a Court of the Queen's Bench shortly before the luncheon adjournment. A Queen's Counsel rose and made an application. He spoke for perhaps two minutes. But I have never forgotten it. He stood erect, a figure to me of perfect dignity. He spoke clearly,

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[1] T. A. FINLAY, ADVOCACY: HAS IT A FUTURE? 4 (1986).

[2] Author's recollection.

> in a pleasant voice which carried easily all over the Court. The few sentences were balanced and simple. The whole manner was commanding but completely courteous. That was Sir Edward Clarke. I did not know who it was until afterwards. What he asked has long since gone from my mind, but how he asked it has remained a vivid memory and a model to this day.[3]

Mention of Sir Edward Clarke brings to mind the topic of candor with clients, which is a sometimes unappreciated characteristic of a great advocate. Clarke gave Oscar Wilde the best advice he never followed. He counseled Wilde not to sue his male lover's father, the Marquis of Queensberry, for libel. That suit, launched against Clarke's advice, led to Wilde's fateful confrontations with another prominent Irishman in London, Edward Carson. The tragedy that befell Wilde, including his sad demise, is linked directly to Carson's relentless cross-examinations of him. That story is beyond this paper, although it provides a poignant study of the place of advocacy in the law's imperfect efforts to grapple with the social issues of the time.

Candor with clients brings to mind the accomplishments of my former partner, the much-loved and widely-respected advocate Peter Woods Butler, Q.C., now deceased. He could predict the outcome of a case faster and more accurately than anyone else I have encountered. Quick to realize the harsh realities of a weak case, he would acquaint the client with the facts of life and settle very early, usually to his client's great advantage. On the other hand, he tried and won seemingly difficult cases because of his talent for discovering the merits of a strong case in the initial client meetings.

One cannot mention Peter Butler without drawing at least one anecdote from the legion of stories about him. Despite having a firm grasp of the importance of his work, Peter made it all seem like one amusing story after another.

At one very public hearing of the British Columbia Securities Commission, all the respondents were well-known, and the fourth estate had a large presence. The press managed to have a photograph prominently published in the newspaper in which Butler appeared to the untrained eye to be asleep during the hearing. Knowing there is nothing the prosecution fears more than a happy jury or a smiling judge, Peter came to the hearing the next day armed with a large Mickey Mouse alarm clock. He advised the chair that his wife had seen the photograph. For years, he said, he had been telling her how important he was and how important the work was that he did downtown every day. She suggested he take the alarm clock to keep him awake. He con-

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[3] M. HILBERY, DUTY AND ART IN ADVOCACY 28-29 (1959).

cluded his speech by assuring the chair that the picture of Mickey Mouse was no reflection on him.

Peter then brought a "fan" motion to permit him a small electric fan at the counsel table to save him from the summer heat. He followed the fan motion with what he gravely announced was the most important motion in the entire hearing, the "jacket" motion. Counsel must be permitted to remove their jackets. Even the chair could do this if he wished. There would be an exception, however. He said that Michael Goldie, Q.C. (then a dignified counsel, now a retired judge) who was representing another respondent, did not perspire and would not remove his jacket in any event, even if he was in the Sahara Desert.[4] And on and on. This, of course, was not only theatre; Peter knew, better than anyone, that making light of the process would only help his client, in that particular case.

The celebrated texts on the subject of advocacy create lists of qualities for the advocate. The qualities are daunting for the mortal reader, and it is normal to have trouble identifying with the hero who inevitably springs from such a list. Standard fare for such lists includes impeccable judgment, courage, integrity, diligence, and an Olympian capacity for work. It gives one pause when one considers this exalted plane. How does one reconcile such a view with the lower road that many members of the public believe our profession commonly treads? Splendor is not always the first vision that comes to mind when we are viewed from without. While the right of a person to be represented in the courts by an advocate has been recognized in England since at least 1200 A.D.,

> [i]t has excited the cordial dislike of the layman ever since. In the Peasants' Revolt of 1381 . . . when the men of Kent reached London they first burnt down the house of the Lord Chancellor (the head of the English lawyers), then the Temple, the home of the advocate even then for over 200 years, and then broke into Newgate to free the prisoners. One disappointed chronicler described the escape of many lawyers from the flames:
>
> > It was marvellous to see how even the most aged and infirm of them scrambled off with the agility of rats or evil spirits.[5]

Having paid customary homage to the domain of disparaging remarks concerning our profession, we may now set our sights on courage. A lawyer's

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[4] These stories are transcribed but they appear here as they were related to me by my partners, Rob Anderson and Ken McEwan, who participated in this hearing.

[5] R. DU CANN, THE ART OF THE ADVOCATE 13-14 (1985).

courage is a central theme in the annals of advocacy. Its absence disqualifies counsel from standing among the ranks of great advocates. Churchill, whose courage no one would question, wrote: "Courage is rightly esteemed the first of human qualities . . . because it is the quality that guarantees all others."[6]

Courage is an even rarer quality than good judgment. In those moments of our history when great advocacy has served to strengthen the rule of law, courage has played an essential part. The story of Thomas Erskine and Thomas Paine is germane in this regard.

> On a November evening in 1792, Thomas Erskine of Lincoln's Inn was walking home across Hampstead Heath after a day in the courts. Three days earlier, he had accepted a brief to defend the famous pamphleteer and agitator Thomas Paine, who had been charged with treason following his publication of the second part of *The Rights of Man* which contained bitter personal attacks on William III and George I, and much trenchant criticism of monarchy as an institution.
>
> A figure standing in his path brought Erskine up short. It was his friend Lord Loughborough. His Lordship had no time to waste on the pleasantries. "Erskine," he said, "I have a message from the Prince of Wales himself. Your conduct is highly displeasing to the King." Erskine sensed what was coming. Six years earlier, he had been appointed Attorney-General to the Prince–a plum post, involving a handsome retainer and the prospect of appointment to the very highest judicial offices. Loughborough pressed on. "You must not take Paine's brief." Erskine, who personally disapproved of much of Paine's work, did not hesitate. "But I have been retained," he said, "and I will take it, by God!"
>
> He did take it and he held it. He held it although he was publicly condemned with scurrilous attacks on him in government newspapers, and then, when through no fault of his the trial was over and Paine was convicted, Erskine paid the price for his courage. The King moved against him and he had his office as Attorney-General to the Prince taken from him. But he remained unbowed and went on to so distinguish himself at the Bar that eventually he became Lord High Chancellor of England.[7]

Edward Carson, the devastating cross-examiner of Oscar Wilde, is rightly cited when courage in advocacy is studied. In 1892 he appeared for Lord

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[6] THE QUOTABLE CHURCHILL 31 (1998).
[7] J. PHILLIPS, ADVOCACY WITH HONOUR 1-2 (1985).

Clanricarde before a commission set up to inquire into the wholesale evictions of tenants then taking place in Ireland. When he applied to cross-examine the first witness, the President of the Court, an English High Court judge, who should have known better, refused to allow him to do so:

President: I decline to hear you.
Carson: I must press this matter. I will ask for a vote to be taken to see if every Commissioner takes your view.
President: I will not hear you further, and I will order you to withdraw.
Carson: I insist upon my right till every Commissioner orders me to withdraw. I will stand up here and now for justice to be done to Lord Clanricarde as well as to everyone else.
President: The Commissioners have consulted and we have come to the unanimous conclusion that we will not hear you . . . .
Carson: My Lord, if I am not allowed to cross-examine I say the whole thing is a farce and a sham. I willingly withdraw from it. I will not prostitute my position by remaining longer as an advocate before an English Judge.
President: I am not sitting as a Judge.
Carson (*in a loud whisper*): Any fool could see that.

And having remained on his feet throughout this exchange, Carson threw down his papers and walked out of the room.

These were strong but thoroughly justified words. And Carson's judgment cannot be faulted. If he was denied the right to cross-examine, there was little he could usefully do. His client lost nothing by his refusal to take any further part in the proceedings; instead the Commission lost much of the authority it expected to enjoy.[8]

Advocates who have appeared on behalf of clients facing the death penalty have found it a uniquely troubling responsibility. In examining courage, one might look back to a time when execution was a commonly applied sentence. In 1911, a bomb had exploded at the *Los Angeles Times* newspaper, killing fifty people. Los Angeles was a town where unions were not popular—there weren't any there! Two union members, the McNamara brothers, were engaged in a lifelong battle against capitalism, and they had selected the popular newspaper as an appropriate symbol to attack. The clearly demonstrable facts pinned them down as being responsible for the blast. Public senti-

[8] R. DU CANN, *supra* note 5, at 53-54.

ment had been whipped into a frenzy by the grief arising from the deaths of fifty innocent people, and those sentiments were published in the aggrieved newspaper. The prevailing sentiment was that it was of little use to await the sanction of the court for the executions. It was reasonable to expect that this public frenzy would be escalated by a guilty plea by the perpetrators and their escape from the attentions of the hangman. Such was the setting encountered by Clarence Darrow when he arrived in town to defend the McNamaras. Faced with the evidence available, the only appropriate course of action was to counsel guilty pleas:

> On December 1, 1911, Darrow went into court to plead his clients guilty, knowing that the masses would turn on him as soon as the news spread. It was one of the worst days of his life and he never forgot it: ". . . if perchance I allow myself to slip back the bolt, with which all mortals seek to lock away some of the sad and unpleasant memories of the past, at once my mind goes straight to the courtoom in Los Angeles on the evening of the plea of 'Guilty.'"
>
> . . . [E]veryone knew he was the chief counsel and that the decision must have been made with his approval. He was cursed and threatening gestures were made against him as he left the court, but he refused the chance to avoid the crowds and leave by a back entrance. Was not this confirmation of what he had always known about the fickleness of public sentiment? It was not pleasant, but he determined to face the crowd's vituperation as he had faced its cheers.[9]

Nor did Darrow escape unscathed. The authorities in Los Angeles decided to prosecute him in connection with an alleged bribe to one of the jurors on the McNamara case. The trial judge in the sentencing hearing, putting the presumption of innocence to one side, took the liberty of alluding to the bribery of a juror as being a necessary incentive for the guilty pleas. Although another great advocate, Earl Rodgers, successfully defended Darrow against the assault on his character, it retained some vitality for the rest of Darrow's life.

One can say with utter certainty that no one has achieved any substantial success in the pursuit of advocacy without suffering the exhaustion of swimming against the tide. As it has often been said by seasoned counsel, all that is needed in litigation is stamina. Work for the advocate is the price of admission. If one is mindful of the client's situation, and has any conscience whatever, the court appearance without preparation is a singularly unrewarding experience.

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[9] K. TIERNEY, DARROW, A BIOGRAPHY 247 (1979).

A former chief justice of Canada, Brian Dickson, often said he was lucky, and that the harder he worked, the luckier he seemed to be. Louis Nizer practiced law in New York with unparalleled success for more than sixty years. When he was ninety, he wrote the last of his books about his life in court. He wrote this about preparation:

> The physician, Sir William Osler, once described the secret of preparation:
>
> > There is an old folklore legend that there is some mystic word which will open barred gates. There is, in fact, such a mystic word. It is the open sesame of every portal: the true philosopher's stone, which transmutes all the baser metal of humanity into gold. It will make the stupid man bright, the bright man brilliant and the brilliant steady. With the mystic word all things are possible. And the mystic word is "WORK."[10]

In the same book incidentally, Mr. Nizer wrote this prayer for the advocate, who works in what he described as the "perverse circumstances" of the practice of law:

> Please, O God, give me good health with which to withstand the rigors of a most arduous profession–the law.
>
> Please grant me equanimity which calms everyone around me and enable me to balance like a gyroscope in the storms of contest.
>
> Give me peaceful sleep, for while I must keep my mind on my work, I must not keep my work on my mind.
>
> Touch my words with eloquence, not in the sense of harangue, but in the true meaning of oratory–a flashing eye under a philosopher's brow.
>
> Diminish my worries, particularly those anticipated worries which are like interest paid on a debt that never comes due.
>
> Increase my capacity for work, so that I will not suffer the fatigue of thought and will plow deep while sluggards sleep.
>
> Please see to it that I never become afraid of the violence of an original idea or of a stretched mind.
>
> Above all, O Lord, do not diminish my intensity for a client's cause, for from it spring the flames which leap over the jury box and set fire to the convictions of the jurors.
>
> I would pray that my efforts do not blind me to the uniqueness of love, the comfort of friendships, and the joys of a cultivated mind.

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[10] L. NIZER, CATSPAW 107 (1992).

> Please teach me horizontal as well as vertical faith–vertical in obeisance to you, horizontal in my obligations to the community.
>
> We cannot control the length of our lives, but we can control the width and depth of our lives. And I know that when you finally touch us with your fingers to permanent sleep and examine us, you will look not for medals or honorary degrees, but for scars suffered to make the world a little better place to live in.
>
> I thank you for casting me in the legal profession, dedicated to justice, imbued with the sanctity of reason.
>
> The law has honored me. And I shall always honor the law. Amen.[11]

A prodigious amount of work is required for a career in advocacy worthy of mention. It is appropriate to focus on the type of work. The Nizer prayer alludes to this: "Please see to it that I never become afraid of the violence of an original idea or of a stretched mind." A more pedestrian variation on the theme in the current vernacular is "use your head."

Language is the medium of our profession, and an advocate must choose words wisely. British Prime Minister Harold Macmillan once described a speech as the inevitable tightrope walk between cliché and indiscretion.[12] Mark Twain said the difference between the right word and the almost-right word is the difference between a stroke of lightning blazing across the sky and a lightning bug.[13] Both images capture well one of the perpetual matters of judgment facing the advocate. Great advocates stay on the tightrope and find the right word with apparent ease. That ease is, of course, more apparent than real, and the perception that liberating arguments and scathing cross-examinations are like Pallas Athene, who sprang fully armed from the head of Zeus, is unfortunately wrong. The truth is more likely to be found in the sanctuary to which the barrister retires to reflect and prepare. This sanctuary may be elaborate or simple; the crucial element is that the advocate spends time there, thinking, undisturbed, and usually alone.

Literature contains a storehouse of the qualities an advocate must strive to acquire. In his novel *The Outsider*[14] Albert Camus tells the story of Meursault, an ordinary man, not an evil one, who finds himself on trial for murder. The events of this poor creature's life are unfolded by Camus so that the reader identifies with Meursault entirely, as though he or she were sitting in

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[11] *Id.* at 297-98.

[12] This succinct description attributed to Macmillan was related by the Honorable Mr. Justice Frank Iacobucci during his remarks to the American College of Trial Lawyers in Philadelphia in 1999, at the time of his induction into the College as an honorary fellow.

[13] G. F. LIEBERMAN, 3,500 GOOD QUOTES FOR SPEAKERS 278 (1983).

[14] A. CAMUS, THE OUTSIDER (Penguin 1982) (first published in French as *L'Étranger* in 1942).

the prisoner's dock in his place. Meursault, who is soon condemned to die, speaks of the lawyers and journalists quietly bantering and joking near him in the courtroom during the breaks in the trial. He is entirely alone, more alone than if no one else were in the room. In spirit, his own lawyer has deserted him. The true advocate would not do this. He or she would consider the jury, the witnesses, and, most of all, the client throughout the trial. This is the compassion the advocate must seek to have.

I wrote this paper initially to honor the career of a lawyer named Allan McEachern, who was a great advocate and later a strong judge. For nearly thirty years as counsel, he served in the trenches of civil and criminal litigation, and he achieved the standard of which Lord Birkett spoke, the standard we all seek:

> When men and women are brought into the civil or criminal courts, for whatever reason, they should be able to turn for assistance at what may be the critical moments of their lives to a trained body of advocates, independent and fearless, who are pledged to see that they are protected against injustice and that their rights are not wrongly invaded from any quarter. The vocation of the advocate calls for the nicest sense of honour and for a complete devotion to the ideals of justice, and I believe it to be a lofty and necessary calling which is vital for the maintenance of that way of life in which we have come to believe. To that great calling men and women might well devote their greatest gifts and their highest powers.[15]

[15] BBC LECTURES, SIX GREAT ADVOCATES 110 (1961).

THE CENTER FOR PERINATAL MEDICINE AND LAW†

Donald E. Fadjo*
Fred K. Morrison**
Joseph Silva, Jr.***

Introduction by Fellow Robert Ritter: We are said to be in the midst of a medical malpractice insurance crisis in the United States, an unfortunate cyclical phenomenon that, among other things, heightens the mistrust and misunderstanding between the trial bar and doctors. One of the more complex and contentious areas of medical malpractice litigation involves cases dealing with injury to the fetus and the newborn. Our panelists have created two pioneering programs to facilitate rational and meaningful dialogue between lawyers and doctors, and to identify the factors that prove medical malpractice in a perinatal injury case as well as those factors that tend to rule out negligence in that tragic situation. Dr. Joseph Silva, Dean of the medical school at the University of California, Davis, and Donald Fadjo, a practicing plaintiffs' attorney, have chaired or co-chaired two international symposia sponsored by the American Bar Association entitled "The Experts Analyze Brain Damaged Baby Cases." The faculties of these symposia have included renowned experts from around the world in the areas of obstetrics, placental pathology, perinatology, radiology, and other subspecialties in fetal and pediatric medicine. The second symposium, in 1999, was attended by more than eight hundred physicians, lawyers, and other professionals from six countries. The third will be held in the fall of 2004. Based upon the success of these landmark meetings, and in order to advance their purpose, Dr. Silva and Mr. Fadjo in 2001 established a unique multidisciplinary, educational entity at the UC Davis School of Medicine called the Center for Perinatal Medicine and Law. This cutting edge program provides a forum for intelligent study by doctors and lawyers working together to better address the difficult issues involved in disease and injuries to babies. Justice Fred Morrison, of the California Court of Appeal, Third Appellate District, serves as a board member and advisor to the Center. Justice Morrison, Dr. Silva, and Mr. Fadjo will now

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† Panel discussion at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 11, 2003.

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tell us more about this new model program of great importance to our two professions. Gentlemen, the Society welcomes you.

Justice Fred Morrison: It is a privilege to be here and to talk about the Center for Perinatal Medicine and Law. I admire and envy this association and the idea of getting the best trial lawyers together to relax and share friendship—and not talk about what you do.

The Center for Perinatal Medicine and Law was created by Dean Silva and Don Fadjo, and I have been a supporter and a frequent participant in its programs. As I'm sure you know, a medical malpractice case is very stressful and scary for a young doctor, for any doctor. Our audience at the medical school includes medical students, residents, new doctors, and anybody else who wants to attend. Doctors, of course, talk among themselves and frequently see any lawyer as a "bogey-man," to be strenuously avoided at any cost, and malpractice suits as a mere lottery for lawyers in which they can make a lot of money. The purpose of the Center is to take away some of this fear and uncertainty, to give the doctors a comfort level with the judicial process, and to help them understand what it's all about—that a malpractice case is an important event, and we all have a stake in making it accurate and fair.

A quotation illustrates the attitudes that lawyers and doctors have about these lawsuits. This comes from a 1961 book review by Dr. Bernard Diamond:

> In the malpractice suit, more than in any other social interaction, the physician and the lawyer are apt to be reduced to their respective caricature images. The physician is convinced that the lawyer's only motive is corruption and dishonesty, with a fat contingency fee as the reward for his jealous attack on the medical profession. The lawyer, on the other hand, may well consider the malpractice suit as a social duty, as a crusading exposure of the doctor as a pompous quack who was impotent to heal. Many physicians and a few lawyers look upon each malpractice suit as another battle in the great holy war between the two professions.

We don't need any more holy wars right now. So one of the goals of the Center is to reduce some of the tension, particularly from the doctors' perspective, and make for better medicine and for better trials. Now I'll turn it over to the Dean, who was instrumental in creating this Center.

Dean Joseph Silva: Thank you very much for extending me an invitation. I am a researcher, and I still practice medicine, and I still enjoy it. When I first

received your invitation, I felt pretty comfortable—and then I realized that you're all lawyers. Now I feel a little threatened!

The Center is an institution and program that I hope we can replicate in many medical schools throughout this country. Contributing to my interest is the fact that I also serve as the CEO of our health system. We have about 8,000 employees. I have 2,200 volunteer faculty, 500 doctors that are on the faculty full time, and about 700 residents. Our referral practice spans an area almost as big as Pennsylvania. We are a major resource for tertiary and quaternary care in northern California.

When I became dean five and a half years ago, I got very close to the reality of medical malpractice. We are mainly self-insured, although we do have coverage for suits that go over $25 million, and all five medical schools in the University of California system pay our costs as an aggregate; we support one another because we have one president and one board of regents. My malpractice bill in the last few years for our self-insured program has been about eight million dollars. That isn't bad, especially on a cost-per-faculty basis–but when I looked at our data, payments out in "bad baby syndrome" cases amounted to a disproportionate thirty percent of the total payments. So those cases have a large impact on medical centers.

The problem probably will grow as we have more and more uninsured American citizens who can't get access to prenatal care. It will be especially bad in areas where there is a large immigrant population that cannot qualify even for Medicaid or other federally funded programs. Women who don't have prenatal care come in with great risks.

My other reason for becoming involved in the development of this center is a personal one: My first grandson died; he was a "bad baby syndrome" case. My background is in internal medicine and infectious diseases; I have devoted thirty years to that, and I should know a lot of medicine. Following the death of this grandchild who bore my name, I realized that I really didn't know much. So much of medicine is built in silos; there are many silos and not a lot of cross-talk or interaction among them. In relation to "bad baby syndrome," we have placental pathologists, obstetricians, anesthesiologists, neonatologists, radiologists, all of whom have only pieces of knowledge about something that, unfortunately, is a common tragic disease in our society and across the world.

For these reasons, Don Fadjo and I decided to set up a conference to bring in the experts from academia. The Center grew out of the conferences. I cannot say that the Center is completely secure yet; we're in a free-floating state in a number of departments. A number have embraced the Center with warmth and interest, but a number of departments are still watching and wondering why we are doing this.

The main function of the Center right now, besides planning conferences, is to introduce our doctors in training to what happens when they are sued—and they will be sued; that's the state of America now. We teach them why the process exists and how to survive it, psychologically as well as physically. A few years ago, one member of my faculty described the first time he went into medical malpractice court. To convey how he felt, he described a scene from the movie *Gladiator*: The gladiators were down in the dark dungeons until all of a sudden they were taken up and tossed out into the sunlit arena with people yelling and screaming all around them; and from time to time the guards would turn the tigers loose. At the Center, we educate the young doctors so they are more prepared for the process and don't feel as if they have been thrown to the tigers.

Starting the Center took a certain amount of courage, but we have also had a lot of fun with it. We are now looking for more federal funding and will begin describing our work to other deans. I wanted to give it a couple of years before we publicized our experiment too widely, but now I think we can serve as a model to advance the science. That is important because if we can establish a good database, I think a lot of the cases will disappear, and the facts will speak for themselves. And other deans will be happy to hear that establishing the Center hasn't even cost us a lot, except for our own personal time.

Justice Morrison: An important part of our program involves "grand rounds," which is the medical term for an educational program, during which we stage mock trials and mock depositions, organized by Don Fadjo. These expose the doctors to what cross-examination is like and what the purpose of a trial is. We hope that they become more comfortable with the process and realize the importance of communication and documentation. One argument against this kind of program is that the time spent on this could be replaced by more time spent learning medicine. Is the trade-off worthwhile, Dean Silva?

Dean Silva: I believe it definitely is. We are in the midst of a reformation of education of physicians in this country, mandated by the over-arching Liaison Committee of the Council on Medical Education. We want our physicians to know how to communicate better, we want them to know sociology, we want them to know financial aspects of practice, and we want them to know the law that applies to their practice since it's an important component of our society. There are demands that we look at all kinds of areas that were not part of the old curriculum. Yes, there may be trade-offs—there are always more metabolic cycles or drugs or processes the students could learn—but no one is ever going to know all of medicine, and what we do know or think we know keeps changing. For years I've been telling our departing students or residents that

whatever they know at that time, if they don't keep reading or going to conferences, half of what they know will probably be wrong or out of date in five years. (And, of course, we don't know what part is going to become out of date.) In sum, we cannot teach them all of medicine anyway, and I think the substitution of these other areas in our curriculum has been very beneficial.

Justice Morrison: The idea and the spark for this Center came from Don Fadjo. How did that happen, Don?

Mr. Donald Fadjo: As someone who has had the privilege of representing families who have brain-damaged children, I came to the realization that many of the fine doctors I contacted to ask for assistance in evaluating cases didn't fully understand our medical legal system, even though they might have participated previously as expert witnesses or as treaters who had been called to testify. So about six years ago I contacted my distinguished colleague and good friend Dean Silva to ask whether he would like to get his institution involved in educational efforts in this area. We had just held a conference in 1997, sponsored by the American Bar, where we had over four hundred attendees. Justice Morrison was on our faculty. I told Joe that if we did do something with his institution, we would have to be sure it was something that would be credited to the institution as a success, not just a valiant effort. There was too much at stake because I didn't know of any other institution in the country that was doing anything like it, and we had been diligent in our search for such an entity.

Joe agreed that he wanted his school to become involved but said it would take some time because he would have to gain acceptance by the faculty. To make a long story short, the UC Davis School of Medicine co-sponsored, with the ABA, the conference we had in San Francisco in 1999, where we had around nine hundred registrants from six countries. Then we had our first grand rounds at the medical school in March of 2000, with a panel similar to the one at the San Francisco conference. We used the same fact pattern and faculty from the medical center in the same subspecialty areas that had participated in the conference. We had asked the faculty to read the transcripts of the conference proceedings and to discuss candidly among themselves, before the grand rounds, what their views were. We brought the literature up to date. The grand rounds were very well attended and, more importantly, enthusiastically received.

At that point the Dean graciously made an introduction to key faculty members, and we began the process of forming the Center. I am most appreciative of being given a clinical faculty appointment at the School of Medicine. It is a tremendous honor, and I will do everything I can to make sure the young

doctors leave their training experience understanding more about the legal process. We do not insulate them or immunize them; we do not do anything to keep them from being accountable for their conduct. One of the first things we tell them is that they will learn more about the litigation process by attending our grand rounds, but they will not be given any tools or devices, any deus ex machina, that will pull them out of harm's way if they do make an error that no reasonable or prudent physician would make. They cannot escape accountability, but they can be prepared for the process. The young doctors have come to these grand rounds in excellent numbers. That might not mean much, in all fairness, because part of their attendance is mandatory, but older doctors and people from other departments have attended, as well. What we are hoping to accomplish through our process is to begin a dialogue so that doctors do not believe that lawsuits are random, and so that doctors do not believe there is nothing they can do to avoid litigation.

Our primary focus is the Ob-Gyn department. Approximately seventy-five percent of the members of the American College of Obstetricians and Gynecologists (ACOG) are sued during their careers. On average, each is sued two-and-a-half times during his or her career, and approximately twenty-five percent are sued for events that allegedly occurred during their residencies. We impress upon them that this is serious. We emphasize that people are being sued not just because of bad outcomes but also because of negligence, and we try to disabuse them of the notion that plaintiffs' lawyers file a lot of frivolous lawsuits. We don't claim that there are no frivolous suits; of course that would be an absurd statement. We do tell them, though, that a lawyer can't continue to practice law successfully by taking on frivolous lawsuits, because those suits will be vigorously defended, and chances are that the lawyer will lose them, after spending a lot of money and a lot of time. We also tell them that if they care about the practice of medicine as much as they believe they do, they have to improve their communication skills. The dean and the judge and I have talked about this repeatedly. Part of it is written communication; if they don't write it down in a timely fashion, they will be hard-pressed to convince anyone after the fact that they did certain things, or asked for certain things to be done. Part of it is oral communication; if they don't communicate candidly with their patients, they will be much more vulnerable to litigation because they haven't established the bonds.

Some specialties are more at risk just by the nature of their interactions. Anesthesiologists don't have as much interaction with patients as most other specialists. The surgeon may not have the same interaction as a primary-care doctor. But we try to educate them about the risks that are avoidable. We put on mock trials in which we intentionally make the fact patterns rich, or target rich if you will, to stimulate a lot of debate. And we use their own faculty to

show how these areas are exploited in litigation, because that increases the impact. We tell the "students," "You will not be totally blindsided in a lawsuit if you come to the grand rounds." In brief, we take away the unknown, the mystery, and we tell them they have to be better communicators, they have to be diligent, and, most importantly, they cannot continue to have the feeling or attitude that they are being oppressed. On this point, Judge, will you please share what you said during the Mott Lectureship in November of 2001? This was a kickoff for our conference series.

Justice Morrison: The doctors were complaining to the Dean that the medical malpractice litigation is just a lottery for lawyers, and the doctors can get sued at random, and that it's all very unfair to doctors who are just trying to help people stay healthy and get over crises in their lives. I pointed out to them that, in California anyway, they have a privileged status under the law that none of the rest of us have; doctors have special rules, an important one being the $250,000 cap on pain and suffering damages that has been in place since 1978, I believe, and hasn't even gone up with inflation. We have various special laws that single out doctors and give them better treatment or better notice in all kinds of situations. The doctors had never thought about that. Sure, malpractice can be a problem, and it needs to be thought about and guarded against; but the doctors do get special treatment, and I think they feel a little better about the situation when they become aware of the fact that they have been granted this special status. The California legislation did seem to have a significant benefit in ameliorating the malpractice insurance crisis back in the 1970s, and I gather that California's law is being considered now as a model in other states that are experiencing crises in malpractice insurance.

Mr. Fadjo: Dean, when you get feedback from your faculty as to the role and content of medical education, aren't there constant tensions and competing interests with regard to this new curriculum? We want young doctors to be better able to understand the plight of the patient, not just to be a dispenser of medical knowledge. Isn't that part of what you're trying to do?

Dean Silva: Yes, that's a trend across the country. Physicians increasingly are being trained to be interactive. The solo flyers, the highly individualistic persons, the ones featured in a lot of movies and plays tend to be surgeons—but I'm going to steer clear of that! Considering the complexity of medicine now, doctors have to interact with everyone, and I mean everyone. Also, there is such a nursing shortage now that hospital directors are saying to some surgeons, "Take your cases somewhere else; I can't afford you. If you rip into our nurses, I can't get replacements." We are changing the curriculum from

straight lecture and memorization to active learning where the students and faculty work in small groups on problems facing modern medicine, and actually teach each other.

Half the time when I'm designing a new drug or diagnosing a disease or condition I haven't seen before, there's no answer in the literature. What I do is based on hunches and feeling, and I've been at it over thirty years now. I don't think the public really knows that—medicine is art as well as science—so you want a physician for the future who is very interactive with patients. E-mails and websites are becoming very common in our group practices now. There are whole services being developed where you consult with specialists without sending the patient. Medicine is changing at a very rapid rate, but it can be hard to put that into the curriculum because the attitude of the old guard tends to be, "I turned out pretty well; why change it?"

Mr. Fadjo: I would like to commend a couple of items to your reading. One is in the January 2003 "Green Journal" of ACOG, *Obstetrics and Gynecology*; it's a survey of a select subset of Fellows within ACOG about their knowledge regarding neonatal encephalopathy and cerebral palsy. The second is a new publication entitled *Neonatal Encephalopathy and Cerebral Palsy: Defining the Pathogenesis and Pathophysiology*, jointly sponsored by ACOG and the American Academy of Pediatrics. You can be certain that we're going to be faced with this latter document in our future litigation. It is ninety-four pages long and it has four to five hundred references in it. Someone who was on the task force just presented it in a capsule form at a D.R.I. meeting within the last week or so. We need to familiarize ourselves with that document; we need to look at the strengths and weaknesses of it; and, candidly, what we need to do is bring to the process as much objectivity as we can.

One thing that I think is important, whether you're going to a conference held by A.T.L.A., or by D.R.I., or by any group, is that you strive for as much objectivity as possible. That sounds obvious, but you want to take a look at the data, you want to look at the strength of the evidence. The way we're going to make a difference in this dialogue between our professions is to get away from shouting at each other and talking *at* each other, and to recognize that no one wants to have a brain-damaged baby result from a pregnancy. We need to figure out, first, what is preventable. I'm not talking about standard of care necessarily. I'm talking about determining what is physically preventable. The second question, then, is: If it is preventable, what is reasonable to expect a physician to do under the circumstances? When can the problem be determined? What interventions are possible?

One of the things we are going to try to do with the Center for Perinatal Medicine and Law is teach young doctors about these cutting-edge topics. We

want to stay on the cutting edge of the literature. We try to contact the people around the world who are writing the articles, to understand better what they are actually saying. And our hope with respect to the international conference series is that we'll continue to be able to attract world-class people to be on the faculty and to have a robust exchange of ideas.

Some of my brethren in the plaintiffs' bar—and I am a plaintiffs' attorney—had some interesting comments about the participation of our keynote speaker at the last conference, in 1999. Dr. Karin Nelson is the acting chief of neuroepidemiology at the National Institutes of Health. The child health and human development knowledge that she has is tremendous. I said to one of my colleagues, "You've read articles that she has written, you've read commentaries in which she has been quoted. Wouldn't you like to see her firsthand and actually hear her views?" The person responded, insightfully, "Yes, but I'd like to have someone ask her questions, not just hear a keynote speech." I think that's a valid point, and for the 2004 conference, which will take place in November in San Diego, we're going to have breakout sessions for plaintiffs' lawyers with people who are on the advisory committee, such as Bob Ritter and others, who are going to help us understand how the information that was presented during the plenary sessions could be used in practice. We will have similar sessions for the defense lawyers, and for risk management and claims executives. The key is the conversation, the exchange of information.

I'll be candid with you—I am awed by the responsibility of having any participation in these various undertakings. I am truly undeserving, and I don't say that out of false modesty. But I have a tremendous passion for this undertaking, and they know I have a lot of energy so they point me in the right direction, like the Energizer Bunny.

For the 1999 conference, we didn't have a specific numerical goal. Our goal was to have as many of the top people from around the world as possible attend that conference. We have the same goal for the 2004 conference. We want the leadership of different organizations from different countries to attend. We want these leaders to take the message back to their countries and then come back to the next meeting, whenever it is, and have a robust exchange of ideas. There is no inhibition or prohibition of any particular viewpoint. We just want to make sure that if someone is making a point, they have as much science to support it as is available.

There is one other thing I would like to say to you. You represent the best and the brightest in the profession; you are truly a special group. My hope is that you will say to your brethren, "We've had a running battle with the medical profession for years. It's not intentional, it's just a reality of life. Doctors don't view people that hold them accountable as people they want to join for lunch or dinner. But the truth is that good doctors are anxious about practic-

ing medicine for fear of being sued. Is that bad, is that good? We can debate that, but the important thing is this: let's demystify litigation." That what we do in our grand rounds—and we need the help of lawyers such as you. I truly find the grand rounds exciting because, as the moderator, I get to stand back and watch really fine attorneys who have tried cases for twenty-five or thirty years cross-examine witnesses and the judge rule on various motions. The young doctors literally sit on the edges of their chairs while they watch their faculty, whom they respect, being grilled in some pretty rigorous cross-examination. We even have residents participate in various proceedings. They all know that it could be real, and each of them could be the one on trial.

Justice Morrison: It is interesting to see how the students react when the faculty, acting as expert witnesses, are cross-examined. It's quite a revelation when the students realize that these nearly godlike figures can be brought down and asked real questions—treated not disrespectfully but also not deferentially. They are treated as witnesses. The process is eye-opening and probably a little stress-inducing at first—for the students as well as the faculty—but eventually, as they become familiar with it, they reach a certain comfort level, or so we hope.

From my neutral and detached position as a judge, I've been impressed with the medical center's program and with the fact that they've made Don Fadjo, a plaintiffs' attorney, an associate clinical professor. I think that says a lot for the school, for Dean Silva, and for Don. There is so much distrust in this area, and they have been able to bridge that. I think this has enhanced the program significantly.

Dean Silva: The faculty are carefully selected. Most of them champ at the bit to do it because they do have substantial egos and are recognized as experts in their respective fields. Beyond that, however, I think they have a genuine interest in fostering this program. It is not a picnic for them, because the questions are tough. They're meant to be tough and rigorous, because that's crucial to the education. But our faculty members have found that they can carry what they learn back into their practices. One of them has said that he has done a fair amount of malpractice work, on both sides of the problem, and he has used a lot of these cases in his teaching, because after you do it long enough, you start seeing patterns within the silos within medicine. That's important when you're writing textbooks or educating doctors. There's a ripple effect for which I don't have quantitative data, but I think it is definitely occurring.

Mr. Fadjo: There are two more articles I commend to you, and I apologize for the obvious bias regarding the first one. In the current issue, the March 2003 issue, of the "Green Journal" *Obstetrics and Gynecology*, there is an arti-

cle in which Justice Morrison, I, and others from the medical center discuss our inaugural efforts in teaching malpractice litigation in a mock trial setting. We have other articles that are currently under submission, about the international conference series and other projects. In a nutshell, what we believe is important is that the dialogue continue. When we have faculty at these mock trials and grand rounds, it is not a casual undertaking. We've had seasoned faculty members disagree with each other with some vehemence, and we think it's good for the students to see this. We want the students to understand that this is a very important process. Litigation is not something that's going to go away, and accountability is part and parcel of our current societal fabric. They need to understand how the process works and what they can do to be better doctors by communicating more effectively with their patients.

The second article I want to mention now is in the February 26, 2003, issue of JAMA, and it's entitled "Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors." In a nutshell, the question is, don't physicians have a moral obligation to tell patients when medical errors have been committed, and will that eventually be legislated as a legal obligation? Then the next question is, how do you define a medical error; does there have to be harm associated with it? Finally, what is the physician going to say with regard to whether there's going to be remedial action and whether the physician has implemented steps within the institution, through the dean or through the various oversight committees, to try to minimize the recurrence of such errors? Patients that were surveyed wanted this information.

At this point, we'd love to open the floor for questions. We'd like to hear anything you would like to know about this from these two very distinguished individuals. I'll make sure the questions flow to them.

QUESTIONS AND ANSWERS

Q: Because of your unique role at the Center and because of your genuine effort to gather the evidence-based information, do you realize that your Center could offer a great "stamp of approval," if you will, or stamp of authority if you published for the rest of us information that you know to be accurate, or conversely, that you know not to be accurate? Do you see your role eventually to include either endorsing or critiquing literature and providing assessments of its value? Or do you see your role as more procedural, in educating successive groups of students and residents about litigation and the real world? How expansive do you see your role?

A: (Dean Silva) That's a great question. Frankly, Don and I are sort of "Brailling" the future. Right now I'm in a steady state; we're consolidating what we've done. This is still a quite controversial program I've set up with

the Center. The courtroom simulation is good because we're reaching a comfort level now with having lawyers come into rounds and having a lawyer as a faculty member. (Actually, Don's the second lawyer to have a faculty appointment: One of our ethicists used to practice law in Colorado, but he doesn't do it now.)

We have fond hopes for the future, but we first have to develop funding; and to go to foundations for funding, you must be settled internally and have all your people on board, with no animosity. We want this to be an enduring product.

In our longer term plans there certainly is a reference library. Actually, it is easy to develop a library now; all it takes is one computer and a devoted staff. We'll probably start that soon. I think you are pointing the way toward a natural development from there, and I appreciate hearing about it. If you have interest in it, please contact me.

The "Center" label, by the way, already has allowed us to draw experts from around the world who generally don't want to touch this area. They're working in a lab or model and don't want to get involved in controversy. We call them and describe our Center, and emphasize that it is meant to be evidence-based. It's amazing how quickly the barriers fall.

(Mr. Fadjo) I would like to add a comment or two. The question is not only insightful, but also cuts right to the heart of the issue. Will there be a database that has sufficient reliability to make us comfortable with "endorsing" it for use in litigation? We want our international symposia series and other programs to bring together the top people from around the world in different disciplines to debate the issues in their fields. Hopefully, out of that experience we will gain increased comfort with critiquing the literature. At the present time, candidly, no one at the medical center or in any one subspeciality feels that comfortable.

I want to give you some idea of how complicated this is. We put a pediatric neurologist, a pathologist, a neonatologist, and a neurologist together on a panel, and this is quite a compliment to the institution because I don't think that this same assemblage had ever been on a single panel discussing a single case before; that is not part of the traditional medical school experience. They enjoyed it, and it was fascinating—but what was most fascinating was seeing how differently they viewed the same data. Bringing all of that together into a coherent position will not happen overnight.

In sum, your point is one that requires very careful and thoughtful response. We hope to build momentum toward that day when we can give, if not an imprimatur—that's far too important a concept—at least a statement to this effect: "Here's the evidence that we find from all the top people around the world, and this is how it can be evaluated." But for the immediate future we're just going to do our best to continue to build.

Q: First, I want to applaud your work. I have occasionally encountered residents sitting in on depositions, for example, but attempts to educate doctors about these procedures seem to be haphazard in most parts of the country. I have two questions. Is your program a required course—or merely an occasional program? And have you worked with other medical schools to try to set up similar programs elsewhere?

A: (Dean Silva) It is not a regular course; it is something that we do periodically, because it takes a lot of work. That's the difficulty; it's manpower related. But it has a big impact. It grows and ripples through other departments. For example, even though it's called Perinatal Medicine and Law, some of the cases have gone into neurosurgery and medicine. The other departments are really hungry for it. These periodic programs are geared to the residents. At the medical student level, we have given a couple of lectures on the basics of the procedures, what a tort is, why there are lawsuits, and that kind of thing. The accrediting agencies now demand that every medical student have some amount of instruction devoted to this.

Where we're going in the future depends to a certain extent on a separate group that approves residency programs in this country. This is an umbrella organization of most of the professional medical societies, and it is called the Residency Review Committee. They have announced that in the next three to four years we're going to have to show that our residents are trained in certain core competencies. They don't care what field the resident is pursuing—pathology, radiology, neurosurgery, family practice—each one is going to have to demonstrate competency in these core areas, and that means through a test mode, not just attendance. There are six of these core areas that every program must cover, and we have eighteen thousand residents in this country (maybe somewhat fewer now that the international medical graduates are having trouble getting in), so this is a big job. Medical-legal issues are included in the sociology core. In other words, we're seeing essentially a prescription for the education of the profession, not only at the medical school level but at the level of the resident. Reiteration will be important. That addresses part of your question.

In terms of trying to get other schools to adopt similar programs, I do plan to work with at least the other schools in the University of California system, but I have to tell you that I really went into this walking on eggs. If I didn't enjoy a good relationship with Don, I would have thrown him out years ago. I didn't need more work, and I can generate enough controversy just be sending out an e-mail on my ordinary medical school business on a given day, so I didn't need to drag my institution into the scary legal arena. For the betterment of the profession, however, I saw that it was very important. I have also participated personally in medical malpractice suits, and I've seen both the good and the bad. Be that as it may, in most medical schools the faculty con-

trol the curriculum, which is why we have to consolidate our faculty and get them on board. We, like all schools, still have some internal political tensions. Once our faculty get locked in and our Center is an enduring product, we will be in a position to put a descriptive out to the medical schools of the University of California. The California Medical Association actually would like to see this. Eventually, we're going to present something to the association of medical school deans in this country, the AAMC.

Q: Have you given any consideration to post medical school—in other words, to extending your programs to doctors already out in practice?

A: (Dean Silva) We have professional societies, just as you do, where they'll bring in experts to tell them the dos and don'ts on how to avoid medical malpractice, but nothing more than that. Most physicians go to hospitals for their CME credits throughout the country, and the hospitals occasionally put on medical legal programs, but it is an infrequent event, and that's a problem. You know the depth of the data you're dealing with in malpractice litigation, even if you limit yourself to one area; an occasional program cannot cover it. The problem for the doctors, though, is that there is a huge database they have to learn all the time—new basic knowledge about their field plus this new drug and that new procedure, so there's a density factor.

(Justice Morrison) We did put on a program one Saturday morning for the local Ob-Gyn association in Sacramento county; it was essentially a repeat of one we'd done in grand rounds. There was interest in it, and it seemed to be well received.

Q: Are you doing any more than giving doctors a "warm and fuzzy" feeling about the litigation system and how it works—which is certainly a laudable undertaking? Are you going beyond that, to look at the causes of some of the problems, such as cerebral palsy, and the avoidability of the problems in the first place?

A: (Dean Silva) That's why you have a center; we have a number of centers that are in stages of evolution. Generally, a center starts with an educational base and then moves into data retrieval. We do have some faculty who are working on components of this; but that part of our function will take time. It's hard to explain to the layman without sounding as if I'm talking down to you, but cracking a problem in science takes a lot of time. Let me just use one example, something many older lawyers know all too well—ulcers. Now we have great drugs, but cracking that nut took about twenty years of hard research on physiology and gut mucosa. At first, surgeons developed all sorts of wonderful techniques, but we had to wait for concepts related to receptor sites on cells, and then we had to wait for new chemistry to design

the drugs. Now we have eight or nine products that you hear advertised all the time on television. They resulted from twenty years of hard work by thousands of people. We would love to come up with easy ways to end all of these problems right now. Unfortunately, science doesn't work that way.

THE CENTER FOR PERINATAL MEDICINE AND LAW†

Donald E. Fadjo*
Fred K. Morrison**
Joseph Silva, Jr.***

Introduction by Fellow Robert Ritter: We are said to be in the midst of a medical malpractice insurance crisis in the United States, an unfortunate cyclical phenomenon that, among other things, heightens the mistrust and misunderstanding between the trial bar and doctors. One of the more complex and contentious areas of medical malpractice litigation involves cases dealing with injury to the fetus and the newborn. Our panelists have created two pioneering programs to facilitate rational and meaningful dialogue between lawyers and doctors, and to identify the factors that prove medical malpractice in a perinatal injury case as well as those factors that tend to rule out negligence in that tragic situation. Dr. Joseph Silva, Dean of the medical school at the University of California, Davis, and Donald Fadjo, a practicing plaintiffs' attorney, have chaired or co-chaired two international symposia sponsored by the American Bar Association entitled "The Experts Analyze Brain Damaged Baby Cases." The faculties of these symposia have included renowned experts from around the world in the areas of obstetrics, placental pathology, perinatology, radiology, and other subspecialties in fetal and pediatric medicine. The second symposium, in 1999, was attended by more than eight hundred physicians, lawyers, and other professionals from six countries. The third will be held in the fall of 2004. Based upon the success of these landmark meetings, and in order to advance their purpose, Dr. Silva and Mr. Fadjo in 2001 established a unique multidisciplinary, educational entity at the UC Davis School of Medicine called the Center for Perinatal Medicine and Law. This cutting edge program provides a forum for intelligent study by doctors and lawyers working together to better address the difficult issues involved in disease and injuries to babies. Justice Fred Morrison, of the California Court of Appeal, Third Appellate District, serves as a board member and advisor to the Center. Justice Morrison, Dr. Silva, and Mr. Fadjo will now

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† Panel discussion at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 11, 2003.

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SAUDI ARABIA: FRIEND OR FOE?†

Wyche Fowler, Jr.*

Editor's note: Toward the end of his speech and in the question-and-answer session that followed, Ambassador Fowler addressed the then-impending war in Iraq. Although these remarks are now dated, the perspective and possible consequences remain pertinent and provocative.

I have a thesis this morning: Our battle against terrorism and all the rage and chaos of the Middle East do not represent, in my opinion, a battle of civilizations or even a clash of religions. In broad encapsulation, it is a clash within Islam, between the religious moderates and, for lack of a better term, the militants or the extreme fundamentalists of Islam. Now I need to give you a definition: In my opinion a Muslim fundamentalist is one who rejects modernity, modernism in almost all of its manifestations. He thinks the troubles of this world are not from insufficient modernity but from excessive modernization. In other words, the struggle is not so much against a single Western enemy but against the westernizing enemies in his home and in his region. He wants to destroy the laws and institutions, social customs, and democratic traditions that the West has introduced. Osama bin Laden announced his plan and his determination to destroy these westernizing influences and to return to his Holy Grail, to mix religious metaphors, which was the Islam of the seventh century when Mohammed received the dictation from God.

That is the basic conflict. Stemming from that are a couple of resentments in the Arab world, and a few specific grievances about the United States and our allies that emanate from that part of the world. My observations, which I will try to report to you as accurately as possible, are based primarily on my experience in Saudi Arabia, but what I say about Saudi Arabia could be true in Qatar and the U.A.E. and probably Indonesia and any other predominantly Islamic country.

In Saudi Arabia protecting the family and protecting the culture against modernization is the number one priority. In America, as you know, the phrase "family values" has become a sort of political touchstone, and both parties try to claim being the party of family values; but in Saudi Arabia the

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family truly is *the* critical social unit and the source of one's identity, far more important than one's tribe or nation. All social policy, I submit, as well as the natural instinct in these cultures is to preserve the traditional family—the mother at home as nurturer and manager of the household, grandparents and cousins as educators and babysitters, and all a nucleus not only of love but of security. To change this family foundation even slightly is to risk, in their minds, the Western experience when the mother works out of the home, which is divorce rates over fifty per cent, juvenile delinquency, soaring rates of out-of-wedlock births, sexual permissiveness, and even, under our first amendment, a high toleration of pornography. All of these are thought to be, in the conservative Islamic mind, a direct result of the breakup or disintegration of the family, usually precipitated by the mother leaving the traditional role as nurturer in the home. We in the United States would fight, I believe, for the emancipation of women. Islamic societies are fighting for the homebound, home-led role of womanhood. The first resentment, then, is of the negative impact of westernization on the family unit.

Another resentment worth fighting for has to do with the relationship between religion and law. In our country we believe passionately in the separation of church and state. In Saudi Arabia and in most Islamic countries they cannot conceive of such a separation or of giving preeminence to civil society over the laws of God. Why would you do that, and how could you still consider yourself a religious nation? In Saudi Arabia they don't have a constitution; the *Koran* is the constitution. The word of God is the final authority governing all civil society. A couple of years before I got there, King Fahd, of Saudi Arabia, even changed his name. He is no longer King Fahd, he is Fahd, Custodian of the Two Holy Places. He is referred to, in English and Arabic, as Fahd the Custodian. Why? Because God sent his messenger, Mohammed, to be born in Mecca and to die in Medina, and those two holiest places are in Saudi Arabia. The king is responsible for protecting and taking care of those places, not just for the inhabitants and citizens of Saudi Arabia but also for the 1.2 billion Muslims in the world, who are required, if they are financially able, to make the Hajj, the pilgrimage to Mecca, at least once in their life. Keep that in mind when you hear about this terrible thing called "Wahhabism," which basically is the most conservative interpretation of Islam. We think it is crazy that you can't get a drink in a hotel. They take seriously the custodianship placed upon them by Allah, and they don't want any dirty bookstores, or bars, or restaurants to foul the pristine atmosphere of their holy places to which two million Muslims travel every year.

I will move more quickly through some specific grievances against the United States and its allies. The fundamentalists don't like the stationing of troops in Islamic countries. That places infidels on holy ground and introduces

Western influences. Until recently, in Saudi Arabia the king was always able to defend America and to point out that we were invited there. He could say to the Iranians and to the Qataris, "I don't want to hear any bad things about Americans. The Americans were the only people who came when we asked for help in fighting Saddam Hussein, in repelling him from Kuwait. Then they went home with no territorial aggressions, no colonial aspirations." Indeed, for a long time America was the beacon of friendship in the Arab world because it was our early missionaries and educators, beginning at the turn of the twentieth century, that went to the Arab countries, built schools and hospitals, and then went back home without demanding anything. We built the American University in Beirut, the American University in Cairo, almost every hospital that's over fifty years old—and all are flourishing because of the good work of the Americans. We got enormous credit for that; but that credit has worn thin. Now Osama bin Laden says the stationing of troops in Saudi Arabia is neocolonialism, and conservative Muslims respond to that.

They are mad about oil and energy policies. I could talk a long time about that, which I won't do, but I will tell you that in my opinion, what's happening now is not about oil. All we have to do is remove the sanctions against Iraq, and we could have all the oil we want. We don't have to go fight to conquer it or risk what will happen if we try to take over the oil industry in Iraq.

The greatest problem that we have now, the greatest grievance that overshadows oil or energy or the stationing of troops or even the promotion of democracy, the issue that has fueled the hatred that is now directed against the United States is our failure to understand and help resolve the Israeli-Palestinian conflict. In the eyes of the Arabs, America in the last two years has lost its honest broker status in that conflict, and, by refusing to engage in a peace process, has actually joined the Israelis in fighting the Palestinians. This perception is exacerbated by twenty-four hour satellite television. In Israel the television shows only the innocent Israeli victims of Palestinian bombers. In the Arab world the television shows only American aircraft, flown by Israelis, blasting away at Palestinian homes.

I am helping Coca Cola fight an Arab boycott against Coke. President Mubarak of Egypt has said, "This boycott is not by the government. It comes from women and children." And then he immediately corrected himself and said, "Actually, it is coming from the children. They see this war on television twenty-four hours a day, and they pull the Coca Colas out of the refrigerators and throw them away, and they say to their mothers, 'We don't want any Cokes anymore, and we don't ever want to go to McDonald's again.'" Just as most Jews worldwide, whether they are religious, observant, or secular, see American foreign policy and its implications through the prism of Israel, or the prism of respect for the existence of Israel, most Arabs and most Mus-

lims see American foreign policy through the prism of the Palestinian cause. Americans fail to recognize what I call the windows and mirrors syndrome. We in America see American foreign policy through the window; we interpret world events looking out through the window. We don't perceive the mirror effect of how others see our policy and the effect of that policy—in this case, our refusal to get between the Israelis and the Palestinians, which is the greatest carnage going on in the world right now.

Crown Prince Abdullah is the ruler now because King Fahd is ailing, as you know. Abdullah came to Crawford, Texas, to see the President last year and brought with him a peace plan for Israel-Palestine. This plan had been endorsed by all fifty-seven members of the Arab League, an incredible political accomplishment; the Arab League never agrees on anything. All fifty-seven recognized Israel's right to exist. They said Israel had to get back on its side of the 1967 line, but they recognized for the first time Israel's right to exist and offered a normalization of relations immediately. And I emphasize that this was brought by Saudi Arabia. It wasn't brought by Israel's peace partner Egypt, and it wasn't brought by Israel's peace partner Jordan; it was brought by the Saudis. (It is also the Saudis who are writing the constitution for the Palestinians, complete with all of the guarantees drawn from our constitution.) We did not touch this peace plan.

Prince Abdullah was honest with the President. He said, "These are the grievances and the resentments that have to be dealt with; please deal with them before you go off bombing Iraq. You have to finish the job in Afghanistan [we have a long way to go before we have stability in Afghanistan] because if you walk away without achieving a stable democratic government there, it's going to become an even greater haven for terrorists. Secondly, you have to get between the Israelis and the Palestinians. At least get a peace process going to give people some hope."

This brings me to Iraq, where war seems imminent. In view of what I have told you, is invading Iraq the best way to aid the moderates in their battle against militant fanatics in that part of the world? Is it the way to fight terrorism, or could it cause more terrorism? Is democracy a realistic hope in Iraq? It has no history of constitutionalism at all. Can we prevent the breakup of Iraq? The United States has told everyone that we will not allow the breakup of Iraq; we are not going to allow an independent Kurdistan; we're not going to allow the Shias to establish their own state, or Turkomen. But what if the Kurds, a week or a month or a year after our successful military operation—and I have no doubt that it will be successful—declare an independent Kurdistan? Are we going to go fight the Kurds in the north and tell them they have to be a part of the democratic federation in Baghdad? I don't think so. As you probably know, the more militant or fundamentalist Shias in the south have a history of taking

not only their religious instruction, but also their political marching orders from the Iranians, and there already are Iranian soldiers in northern Iraq ready to get into the battle with the Turks and the Kurds. And even if the Iraqis do not fight and throw down their guns, and welcome us as liberators, and we're spared killing a lot of people and losing our own grandchildren, you end up with the witches brew of horrors for the Arab and Muslim world: an Israeli occupation in Palestine and an American occupation in Iraq. That was the prediction of Osama bin Laden, which is what got him started, which is what got him kicked out of Saudi Arabia, which is what made him a terrorist. And therein lies the danger, not only for that part of the world but also for us.

There is a role for lawyers in this, I submit. A play called *State of the Union* won the Pulitzer Prize in 1946. In one scene the fictitious president has had a long day and is trying to go to bed. As he's going up the stairs, an aide runs in to say, "Mr. President, before you retire there are a bunch of southerners that want to see you." Seeing the scowl on the President's face, the aide adds, "Please, Mr. President, see them, they can deliver a lot of votes." The wife of the President turns to her husband and asks, "How do you deliver the votes of a free people?" The President replies, "My dear, whenever people are ignorant or prejudiced or lazy, they are never free." As lawyers, as upholders of the law, we must examine how much of our policy is based on ignorance of the region and its history, prejudice of those of different faiths and traditions, and laziness, or impatience to do something quickly even if it's wrong. If we act without conducting that self-examination and without speaking out about it, it is not only the citizens of Iraq whose rights are in jeopardy but also our own. We must examine how the rule of law applies at home as well as abroad.

QUESTIONS AND ANSWERS

Q: To your knowledge, does anyone who has the ear of the President have the background and knowledge you just shared with us?

A: I'll answer you honestly—I don't know. I know what everyone knows, which is that regime change in Iraq has been advocated ever since the last Gulf War by Mr. Cheney, Mr. Rumsfeld, Mr. Wolfowitz, Mr. Perle, and others—openly advocated in many articles as the best way to free the region of the malice of this unpredictable dictator and also to set off some kind of domino effect of democracies in the area. When President Bush was elected these people were put in power and influence, and the President has obviously accepted their position.

A former ambassador to Saudi Arabia said a long time ago, "Hope is a very good companion but a very poor guide." And though we all hope and believe that democracy is the best vehicle and the finest opportunity for

human expression and choice and freedom of decisions, it cannot be imposed. Of the fifty-seven members of the Islamic Conference, Turkey is the only democracy as defined by our State Department criteria (independent judiciary, elected parliament, basic human rights in their constitution), and Turkey voted not to join this war. In so doing, they turned down an offer of an enormous amount of aid from us. Why? Because of the kinds of considerations I have mentioned, the unintended consequences of this mirror effect that we do not understand.

Q: I have two questions. What are the risks that the weather and sandstorms will block our military? Does Iraq have weapons of mass destruction, and if so, where are they or how do we find them?

A: I think too much is made of the weather factor. Yes, the storms blow and it's uncomfortable, but I am told by our military that our equipment will not be affected by the sand or heat The greater effect will be on our troops, but if we end up having to fight in the streets or door-to-door, we're in trouble anyway.

Regarding weapons of mass destruction, the administration now admits that Hussein has no nuclear weapons. (By the way, suppose we do succeed in establishing democracy in Iraq. One of the first things a democratically elected government of Iraq may do is build nuclear weapons. Why wouldn't they? All their neighbors have them. That was our whole Cold War strategy with the Russians. If their neighbors—the Israelis, the Indians, the Pakistanis, and now the Iranians—have them, it's in the interest of their people that they are representing democratically to build nuclear weapons for counterbalance.) Chemical and biological weapons are a different matter, and I'm sure they've got them somewhere, but this is another area that shows our failure to understand the Arab perspective. The Arabs are getting very tired of our telling them whom or what they ought to fear. They know that Saddam is eight thousand miles away from us and can't hurt us with chemical or biological weapons. We claim that he has these terrible weapons of mass destruction that he can use on his neighbors. They say, "We don't think so. He had his chance in the Kuwait war, and he didn't use them against us. He used them against his own people, but he didn't use them against us. Why? Because he knows that if he does use them against a fellow Arab country we Arabs will go wipe him out; we won't need your help." In brief, in my opinion, chemical and biological weapons are not the problem. The problem is all those other issues that I already discussed.

BOOK REVIEW

LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION, BY WALT BACHMAN†

David R. Normann*

Editor's note: In his Law v. Life: What Lawyers Are Afraid To Say about the Legal Profession, *published eight years ago, Walt Bachman provided a cautionary description of the practice of law for the benefit of those at the threshold of the profession. Given the resurgence of law school applications, David Normann's review of the book seems as timely now as then. It also provides food for thought for those of us who are mature in the profession.*

The format of the book's title casts it in an adversarial light. However it is not a critical exposé of the law; rather, the author is concerned with the legal profession and its effect on those who are involved in it.[1] The book's jacket makes this clear by proclaiming "what life is really like in the profession everyone loves to hate" and referring to "the 'moral neutering' imposed by a lawyer's ethical duty of advocacy."

Readers will find it difficult to question the author's knowledge of his subject, for, as he explains in the book's introduction, his has been a diversified career since graduating from Stanford Law School in 1970.[2] There is a bit-

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[1] The book is addressed, primarily, to prospective law students and, secondarily, to those already in law school and to young lawyers. Bachman's concern is that the targeted readers tend to choose a career based on false impressions inspired by the media, which unrealistically portray the practice of law as glamorous, providing instant power and wealth, but ignoring the realities. While critics will argue that he overstates the case, undoubtedly many lawyers will agree with much of what he states. I have taught the course in ethics (The Legal Profession) for several semesters at Loyola, which is required in the first year. It is painfully true that students come to law school without insight into, or understanding of, the legal system, how it works, and what will be expected of them in the future. Once the idealistic dream ends and reality sets in, they are burdened by investments of time, study, and money, which too often are beyond the point of no return.

[2] W. BACHMAN, LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION 5 (1995). Mr. Bachman began his career as an associate in a large Minnesota firm, which he left after a short while to form a small, fledgling practice with two other lawyers. *Id.* at 6. In 1976, he accepted a position as chief prosecutor in cases involving lawyers' ethical violations. *Id.* at 9. Thereafter, he became a criminal prosecutor, but returned "full circle" to become a partner in a large Minneapolis firm. *Id.* 10-11. Today, he devotes his time to teaching and writing. *Id.* at 12.

tersweet tone as he acknowledges being the beneficiary of the many satisfactions and rewards provided by his practice, while simultaneously reflecting on those matters as revealing "[a] gaping chasm [that] exists between the image and the reality of lawyering in America."[3] The chapters that follow confront that reality—"lessons . . . I wish I'd learned in law school, but didn't."[4]

The author presents his thesis in straightforward, precise phrasing, condensing his reasoning into specific "lessons," at times with a tongue-in-cheek approach, but more often with austere seriousness. Thus, Lesson One: *"Though the risks and consequences of a legal dispute are more dire for the client, it is often the lawyer who gets the ulcer."*[5]

Bachman argues that lawyers are unique candidates for stress, with its harmful physical and emotional consequences, because they bear responsibility for the client's fate but yet are unable to control the many matters that can be disastrous to the client.[6] His personal experience in the practice of law taught him that clients can usually bear the burden of defeat with less trauma than their counsel.[7] Hence, he concludes that "the practice of law today must be viewed as a high-risk profession."[8]

Many of the same reactions to stress are responsible for lawyers' ethical violations, particularly in the context of neglect of clients' business, as he painfully observed while serving as the prosecutor of such cases.[9] The reader leaves "Lesson One" with a sense of pity for those ensnared by their inability to effectively deal with the real causes of their failures. In a profession so maligned by public opinion, it is interesting to note that when viewed from within by one of its own, there are revealed forces at work that can undermine the most stoic personality. This should not be interpreted as an excuse for aberrant behavior, for, as we shall see, Bachman does not spare the rod when exposing the need for reform in his profession.

Perhaps like many law students, Mr. Bachman entered law school with altruistic visions of service to others.[10] After admission to the Bar, he began active practice and quickly learned the lawyer's paramount duty of fidelity to one's client.[11] Zealous representation of the client's cause is demanded, which often means the need to inflict harm on others, and this is ethically

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[3] *Id.* at 13.
[4] *Id.*
[5] *Id.* at 20.
[6] *Id.* at 22-23.
[7] *Id.* at 19. "It seems to be part of the human . . . condition that the burden of responsibility for preventing something bad from happening, especially to others, is often worse than the painful occurrence itself." *Id.*
[8] *Id.* at 22.
[9] *See id.* at 23-24.
[10] *Id.* at 30.
[11] *Id.* at 32.

driven.[12] Herein lies the root of the nonlawyer's negative perception of the profession. As Bachman states, "Ironically, the aspect of lawyering most repugnant to nonlawyers flows from the very strength of the profession's ethical duty to help the client."[13] Hence, Lesson Two: *"Law is the only learned profession in which one is ethically obligated to hurt people."*[14]

The duty of zealous advocacy weighs heavily on the author. The legal axiom applies to all, irrespective of guilt or innocence, saint or sinner. Bachman asserts that advocating a repugnant cause, or hurting an innocent adversary, invariably burdens every lawyer at some point in his career.[15] He believes that lawyers rationalize this aspect of their endeavors, claiming that they are driven by the system and that somehow a just result can be expected from the keen competition between opposing counsel. However, the public sees it otherwise, which deepens the gulf between the way lawyers view themselves and how they are perceived by those outside the profession.[16] Surely, the time is long overdue for a hard look in the mirror—to "see ourselves as others see us."[17]

Bachman cites disturbing statistics concerning the incidence of depression in law students. He notes that between three percent to nine percent of persons living in the industrial nations of the world suffer from depression, whereas the rate for law students is an alarming seventeen percent to forty percent.[18] Significantly, the malady for students prior to entering the study of law is consistent with normal rates, but statistics reveal that the high percentage in law students extends into practice.[19] The author concludes, *"Law school depresses students through gloomy immersion in the risks of life, the glorification of dispute, and a process of moral nuetering."*[20]

Bachman focuses on the "case method" study of law, particularly the first-year course in torts.[21] He hypothesizes that without realizing it, the law student's mind is being transformed to believe that much of life is an accident waiting to happen.[22] Gone are the carefree days of normal activities taken

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[12] *Id.* at 36.
[13] *Id.* at 34.
[14] *Id.* at 36.
[15] *Id.* at 37. "The helping mandate of the legal profession enshrines the principle of an essentially amoral dedication to obtain the best possible outcome for the client, even at the risk of hurting a more deserving adversary." *Id.*
[16] *Id.* at 41.
[17] O wad some Pow'r the giftie gie us
To see oursels as others see us!
Burns, *To a Louse, reprinted in* W. NEILSON, ROBERT BURNS 274, 275 (1917).
[18] W. BACHMAN, *supra* note 2, at 50-51.
[19] *Id.* at 51.
[20] *Id.* at 52.
[21] *Id.*
[22] *Id.* at 53.

for granted as safe and secure, now replaced with an expectation that no matter how carefully one plans, something will malfunction, with potentially disastrous results.[23]

His second point—the glorification of dispute—stems from being taught "to think like a lawyer," the standard for reasoning planted firmly in students' minds from virtually the first day of law school.[24] The author views the effect of this process as "the development of a critical skepticism about any proposition, no matter how seemingly straightforward."[25] In sum, law students are trained from the earliest days of their studies to dispute almost all assertions by others.

The third contributing factor to depression in law students—the process of moral neutering—evolves from their training to become advocates.[26] Students learn to represent clients, not causes.[27] They are required to argue convincingly, with apparent utter sincerity, in support of positions in which they do not believe.[28] The student is not graded on whether his argument is morally right or wrong but, rather, on his analysis of the issue and his ability to persuasively assert the position that he has been assigned to take. Gradually, without awareness of the transformation in his mode of thinking, he is "distanced from personal values, from the very precept that such values are paramount."[29]

As noted earlier, in each chapter of his book, Bachman states his thesis in the form of "lessons" that he did not learn in law school. Perhaps the most disturbing is in the chapter titled "A Lawyer's Dual Life," where the lesson is couched in a humorous vein, but quickly turns to a serious discussion:

> *Aspiring lawyers raised in psychologically healthy families face more obstacles in law school and their careers than those raised in dysfunctional families. Personal traits learned in healthy families,*

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[23] *Id.*

> The study of torts . . . is necessarily an over-exposure to the graphic and ever-present risks of living. . . . The first teaching of law school, therefore, is to approach life with greater apprehension, with a heightened sense of all that can go wrong. A legal education dampens the spirits of the bold and can virtually paralyze those already disposed to be cautious.

Id.

[24] *Id.* at 54.

[25] *Id.*

[26] *Id.* at 56.

[27] *Id.* "[L]aw school seeks to enshrine the virtue of the professional advocate who zealously furthers the cause of even a morally abhorred client." *Id.*

[28] *Id.*

[29] *Id.* at 57. Critics will argue that the author overstates the case. Perhaps so, but this reviewer has observed through years of law practice that trial lawyers often are disposed toward the notion, "I can believe anything."

> *such as honesty, sharing, open communication, and trusting, are dysfunctional in the practice of law. Over time and with much practice, psychologically healthy people can learn new skills to offset their personal traits, so they can achieve a successful legal career.*[30]

The author attempts to make his point by examining several character traits. Candid disclosure wears different faces when representing a client in the practice of law as distinguished from interpersonal relationships.[31] The skillful advocate will fervently present evidence that supports his client's case, while ordinarily not revealing those matters that undermine it, relying on ethical rules of conduct that require his adversary to bear the burden of discovering adverse facts.[32] In contrast, communication in personal relationships is expected to be forthright and open, admitting to faults and weaknesses. Bachman states his premise bluntly: "An adversary presentation by the most ethical lawyer, when analyzed in the parlance of personal relationship psychology, would be taken, at best, as a collection of half-truths, if not utter falsehoods."[33]

Bachman argues that while mutual trust is essential to healthy human relationships, lawyers—particularly trial lawyers—are motivated to be distrustful of others—to question every statement, probe every assertion, and analyze every document in search of an opportunity to discredit.[34]

The author sees successful advocates as often being skillful at outwitting others, such as by the exploitation of a personality weakness in a truthful witness, which makes the witness appear surreptitious when testifying.[35] A nervous twitch, a hesitant reply to a question—all enhanced by the tense drama of the courtroom—are pounced on by cross-examiners to portray the adverse party, or witness, as unworthy of belief. Bachman believes that these talents are acquired early in life, long before law school,[36] perhaps, for example, by the child who observes a vituperative, abusive father manipulating his wife's passivity until she feels responsible for his violence. "The lesson that one's own purposes can be served by maneuvering another person into

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[30] *Id.* at 77. Such vicissitude in values, if true, causes one to ponder whether students from healthy backgrounds might qualify, in law school, for special accommodations as disadvantaged under the Americans with Disabilities Act!
[31] *See id.* at 74.
[32] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994). The official comment to the Rule states, "Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party." *Id.* cmt. 15. *But see* FED R. CIV. P. 26 (requiring voluntary disclosure of information).
[33] W. BACHMAN, *supra* note 2, at 73.
[34] *Id.* at 74-75.
[35] *Id.* at 75.
[36] *Id.* at 75-76.

a position that takes advantage of his or her personal weaknesses . . . is tremendously helpful in the practice of law."[37]

Perhaps the root causes of these problems extend beyond childhood experiences. Success in the practice of law is often measured by the size of one's clientele. However, persons in deep trouble, or whose fortunes are precariously exposed, are not overly concerned about their lawyer's ethical standards. The client has one objective—to win—and how the lawyer accomplishes it is of secondary or no real importance. Hence, clients too often seek out those lawyers who manifest the characteristics that enable them to abuse the spirit of the system without technically violating its rules. In these days of an overcrowded profession, the truly ethical lawyer is, indeed, in a difficult position. Bachman concludes this demoralizing chapter with a description that is disturbingly familiar to many lawyers:

> One of the most odious people I have ever met was a lawyer who had the ability to ooze reason and charm before the court or jury one minute, and then a minute later in the court house corridor during a recess, purple-faced and spitting vituperation, hurl vile obscenities and personal insults at the opposing lawyer. In almost every case, he attempted to rattle the opposition with similarly rageful behavior out of court. He was also in tremendous demand as a trial lawyer.[38]

In a chapter entitled "The Almighty Billable Hour," Bachman berates the virtually universal practice that forms the financial stability of law firms, "the enshrined rule of modern American lawyering that a lawyer's worth is measured . . . by a rate linked to the relentless tick of the clock."[39] The premise is that law firms are judged more on their financial prominence than on the quality of their work.[40] Since increasing required billable hours, rather than hourly rates, is the least obtrusive way (from the client's perspective) to accomplish that goal, many firms now require of their partners and associates a minimum of 2,000 hours billed yearly. Whereas twenty years ago associates in firms were able to attain partnership status with roughly 1,500 billable hours, the minimum level has escalated, transforming "lawyers' lives . . . by a ceaseless spiral of mandated workaholism."[41]

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[37] *Id.* at 81.
[38] *Id.* at 84. One is prompted to recall the solemn prayer humbly beseeching, "not weighing our merits but pardoning our offenses." THE EPISCOPAL CHURCH, *Eucharistic Prayer I, in* THE BOOK OF COMMON PRAYER 336 (Charles M. Guilbert custodian, 1979).
[39] W. BACHMAN, *supra* note 2, at 102.
[40] *Id.*
[41] *Id.* at 103.

Conceding that one may disagree with the precise numbers, nonetheless, Bachman uses the 1,500 hours as the reasonable maximum.[42] However, he cautions young lawyers about the many nonbillable hours in the daily activities of a lawyer. One is expected to serve on firm committees, review employment applications, interview prospective associates, attend continuing legal education seminars, perform community service, etc., from which he notes that billing forty hours per week requires approximately fifty-five to sixty hours of work.[43] He advances as another "lesson": *"10% of a lawyer's soul dies for every 100 billable hours worked in excess of 1,500 per year."*[44]

Has Bachman fairly described the profession of law in this short book (140 pages)? The author, sensitive to and troubled by the problems he describes, candidly admits that he purposely sought to expose the negative rather than the positive side of lawyering.[45] But readers of this book should not lose sight of both sides. One may be too inclined to unjustly condemn the profession and lawyers. Bachman's book exposes difficult and perplexing problems that have developed from the nature of the profession, without attempting to defend those who strive to maintain ethical standards. It is probably true that only those who work within the profession understand and appreciate the efforts and resources devoted to those endeavors. One reads Bachman's book with a profound sense of loss for a profession that has produced through the ages real giants. We like to remember the role of lawyers in the Magna Carta, the Declaration of Independence, the Constitution, and the Bill of Rights—frameworks for humanity, providing hope and courage to the oppressed as well as to the blessed. We must never lose sight of the majesty and awesome power of the law. Have we truly allowed all of this to slip into the abyss of public scorn? Are we, like Wolfe's lost angel, groping in vain for meaning in an insidious environment of our own making and by which we now have been victimized?[46] The disturbing danger in Bachman's book is that readers may generalize too much—that they will forget that in all ages there were and are ethical, moral, highly motivated lawyers who are eager to "help the

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[42] *Id.* at 107.

> The lawyer's professional life is filled with aggressive, manipulative, half-truthful and other destructive behaviors, most of which are necessary, if unfortunate, by-products of our adversary system. If one wishes to salvage a measure of humane existence from a life spent in the aggressive pursuit of other people's causes, one must keep billable hours below 1,500 a year.

Id.

[43] *Id.* at 107-08.

[44] *Id.* at 107.

[45] *Id.* at 137.

[46] T. WOLFE, LOOK HOMEWARD, ANGEL (1957).

helpless,"[47] to comfort the forsaken and destitute, and to work for justice for all people.

Notably absent in this work are proposed remedies and reform measures. In an epilogue, the author acknowledges that is a matter for another day. His objective was "to provoke debate rather than calm troubled waters."[48] His task was to make the diagnosis, not prescribe the cure:

> A few of those who read my early draft manuscript felt frustrated that the book fails to prescribe remedies for the ills it discusses. But the first step toward addressing any set of problems is a detailed descriptive diagnosis, and I found myself unwilling—unable, even—to leap to issuing prescriptions until that diagnosis was clear.[49]

One may question whether the author has painted with too broad a brush; however, his diagnosis is sagacious and unsettling in its clarity. He is warning the profession that such things as excessive billable hours, stressful working conditions, advertising that has soared out of control, and too many lawyers have degenerated the once venerable practice of law to big business status, which readers of his book will perceive as a pervasive sickness that virtually screams for reform. Bachman forces lawyers to take a hard look at objective reality, turning from subjective surrealism. The American lawyer no longer performs his tasks with the quiescent serenity which flows from "the joy of working."[50] Sadly, I believe Bachman would say, he has lost sight of his star.[51]

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[47] The phrase is from Lyte's hymn:

When other helpers fail and comforts flee,
Help of the helpless, O abide with me.

Henry Francis Lyte, *Abide With Me, in* THE HYMNAL OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA: 1940, at 467 (1957).

[48] W. BACHMAN, *supra* note 2, at 140.

[49] *Id.* at 139.

[50] And no one shall work for money, and no one shall work for fame,
But each for the joy of the working, and each, in his separate star,
Shall draw the Thing as he sees It for The God of Things as They are!

R. KIPLING, *When Earth's Last Picture Is Painted, in* RUDYARD KIPLING'S VERSE: INCLUSIVE EDITION 1885-1926, at 258, 259 (1928).

[51] In 1993, at the conclusion of the spring semester at Loyola, I gave an examination to the first-year class in the ethics course, The Legal Profession. During the semester, we candidly discussed the practice of law within the limits prescribed by the ABA Model Rules of Professional Conduct. Several students were obviously disturbed by lawyers defending known criminals, advocating causes in which they did not personally believe, and representing clients whose reputations and actions were seen as repugnant.

The final question on the examination required each student to be insightful—to state with candor his feelings and how he related those to what was studied and learned in the course. The question acknowledged that one objective of the course was to sensitize the students to self worth, rooted in decency, integrity, and honor. They were asked whether "successful living" was dependent on those values, and I inquired of personal goals in fulfilling their lives' missions.

[51] *continued*

One student's answer was particularly revealing:

> I am truly amazed that you had the guts to ask this question and I sincerely appreciate the chance to tell you some provoking insights I have gleaned through this course.
>
> It is no secret to my closest friends that this course changed my life and career expectations. My husband saw my entry into law school as a move that would benefit us financially. That was never my goal. I have always wanted to be a judge. I had/have a high demand for justice and equity. I thought that being a lawyer would let me work toward that goal. What I find out is—through this course, mainly—that the law is not particularly concerned with justice. . . . I could perhaps live with that, but I find I'm not capable of contributing to injustice by representing a party or cause I don't believe in. I don't want to impose my own brand of justice on the world, but unless you can afford to hang out your own shingle and turn away business that you find "unpalatable," you are out of luck. Most attorneys facing the job market are looking at big firms for employment. You represent who they tell you. I am desperately trying to find something else to do.
>
> What the whole crowded job market boils down to, for me, is a question of "How low do you go?" How much of your soul, your ethics, and your morals are you willing to forego to get ahead? Because it seems to me that it takes something radical for a young lawyer to make a name for himself or herself these days. Even more problematic for me are the Model Rules. To me, ethics and morals are two different things. The terms are not interchangeable. Yet people confuse them all the time. There are plenty of things considered perfectly ethical under the Model Rules that I find immoral. This is not the place to go into that. You are looking for something else. So I will tell you this: for me, it is not worth it. No way. There are so many more important and wonderful things in the world to live for and enjoy. Why would I choose a career that requires long hours away from my loved ones? Why would I select a career that requires me to sacrifice my own morals and beliefs in order to make a living? . . . I couldn't live with myself if I felt like I contributed to the already incredible amount of injustice in this world. So, because I'm no quitter, I'll finish law school, then look for some other way to put this wonderful education to good use.
>
> Professor Normann, it is because of your class that I can never be an attorney. I owe you a debt of gratitude I probably never can repay. Truthfully, I have shed tears over this class because of the way the "facts of life" as an attorney hit me. Thankfully, I realized it before I became too immersed to see my soul slipping away from me. I want to spend my life doing something I can live with and be proud of. I hope you take this for the compliment that I mean for it to be.

Examination Paper from an Anonymous Student in the course, "The Legal Profession," to David R. Normann, Professor of Law, Loyola University School of Law (May 1993) (on file with author).