International Society of Barristers

Volume 39 Number 2

Quarterly

International Society of Barristers Quarterly

Volume 39 **April 2004** **Number 2**

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International Society of Barristers Quarterly

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Volume 39
Issue Number 2
April, 2004

The INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY (USPS 0074-970) (ISSN 0020-8752) is published quarterly by the International Society of Barristers, University of Michigan Law School, Ann Arbor, MI 48109-1215. Periodicals postage is paid at Ann Arbor and additional mailing offices. Subscription rate: $10 per year. Back issues and volumes available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1911. POSTMASTER: Send address changes to the International Society of Barristers, University of Michigan Law School, Ann Arbor, MI 48109-1215.

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RELATING TO RIGHTS—A JUDGE'S PERSPECTIVE[†]

Rosalie Silberman Abella*

Rights are hard work. People have strong views about them and tend to think that their views are the right ones. But if people are divided in what they think the right rights are, they are united in believing in *justice*.

So what is "justice," this ineffable, democratic Holy Grail; and why, if it is so central to our civility, does it attract so much controversy and such fragmented consensus?

The amazing thing is that even though justice eludes definition, it is like good art, something people claim to know when they see it, or, more pertinently, know when they don't see it and think they should. It is about fairness.

I offer the following additional evidence to support my theory that justice is an unquenchable public thirst. Look at how justice and fairness resonate in each of the five pictures nominated for "Best Picture" at this year's Oscars. *Seabiscuit* is a story about how decency can win; *Master and Commander* is a story of how courage is wisdom's best ally; *Lost in Translation* is a story of how sometimes, to maintain your integrity, you need to defer to respect for others; *Mystic River* is a story about how painful injustice feels and how unjudgmental compassion can be; and the winner, *Lord of the Rings*, was about how there are overriding social virtues that transcend power, the story of the selfless commitment to social peace. And these, I would argue, are the values that make up the justice package: decency, courage, wisdom, integrity, respect, compassion, and commitment.

There is no doubt that we are surrounded by issues that attract our justice compass. Just consider the news on any given day. When I was preparing for this talk a couple of weeks ago, I decided to use that Sunday's *New York Times* as my laboratory and found, as I had expected I would, a host of stories that implicate our sense of justice and somebody's rights:

- a Somalian doctor in Italy who is proposing a less invasive form of female genital mutilation;
- the corruption and murder of a Brazilian mayor;
- the RCMP raid on an *Ottawa Citizen* journalist's home and revelation of police misconduct in Toronto drug cases;

[†] Opening address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton Golf Resort, Naples, Florida, March 1, 2004.

* Justice, Court of Appeals for Ontario, Toronto, Ontario, Canada.

- the dismissal from his post of Pakistan's chief nuclear scientist for selling nuclear parts, plans, and designs to Iran, Libya, and North Korea;
- Connecticut's closing of two casinos that had brought millions to the aboriginal tribes who ran them and to the state coffers;
- Justice Scalia's duck hunting trip with Dick Cheney despite a pending Supreme Court case in which Cheney is being sued by two public interest groups;
- a controversy over whether lip-synching is being used too much at rock concerts; and
- a by-now run-of-the-mill, get-rich-quick but illegal scheme by a greedy thirty-two-year old Princeton grad whose claim to fame was that he once dated Paula Abdul.

And this was just one day's news. Add to this the implications of Lord Hutton's report on the Blair/BBC/David Kelly scandal, the Pope's thumbs up for Mel Gibson's movie *The Passion of the Christ*, Martha Stewart's disorderly conduct, Enron's regrettably systemic arrogance, and the media hysteria over whether Justin Timberlake's overexposure of Janet Jackson's right breast was too tasteless for a halftime show at the Super Bowl.

Add to the mix the serious rights debates creating turbulence around same-sex marriage, affirmative action, gun control, and health care, and you see that, consciously or not, we are constantly immersed in contexts which raise justice considerations. These are contexts which present us with choices about rights, and the decisions we make about those choices are decisions by which we will ultimately be defined and, more importantly, ultimately be judged, whether as lawyers, as individuals, or as societies. And that means that an overall rights strategy should focus not only on the context of the moment but on the judgment of time.

In other words, history decides how just we have been. This theme was reinforced for me recently by a play called *Copenhagen,* written by Michael Frayn, currently touring Canada in a wonderful National Arts Centre production and showing, yet again, how culture can be justice's Boswell. The plot resonates particularly because of the current outrage over Abdul Qadeer Khan, the formerly revered and currently disgraced nuclear scientist and founder of Pakistan's nuclear weapons program, who apologized recently for what he referred to as his "unauthorized proliferation activities," or, as it has been less disingenuously put, selling nuclear capability to rogue states.

In *Copenhagen* justice plays out via a fictionalized account of what happened at a real meeting in Copenhagen in September of 1941 between two Nobel laureates, Niels Bohr and his former student, the German physicist

Werner Heisenberg. The meeting took place in Bohr's home. Together, the two men had revolutionized atomic physics in the 1920s with their work on quantum mechanics and the uncertainty principle.

I had seen the play in New York two years earlier and found it heavy. I remember turning to my husband about twenty minutes into the play and whispering, "Couldn't you get tickets for *My Fair Lady*?" The play was a sophisticated, intellectual exposition on the justice of developing nuclear weapons and on whether there was a moral distinction between developing them for the Allies and developing them for Hitler. As I left the theater after seeing it the first time, I remember feeling two things equally: uncomfortable and stupid. Stupid because I didn't understand a thing the characters said about physics, nuclear fission, or the complementarity principle, and uncomfortable because of the moral equivalencies the play seemed to draw between the two characters, each loyal to his own sense of national pride and professional responsibility.

This time when I saw it, I paid better attention and was so intrigued by its complexity that I bought the text so I could read it at my own physics-bereft pace.

The justice question at the heart of the play is what Heisenberg's duty was as a loyal German and as a scientist in charge of its nuclear program. Was he obliged to help protect Germany by developing the atom bomb, or was he obliged to protect the world *from* Germany by sabotaging its production? The atom bomb was, as you know, never developed in Germany, and the play leaves unclear whether this was due to Heisenberg's deliberate derailment of the program or just the result of getting the calculations wrong.

The genius of the play is the way it plays on the tension between the mentor Niels Bohr, half Jewish and living self-consciously and proudly in occupied Denmark developing nuclear expertise for the Allies, and the acolyte Werner Heisenberg, working conscientiously and proudly for the occupier and the honor of German science. Both scientists blamed themselves and each other for perceived breaches of their moral responsibilities as scientists, Bohr for coming to America where he worked at Los Alamos and played what he called his "small but helpful part in the deaths of 100,000 people" at Hiroshima and Nagasaki, and Heisenberg for working for a crazed dictator.

I found the most interesting speech in the play to be Heisenberg's explanation for his ambivalence when he says,

> We have one set of obligations to the world in general, and we have other sets, never to be reconciled, to our fellow countrymen, to our neighbors, to our friends, to our families, to our children. . . . *All we can do is to look afterwards, and see what happened.*

The point of the play is not what actually happened at the meeting between Bohr and Heisenberg, because no one really knows, but what it tells us about how we make choices about justice and how the context of the moment may not be a sufficient defense in history's court.

If Heisenberg was right that all we can do is "look afterwards and see what happened"—and I think to a large extent he was—and if it is true that we need to be informed about and understand our evolving contexts in order to make better choices in and about them, I come to a focus for my talk.

I think we have made enormous progress in the development of rights in my lifetime, but I worry that we began stalling a bit in the last decade, so I want to look at two themes in this talk: the threats to rights domestically and the threat to rights internationally.

CIVIL LIBERTIES V. HUMAN RIGHTS

My first theme is that a big part of what was starting to turn our rights vision so myopic was that we were allowing the premises behind civil liberties to checkmate the moves human rights wanted to make. Unless we understand that there is a difference between civil liberties and human rights, we will be unable to confront one of the most formidable conceptual barriers to the continued good health of human rights; and because we need *both* healthy civil liberties *and* human rights to maintain our justice balance, I want to explore the crucial difference between them with you.

Civil liberties is a concept of rights that requires the state *not* to interfere with our liberties. Human rights, on the other hand, cannot be realized *without* the state's intervention. Civil liberties is about treating everyone the same; human rights is about acknowledging people's differences so they can be treated as equals. Civil liberties is only about the individual; human rights is about how individuals are treated because they are part of a group.

But we have to start at the beginning of the story. The human rights story in North America, like many of our legal stories, started in England. The rampant religious, feudal, and monarchical repression in seventeenth century England inspired new political philosophies such as those of Hobbes, Locke, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments. These were the theories of civil liberties that came to dominate the "rights" discussion for the next three hundred years. They were also the theories that journeyed across the Atlantic Ocean and found themselves firmly planted in American soil, receiving confirmation in the Declaration of Independence guaranteeing that every "man" enjoyed the right to life, liberty, and the pursuit of happiness, and that government existed only to bring about the best conditions for the

preservation of those rights. Thus was born the essence of social justice for Americans—the belief that every American had the same right as every other American to be free from government intervention. To be equal was to have this same right. No differences.

The individualism at the core of the political philosophy of rights articulated in the American constitution ascribing equal civil, political, and legal rights to every individual *regardless* of differences became America's most significant international export and the exclusive rights barometer for countries in the Western world. It was formal equality, it ignored group identities and realities, and indeed regarded collective interests as subversive of true rights. Concern for the rights of the individual monopolized the remedial endeavors of the pursuers of justice all over the world.

It was not until 1945 that we came to realize that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind, namely, abuses of the rights of individuals in different groups to retain their different identities without fear of the loss of life, liberty, or the pursuit of happiness.

It was World War II that jolted us permanently from our complacent belief that the only way to protect rights was to keep government at a distance and protect each individual individually. What jolted us was the horrifying spectacle of *group* destruction, a spectacle so far removed from what we thought were the limits of rights violations in civilized societies that we found our entire vocabulary and remedial arsenal inadequate. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of but because of their differences, and we started to formulate ways to protect the rights of the group.

We had, in short, come to see the brutal role of discrimination, a word we had never and could never use in connection with a concept like civil liberties that permitted no differences, and we invented the term "human rights" to confront it. We clothed governments with the authority to devise remedies to prevent arbitrary harm based on race or religion or gender or ethnicity, and we respected government's new right to treat us differently, in order to redress the abuses our differences attracted. We saw how the neutral purpose of civil libertarian individual rights had an unequal impact on the opportunities of many individuals, and eventually we saw that all the good will in the world could not protect us from our own prejudices and stereotypes, or from restrictively designing systems and institutions accordingly.

So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played and extended the prospect of full socio-economic participation to women, nonwhites, aboriginal people, persons with disabilities, the elderly, and those with different

sexual preferences. And, most significantly, we offered this full participation and accommodation based on—and notwithstanding—group differences.

It was as if we had awoken from a 300-year sleep, looked around us, realized how limited our rights vision had become, and, with stunning energy and enthusiasm, acknowledged more rights and remedies in one generation than we had in all the centuries since the Glorious Revolution in England in 1688-89, starting with the remarkable consensus found in the Universal Declaration of Human Rights.

Civil liberties had given us the universal right to be equally free from an intrusive state, regardless of group identity; human rights gave us the universal right to be equally free from discrimination *based* on group identity.

Having decided halfway through the century to endorse a commitment to diversity as integral to our understanding of rights and justice and community, why did we appear to abandon the commitment as the century closed?

What we appear to have done, having watched the dazzling success of so many individuals in so many of the groups we had previously excluded, is concluded that the battle with discrimination had been won and that we could, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted, and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades to demonstrate gay and lesbian pride; and having constructed hundreds of ramps for persons with disabilities, many were no longer persuaded that the diversity theory of rights was any longer relevant, and sought to return to the simpler rights theory in which everyone was treated the same. We became nostalgic for the conformity of the civil liberties approach, and frightened by the way human rights had dramatically changed every institution in society—from the family to the legislature.

And this, I think, is at the heart of why we were marginalizing human rights at the end of the century—because unlike civil liberties, which rearranges no social relationships and only protects our political ones, human rights is a direct assault on the status quo. It is inherently about change—in how we treat each other, not just in how government treats each of us. And so in North America, we tended to yearn for the rights that were less expensive, less confusing, and less frightening. The intellectual baskets into which we placed information once again took the shape of civil rights, and we ended by dismissively calling a differences-based approach reverse discrimination, or political correctness, or an insult to the good will of the majority and to the talents of minorities, or a violation of the merit principle. Personal aspirations, we became convinced, would be realized by those who deserved them, and no one qualified would be turned away. Civil rights trumped human rights. Social and economic Darwinism trumped social and economic reality.

The irony is that having dedicated the last five decades to promoting human rights and tolerance, we came, over time, to do such a good job that we learned to tolerate even intolerance.

Somehow, we started to let those who already had enough say "enough is enough," allowing them to set the agenda while they accused everyone else of having an "agenda," and leaving millions wondering where the human rights they were promised are, and why so many who already had them thought the rest of the continent didn't need them.

We started to ignore the built-in headwinds against those who are different, who are thwarted in their conscious choices by stereotypes unconsciously assigned, and who could not be expected to understand why the evolutionary knowledge we came to call human rights appeared to suffer such swift Orwellian obliteration. We seemed to forget the courage our horror after World War II gave us to expand our understanding and generosity.

We were, I would argue, in a kind of rights distress by the last decade of the century, the decade of deficit reduction, Beavis and Butthead, globalization, and Microsoft, the decade when we didn't ask and didn't tell, and the decade when Americans stood by their man the President but spent over $60,000,000 trying to find out if he'd had an extramarital affair (something a good matrimonial lawyer could have done for half the money . . .). As the new century dawned, we appeared to take at face value Yogi Berra's suggestion that when you come to a fork in the road, take it.

The crash of four planes changed everything.

We realized to our horror that while we were riveted on hanging chads and butterfly ballots, terrorists were next door learning how to fly commercial airplanes into buildings. In less than two hours on the morning of September 11, we went from being a Western world luxuriating in conceptual ethical conflicts to being a Western world terrorized into grappling with fatal ones.

I think that what irrevocably shocked us about the horror of September 11 was how massively it violated our assumptions that our expectations about the rule of law were universally shared, at least to the extent that they would be respected in North America. Whether these expectations were reasonable is not at issue. They were genuine. We felt safe. We no longer do.

What does this mean for justice and protection of rights and freedoms? To begin with, it means that we in the legal system are expected to deliver justice, and to protect rights and freedoms in the turbulence created by a public that is feeling particularly raw, a public with a heightened sense of injustice and a heightened thirst for justice.

Which brings me, because you are the *International* Society of Barristers, to the international world of rights and what the current international situa-

tion says about the United Nation's and the international community's ability to protect them.

INTERNATIONAL THREATS TO RIGHTS

This generation of international rights had its genesis in the 1940s with the triangular triumph of the Universal Declaration of Human Rights, the Genocide Convention, and the Nuremberg trials. These were the responsive forms of justice and rights which reared their heads from the atrocities of World War II and roared their outrage. But where once they represented majestic idealism and miraculous regeneration, today they wistfully represent the distances not yet traveled.

Consider what events have unfolded internationally since then, events the world was largely inclined to neglect notwithstanding the most sophisticated development of international laws, treaties, and conventions the world has ever known, all stating that rights abuses will not be tolerated. We faced all of these and more: the genocide in Rwanda; the massacres in Bosnia and the Congo; the violent expropriations and judicial constructive dismissals in Zimbabwe; the assassinations of law enforcers in Columbia and Indonesia; the slavery and child soldiers in Sudan; the repression in Chechnya; the cultural annihilation of women, Hindus, and ancient Buddhist temples by the Taliban; the attempted genocide of the Kurds by chemical weapons in Iraq; the rampant racism tolerated at the U.N. World Congress Against Racism and Intolerance in Durban, South Africa.

Why, with all our international laws to protect rights, have we ignored this evidence? It is remarkable to me that until the deadly destruction of the World Trade Center forced a reaction to the Taliban and Iraq, we seemed to take comfort from a belief that the palpable and overriding injustices all over the world would, in time, either work themselves out or merge into history.

And so, notwithstanding what should have been the indelible lesson of the Holocaust—namely, that indifference is injustice's incubator—we felt entitled somehow to defer consideration of our international moral obligations and hide behind such contraceptive terminology as "domestic sovereignty" or "cultural relativism." Beyond that, we have achieved an international level of political correctness so bizarre that Syria sits on the U.N. Commission on Human Rights and Libya chairs it. What is going on here?

In searching for the right principles to protect rights and freedoms in a world changing so quickly one could argue that it is out of control, I started with the institutional development of most relevance for us as lawyers, the recent establishment of the International Criminal Court, the modern descendant of the majestic Nuremberg trials. And that took me back to what Nuremberg stands

for. Elie Wiesel said: "Nuremberg is the story of those who did the killing . . . . Nuremberg is also the story of those who did nothing." It is quite a story. A story about inhumanity, about immorality, about indifference. A story with many lessons to teach. But the past five decades have shown how few of them the world has wanted to learn. The most important lesson the world has ignored is that what matters is not just what you stand for, it is what you stand *up* for.

I am the child of Holocaust survivors. My father, who was a lawyer, was the only person in his family to survive the war. His parents, his three younger brothers, and my parents' two-and-a-half-year-old son were rounded up from a small town in Poland and killed in Treblinka. My parents spent four years in a concentration camp.

I never asked my parents if they took any comfort from the Nuremberg trials, which were going on for four of the five years they were in Germany until we got permission to come to Canada. I have no idea if they got any consolation from the conviction of dozens of the worst offenders. But of this I am very sure—they would have preferred, by far, that the sense of outrage that inspired the Allies to establish the Military Tribunal of Nuremberg had been aroused many years earlier, *before* the events that led to Nuremberg ever took place. They would have preferred, I'm sure, that world reaction to the 1933 Reichstag Fire Decree suspending whole portions of the Weimar constitution, to the expulsion of Jewish lawyers and judges from their professions that same year, to the 1935 Nuremberg laws prohibiting social contact with Jews, or to the brutal rampage of Kristallnacht in 1938; they would have preferred that the world reaction to any one of these events, let alone all of them, would have been, at the very least, public censure. But there was no such world reaction. By the time World War II started on September 3, 1939, the day my parents got married, it was too late.

There should never have been a need for a Nuremberg Tribunal. There should never be a need for *any* war crimes tribunals. But there was, there is, and unless we rethink what we're doing to each other as an international community, there always will be.

For me, Nuremberg represents the failure of decent, well-meaning Western democratic nations to respond when they should have and could have, to a virulent, horrifying strain of anti-Semitism in Germany in the 1930s. Millions of lives were lost because no one was sufficiently offended by the systematic destruction of every conceivable right for Jews in Germany that they felt the need for any form of response. And so, the vitriolic language and monstrous rights abuses, unrestrained by anyone's conscience anywhere, in or out of Germany, turned into the ultimate rights abuse: genocide.

I do not for one moment want to suggest that the Nuremberg trials were not important. They were crucial, if for nothing more than to provide juridical

catharsis. But more than that, they were an heroic attempt to hold the unimaginably guilty to judicial account, and showed the world the banality of evil and the evil of indifference. At Nuremberg, victims bore public witness to horror, and history thereby committed to memory the unspeakable indignities so cruelly imposed.

And there is no doubt that some justice did in fact emerge in the aftermath of Nuremberg, and there are many connective dots of history leading to the present of which we can be proud. We have made remarkable progress and are immeasurably ahead of where we were fifty years ago in many, many ways.

But we still have not learned, as an international community, the most important justice lesson of all—to try to prevent the abuses in the first place. We have not finished connecting history's dots. All over the world, in the name of religion, national interest, economic exigency, or sheer arrogance, men, women, and children are being slaughtered, abused, imprisoned, terrorized, and exploited. With impunity.

We have no international mechanisms to prevent the ongoing slaughter of children and other innocent civilians, and no overriding sense of moral responsibility that informs the international community and helps develop a consensus for when responsive military action is required to protect rights and freedoms. Americans should not have to be out there on their own. We have, in fact, no consensus on what our international moral responsibilities are, period, and that is why we are so desperately lacking in enforcement mechanisms, legal and otherwise.

More than fifty years after Nuremberg, we still have not developed an international moral culture that will not tolerate intolerance. The gap between the values the international community articulates and the values it enforces is so wide that almost any country that wants to, can push its abuses through it. No national abuser seems to worry whether there will be a "Nuremberg" trial later, because usually there isn't, and in any event, by the time there is, all the damage that was sought to be done has already been done.

Trials are important, but they are too late, and they are no alternative to the prevention of the destruction of life or liberty in the first place. Trials are a response, not a solution. We cannot simply sit back and watch horrors occur, knowing our indignation will be mollified by subsequent judicial reckoning. Where injustice is preventable, it should be prevented when first identified, not permitted to create its human devastation before being held to account. In the absence of other remedies, episodic responses such as trials to episodes of preventable injustice are unconscionably inadequate and disrespectful to the victims, to their families, and to the cherished concept of a civilized future. What was Nuremberg for, if not to signal to potential violators that justice must prevail?

And so, some concluding thoughts on our theme from *Copenhagen*, Heisenberg's cri de coeur, "All we can do is to look afterwards and see what happened." This year marks the fiftieth anniversary of the American Supreme Court's unanimous decision ending school segregation, in which it said: "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[1]

When the decision was released, President Eisenhower was furious. He told a speechwriter: "I am convinced that the Supreme Court decision set back progress in the South at least fifteen years. . . . Feelings are deep on this. . . . We can't demand perfection in these moral things." In context, Eisenhower wasn't wrong to worry about the ensuing public controversy. Almost fifty years later, the decision is still an open sore.

But how will time judge the justice of the judgment? The answer may well be in these poignant words in the *New York Times* a couple of weeks ago from a fourteen-year-old African-American boy, who said:

> In Arkansas, when I was little, my dad would ask for directions and they would just look at him like he was crazy. I said, "Maybe they didn't hear you." I didn't really understand. But now I do. It still goes on, throughout your whole life.

That is how injustice sounds and that is how injustice feels. There is no justice without rights and no hope without justice.

Sometimes you can't get there without controversy and criticism, but isn't that better than not getting there at all?

EMPATHY AND JUSTICE

Two concluding stories, one literary and one personal, will emphasize the link between justice and empathy.

The first is taken from a book called *Fragments*. It was written several years ago by Benjamin Wilkomirski, a Jewish man then in his mid-fifties living in Switzerland. The book is now hopelessly mired in controversy over its authenticity, but the language and imagery remain compelling. The title of the book comes from the fragments of memories he says he recovered in recent years, memories relating to the years he spent, from the age of four or five, in Polish concentration camps. After the war, when the young boy was ten or eleven, he was placed in a foster home in Switzerland. The horror and brutality of the

[1] Brown v. Board of Education, 347 U.S. 483, 495 (1954).

only life the child had really known left him totally unprepared for the civility of his new surroundings. School in particular was utterly bewildering. And hence this story about the day he was totally humiliated by his teacher in front of a giggling classroom when he was asked to identify a colored poster of the Swiss hero, William Tell, of whom, of course, he had never heard:

> "What do you see here?" [the teacher] asks again.
>
> "Tell! William Tell! The arrow!" they're calling from all the benches.
>
> "So—what do you see? Describe the picture." says the teacher, who's still turned toward me.
>
> I stare in horror at the picture, at this man called Tell, who's obviously a hero, and he's holding a strange weapon and aiming it, and he's aiming it at a child, and the child's just standing there, not knowing what's coming.
>
> I turn away. . . . Why is she showing me this terrible picture? Here in this country, where everyone keeps saying I'm to forget, and that it never happened, I only dreamed it. But they know all about it!
>
> "You're supposed to be looking at the picture—what do you see?" she asks impatiently, and I make myself look at the picture again.
>
> "I see—I see an SS man," I say hesitantly, "and he's shooting at children," I add quickly.
>
> A gale of laughter in the classroom.
>
> "Quiet," barks the teacher, then turns back to me. "I'm sorry—what did you say?" and I can see that she's getting angry.
>
> . . . .
>
> "The hero's shooting the children, but . . ."
>
> "But what?" the teacher says fiercely. "What do you mean?" Her face is turning red.
>
> ". . . But . . . but it's not normal," I say, trying not to cry.
>
> "Who or what isn't normal here?" Now she's beside herself, and shouting. I force down the lump in my throat and try to concentrate. But I can't interpret what's going on. What's this about? . . . .
>
> . . . .

> "It's not normal, bec-because . . ." I'm stuttering again.
>
> "Because why?" she says loudly.
>
> "Because our block warden said, 'Bullets are too good for children,' and bec-bec-because only grown-ups get shot . . . or they go into the gas. The children get thrown in the fire, or killed by hand—mostly, that is."
>
> . . . . she screeches, losing her composure.
>
> . . . .
>
> "Sit down and stop talking drivel."
>
> . . . .
>
> I look over at the warden-teacher, standing there shaking with anger, standing there in front of the big blackboard, her hands still on her hips. My eyes begin to smart, and the big blackboard turns watery, gets bigger and bigger until it surrounds the whole classroom and turns into a black sky, ...[2]

This is a story about a child who interprets the world based on what he knows, and a teacher who judges his answers based on what she does not know. We are each limited by what we do not know, and we are each limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to deliver justice fairly.

And to deliver justice fairly, we must never forget how the world looks to those who are vulnerable. We must never lose our compassion.

Which brings me to a personal closing, and my way of letting you know how important it is that America stay focused on protecting rights and freedoms, because when you succeed, the rest of the world is in your permanent debt.

In 1930, my father got a scholarship to the Jagiellonion University in Krakow to study law. Because there was a quota on the number of Jews admitted to the law school, he was one of only four Jews admitted in a class of over one hundred. Rather than sit in the special seats assigned to the Jewish students in the lectures, he stood through most of his first year at University. Shortly after he completed his eight years of legal training, World War II broke out.

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[2] B. WILKOMIRSKI, FRAGMENTS: MEMORIES OF A WARTIME CHILDHOOD 128-30 (C.B. Janeway trans. 1996).

I have already told you that after spending most of the war in a concentration camp and losing most of their family, including their son, my parents went to Germany, where they had two more children. There my father taught himself English and German, and was hired as a lawyer by the Americans to help deliver legal services for Displaced Persons in Southwest Germany. He developed a deep respect for the American justice system, which he passed on to his children. He applied to emigrate to Canada but was refused because his legal training was not considered a necessary skill. He was eventually permitted entry—as a tailor's cutter and as a shepherd.

When we arrived in Canada in 1950, he applied to become a member of the bar. He was refused admission to the bar because he wasn't a Canadian citizen. Because that would have taken five years, he became an insurance agent instead to support his family. He did well, and I never heard him complain about not being able to practice his profession. On the contrary, he loved his new home for the chance it gave him to raise his two daughters in freedom and security.

Recently, I found some of his papers from Germany, and in them I found the answer to why he always spoke so respectfully and appreciatively of the American justice system. The letters were from American lawyers, prosecutors, and judges he worked with in the U.S. Zone in Stuttgart. They were warm, compassionate, and encouraging letters either recommending, appointing, or qualifying my father for various legal roles in the court system the Americans had set up in Germany after the war.

These Americans believed in him. As a result, they not only restored him but gave him back his belief that justice was possible.

One of the most powerful documents I found was written by my father when he was head of the Displaced Persons Camp in Stuttgart where we lived. It was his introduction of Eleanor Roosevelt when she came to visit our D.P. Camp in 1948. He said:

> We welcome you, Mrs. Roosevelt, as the representative of a Great Nation, whose victorious army liberated the remnants of European Jewry from death and so highly contributed to their moral and physical rehabilitation. We shall never forget that aid rendered by both the American people and army. We are not in a position of showing you much assets. The best we are able to produce are these few children. They alone are our fortune and our sole hope for the future.

I was one of those children. My father died a month before I finished law school, but it meant so much to him that I chose justice as a profession. I learned from him that democracies and their laws represent the best possi-

bility of justice, and that it is the legal system that has the duty to make that justice happen.

I am very proud to be a member of that system, but I will never forget why I joined it.

CONFRONTING INJUSTICE[†]

Bryan A. Stevenson*

It is always a pleasure for me to speak to organizations such as this because I really do think that lawyers and people who understand the dynamics of justice have a special role in our society. Too often lawyers are maligned, misunderstood, and criticized. I worry about that because I think identity is important to dealing with many of the issues that we are struggling with in our society, and lawyers have both the ability to say things that can make a difference in someone's life and the opportunity to position themselves in places and in situations that can change things in fundamental ways. I would like to talk about what that identity means in a struggle to create justice, particularly for the disadvantaged and the marginalized.

When I was growing up, I learned a lot about identity and about the importance of saying things that could make a difference in someone's life. My grandmother was the absolute, undisputed matriarch and power holder in our family. She was an incredible person who had an enormous ability to create love and to create strength for anyone who was near her. She was the daughter of slaves, and her remarkable qualities in many ways had been shaped by her experiences growing up in Virginia right after the end of slavery. She had ten children, of whom my mother was the youngest, and all of the grandchildren loved to spend time with our grandmother, whom we called "Mama." The only difficulty was that there were always so many cousins competing for her attention. One day, when I was about six or seven years of age, she came across the room, took me by the hand, and said, "Come on, Bryan, you and I are going to have a talk out back." I was really excited that she was showing me such special attention in front of all my cousins. She took me out back and said, "Bryan, I want to talk to you about something, but I don't want you to tell anybody what we talk about." I said, "Yes, Mama." She said, "I've been watching you, and I want you to know that I think you're special. I believe you can do anything that you want to do." I just looked up at her. Then she said, "I want you to promise me three things." I said, "Yes, Mama." "The first thing I want you to promise me is that you'll always love your mother, no matter what." I said, "Absolutely, I always will do that." Next she said, "I

[†] Address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton Golf Resort, Naples, Florida, March 2, 2004.

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want you to promise me you'll always do the right thing, even when the right thing is the hard thing." I said, "Yes, Mama, I'll do that." And then she said, "The third thing I want you to promise me is that you'll never drink alcohol." I was only six so I said, "Yes, Mama, I'll never do that." I've never forgotten that conversation.

I have a brother who is a year older than I am and a sister a year younger. When I was about fifteen, my brother came home one day with some beer he had gotten somewhere. He grabbed me and my sister, took us out back, and gave us some of the beer. My sister drank some, but I was hesitating and said, "No, I don't think I'll have any beer." My brother looked at me real hard and said, "Come on, I had some, your sister had some, and you always do what we do. Have some beer." I said, "No, I don't feel good about that." Then my brother said, "I hope you're not still hung up on that conversation Mama had with you." I looked at him and asked, "What are you talking about?" He said, "Mama takes all the grandkids out back and tells them that they're special and makes them promise." I was devastated, but that conversation still had its effect on me.

Now I'm going to admit something a little embarrassing; I am forty-four years old, and I still have never had a drop of alcohol. I don't say that because there's anything virtuous about it; I say that only to show the impact that words can have. There was something very empowering for me in that conversation with my grandmother, and she created for me an identity that was important. And I believe that's what lawyers can do. I think we can change the behavior of people around us. I think we can change the way people see things by positioning ourselves and expressing our views with a kind of understanding and conviction that make a difference.

I have been trying to say things about the criminal justice system in the United States for almost twenty years, because it is a system that is in need of substantial reform. Our criminal justice system treats you much better if you are rich and guilty than if you are poor and innocent. And that's an indictment of a society that is supposed to be committed to equal justice.

LACK OF EQUAL JUSTICE

We have been struggling with a lot of problems. We still do not provide poor people with adequate legal services. Alabama doesn't have a public defender system, so indigent people who are arrested and charged with major felonies have to rely on appointed lawyers. Until a few years ago, even in death penalty cases, there was on compensation cap of one thousand dollars per case for an appointed lawyer's out of court time. The average length of a capital trial was less than three days. The average length of voir dire was less

than three hours. Penalty phase hearings typically take less than three hours. In that system we create real problems of unfairness and unreliability. We don't have a right to counsel *after* someone is convicted, even now that we have seen so many exonerations—more than a hundred ten—in the last few years. There are literally people dying for legal representation today. These dynamics are quite disturbing.

We opened our project in 1989, and that year twenty-five percent of U.S. executions took place in the state of Alabama. I never will forget something that happened just after we opened our office. A man who was scheduled to be executed called and said, "Mr. Stevenson, I don't have a lawyer. Will you please take my case?" I said, "I'm sorry, but we're not in a position to take cases yet. I don't have computers, I don't have staff, I don't have other lawyers. I don't have the resources to start taking cases." He didn't say anything; he just hung up the phone. I went home feeling very disturbed. The next day, he called me again and said, "Mr. Stevenson, I'm begging you, please take my case. I don't have a lawyer. I don't have anything. I know you can't promise me anything. You don't have to tell me you can win. You don't have to tell me you can get a stay, but please tell me you'll take my case. I don't think I can make it through these next twenty-nine days if there is no hope at all." When he said it that way it became impossible to say no. We tried very hard to get a stay of execution, but of course it was very late in the process, and the time for filing appeals had passed. This man had claims that I thought were meritorious and significant, but the opportunity to raise them had been lost due to the lack of earlier intervention.

After trying for twenty-nine days to get a stay and having our last motion denied by the United States Supreme Court, I got in my car and drove to the prison to be with this man during the last few minutes of his life. It was a surreal, extremely difficult experience. Twenty minutes before his execution, we were holding hands and talking and praying, and he was crying. He was telling me about his day, and he kept saying, "Bryan, it's been so strange. When I woke up this morning, the guards came to me and asked what I wanted for breakfast. At midday they came to me and asked what I wanted for lunch, and in the evening they came and asked what I wanted for dinner. All day long people have been saying, 'What can I do to help you? Do you need stamps to mail your letters? Do you need water? Do you want coffee? Do you need access to the telephone to call your friends and family?' Bryan, it's been so strange because more people have said 'what can I do to help you' in the last fourteen hours of my life than they ever did in the first nineteen years of my life." Standing there holding his hands, I couldn't help but think, "Where were they when you were three years old being physically abused by your stepfather? Where were they when you were six and seven being sexually assaulted by your step

siblings? Where were they when you were eleven and twelve and you were experimenting with heroin and crack cocaine? Where were they when you were fourteen and fifteen roaming the streets of Birmingham, Alabama, drug addicted, homeless, with no place to go?" While those kinds of questions were resonating in my mind, this man was pulled away and executed. It was a very difficult moment, and it troubled me that we didn't have in position the kind of advocacy and the kind of resources to make sure that people got the help they needed when they needed it.

Sadly, that still happens in the criminal justice system. There has been a tremendous increase in the number of people sent to prison over the last thirty years. In 1972 there were 200,000 people in jails and prisons; today there are over 2,000,000. This dramatic increase has occurred largely because of increased penalties for drug possession and habitual felony offender laws, some of which have put nonviolent offenders in prison for life without parole. I'm currently representing someone who got a life sentence for stealing a bicycle. He had two prior convictions for nonviolent property crimes—he stole a hammer and some work tools, then he went into an abandoned building to urinate—and then he stole a bicycle. Under our habitual felony offender statute he was sentenced mandatorily to life in prison without parole. Now we are spending $20,000 a year to keep this twenty-year-old man in prison, perhaps for sixty years or more.

Tragically it is not just issues of poverty that we confront in the criminal justice system; there are also issues of race. The legacy of slavery and racial apartheid has created some difficult problems in the administration of criminal justice. Today one out of three black men between the ages of eighteen and thirty is in jail, on probation, on parole, or under criminal justice supervision. That is a devastating statistic. There are enormous collateral consequences for people when they have been pulled into the criminal justice system. In many states such as Florida and Alabama, they permanently lose the right to vote. Thirty-one percent of the African-American male population of Alabama has permanently lost the right to vote. Only recently have some reforms moved toward restoring votes to ex-offenders. Beyond voting consequences, you see devastating effects on communities. Young women tell me that they don't believe they can have mates and they don't expect to have families, or at least the kind of traditional families that many of us have embraced and identify as important to us.

Even within the courts the problem of race rears its head. I've been doing work on bias in the administration of the death penalty for some time. In 1972 the United States Supreme Court struck down the death penalty, in part

[1] *See* Furman v. Georgia, 408 U.S. 238 (1972).

because the justices had observed that it was being applied in a racially discriminatory manner.[1] Eighty-seven percent of the people executed for the crime of rape in the United States were black men who had been convicted of raping white women. Justice Stewart, in particular, said that receiving a death sentence was like being struck by lightning—arbitrary, capricious—and therefore that it was cruel and unusual punishment.[2]

That gave rise to new statutes that were reviewed by the Supreme Court in 1976. The lawyers from the NAACP Legal Defense Fund who had led the fight against the death penalty said to the Court, "Let's not move forward in this area while we still have lingering problems with racial bias," but this time the Court effectively said, "Until you prove to us that there is discrimination, we're not going to presume discriminatory effects."[3]

That gave rise to a third "round," a really significant case to those of us who do work in the criminal area, called *McCleskey v. Kemp*.[4] Lawyers had gone to the state of Georgia with a sophisticated team of researchers, and had done a comprehensive study of Georgia's death penalty. The researchers were able to establish that in Georgia you were eleven times more likely to get a death sentence if the victim was white than if the victim was black; and if the defendant was black and the victim was white, you were twenty-two times more likely to get a death sentence than if both defendant and victim were black.[5] Armed with these data, the lawyers went back to the United States Supreme Court and said, "Here. You said you needed proof, you said you needed evidence. Here it is." And the Court in 1987 accepted this evidence of bias but nonetheless, in a five-four decision, held that Georgia's death penalty was constitutional.

I was a young lawyer working on this case when the decision came down, and I have to tell you that it shocked me. The Court said two things that were especially provocative. One "additional concern" of the Court was that if they recognized disparities of race in the application of the death penalty, it would be just a matter of time before lawyers started complaining about disparities based on race in other kinds of criminal sentencing categories.[6] Justice Brennan ridiculed this part of the Court's analysis as "a fear of too much justice," a presumption that this was somehow too big a problem for us.[7] The Court also said that a certain amount of bias or "apparent disparities" in sentencing are "inevitable."[8]

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[2] *Id.* at 309 (Stewart, J., concurring).
[3] *See* Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).
[4] 481 U.S. 279 (1987).
[5] *See id.* at 326-27 (Brennan, J., dissenting).
[6] *Id.* at 314-15.
[7] *Id.* at 339 (Brennan, J., dissenting).
[8] *Id.* at 313.

To me, this case is the *Plessy v. Ferguson* of our generation because it is an indictment of the ideas or ideals to which many of us have committed ourselves. When I go to the Supreme Court, as I have for a couple of cases, I always stop in front of the building and read the inscription over the main entrance: "EQUAL JUSTICE UNDER LAW." I do that each time before I go inside because it is important to me to understand that and to believe that, and to believe that the Court is committed to that. When *McCleskey* came down I thought about *Brown v. Board of Education*.[9] I am a product of *Brown*. I grew up in a community where black children had not been able to go to public schools; we had to go to a colored school. And in 1954 the Court could have said that racially integrated education in America was too big a problem; it was just inevitable that we have segregated school systems. But a vision of justice animated the Court at that time, and they said segregated schools were unconstitutional, and their unconstitutionality made them not inevitable. Then, with that doctrine and with that commitment, lawyers such as Fred Gray came into our community and opened up the public schools. But for that vision and their action on that vision, I would not be standing here talking to you this morning. Therefore, the absence of similar vision in 1987 was very disheartening to me—because, jurisprudentially, there was no distinction between the bias and evidence that had been proved in the criminal justice context in 1987, and that proved in the education context in 1954. The distinction was one of vision and commitment.

Sadly, even beyond race and poverty, we see disturbing trends of more and more vulnerable populations being brought into the criminal justice system. Tragically, in a lot of states in this country, the mentally ill are no longer housed and institutionalized in treatment facilities because the resources aren't there for such facilities; the mentally ill are simply jailed. More and more of my clients are mentally ill and mentally retarded. My clients also are getting younger; I'm seeing a trend of younger and younger children being jailed. I'm representing fourteen-year-olds who have been sentenced to life in prison without parole; we have almost a dozen sixteen-year-olds under sentence of death.

MAKING A DIFFERENCE

All of you are familiar with all of these issues, and you can talk about similar problems in a variety of contexts, not just the criminal justice system; but I did not come here just to dwell on problems. I really came because I truly believe that lawyers like you have an ability to create an identity, such that if

[9] 347 U.S. 483 (1954).

you say things you can make a difference. I'm the kind of person who believes that to create justice you need good ideas in your mind and conviction in your heart. Don't get me wrong, I realize that you must also be savvy, strategic, and smart. But beyond that, you need the ideas, and then you must add some conviction in your heart, because that is the dynamic that will allow or impel you to do the things that must be done.

When we started The Justice Initiative, everybody said that it was not possible to advocate effectively for this despised group of people. But sometimes you have to believe things you haven't seen. Vaclav Havel, the great Czech writer and president, has talked about what is required to create justice. According to Havel, to create justice, we need a certain kind of hope, not a naive belief that everything is going to work out in the end or a general preference for optimism over pessimism, but rather an orientation of the spirit, a willingness to position ourselves in the face of hopelessness and be a witness. There's something powerful in that idea, and I've learned it time and time again from the clients I have represented.

I represented one man who served six years on death row for a crime he didn't commit. It was an outrageous case of injustice in south Alabama. A young white woman had been murdered and the police had not been able to solve the crime; after seven months, the police had no suspects. The citizens were talking about impeaching the sheriff and impeaching the prosecutor, and we believe that the police decided to make an arrest just to fend off this growing pressure. They arrested an African-American man by the name of Walt McMillan. Mr. McMillan was forty-five years old and had no prior criminal history—and they actually put him on death row *before* he went to trial. The papers reported: "Death-row defendant Walter McMillan will be arraigned tomorrow"; "Death-row defendant Walter McMillan has filed *x* and *y* pretrial pleadings."

Interestingly, on the day the crime took place, Mr. McMillan was at his home raising money for his sister's church. There were about thirty-five people gathered with him, and all of them went to the police immediately after the arrest, to tell the police they had the wrong person. They said to the police: "He was at home eleven miles away when this crime took place. We know that because we were there with him." They were ignored. The only explanation we could conceive for the police choosing Mr. McMillan was that he had had an affair with a young white woman who was related to one of the police investigators.

After fifteen months on death row, Mr. McMillan finally went to trial. His trial lasted a day and a half, and he was convicted of capital murder. The jury sentenced him to life in prison without parole, but we have a statute that allows our elected judges to override jury verdicts of life and impose death

sentences, which the judge did to Mr. McMillan. We got involved after he had been back on death row for a couple of years. As soon as I took the case, I was approached repeatedly by the people who had been with Mr. McMillan at the time of the crime. These poor people and people of color would tell me they wished Mr. McMillan had been out in the woods hunting by himself when the crime took place because at least then there would have been the possibility that he was guilty. Because they were with him at the time, they felt as if they had been convicted, too. The despair in the community was palpable.

When we got into the case, we got a very fortunate break. The police had gotten this conviction by coercing a witness to testify falsely, and for some bizarre reason they had actually recorded the sessions in which they coerced him. Even stranger, after the trial was over, they did not destroy the tapes, but put them in a file in another county. While doing some work in another case, we found the tapes. I played one of the tapes in my car when I was driving down the road one day, and the first thing the witness said to the police was: "You want me to frame an innocent man for murder, and I don't feel right about that." The police officer replied, "Well, if you don't give us what we want, we're going to put *you* on death row." There was a full hour of these kinds of conversations. We went to the witness, who admitted that his trial testimony was false. There were two other witnesses, and both of them admitted that their trial testimony was false. With this evidence, we went to court and requested a hearing on Mr. McMillan's conviction.

When we went to court, I was excited to see many people from the poor community, from the community of color, in the courtroom. The courtroom was packed. We started talking about the tapes, and we impeached the police officers, and we put on the witnesses. When we left the court that day, I saw hope growing in the community. When I returned for the second day of the hearings, however, I noticed that all the poor people and people of color who had been inside on the first day were now sitting outside the courtroom. I went up to the community leaders and asked, "Why aren't you all inside?" They replied, "They won't let us in today." I went to the deputy sheriff and said, "I want to go into the courtroom." He said, "You can't." I said, "I'm the defense attorney, I think I have to be able to go inside." He said, "I'll go check." He checked and then came back and said, "Well, *you* can come in." I walked into the courtroom and saw that things had been changed considerably. They had placed a metal detector that you had to walk through just inside the door, and on the other side of the metal detector they had positioned a huge German shepherd dog. Further, the courtroom had been filled with people sympathetic to the prosecution's case. I complained to the judge, and the judge said, "I'm sorry, you people will just have to get here earlier tomorrow." I went out and explained to the community leaders what had happened and said I was sorry.

They said, "That's okay, Mr. Stevenson, we'll just have a few people be our representatives at today's hearing." They began selecting people to be representatives. One person they chose was a beautiful, older black woman I will never forget. When the leaders called her name as one of the representatives, Miss Williams beamed with pride at the opportunity and started fixing herself up; she had a little compact, which she used to get her hat situated just right. I was back inside when they started letting the community people come in, and I saw Miss Williams walk through the door with tremendous grace and dignity. She held her head high when she walked through that metal detector—but when she saw that dog, she stopped dead in her tracks. She began to tremble and then her shoulders sagged and her body just seemed to droop, and then tears started streaming down her face. She groaned loudly, turned around, and ran out of the courtroom. It was a painful thing to see.

We had another good day in court, and I had forgotten all about Miss Williams until I was going to my car that night. At the end of the day, she was still sitting outside the courthouse, and she came over to me and said, "Mr. Stevenson, I feel so bad. I let you down today. I let everybody down today, and I just don't know what to do about it." I tried to console her. I said, "Miss Williams, it's okay; it's not your fault. They shouldn't have done what they did." She said, "No, no, no. I was meant to be in that courtroom. I should have been in that courtroom. I wanted to be in that courtroom." She began to cry, and then she said, "But when I saw that dog, all I could think about was Selma in 1965. I remembered how we were going to march to Montgomery for the right to vote, and they put dogs on us. I tried to make myself move, I wanted to make myself move, but I just couldn't do it." She went away with tears running down her face.

The next day we went back to court. That morning Miss Williams's sister told me that the night before, Miss Williams didn't eat, didn't talk to anybody, and stayed in her bedroom praying all night long, "I can't be scared of no dog, I can't be scared of no dog." Her sister told me that that morning she had begged the community leaders for another chance to be a representative. And on the trip from the house to the courthouse she kept saying over and over again, "I ain't scared of no dog, I ain't scared of no dog." When Miss Williams came into the courtroom, even from where I stood, I could hear her saying over and over again, "I ain't scared of no dog, I ain't scared of no dog." Then I saw this beautiful, older woman walk through the metal detector, walk up to the dog and say in a very loud voice, "I ain't scared of no dog." She walked past the dog, sat down on the front row of the courtroom, and said, "Mr. Stevenson, I'm here." I turned around and said, "Miss Williams, it's good to see you here." A few minutes later, she said again, "No, Mr. Stevenson, you didn't hear me, I said, I'm *here*." It was getting a little embarrassing, so I

turned around and said, "No, Miss Williams, I do see you here, and I'm glad to see you here." The judge walked in, and everybody in the packed room stood up, and then everybody sat back down when the judge took his seat. But when everybody else sat back down, Miss Williams remained standing. When the courtroom got quiet and people were looking at her, Miss Williams said, one last time, *"I'm here."* It became clear to me then what she was saying. She wasn't saying "I'm physically present." What she was saying was this: "I may be old, I may be poor, I may be black, but I'm here because I've got this vision of justice that compels me to stand up to injustice."

Why do I tell you that story? I tell you that story because I believe that lawyers, people of good will, people with conscience, people with vision can do a lot of things to make the world a better place, but the most important thing we can do is to say "I'm here." And when we position ourselves in places where there is suffering, where there is injustice, where there is unfairness, and—with our talents and our abilities—say, "I'm here," something resonates, something changes. You may have to say, "I don't know anything about this area of the law but I'm here," or "I'm not even a lawyer but I'm here." And I believe if we do that, we change the dynamics of justice.

I talk to a lot of young people who tell me at thirteen and fourteen that they don't believe they're going to live past the age of eighteen. That's how hopeless they have become. I believe we've got to hold those youngsters and tell them, "No, I'm here, and it doesn't have to be that way." As an advocate I believe I have to go to the United States Supreme Court and say, "I'm here to tell you that racial bias in the administration of criminal justice is not inevitable, cannot be acceptable. That's an untenable doctrine."

We ultimately prevailed and got Walter McMillan released from death row after six years. There were dozens of people outside the prison when he walked out. The first person he went to was Miss Williams. He hugged her and said, "Miss Williams, I'm here because you were there for me."

I come from a musical family. My mother was a church musician, and she went from church to church until she got involved in a church where she had an enormous choir that became very popular. The choir got bigger and bigger, and the church got bigger and bigger, and the music was incredible. They had all kinds of instruments and one hundred voices in the choir, and you could be blown away by the wall of sound. After a few years, a neighboring deaf school started sending their students to the church. One day some of the deaf children approached my mother and asked if the deaf children could be in the choir. She decided to start a choir for deaf children at the church. That didn't make any sense to me, but I was visiting one weekend and went to the church on Sunday morning, and I saw on the program that the deaf children were going to sing. When we got to that part of the program, the deaf children

stood up—about fourteen of them ranging in age from eight to thirteen. They held each others' hands and just stood there at first. But everybody else in the church knew that it was time for them to do something, and the congregation began to stomp their feet. The musicians began playing their instruments, and a rhythm began pulsing through the building. When the rhythm became very pronounced and very precise, and the deaf children could feel the rhythm, they opened their mouths and began to sing. They only got out a few words before everybody started singing with them, but there was something overwhelming about the experience. I identify with those children because, like a lot of people, I have disabilities that sometimes keep me from saying "I'm here," that keep me from doing the things that have to be done, but within a community, there can be strength. And that's what I think organizations such as yours can offer to a world that needs to see some hope of justice. I am excited and honored that this group of the world's finest attorneys would have space in their hearts and a place in their program to talk about confronting injustice, because I have no doubt that when you say "I'm here," there is tremendous possibility for reform.

For me the task has become very simple. I have become a lawyer who believes that each of us is more than the worst thing we've ever done. I have learned that from my clients. I believe that if you tell a lie, you're not just a liar. I believe that if you take something that doesn't belong to you, you're not just a thief. I believe that even if you kill someone, you're not just a killer. Because of that, you have a fundamental human dignity that must be protected by law. If it is to be protected by law, the more despised, the more hated, the more rejected, the more condemned you are, the more you need lawyers who understand your fundamental dignity, lawyers who have some ideas in their minds and conviction in their hearts. As all of you know, it can be difficult to provide services to the world's neediest. They can overwhelm you, and they can wear you down. There is so much suffering, so much poverty, so much abuse, so much dysfunction. But I have learned that there is something wonderfully empowering and energizing in positioning yourself to be the simple voice for human dignity.

I will close with one last story. I was gong to court not long ago on a series of motions challenging judicial misconduct and prosecutorial misconduct and police misconduct. There was no *conduct* in this county; it was all *misconduct.* I knew that I was going to face a very contentious hearing, and I was by myself; I didn't have any other lawyers or staff with me. As I walked through the front door, an older black man who was the janitor in this courthouse came up to me and said, "Who are you?" I said, "Well, I'm a lawyer, and I'm going to argue some motions today." He said, "You're a lawyer?" I said, "Yes, sir, I am." At that point this man hugged me and said, "I'm so glad you're here. I'm

so proud of you." It was wonderful. I usually don't get greeted that way when I go to court. Then I went inside and started arguing the motions. As I expected, the proceedings became very contentious very quickly. The assistant prosecutors were coming in, along with a clerk and a police officer, and everybody was angry that I was talking about misconduct of the sort that I had detailed in these motions. You could feel the tensions growing. After about an hour the court was packed with a lot of people who were very hostile and very upset about the arguments I was making. Out of the corner of my eye I noticed an older black man, the janitor who had greeted me so lovingly, pacing outside a door and looking through a window in the door. After about twenty minutes of pacing back and forth, the janitor opened the door, came inside the courtroom, and sat down behind me. About ten minutes later the judge announced that we were going to take a recess. During the recess a deputy sheriff jumped up and ran across the courtroom to confront the janitor. The deputy sheriff asked, "Jimmy, what are you doing in this courtroom?" The janitor stood up, and he looked at me, and he looked at that deputy sheriff. Then he said, "I came into this courtroom to tell this young man, 'Keep your eyes on the prize and hold on.'"

Now I say to you that I have come into your meeting today because I know there are people in this room who know the importance of saying, "I'm here." I know that there are people in this room who have a vision of justice that not only speaks to their minds but to their hearts as well. I say to those of you with that vision, "Keep your eyes on the prize and hold on."

WITH PEACE, LOVE, AND FORGIVENESS[†]

Kim Phuc Phan Thi*

Good morning, ladies and gentlemen. It is a great pleasure for me to be here with you this morning to share my story. Before sharing my personal story, though, I would like to begin with my memories of that day more than two years ago that changed our world and the way we think about our world. Before that, September 11 was a happy day for me, a special date. It is my wedding anniversary. I was married to my husband Toan in Havana, Cuba, on that day in 1992. Now September 11 is a date in history nobody can forget, unhappily. That morning I was in the Toronto airport getting ready to fly to Washington, D.C. for a meeting at the White House. Suddenly I saw the news on CNN. I saw the airplane hit the second tower and the fire, and I was so afraid; all my memories of fire and war came back to me. At that moment they were calling my flight for boarding. I showed my boarding pass and got into the airplane, but I kept thinking, "That is not an accident." My flight took off, and I prayed—and then I heard the pilot say, "We have to turn back." I returned to Toronto.

I cried a lot that week. It got to the point that I couldn't watch the news. I didn't want to believe this could happen in a free country so close to home. I didn't know how to answer my boys when they asked me, "Mommy, how could people do that?" It took some time and prayer before hope and peace came back to me. Then I realized that I learned lessons from September 11. It made me realize how brave and good people can be, and it reminded me why I chose to raise my children in freedom in the West and how precious freedom is. We must never take it for granted.

My Story

Now I will take you back to the past, to Vietnam forty-two years ago. You will remember me as a little girl from another time, another war, and another airplane. I grew up in Trang Bang, a small village in South Vietnam. As a child I was happy, always laughing and playing with my friends and riding my bicycle to school. My family—my parents, my brothers and sisters and I—lived in a nice house with a big yard and lots of fruit trees and animals. I felt safe and

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[†] Address delivered at the Annual Convention of the International Society of Barristers, Ritz- Carlton Golf Resort, Naples, Florida, March 4, 2004.

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loved. Before the war I was never afraid. Then one day the fighting started and the war came to my village. The soldiers began pounding on our door—and for the first time I knew fear.

I was nine years old, the same age my son Tom is now, on June 8, 1972. All the children were hiding in the one safe place, the temple. Suddenly the soldiers heard the airplane coming and shouted to us, "Run out, run out." We ran and ran. We were too young and frightened to realize exactly what was happening, but I learned later that the airplane dropped napalm bombs. There was fire all around; the road was on fire.

My clothes suddenly were gone and then I saw fire in my body. I was still so scared that I kept running and running and crying. A group of journalists were down the road. Most of you have seen the picture; the next day it went around the world and it became very famous. The children who are running with me in that picture are my brother and my cousins, who still are living in Vietnam. The picture helped change the way people saw the Vietnam War and all wars. It also changed my life forever. The photographer, Nick Ut, won a Pulitzer Prize, and he had already won my heart because he put down his camera and rushed me to the nearest hospital. Uncle Ut saved my life.

LESSONS LEARNED

Today I want to talk about some of the lessons I learned from that experience, how it changed my life, how I owe my values and who I am today to that experience.

Strength from Pain

Sometimes terrible things can happen in our lives. Sometimes, if we are lucky, we can learn from our experiences, and they can even make us stronger. That was my first lesson. I learned to be strong even when it hurt so badly. I was nine years old. Before that day, I knew nothing of pain, except for falling off my bicycle a few times. Napalm is the most terrible pain you can imagine. It is burning gasoline under the skin. Water boils at 100° Celsius; napalm generates a temperature of 800° to 1200° Celsius. Unfortunately, the soldiers who tried to help me on the road that day didn't know about napalm burning under the skin so they poured water over my body, which just made the napalm burn deeper. When my parents found me at the children's hospital in Saigon three days after the bombing, I was in the death room, unconscious. I had been left to die. Then a miracle: I was transferred to the Barsky Burn Clinic in Saigon, and that's where I survived. I don't want to talk a lot about suffering. Let me just say the pain was unbelievable. I would pass out every day, every time the nurses put me in the burn bath and cut my dead skin off. I

was in the hospital for fourteen months, I had seventeen operations, and I almost died many times.

Somehow I survived. Somewhere I found strength. Inside of me was a strong little girl who was determined to live. My last operation gave me the freedom to move my neck and my underarm. That was in Germany in 1984. Today, I sometimes still have pain, but I have learned to deal with it. Normally I don't have any pain, but when the weather changes, the pain comes back to me, and I feel like I am being cut by a knife. How do I deal with that? I get a massage, apply cream, or do something that distracts my mind such as going out for a walk or singing a song. I never concentrate on the pain. I learned that when I focused on the pain, it just got bigger and bigger and bigger. Facing that kind of pain was harder than any challenge that would happen to me ever again. And I met that challenge. This has made me very strong inside. I thank God for that.

Importance of Love

Another lesson I learned was the importance of love and working together. Love helped me recover, I know that—the compassion of my doctors, nurses who were so wonderful, and my family who loved me so much. When I came home from the hospital, I suffered a lot of pain, but everybody was there to help me. My sisters, my brothers, my cousins, and friends took turns giving me massages every day, and they pounded my back to get the blood moving. My skin was so tight on my body and so itchy for a long time; my favorite place was a shower.

Sometimes I felt so sorry for myself. You see, I wanted to wear short-sleeved blouses because Vietnam has hot weather. I would look at other girls with their beautiful arms in short-sleeved blouses, and then I would look at my arms. One was beautiful but the other was so scarred and painful, and I asked, "Why me, why do I have to suffer?" Because of the scars I thought I would never have a boyfriend, or get married, or have a baby. But I was so wrong. I have a wonderful husband, and I have two lovely sons, Thomas and Steven, nine and six years old. And now my parents are living with me in Canada. I am surrounded by love.

Love is not always easy and gentle. Sometimes it is tough. I was supposed to do a lot of exercises every day when I came home from the hospital. They hurt a lot, and I didn't want to do them. My mom made me do them. "Kim, don't cry because it makes me cry." "If you don't want to be disabled, you must do your exercises." My mom is very strong and very stubborn—just like me. I love her, I obeyed her, and I got much better.

After the war our lives were very difficult and different. Our house was destroyed. How did we survive, when we had everything one day and sud-

denly had nothing? We were lucky, we had our family. Everybody worked together as a team to rebuild our lives. The lesson I learned is that you can lose what you think is everything, but if you have family, family love, and God's love, you have everything.

Importance of Education

Third, I learned the importance of education. As a little girl, I loved going to school. After I was wounded, the hardest part was missing my teachers and friends. When I began to get better, the first thing I wanted to do was to go back to school. To me, that meant a normal life, being a kid again. I began to dream of becoming a doctor. I was determined and I studied hard in order to catch up with my friends. I did two years of work in one. As you might imagine, in Vietnam at that time, it was difficult to go to school sometimes because it was very dangerous. If there was fighting nearby, the school would close and we would stay at home.

When I was nineteen years old, going to school became even more difficult for me personally because the Vietnamese government found me and decided that I should be a war symbol for the state. An officer would come and pick me up from my classes whenever the government wanted, so I could do interviews with the foreign press or appear at various events. I wanted to be left alone to study and to live a peaceful life, but they didn't care what I wanted. My dream, as I told you, was to study medicine, to give back what had been given to me, but in my country we were not free to make our own choices.

One day I met the Prime Minister. I begged him, "Please let me go somewhere quiet to finish my schooling." And he listened to me. Soon after that he arranged for me to go to Cuba. At the University of Havana I had to give up studying medicine because of my own health problems and also because of language problems. When I arrived in Cuba I was amazed to discover that they spoke Spanish. I had learned a little bit of English at my high school in Vietnam, but in Cuba I had a whole new language to learn. I switched my course of study to English and Spanish. It was a challenge, amigos, but I did it. I was determined to get an education, and I got it. I still love to learn and I love to speak to children who are learning right now.

Love of God

Another lesson: I learned to love God. Like most Vietnamese children in my area, I was raised in the Cao Dai faith. That taught me to believe in many gods or spirits, but for me something was missing. I wanted to know God personally. In 1982 I found a New Testament in the library, and soon after that I decided to become Christian. That happened at Christmastime in 1982, when

I was nineteen years old, and I realized that God had a purpose for my life. My Christian faith has been essential to my happiness and my values.

Importance of Freedom

Freedom is wonderful. You see, from the time the government found me, I always had "minders," people from the government whose job it was to watch me every minute of the day. Even when I was in Germany for my last operation in 1984, a woman was assigned to watch me twenty-four hours a day. She slept in my hospital room, and I could not go anywhere alone. From that moment I began to form my plan. I was determined one day to escape to freedom.

My chance came eight years later. I had met my husband Toan at the University of Havana, where we were both students. In 1992 we married, and I managed to get permission to go to Moscow for our honeymoon. Can you imagine a honeymoon in Moscow? At first they were willing to give permission only to my husband. I said, "What, he is going to go on his honeymoon alone, without his wife?" Finally they allowed me to go, and I took that as a good sign; from friends, I had heard rumors that it was possible for people to defect to Canada on the return trip from Moscow to Cuba.

When the plane stopped to refuel in Gander, Newfoundland, I was so excited. I had kept my plan secret, even from my new husband, until we were on the airplane leaving Moscow. Then I told him that I had no choice, I wanted to stay in Canada; this was our chance for freedom. All I knew about Canada was that the weather is cold, and the people speak French and English, and Canada has a pretty flag. We had one hour on the ground in the waiting area. I just had my purse and my camera with me; everything else was on the airplane. All of our friends and our studies were in Cuba. And I knew nothing about *how* to defect. If we were caught, we would be punished. Toan was so scared, even more than me, but I tried to convince him, and then I prayed, "God, help me see the way to do it." When I opened my eyes, I saw a glass door that was a little bit open, and on the other side I saw a group of Cuban people from our airplane with a Canadian immigration officer. I took my chance and I said to my husband in Vietnamese, "Please, Toan, give to me your passport." Thankfully, he didn't ask me any questions, he just gave it to me. That is real courage and real love, and I learned that sometimes in our lives we need to take a risk and move on. Our journey to freedom was twelve years ago, and it is a story we save for our children. Mommy and Daddy had nothing—but we had each other and we had freedom, so we had everything.

Forgiveness

Then I learned the most difficult lesson of all, how to forgive. Many doctors and operations repaired my body, but the person who had been saved by the

doctors was still filled with hatred, bitterness, and anger. "Love your enemies," Jesus said. When I first read that, I didn't know how to do it. It seemed impossible for me. I had so much scarring and pain all the time, and I was living as a victim. But I prayed a lot and I read the Bible and I learned to be positive, to start counting my blessings. And I asked God to help me learn how to forgive, how to love my enemies. When I started to pray for my enemies, my heart got softer and softer and softer. Finally, I got it, and when I got it, I didn't want to lose it. It wasn't easy. I didn't just say one day, "I forgive," and walk away from it. It was a long process, and it took the power of God's love to heal my heart. Then I realized the value in my suffering and how it could help me reach out and help others. I have forgiven—but I do not forget, so that I can work to prevent the same thing from happening again.

I am so grateful to have learned so much in my life. Having known war, I know the value of peace. Having lived under government control, I know the value of freedom. Having lived with pain, I know the healing power of love. Having lived with poverty, with losing everything and having nothing, I know how to value what I have. Most important: Having lived with hatred, terror, and corruption, I know the power of faith and the power of forgiveness. Dear friends, napalm is powerful, but faith and forgiveness are much more powerful than napalm could ever be.

In 1996 I was invited to the Vietnam Veterans Memorial in Washington, D.C. It was a very emotional moment for me. I saw the names of the Americans who had died on the wall. I had a chance to speak for a few minutes. Let me share with you what I said and what happened after I spoke.

> Dear friends, as you know, I am the little girl who was running to escape from the napalm fire. I do not want to talk about the war because I cannot change history. I only want you to remember the tragedy of war in order to do things to stop fighting and killing around the world. I have suffered a lot from both physical and emotional pain. Sometimes I thought I could not live, but God saved my life and gave me faith and hope. Even if I could talk face to face with the pilot who dropped the bombs, I would tell him that we cannot change history, but we should try to do good things for the present and for the future to promote peace. Dear friends, I just dream one day that people all over the world can live in peace. Thank you so much for letting me be a part of this important day. May God bless you.

In the crowd there was one American who especially wanted to see me—John Plummer, who had been a captain in the Army and who had felt a terrible sense of responsibility for what happened to me. He managed to meet me after

the ceremony, and it was really touching. We both cried, and I was as happy as he was that we had that chance to meet, because I wanted to let him know from my heart that I forgive what happened and everyone involved.

Patience

Another lesson I learned was patience. Patience was always part of my character, which is good because I had to wait many years for so many things: for healing, for education, for love, for freedom, even six years for my Canadian citizenship. Now I know that good things come in good time.

THE ULTIMATE LESSONS

This is the heart of what I learned: I learned that I need to help children. A few years ago I founded the Kim Foundation, an international charitable foundation, dedicated to helping child victims of war. Years ago I was a child of war who was given a future through the generosity of friends and strangers and through financial help from business people; people found ways to help one little girl. Now that little girl is ready to give back. My photograph was an accident of history—the photographer happened to be on the road that day—but I never forget the thousands of innocent children who did not have their picture taken. These are the children I want to help. Children are our hope and our future. If we want to heal the world, we have to begin with the children. The Kim Foundation believes in childhood for all children, and the Kim Foundation helps provide wheelchairs and medication for children wounded in Afghanistan, Iraq, Vietnam, and African countries.

You can visit my website, www.kimfoundation.com. I would be honored if you would join us in our work, financially, personally, however you can. I believe that together we can make a huge difference in helping innocent children who are suffering because of senseless violent conflict and war. Let's give back hope so these children can enjoy being children again, like your children and my children. Let us plant the seed of peace. That is my wish, that is my cause.

There is one last lesson I want to share with you. I learned to take control of that picture. When we moved to Toronto, I wanted to hide from that picture. I wanted to live a normal life, a quiet life, with my husband and my family. But one day a photographer from London, England, found me on the Toronto street, and she took a picture with a long lens. Suddenly I was in the papers again. It seemed that picture didn't want to let me go. At first I was very upset. Remember that for many years that first picture controlled me; I was taken out of school to give interviews for the state. With the new publicity, I felt like a victim all over again. Then a wonderful thing happened: I real-

ized that if I couldn't escape that picture, I could work with it for peace. Finally I accepted it as a powerful gift, part of God's plan for my life. Now I am working with my picture for good, and it is my choice.

As you know, my picture is a symbol of war, but my life is a symbol of love, hope, and forgiveness. Now I travel following my picture around the world. I used to call my mom and say to her, "Mommy, that little girl is not running anymore, she's flying." I have met many powerful people. I want to leave you with a new way of looking at my picture. When you see that little girl running up the road and crying out, don't see her as crying out in pain and fear, see her as crying out for peace.

THE PRESIDENCY AND GEORGE W. BUSH[†]

Terry Moran*

A little information about my background will help explain why I consider it a great privilege to be here with you. Before becoming a political reporter, I covered the courts and major developments in the law for about ten years. In that time I developed a profound respect and even love for the law and for what you do. You have attained excellence in this special profession, and you have my utmost respect. And I don't think I'm alone in feeling that way. Despite all of the criticism that you get, the vast majority of your fellow citizens have great hope and trust in what you do and in the ideals that you serve.

That is one reason, maybe the main reason, why a strong argument can be made that the Supreme Court's decision in *Bush v. Gore* was a shocking strategic error. Regardless of the legal merits of the case, there was a political process at work. Yes, it was messy and confusing—it was democratic. And in my judgment as a lay person, it was an enormous error for the Supreme Court to intervene in that process. The trust that I developed watching what you do, trust that is widely shared, took a hit that day.

In covering an impeachment and a contested election and war, I've had a front-row seat to some profound issues, some constitutional issues, which has been a great learning experience, and coming from covering the law to covering politics was very valuable. It enabled me to bring a couple of lessons into covering politics that a lot of my fellow political reporters have not had. One is this: People are smart. There seems to be a common assumption in political journalism that people are stupid and that they are manipulated by the Svengalis of Karl Rove and Bob Schrum and Dick Morris; but when you see enough jury trials, you realize that people are actually pretty smart, and they are capable of making difficult factual and moral determinations. A second lesson learned from covering the law is that there are two sides to every story, which is something that not everyone in my business always remembers.

In addition to the valuable experience of covering the law, I also have had the good fortune to have mentors who have taught me the responsibilities of my profession. Michael Kingsley was my first editor at the *New Republic*. I worked for Stephen Brill, who founded *American Lawyer* and then CourtTV, on both the print side and television. At ABC News, Peter Jennings and the

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[†] Address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton Golf Resort, Naples, Florida, March 2, 2004.

* ABC News White House Correspondent, Washington, D.C.

great Sam Donaldson have been tremendously generous with their wealth of experience. That reminds me of something Sam told me once, because I do get a lot of hate mail and a lot of strong responses from people. Quoting L.B.J., I think, Sam commented, "Sometimes being White House correspondent is like being a jackass in a hailstorm; you just have to stand there and take it."

GEORGE W. BUSH: BACKGROUND

For the past three years the only subject of my stories has been one man: George W. Bush, and I'd like to talk a little bit about him today. I offer this proposition for your consideration: In his exercise of the executive power at home and abroad, George W. Bush is the most consequential president since Franklin Roosevelt. For better or worse, the office and the country will never be the same.

Before I unpack that sweeping statement, I should address some important preliminary questions. First, do I have a nickname? As you may know, the President loves to give people nicknames. Among the reporters, we have Stretch, Super Stretch, Little Stretch, Pablo and Pancho, Johnny Boy and AP Man (he works for the Associated Press), and Mom (one of our pregnant colleagues). It's both a tactic and a natural habit. Mr. Bush, like most politicians, is naturally a people person. He likes people, and he likes people to like him. Being around him can be genuinely fun. Like a lot of good politicians, he seeks to put people at ease—the better to understand them, the better to disarm them, the better to enlist them in his purposes. There is nothing sinister in this. It's both authentic and manipulative; that's just the way people are sometimes. However, I do not have a nickname, and I prefer it that way. In some ways, I've worked hard to keep it that way, because it makes it much easier to ask the kinds of questions that Bush doesn't like—and sometimes that the other side doesn't like. (In fact, one of the reasons I might hope for a Democratic victory is that I could then give the other side a hard time and earn my bona fides on the White House beat.) In any event, it helps to keep Mr. Bush at formal arm's length, I think. This President is a very seductive personality, and it's easier for me if I keep the relationship more formal.

I should mention that I almost had a nickname. The first time Mr. Bush ever called on me in a press conference was during the transition after the Supreme Court had decided the election, and I had just come from covering the Gore campaign. Mr. Bush had a little cheat sheet on the new reporters in the room and when he saw my name, he said, "Terry Mor***o***n." That didn't stick, for which I am grateful.

Second preliminary question: What is Air Force One like? It's cool. It's a nice ride. It feels a bit like a target sometimes, when we fly into places such

as Indonesia, but they take care of us pretty well. The only downside is that since somebody leaked to the *Washington Post* that we once watched a somewhat steamy movie, they now censor what we get to watch on those long international trips.

Question three: Is the President really stupid? That's an offensive question, but I hear it often. Many Democrats and journalists are convinced that this forty-third President is an ignoramus. To be fair, there is some evidence on that side of the argument. Sometimes he just sounds dumb. One day last week, I joined a few of my colleagues and went into the Oval Office to toss a few questions at Mr. Bush and Chancellor Schroeder of Germany. The President was asked how their strained personal relationship was faring that day. I am quoting his response from the transcript: "The Chancellor's got a good sense of humor, and therefore he's able to make me laugh, and a person who can make me laugh is a person who is easy to be with, and a person who is easy to be with means I've got a comfortable relationship with him." That actually is as clear as a bell. It is similar to his recent statement that the unemployment numbers are evidence that too many people are losing their jobs. You can't argue with that. "Bushisms," as these little gems are called, are fun; each person has his or her favorite. Some people like "Hispanically." Others quote this 2001 announcement in Quebec City, at the Summit of the Americas: "It's very important for folks to understand that where there is more trade, there is more commerce." My personal favorite came during a campaign stop in 2000 when candidate Bush said empathetically, "I know how hard it is to put food on your family," which conjures up a wonderful picture of a pancake breakfast in the Bush home.

I talk about "Bushisms" good naturedly, though, in part because the President is good natured about his "adventures in English." They do not prove that he is dumb. In fact, he knows something that a lot of us in the media seem to forget, which is that the whole point of a public utterance is to convey your message. While his verbal missteps are much mocked by reporters who pride themselves on their literary turns of phrase, they are miscues in what generally is a very clear message. Think about it: There is little doubt or confusion about where George W. Bush stands on the major issues of our time. For better or worse, you know his positions, and that's because, for better or worse, he speaks his mind. And, believe me, that's a positive characteristic in a politician. I covered Vice President Gore's campaign; I followed the Vice President for a solid year. You could teach English using Al Gore's words on the stump. His sentences parsed, his verbs agreed, his thoughts flowed in paragraphs—listening to him was a remarkable experience. Yet, many people who heard him could not figure out what he was saying, and thus did not know what he stood for politically. One little item from the campaign illustrates my point.

The program for the World Series in October contained a series of questions for the candidates, and one question was, "What do you think of domed stadiums?" The Vice President's answer was long and consisted of statements such as these: "domed stadiums are among the great architectural accomplishments in North America," "the King Dome in Seattle is the largest enclosed space," "but it depends on the perspective of the spectator at the game." George W. Bush's entire answer consisted of the following words: "I like to watch baseball outside."

George W. Bush actually is quite smart in a way a lot of reporters don't perceive. We tend to think, mistakenly, that the only kind of intelligence is the kind we think we have—verbally facile, comfortable with abstract concepts, digressively curious about the world and its cultures and histories, clever. Bush is none of these things. Instead, he is linear, ruthlessly focused on the subject at hand, swift, to the point, with a highly developed appetite for the bottom line. He thinks categorically, sometimes to the point of reductionism. He thinks strategically; he is tactically savvy. He is a dangerous negotiator, as congressional Democrats have discovered again and again. This is a president who plays the political game exceedingly well, and he insists on measuring arguments and policies by describable, obtainable, real-world results. Those are not bad qualities to have in a chief executive.

Now, I also like to say that Mr. Bush came to the presidency with an excellent mind with nothing in it, for it is true that his store of worldly experience—the kind of practical and prudential wisdom you would like to see in the most powerful person in the world—was mighty slim. The first foreign trip he took was to Mexico, which insulted the Canadians. Then the White House, sensitive to criticism that the President had traveled outside the United States very little in the more than fifty years of his life, actually issued a document listing on White House stationery the international travel of George W. Bush. It was alphabetical, and at the top of the list was Bermuda.

All of that has changed. This is a man who has dominated the world stage like few presidents before him. He is upsetting all kinds of apple carts, turning fifty years of international arrangements on their heads, cleaving American politics, and presenting us with a fundamental choice this election year. And that is no accident. This is a consequential presidency, deliberately designed to be such, both at home and abroad. Think about it. The record of this administration includes all of the following: three tax cuts opposed by the other party, which was in the majority in the Senate for the first and largest of those cuts; a fundamental change in the direction of education policy; a fundamental change in the direction of Medicare policy, over the fierce objections of many in his own party and the opposition of Democrats fearful of ceding a political issue to the GOP; fast-track trade authority; fifteen billion

dollars for AIDS relief, tripling previous efforts; two wars; Guantanamo Bay; the efficient and merciless of removal of presidents in Liberia and Haiti; a midnight trip to Baghdad, which might have been the most spectacular presidential adventure ever. This is a guy who knows how to be President.

In just three years George W. Bush has demonstrated that he possesses a conception of the office and a capacity to carry it into effect that rivals the strongest executives in our history, such as Lincoln, the two Roosevelts, and L.B.J. Please understand that I'm not saying George W. Bush is Abraham Lincoln, and I'm not saying that I think what he has done is good for the country or the world. That is not for me to say. Rather, I am trying to say something about this deceptively uninteresting man, the remarkable office that he holds, and our troubled times. The power of the presidency is at one and the same time enormous and elusive. Its enormity is obvious: The President is the sole custodian and the wielder of the physical force of the United States, the most awesome military power in history. He is, with the Vice President, the only elected national officer of the most diverse and wealthiest nation in history. He is the discretionary executor of a vast body of domestic law affecting every citizen in countless ways every day. He is the voice of the nation in the world and at home, especially in moments of crisis. But the presidency, it turns out, is also an obscure institution. Its power simply eludes many of its occupants; they just can't figure out how to make it work. Jimmy Carter is a recent example of an intelligent and well-intentioned man who failed to grasp successfully the power that the electorate had awarded him. This President's own father, George Herbert Walker Bush, is in many ways another failed president. Our history is littered with them.

The challenge, it turns out, is built into the Constitution itself. Article 2 is the most loosely drawn chapter in the founding document. Remember its opening words: "The executive power shall be vested in a president of the United States of America." Those fifteen words have been the focus of fierce constitutional debate and litigation because they are not clear. What is "executive power" anyway? What does it mean to exercise it? What is it *not,* perhaps just as importantly? How much discretion is lodged in those words? How should that discretion be exercised? Is that sentence an affirmative grant of power—in other words, does the President get to exercise what might be considered executive power based on traditions reaching back to monarchy—or is it just a statement that whatever the Constitution defines as executive power and nothing else will belong to the President? These are very deep constitutional waters, and I'm in way over my head, so I'm not going to plumb them; but I wanted to focus your attention on the malleability of this remarkable office. There are as many ways of being president as there are presidents. The power of the presidency is a glittering garment that drapes itself on its occu-

pant according to that individual's temperament, intellectual outlook, and belief system. For some it's a bad fit, and for others it suits just fine.

THE EVOLUTION OF THE BUSH PRESIDENCY

Early on September 11, 2001, George W. Bush was in Sarasota talking about literacy, an utterly innocuous subject. And if you had seen him that morning, you might have been reminded of Walter Lippman's description of Franklin Roosevelt in 1932: "He is a pleasant man who, without any important qualifications for the office, would very much like to be President." It wasn't true of F.D.R., nor was it of G.W.B., but it does capture something. At the beginning of his term, it sometimes seemed that he was just phoning it in. He seemed to be a president without a purpose. There was even a joke that he saw the presidency as a steppingstone to the job he really wanted: baseball commissioner.

The reason was that he had not found a purpose commensurate with his executive personality. The times, as Mr. Bush conceived them that September morning—and, to be fair, as both he and Mr. Gore had conceived them during their campaign—did not offer scope for dramatic action. That changed completely, of course, on that day. Having not traveled with the President on what promised to be a relatively newsless trip, I was in the White House on the morning of September 11. We were chased out by the Secret Service agents; they swung the gates open and yelled, "Run!" They screamed at the women to take their shoes off so they could run faster. And we ran out into that splendid morning like deer. We ran for blocks, pointlessly, until we all came to our senses and stopped. Then we turned and saw the smoke rising from across the Potomac, where the Pentagon was in flames.

The United States has suffered surprise attack on its soil three times.[1] The British burned Washington in 1814. On December 7, 1941, Pearl Harbor was attacked. And, of course, on September 11, 2001, New York and Washington were hit. Each time the country has responded by moving aggressively and dramatically into world affairs. After the 1814 attack on Washington, the country preemptively seized new territories to protect itself and declared the Monroe Doctrine to warn the European powers to stay out of this hemisphere. After the second attack, which drew this country into World War II, Franklin Roosevelt and Harry Truman set out to secure the U.S. by securing the world, through the use of new multilateral institutions such as NATO and the UN to promote free societies and free markets. Now, after the third attack, we are

[1] For these points I am indebted to an interesting new book: J.L. GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE (2004).

seeing once again a radical redirection of American strategy. The Bush doctrine is radical, like those two previous responses to surprise attacks on this usually placid, usually blissfully ignorant democracy. Its aim is nothing less than to impose norms of twenty-first century behavior on foreign states and on their citizens, under penalty of preemptive intervention by the United States acting alone or in concert with states and perhaps international institutions willing to use force to secure the civilized world from a new barbarism.

This radical doctrine is designed to meet a radical new threat—the possession of enormous killing power that once was reserved to states by non-state actors, gangs of fanatics bent on mass murder. The wound that still gapes in lower Manhattan is merely the harbinger of far darker possibilities that I don't need to describe. We live with them now somewhere in the recesses of our consciousnesses every waking hour. This new doctrine is maximal, it is categorical, it is as clear as a bell in its articulation and execution so far. It is strategic in the grandest of senses. It is moralistic. It is, in other words, a direct reflection of the executive personality and the habits of mind of George W. Bush. And in pursuing this new direction for America, Mr. Bush is changing the presidency itself.

This is a big subject, so I will just touch on a few issues. What is happening in Guantanamo Bay represents an amazing expansion of presidential power, and it is hard to see how it could ever be completely checked or negated; every future president will be able to do something similar. The killing and capture of individual terrorists in Yemen, the Philippines, Indonesia, and elsewhere mark a further increase in presidential power around the globe. It is hard to describe these actions as warmaking actions in the classic constitutional sense.

Mr. Bush also has changed the United States's role in international institutions in irrevocable ways. This has created a crisis of legitimacy not only for this country but also for those institutions. I'm not passing judgment here—the crises may be productive—but the reckoning has arrived. The old order is being blown away, and George W. Bush ushered in the storm.

At home, too, the presidency has been altered. The assertion by the President that he can declare residents and even citizens to be enemy combatants beyond the reach of normal court processes is just the most dramatic example of the possibilities he sees for using his office to confront the new threats. By the way, we should not assume that these threats are exaggerated or insubstantial or imaginary. Recent intelligence not only from our government but from other governments around the world points to long-term plans by Islamic terrorists to burrow deeply into Western societies, by recruiting citizens to their cause or even becoming citizens themselves. That presents us with some novel challenges, and the maximal response by President Bush and

his Attorney General is one possible response—one that will leave a residue of new options, new conceptions, and new powers for future presidents. The creative energy of this new Bush conception of the presidency will not be easily squelched, for better or worse.

I do want to touch briefly on the Bush domestic agenda beyond the war on terrorism. It is often said that George W. Bush is a divisive figure, and that is true. Polls prove that, beyond any question. But remember that we were a divided country before he took office. During the last campaign, we all talked about the fifty-fifty nation and looked at the map of the red and blue states. I began to wonder then what it is that so divides us, and I'm afraid that the answer I came up with was culture—which is dangerous. We are still arguing over the deep fault lines that opened up in the 1960s: the role of religion in public life, the new freedoms in life styles and personal choice, the relevance of traditional forms of patriotism and respect for established institutions, the importance of public decorum and manner of public discourse, our own story as told in the form of history to our children. We are still sorting through these issues about which we have been disagreeing so deeply for almost forty years, and now there seems to be a new urgency in these so-called culture wars. We're engaged in a real war now, so the questions have been subsumed into a great pressing question that underlies our current debates: *Which* America will fight and win this war—Clinton's or Bush's? The green, globalist, empathetic, more-or-less-nonreligious or at least not-so-ostentatiously-religious America that hails Hollywood portraying an ordinary American family as two men and a child? Or the traditionalist, nationalistic, martial, devout America that sees the Super Bowl halftime show as a sign of dangerous decadence?

George W. Bush said a long time ago that the reason he got into politics in the first place was to show that his generation wasn't all about smoking pot and tearing down tradition. And his categorical approach to the presidency, his tendency in both language and policy to stake out firm and maximal positions, has further cleaved this country over issues that touch us deeply. And here too, I'm afraid, he and an increasing number of conservatives see a national security purpose; many conservatives increasingly believe that the only way to confront a resurgent and aggressive Islamic fundamentalism is with a cultural confidence in the fundamentals of the West, an unapologetic insistence that our traditional way is best.

I think these are the stakes in this election, and they are very high. But I don't want to close on a grim note. Partly because of my experience covering what you do, I am convinced that whatever way is the right course, the American people will get around to finding it. When I get into discussions with my colleagues who are convinced that people are stupid and easily manipulated and don't know what they're doing when they go into the ballot booth, I point

out that in my lifetime the people of this country, operating primarily through the exercise of the franchise, have ended an apartheid system, launched an environmental revolution, won the Cold War, opened the doors of the country to immigration of markedly different ethnic and religious backgrounds and done so peacefully and prosperously, and opened the doors to trade in a way that has revolutionized the world economy. If the voters are so stupid, how did they do all of that? As trial lawyers and judges, you know that people are smart. They manage somehow, in all the craziness of the campaigns (which I dearly love), to do the right thing and get to the right answer. So amid all the hoopla and hypocrisy of this election campaign, remember that; and remember also what Lily Tomlin said: "Ninety-eight percent of the adults in this country are decent, hardworking, honest Americans. It's the other lousy two percent that get all the publicity. But then, we elected them."

LOSING—PART ONE[†]

Glenn E. Bradford*

> *Because trial lawyers identify closely with their clients, they enjoy their practice only when they win, and nobody wins all the time.*[1]
>
> Martin Mayer, *The Lawyers*

It is frequently said that the only lawyers who don't lose cases are lawyers who don't try cases. New York trial lawyer Henry Miller says that "[t]he only trial lawyers who do not lose cases are those who do not try cases, who settle too many cases, or who take only cases that are such sure winners they do not need a trial lawyer to try them."[2] Noted Washington, D.C., criminal lawyer Edward Bennett Williams made this comment about the common perception that some trial lawyers never lose cases:

> Once in a while the illusion is created, probably by an overenthusiastic press, that some great trial lawyer never loses a major case. This is pure fiction, and not harmless fiction at that. It casts the whole administration of justice in an unfavorable light. . . . There is a limit to what a genius can do with the material with which he must work.[3]

The acid test for a professional advocate is defeat. After thirty years of trying cases on my own, I can speak with some authority on this point. The easy part of the job is to work hard on a case for several years, do a good job at

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[†] This article is a revised version of an article that first appeared in the July/August 2002 edition of the *Journal of the Missouri Bar*.

* Bradford & Walsh, P.C., Kansas City, Missouri. I would like to thank Dr. Robert F. Willson of the University of Missouri-Kansas City English Department for his editorial assistance. Additionally, I would like to thank the following outstanding trial lawyers for reviewing my manuscript and making editorial and substantive suggestions: Jerry Kenter, Arthur H. Stoup, Professor James W. Jeans, Judge Scott O. Wright, John M. Kilroy, Sr., R. Lawrence Ward, Marietta Parker, William H. Sanders, Jr., Raymond C. Conrad, Jr., R. Frederick Walters, and James W. Benjamin of Kansas City, Nicole L. Sublett of Jefferson City, Daniel K. Atwill of Columbia and, of course, Henry G. Miller of New York. And, finally, I would like to thank Ms. Sublett for her editorial assistance and advice in revising the article.

[1] MARTIN MAYER, THE LAWYERS 44 (1968). Mayer illustrates this point with a quotation from a former associate of famed New York lawyer Max Steuer. "There's grown to be a legend that none of Steuer's clients was convicted. That's nonsense, and no honor to Max. A good half of them were convicted—but nearly all of them were guilty . . . ."

[2] HENRY G. MILLER, ON TRIAL: LESSONS FROM A LIFETIME IN THE COURTROOM 122 (2001). Mr. Miller asked that we include the statement that his article in book form was reprinted with permission from the New York Law Journal, Copyright, the New York Journal NLP IP Company.

[3] EVAN THOMAS, THE MAN TO SEE 157 (1992).

trial, and reap the benefits of a favorable verdict.[4] The hard part of the job is to work hard on a case for several years, do a good job at trial, lose the verdict, and then get a phone call from the client firing the firm as counsel. This is the point where you determine whether a litigation career is really what you want to do with the rest of your life.

In his article *On Losing*, Minnesota trial lawyer Douglas A. Hedin has documented the disastrous effects of defeat on several notable advocates of years past.[5] Ultra-successful New York plaintiff's lawyer Thomas Moore says, "If I lose a case, it's a disaster, the losses live with me, it's like a grieving process."[6] Although most trial lawyers probably do not go through anything comparable to a grieving process, it is certainly easy to become discouraged and lose confidence after a significant loss.

Based on his experience of a lifetime in the courtroom, New York trial lawyer Henry Miller makes the realistic observation that "[w]e must accept that in our careers we are going to lose a certain number of cases. We just do not know which ones they will be."[7] Losing, at least occasionally, is simply a reality for an active trial lawyer practicing in the real world.[8] There are two separate and distinct facets to our consideration of the subject of losing: (1) dealing with the fear of losing and (2) coping with the reality of losing. This article focuses on dealing with the fear of losing. *Losing—Part Two* will deal with handling actual losing.

FEAR OF LOSING

Nationally-known trial practice expert James W. Jeans has observed that "[t]he number of lawyers who appear regularly in court . . . numbers less than ten percent of the bar. Why?,"[9] Professor Jeans asks. "As in most such cases,

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[4] Professor James W. Jeans, one of America's most respected experts on trial advocacy, kindly reviewed a draft of this article and expressed disagreement with only one major point: that it is easy to deal with victory. Professor Jeans had this observation:

> Nothing grooms the ego quite as much as a successful jury result. Therein lies the danger. A few successes and the trial lawyer is seduced into thinking that he or she is an accomplished professional. It takes a continuing dose of genuine humility to prevent the germ of victory [from] corrupt[ing] one's sense of self-importance. Some wag observed: "Success is the public destruction of a person in the process of learning." Amen. I have seen too many lawyers have a few successes and self destruct in an explosion of ego.

Letter from Professor Jeans, in possession of the author.

[5] Douglas A. Hedin, *Commentary: On Losing,* 26 AM. J. TRIAL ADVOC. 107 (2002).

[6] *See* a thumbnail biography of Thomas Moore available at www.fansoffeiger.com/moore.htm. This site features short sketches of many prominent lawyers, past and present.

[7] HENRY G. MILLER, *supra* note 2, at 122.

[8] *See, e.g.,* Rich Haley, Mark S. Mandell & Barry J. Nace, *Silver Linings*, TRIAL, May 2002, at 60.

[9] JAMES W. JEANS, TRIAL ADVOCACY 5 (1975).

it is a fear of failure, a feeling of inadequacy that restrains them."[10] Oakland, California, plaintiff's lawyer J. Gary Gwilliam writes that "[t]he fear of losing is really the fear of failure."[11]

Noted Kansas City criminal defense lawyer James R. Wyrsch feels that a healthy fear of losing is one of the things that motivates a lawyer to put forth a maximum effort on behalf of the client. Although a fear of losing may well serve as a strong motivator for many active trial lawyers, a fear of losing can become crippling for others. Judge Stephen T. Logan, an early law partner of Abraham Lincoln, was said to be an extremely able and aggressive litigator. "'Logan fought a five-cent case just as energetically and as well as he fought one for ten thousand dollars, rather better because such a big pile of money broke him down through fear of losing the case.'"[12]

A distinction can certainly be drawn between *fear* of losing and *dislike* of losing. No lawyer who ever lost a case was happy about losing. However, a keen dislike of losing or a strong desire to avoid losing does not necessarily equate to a *fear* of losing. A fear of losing often seems to prevent a lawyer from conducting a full-blooded representation for a deserving client. The lawyer recommends a less than optimum settlement. Another continuance request is filed. A case is delegated to a junior attorney to try "for experience." Highly respected Kansas City lawyer James W. Benjamin reports that he learned to try cases by helping to keep Kansas City legend Clay C. Rogers's trial record as pristine as possible. Benjamin reports that he did get a lot of experience on Rogers's cases, but recorded few wins. Although no doubt healthy to some degree, a fear of losing can become so pronounced, "that we lose the courage to undertake the difficult case."[13]

In a 1939 piece on New York lawyer Lloyd Paul Stryker for the *New Yorker* magazine, Alexander Woollcott described Stryker as having a relish for combat and contrasted his attitude with that of many of his contemporaries at the bar:

> The practice of settling out of court has so gained ground of late that many a noted lawyer can hardly remember when last he underwent the disconcerting experience of trying a case before a jury. Furthermore, it may be guessed that among the many excellent reasons which dictate a settlement in any case is the unconfessed one that, for personal reasons, the counsel involved would a little rather not submit

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[10] *Id.*
[11] J. Gary Gwilliam, *The Art of Losing*, TRIAL, May 1998.
[12] ALLEN D. SPIEGEL, A. LINCOLN, ESQUIRE: A SHREWD, SOPHISTICATED LAWYER IN HIS TIME 25 (2002) (Spiegel attributes this description of Logan to Lincoln's last law partner, William H. Herndon).
[13] J. Gary Gwilliam, *supra* note 11.

> to ordeal by combat. Once down in that dusty and unpredictable arena, the most disturbing things might happen to them.[14]

All of us have encountered lawyers who start to get panicky if a trial date looms too close for comfort.

CHERRY-PICKING CASES

My own trial lawyer hero is Earl Rogers, the legendary Los Angeles criminal lawyer of the early 1900s. As testament to Earl Rogers's abilities, when Clarence Darrow was indicted for jury tampering in the McNamara brothers case in Los Angeles in 1912, he hired Earl Rogers to defend him.[15] Darrow himself once described Rogers as the greatest jury lawyer of his time.[16] However, in Rogers's biography *Take the Witness*, the authors assert that Rogers made a decision early in his career never to accept a truly hopeless case:

> It was at this stage of his career that Earl made an important decision. It was never to take a case that was absolutely hopeless, no matter how much in money it would bring to him. Many of his early associates still argue that he had determined upon this course because he felt that success was a criminal lawyer's chief asset and that a losing case would impede his rise to the top.[17]

I have to confess that Earl Rogers lost a great deal of my admiration when I learned that he accepted only cases that he thought he could win.[18]

Certainly an argument could be made that the demonstrably guilty are as entitled to legal counseling and representation as are the factually innocent and the not-so-demonstrably guilty. Indeed, the *ABA Standards for Criminal Justice* state that "[t]he highest tradition of the American bar is found in the obligation, in the lawyer's oath, never to reject 'from any consideration personal to myself, the cause of the defenseless or oppressed.'"[19] Refusing to provide counsel and representation for someone who badly needs it does no credit to the lawyer, flashy win-loss records notwithstanding.

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[14] LLOYD PAUL STRYKER, THE ART OF ADVOCACY 291-92 (1954) (reprinting "Knight with the Rueful Countenance").
[15] GEOFFREY COWAN, THE PEOPLE V. CLARENCE DARROW, THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER 283 (1993).
[16] ALFRED COHN & JOE CHISHOLM, TAKE THE WITNESS 2 (1943).
[17] *Id.* at 43.
[18] I first learned about Earl Rogers from the book FINAL VERDICT, written by Rogers's daughter, Adela Rogers St. Johns.
[19] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.5, at 20.

Commentator Kenneth Bresler's *Essay: "I Never Lost A Trial": When Prosecutors Keep Score of Criminal Convictions* argues that it is unprofessional for prosecutors to keep score of their personal wins and losses. Bresler also maintains that "[i]t is also unprofessional for [criminal] defense lawyers to keep score of their wins and losses, because it decreases their availability and increases their reluctance to take triable cases to trial."[20] Bresler asserts that "[w]hen defendants whose cases will be hard to defend approach defense lawyers who protect their 'win-loss' records, the lawyers will tend to either decline the retainer or urge the client to plead guilty."[21]

In contrast to Earl Rogers's approach based on professional self-protection, Oklahoma's famed criminal lawyer Moman Pruiett, a contemporary of Earl Rogers, once accepted a retainer in a seemingly hopeless case, allowing as to how he was "the guy that can swallow the sour right along with the sweet."[22] A fear of losing is a significant problem if it motivates a lawyer to decline a professional engagement solely to avoid the possibility of losing a case.

RIDING THE ROLLER COASTER

The life of a professional advocate is typically full of ups and downs. New York trial lawyer Henry G. Miller had this observation about trying cases:

> Young lawyers think trying cases is all glory. But trial lawyers pay a price unknown to our armchair colleagues who never stray beyond the safety of their desks. Trial lawyers lose cases. Did you ever hear of a lawyer's losing a contract? If you lose at trial, every explanation seems lame. The client who adored yesterday's summation glares at you in disgust after today's defeat. The jury has rejected you. It's a personal defeat. It burns in memory. Defeat is the price trial lawyers pay for success.[23]

Professor Jeans reports that he was frequently asked by a student of trial advocacy for his opinion as to whether he or she might make a good trial lawyer. Professor Jeans's standard response: "Can you live the life of a manic depressive?"[24]

Earl Rogers's career certainly reflected Professor Jeans's observation about the profession of advocate. Friends of Rogers once feared that he was

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[20] Kenneth Bresler, *Essay: "I Never Lost A Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996).
[21] *Id.*
[22] *See* MOMAN PRUIETT, MOMAN PRUIETT CRIMINAL LAWYER 157-58 (1945).
[23] HENRY G. MILLER, *supra* note 2, at 117.
[24] Letter from Professor Jeans, in possession of the author.

so despondent over a guilty verdict that he might even commit suicide.[25] "He had begun to look upon himself as unbeatable and his pride was shattered."[26] Although one of the most successful trial lawyers in history, Rogers ultimately died alone and broken at the age of 52, friends and family attributing his early demise to the pressures and demands of his career as a criminal lawyer.[27] Rogers's daughter had this analysis:

> As for Earl Rogers, he took it—the word Guilty—as black defeat. Somewhere, sometime, a man must learn to live with his defeats. Nobody, as I learned to say when I became a sports writer, can win 'em all. Papa never accepted this. He wasn't just a bad loser. He was determined not to be a loser. Such a man will win more than his share, but when defeat comes it is disaster.[28]

If defeat is indeed the price trial lawyers pay for success, maybe the most successful courtroom lawyers have to pay an even steeper price when they encounter that rare defeat.

LAWYERS DON'T HAVE BASEBALL CARDS

Much like Earl Rogers, many litigators seem concerned about their batting average in court cases.[29] The good news for litigators is that lawyers don't have baseball cards. If we did have baseball cards, or maybe "barrister cards," everyone would be able to see our courtroom track record at a glance on the back of our card. A potential client could simply flip over to the back of the card and check out your win/loss ratio. An opponent could ask for a copy of your card in discovery to determine if she should settle with you. Juries might start asking to compare cards during deliberations. The possibilities are endless.

Maybe, eventually, a market would develop in these collectibles. Would a Daniel Webster barrister card sell for more than a Ty Cobb baseball card? Would you take two Max Steuer's for a mint condition John W. Davis? Would you drive all the way across town on a Saturday morning to acquire that vintage Gladys Root card?[30] And did the Patty Hearst pardon retroactively convert an "L" to a "W" on F. Lee Bailey's card, or is there a Maris-like asterisk next to the Hearst case on F.'s card?

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[25] Douglas A. Hedin, *supra* note 5, at 126.
[26] *Id.* at 127.
[27] ADELA ROGERS ST. JOHNS, FINAL VERDICT 226-27, 507-12 (1962).
[28] *Id.* at 237.
[29] *See, e.g.,* Kenneth Bresler, *supra* note 20.
[30] *See* short biography of Gladys Towles Root available at www.fansoffieger.com/root.htm.

Gerry Spence would probably have the most collectible card of all. On the front side of his card, Gerry would appear in his buckskin jacket and smile confidently out from under his trademark ten-gallon hat. The majestic Rockies would provide a dramatic background. Gerry has never lost a case. I heard him say so on *Larry King Live*. In fact, Gerry has apparently never even lost an argument.[31] You would probably need 100 Glenn Bradford cards to trade for one Gerry Spence card. I wonder if it would help my standing if I donned a buckskin jacket and cowboy hat for my picture for my card?

Celebrated Houston criminal defense attorney Richard "Racehorse" Haynes "refuses to reveal his [overall] win-loss record. 'I don't ever talk about that,'" Haynes has said, explaining his fear "that if he publicized his win-loss record, the newspapers would print it before every trial and make it sound like a sporting event. It's not a sporting event."[32] So I guess we'd better not print up any "Racehorse" Haynes cards. And I would have bought one of those.

Fortunately for many of us, lawyers don't have baseball cards. The plain fact of the matter is that nobody has any practical way of knowing what your "batting average" is in the first place. Few notice and fewer still remember.

THE SUN WILL STILL COME UP IN THE MORNING!

In his book *On Trial: Lessons from a Lifetime in the Courtroom*,[33] Henry Miller provides a number of practical suggestions for the young trial lawyer. Here is one of the best:

> *Do Not Worry Just About Winning.* Howard Fearfill has not taken a verdict in years. Everybody knows it. Too bad. He tries a good case, well prepared, strong opening, persuasive summation, knows the law. But he cannot take defeat. Problem: vanity. He thinks more about himself than his client. Pride drags him down. Defeat ages him. He thinks the whole world chuckles at his every loss. In truth, most of the time, nobody is even looking. . . . Secret: the world does not end with our every defeat.[34]

Well-known Chicago trial lawyer Fred H. Bartlit, Jr., a former athlete, feels that his sports background prepared him well for his career as a trial lawyer.

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[31] *See* GERRY SPENCE, HOW TO ARGUE AND WIN WVERY TIME: AT HOME, AT WORK, IN COURT, EVERYWHERE, EVERY DAY (1996).
[32] EMILY COURIC, THE TRIAL LAWYERS: THE NATIONS'S TOP LITIGATORS TELL HOW THEY WIN 325 (1988).
[33] HENRY G. MILLER, *supra* note 2.
[34] *Id.* at 162-63.

> Sports teach valuable lessons. They teach you how to win and how to lose. You can be an athlete and do a fabulous job and lose and you don't kill yourself. It hurts, but you don't kill yourself. A lot of people don't win in law because they're afraid to try because they're afraid to lose. And sports teach you to try your damnedest. If you fail, guess what? You didn't die.[35]

Like Fred Barlit, I believe that experience with competitive athletics is the best possible preparation for a courtroom career. Sports teaches you how to win and, more importantly in my view, how to lose. You don't go home and blow your brains out; you just come back and try harder the next time.

WE REALLY DON'T MAKE THE FACTS

It is an axiom of the profession that the lawyers don't make the facts. At the heart of the fear of losing, perhaps, is the assumption that the trial lawyer has more or less complete control over the outcome of a trial and, therefore, that the result in any given case is a direct reflection upon the competence of counsel. The idea seems to exist in the minds of many laymen (and many lawyers who should know better) that there are some few elite trial lawyers who can take on and win any case—or better yet, either side of any case.

Illinois trial lawyer Floyd E. Thompson commented that "[t]he path of the trial lawyer is not strewn with roses. However careful his preparation may be, he cannot always fortify himself against surprises. There are at least two sides to every lawsuit and a lawyer on each side. Only one of these lawyers can win and it will not always be the more skillful."[36]

Edward Bennett Williams felt that the lawyer's performance in a typical case accounted for, at most, twenty percent in the outcome.

> If you turn over any given football team to the best coach in America, he may win two more games than the most incompetent coach would win with the same material. Likewise, if you take a hundred criminal cases and assume that fifty of them should be won on the merits and that fifty should be lost, and then turn them over to the most able and experienced advocate in America, he will probably win sixty and lose forty. Turn the same cases over to the most incompetent trial man and he will win forty and lose sixty. The concept of a great

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[35] DONALD E. VINSON, AMERICA'S TOP TRIAL LAWYERS, WHO THEY ARE AND WHY THEY WIN 96-97 (1966).
[36] FRANCIS L. WELLMAN, SUCCESS IN COURT 279 (1941).

> trial lawyer who always wins has no foundation in reality. It is a television or Hollywood fiction.[37]

As Williams noted, there is simply a practical limit to what even the most accomplished advocate can achieve in any given case.

ANGEL CORDERO, JR., MR. ED, AND SEATTLE SLEW

My comparison is to a jockey. A jockey's job is to enable the horse to perform at its best. The jockey can attempt to position the horse next to the rail or on the outside. The jockey can give the whip at the appropriate time. The jockey can encourage the horse to put on a burst of speed over the final furlong. For certain, an excellent jockey can sometimes make the difference between winning and losing a close race. However, even Eddie Arcaro, Bill Shoemaker, or Laffit Pincay, Jr. could not have made a Breeders' Cup winner out of a Budweiser Clydesdale.

It has been written that "[t]he British bar seems fairly well agreed"[38] that "[o]f every hundred cases, ninety win themselves, three are won by advocacy, and seven are lost by advocacy."[39] Indeed, sometimes the best thing we can do is just not make a bad situation any worse. In my view, the key question to ask yourself is whether you made the most out of what you had to work with in any given case. What may not look much like a "win" to others may in fact be a relatively favorable outcome for the client, given the unique circumstances of that particular case.

Accepting the proposition that a trial advocate can only do so much to affect the outcome of any given lawsuit is a necessary step in putting winning and losing in proper perspective. The trial lawyer eventually has to learn to be honest with herself about what she was able to accomplish with the facts and law with which she was given to work. We are not always dealt winning hands or hired to ride the fastest horse.

DOES THE BEST PREPARED LAWYER ALWAYS WIN?

Intensive pretrial preparation is universally emphasized as the key to winning at trial. According to F. Lee Bailey, the best prepared lawyer almost

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[37] EVAN THOMAS, *supra* note 3, at 157. Mr. Thomas is quoting from an early draft of Williams's book *One Man's Freedom*.

[38] *See* MARTIN MAYER, *supra* note 1, at 44.

[39] DAVID S. SHRAGER & ELIZABETH FROST, THE QUOTABLE LAWYER 35-16.23 (1986). Martin Mayer attributes the quotation to the British bar generally. MARTIN MAYER, *supra* note 38.

always wins.[40] Certainly, no experienced lawyer would disagree with the need for rigorous pre-trial preparation. However, the power of an advocate to impact the results of a trial may be exaggerated, the advocate's level of preparation notwithstanding.

In their landmark book, *The American Jury*, a report on the most extensive research project on juries ever attempted, authors Kalven and Zeisel observe that in only a small percentage of close cases does the quality of the lawyer's performance appear to change the result.[41] Kalven and Zeisel found that the abilities of opposing counsel are perceived to be substantially equivalent in the vast majority of jury trials (76%).[42] Kalven and Zeisel conclude that the abilities of counsel had only a one percent impact on the system.[43] Another study concluded that "[t]he attorney is but one of many factors influencing juror and jury decisions."[44] The authors of the study conclude that "[t]his attempt to take a more comprehensive look at juror reactions to attorneys reveals that the attorneys, like other trial participants, contribute to, but do not single-handedly determine, the outcome of a trial."[45] The literature makes it clear that trial lawyers do not influence jury verdicts nearly so much as they think they do.

Kalven and Zeisel quote famed British barrister Sir Patrick Hastings, who gives trial lawyers only slightly more credit. "I have known so many advocates, good advocates and very good advocates, bad advocates and very bad advocates, and in the result that I am satisfied that at least ninety per cent of all cases win or lose themselves, and that the ultimate result would have been the same whatever counsel the parties had chosen to represent them."[46]

After observing jury trials from the bench for more than twenty years, Senior U.S. District Judge Scott O. Wright is in agreement with Kalven and Zeisel to the effect that the lawyer's performance can make a difference,

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[40] DONALD E. VINSON, *supra* note 35, at 107.
[41] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 351 (1966).
[42] *Id.* at 372. Kalven and Zeisel were specifically studying jury trials in criminal cases.
[43] *Id.* at 371-72. Kalven and Zeisel based their study on comparing the trial judge's opinions on the case to the jury's actual verdict. "There is but one final statistic on the over-all effect of superior defense counsel. Since the factor appears in one out of 11 trials, and since it causes disagreement once every nine times it is present, a disagreement is caused by superior defense counsel in (1/11 X 1/9 =) 1/99, or in a little more than one per cent of all trials." The disagreement referred to is disagreement between the judge and the jury as to the appropriate verdict.
[44] Shari Seidman Diamond, et. al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17 (1996). In addition to Kalven and Zeisel's work, other studies have confirmed that the actual power of the lawyer to affect a jury verdict may be substantially less than lawyers believe. *See also* Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communications*, 68 IND. L.J. 1297 (1993); Roselle L. Wissler, et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999).
[45] Shari Seidman Diamond, *supra* note 44.
[46] HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 41, at 372 n.26.

when a strong performance by one lawyer is met by a weak performance by the opponent—in a very close case.[47]

Lincoln biographer Albert A. Woldman put it this way: "Defeats and victories in legal contests, depending as they do upon other antecedent facts and circumstances, are those ultimate results that may or may not prove anything in so far as the respective abilities of the contesting lawyers are concerned."[48]

The individual lawyer's level of preparation can certainly be a factor in the outcome of any given case, but to isolate the lawyer's level of preparation as the sole determiner of the outcome of all trials flies in the face of reality and does a real disservice to the justice system itself. Even the most thorough preparation won't always overcome a strong set of facts. As La Rochefoucauld observed: "There is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts."[49]

EVEN ABRAHAM LINCOLN DIDN'T WIN EVERY CASE HE TRIED

Before he became President of the United States, Abraham Lincoln was widely recognized as one of the foremost trial lawyers in the state of Illinois, if not the entire country.[50] In his book *Lawyer Lincoln*, author Albert A. Woldman devotes an entire chapter to assessing Abraham Lincoln's trial record compiled during his twenty-three years of active practice. Woldman actually went to courthouses in Illinois and reviewed the available court records of Lincoln's trials in state and federal courts; and he notes that the record did not seem to be particularly outstanding, despite Lincoln's reputation as a leading trial lawyer.[51] "It is impossible to determine his record of victories and defeats in the circuit courts, where he must have tried two thousand or more cases during his long career. But we have the statement of Whitney that Lincoln 'was not more than ordinarily successful for a first-class lawyer; he certainly did not succeed in every case . . . he was sometimes defeated, like other lawyers, even in cases that he believed in and did his best to succeed in.'"[52]

> Of 87 cases for which the records are available and that Lincoln tried before the court without a jury, decrees were rendered in favor of his

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[47] Telephone interview with Scott O. Wright, Senior U.S. District Judge in the Western District of Missouri (Jan. 30, 2002).
[48] ALBERT A. WOLDMAN, LAWYER LINCOLN 247 (1936).
[49] DAVID S. SHRAGER & ELIZABETH FROST, *supra* note 39, at 109-55.4.
[50] *See* the analysis of Lincoln's career available at www.fansoffeiger.com/lincoln.htm.
[51] ALBERT A. WOLDMAN, *supra* note 48, at 246.
[52] *Id.* (referring to Henry C. Whitney, a contemporary circuit-riding lawyer in Illinois).

> clients in 40 and against them in 47. Of 82 actions argued before a jury, verdicts favorable to his clients were returned in 43.[53]

If the immortal author of the Gettysburg Address had to struggle to win as many cases as he lost, then it seems to me that we mere mortals cannot reasonably expect to avoid our fair share of losses.

IT'S EASY FOR YOU TO SAY, MR. PROSECUTOR!

Prosecutors usually win and usually should win.[54] William G. Hundley, veteran Washington, D.C. defense lawyer, described the difference in prosecuting and defending in an interview with *The Washington Lawyer*: "The hardest thing to learn when I became a defense attorney was how to lose. At Justice we could select the cases we wanted to bring. I can't remember losing a case as a prosecutor. Well, you lose them as a defense attorney!"[55] Mr. Hundley adds: "I remember [Edward Bennett] Williams telling me things like, 'Look, Bill, as long as you don't see your name in the upper left-hand corner of the indictment, don't get too upset about it,' and 'Don't get personally involved. Your job is to give them the best defense you possibly can.'"

Mr. Hundley has this recollection of his long career at the criminal defense bar:

> Most of the people that I've represented have had some problems. I've won some. I've won more than my share. It's a great feeling. But you don't win that much, and you don't always win on the merits. You win on technicalities, statute of limitations, and things like that.
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> . . .
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> I've had a fair amount of success. Now, I've had a lot of losses, too.

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[53] *Id.*

[54] *See* Thomas A. Hagemann, *Confessions of a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151 (1996). *See also* Kenneth Bresler, *supra* note 20. Outstanding federal prosecutor Marietta Parker of Kansas City had these comments:

> I agree that it can be counter-productive for an attorney to pay too much attention to his win/loss record in most cases. However, if one is a criminal prosecutor, one must be aware of losses. If a prosecutor's win/loss ratio is significantly lower than other similarly situated prosecutors, careful analysis must be conducted to insure that s/he is filing meritorious cases. (Popular legal lore holds that a prosecutor of average skills should have an 80 to 85% success rate by virtue of the fact that s/he gets to chose which cases to file.) Prosecutors rightly bear a heavy burden to balance their obligation to represent the citizens they serve by bringing criminals to justice with their ethical obligations not to damage or destroy reputations by filing cases inappropriately. That, of course, is the subject of at least half of another article, so no need to dwell on it here.

[55] *Legends in the Law: William G. Hundley*, WASHINGTON LAWYER, Nov. 2001, at 30.

> At one time they used to refer to a "Hundley Wing" at Allenwood [prison].[56]

Even the most extensive preparation won't guarantee success in defending criminal cases. Furthermore, preparation is surely not the only factor operating to determine the general effectiveness of a trial lawyer. Among other things, the attractiveness of the lawyer's personality or likeability is seen as a significant factor.[57] Pre-trial preparation is simply one of a number of factors that may have an impact on the outcome of a trial.

WINNING DESPITE OUR OWN BEST EFFORTS

Veteran Kansas City lawyer Jerry Kenter wisely advises younger trial lawyers not to get too high after a victory or too low after a defeat. As the lawyer's performance is likely seldom the primary cause for defeat, the lawyer's performance is likely seldom the sole cause for victory.[58] Clearly, we sometimes prevail in spite of ourselves. This point was brought home to me early in my career when I encountered a juror on the street a few days after the conclusion of a criminal trial in which my client was acquitted on a burglary charge. Expecting praise, I was taken aback when the juror informed me that I had done an abysmal job (not his exact words) in representing the defendant but that he had "saved me" in the jury room by straightening out the other jurors on the crucial question of expert testimony. The juror rather disdainfully pointed out that neither lawyer in *voir dire* had discovered that he taught a class on crime scene investigation at a local university. Apparently, the tool mark expert for the prosecution didn't know what he was talking about. Silly me, I had thought that the government's inability to attribute the tire iron in question to my client was defense enough. Nevertheless, ever since this deflating experience, I have tried not to take a favorable verdict as solely a testament to my own performance.

IS THE LAWYER'S BATTING AVERAGE THE MOST IMPORTANT ISSUE?

It seems to me that a trial lawyer should focus not on whether the trial of a case is likely to result in a gold star for the lawyer but, rather, whether it is in the *client's* best interest to try the case. Of course, in a majority of cases the parties are able to reach a settlement. If your client is offered a favorable

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[56] *Id.* at 34-38.
[57] HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 41, at 364.
[58] *See generally id.* at 372.

settlement, then by all means you should make the settlement. I am certainly not advocating that we rush to the courthouse and try every case just for the sake of trying cases. In some cases, however, a reasonable settlement opportunity is just not presented. Under the federal sentencing guidelines, for example, an indicted defendant frequently has precious little incentive to plead guilty.[59] A convicted defendant may well end up in essentially the same place for sentencing whether he pleads guilty or is found guilty after a trial. Another example might be where the defense makes no dollar offer in a civil case. What if, as happened to me a number of years ago, the plaintiff never makes a demand anywhere near the maximum amount he can legally recover? Do you ask the client to pay double to avoid sustaining a loss in a trial? If the client has nothing to lose, then why not try the case? Can we legitimately say that the client has nothing to lose but I, the lawyer, do have something to lose? *I* might lose.

The *ABA Standards for Criminal Justice* provide as follows: "The natural desire for personal achievement, or for personal success . . . never justifies a lawyer compromising his or her professional judgment about a client's best interests. . . . The correct role of defense counsel is to strive not for 'courtroom victories' . . . but for results that best serve the client's long-range interests."[60] Similarly, the *Model Code of Professional Responsibility* provides that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client. . . . [H]is personal interests should [not] be permitted to dilute his loyalty to his client."[61] Judgments and advice about whether to accept a settlement or go to trial should be made solely according to what is in the client's best interest. Considerations related to the lawyer's "batting average" should play no role in the decision process. The only person's interest in a case which should count for anything is the client's interest.

Judge Scott Wright, a veteran of many years as an active trial lawyer, says that in his experience the client often tends to evaluate the effort of the lawyer as much as the result.[62] Judge Wright reports that his clients frequently expressed pleasure with his efforts in vigorously fighting for them, no mat-

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[59] Under the November 1, 2001, version of the *Federal Sentencing Guidelines Manual* (West 2001), propounded by the United States Sentencing Commission, a defendant pleading guilty and thereby "accepting responsibility" would be entitled to a two-point reduction in his guidelines score. For someone looking at a level 31 offense, a two-point reduction would provide for sentence of 87-108 months for a defendant with a limited criminal history. At the original level 31, the guideline renge would be 108-135 months for the same defendant. See back inside cover of the sentencing manual for table.

[60] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE Standard 4-1.6 (1993).

[61] MODEL CODE OF PROF. RESPONSIBILITY Canon 5, EC 5-1 (1980).

[62] Telephone interview with Scott O. Wright, Senior U.S. District Judge in the Western District of Missouri (Jan. 30, 2002).

ter the outcome of the trial. To extend the baseball analogy, clients seem to appreciate it when lawyers are willing to go to bat for them.

Veteran attorney Lynn K. Ballew of Harrisonville, Missouri, points out that the well-known Missouri Bar client survey of some years ago found that, while lawyers tend to believe that results are extremely significant to clients, clients listed "results" as a cause of dissatisfaction only a small percentage (2%) of the time.[63] Clients placed far more importance on such attorney attitudes as friendliness, equality, helpfulness, courtesy, and consideration.[64] Ballew suggests that the survey shows that clients are often more realistic about results than are some of us lawyers.

As found in *The American Jury* study, in most trials the opposing lawyers are more or less evenly matched and essentially offset each other.[65] Perhaps the advocate's true role in the larger scheme of things is to provide effective representation for the client so as to match the quality of the opponent's representation and make certain that the merits of the case determine the outcome. The noted Patrick F. McCartan of Cleveland, Ohio, says that a good trial lawyer "must dare to fail. If you're afraid of losing just because of losing, you're in the wrong place."[66]

It has long been a saying in the profession that ten percent of the lawyers try ninety percent of the cases. If you are afraid to lose, if you are afraid to take the calculated risk of a trial, then you cannot possibly ever win. Henry Miller puts it more bluntly: "Timid trial lawyers never win a damn thing."[67] The colorful Percy Foreman[68] once observed that "[c]ourage in the courtroom is more important than brains. If I were hiring a lawyer and had to choose between one that was all brains and one that was all guts, I would take the guts."[69]

CONCLUSION

The simple truth is that you have to be willing to lose in order to ultimately win. Before you can be persuasive and compelling, you have to demonstrate the courage of your convictions by announcing "ready" when the trial judge calls the case for trial. Having a fear of losing is a perfectly natural thing, particularly for a relatively inexperienced trial lawyer who has neither lost

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[63] MISSOURI BAR PRENTICE-HALL SURVEY: A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT 67 (1963).
[64] *Id.*
[65] HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 41, at 372.
[66] *Id.*
[67] Henry G. Miller, *Learning to Love the Trial Lawyer's 14 Challenges*, 74 N.Y. St. B. J. (2001).
[68] Information on Percy Foreman is available at www.fansoffieger.com/foreman.htm.
[69] DAVID S. SHRAGER & ELIZABETH FROST, *supra* note 39, at 41-19.29.

very much nor previously fortified his personal confidence level with a number of substantial courtroom victories. A fear of losing is really only disadvantageous to the extent that it prevents a lawyer from fulfilling his duty to his client. A fear of losing might even prove to be somewhat of an asset for a lawyer by providing a strong motivating factor. If a lawyer is to maintain a career as a courtroom advocate, then he or she must develop the ability to deal with the fear of losing. Tempering ambition with a healthy dose of reality is a good place to start. No lawyer is so good that he can win every case and no lawyer is so wise that he can always tell the difference between the winners and the losers.