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John W. Reed, *Editor*

THE IMPORTANCE OF DIVERSITY IN THE LEGAL PROFESSION[†]

Eric H. Holder, Jr.*

We live in an America that is now a lot more diverse than at any other time in our nation's history. The 2000 census confirms that. The number of Hispanic people in the United States is now larger than the number of African-Americans; Hispanics are now the largest minority group in the nation. About one third of the American people are from minority groups. That's up from one fourth only about ten years ago. If current demographic trends continue, it is expected that by the year 2050 there will be no majority race in the United States—no racial group will constitute more than fifty percent of our population. Clearly our nation has become and will become more diverse. But what about our profession? Have we kept pace with these changes, and, just as importantly, should we?

As leaders of the bar you help to establish the standards of professionalism and ethics that govern the practice of law. As attorneys who have reached the pinnacle of our profession in many different sectors, you are role models for the next generation. In short, this is a gathering of individuals with considerable power to influence the legal community. And with that power I believe comes considerable responsibility.

Presidential Challenge

I'd like to begin by describing a nationwide network known as Lawyers for One America. In the fall of 1998, when I was the Deputy Attorney General, President Clinton asked me to take on a new assignment. He saw that our nation was making progress in its quest for racial healing, but he wanted to do more, to quicken the pace of positive change. Despite a booming economy, historically low inflation, and the lowest crime rates in thirty years, the President feared that too many Americans, principally those from ethnic and racial minorities, were excluded from this prosperity. Thirty years earlier, as you might remember, the Kerner Commission on Civil Disorders had forecast this possibility when it said, "Our nation is moving toward two societies, one black, one white—separate and unequal." These concerns prompted 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.

* Covington & Burling, Washington, D.C.; former Deputy Attorney General of the United States.

President to launch his Race Initiative. As part of that initiative he asked me to convene a group of lawyers to discuss what the legal profession might do to redress racial inequality and injustice, including the lack of diversity in our own ranks.

I brought together an ad hoc group of about fifteen individuals to serve as a planning committee and as a brain trust. The presidents of all of the minority bar associations, the president of the American Bar Association, and a few other key individuals began meeting in my office on a fairly regular basis. After months of intense discussions and creative brainstorming, we built a foundation for the legal community to recommit itself to increasing the diversity in the legal profession and increasing access to legal resources for underserved communities. The culmination of those initial meetings and exchanges was an event at the White House in July of 1999 at which the President issued to the legal community a call to action.

That event occurred, I thought very aptly, in the same room where thirty-six years earlier President John Kennedy had brought together two hundred fifty lawyers to challenge them to participate in the burgeoning civil rights movement. That challenge was issued by President Kennedy at a time when Alabama Governor George Wallace had defied a court order to admit black students to his state's university, and it was shortly after civil rights leader Medgar Evers had been brutally murdered in his own driveway. President Kennedy's call led to the formation of the Lawyer's Committee for Civil Rights Under Law.

Although our times are in many ways less tumultuous, it was nonetheless appropriate that we convened in the shadow of President Kennedy to confront the racial inequities that have outlived the 1960s. President Clinton began his remarks that summer day by noting that the challenge to build one America continued. He discussed some of the differences and also some of the similarities between the problems that we confront today and the legacy of our nation's past, and then he called upon the legal profession to do two concrete things in pursuit of diversity: First, he asked the lawyers present to recommit themselves to fighting discrimination, to revitalizing our poorest communities, and to giving people an opportunity to serve in law firms who would otherwise not have it. Second, the President called upon the legal profession to set the best possible example, to tear down the walls in our hearts and in our heads. And then he asked me to report back on the progress of the legal community in meeting his challenges to diversify and to engage in pro bono activities.

President Clinton's call to action resulted in the formation of Lawyers for One America, which has survived the administration. It is now a nonprofit organization headquartered in San Francisco and dedicated to working with

lawyers, corporations, law firms, law schools, bar associations, civil rights groups, and public interest organizations to meet the President's challenge. Lawyers for One America has created a database of successful practices and programs aimed at increasing diversity at all levels of the legal profession and expanding access to legal services. So that we could appreciate where we as a profession currently stand, one committee of Lawyers for One America compiled statistics on the current composition of the different tiers of the legal community, from law students to academics, associates to partners, law clerks to judges. Meanwhile, individual legal organizations have worked one on one with Lawyers for One America to take their own steps toward meeting the President's challenge. Within the Justice Department itself, we hastened our efforts to develop a comprehensive eight-point plan to recruit and to hire and, significantly, to retain a more diverse pool of attorneys. We also reached out to other federal agencies, to try to convince them to do the same thing.

Lawyers for One America delivered a comprehensive report on its activities to the President in the fall of 2000. I urge you to visit the website at www.lfoa.org for information about the organization and the report. I also urge you to support Lawyers for One America in its ongoing activities, and to use it as a resource for any diversity-related activities in which you might be involved.

THE CURRENT STATE OF DIVERSITY IN THE PROFESSION

It is clear that our work is not done. Notwithstanding the substantial progress that has been made in the last forty years, women and minority ethnic and racial groups continue to be vastly underrepresented within all parts of the profession. I ask you to consider the following disturbing statistics: Only four percent of all the partners in the nation's largest and most profitable law firms are racial minorities. In the seventy-seven largest firms in New York City, thirty-four out of 4,400 partners—approximately three quarters of one percent—are African-American. In the forty largest firms in Chicago, only forty-six of about 3,000 partners are African-American. In Washington, D.C., a city with a minority population of about sixty-five percent, less than five percent of the partners in the city's largest firms are black. One in ten of the nation's largest firms has at most one minority lawyer. About thirteen percent of the associates at major firms are people of color, and half of those are Asians. Contrast these figures with the fact that thirty-three percent of our nation's population presently are people of color. A 2003 study found that the five-year attrition rate for minority male lawyers at firms was sixty-eight percent and for minority females was sixty-four percent.

The situation in corporate legal offices is not significantly better. Only thirty counsel of Fortune 500 companies are racial minorities, and sixteen of those were named in the last two to three years. Women hold about eighteen percent of the general counsel positions of the Fortune 500. Overall, women comprise about thirty-seven percent of the nation's corporate legal counsel staff, and racial minorities comprise only about nine percent. A little over seven percent of law students in this country are African-American, yet blacks represent about thirteen percent of the nation's population. The disparity for Hispanics is even greater—about 5.5% of law students against thirteen percent of the general population.

The statistics on the judiciary also are far from encouraging. Despite a considerable effort by the Clinton administration, there are about the same number of active African-American federal appellate judges today as there were when Jimmy Carter was the President. Remarkably, we have made no real progress despite the addition of some forty-seven seats on the federal courts of appeal between 1979 and 1999. I'm sure you're all aware that the Fourth Circuit, which exercises jurisdiction over a higher percentage of African-American citizens than any federal circuit save the District of Columbia, never had a black appellate judge until President Clinton used a recess appointment to name Roger Gregory to the court. And the state courts are frequently even less diverse. In Florida, for example, seven out of every ten judges in the court system are white men. In Georgia, where African-Americans constitute twenty-six percent of the state's population, only six percent of the state's judges are black. And as late as 2002, of Maryland's 261 judges, only two were Hispanic and none were Asian.

There are other sources of discouraging statistics. Recently the *National Law Journal* published its profiles of the one hundred "most influential lawyers" in our nation. By my count, ten of those were women, five were black, two were Asian, and one was Hispanic. As these statistics suggest, the disparities in the legal profession tend only to get worse as one moves to higher and higher career plateaus. The percentage of minority partners at major law firms is minuscule even compared to the percentage of minority associates, and among the pool of partners barely half of African-American partners at large law firms hold equity stakes as compared to over seventy percent of their white counterparts. It is still harder for minority attorneys to make partner, notwithstanding the widespread use of affirmative opportunity programs in the private sector. According to one study, African-American partners are one third more likely than whites to have attended a so-called top tier law school.

Undoubtedly, some of the disparity in the upper echelons will disappear in the coming years as the next generation of lawyers reach their professional

prime. To some degree, however, the disparities at the top are a self-fulfilling prophecy. Without mentors and role models to encourage their professional development, young minority lawyers are at a permanent disadvantage in moving up the career ladder.

DIVERSITY AND SERVICE

The overall lack of diversity within the legal profession adversely impacts our ability as lawyers to serve those who are most in need of assistance. According to a 1993 study by the American Bar Association, half of all low income households have at least one serious legal problem per year, and three quarters of that group have no access to a lawyer. Sadly, it is one legacy of our nation's history that this class of underrepresented clients disproportionately consists of racial minorities, single mothers, and battered women. Of course, attorneys of all stripes and all backgrounds can and do serve this client base by devoting countless hours of free legal assistance. Their efforts are most commendable. But a legal profession lacking significant racial and gender diversity can go only so far in combating the sense of alienation that the disadvantaged clients feel when regularly confronted by an establishment of a distinctly different color and gender. For too many people, justifiably or unjustifiably, law is a symbol of exclusion rather than empowerment. In a 2001 survey eighty-five percent of African-American respondents agreed with this statement: "There are two systems of justice, one for the rich and powerful, and one for everybody else." Eighty-five percent!

It almost goes without saying that the criminal justice system is the bleakest example of the socioeconomic and racial divide, but the disheartening reality also applies to many other aspects and facets of law and life—to landlord-tenant disputes, where families endure substandard housing conditions out of fear of eviction; to contracts, where consumers become trapped in cycles of debt and bankruptcy because retailers impose usurious credit terms; to families, where women endure physical abuse because they have little faith in law enforcement or the courts. The legal profession, however dedicated to pro bono activity, will always lack some of the credibility integral to forging strong attorney-client relationships so long as it bears little resemblance to the clientele it purports to represent. But it is not only those from the lower socioeconomic strata that are adversely affected by this lack of diversity. All of society is negatively impacted when a homogenous legal profession is unable to deal as effectively as it might with an increasingly smaller, more diverse world.

One of our nation's greatest strengths in this new world is our racial and ethnic diversity, and any profession that fails to take advantage of this diversity

does so at its peril. Without diversity we give up one of our truly American advantages, just as the legal world is becoming truly global in its nature. We have an abundance that the Japanese, the Germans, and others simply lack. If we are to compete effectively, we must make use of all our resources, and the greatest of these resources is our potentially diverse body of young lawyers.

Many domestic businesses have come to realize that there is a business case to be made for diversity. Surveys of minority consumer groups, where the greatest increase in buying power is expected to occur over the next few years, show that these groups are much more likely to buy from companies that they perceive to be diverse and committed to the diversity concept. About 350 businesses in the United States—major businesses, large companies—have signed a pledge to make diversity in the law firms they hire a priority matter and to hire only those firms where diversity is found. As the demographic changes in our population become more pronounced, these business-driven trends will only continue.

The challenge in the years ahead is to employ the immense creativity of the legal profession in our quest for one America. I don't need to remind this audience that lawyers are a clever lot. If you consider some of the more creative causes of action or criminal defenses or prosecution theories that you've heard over the years, you know that we can come up with some interesting ideas. This creativity can and should be harnessed in service of the cause of diversity. For instance, whatever your views on affirmative action, I believe there are many ways to diversify our own ranks without inflaming the divisive debates that have undermined so many well-intentioned efforts in the past. Bar associations can work harder to promote mentorship programs for minority lawyers. Law schools can improve outreach efforts at single sex and traditionally black colleges. Private practitioners can establish apprenticeship programs in conjunction with area public schools. These are all solutions that defy the notion that progress in the legal profession is a zero sum game.

For well over a decade San Francisco has served as a leader in efforts by metropolitan bars to create greater racial diversity in the legal profession. One hundred legal employers in the city adopted the ambitious "Goals and Timetables for Minority Retention" that committed them to hire and retain minority lawyers in significant numbers. Although they have not yet met the goals that they have set, they have made real progress. In February of 2000, I spoke to the Conference of Chief Justices of the State Supreme Courts. That organization unanimously passed a resolution in support of Lawyers for One America and committed itself to playing an active role in the pursuit of diversity. Following that meeting Chief Justice George of the California Supreme Court agreed to meet with managing partners and general counsels in San Francisco to discuss the importance of hiring minority lawyers and minor-

ity-owned law firms. I urge all of you to take similar actions. And in taking action you will inevitably take on the challenge of leading by example. For older lawyers, please be mindful that your generation (and I guess my generation now) will set the tone for other lawyers to emulate.

The legal profession devotes a great deal of energy and resources to encouraging its incoming crops of young lawyers to commit themselves to pro bono activities. While this emphasis is proper, we tend to forget that older lawyers, unencumbered by the stress of making partner or vice president or of paying off student loans, are often much better situated professionally and economically to devote extra time to pro bono enterprises. And when you get involved in these activities, I urge you to try to get others involved. Your peers, your friends, the godparents of your children, your former partners, and your law school classmates all can help in this effort.

It is also important for us to remember that we attained our present positions under the guidance and mentorship of others. I urge you to take active steps to assist and promote the careers of talented young minority and women attorneys, individuals who may not have ready access to the powerful social or family networks upon which many of us were able to rely. I applaud the efforts of the Bar Association of San Francisco, which has worked to replicate a symposium for women and minority lawyers that explains the process for becoming a judge, a model based upon a symposium created in Washington state. This model is now being used by the National Bar Association and the Bar Association of New York.

You all probably read or heard about the statistics on Supreme Court law clerks that were published several years ago in *USA Today*. Up to two years or so ago, according to my research, only ten of the 394 clerks hired by the nine sitting justices had been African-American, and only five were Hispanic. As you all well appreciate, memberships in the organizations to which you belong are highly coveted in the legal profession for both the learning experiences that they offer and the prestige that they carry. I urge you to make affirmative efforts to solicit and encourage applications from minority candidates. Reassess selection criteria with an eye toward leveling the playing field. Consider an applicant who does not enjoy all of the socioeconomic advantages of her peers. Interview at law schools that you may not traditionally visit. I think you'll be pleasantly surprised at the breadth of talented, qualified applicants who are eager for the chance to prove themselves.

There is no question that, however strong our commitment, we cannot counteract this country's unfortunate legacy of racial and gender inequality overnight or even over the course of the next few years. But considering the strides the legal profession has already made, the obstacles before us now are eminently surmountable.

CONCLUSION

The world has changed significantly during the course of the last century and the world will change even more in this century. Although many seem to fear what is an admittedly uncertain future and look nostalgically back to an America that in truth never existed, I implore all of you, especially my younger colleagues, to embrace the coming years and try to make them your own. I urge you to craft new solutions to the old problems that continue to bedevil us and to find innovative, contemporary ways to deal with future concerns. We have to remember that positive change is possible, and man-made problems are susceptible to manmade solutions. We must not look at an imperfect world and consign ourselves to merely existing in it. We must use our formidable skills and the power that we have or will acquire to make it better. You are some of the best and the brightest; you have been superbly trained; you are the leaders in our profession. You have a duty, I believe, to the people of this nation; and I hope that as leaders in the legal community you will be leading advocates for a more diverse profession. I implore you to join together in making the elusive dream of "one America" a concrete reality.

THE PROMISE OF *GIDEON*[†]

Gerald F. Uelmen*

As the International Society of Barristers gathers in Florida, it is fitting that we take a little time to reflect on one of the legal landmarks of Florida, *Gideon v. Wainwright*.[1] What I'm proposing to do this morning is take you on a train trip through the history of the sixth amendment right to counsel. I realized that this was a trip that called for a train ride for several reasons. First, for much of our history, our system of criminal justice for indigents strongly resembled a railroad. Second, one of the landmark cases arose from events surrounding a train ride. Third, a lot of heroes deserve recognition in the course of this historic journey, and we're going to need a long train if we're going to get all of them on board.

Nabb v. United States

To start our trip, I selected a locomotive—a Southern Pacific steam locomotive known as Champion Number One. We're going to board our train in Washington, D.C., in 1864, with a pair of heroes who are on their way back to Missouri with empty pockets. Their names are George Nabb and Luke Lawless. When they were young lawyers in 1841, George and Luke were appointed by the federal circuit court for Missouri to represent an Indian from the Kickapoo tribe who was charged with murder, an offense punishable by death. They did a great job; after a three day trial their client was convicted of manslaughter. They then presented bills for $500 each to the Department of the Interior's Bureau of Indian Affairs. After twenty-three years of frustrated attempts to collect their bills, they finally had their case heard by the newly established Court of Claims in 1864. As authority they cited both the sixth amendment of the U.S. Constitution and an enactment of the first Congress in April of 1790, before the sixth amendment was even ratified, which provided that any person charged with any capital offense "shall be allowed to make his full defense by counsel learned in the law, and the court before which he is tried . . . shall immediately, upon his request assign him such counsel not exceeding two, as

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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. The oral presentation used the metaphor of a train ride and was illustrated by a showing of photographs of persons in the stories and of railroad equipment of the time.

* Professor of Law, Santa Clara University School of Law; Academic Fellow, International Society of Barristers.

[1] 372 U.S. 335 (1963).

he may desire, and they shall have access to him at all reasonable hours."[2] The Court of Claims concluded that while these provisions established a right to counsel, they did not establish any right of counsel to be paid. As the court put it: "This is the declaration of a right in the accused, but not of any liability on the part of the United States."[3] And that's the way it was not only in the federal courts but in the courts of most states as well.

You'll occasionally see this time period referred to as a golden era of proud tradition for the bar. Don't believe it. The official reports are full of cases of lawyers trying to recover paltry sums for fees or expenses and being told, in effect, to get by by doing less for their clients. One of my favorites among these cases is an 1860 ruling from the California Supreme Court authored by Justice Stephen Field before he was appointed to the U.S. Supreme Court by Abraham Lincoln. He declared:

> The duty imposed in this way, it is true, could be carried to unreasonable lengths so as to become exceedingly burdensome. But we have heard no complaints of this character. It is usual to apportion the duty among the different members of the profession practicing before it so as to render it as light upon each as possible.[4]

Knowing of his imperious personality and his subsequent history, I don't find it surprising that Justice Stephen Field heard no complaints. In 1889, when former California Supreme Court Justice David Terry complained to Justice Field about one of his rulings, Justice Field's body guard pulled out a revolver and shot Terry dead.

As the burden of providing indigent defense through uncompensated appointments grew, the quality of the representation provided declined. Here is a graphic description of the sad state of the sixth amendment right to counsel in 1917:

> The classes of lawyers who are usually assigned to defend, present a phase of this question which cannot be regarded as unimportant. It is a regrettable fact that in nearly all communities, particularly in the larger cities, there are types of lawyers who are not truly representative of a great profession. They are commonly referred to as "shysters" but also described as "snitch lawyers," "jail lawyers," "vampires," "legal vermin," "harpies," and other inelegant but extremely

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[2] Federal Crimes Act of 1790.
[3] Nabb v. United States, 1 Ct. Cl. 173 (1864).
[4] Rowe v. Yuba County, 17 Cal. 61, 63-64 (1860).

> emphatic phraseology. They are grasping and mercenary without character, ability, or conscience. They prey upon the ignorance or fear of the prisoner or his relatives or friends in their effort to extort a fee. If it not be forthcoming, they advise the prisoner to plead guilty on the pretext that he will get greater leniency from the court than by standing trial.[5]

These conditions led to the establishment of public defenders' offices, the first in Los Angeles in 1913. One of the founding lawyers of that office was Clara Shortridge Fultz, one of the first women admitted to the bar of California.

POWELL V. ALABAMA

But it is now March of 1931, and our train is pulling into Chattanooga. Here we pass through one of the hobo jungles in which over 200,000 homeless in America established their residences during the depths of the Depression (many of these were called "Hoovervilles" in honor of our beloved President), and we pick up some uninvited passengers; a score of hobos settle into an open gondola car as our train crosses the line into Jackson County, Alabama, on its way to Memphis. Half of the hobos are black and half are white, and a fight breaks out between them. The black boys succeed in throwing all but one of the white boys off the train. The white boys straggle into the train station in Stevenson, Alabama, to complain. The stationmaster calls Paint Rock, the next stop down the line, where a posse of deputies assembles to search the train. The search turns up nine black boys ranging in age from thirteen to twenty, one white boy, and two young white girls, Ruby Bates and Victoria Price. Victoria and Ruby claim they were raped by the black boys on the train. As muttering crowds gather, the militia is called on to guard the boys, who are transported to the jail adjoining the Scottsboro courthouse. Five days later a grand jury returns an indictment charging all nine boys with rape—a capital offense. After arraignment no lawyer appears to defend them, so the judge announces he is appointing all the members of the bar—all of seven lawyers, three of whom are later retained to assist the prosecution. The only one the least bit interested in the piddling $100 fee customarily paid to lawyers appointed in capital cases is Milo Moody, a sixty-nine-year-old courthouse denizen in the twilight of an unremarkable career. The case is set for trial one week later.

When the case is called for trial in the Scottsboro courthouse, the prosecution announces that they want to sever the defendants and proceed with four

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[5] MAYER C. GOLDEN, THE PUBLIC DEFENDER 18-20 (1917).

separate trials. Stephen R. Roddy, a lawyer from Chattanooga, appears in the courtroom and announces he was retained to assist the defendants, but insists that he will function only as an amicus, assisting local counsel. It is apparent to everyone that he is well-fortified with spirits. As one chronicler puts it, "His modest legal abilities were further limited by his inability to remain sober." Milo Moody steps forward and says, "I will go ahead and help do anything I can." And thus, with no preparation, no investigation, and little consultation with their clients, Moody and Roddy proceed to trial representing all nine defendants. The trials provide plenty of excitement for the crowds that jam the courtroom, with at least two thousand more on the courthouse lawn. Ruby Bates and Victoria Price are subjected to very little cross-examination. The biggest surprise comes when one of the defendants testifies on cross-examination that the other eight boys all raped the girls and that he alone is innocent. Moody and Roddy waive closing argument in all four trials and the verdicts of guilty come in rapid succession, greeted by cheering crowds.

What's often overlooked about the first Scottsboro case is that it really was not a case about denial of counsel. It was a case about denial of competent counsel prepared for trial. The Scottsboro boys were given lawyers; they were given a drunk from another state and an elderly courtroom denizen.

After eight of the nine boys were sentenced to death, the case took on a life of its own. A communist organization, the International Labor Defense, struggled against the NAACP to control the defense, and the ILD won. At times the organization seemed more interested in pursuing propaganda than in pursuing justice, but the ILD did retain some first-rate lawyers to pursue the appeals and the retrials. The first appeal went directly to the Alabama Supreme Court, and it provided an opportunity for the new attorney general of Alabama to strut his stuff. His name was Thomas E. Knight, Jr., and his daddy, Thomas E. Knight, Sr., was a justice on the Alabama Supreme Court. For the defendants, a distinguished Chattanooga lawyer argued the denial of counsel issue. His name was George W. Chamlee, and he is one of the real heroes of this story. His grandfather was a decorated Confederate veteran, and Chamlee himself had served as the district attorney for Chattanooga. He was one of the few lawyers in Tennessee who would defend Communists arrested for vagrancy for distributing leaflets. On one occasion when a prosecutor expressed outrage that the defendants were seeking to overthrow the United States government, Chamlee quietly reminded the court that all of their grandfathers had also repudiated the federal government and sworn allegiance to the Confederacy.

The Alabama Supreme Court refused to view the Scottsboro case as a denial of counsel case. The principal opinion was authored by none other than Justice Thomas E. Knight, Sr., the attorney general's daddy. He noted that the

defendants were represented throughout by the honorable Milo Moody, an able member of the local bar of long and successful experience in the trial of criminal and civil cases. In defending the haste with which the trial was conducted, Justice Knight pointedly reminded his Yankee readers that the trial of McKinley's assassin, Czolgosz, in Buffalo, New York, was conducted ten days after McKinley's death and took only eight hours and twenty-six minutes. He then concluded:

> True this Czolgosz verdict was rendered in a case where a human life had been taken in a most dastardly manner. But we are of the opinion that some things may happen to one worse than death, at the hands of an assassin, and, if the evidence is to be believed, one of those things happened to this defenseless woman, Victoria Price, on that ill-fated journey from Stevenson to Paint Rock, on March 25, 1931.[6]

Chamlee did win a dissenting opinion from Alabama's Chief Justice on the right to counsel issue, which greatly strengthened the defense posture before the United States Supreme Court. Six months later the case was argued to the United States Supreme Court, a court that in 1931 reflected the deep conservatism of ten years of appointments dictated by Chief Justice William Howard Taft, but Taft was gone when the Scottsboro case reached the Court. In 1930, on the same day that Taft announced his resignation, President Hoover had nominated Charles Evans Hughes to replace him. The Scottsboro case was argued by attorney general Thomas E. Knight, Jr., for the state and Walter Pollak for the defense with George Chamlee on the brief.

The seven-to-two ruling in *Powell v. Alabama*[7] was authored by Justice George Sutherland, a former senator from Utah who helped manage Warren Harding's presidential campaign. The majority opinion displays a wonderful grasp of reality that was curiously absent in Sutherland's other opinions, most of which have been consigned to well-deserved oblivion. He criticized the collective appointment of the entire bar as little more than an expansive gesture which would not give that clear appreciation of responsibility or that individual sense of duty that would accompany the appointment of a selected member of the bar specifically named and assigned. Rather than focus on the trial, Justice Sutherland emphasized the denial of counsel prior to trial to investigate and prepare the case. He said during perhaps the most critical period of the proceedings against these defendants, that is to say from the time

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[6] Powell v. State, 141 So. 201, 211 (Ala. 1932).
[7] 287 U.S. 45 (1932).

of their arraignment until the beginning of their trial when consultation, thoroughgoing investigation, and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

The case was the first holding that the constitutional guarantee of due process as to the states included a right to the assistance of counsel. Dissenting Justice Pierce Butler conceded the right but insisted that the record showed no denial of the right. Noting that no application for a continuance was made, he concluded the silence of Stephen Roddy and Milo Moody required a finding that the claimed lack of opportunity for preparation was groundless, for if it had any merit they would be bound to support it.

The Scottsboro case actually wound on for another eighteen years before the last Scottsboro boy was released from prison in 1950. There were more heroes, like Samuel Leibowitz who served as lead defense counsel during the retrial, and the case went back to the Supreme Court a second time, to establish the right to a jury from which blacks were not excluded.[8] But as we return to our train and turn it around to head for Charleston, the hero that we should invite on board is George Chamlee of Chattanooga. He paid a heavy price for joining the Scottsboro defense, including having to face an ethics inquiry by the bar association on trumped up charges designed to discredit the defense. We also should note that the difference between a pro forma defense and meaningful assistance of counsel will not emerge for any judge whose reading of a cold record is not illuminated by the reality of experience.

One final footnote before we leave the Scottsboro case: From 1931 until 1937, while the most celebrated case in Alabama history was splashed all over the front pages of every newspaper in Alabama, one might have expected to read some comment about the case from the senior senator from Alabama, the key person who represented Alabama in the United States Senate. That senator was Hugo Black. His discreet silence did not go unnoticed. In August of 1937 when President Franklin D. Roosevelt nominated Senator Black to be his first appointment to the United States Supreme Court, Norman Thomas of the Socialist Party asked the Senate Judiciary Committee to question Black about his silence on the Scottsboro case. The NAACP requested that he be questioned about his relationship to the Ku Klux Klan. Neither question was asked. After Black's confirmation, his prior membership in the Klan was exposed for the first time, in a storm of public controversy. But Hugo Black came to the Supreme Court with a deep appreciation of the right to counsel. At the time of his election to the Senate, he was regarded as one of the most successful trial and appellate lawyers in the state of Alabama. In one case,

[8] Norris v. Alabama, 294 U.S. 587 (1935).

Black had defended a Methodist minister (and known Klansman) who admittedly had killed a Catholic priest, after the priest had performed the marriage ceremony uniting the minister's daughter and a Puerto Rican man. At the trial, Black introduced the jury to the groom after closing the courtroom blinds to accentuate his dark complexion. In his closing argument Black emphasized his client's belief that the priest had married his daughter to a Negro. The jury acquitted the minister, to the outrage of the small Catholic community in Birmingham, and it was later revealed that the police chief, the jury foreman, and the judge were all members of the Robert E. Lee Klan of the Ku Klux Klan, the same chapter that Hugo Black joined two years later. When his past membership was exposed after his confirmation as a Supreme Court Justice, he dismissed it as an act of political expediency, in a masterful national radio address. Before he went on the radio, a national poll reported that fifty-nine percent of Americans thought he should resign. After the address only forty-four percent thought so. But not until Clarence Thomas fifty-four years later would a Supreme Court justice come to the Court with such a dark cloud over his head.

JOHNSON V. ZERBST

Now, back on our train, we head for Charleston, South Carolina, in January of 1935. Two young marines who were arrested for possessing and passing counterfeit twenty dollar bills have been indicted and are being arraigned in federal court. They plead not guilty. The judge asks the defendants if they have counsel. They reply, "No." The court asks if they are ready for trial, and they respond, "Yes." The cold record provides no corroboration of their claim that they asked the prosecutor if they could have a lawyer appointed and he told them that in South Carolina courts did not appoint lawyers except in capital cases. The case proceeds to trial, and the two marines defend themselves as well as the average lay person usually does. They do not cross-examine the chief witness against them, but they do voice an objection to his testimony on the ground that it was false. The closing argument one of them makes to the jury consists of the following: "I don't consider myself a hoodlum, as the district attorney has made me out several times. I could not have been a hoodlum of very long standing because they don't keep them in the Marine Corps. I am not from New York as the district attorney stated, but from Mississippi. I was only stationed for government service in New York." And that is his defense. The jury returns a verdict of guilty, and both defendants are sentenced the same afternoon to four and a half years in the federal penitentiary in Atlanta.

Eight months later they file a petition for a writ of habeas corpus in the federal district court in Atlanta. The court agrees that they were deprived of their

sixth amendment right to counsel but concludes that relief is not available by habeas corpus since the error was not jurisdictional. At this point the ACLU takes an interest in the case and asks a young lawyer in Atlanta to take an appeal to the Court of Appeals for the Fifth Circuit. That lawyer is Elbert Tuttle, who married an Atlanta girl and moved to Atlanta to practice law after graduating from Cornell Law School in 1923. Like George Chamlee, Elbert Tuttle occasionally has defended Communists who passed out literature. He took one of those cases to the United States Supreme Court and won a five-to-four vindication of first amendment rights.[9] But he does not fare as well with his right to counsel claim in the fifth circuit. The judges conclude that the marines waived their sixth amendment rights by failing to assert them to the trial judge.

At this point the ACLU is ready to throw in the towel but Elbert Tuttle insists on seeking United States Supreme Court review at his own expense. He arrives before the United States Supreme Court just as Justice Hugo Black takes his seat there, and the six-to-two victory that Tuttle wins turns out to be one of the first opinions authored by newly appointed Justice Hugo Black. The case is *Johnson v. Zerbst*,[10] a true landmark of constitutional jurisprudence. Justice Black rules that a waiver of the sixth amendment right to counsel cannot be presumed from a silent record, and compliance with the constitutional mandate of the sixth amendment is a jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. Justice Black conceives of defense counsel as an essential component of a court of justice. He says that a court's jurisdiction may be lost due to failure to complete the court as the sixth amendment requires by providing counsel for an accused who is unable to obtain counsel and who has not intelligently waived this constitutional guarantee. The same two justices who dissented in *Powell v. Alabama*, Justices Pierce Butler and James McReynolds, register their disagreement with Black's sweeping opinion in *Johnson v. Zerbst*.

As we turn our train around again and move on to Maryland, let's invite Elbert Tuttle aboard. This was just the beginning of a heroic career that would span seventy years. In 1954 Elbert Tuttle was appointed to the fifth circuit and presided as its chief judge from 1960 to 1967. He held the distinction of having authored more published opinions than any federal judge who ever sat. And in 1990 the building housing the Eleventh Circuit Court of Appeals in Atlanta was renamed the Elbert Parr Tuttle Court of Appeals Building. But *Johnson v. Zerbst* did not transform the federal courts overnight into a sixth amendment paradise where every indigent automatically got a lawyer. In the seven years

[9] Herndon v. Lowry, 301 U.S. 242 (1937).
[10] 304 U.S. 458 (1938).

after the Supreme Court issued its opinion in *Johnson*, federal prisoners filed around five hundred federal habeas petitions every year, and about five percent of them were granted. The courts routinely held that a defendant who entered a guilty plea had no need of a lawyer and a valid waiver could be presumed from the entry of a guilty plea. Many states were doing better than the federal authorities in making counsel available to indigents. In 1942 thirty-five states had a clear legal requirement or an established practice to provide counsel on request in serious noncapital as well as capital cases.

BETTS V. BRADY

But Maryland was not one of those states, and when our train arrives in Maryland, we meet Smith Betts, a forty-three-year-old, unemployed farmhand in rural Carroll County, in the north central part of Maryland, snuggled against the Mason-Dixon Line just south of Gettysburg. He is charged with robbery. He has asked the court to appoint a lawyer because he cannot afford one, and the court has refused, explaining that in Maryland lawyers are appointed for indigents only in rape and murder cases. Betts waives the jury trial, muddles through the cross-examination of the prosecution witnesses, calls a couple of alibi witnesses, and is found guilty and sentenced to eight years in prison.

When Betts's petition for habeas reaches the Supreme Court,[11] only three justices are ready to declare that due process requires the appointment of counsel in all cases of serious crime. The majority, led by Justice Roberts, reject a hard and fast rule; they insist that a denial of due process must be tested by an appraisal of the totality of facts in a given case. As authority, Justice Roberts cites a coerced confession opinion from the same term applying a totality of circumstances analysis to the voluntariness of confessions.[12] He concludes his opinion with an "argumentum ad horrendum," to this effect: If we recognize the right to counsel for robberies, we'll have to recognize it for traffic violations and for civil cases as well. In his dissent, Justice Hugo Black recognizes where the totality of circumstances test will lead the Court; it will have to engage in a supervisory role, second-guessing the impact of denial of counsel with very little factual basis to inform its judgment. As Justice Black puts it, "Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented."[13]

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[11] Betts v. Brady, 316 U.S. 455 (1942).
[12] *Id.* at 462 n. 12, *citing* Lisenba v. California, 314 U.S. 219 (1941).
[13] 316 U.S. at 476.

GIDEON V. WAINWRIGHT

Justice Black will climb aboard as we point our train south for the twenty-one year journey to full vindication of his view, in *Gideon v. Wainwright*.[14] During that period the Supreme Court decides dozens of cases based on the totality of circumstances and weaves a bizarre web of irreconcilable precedents. Many of those decisions are closely divided, often with Justice Hugo Black dissenting. Finally, on January 8, 1962, the court receives the handwritten petition of Clarence Earl Gideon that changes the course of sixth amendment history.

As the court perceives, the facts of Gideon's case are remarkably similar to the case of Smith Betts. Gideon was charged with burglary of the Bay Harbor Poolroom in Panama City, Florida. When his case was called for trial, he asked to have a lawyer appointed to represent him, and the court informed him that counsel could be appointed only for capital cases. Gideon then represented himself, and after a one day jury trial he was convicted and sentenced to five years in prison.

If the Supreme Court applies the totality of circumstances test of *Betts v. Brady*, it will be hard put to conclude that a lawyer would have made much difference in Gideon's case. An eyewitness testified that he saw Gideon come out of the pool hall at five-thirty in the morning with bulging pockets and a pint of wine in his hand, go to a phone booth, and make a call. The cigarette machine and the jukebox in the poolroom had been broken open and all of the coins removed. Gideon had called for a cab, and the cab driver later confirmed that he had picked Gideon up at the scene of the burglary, and Gideon had paid him in nickels, dimes, and quarters. Gideon called a friend, who said she had retrieved a partly full wine bottle from the telephone booth.

Abe Fortas is appointed to represent Gideon before the United States Supreme Court and presents an eloquent argument. The opinion overruling *Betts v. Brady* is authored by Justice Hugo Black, but it is not Justice Black's most memorable opinion. He finds all the eloquence he needs in Justice Sutherland's opinion in *Powell v. Alabama* and his own opinion in *Johnson v. Zerbst*. He says, "In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice."[15] Noting that twenty-two states had filed an amicus brief describing *Betts* as an anachronism when handed down and urging that it be overturned, Justice Black concludes with obvious satisfaction, "We agree."[16] The decision is unanimous.

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[14] 372 U.S. 335 (1963).
[15] *Id.* at 344.
[16] *Id.* at 345.

But to my mind the real hero of the *Gideon* case is not Abe Fortas or Justice Hugo Black. It is a local lawyer by the name of Fred Turner from Panama City, Florida. After Gideon's case is remanded for a retrial, Gideon fires the lawyer sent by the ACLU to represent him and asks the court to appoint Fred Turner, a local lawyer he had seen in action. Fred Turner accepts the appointment and spends a month investigating the case and preparing for trial. By coincidence he had represented the chief prosecution witness in a previous case and knew that he had a rather shady past. (It is interesting to reflect that applying today's ethical standards, Fred Turner would not have been able to accept the Gideon appointment because of that conflict of interest.) Turner's cross-examination manages to focus considerable suspicion on the complaining witness himself. He also manages to offer some innocent explanations for the most incriminating evidence against Gideon. For example, the pocketful of coins with which he paid the cab driver is explained by a recent poker game in which Gideon was very much a winner. The final witness is Gideon himself, who asserts his innocence. The jury is out one hour before they return with a verdict of not guilty. In a case where a court following *Betts v. Brady* would have concluded that a lawyer couldn't have made a difference, Fred Turner proved how precarious such judgments really are. Fred Turner does make a difference, the difference between a verdict of guilty and not guilty. So let's invite Fred Turner on board our train.

STRICKLAND V. WASHINGTON

We now head for Miami. This trip of six hundred miles, from Panama City to Miami, will take us fifteen years. During those fifteen years the U. S. Supreme Court will undergo some remarkable changes. Of the nine justices who agreed in the historical reversal of Gideon's conviction, five are gone from the Court by 1972. Chief Justice Earl Warren has been replaced by Chief Justice Warren Burger. Abe Fortas has come and gone, after replacing Justice Goldberg and being replaced by Justice Blackmun. Justice Powell has replaced Justice Harlan. Justice Thurgood Marshall has replaced Justice Tom Clark, and Justice Hugo Black himself has been replaced by then Justice (now Chief Justice) William Rehnquist. There's one remarkably consistent pattern to these appointments; with one exception, Justice Thurgood Marshall, none of them has ever represented a defendant in a criminal case. Of those who decided *Gideon*, only Justices Brennan, Stewart, and White are still on the Court when it finally addresses the standard of competence to be demanded from appointed counsel representing indigent criminal defendants.

The case that presents this issue for resolution is a case from Miami—the case of David Leroy Washington. David Leroy Washington celebrated the 1976

Bicentennial with a ten-day crime spree that included three brutal murders. His victims included a Protestant minister, an elderly woman, and a twenty-year-old college student. After he was arrested and confessed to the third murder, an experienced criminal defense attorney was appointed to represent him. Ignoring the advice of that attorney, Washington then confessed to the first two murders. In a Miami court, he pleads guilty to all three murders. The judge accepts the plea and says he has a great deal of respect for people who are willing to step forward and admit their responsibility. Washington then agrees to waive his right to have a sentencing jury, and the judge—undoubtedly with great respect—sentences him to death on each of the three counts of murder.

Now one would think that this is the kind of case where a zealous advocate could not make much difference. Not until Washington gets a different lawyer and files for collateral relief in state court and then for a federal writ of habeas corpus does it emerge that his first lawyer had pretty much given up on David Leroy Washington after he ignored the lawyer's advice and confessed to the first two murders. No presentence report was requested, no effort was made to find or present any character witnesses or psychiatric experts. Fourteen affidavits and two psychiatric/psychological reports suggest that a lot of evidence was available to show that Washington was chronically depressed because of his inability to support his family. To rebut this, the state simply called the sentencing judge, who testifies that none of this would have made any difference; he still would have sentenced Washington to death.

The brand new U.S. Court of Appeals for the Eleventh Circuit in Atlanta grants an en banc rehearing of Washington's case and formulates some specific guidelines to define counsel's duty to investigate. This court also rules that if a defendant shows that counsel's failings worked to his actual and substantial disadvantage, the writ must be granted unless the state proves counsel's ineffectiveness was harmless beyond a reasonable doubt. The U. S. Supreme Court then grants certiorari, to resolve a conflict among the circuits as to the appropriate standards for effectiveness of counsel. Weighing in with the prosecution to urge reversal of the eleventh circuit standards are the Solicitor General and the attorneys general of forty-one states.

Delivering the opinion for a majority of seven is President Ronald Reagan's first appointment to the Supreme Court, Justice Sandra Day O'Connor, who was appointed when Potter Stewart retired in 1981. The Court reverses the eleventh circuit and rules instead that only a broad standard of reasonableness should be applied; counsel's performance must be so deficient, O'Connor says, that counsel was not functioning as "counsel" guaranteed by the sixth amendment.[17] The purpose of the sixth amendment, according to Justice

[17] Strickland v. Washington, 466 U.S. 668 (1984).

O'Connor, was not to improve the quality of legal representation but simply to insure that criminal defendants receive a fair trial. Even if counsel's performance falls below this standard, the Court concludes, the defendant must show a reasonable probability that but for counsel's ineptitude the result would have been different.[18]

The standards established in *Strickland v. Washington* sound suspiciously like a resurrection of the totality of circumstances test of *Betts v. Brady*, but the only one who seems to notice is dissenting Justice Thurgood Marshall. Perhaps that is because he is the only one left on the Court who has ever represented a criminal defendant. He finds the broad standard of reasonableness of little use. He presents an argument that echoes the point made by Hugo Black in his *Betts v. Brady* dissent forty years earlier. He writes:

> [I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.[19]

Marshall's point, of course, was the principal lesson of *Gideon v. Wainwright*. In twenty short years that lesson has been forgotten and the ad hoc inconsistency of *Betts v. Brady* is again triumphant. The *Strickland* opinion is delivered on May 14, 1984, and two months later David Leroy Washington is strapped into Florida's electric chair and executed.

The hero we should invite on board our train as we head back to Washington is Thurgood Marshall. While Marshall is remembered mainly for his work in dismantling school segregation, he was a criminal defense lawyer of some note before his appointment to the Supreme Court. In dozens of cases he represented black defendants on trial for their lives. In many of these he entered the case on habeas or appeal after trial counsel had already botched the case. His experience had taught him an unforgettable lesson: There is a direct relationship between the black population on southern death rows and the quality of counsel appointed to represent indigent defendants.

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[18] *Id.* at 694.
[19] *Id.* at 710.

LESSONS THAT SHOULD HAVE BEEN LEARNED

As we size up the future prospects of keeping our right-to-counsel train rolling, we should reflect on the lessons that our passenger list of heroes has taught us.

- George Nabb and Luke Lawless, whose twenty-three-year quest for reasonable compensation left them with empty pockets, taught us that the defense of accused criminals never has a high priority with any government entity. When it becomes necessary to cut budgets, the budgets of defense offices will be the first to suffer.

- The experience of George Chamlee and Sam Leibowitz in the Scottsboro case suggests that the difference between denial of counsel altogether and the provision of incompetent or unprepared counsel is an elusive one and that the gulf the law has created between the two is largely a fiction.

- Elbert Tuttle's victory in *Johnson v. Zerbst* offers a revolutionary concept that is often overlooked: A tribunal can't even call itself a court of justice until it is completed by the presence of counsel for the accused.

- If courts regarded the competence of defense counsel as just as essential to the achievement of justice as the competence of the judge, we'd certainly have a different standard of competence applied than that of *Strickland v. Washington.* Justice Hugo Black's consistent lesson was that the process of reviewing the record to ascertain whether the lack of competent counsel was prejudicial is an adventure in folly.

- We'll never know what difference a competent lawyer could have made until we have a competent lawyer try the case. Fred Turner offered a convincing demonstration of that proposition in representing Clarence Gideon at his retrial. And Justice Thurgood Marshall seemed to be the only one who hadn't forgotten that lesson in *Strickland v. Washington*, perhaps because he was the only one left on the Court who had ever been a criminal defense lawyer. That's a perspective that has now disappeared completely from the Court for the first time in its history.

Even though our travels have been largely confined to the American South, we should not conclude that the unmet promise of *Gideon* is confined to the South. Nor should it surprise us that with rare exception the heroes on our passenger list—including a Supreme Court Justice who was nearly unseated because of his prior membership in the Klan—were very much of the South. With those lessons our train ride through the history of the sixth amendment right to counsel comes to its conclusion.

JURY REFORM IS COMING: MAKING THE MOST OF TRIAL PRACTICE CHANGES

Molly Townes O'Brien*

A nationwide movement to reform jury trial practice is underway. At the core of these reforms is an effort to make the courtroom more like a classroom. The current wave of jury reform is designed to take advantage of learning theory that shows that "active learners" remember and comprehend new information better than passive learners. Reforms in jury trial practice now being proposed across the country will allow jurors to take a more active role in the trial, to become "active learners" by allowing them to take notes, ask questions, discuss the evidence with each other, keep notebooks with exhibits and jury instructions, and more. The current wave of jury reform also gives attorneys more opportunities to address the jury and more opportunities to explain the merits of their case. The goal of the reforms is to improve jury comprehension and motivate the jurors to stay awake and attentive.

In general, reforms that treat the courtroom more like a classroom favor the lawyers who are the better teachers. Most trial lawyers already consider themselves to be good teachers. The "active learning" jury should motivate trial lawyers to pick up the chalk and plan to teach even more. Although students/jurors *feel* more empowered in an active learning environment, it is the person who has something to teach who is most empowered. The teacher is empowered because he or she has an audience that is attentive and better equipped with the tools to learn. The teacher/lawyer will see the reforms as new opportunities to reach into the jurors' minds. The skilled teacher/lawyer will guide note taking, provide excellent written materials for the juror notebooks, and use juror questions to gain insight about how the jurors view the evidence. In other words, reforms designed to improve juror comprehension will, in the hands of a skilled teacher, give the trial lawyer more and better opportunities to teach and persuade the jury of the justice of their cause.

In this short article I will give you an overview of recent jury reform initiatives and think out loud a bit about how trial lawyers can make the most of the coming jury trial practice reforms.

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JURY REFORM IS ON THE WAY

At the recent Annual Meeting of the American Bar Association, I listened as the incoming president, Robert J. Grey, Jr., announced that he will dedicate his presidential year to an ambitious jury reform initiative. Under his leadership the American Bar Association will undertake to draft new and revised standards for jury administration and jury trial practice. President Grey said that he hopes the new standards will help to bring the jury into the twenty-first century and transform jurors from passive observers to active participants in the trial process. As I listened to his description of the ABA's American Jury Project and American Jury Commission, their mission and goals, the ideas sounded very familiar to me. I had recently served on the Ohio Supreme Court Task Force on Jury Service. Our Task Force recommended changes in Ohio's jury practice and administration designed to accomplish the same goals.

The ABA's jury reform initiative is, indeed, part of a nationwide movement for jury reform—a movement with a fairly long history and a broad-based and organized constituency. One after another, states are hopping on the jury reform bandwagon. Arizona, California, Colorado, Florida, Hawaii, Maryland, Minnesota, New York, Ohio, Texas, and Washington are on board. In fact, all but a few states have active jury-reform projects. The American Bar Association, the American Judicature Society, and the International Association of Defense Counsel also are already on board, organized and ready to assist state committees and task forces charged with reviewing and reforming jury service. Reform in jury trial practice and jury administration is definitely coming.

WHY REFORM NOW?

When a typical attorney hears about any one of the many jury reform projects that are now in progress around the nation, his first reaction is to say, "Hold on! If it ain't broke, don't fix it." The right to a jury trial is central to our system of justice. It holds a special place of reverence in our democratic system because it brings the values, ideas, sensitivity, and rationality of the average citizen to bear on society's most controversial events and most difficult issues of truth and justice. The jury system certainly ain't broke. It operates relatively smoothly day after day in trial after trial all over the nation. Jurors show up for jury duty; they are questioned, selected, and sworn in; they listen to the evidence; they render a verdict. What's the problem?

In some sense, there is no "problem." The jury reform initiatives now taking place around the country begin from a premise that the fundamentals of the jury system in the Unites States are sound. There is no effort under way to radically change the jury process. On the other hand, no one would claim

that the system is perfect. It is arguable that public dissatisfaction with the jury system has grown in the last several years. After several highly publicized trials with controversial verdicts—the O.J. Simpson trial and the infamous McDonald's coffee burn verdict come immediately to mind—many wonder whether the jury system can deliver trustworthy verdicts. In spite of social science research that demonstrates that juries are competent fact-finders, public confidence in the jury system sags when juries reach controversial verdicts in highly publicized cases. Outrage over "bad" verdicts contributes to public support for jury reform initiatives. Moreover, some polls also reveal widespread negative feelings about jury service. Jurors complain of poor treatment by the system, of difficulty dealing with financial, family, and work responsibilities during jury service, of delays in the trial process, and of lack of understanding of the jury's role. And the complaints do not end with the general public. Lawyers complain, for example, that, too often, juries do not represent a true cross-section of the community. Meanwhile, court administrators struggle with the difficulty of assembling a demographically diverse group of prospective jurors and, in some areas, wring their hands over low jury response rates.

None of these complaints is new. Complaints about the jury system have been around as long as there have been juries. Efforts to reform the jury system have similar longevity. Supreme Court Chief Justice Warren Burger called for reform of the civil jury in 1971. Beginning in the 1970s and continuing to the present, social scientists have conducted research on jury fact-finding and decision-making and have made suggestions for reform. These suggestions generally have fallen on deaf ears in state courts, legislatures, and rule-making committees.[1] In 1978, the ABA produced a set of uniform jury standards that spurred partial or piecemeal reform in several states. There was little momentum until recently, however, toward comprehensive reform of the jury system.

In the 1990s, ideas about jury reform began to coalesce around two key concepts: rewarding service and active learning. Jury administrators became more organized and vocal in expressing their concerns about juror comfort, convenience, and education. Lawyers, academics, and social activists interested in racial justice pressed their concerns about jury administration practices that failed to produce a diverse jury pool. Meanwhile, social scientists and legal academics continued to critique jury decision-making and point to defects in juror comprehension. Juries typically made good factual determinations, especially in simple trials, the research showed. But jurors frequently misunderstood instruc-

[1] Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes,* 32 U. MICH. J. L. REFORM 213 (1993).

tions on the law. And jurors often failed to understand or remember the facts in complex or lengthy trials. Social scientists argued for reforms that would transform the role of the juror from passive listener to active learner. In 1993, Judge Michael Dann, a superior court judge in Phoenix, Arizona, wrote an influential article that critiqued the traditional passive role of the jury.[2] Judge Dann considered research in psychology, learning theory, and group decision-making and concluded that active learning techniques would improve juror comprehension and the reliability of jury decision-making. He pulled together the most commonly suggested techniques for improving juror participation at trial and suggested that giving the jurors a more active role in the trial process would enhance the educational and democratic objectives of the trial.

During the 1990s, courts, rule-making committees, and other groups embarked on new studies, formed task forces, and organized to promote active learning jury reform. The American Judicature Society produced a guidebook to comprehensive jury reform.[3] The National Center for State Courts and the National Center for Citizen Participation in the Administration of Justice conducted empirical research on jury reform.[4] The International Association of Defense Counsel (IADC), an organization of attorneys who represent corporations and insurers, launched its National Jury Trial Innovations Project with the stated goal of "making the jury trial a better place to teach and learn." By the late 1990s, jury reform could be seen as a national movement.

Many of the reforms included in the current wave of jury trial reform are designed to give trial lawyers exactly what they want: a happy, attentive jury. In the area of jury administration, recommended reforms focus on improving juror comfort, convenience, compensation, selection, and education. One of the "reforms" in the Ohio Task Force report, for example, calls for the court to provide free parking for jurors. These changes are designed to improve the response rate to jury summonses and provide the best possible experience for jurors while they fulfill their civic duty. Such reforms evoke little controversy within the practicing bar. Other reforms, however, are geared toward empowering jurors and improving juror comprehension during trial. These changes in jury procedures are likely to alter the traditional courtroom dynamic.

As I mentioned above, these reforms generally favor the lawyer who is the better teacher. The best teacher/lawyers are not the only winners however. Active learning reforms help attorneys who must present a case that is based

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[2] B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries,* 68 IND. L.J. 1229 (1993).

[3] AMERICAN JUDICATURE SOCIETY, ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM (1999).

4 *See, e.g.,* PAULA L. HANNAFORD & G. THOMAS MUNSTERMAN, DRAFT FINAL REPORT FOR THE MASSACHUSETTS PROJECT ON INNOVATIVE JURY TRIAL PRACTICE (2000). The report was prepared for the National Center for Citizen Participation in the Administration of Justice, with funding by the State Justice Institute, and published by the National Center for State Courts.

on legal arguments that are not intuitive to the average juror. This shifts the advantage in a jury trial to the party who has the law on his side. Perhaps that is as it should be; the party who has the law on his side should win, right? We know, however, that in the past, jurors who did not understand the legal instructions given to them did their best to unravel the facts of the case and then applied their rough estimation of the law. Using their rough estimations of the law, jurors often made decisions that were technically wrong but could easily be justified by sentiment, custom, or equity. Sometimes jury justice has been street justice. For many lawyers, this has been part of the beauty of the jury system. Jurors bring their street sense of morality with them into the jury box, and the lame set of legal instructions intoned at the end of the trial have traditionally been too weak and incomprehensible to make the jurors see the case through a legal lens.

It should come as no surprise that insurance defense counsel are stalwart proponents of "active learning" juries. These are the attorneys who most often walk into court with only the law to protect their clients. These are the attorneys who most often face an uphill battle against sentiment and against the jurors' sense of street justice. Organized with team leaders in every state, IADC members have made hundreds of presentations to thousands of attorneys. The IADC presentations typically include a short video called "Order in the Classroom" that depicts a group of students assembling in a classroom. As the students take their seats, the teacher informs them that they have been summoned to take a class. They must take the class. They have no choice. The teacher goes on to explain that the course will be taught by ten—or maybe twenty—different teachers and that none of them will tell the students what is important and what is not important. The class could go on for days or even weeks. "I'm not sure," the teacher tells them with a wry grin. Further, the teacher says, "You must decide which teachers are telling the truth and which are lying." During this class, the teacher goes on to explain, the students will not be permitted to discuss the material with each other, take notes, or ask questions. Sometimes, they might be allowed to look at a document, but that will probably be while the teacher is talking about other important subjects. Moreover, the students will not be told the rules of the class until all the lectures are completed. Then they will be locked in a room together for the final exam—which will involve only one question—and they will not be permitted to leave until they all agree on an answer.

As the teacher tells the students what is in store for them, the students look bewildered. Gradually, however, their expressions reveal exasperation, frustration, and even anger. The video powerfully illustrates that the procedures lawyers take for granted—instructing the jury on the law of the case only after the close of all of the evidence, for example—run counter to the way people

generally learn and conduct everyday life. The typical juror is present through coercion and passive by requirement but is nevertheless expected to make important decisions about serious matters without notes or questions, and often without clear instructions. The reforms advocated by the IADC, the ABA, and the American Judicature Society aim to make the courtroom more like a modern educational environment. They are based on adult learning theory and social science research that shows people understand and remember more information when they are "active learners." These reforms are designed to take some of the rough edge off jury decision-making. Jurors will still bring their own sense of justice and common sense into the trial process, but their decision-making will be better informed on both the law and the facts.

In the jury trial context, being an "active learning" environment translates into allowing jurors to take notes during the trial, providing jurors with notebooks that contain copies of the exhibits and instructions, giving the jury instructions on the law before the trial begins, allowing jurors to question witnesses, using "plain English" at trial and in jury instructions, allowing mini-opening statements or interim commentary by attorneys, providing all jurors with copies of written instructions, giving final instructions prior to closing arguments, giving jurors suggestions on conducting deliberations, and conducting a post-verdict meeting with the jurors. This is the specific package of trial practice reforms now being considered, studied, and implemented across the country.

OVERVIEW OF THE "ACTIVE LEARNING" INNOVATIONS

Most trial lawyers hate surprises. In the trial process, forewarned is forearmed. If there is something new in the jury trial process, you need to know about it ahead of time so that you can prepare. When you know what to expect from the new jury trial practices, you should be able to use them to your client's advantage. Below, I describe each of the "active learning" trial practice innovations and give a few preliminary thoughts about how to make the most of them.

Juror Notebooks

The practice. Jurors are provided with three-ring notebooks for keeping documents and other information about the case. The notebooks are expected to help the jurors organize, understand, and recall the trial information. Typically, each notebook will contain tabbed sections for copies of court instructions, copies of prosecution exhibits, and copies of defense exhibits. Court personnel will assemble the notebooks so that each juror receives an identical copy. The notebooks should be given to the jurors just prior to the beginning of

deliberations. Because each juror will have his or her own notebook, each juror will have equal access and ability to refer to exhibits and instructions.

Making the most of the practice. If there is something that you want the jurors to remember, find a way to put it in an exhibit that will fit on notebook paper. Put together your own 8½-by-11-inch copy of the exhibits you expect to include in the juror notebook before trial. Organize them in a way that makes your exhibits most accessible and most powerful. If there are numerous exhibits, create a table of contents. At the close of the evidence, you will give your well-organized copy of the notebook exhibits to a court employee for copying and distribution to the jury.

Juror Notetaking

The practice. Jurors are permitted to take notes for use during the trial and during the deliberations. Taking notes is expected to aid memory, encourage active participation, decrease deliberation time, and increase juror satisfaction.

Making the most of the practice. Many people learn best what they have written. You can help the jury learn and remember what you want them to know by influencing what they write down. Be aware of when and how the jurors are taking notes. You do not want the jurors taking notes during the opposition's opening argument, so you should request that paper and pens be distributed only *after* openings are completed. During your own opening, consider telling the jury what to listen for and what to write down as they hear the evidence. During the presentation of evidence, be sensitive to what the jurors decide to take down and use good teaching strategies to help the jurors put what you think is important in their notes. For example, if your witness has just said something important, pause in your presentation to give the jurors time to write it down. You might even ask an expert witness questions that are designed to get the jurors to pick up their pens: "Is that important?" "Why is that important?" You can also suggest what will go into the jurors' notes by having your witness use a blackboard or flipboard. Teachers have been doing this for years. Whatever the teacher writes down, the students write down. Copying off the blackboard is an American tradition. Now you have an opportunity to capitalize on the training we all received in elementary school. Whatever you or your experts write, the jurors will write.

Juror Questions to Witnesses

The practice. Jurors may submit questions to the witness through the judge. The question is submitted on paper and reviewed by both the judge and the trial attorneys. The trial attorneys are given an opportunity to object to the question at side bar. If the trial judge, in his or her discretion, determines that the question is appropriate, the question is read to the witness by the judge. The

practice of allowing jurors to ask questions is expected to improve juror understanding of the evidence and to motivate jurors to pay attention during trial.

Making the most of the practice. This practice is the innovation that seems to worry criminal defense attorneys most.[5] Some attorneys believe that allowing jurors to ask questions alters the adversarial quality of the trial and puts the jury in the role of the inquisitor. It also threatens to upset carefully planned trial strategy. Having carefully crafted their examinations to avoid certain areas, attorneys are loathe to allow the jurors to open up a can of worms. There is no guarantee that a juror question will not lead to the introduction of information that the attorney hoped to keep out of evidence. On the other hand, the fact that a juror asks a question does not alter the Rules of Evidence. Juror questions should not lead to the introduction of irrelevant, prejudicial, or otherwise inadmissible evidence; and they should not be permitted to disrupt your trial strategy. There are several things you can do to make sure that they do not:

- As any question is submitted, it should be the regular practice for both attorneys to approach the bench and review the question.
- All objections to juror questions should be expressed out of the jury's hearing and on the record.
- Remember that there is no requirement that the judge read the question to the witness simply because the information sought is admissible.
- Think expansively about potential objections and do not hesitate to request that the judge exercise discretion to decline to ask a question on the ground that it will alter your chosen order for presenting the evidence or your chosen trial strategy.
- If a question submitted by a juror will not be read to the witness, ask the judge to take responsibility for ruling the question inappropriate.
- Be prepared with proposed language for a limiting instruction that the judge can give if the question is permitted.
- If the question seeks admissible information but disturbs your strategy, ask the judge to explain to the jury that another witness will cover the information sought.

Remember also that juror questions may give you insight about what the jury is thinking, what interests the jurors, and what they might have misunderstood or missed. Use the jury questions to help you shape your examinations to meet

[5] The cases for and against jury questions are well developed in two reports that were considered by the Colorado Supreme Court's Jury System Committee: Mary Dodge, Should Jurors Ask Questions in Criminal Cases? A Report Submitted to the Colorado Supreme Court's Jury System Committee (Fall 2002); Carrie Lynn Thompson, Should Jurors Ask Questions in Criminal Cases? Minority Report (Fall 2002). Both are available at www.courts.state.co.us/supct/committees/jurycom.htm For another articulation of the arguments against allowing jurors to ask questions in trial, *see* N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials,* 40 IDAHO L. REV. 553 (2004).

their expectations and interests. Ask follow-up questions to the jury question when a juror question identifies an inconsistency or problem area in your opponent's case.

Pre-Instructing the Jury

The practice. Before opening statements, the judge pre-instructs the jury, introducing the parties, their claims, the matters not in dispute, and the governing legal principles, including the role and responsibility of the jury. The pre-instructions may be delivered orally and in writing. This practice is expected to help jurors recall information, identify the important evidence as it is presented, enhance juror memory, and help jurors link evidence to relevant issues.

Making the most of the practice. Prepare and submit proposed pre-instructions before trial. Let the jury hear your theory of the case from the mouth of the judge. The theory you present in opening statement and closing argument will sound more convincing and be more memorable if it echoes what the judge has said in pre-instructions. Be sure to include instructions on any point of law that may help your client. If you do not want to reveal your theory of the case early, make sure that the pre-instructions inform the juror that they must keep an open mind throughout the trial and to wait until the close of evidence to make a decision.

Mini-Openings/Interim Commentary

The practice. Before voir dire, trial attorneys present a brief opening statement outlining the major theory of the case. At periodic intervals during the trial, they then explain to the jury the significance of the evidence or testimony about to be presented and how it relates to the theory of the case. Opposing counsel has an opportunity to respond to interim commentary. It is expected that interim commentary will increase juror comprehension, keep jurors focused, and allow counsel to do a better job of organizing information for the jury.

Making the most of the practice. Interim commentary generally is used only in lengthy or complex civil litigation. It is not clear whether judges will allow it in criminal trials. If they do, it will provide an opportunity for defense counsel to summarize, organize, and comment on the evidence. I expect that, if given such an opportunity, most attorneys will need no prompting to use it to their client's full advantage. Have fun.

Plain English

The practice. Judges and attorneys are encouraged to prepare instructions that are conversational in tone and that are structured to improve juror com-

prehension. If the charge is lengthy, the judge may use "stretch breaks" or audiovisual aids.

Making the most of the practice. This "innovation" is really no more than a common sense suggestion. Lawyers and judges should always try to use language that is understandable. Many have tried; few have succeeded. As you listen to instructions prepared in "plain English," watch for deviations from past instructions that might create grounds for appeal. One interesting outcome of the Ohio pilot project was that very few judges changed their instructions to adopt "plain English"—evidently fearing reversal—but an overwhelming majority of jurors (92%) claimed they understood the instructions anyway.

Instructions Prior to Closing

The practice. The judge's charge to the jury, including all instructions on the governing law and the manner of weighing the evidence, is given before the attorneys make their closing arguments to the jury.

Making the most of the practice. If the judge charges the jury before closing arguments, you can tailor your closing argument to echo the words of the judge. That can make your closing argument more memorable.

Suggestions for Conducting Deliberations

The practice. Immediately before the jury retires, the judge provides written and oral instructions on how to manage the deliberative process. For example, the judge may provide suggestions on selecting a jury foreperson. The judge may suggest that the jury avoid an early public vote on the verdict and allow all jurors to express their opinions. Other matters, such as the order of deliberations or a process for dealing with disagreement may be addressed. For example, the judge may recommend that the jury consider one offense at a time or recommend a process for working through the verdict form.

Making the most of the practice. Be sure to find out in advance what instructions will be given. Consider drafting proposed instructions that highlight the importance of allowing each individual juror to have and express an opinion and the importance of respecting the opinion and memory of each.

Written Instructions for Jurors

The practice. A copy of all of the jury charges, including the charges on the law and the suggestions for the deliberative process, is given to each juror in a three-ring binder. It is expected that this practice will increase juror comprehension, provide guidance, and reduce disputes among jurors regarding instructions. It also provides each juror with equal access and ability to refer to the court's instructions, and may thereby reduce the power of individual leaders on the jury.

Making the most of the practice. If jurors are to be provided with a written copy of all of the charges, the jury charge conference must be held with sufficient time to allow for the charges to be cleaned up and copied. To take full advantage of written instructions, draft proposed instructions early. Refer to the written instructions in closing argument.

Juror Questions about Instructions

The practice. In the final instructions to the jury, the judge gives clear guidance to the jury on the procedures for requesting clarification of instructions.

Making the most of the practice. Stay involved in screening and reviewing any jury requests for clarification of the jury charge. Be sure all of your objections to supplemental instructions are on the record.

Post-Verdict Meetings

The practice. After the verdict, the judge meets with the jury to offer personal thanks for their participation and to answer general questions about trial or post-trial procedures. The judge may also solicit suggestions for improving jury administration and management.

Making the most of the practice. Some judges may permit attorneys to attend post-verdict meetings with the jury, with the consent of all counsel. If you are permitted to attend, go. Listen. Learn all you can.

JURY REFORM ROLLS ON

The IADC, the ABA, the National Center for State Courts, and the American Judicature Society have undoubtedly been influential in spurring jury reform in a number of states. But states do not generally adopt reforms simply because they are recommended by national organizations. Each state proceeds with reform in its own idiosyncratic way, achieving change only after the state rule-making authority has studied the proposed reforms for itself. Several states have already completed extensive jury reform studies and implemented comprehensive jury reform. Others are just beginning.

I served on the Ohio Supreme Court Task Force on Jury Service, which was appointed in 2002 and which published its recommendations for reform in February 2004. The recommendations of the Task Force still await implementation through supreme court rules and legislation. The Task Force was composed of twenty-five members, including judges, trial lawyers (including plaintiffs' and defense counsel, and prosecutors and criminal defense attorneys), court administrators, journalists, academics, and members of the public. The mission of the Task Force was to "study and evaluate the jury system and make recommendations to broaden citizen participation, improve the trial

process, enhance the quality of justice, and promote greater public confidence in the Ohio jury system." The work of the Task Force involved several different projects, each with a particular focus. For example, one Task Force committee examined ways to diversify jury pools and improve public access to information about jury service. Another committee set up a Trial Practice Innovations Pilot Project. The Pilot Project was, in essence, a demonstration project intended to encourage the use of the jury trial practice innovations that are expected to enhance juror performance and satisfaction with jury service. Fifty-three judges in thirty-three counties in Ohio, hundreds of lawyers, and thousands of jurors participated.

The Pilot Project asked judges, juries, and attorneys to use the suggested jury trial innovations and then to comment on how well the reforms worked. Some of the jury practices that were included in the list of "innovations" actually were variations of long-standing jury practices that some Ohio judges had used for many years. For example, the struck method of voir dire, which involves conducting group voir dire on the entire panel and making challenges and strikes out of the hearing of the jurors following a recess, is a method commonly practiced across the state, although there are numerous potential variations in the method. In contrast, other innovations—such as compiling a notebook for each juror or allowing jurors to take notes—were practices that have not previously been prevalent in Ohio. These innovations have been used in individual courtrooms in Ohio but not widely practiced. Ohio chose to pilot the particular innovations suggested by the research and work of jury reform initiatives in other states; Ohio piloted only reforms that had been studied and shown to be successful in improving juror understanding of the process, comprehension and retention of the evidence, and fairness of the deliberations.

The participating judges attended a conference to educate them on the trial innovations. (I have it on good authority that the judges were allowed to ask questions and take notes during that conference.) Then the judges employed the trial techniques in their courtrooms for the next six to eight months. Following each jury trial, the judge, the jurors, and the attorneys filled out questionnaires. By documenting a vast and varied set of experiences with these innovations, the Task Force hoped not only to uncover any unexpected problems in the operation of the reforms but also to document the absence of problems. In other words, this study was not designed to duplicate social science research that had already been done in other states to demonstrate the merits of the "active learning" package of reforms. Instead, the Ohio study was done primarily to allay the fears and concerns of judges and attorneys who might otherwise resist changes in the system.

When the results of the Pilot Project surveys came in, there were no real surprises. Jurors overwhelmingly liked the reforms. Judges too found little to

complain about with the package of jury trial reforms. And as expected, attorneys were somewhat more ambivalent about some of the reforms. For example, only about 60% of attorneys, versus 98% of judges, favored allowing jurors to take notes during trial.

The Ohio Task Force prepared a report recommending the "active learning" jury reforms.[6] It also recommended a host of jury administration reforms to make jury service more convenient and comfortable. The Task Force recommendations detailed the legislative and rules changes that would be necessary to implement the reforms. Shortly before the Task Force was to publish its recommendations, we became aware of a bill that had been introduced in the Ohio legislature—a jury reform bill modeled on the "Jury Patriot Act." The Jury Patriot Act is a piece of draft legislation from the American Legislative Exchange Council, a conservative organization that represents business and corporate interests. As it has been introduced in other states, the Jury Patriot Act eliminates exemptions from jury duty, increases the penalty for jurors who fail to respond to a jury summons, and creates a "lengthy trial fund" supported by civil filing fees to pay jurors when their jury duty extends beyond a certain number of days. The Task Force immediately rejected the core provisions of the Jury Patriot Act. Members of the Task Force had no interest in increasing penalties on jurors. Every lawyer present said that he would rather have a jury made up of people who were willing to be there, not a group who were there only because of a criminal sanction. The Task Force worked with the legislators who had introduced the bill, to rewrite it. The rewritten bill now reflects many of the Task Force recommendations, and a vote is expected before the end of the next legislative term.

CONCLUSION

The jury system and the adversarial trial are staples of American justice. If the new wave of reform is to improve the quality of justice, it will be because trial lawyers are involved at every stage of the formulation and implementation of reform. It will also be because trial lawyers take up the challenge to be better teachers. Given new opportunities to reach into the minds of the jurors, trial lawyers will undoubtedly incorporate the jury practice reforms into their trial strategy and use them to their best advantage.

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[6] Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service (Feb. 2004), available at www.sconet.state.oh.us.

LOSING—PART TWO[†]

Glenn E. Bradford*

We older lawyers know a lot. We had the best teacher in the world: defeat.
Henry G. Miller[1]

COPING WITH DEFEAT

In assessing the relative merits of some of the outstanding trial lawyers of the twentieth century, Professor Gerald F. Uelmen writes that "[t]he ability to pick yourself up and forge ahead after a setback is an essential quality for a trial lawyer. . . ."[2] Edward Bennett Williams was well known for his determination to win, not only in court cases but also in the athletic successes of his Washington Redskins and even extending, it is said, to firm softball games. It was Williams who employed the legendary Vince Lombardi as head coach of the Redskins to deliver a winning football team to Washington, D.C. area fans. Lombardi, celebrated coach of the Green Bay Packers during their glory years of the 1960s, is remembered as much as anything for his credo that "[W]inning isn't everything—it's the only thing."

Author Evan Thomas, in his book on Williams's life, *The Man to See,*[3] provides this vignette between Williams and Lombardi:

> On the night he hired Vince Lombardi to be coach and general manager of the Washington Redskins, Williams had said to the legendary coach, "You and I must always win, Vince. But nobody *always* wins. I don't care how great you are, you've got to lose. You've got to learn to deal with that."[4]

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† This article is the second part of a revised version of an article that initially appeared in the July/August 2002 issue of the *Journal of the Missouri Bar*. The first part may be found at 39 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 391 (2004).

* 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] Henry G. Miller, *Living with Defeat,* MO. TRIAL ATT'Y, Feb. 1991.

[2] Gerald F. Uelmen, *Who Is the Lawyer of the Century?,* 33 LOY. L.A. L. REV. 613, 642 (2000); 36 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 407, 430 (2001).

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

[4] *Id.* at 22.

In his thoughtful book, *In Search of Atticus Finch*,[5] Florida trial lawyer Mike Papantonio describes what he terms the differences between the "haves" and the "have-nots" of law practice. Here is his comment on winning and losing:

> The haves believe in healthy competition—they are proud to win, but they do not allow their need to win to distort the way they live. The have-nots' infatuation with competition and winning creates a "me against them" attitude that touches even their most personal relationships and forces them to evaluate their happiness according to their win/loss ratio.[6]

As in athletics, the key point to remember seems to be to avoid confusing your performance as a trial lawyer with your basic self worth.[7]

Unfortunately in my view, the sports pages frequently document the supposed inability of champion athletes to cope with defeat.[8] An inability to stomach defeat is frequently cited as *the* reason explaining the success of a Michael Jordan or a Wayne Gretsky. Many are the athletes who have called our attention to how much they hate to lose. Calling attention to how much you hate to lose is really a backhanded way of saying what a great (and successful) competitor you are. "I hate to lose more than anybody" really equates to "See, this is why I am such a great [runner][golfer][bridge player][baseball player][quarterback][trial lawyer]." This kind of comment isn't insight, it's bragging.

The incomparable Richard Petty was once asked about dealing with a prolonged losing streak at the end of his long racing career. Instead of the expected show of frustration and bitterness, Petty just grinned and said that

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[5] MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS (1995).

[6] *Id.* at 209.

[7] An excellent article discussing this point can be found at www.usa-gymnastics.org/publications/usa-gymnastics/1997/5/body-balance.html (*Don't Put Your Ego on the Line Every Time*):

> Probably one of the toughest skills for any athlete to develop is the ability to separate his/her worth as a person from the quality or outcome of his/her performance. Too many athletes, like the one described above, make the serious mistake of believing that when they perform poorly, they have something to be ashamed of and that they are less deserving of love and respect than when they win. This way of thinking is terribly destructive, killing the joy inherent in sports and interfering with an athlete's quest for excellence.

[8] *See e.g., Dauw Motived by Hatred of Losing,* dailybeacon.utk.edu/article.php/9121. To see how much drag racer Ron Capps hates to lose, *see* www.extremegarage.com/dragracing_nhra/articles/ron_capps_interview.htm. Here's a sample:

> Q: If you are content, what drives you to show up every day and be competitive?
> CAPPS: Losing. Losing is the biggest fear that I have. I hate losing in qualifying; I hate losing especially on Sunday. I hate losing at anything. Failure, to me, is worse than death. I hate failure and I hate losing.

when he started in racing he never dreamed that he would win 200 NASCAR races. "I just knew that I loved to race and I loved to win and I wanted to do as much of each one of those two things as I possibly could."[9] I think this is one of the most refreshing comments on competition that I have ever heard.

Kansas City Chief's coach Dick Vermeil is often heard to say on Monday that the team needs to forget about Sunday's loss, put it out of their minds, and focus positive energy on next Sunday's game.[10] This is what true *professional athletes* do. They don't let the agony of defeat squelch their pursuit of the ecstasy of victory the following Sunday.

HOW DID RUFUS CHOATE DEAL WITH DEFEAT?

Perhaps every individual lawyer has to find his or her own way of dealing with losing on an emotional level. As with every human endeavor, there comes a point when a person has to accept the fact that he has done his best in a given situation and move on to other things. Boston's Rufus Choate,[11] who practiced law in the first half of the nineteenth century, has been considered by many to have been the greatest courtroom advocate ever produced in America.[12] Not even his friend and colleague Daniel Webster was considered his equal.[13] Among Choate's hundreds of cases were a not inconsiderable number of adverse results. Choate once described his philosophy "when a case has gone against me. . . . Now I am not unfeeling; but after all has been done for a client that I can do,—and I never spared myself in advocating his legal rights,—the only thing left for me is to dismiss the case from my mind, and to say . . . , 'bring on the next [case]!'"[14]

Choate's biographer Claude M. Fuess records that Choate "indulged in no regrets or rejoicings." "'When I have once argued a case,' he told [a colleague], 'and it is settled, I am done with it. I cast it forcibly out of my mind

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[9] *See generally* www.pettyracing.com/richard/bio.htm.

[10] Happily, Coach Vermeil doesn't have to say this as often as he used to!

[11] *See generally* SAMUEL GILMAN BROWN, THE LIFE OF RUFUS CHOATE (1881).

[12] LLOYD PAUL STRYKER, THE ART OF ADVOCACY 176 (1954):

> In the Rotunda of the Boston Courthouse there stands a noble bronze. Wrought by the master hand of Daniel Chester French with fine feeling and consummate art, the statue of Rufus Choate looks down upon the hurrying throng of lawyers who hardly pause to glance at the strong lineaments of a noble face or the determined posture of a resolute and manly figure. Here for all time is a glorious memorial that will commemorate forever the greatest advocate of America.

See generally CLAUDE M. FUESS, RUFUS CHOATE: THE WIZARD OF THE LAW (1997) (originally published in 1928).

[13] In his biography of Webster, Henry Cabot Lodge concluded that Webster was a great jury lawyer and an unparalleled public orator but that "[b]efore a jury Webster fell behind [British barrister Thomas] Erskine and Choate. . . ." HENRY CABOT LODGE, DANIEL WEBSTER 202 (1911).

[14] CLAUDE M. FUESS, *supra* note 12, at 189–90.

and never allow it to trouble my peace. I should go mad if I allowed it to abide in my thoughts.'"[15]

"IT AIN'T OVER TILL IT'S OVER"

If a verdict is truly unjustified, then the losing lawyer should take advantage of the right to file post-trial motions and, ultimately, to take an appeal. The very purpose of post-trial review is to ensure that the jury's verdict is within the parameters of the law and the evidence. The primary way I have always tried to deal with defeat is to lick my wounds in private over the weekend and then come in on Monday morning ready to work on my post-trial motions. If a verdict is truly wrong, the trial court or the court of appeals will not infrequently take appropriate curative action. As Yogi Berra so famously said: "It ain't over till it's over."[16]

In his book analyzing the personality and performance traits of what he calls America's fourteen top trial lawyers, author and nationally known jury consultant Donald E. Vinson notes a general "tenacity" in the use of the appeals process.[17] "They (the fourteen top trial lawyers) learn from the experience and do whatever is necessary to turn the loss into a win, to rectify the situation."[18]

The legendary Moman Pruiett's legal career is a virtual testament to tenacity. Moman Pruiett practiced law in the Oklahoma Indian territory and later in Oklahoma City, Oklahoma. "From 1900 to 1935, he defended 343 persons accused of murder. Three-hundred four of them were acquitted—not one was executed."[19] Pruiett's one client to receive the death penalty was spared by clemency from President William McKinley. Although a young lawyer not yet fully established, Pruiett, who had been appointed by the court, paid his own expenses to travel to Washington, D.C., where he lobbied friendly legislators for two weeks seeking an entrée to President McKinley on behalf of his condemned client, an indigent black man. When Pruiett finally succeeded in getting an audience at the White House, President McKinley was so impressed with the young lawyer's arguments that he commuted the federal jury's death sentence to life imprisonment.[20] The commutation order came down four days before Pruiett's client was scheduled to hang.

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[15] *Id.* at 189.
[16] *See* BARTLETT'S FAMILIAR QUOTATIONS 754 (16th ed. 1992).
[17] DONALD E. VINSON, AMERICA'S TOP TRIAL LAWYERS, WHO THEY ARE AND WHY THEY WIN 105 (1996).
[18] *Id.*
[19] Gerald F. Uelmen, *supra* note 2, at 615–16. *See also* MOMAN PRUIETT, MOMAN PRUIETT CRIMINAL LAWYER (1944).
[20] MOMAN PRUIETT, *supra* note 19, at 115–27 (autobiography).

BE A CONSTRUCTIVE LOSER

Famed stock car driver Dick Trickle was once asked about his attitude toward winning and losing. Bear in mind that Dick Trickle is considered the most successful short track stock car racer in history, with more than 1,200 wins to his credit on tracks all over the United States.[21] Trickle acknowledged that even the best preparation cannot guarantee success but that it can put a driver in a position to win, given the breaks in any given race. Trickle acknowledged that losing is a part of racing. However, he advised that his philosophy was to be a "constructive loser." Being a "constructive loser," Trickle explained, means trying to analyze why you lost and then attempting to correct for the cause of the loss in future races.

Author John C. Maxwell's book *Failing Forward: Turning Mistakes into Stepping Stones for Success*[22] deals with the fear of failure and how to overcome actual failure. Maxwell quotes author William Marston: "If there is any single factor that makes for success in living, it is the ability to draw dividends from defeat."[23] Author Emily Couric sums up the primary attributes of the ten leading trial lawyers who are the subject of her book, *The Trial Lawyers*: "Similarly, all [of the ten featured lawyers] know how to learn from their own mistakes. Whether through postverdict jury interviews or thoughtful self-evaluation, they continually review past strategies and techniques and modify them as they move on."[24] In his introduction to Lloyd Paul Stryker's classic work *The Art of Advocacy*, Judge Harold R. Medina comments that "I can still think of incidents, omissions and mistakes I made over thirty years ago in cases which I lost. The one thing I miss most in this book is emphasis upon defeat as a means of progress."[25] It is clear that defeat is one of the primary means by which lawyers learn to become effective trial advocates.

BILL SANDERS LEARNS FROM MOE LEVINE

Veteran Kansas City defense lawyer William H. Sanders, Sr., senior partner of the highly regarded firm of Blackwell, Sanders, Peper & Martin, tells of trying a jury case in his early years at the bar against legendary New York

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[21] *See generally Dick Trickle, America's Winningest Driver,* available at www.tricklefan.topcities.com.
[22] JOHN C. MAXWELL, FAILING FORWARD: TURNING MISTAKES INTO STEPPING STONES FOR SUCCESS (2000).
[23] *Id.* at 144.
[24] EMILY COURIC, THE TRIAL LAWYERS: THE NATION'S TOP LITIGATORS TELL HOW THEY WIN 364 (1988). The lawyers profiled are Fred Bartlit, Julius Chambers, Linda Fairstein, David Harney, Richard "Racehorse" Haynes, Arthur Liman, Howard Weitzman, James F. Neal, and Edward Bennett Williams.
[25] LLOYD PAUL STRYKER, *supra* note 12, at xi.

plaintiff's lawyer Moe Levine.[26] (If lawyers had baseball cards in those days, Moe Levine's card would have been the legal equivalent of a Babe Ruth.) A loss in his case against Levine left Sanders questioning his very future in the profession.

Frustrated by what he describes as a consistent pattern of losses in his early years at the bar, Sanders swallowed his pride and sought the guidance of the older lawyer. Levine flatly told Sanders that he would never win jury cases with the approach he was taking. Levine candidly suggested that Sanders's approach before the jury was too much that of the "street fighter" and that he was being perceived by jurors as ruthlessly pursuing a favorable verdict without regard for the justice of the case.

Accepting Moe Levine's judgment, Bill Sanders altered his approach and went on to become one of Missouri's most successful defense lawyers ever. Sanders credits Moe Levine's advice with changing the whole course of his career.

TALKING TO JURORS—SAVING THE NEXT CASE

In addition to taking advantage of available post-trial corrective remedies, a constructive loser might be the lawyer who takes advantage of an opportunity to talk frankly with jurors as to why the case was lost.[27] In *The Art of Advocacy*, Lloyd Paul Stryker commented that "[p]erhaps the most useful lessons ever offered me have come from jurors after the case was over."[28] Experience teaches that frank communication with jurors often reveals unstated, underlying reasons for otherwise unexplainable losses at trial.[29] This information can sometimes be put to use in future, similar cases.

I once happened to observe a prosecutor friend trying a shoplifting case in the Jackson County Circuit Court. A few weeks later, he indicated that he had lost the case because of a tendency well-known to prosecutors for jurors

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[26] You can read one of Moe Levine's closing arguments reprinted and available at www.howardnations.com/persuasivejuryarguments/ii-iii.html. *See also* MOE LEVINE, THE BEST OF MOE: SUMMATIONS (1983).

[27] The redoubtable Kansas City trial lawyer Arthur H. Stoup recommends that the trial lawyer have an associate or a paralegal actually talk to the jurors to insure that the jurors won't be worried about hurting feelings and will provide an honest explanation of their thinking. Chicago's Fred Bartlit also has a paralegal conduct post-trial jury interviews or "debriefings" in every trial. Bartlit's paralegal is careful not to reveal to the jurors who she is working for so as not to influence the juror's comments. EMILY COURIC, *supra* note 24, at 22–23.

[28] LLOYD PAUL STRYKER, *supra* note 12, at 56.

[29] An example was a case in the late 1970s in which jurors reported that they had returned a verdict for a plaintiff in a premises liability case because they understood that the law makes the property owner responsible to someone injured on his land, the lack of any evidence of negligence notwithstanding. Obviously, this apparently popular misconception about the law won out over the clear requirements of the verdict-directing instruction.

to regard a shoplifting offense as completed if and only if the alleged shoplifter actually leaves the store premises with the purloined goods in hand. This, of course, is not the law.[30]

It was my suggestion that the prosecutor broach this apparently commonly held misconception in voir dire in his next shoplifting trial and thus get the issue out on the table. Several months later the prosecutor called and told me that he had indeed raised this false issue in voir dire and had thus been able to disabuse the jurors of this misconception when, as forecast, the judge's verdict-directing instruction contained no such element. My friend the prosecutor was able to win the next case because he made the effort to understand the jury's decision process in the earlier one. He was a constructive loser.

WHAT IS THE TRUE MEASURE OF A LAWYER?

The best way to handle a defeat is probably to treat it as a learning experience and try to profit by the experience, as Bill Sanders did in his case with Moe Levine. Be a constructive loser if you have to lose. Another approach might be to try adopting new values in addition to the value of "winning." How about measuring yourself in terms of your independence, courage, loyalty, and determination instead of solely on the basis of your persuasive abilities and trial skills?

The esteemed Judge Harold R. Medina rated loyalty and courage as two of the most important qualities of a good lawyer. "But of all the qualities which bring satisfaction and success, as I have defined it, loyalty to one's client through thick and thin stands, in my judgment, at the very head of the list."[31]

> It takes courage to stand up and fight when the chances are a hundred to one that you will get hurt. And by the same token the man who stands up and takes his beating but keeps at his post, forging ahead at every opportunity and giving ground only when he must, this man sooner or later has everyone in the courtroom rooting for him and wishing him well.[32]

Why do we so admire Clarence Darrow?[33] Did he win a higher percentage of his cases than everybody else? The record shows that he did not. He

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[30] *See, e.g.,* MO. REV. STAT. §537.125.3 (2000).
[31] JUDGE MEDINA SPEAKS: A GROUP OF ADDRESSES BY HAROLD R. MEDINA, JUDGE, UNITED STATES COURT OF APPEALS 292 (1954).
[32] *Id.*
[33] For more information about Darrow, *see* Professor Douglas O. Linder's Darrow site at www.law.umkc.edu/faculty/projects/ftrials/daresy.htm.

lost the Scopes trial.[34] Leopold and Loeb got life.[35] He pleaded the McNamara brothers guilty and incurred widespread denunciation throughout organized labor for doing so.[36] The answer is that we admire Clarence Darrow at least as much for his dedication to what he believed in as we do for his courtroom skills and overall record as a trial lawyer. When we think of Darrow, we think of courage and determination, devotion and passion for a cause in which he believed.[37] Clarence Darrow was not called "Attorney for the Damned" for nothing.[38] Boston lawyer Joseph Welch, hero of the Army-McCarthy hearings and no tabby cat himself, remarked that Clarence Darrow's single greatest character trait was that he was "so brave and fearless."[39] "He was so brave and so fearless, that he did not realize that he was either."[40]

Lawyer Robert Rantoul, Jr., of Boston once agreed to represent the defendant in a notorious and seemingly hopeless murder case where the appointed special prosecutors were none other than Daniel Webster and Rufus Choate. It is said that in accepting the case, "Rantoul [acted] with characteristic courage."[41] History records that John Adams, although a dyed-in-the-wool American patriot, agreed to represent the British officer Captain Preston on murder charges arising out of the Boston Massacre and ultimately secured his acquittal, much against popular sentiment.[42] We aren't talking trial technique here; we're talking backbone. And dedication.

In the biographies of history's most notable advocates—from Demosthenes to Cicero to Thomas Erskine to Thurgood Marshall—the word "courage" appears again and again. Writing of British barrister Sir Edward Marshall Hall, Lloyd Paul Stryker noted that Hall "became a great and famous advocate. He had that indispensable quality for the role—stark courage."[43] Edward Majoribanks, Hall's biographer, records that "Marshall Hall was absolutely fearless and respected no man's interests, not even his own, when his client's life, fortune, or reputation was at stake."[44]

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[34] *See* www.law.umkc.edu/faculty/projects/ftrials/scopes/scopes.htm. *See generally* Geoffrey Cowan, *A Man for Some Seasons: Clarence Darrow,* American Lawyer, Dec. 6, 1999 (available at www.law.umkc.edu/faculty/projects/ftrials/DarrowCowan.htm.

[35] *See* www.law.umkc.edu/faculty/projects/ftrials/leoploeb/leopold.htm (select "Decision and Sentence" from the menu).

[36] *See The Bombing of the Los Angeles Times*, available at www.usc.edu/isd/archives/la/scandals/times.html.

[37] *See* MIKE PAPANTONIO, CLARENCE DARROW, THE JOURNEYMAN (1997).

[38] *See* ARTHUR WEINBERG, ATTORNEY FOR THE DAMNED (1957, reprinted by U. of Chicago Press 1989).

[39] *Id.* at xxi.

[40] *Id.*

[41] *See* CLAUDE M. FUESS, *supra* note 12, at 63.

[42] DAVID MCCULLOUGH, JOHN ADAMS 65–68 (2001); *see also The Boston Massacre Trials,* available at www.sjchs-history.org/massacre.html.

[43] LLOYD PAUL STRYKER, *supra* note 12, at 170.

[44] EDWARD MAJORIBANKS, FAMOUS TRIALS OF MARSHALL HALL (1989).

In the long run, qualities of personal character may well count for more in a lawyer than mere forensic skill.[45] Indeed, the only major legal figure in our history reputed never to have lost a case was none other than Aaron Burr of New York, persona non grata Vice President under Thomas Jefferson and vilified slayer of Alexander Hamilton.[46] Although no doubt an accomplished advocate who apparently achieved unparalleled success during his long courtroom career, who among us today admires Aaron Burr? If "winning" was the only significant measure of a lawyer, then Aaron Burr would logically stand at the head of the profession.[47]

"YOU GOT TO KNOW WHEN TO HOLD 'EM, KNOW WHEN TO FOLD 'EM"

A jury trial has been well described as a game of "half chance, half skill."[48] It seems to me that becoming an active participant in that game is largely about accepting risk. If you (and your clients) are willing to accept more risk, you will try more of your cases, you will win more cases, and you will lose more cases. If you accept more risk and try more cases, your winning percentage will undoubtedly go down over time, in accordance with Edward Bennett Williams's 60-40 principle. In other words, if you only leave the warmth and safety of your office to try a case every three or four years when you think you have a certain winner, then you will probably be able to maintain a higher win/loss ratio than if you tried all the cases that probably need trying.[49] However, there is clearly a practical cost to such a conservative approach. The trial bar eventually identifies the lawyer who habitually avoids the courtroom and extracts settlements accordingly.[50] The converse propo-

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[45] One of Abraham Lincoln's biographers had this comment about "winning" as the sole measure of a lawyer's stature:

> [I]f success in the courts is the criterion [of the rank of a lawyer], then Aaron Burr must have first honors, for he never lost a case. But if loftier considerations enter into the question of what constitutes a really great lawyer—if it is right to demand something nobler than advocacy, something broader than commercial success—then it is proper to insist on personal character as one of the elements that determine the just rank of any member of the profession.

FREDERICK TREVOR HILL, LINCOLN THE LAWYER 32–33 (1986) (originally published in 1906).

[46] NATHAN SCHACHNER, AARON BURR 88 (1937).

> It was said at the time that in all his life Burr never lost a case that he personally conducted. The obvious retort to such an assertion is, as all lawyers are aware, that the successful ones' practice was either severely limited or that he chose his cases with care. Burr chose his cases with care. He *refused to appear* in court on a matter of whose eventual success he was not fairly confident.

Id. (enphasis added).

[47] This point was made by Frederick Trevor Hill in his book on Lincoln's legal career. FREDERICK TREVOR HILL, *supra* note 45.

[48] CLAUDE M. FUESS, *supra* note 12, at 171.

[49] This assumes that one's ability to analyze the odds of winning or losing at trial is reasonably well developed in the first place. *Cf.* Bradford, *Losing—Part One,* 39 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 391, 398 (2004).

[50] HENRY G. MILLER, ON TRIAL: LESSONS FROM A LIFETIME IN THE COURTROOM 118 (2001).

sition also applies. Alexander Woollcott writes that Lloyd Paul Stryker actually preferred to try a case rather than settle. "While, in the interest of his client, he often does settle out of court, the fact that in his heart of hearts he would rather not gives him a tremendous advantage when it comes to bargaining."[51] Settling cases is a lot like playing poker. Your opponents have to take your bluffs seriously. If you always fold, then no one is going to take your bluffs seriously.

MAKE THEM BEAT YOU!

All other considerations notwithstanding, sometimes you just need to make your opponent beat you if he wants your client's money, his good name, his freedom, or his life. Make him fight for it. There really are cases in which the principles involved are more important to the parties than the economics. Sometimes clients can live with an unfavorable but definitive verdict more comfortably than they could have lived with the nagging uncertainties of an unsatisfying settlement. If your opponent can beat you fair and square in such a case, then so be it.

As a neophyte in the profession, I had the good fortune to work for the late Samuel Lang of New Orleans, a brilliant lawyer and a sensible man. When I reluctantly had to leave his law firm to enter the JAG Corps during the Viet Nam war, Mr. Lang sent me a letter of advice and encouragement. I still have his letter. Here is what he told me about trying cases: "Do everything legitimate in your power to win your cases—every last one of them. Fight like hell for your clients! Hate losing! Despise defeat! Don't ever get to where you *accept* losing. But, on the other hand, don't become intimidated by the prospect of losing to the point where you become reluctant to press forward on a meritorious claim or defense."

NO PRESSURE, NO DIAMONDS

What happens when the overwhelming defeat finally comes? Do we go ahead and meekly assume our place alongside those cold and timid souls who know neither victory nor defeat?[52] Do we sulk in our office for months,

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[51] LLOYD PAUL STRYKER, *supra* note 12, at 292.

[52] It is not the critic who counts, not the man who points out how the strong man stumbled or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes up short again and again; who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause; who, at the best, knows in the end the triumph of high achievement; and who, at the worst, if he fails, at least fails while daring greatly, so that his place will never be with those cold and timid souls who know neither victory nor defeat.
Theodore Roosevelt, *quoted in* J. Gary Gwilliam, *The Art of Losing,* TRIAL, May 1998.

blaming the judge or the jury? Do we agonize over the question of whether Plan B might have proven superior to the ultimately unsuccessful Plan A? Do we settle every case for the next ten years, no matter what? Does the fear of losing now paralyze us into perpetual inaction?[53] Or maybe, more likely, perpetual discovery?

California lawyer J. Gary Gwilliam writes that "[t]he first lesson we learn from our losses is perseverance. We need to prepare to fight the next battle."[54] I once knew a lawyer who was so devastated by a terrible loss at trial that he couldn't muster the stomach to work on the appeal. Not only did he lose the main claim at trial but the jury returned a verdict on the defendants' counterclaims in the amount of several million dollars. The situation proved especially unfortunate when the lawyer's partners eventually succeeded in having the case completely reversed on appeal and a substantial money judgment entered for their client. Had he shown some fortitude and determination, the lawyer could have ultimately emerged as a big hero.

Highly-regarded Kansas City defense lawyer Spencer J. Brown says that, because the outcome of a case is usually determined by the facts, he tries not to take too much of the credit for a victory so that he won't have to take too much of the blame for a loss. Henry Miller says that "[p]utting defeat in perspective may be the secret of great trial lawyers. Having conquered the dread of defeat, they are even more formidable."[55] Perhaps one secret of Spencer Brown's success in the courtroom is his perspective on winning and losing.

In reality, some experience with defeat may make for a better lawyer in the long run. Like other people, lawyers may "need hard times . . . to develop psychic muscles."[56] It has been said that "[y]ou can tell the character of a man by what it takes to stop him."[57]

Learning to cope with defeat includes developing the capacity to be gracious in defeat. The renowned Louis Nizer had this to say about how a lawyer should conduct himself: "Politeness is the mark of a gentleman even in legal combat. I have rarely seen a successful trial lawyer who did not practice courteous amenities toward friend and foe alike."[58] If you want to see a model for how a lawyer should conduct himself in the face of a devastating

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[53] "For some people, fear of failure brings about absolute paralysis." JOHN C. MAXWELL, *supra* note 22, at 39.
[54] J. Gary Gwilliam, *supra* note 52.
[55] HENRY G. MILLER, *supra* note 50, at 122.
[56] FRANK HERBERT, DUNE 162 (11th printing 1977) ("from 'Collected Sayings of Muad'Dib' by the Princess Irulan").
[57] ERWIN LUTZER, CONQUERING THE FEAR OF FAILURE 147 (2002).
[58] LOUIS NIZER, MY LIFE IN COURT 91 (1961). Of course, Mr. Nizer practiced law in a time when women trial lawyers were very much the exception.

loss at trial, read the *Denver Post*'s account of Stephen Jones's graceful reaction to the guilty verdicts against his client, Timothy McVeigh.[59]

CONCLUSION

We all want to win. No lawyer worth her salt is ever satisfied with an unfavorable outcome.[60] Winning is the goal and rightly so. However, losing a case should not necessarily be *feared*. It is painful and frequently difficult to accept. If you are representing a plaintiff, it can also be expensive. However, losing a case is not a disgrace. It is not necessarily even a negative reflection on the efforts of counsel. It is not really a failure, in any fair sense of the term. It is just something that goes along with being in the trial lawyer business.[61]

If a lawyer is going to maintain a long career as a courtroom advocate, he or she is going to have to learn to cope with both the specter and the reality of defeat. Persistence, perseverance, and fortitude are primary job requirements for a professional trial lawyer. Nationally known trial lawyer Stephen D. Susman of Houston, Texas, has identified toughness and resiliency as prime characteristics of successful trial lawyers.

> And I should add another characteristic of trial lawyers, a very, very important characteristic, is the ability to get knocked down and to stand right up. It's the ability to take a loss because anyone who is a trial lawyer, if you try enough cases, you're going to lose some . . . I'd say a person who can suffer a real bad loss and continue to function, that is, in my opinion, the hallmark of a good trial lawyer.[62]

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[59] *See Guilty on Every Count,* Denver Post, June 3, 1997, reported at www.rickross.com/reference/mcveigh/mcveigh14.html:

> Meanwhile, McVeigh's attorney, Stephen Jones, appearing soft-spoken and somewhat downcast, said he planned to "get right back to work. There will be a second phase to this trial, and we're going to be ready for it."
>
> Jones, who is also bound by the gag order not to discuss the case, reiterated that he would be ready for the next phase and congratulated the prosecution team.
>
> "I simply wanted to say we will be ready for the second stage in the morning and I congratulate (the prosecution) and the FBI agents who were responsible for the investigation and prosecution of this case and their work on behalf of the United States and their presentation in court."

Henry G. Miller has provided a number of concrete examples of stereotyped winners and losers in his book, *On Trial: Lessons from a Lifetime in the Courtroom* (2001).

[60] I still have the trial record of the first case I ever lost. The case was *United States Air Force v. Howard M. Bell, SSFT, USAF,* a Special Court-Martial. The military jury came back with their verdict at 1:00 a.m. on Sunday morning, May 6, 1973, and convicted my client of communicating a threat to kill a female airman. We appealed. We lost. I am still irritated about it. If you want to discuss all the reasons why the jury and the court of appeals were srong in convicting my client in this case, feel free to give me a call, collect, at (816) 283-0400. I can live with it—but I don't have to like it!

[61] Henry G. Miller, *supra* note 1, at 13.

[62] DONALD E. VINSON, *supra* note 17, at 105–06.

Note that Susman doesn't identify great jury rapport or an ability to think on your feet as the "hallmark" of a good trial lawyer. The ability to absorb a tough loss and still perform gets this ultimate accolade. In my view, this key ability is what separates a *professional* advocate from a "wannabe" advocate. Many are the talented lawyers who came into the profession on fire with the desire to be great courtroom advocates and who ended up planning estates in the face of initial spirit-breaking defeat.

The truth is that the trial lawyer's performance is but one aspect of a trial. And, as a society, we would certainly hope that the merits of the controversy would have more of an impact on the ultimate result than the merits of the contending advocates. In fact, this is what the studies have shown.[63] Despite what you may hear on CourtTV and Larry King Live, there are simply limits to what even the most experienced, skilled, and well-prepared lawyer can accomplish in any given case. Sometimes your clients are just wrong. Sometimes your clients are just guilty. Discussing this point, Henry Miller remarks: "And sometimes we should lose. Defeat may be a just result, although it may take us some years to realize it."[64]

The saying in the profession used to be that a trial lawyer wasn't really a member of the guild until he had lost a client to the hangman.[65] Thankfully, the guild currently maintains lesser requirements for membership. Prominent Chicago lawyer George Haight was once asked, "What makes a good lawyer?" His short reply deserves to be remembered: "Lots of scar tissue."[66] Take pride in your victories. Take pride in your scar tissue.

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[63] 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 Communication,* 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).

[64] HENRY G. MILLER, *supra* note 50, at 120. An example that most of us can probably understand is represented by the mixed feelings of Kansas lawyer Paul Wilson, the assigned Assistant Attorney General who represented the State of Kansas in *Brown v. Board of Education.* PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION 68 (1995).

[65] The fabled Melvin Belli, "The King of Torts," got to witness the public execution of at least three of his early criminal clients, two by hanging and one in the gas chamber. This may help explain why Mr. Belli went on to specialize in personal injury cases. MELVIN M. BELLI, MY LIFE ON TRIAL (1976).

[66] DAVID S. SHRAGER & ELIZABETH FROST, THE QUOTABLE LAWYER 190-75.96 (1986).

A BIBLICAL CASE FOR RELIGIOUS DIVERSITY—CAN LOVE BECOME A HERESY?[†]

W. Eugene March*

Currently it is estimated that there are more than 1,500 active religions in the world. To be sure, some can claim only a very small number of adherents, and some are clearly subsets of larger entities. In a world with an estimated population of some six and a quarter billion (and counting), over five billion are claimed as members of one religion or another. This multiplicity of religions is called "religious pluralism." Basic to this diversity of religions is the conviction of the adherents of each that their religion is meaningful, valid, and true. Religions abound!

Over a decade ago, in her award winning book *Encountering God*, Diana Eck of the Harvard Divinity School wrote of this diverse reality in these words:

> If our world were a village of a thousand people, who would *we* be? The World Development Forum tells us that there would be 329 Christians, 174 Muslims, 131 Hindus, 61 Buddhists, 52 Animists, 3 Jews, 34 members of other religions, such as Sikhs, Jains, Zoroastrians, and Baha'is, and 216 would be without any religion. In this village, there would be 564 Asians, 210 Europeans, 86 Africans, 80 South Americans, and 60 North Americans. And in this same village, 60 persons would have half the income, 500 would be hungry, 600 would live in shantytowns, and 700 would be illiterate.[1]

Christian theology across the centuries has tended either to ignore the reality of a plurality of religions or to condemn all other religions as irreligion, as paganism, as falsehood. Christians in the West have until very recently lived in situations where people of other religions simply did not exist. For many, the reality of other religions was largely unrecognized and unappreciated. When acknowledged at all, other religions were mostly

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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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[1] D. Eck, Encountering God: A Spiritual Journey from Bozeman to Banares 202 (1993).

viewed as evidence for the need to send out messengers to seek to convert the "nonbelievers," the non-Christians, to the true religion.

Now, however, at least in many metropolitan areas in the United States, Canada, and the United Kingdom, Muslims, Sikhs, Buddhists, Zoroastrians, Shintoists, Confucianists, and members of other faiths as well live in the neighborhood and are met in the workplace by the Christians and Jews (and in a few places Muslims) who have long lived side by side. The reality of other religions is no longer hypothetical or an issue only if one ventures "over there." Other religions are "here" and adherents of these religions have names and faces. "Their" children go to school with "ours." They are full citizens with all the same privileges and obligations. Are their religious beliefs wrong? If so, is their "error" contagious or dangerous? Do they have an authentic relationship with the divine? Do they really worship God?

In another recent award-winning book *The Dignity of Difference*, Jonathan Sacks, Chief Rabbi of the United Hebrew Congregations of Britain and the Commonwealth, writes:

> Religion can be a source of discord. It can also be a form of conflict resolution. We are familiar with the former; the second is far too little tried. Yet it is here, if anywhere, that hope must lie if we are to create a human solidarity strong enough to bear the strains that lie ahead. The great faiths must now become an active force for peace and for the justice and compassion on which peace ultimately depends. That will require great courage, and perhaps something more than courage: a candid admission that, more than at any time in the past, we need to search—each faith in its own way—for a way of living with, and acknowledging the integrity of, those who are not of our faith. Can we make space for difference? Can we hear the voice of God in a language, a sensibility, a culture not our own? Can we see the presence of God in the face of a stranger?[2]

In a book to be published by Westminster/John Knox Press late this year or early next, I attempt to respond to Sacks's challenge to "make space for difference." This lecture is part of that same project. To enable Christians to acknowledge "the integrity" of those who are not Christian requires a major adjustment of theological world-view for many, particularly with respect to how the Bible is to be read and interpreted.

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[2] J. SACKS, THE DIGNITY OF DIFFERENCE 4-5 (2002).

For centuries the church has assumed and declared that anyone who stands outside the church is, by that very circumstance, beyond the circle of God's positive care. To suggest a revision of such a position meets serious resistance by many who have been nurtured on the milk of exclusivism (nobody else matters) and/or supersessionism (Christians have replaced Jews as the chosen people). Some inertia stems from a fear that somehow God will be compromised if Christians acknowledge that Hindus or Muslims or Jews have authentic experience of the divine, a relationship equal to that claimed by Christians. But for many others, a lack of information, or an abundance of misinformation, provides the major stumbling block to a more positive assessment.

Historical Context

During the past forty years biblical scholars, Jewish and Christian, have made major revisions in our understanding of the first century context from which the community that came to be called "Christian" emerged. What is difficult for many to understand or remember is that "Christianity" as a religion did not exist prior to around 150 of the Common Era. There were Judean followers of a Galilean named Jesus, but neither Christianity nor Judaism, as religions, existed before the middle of the second century, at least not in the forms that we now know them.

The differentiation of the two communities and the subsequent "religions" that emerged came about largely because of a "9/11" kind of disaster that befell Jerusalem in 70 C.E. A rebellion had begun some four years earlier, led by persons zealous for political autonomy and, in some instances, convinced of an imminent divine intervention that would insure the overthrow of the enemy, Rome. In response, the Roman legions marched mercilessly through Palestine. And then, to underscore their domination, in 70 C.E. they utterly destroyed the temple in Jerusalem, and much of the city as well.

After this horrific event, certain Pharisaical rabbinical scholars began to lay the foundations of modern Judaism by defining a biblical canon, by developing a methodology for reading and interpreting their Bible, and by establishing—over the course of a century—an "orthodoxy" that stood in some contrast to the diversity that had prevailed in the preceding centuries.

During these same decades, the followers of Jesus began a similar process of self-definition, selecting spiritual writings, reading and interpreting the Bible—the Hebrew Bible, because that is all there was for the first century or so—much as their rabbinic counterparts were doing, and by developing a "catholic" doctrinal base by which to determine "heresy,"

a hitherto unknown category. Thus, by the end of the second century of the Common Era it is correct to say that Judaism as a religion and Christianity as a religion had come into being.

So what can be said about the historical and social context from which the New Testament arose? First, wide diversity in the midst of a religiously plural world was the norm. There were many religious traditions and a variety of Jewish and Christian responses to them and to one another. No one group had "the answer." There was relative tolerance for different religious practices so long as there was no effort to impose conformity or uniformity.

Second, all the documents of both emerging Judaism and Christianity were written, collected, edited, and revered by people who comprised distinct minorities. The writings were addressed to people struggling to maintain their identity, sometimes in the face of suppression, oppression, and even persecution, but always as relatively powerless communities surrounded by the dominant, ruling majority. Whether in Babylon, Palestine, or Rome, community survival was a live issue—perhaps the major issue—for those who wrote and received what we may now call the Scripture.

It is very important to remember that what is said from a recognized position of powerlessness takes on a different ring if the power structures are reversed. And, of course, this is exactly what happened when Emperor Constantine converted and "made" the Roman Empire "Christian" in the fourth century of the Common Era. New Testament instructions about how to live as a minority population suddenly took on a different sound. A government that had formerly been "tolerated" and "endured" because there was no real alternative became a government "defended" and given "divine sanction" on the basis of Scripture. Numerous other reversals in Christian practice took place as well. The "marginalized" had become the "establishment." To encourage those with no political or economic clout to love their enemies is different than admonishing those who constitute the dominant group to do so. The importance of this change of social status for the interpretation of the Bible cannot be overemphasized. For modern readers it is very important to try to recognize and understand the Bible from the minority position in which it was originally written and preserved.

Third, the New Testament, at least all but the Pauline letters, was written after the catastrophe of 70 C.E. and in the midst of growing controversy among Gentile and non-Gentile Christians and between some synagogues and some Christian communities. These tensions were real and, for many, terribly upsetting. The writers of the Gospels, for instance, addressed people who in some instances were being forcibly expelled from their family synagogues. Opposition from some rabbinic authorities put in jeopardy the

protected status Rome had extended to Jews. And some Christians responded aggressively against their antagonists. Mostly the quarrels were verbal, not physical, but they were often loud and vehement.

Then as now, sometimes things said in the midst of arguments, particularly family arguments, are overstated and under-considered. There are strong statements in the New Testament about "others"—particularly the "Jews"—that must be heard in the light of the controversies that were increasing in the last decades of the first century. It is important to acknowledge that some statements in the New Testament (and in the Talmud, for that matter) reflect the realities of the painful "family quarrel" that was taking place. Such statements should not be lifted out of their literary or historical contexts, however, and understood as "eternal truth."

With the above contextual realities in mind—namely, the diversity, the minority status of the participants, and the growing controversies—the interpretation of the Bible can proceed. The Bible should be understood along at least two lines that are often ignored or unidentified. First, there is the "explicit" story found first in the Old Testament, or Tanaach, and then in the New Testament as well. The "explicit" story of the Bible concerns the Hebrew people rescued from slavery and brought to a land of milk and honey. The story is one of allegiance and betrayal, of successes and failures, of profound insight and incredible blindness. But over all, the Hebrew Bible recounts with utmost surety the story of a gracious, compassionate God who simply will not abandon the people divinely selected to embody Torah and to be a light to the nations.

In the New Testament there is a parallel "explicit" story about the ministry of Jesus, the allegiance and betrayal demonstrated by his disciples, the emergence of a fellowship that came to be called "the church," and the charge by God to carry the message of Jesus throughout the world. Once again, the principal story is about the grace and loyalty of God to those called into divine service.

Now, certainly, for believers the "explicit" story is of utmost importance. It sustains, challenges, guides, and all the rest. But behind or beneath this "explicit" story is an "implicit" one all too often missed. And it is this "implicit" story that provides the basis for a positive view of other non-biblical religions, providing the "space for difference" that Jonathan Sacks calls for.

What do I mean? Well, the story about Noah and his family and their preservation in the midst of the great flood, for instance, is not a Jewish or Christian or Muslim story alone. Noah is a representative of humanity. It is humankind that is preserved. To this point in the biblical story there has been no "covenant" or "exodus" or giving of any of the Torah. The perhaps

not so "implicit" point is that God's judgment and rescuing love encompass the whole human family.

The stories told about Abraham and Sarah likewise predate the rise of the people of Israel. While the three biblical religions claim this heritage, the stories are not the exclusive property of any one tradition. And within these stories "foreign" kings are presented as far more sensitive to and responsive to God's ethical claim on humankind than either Abraham or Sarah. The "implicit" message is that God is God of all and is concerned for all, not just those who will become particular agents of the divine will.

One can cite numerous other biblical traditions in support of this contention. The prophets of Israel, especially Amos, Isaiah, and Jeremiah, while given the work of addressing Israel primarily, assume that all peoples belong to God and are both judged and blessed accordingly. The wisdom books, particularly Proverbs, Job, and the Wisdom of Solomon, affirm the God-given solidarity of all peoples and the gracious providence extended by God to all. In the New Testament as well, Jesus is repeatedly presented as one who cared for and sought out all manner of folk, the "chosen" and the "sinners."

The "implicit" story in the Bible is that all people belong to God and matter to God. And thus, by deduction, there are no people automatically or arbitrarily to be excluded from God's mercy and care, even if they happen to profess beliefs that in human terms are labeled as Hinduism, Taoism, and so forth. To be sure, this is not immediately self-evident from reading the Bible because of the dominance of the "explicit" story, but the whole point of the dominant story is to declare God's interest in and concern for the whole human family. The "elect" were always intended for service beyond their group, not for privilege within it! The "implicit" story is about God's desire that no one be left behind.

CONTEXTUAL REINTERPRETATION

With all of this in mind, perhaps it is time to consider one of the more "challenging" passages in the New Testament, at least so far as developing a more positive appreciation of other religious traditions is concerned. One particularly well-known text most frequently brought forward to counter the position I am trying to advance is found in the Gospel of John: "Jesus said to him [Thomas], 'I am the way, and the truth, and the life. No one comes to the Father except through me.'"[3]

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[3] *John* 14:6.

All too often this verse has been ripped out of its literary, historical, and social context and has thereby come to be widely misunderstood and radically misused. Rather than being recognized, as originally intended, as an invitation into a closer relationship of discipleship with Jesus, the verse has been used all too often as a test of "orthodoxy" and as a tool with which to browbeat the "unsaved." Too many times arrogant assertions of religious "superiority" have displaced the loving Lord whose way is at issue. How did this ever happen? How did the all-embracing love of God made particular in Jesus of Nazareth come to be interpreted as the "exclusive" possession of only a few? Where is the "truth" or the "life" in such an understanding of Jesus's way? How did the practice of the love advocated by Jesus come to be the basis for a charge of heresy?

The context here is crucial. What is the historical context of this passage? What did those who lived when the Gospel of John was written consider self-evident; what was common knowledge that modern readers may not now know or recognize? And further, what is the literary context of this particular verse within the Gospel of John itself? These questions may sound "academic," but they are critical.

Remember first the catastrophe that occurred in Palestine in 70 C.E. The Temple of Herod, built on the site of Solomon's Temple, was utterly destroyed by Roman troops at the order of Emperor Vespasian. The wood in the structure was burned. Every stone in the building's walls was knocked down. Those who tried to resist were slaughtered. For the populace of Jerusalem and Judea this was a cataclysmic event.

Remember, too, that in the years following the ministry of Jesus (roughly 30-33 C.E.) but before 70 C.E., there was a wide degree of diversity among the Jews in Palestine. There were a number of "parties" reflecting different understandings of what was involved in following God's way, of what it meant to live in accordance with the Torah (Law) and the Prophets. There was no "orthodox" position that determined who was or was not a Jew, or that ruled some out and others in. Conflicting positions could and did compete. Nonetheless, all Jews were related by a common history, by revered religious traditions, and because they were a definite minority in the political and religious world of the Roman Empire.

And among the Jews there were the "Christians." Of course, these Jews were not called "Christians" until near the end of the first century C.E. They were simply Jews who recognized in Jesus of Nazareth the distinctive work of the gracious God celebrated in the traditions of the Jews and called "Abba" (Father) by Jesus. At the outset of the Christian movement, the disciples, and most other followers of Jesus the Jew, were themselves Jews. This must not be forgotten. Not until thirty or forty years after Jesus's

crucifixion and resurrection did any significant number of non-Jews (Gentiles) begin to join the movement, and those persons mostly lived outside Palestine in Asia Minor and elsewhere around the Mediterranean basin.

After 70 C.E., however, things "Jewish" in Palestine began to change in some dramatic ways. Jewish identity was being more sharply defined, with some groups held more and more suspect by the rabbinic leaders. Slowly but steadily the notion of "heresy" began to form as "orthodoxy" rather than diversity became the norm.

In this context the Gospel of John was written. The exact time and place of writing continues to be debated among scholars, but most consider it likely that John was written somewhere around 90 C.E. Most likely, those addressed by the Gospel were Jews who were followers of Jesus. They knew the traditions of their forebears and lived as Jews were expected to live. Non-Jews living around the congregation addressed by John probably would have seen little difference between these Jews who were Christians and other Jews who were not. But for some Jews there were distinct, irreconcilable differences.

For Jews who were Christians this meant trouble. Two times the author of the Gospel of John mentions that there is fear among Jesus's followers because of their threatened expulsion from their synagogues, and once John has Jesus warn of that very possibility.[4] For caring Jews, to be "put out of the synagogue" was tantamount to a death sentence. Family, friends, community celebrations marking the beginning of life, the end, and all the in-between—everything was centered in the synagogue, especially after 70 C.E. In this changed circumstance, for Jews to walk in Jesus's way took on a new dimension with potentially costly, painful consequences.

The controversy among Jews about the significance of Jesus grew more and more intense as both Jews and Christians tried to define their own identities. By 150 C.E. there were "debates" going on by representatives of both groups. Whether people actually confronted one another directly or whether these events were only "on paper" and shared only within the supporting community is unclear. But the rhetoric was heated and pointed. By the end of the second century C.E. Christians and Jews were totally separated, at least so far as the "authorities" were concerned. Judaism and Christianity were established as separate "religions," sharing many traditions but nonetheless self-standing, independent, and increasingly disdainful of one another. The Gospel of John was written as this process of self-definition was beginning.

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[4] *Id.* 9:22, 12:42. 16:2.

With this background in mind, the verse previously quoted may sound somewhat differently than has all too often been presumed. These words of Jesus, in the literary context of John, were words of encouragement and assurance. In the midst of conflict and possibly mistreatment by family and friends, Jesus's followers were reminded that Jesus did offer them an authentic way of living that was in accord with God's love. To follow Jesus was to live in love as Jesus instructed, and this was God's way.

Jesus is not pictured in John 14 as debating abstract principles. Jesus was not trying to establish a religion. Jesus was not debating possible strategies of evangelism. Not in John 14. Rather, Jesus is pictured by the writer of John as trying to prepare his disciples for a time when he would leave them. Jesus was assuring them that what they saw in him was the very presence of God in their midst, and thus to be trusted even in the face of persecution and rejection. Jesus himself was the living and authentic way of love to be followed no matter what might happen. For the writer of the Gospel, the issue was not philosophical. The issue was practical, a matter of maintaining loyalty within a hard-pressed congregation of Jews who had chosen to follow Jesus and who were now being expelled from their lifelong communities, their synagogues. To disregard this literary and historical context is to do violence to the words remembered and preserved.

The Gospel was written for people experiencing the pain of the division that was taking place. Thus, while there are many positive references to people who were Jews (like the disciples of Jesus, for instance), there are numerous references that carry a tone of anger and disdain for others of "the Jews." The "Jews" that are warned against and feared, and who are at times the object of derision in the Gospel of John, are the religious authorities, those in charge in the synagogues and those who were the self-appointed (from the Gospel's perspective) guardians of the tradition. These "Jews," not all Jews, are considered enemies of Jesus and thus also of Jesus's followers.

In John, Jesus is not presented as worrying about Hindus or Muslims or Taoists or, for that matter, participants of any of the other religions of the world that we now know. Jesus as a Jew is pictured addressing an issue existing among Jews. Luke, in Acts 4:12, describes the Jew Peter, a disciple of Jesus, in a similar situation challenging other Jews to recognize in Jesus the saving work of God. To take the words ascribed to Jesus and Peter out of their literary and historical contexts is to misuse them. These words are not "policy statements." They reflect the rhetoric of conflict and the struggle of a movement, very much a minority movement, to account for itself and to survive. They provide encouragement and challenge for Christians to be faithful to the God whose way was exemplified in the ministry of Jesus.

These words do not define how Christians should understand others but how Christians should structure their own commitments and priorities.

In John 14 Jesus announced that he was going to leave the disciples and go to a place that they knew. The text is unclear whether Jesus had Jerusalem in mind or his heavenly home. At any rate, Thomas, one of the disciples, objected, saying that neither he nor any of the other disciples knew where Jesus was going or how to get there. Thomas wanted to know the "way." To this question Jesus responded, "I am the way, and the truth, and the life."[5] The point is that Jesus himself provides all a Christian needs for a full and authentic life. When Christians were being treated as heretics, John insisted, they needed to stand firm and take comfort from their Lord who assured them that he was truly God's gift to them and a reliable guarantor of true life.

At the time when the Gospel of John was written, there was no aim to eradicate "Judaism." There was no intention to say that Jews, as contrasted with Christians, had no knowledge or relationship with God. The purpose was to provide a secure place for a minority of Jews called Christians, within what was itself a minority people in the Roman Empire (namely, the Jews being defined by the emerging rabbinic leadership), to follow its own "way" (namely, the way of Jesus). The purpose of John was not to establish dominance over others but rather to assure authenticity to his beleaguered audience. Words of comfort for "us" should not, need not, be used as words of attack or denunciation of "them."

CONCLUSION

One of the wonderful, but problematic, features of the biblical story is that God insists on meeting humankind in very particular moments and ways. God is certainly not limited to the particular persons or to the events recounted in the biblical story, nor is God the sum total of all of these accounts. God cannot be "abstracted" from the various witnesses either and made into a set of principles or "truths." In each story a glimpse of God is to be had. In the person of Jesus God is to be met. But always in particular places, in particular times, in particular circumstances. There are an ample number of particular stories to meet the needs of those seeking the way, but not by generalizing the particulars into some unspecific guide or absolute rule. Rather, each particular account needs to be studied and embraced to learn what that particular moment offers.

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[5] *Id.* 14:5-6.

Jesus is, for Christians, undoubtedly the most profound moment in God's story with the human family. And what Jesus teaches over and over again is to recognize the depth of God's grace and the ever-widening circle of God's love. To walk in Jesus's way is to be strengthened by God's love and emboldened by God's Spirit to live and love as Jesus did. To find life and truth in Jesus is to celebrate God's most intimate and most particular sharing of divine love. But God is never restricted or limited by the particulars, only enhanced. Christians know Jesus as the incarnation of God's love in the world. To participate in that love can never be heresy. The way, the truth, and the life that believers encounter in Jesus testifies to the God of the Bible who from beginning to end reaches out to include, not exclude, all humankind in a relentless expression of divine compassion, forgiveness, and rescuing love.