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Editorial Office

University of Michigan Law School
Ann Arbor, Michigan 48109-1215
Telephone: (313) 763-0165
Fax: (313) 764-8309

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RECENT CHANGES IN THE ENGLISH LEGAL PROFESSION†

Lord Slynn of Hadley*

Experienced actors always say that it is deadly to appear on a stage or in a film with child actors or with attractive animals. I feel that for an ageing English male lawyer, following a beautiful woman who is a former bar president of great ability[1] falls very much into the same category. Despite the difficulty, I am delighted to be here, and it was a great privilege to receive an invitation to speak.

When Walt Byars talked yesterday about the friendship of this organization, I knew exactly what he meant. For the Marco Island meeting,[2] I flew into Miami and then drove immediately to the Island. In the lobby of the hotel, Jim Harper was waiting for me. In that gravelly, direct way that Jim Harper alone has, he said, "Give your jacket and your tie to the bellboy, and come have lunch." Four large dry martinis later, he said, "It's been nice lunching with you. I've got a tennis match." That was my abiding memory of Marco Island; no doubt my abiding memory of this meeting—at least of the events so far—will be the enthusiasm with which the Alabama delegation shoot craps (I hope I've got the expression right—it's a new one to me). I hope very much that when any of you come to England, you find the same warm reception. One of my American friends came over last year and took a holiday in Yorkshire, driving through the dales, a very beautiful part of England. He stopped one day outside a pub and noticed at the door a poster which said, "Today's Special: a pint of beer, a pie, and a friendly word. £2," so he went in. A rather surly barman left his newspaper and came to the counter. My friend put his two pounds on the counter, and the barman gave him the pint of beer and the pie. My friend said, "That's all very well, but what about the friendly word?" "If I were you, I would not eat that pie."

Choosing a subject on these occasions is always, I find, very difficult. Once, when I was asked to speak at a bar meeting in Georgia, I asked, "What shall I talk about?" The lawyer replied, "With your accent, if you just read two pages of the telephone directory, they won't notice anything different." Fortunately,

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† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Dorado Beach Resort, Dorado, Puerto Rico, March 7, 1995.

* House of Lords; Member of the Privy Council; Fellow, International Society of Barristers.

[1] *See* P. Seitz, *Zen and the Art of Herding Cats*, 30 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 320 (1995).

[2] Annual Convention, International Society of Barristers, Marco Island, Florida, March 20–26, 1983.

on this occasion John Reed decided not to make me choose the subject but he gave me the title which you have in the program. I hope you won't feel that it's as remote as Mars. I believe the subject is not irrelevant to American barristers. Although geographically I may have come farther than most of the Fellows and guests at this meeting, I have no doubt that psychologically, intellectually, and culturally, there is no group of lawyers outside North America with whom you have closer ties than you do with the English bar and the English bench. Just as we follow very closely what happens to your professional organizations and to your bench, so I have found over the years that American lawyers have taken considerable interest in what we do. I know you all think we're terribly out of date and slow to change and jealous of all our outmoded traditions, but there has never been a period of greater soul searching, greater introspection, and greater change in the practice of law than has happened in my time at the bar.

None of the changes that I'm going to describe briefly is to be taken in any way as indicating a change in the fundamentals which are the base of our system in England and Wales. The integrity and the dedication, the high standards and intelligence of the bar—qualities shared no less by the solicitor side of the profession—remain. Independence, commitment to the bench, and camaraderie exist to a very high degree in the United Kingdom between the bar and the bench. Those qualities will always remain despite the changes, some of them quite radical, that I will recount.

I am going to talk about four areas of change. I am going to say something first about the changes in the training of the members of our legal profession and in the structure of our profession. I say our profession because, although we have separate branches—barristers who wear wigs and solicitors who don't and who carry out separate tasks—I regard them as forming parts of the same profession. They are not two independent professions, and that is becoming increasingly recognized. Secondly, I shall say something briefly about the changes in the judiciary, in the appointment process and perhaps in the type of person who is now appointed to the bench in England. Thirdly, I shall say something about the effect on the practice of lawyers and the work of judges of the United Kingdom's entry into the European Economic Community, now called the European Union. Finally, and even more briefly, I shall say something about changes in procedure for dealing with disputes both inside and outside the court system.

TRAINING AND THE STRUCTURE OF THE PROFESSION

Let me set the scene, and forgive me if this is rather personalized and anecdotal. When I was called to the bar, the training was, to say the least, rudimen-

tary. There were some exams but it was not too difficult to pass them even if you hadn't earned a law degree. Attendance at lectures for the bar exams was optional. I went to only one in the whole of my reading for the bar. It was a lecture given by a very eminent land law specialist, Professor Geoffrey Cheshire, who is also an expert on the conflict of laws. He sat at a table in a room in the basement of Lincoln's Inn and about seven or eight of us turned up. When we were all seated he looked up and said, "I don't know why you people have come here. You'd be much better off at home reading Trollope than listening to me talking about land law." So one didn't go to very many lectures. One focused instead on a specialized series of crammer's books which were called "nutshells" and which were terribly valuable. I used to lie on the lawn of my parents' house or on the lawn of Gray's Inn learning the nutshells by heart. It was a very compact, inexpensive, and convenient way of studying for the bar exams. There was no training in advocacy or in practice and procedure, in any real sense, although there was an exam in the latter. And one was supposed to learn the standards and traditions of the profession by eating dinners. Before you could be called to the bar, it was obligatory that you kept a number of terms by eating dinners in the hall of your Inn. If you were not a graduate you had to eat thirty-six, and if you were a graduate you were required to eat only eighteen. Although I was in fact a graduate, I thought the dinner was such good value at five shillings that I ate thirty-six instead of the necessary eighteen.

Next, you became a pupil for twelve months, and you usually had to pay a fee to be a pupil. Some people didn't charge it but many did. The standard fee was a hundred guineas, and forty years ago a hundred guineas was a lot of money. After you had done your pupilage, if you were lucky, you were asked to stay on as a tenant in the chambers. As a tenant, you didn't get a salary. If you were exceptionally lucky, you were asked to be a devil. I was a devil for an extremely busy junior with an enormous practice, and he said, "If you'll be a full-time devil, I will pay you a hundred guineas a year." Even in the late 1950s, you could not get much for a hundred guineas a year, so I said, "That's an interesting figure," and he responded, "Yes, that is what I was paid twenty-five years ago by my pupil master and that's what he was paid twenty-five years before that by his pupil master, so a hundred guineas seems to be just about right."

Solicitors on the other hand very often didn't have a law degree, though increasingly by the late '50s they had. They went to a course run initially by tutors and then by the Law Society, and they did a period of articles with a firm of solicitors, doing the preparatory work for cases, conveyancing, wills, and legal advice for companies. Again there was a distinction between the graduate and the nongraduate. If you were a graduate, you did three years. If you

were a nongraduate, you did five years and you probably had to pay a premium. You didn't get a salary.

In other words, in order to become a lawyer at that time, whether member of the bar or solicitor, either you had to have some money or you had to be very, very committed to qualifying for legal practice.

Today you still have to be dedicated and to some extent you still have to have some money, but there has been a substantial change in the training which in time is going to have an impact not only on those who practice law but on those who are appointed to be our judges. And let us not mince words: The quality of training and backgrounds are very relevant to the proper administration of justice. Now all young lawyers are graduates, although not in your sense of having done an undergraduate degree and then moving on to do a law degree. For us law is an "undergraduate" degree. At eighteen boys and girls go into university and study—"read"—law instead of some other subject. Afterward they take a course of practical training for one of the two different sides of the profession. At the bar, they still have to do pupilage and they still have to eat some dinners but far fewer. (I don't quite understand why the number of dinners is now less than it used to be.) The solicitors on the whole also do a shorter course of legal training. As a pupil now you can probably get a scholarship from your Inn or chambers. As a young trainee solicitor you're probably paid a salary, which in London is an amount that seems to the elderly like me rather substantial.

It is sometimes asked whether we should now have a common professional training for the young lawyer instead of setting the young barristers and the young solicitors on separate paths as soon as they come from the university. This seems to me to make a great deal of sense and I think that it will probably happen. There is, however, a lot of resistance to it, and it may not come.

That is the training. Now what about the profession itself? There have been extraordinary changes. When I came to the bar there was a law which prohibited partnerships of solicitors from having more than twenty partners. (The bar could not have partnerships at all, and that rule is retained.) Now there are many firms of solicitors in London which have upwards of a hundred partners and many lawyer associates besides. That has resulted in tremendous change in the way in which firms of solicitors work. They have taken now to having an efficient business organization.

Even the bar has changed in this respect. It's quite remarkable. When I became a tenant of my chambers, we were four people, and we had one clerk who looked after the money and got in the cases and two junior clerks who did the typing. The two boys typed with two fingers. Nobody could take shorthand, and nobody could type from a dictating machine so everything had to be

done in manuscript. It was all done in a rather slow, very careful process. For example, when one of the boys had typed something—with two fingers—he would read it to the other who would check it against the manuscript.

Now things have changed very much. Everyone seems to have fax and word processors. (By the way, I don't know why they are called "word processors." That seems to me an inappropriate term. I should have supposed that the person who actually dictated was the word processor.) The bar has become much more mechanized, much more efficient. I mention this not simply to show that we have kept up with the times but because I believe it reveals a changing attitude. The bar doesn't now simply seek to speak ex cathedra (or pontificate, as Pat Seitz termed it). Instead it seeks to have a professional practice in order to give efficient service to business.

We have paid great regard to the way you run your offices here. I remember the first time I went to the offices of an American law firm. I was astonished by the opulence. There was a waiting room for clients to sit in. It had comfortable chairs and attractive pictures on the walls. You got offered a cup of coffee. In my chambers you climbed up a very dirty, narrow, wooden staircase, Dickensian in the extreme, and you came directly into the office. There was nowhere for clients to sit, and there was no possibility of their being offered even a cup of tea. It was an extraordinarily old-fashioned way of conducting business. When some great tycoon came into chambers, he must have wondered where on earth he had gone, particularly if he had recently visited Coudert or a similar firm in the American law scene. That has changed.

One big change has been in the area of looking after people who can't afford to pay for legal advice or litigation. Young barristers have established something called a free representation unit, and for no charge they do cases before tribunals of different kinds. This is paid for by the bar and by the Inns, which don't get any fee for doing it. It's pro bono work, and it's terribly important. The solicitors have a duty-client scheme which is obviously important for those who are arrested or find themselves in financial difficulties and need immediate advice.

What about contingency fees at the bar? Solicitors don't have contingency fees; they charge usually at an hourly rate. The bar has not charged at an hourly rate but generally has set a fee for each case. When I was initially at the bar, my clerk, who was very experienced and good at knowing what the market would take, would set the fee based on the size of a set of papers; he usually didn't even open it to read it. If it was large and heavy, that was a good sign, and he would demand a fee of a rather large amount, which sometimes used to shock me. If it was a thin little bit of paper, he might look to see how much money was involved and then he would pluck from his experience and

from the air a fee. There has been talk about our adopting contingency fees, but I have to say that there is probably no chance of our adopting them in precisely the form you have in this country. We have gone a little way toward your system. It has been agreed that we should have what is called a conditional fee. (You'll say that this is the English being rather hypocritical.) A conditional fee will allow the barrister and the solicitor to say to the client, "I think you've got a case but you haven't got any money. I will do the case on the basis that if we win I get a fee. If we lose, no fee." That's your system so far, but here is where we depart: We have said that the fee is not to depend on the amount of money received in judgment; the barrister is not to have a percentage of the damages awarded. The lawyer will be allowed to say, "If I win I won't charge you my normal fee. I get an increased fee to take account of the fact that I'm doing this on a free basis, and I may lose a lot of other cases," but the committee advising the Lord Chancellor on this wants to insist that the uplift fee should never be more than 100% above the normal fee. We're still trying to work out all the details; this is not yet effective.

Another important change has occurred in the area of barristers seeing clients directly. That was always forbidden. A client could not go directly to a barrister, and a barrister could never see a client in the absence of the solicitor. Indeed, a barrister was not expected to see *witnesses*, other than experts, before the hearing. We have modified that rule to some extent. For a very peculiar reason, one of the lucrative parts of practice for solicitors in England was conveyancing. The real estate agents have muscled in on this and are now allowed to transfer houses. So the poor, wretched solicitors have lost some of their work, and they thought that they should therefore have the right of audience in court. The bar eventually replied, "Okay, but if you're going to come into court, then we must have a form of direct access." This access, however, is limited to other professional people; now a barrister can see an architect, an accountant, an actuary, a surveyor directly, but he still can't see the lay client. We think this is a good rule although it may sound very strange to you.

This brings me to the last of the changes in the structure of the profession that I will discuss—and the most important one. This is the one that is very shocking to many old lawyers and judges. Solicitors could always appear in the lay magistrate's court and could do minor criminal cases and to some extent could appear in civil cases in the lower courts but they had no right of audience in the higher courts, in the courts of appeal or in the House of Lords. After a great deal of lobbying and discussion over the years, it has now been accepted that solicitors who have had experience in the lower courts should be given a license to practice in the higher courts. For the first time they can prosecute before a jury, and for the first time they can go into the higher courts,

and therefore into the European Court of Justice. Thus far about 250 solicitors have been admitted, usually because of their experience but sometimes after passing an examination.

As was inevitable, they have formed an association of solicitors who are qualified to appear in the higher courts, and they asked me if I would be their president. I was a bit frightened at first; having been away in the European Court I hadn't really been involved in all the political infighting. Eventually, I concluded that it was important that one of the Law Lords give guidance and support and—I hate to say it—a certain amount of respectability to this new body, so I took on the job.

I don't think this new role of solicitors is going to cause too much trouble. The problems we've had so far have scarcely been of earthshattering importance. Should solicitors appearing as advocates in the higher courts wear wigs? That has taken more emotional and intellectual energy than any other subject which we have had to consider. Should the solicitor advocates be allowed to have lunch (not dinner) in the Inns of Court? Should a solicitor be allowed to become a Queen's Counsel? I don't doubt that we can manage to sort out these issues. The larger question is whether this will lead to fusion of the two branches of the profession. I don't believe it will. The bar is firmly opposed to it. I don't think the Law Society is in favor. We shall get nearer but I don't think there will be any fusion.

One interesting note on the subject of wigs, which we shall keep for the bar for the time being (there was a lot of opposition to letting solicitors wear them): I thought wigs were merely an amusing feature of our procedure, but there was a survey of people in prison, who were asked, "Would you prefer that you be defended by a barrister in a wig or a lawyer without a wig?" They were absolutely solid in favor of barristers retaining wigs and representing them at their trials.

There have been other changes, some of them in the funny old customs we used to have: Queen's Counsel couldn't go into court without a junior, and the junior had to have a fee which was two-thirds of the senior counsel's fee. If you moved from one circuit to which you belonged to another circuit to do a case, you had to send wine to your home circuit mess as a penalty for moving out of your circuit. These are all gone, but they don't require discussion here.

THE JUDICIARY

The English judiciary has had a strange image throughout the rest of the world. This was not very surprising. They were remote. They tended to be Oxbridge, upper class, not particularly aware of what was going on in the

world, and terribly proud of what they were and what they did. There was a time during Queen Victoria's reign when a petition asking for some change in the court procedures was to be presented to the Queen on behalf of the judiciary, and the first draft of the petition began, "Recognizing as we do our own deficiencies . . . ." Some of the judges thought this was an intolerable thing to say, a long debate ensued, and eventually a compromise was reached. The petition began, "Recognizing as we do each other's deficiencies . . . ." Even as late as 1936 the Lord Chief Justice said in a speech, "His Majesty's judges are satisfied with the almost universal admiration in which they are held."

I do think we have changed now. The judiciary is much larger. Most judges still come from the ranks of barristers in private practice, but we have now recognized that solicitors too should become judges. The current Lord Chancellor, with support from both the bar and the bench, considers that the key principle here is that people should be appointed to the higher courts only if they have had experience. This means that you have to begin as a part-time criminal judge—what we call recorder and assistant recorder—and then solicitors will normally become circuit judges—our second-tier judges, of whom there are about 500—before they can be considered for the high court bench.

This is going to change, at least to some extent, the ethos of the bench. In the first place, solicitors' practice on the whole has been different, even if they have had some judicial experience. Also, the age of the judges at appointment is going to change. Fifty years ago the average judge was appointed to the high court at about fifty-five, and he had to serve for fifteen years to get a pension. There was no retirement age; he could go on until his wife told him he really had had enough. Then the socialist government in the early 1960s, no doubt with egalitarianism in mind, said that judges must retire at seventy-five. I thought that was a most retrograde step. Our judges can't take senior status as they can in your country, so the income of a retired judge drops to a pension of fifty percent of what he had been earning. That gave judges every incentive to go on until the last possible minute at age seventy-five. Now Parliament has decided that judges should retire at seventy (which seems to me absolutely absurd because one really is at one's best between seventy and eighty), and they are going to have to have served twenty years to get the miserable fifty percent pension. So judges will have to begin younger and remain on the bench longer in order to get their pensions.

The only advantage of the high court bench is that you can't be removed except by a resolution of both the House of Commons and the House of Lords. This provision was introduced in the Act of Settlement in 1700, and since that time nobody has been removed by a resolution of the House of Commons and the House of Lords. Everybody has some friends somewhere. Lower judges

can be removed by the Lord Chancellor for misconduct, but that doesn't happen very often either. The only time I remember it happening was when a county court judge was caught smuggling large quantities of cigarettes and alcohol in his boat across the Channel from France. He was prosecuted and told he'd better get off the bench quickly. Since he didn't seem to want to get off quickly, he was sacked.

In another radical change, judicial positions in the lower courts are going to be advertised. This is very shocking to a traditionalist like me. Advertising a judicial appointment! And there are going to be competitions—I don't know what sort of competitions. Just imagine being forty-eight or fifty and having to take part in a competition if you wanted to go onto the bench! And there is to be a job description. That is astonishing. After all, we know what the bench is and we know the appointee—it's a small bar and small bench—and there's no need for such nonsense as a job description. Even worse, the Lord Chancellor, who makes these lower court appointments, is going to have to listen to the advice of an advisory panel. Worst of all, the advisory panel of three people is to include a lay person. Can you imagine anything more calculated to reduce the status and prestige of the English bench than to have a committee with a lay person on it advising the Lord Chancellor as to appointments? However, I dare say it will all work out very well, and fortunately nobody has suggested that it should apply to the high court.

John suggested that I might talk a bit about the Privy Council. "Privy Council" may sound slightly antediluvian, but there has been a change here which I regard as very important. The Privy Council consists of a large number of people, and you're appointed to it for life, so even when your party goes out of office, you remain a member of the Privy Council. Subordinate, delegated legislation which has to be approved by the Queen is approved by the Queen "on the advice" of the Privy Council. This, by the way, is a very entertaining ceremony. About four of you go to the palace and are called in to the Queen, the clerk of the Council reads out the various bits of legislation, and the Queen says, "Approved." You have to stand throughout the proceedings, because it was thought that if the Privy Councillors sat down, they might talk, and nobody is expected to say anything.

The particular body that we're concerned with is the Judicial Committee of the Privy Council. It consists normally of five of the Law Lords, although occasionally we sit with Privy Councillors from other countries. In the old days the Australian Chief Justice might come, or now the New Zealand Chief Justice or the Chief Justice of Jamaica sometimes comes and sits with us as one of the five. We hear appeals from New Zealand, from Hong Kong, from many of the Caribbean islands. Some of these cases are of great importance. The

reason I mention the Judicial Committee is because of this change: When these former colonies became independent republics, instead of abolishing the appeal to the Privy Council, they decided that they would make the Privy Council their final supreme court of appeal. And so from Jamaica or Trinidad and Tobago we get appeals to us as the Privy Council, and we give judgment. We don't simply tender advice to Her Majesty.

I will mention one of the important cases that came to the Privy Council. We had been much troubled about the fact that in some of the Caribbean islands, prisoners convicted of murder were kept on Death Row for fourteen, fifteen, or sixteen years and then told, "We will hang you tomorrow morning." Five or six years ago five members of the Privy Council had ruled, in a 3–2 decision much in line with many American decisions, that to keep people on Death Row for many years, with the threat of execution hanging over them, and then to hang them was not cruel and inhuman treatment contrary to their constitutions, constitutions which had taken on board the European Convention on Human Rights. This issue came up again about eighteen months ago, and we thought that the previous decision really might not have been right. We convened a special committee of seven Privy Councillors, including a retired Lord Chief Justice, and we decided unanimously that it was cruel and inhuman treatment contrary to the constitution to keep someone on Death Row for fifteen years and then to execute him. We laid down guidance for the Caribbean islands and for all parts of the Commonwealth that there is a presumption that it would be inhuman treatment to execute after five years on Death Row.

EFFECT OF EUROPEAN UNION

English judges and lawyers now must be much aware of European Community law. European Community law takes precedence over national law if there is a conflict. Therefore, if an English judge finds an English statute or an English decision which is in conflict with a European Court of Justice decision or with European subordinate legislation or with the Treaty of Rome, the national judge must without more ado give effect to Community law. The judge has the power and the Supreme Court has the obligation to send questions of interpretation of Community law to the European Court in Luxembourg. So judges have had to learn to look out for points of Community law, and I must say that they depend on the bar to spot these points. This has required a big change in judicial thinking.

Some of the resulting decisions have been very dramatic. We used to say in England that we had no power to grant interim relief and interlocutory injunc-

tion or temporary restraining order against the Crown. The European Court has said that if a judge finds that English law—even a statute of the Mother of Parliaments—is incompatible with Community law, the judge must have the power to grant a temporary restraining order. So now we have a power we never before had.

The bar will benefit from the fact that there is to be mobility of lawyers inside the Community; we have a principle of free movement of workers and free movement of services inside the whole of the Community. This is not easy to achieve in our profession, however. If you are a doctor, free movement can be implemented readily. Diseases and treatments are the same in Copenhagen as in Athens, and it is easy to lay down qualifications for doctors. But the differences between the common law and the civil law make movement of an English lawyer into a civil law jurisdiction (and vice versa) a very difficult exercise. Over the years we have tried to achieve standards by which people can temporarily provide services and standards by which we recognize each other's qualifications so that people can set up in other member states of the Community. This has already had an impact on the bar and is going to have a greater impact on the practice of the law as time goes on.

PROCEDURE

Briefly, we are experiencing radical procedural changes. We're really troubled in the United Kingdom about access to justice. Delays are too long, costs are too high, and there are people who are not getting justice. The courts have recently decided a number of procedural issues to try to reduce delay and cost; and there are to be limits on discovery, the length of submissions, the time allowed for examination and cross-examination of witnesses, and the reading aloud from documents and authorities. Frankly, when I was at the bar, I thought long speeches were delightful. I have to say that as a judge I have become increasingly unenamored of them, and in the House of Lords I am very anxious that we should have shorter speeches. My European Court colleagues are not used to speeches of any length at all, so they, despite my negative vote, decided to limit the length of counsel's submissions to half an hour in the main court and fifteen minutes before a chamber of three judges on a smaller case. (I didn't think fifteen minutes was worth the taxi fare from the Luxembourg railway station to the court, let alone the cost of the air ticket from Athens or Lisbon or Copenhagen.) The English bar has dealt with this very well; its members have managed to get around the rule by taking a long time to answer the very few questions the Court asks. But now we're going to move in the same direction domestically.

I am against time limits. Warren Burger once told me that in the Supreme Court there was a limit of twenty minutes and that one of his predecessors had been known to stop counsel in the middle of the word "if" when his time ended. I don't think we should adopt that in the House of Lords but I think it is quite important that we should lean on the bar, pretty fiercely if necessary, to keep speeches within reasonable limits. It's up to the bar to fight back.

We also have become very interested in alternative dispute resolution procedures. We have a body called the British Academy of Experts which up to now has been training expert witnesses in the way to prepare documents and to give evidence. This has now moved into the area of mediation, and we are very keen to find ways of getting some litigation out of the courts. Solicitors were terrified; they thought money was going to disappear. The bar was horrified and thought it wouldn't get any more work. They are discovering that mediation is rather a good thing as long as you get in before the courts themselves get involved. It is perhaps not without interest that we recently held a conference in Barbados called the Commonwealth Regional Training Program for Negotiation and Dispute Resolution. This was for the Caribbean Commonwealth countries. I think this whole field is going to develop and have a big effect.

Finally, I think the concern about cost and delay is having an effect not only on the length of speeches but also on opinions. I believe our opinions have really gotten too long and could with advantage be shortened. For me the model of a good opinion was given in a suit brought by an older woman against a younger man for the recovery of certain funds. She said she had lent him the money and he had to pay it back. The defense was that it wasn't a loan but a fee she was paying him for certain services rendered. The judge's opinion was not one word longer than this:

> In this case the plaintiff is a lady of a certain age. The defendant is a young man. The plaintiff's case is that this was moneys lent. The defendant's answer is that this was a fee for services rendered. Having seen the alleged stallion in the box, I am quite satisfied he could never command such a fee. There will be judgment for the plaintiff.

That seems to me to say everything the judge needed to say, and in a highly effective way.

HISTORY OF THE RELATIONSHIP BETWEEN PUERTO RICO AND THE UNITED STATES†

Rafael Ortiz Carrión

Christopher Columbus discovered Puerto Rico in 1493 and claimed its territory for Spain. The island remained under Spanish rule until the Spanish-American War. During the nineteenth century, Puerto Rico developed beyond the point of being merely a strategic base for defense of Spanish shipping routes to the Spanish Empire in America. In the second half of that century, after the War of Independence of the Spanish colonies in America, Puerto Ricans began to press for increased political autonomy. Responding to that pressure, Spain granted Spanish citizenship to Puerto Ricans and, from time to time, representation in the Spanish parliament.

In 1897, shortly before the outbreak of the Spanish-American War, Spain approved a Charter of Autonomy for Puerto Rico. Although the Charter was never put into effect because of the outbreak of the war, Puerto Ricans have not forgotten the Charter's provisions and have not hesitated to use them as a benchmark against which to compare political arrangements later established by the United States. The Charter provided for universal male suffrage and created an insular parliament with power to legislate matters for the island not specifically reserved to Spain. The Charter also increased Puerto Rican representation in the Spanish parliament.

In 1898 the Spanish-American War broke out. American troops invaded Puerto Rico and established a military government. This brings us to the core of my topic for today—the history of the relationship between Puerto Rico and the United States.[1]

The United States in Puerto Rico

The Treaty of Paris ended the Spanish-American War. It provided for the cession of Puerto Rico to the United States. It also provided that Puerto Rico's political status and civil rights were to be determined by the U.S. Congress.

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† Address delivered at the Annual Convention of the International Society of Barristers, Hyatt Dorado Beach Resort, Dorado, Puerto Rico, March 6, 1995.

* Judge, Puerto Rico Circuit Court of Appeals.

[1] For an overview of this topic, *see* R. Carr, Puerto Rico: A Colonial Experiment (1984); A. Morales Carrión, Puerto Rico: A Political and Cultural History (1983); U.S. General Accounting Office, Puerto Rico: Information for Status Deliberations (1990) (briefing report to the chairman, Subcommittee on Insular and International Affairs, Committee on Interior and Insular Affairs, U.S. House of Representatives).

From the vantage point of the United States, Puerto Rico posed a new kind of colonial experience. For the first time in its history, the United States extended its government to an extracontinental territory, heavily inhabited by people in a relatively high stage of cultural and political organization and having different traditions, institutions, and language.

Puerto Rico became, according to American constitutional doctrine, an organized unincorporated territory of the United States. As an unincorporated territory, Puerto Rico belongs to the United States in the sense of the source of sovereignty and political authority, but it is not a part of the United States in internal constitutional terms. The federal government has authority to rule over Puerto Rico under the territorial clause, limited only by fundamental rights guaranteed by the U.S. Constitution. This ambiguous nature of Puerto Rico's legal relationship with the United States was affirmed in a series of U.S. Supreme Court decisions in the early 1900s referred to as the "Insular Cases," in which the doctrine of "territorial unincorporation" was defined and applied to Puerto Rico.

Developments in the Relationship with the United States

From the political and legal perspective, since the Treaty of Paris, the United States has ruled over the island through a series of congressional enactments—most notably, the various "Organic Acts": the 1900 Foraker Act, which organized the government of Puerto Rico, taking it from straight military rule to a civilian government under a governor appointed by the President, with limited representative institutions; the 1917 Jones Act, which provided for a locally elected legislative assembly; and the 1947 Crawford-Butler Act, which provided for a popularly elected government and an elected governor.

The Creation of the Commonwealth

On July 3, 1950, Congress approved Public Law 600, "recognizing the principle of government by consent, . . . in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." Public Law 600 provided that the constitution to be adopted should establish a republican form of government and include a bill of rights. It also required congressional approval of the constitution before it went into effect. Certain sections of the Organic Act of 1917 were repealed and the remaining provisions, most of which were originally included in the Organic Act of 1900, were left in effect and retitled the "Puerto Rican Federal Relations Act."

Among the most important provisions originally included in the Organic Act of 1900 that are still in force are: (1) the elimination of tariffs on trade be-

tween Puerto Rico and the United States; (2) the establishment of equal tariffs for Puerto Rico and the United States on all items except coffee imported from abroad; (3) the requirement of the exclusive use of United States currency as the official currency of Puerto Rico; (4) a statement of the jurisdiction of the United States District Court in Puerto Rico, similar to the jurisdiction of the rest of the federal district courts established in the states of the Union; (5) a provision for a Resident Commissioner elected by the people of Puerto Rico as the sole representative to Congress, with the right to speak but not to vote in the House of Representatives; (6) provision for the review of decisions of the Supreme Court of Puerto Rico by the Supreme Court of the United States; and (7) the declaration that all statutory laws of the United States not locally inapplicable, except as otherwise provided, shall have the same force and effect as in the United States—the internal revenue laws excepted.

Public Law 600 also left in force the grant of United States citizenship to the people of Puerto Rico provided for in the Organic Act of 1917.

In accordance with the procedure established in Public Law 600, the act was submitted by referendum to the people of Puerto Rico, who approved it. A constitutional convention was elected and a constitution was drafted. After the constitution was ratified by the people in another special referendum, it was submitted to Congress. In Public Law 447 of 1952, Congress approved the constitution, conditioned upon, among other things, the addition of a provision requiring that any amendments to the Puerto Rican Constitution be consistent with the United States Constitution, the Puerto Rican Federal Relations Act, and Public Law 600.[2] The conditions imposed by Congress were accepted by the constitutional convention and then approved by the people of Puerto Rico in a referendum held for that purpose. The Commonwealth of Puerto Rico resulted.

Once the Public Law 600 process was complete, the United States requested the United Nations to exclude Puerto Rico from its list of Non-Self-Governing Territories. The United Nations removed Puerto Rico from this list in 1953, but its political status remains an issue. Whether the Commonwealth of Puerto Rico is a new type of political entity from the standpoint of federalism and international law or whether it remains a colonial possession under the plenary authority of Congress as provided in the territorial clause of the United States Constitution is still a matter of discussion among scholars and has not been definitively clarified by Congress, the Supreme Court of the United States, or the United Nations.

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[2] Law 447 established two other conditions: (1) deletion of a provision that recognized rights to work, to obtain an adequate standard of living, and to receive social protection in old age or sickness, and (2) addition of a provision assuring continuance of private elementary schools.

The Commonwealth Experience

Immediately after the establishment of the Commonwealth, its promoters advanced two main arguments in its support. The first was that Puerto Rico acquired full political dignity and judicial equality from the compact clause of Public Law 600. One of the main exponents of this theory was Harvard's expert in constitutionalism, Carl J. Friedrich, who used to say that Puerto Rico's commonwealth status "conceivably provides a new model for future developments in the sphere of the liberation of colonial peoples who do not wish or may not be able to organize themselves as independent political communities, yet may not wish to be absorbed into a fully integrated federal union."[3] According to Friedrich: "The status of Puerto Rico . . . is a new dimension of federal government."[4] The nature of this new dimension was described by him as "a kind of 'new state' or, as it is officially called in Spanish 'associated state' in contrast with the 'federated state,' the latter being completely within the Union." The main proponent of that theory, the first elected Puerto Rican governor and primary architect of the Commonwealth, Luis Muñoz Marín, expressed it in the following manner:

> The Commonwealth of Puerto Rico is a new kind of State, both in the sense of the United States Federal System and in the general sense of a people organized to govern themselves. It is a system of government and it is a new manner of relationship to the United States, as it could be in the cases of any large union or confederation of particular societies.

This theory, which eventually obtained prominence and wide popular appeal among the Puerto Rican electorate, led to the second argument in support of the Commonwealth, emphasizing the advantages of the common market, common international commercial and political relationships, and common citizenship, with fiscal autonomy and special flexibility in the application of federal regulatory laws. According to this view, the commonwealth relationship gave Puerto Rico the advantages of statehood and independence without the need of confronting the burdens of either. The promoters of Commonwealth frequently emphasized how "Puerto Rico receive[d] the most favorable treatment that any country can possibly have for its products in the U.S. market . . . [and how] on entering that market Puerto Rican products do not pay a single cent in tariff duties." They also would point out:

> The political truth is . . . that if Puerto Rico were converted tomorrow, or at any time, into a state of the American Union, it would automatically lose a

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[3] C. FRIEDRICH, PUERTO RICO: MIDDLE ROAD TO FREEDOM 17 (1959).
[4] *Id*. at 16.

> great part of its authority. It would lose its authority to devote . . . a large part of its tax potential to purposes which its Legislative Assembly deems desirable on the basis of the prevailing philosophy of government, of economic development, of social welfare, of culture, that is reflected in the legislature through its representation of Puerto Rico public opinion.

In this respect they noted that Puerto Rico had more fiscal autonomy than the states, which on average collect only about a third of the taxes that their citizens pay every year.

In this spirit, the original commonwealth theory was imbued with the objective of responding to the social and economic needs of the island through a series of self-help measures that, when coupled with Puerto Rico's special fiscal autonomy, would allow it to attract private capital and industry and develop a self-sustained economy through a strategy called "Operation Bootstrap." However, shortly after the creation of the Commonwealth, compelled by developments in the United States, the Commonwealth's promoters and leaders began to adopt policies completely contradictory to the original theory of commonwealth and Operation Bootstrap.

The Supreme Court of the United States recognized an increasing amount of power in the federal government, through its interpretation of the commerce clause of the U.S. Constitution. Although this trend had originated during the great depression of the thirties, the requirements of the "welfare state" and national defense accelerated its development during recent decades. The trend toward concentration of power in the federal government caused a concomitant loss of authority in areas in which the Commonwealth originally held power, from the regulation of oil, minimum wages, and slaughterhouses to abortion.

At the same time, a massive expansion in the number, scope, and nature of federal aid programs took place, especially after the creation of President Johnson's "War on Poverty" programs. The pressure on the Commonwealth's leaders to seek federal funds became overwhelming, not only to maintain the support of the electorate, but also because this aid appeared to offer prompt, easy solutions to Puerto Rico's deep economic and social problems. This increase in federal aid, however, was accompanied by an increase in federal regulation of the internal operations of the Commonwealth's government, affecting its policies and programs in education, health, law enforcement, and welfare benefits.

As a result, the promoters of commonwealth theory faced the dilemma of either pursuing a greater amount of federal aid at the expense of a substantial decrease in the Commonwealth's authority to deal with the local problems of Puerto Rico, or continuing their original efforts to enhance the Common-

wealth's authority over local matters. At that time, they did not make a choice. The historical fact is that, paradoxically, they attempted to do both simultaneously. The consequence was a significant increase in Puerto Rico's dependency on federal aid and the failure of all efforts to enhance Commonwealth.

A number of bills were introduced in the U.S. Congress to amend the Federal Relations Act to expand the Commonwealth's sphere of self-government. Several of these bills were formally requested by the Commonwealth government, including the 1959 Fernos-Murray bill and the 1963 Aspinall bill. None were approved by Congress.

After a 1963 congressional proposal to draft a new compact failed, Congress created the U.S.-Puerto Rico Commission on the Status of Puerto Rico, with the charge to investigate status issues. A plebiscite recommended by the commission was held in July 1967, and about sixty percent of the voters expressed a preference for an enhanced Commonwealth. No action was taken, however.

In 1973, President Nixon established an advisory group to study possible revisions in the Commonwealth agreement. The group's recommendations called for adjustments in the agreement to give the island greater autonomy without further action by Congress or the President.

Recently, in November of 1993, a second plebiscite was held. Forty-nine percent of the electorate expressed preference for an enhanced Commonwealth, forty-seven percent for statehood, and four percent for independence. To date, no action has been taken by Congress on the enhancement of Commonwealth.

THE PUERTO RICAN PARADOX

To understand the causes and effects of the political standstill, we should take a brief look at the cultural and economic dimensions of the Puerto Rican reality.

The Cultural Dimension

Puerto Rican heritage stems from Spanish, Indian, African, and European cultures, with recent influence coming from the United States. The Spanish had substantial influence in Puerto Rico from 1493 until 1898. As a consequence, the basic legal institutions, principles, and doctrines governing relations between private individuals are of Spanish origin, reflected in the Puerto Rico Civil Code. These institutions, principles, and doctrines continue, alongside the federal legislation applicable to the island and other American legal institutions adopted by the Puerto Rican legislative assembly.

Puerto Rico's cultural heritage reflects the blend of various cultures, but the Spanish language predominates. Spanish is the language of day-to-day affairs

in local government agencies, the legislature, and the courts. It is also the official language of the Puerto Rico public school system as well as in most private schools. Spanish is spoken routinely in business activities, and it is the language of most newspapers, television shows, and radio stations.

American influence has contributed to Puerto Rico's culture, particularly in introducing English as a second language. About forty-two percent of the population has some English proficiency. English is frequently used in some business and financial activities, especially in certain areas such as banking and commercial transactions where the terms of art are in the English language.

The Economic Aspect

From the economic perspective, Puerto Rico is hailed by some as the "shining star of the Caribbean," boasting a standard of living that is the envy of its Latin American neighbors. At the same time, others point out that the economic conditions on the island are dismal by U.S. standards; the standard of living, employment, and production are much lower than those of the poorest state of the Union.

Over the course of the forty-three years that have elapsed since the Commonwealth was established and Operation Bootstrap was initiated, the structure of Puerto Rico's manufacturing sector has changed in response to shifts in global economic and competitive forces. In general, most analysts divide its evolution into two major phases. In the first phase, dating from the initial days of Commonwealth, labor-intensive industries were predominant. During the early 1950s, Puerto Rican wage rates were significantly lower than those in the states, so the island proved attractive to U.S. corporations with low capital requirements that were searching for a low-cost production site, often for products in the final phases of the production cycle.

Transformations of the factors of comparative advantage, both within the United States and Puerto Rico as well as across the global economy, led to a corresponding evolution of the island's economic structure. Beginning in the late 1960s, the number of new labor-intensive industries starting operations was overtaken by other industries with more capital-intensive production. This period constituted the second major phase in Puerto Rican industrial development.

Some analysts see the current period as marking off a new era within the capital-intensive stage, one in which high-technology and financial service industries are emerging as dominant. The increasing number of such industries probably is linked in part to the revision of the Internal Revenue Code of the United States, which removed the old stipulation that profits could be remitted tax-free to the U.S. from Puerto Rico only upon liquidation. Under the new provision, corporations are allowed to repatriate qualifying profits on a current basis without any federal tax liability, subject only to a ten percent "tollgate"

tax assessed by the Commonwealth on dividends paid to the parent company.

The result of the evolution of the Puerto Rican economy has been a relative diversification into a range of new capital-intensive, high-tech industries and related services. By 1989, the manufacturing sector accounted for nearly fifty percent of gross national product. On the opposite side of the coin, agriculture has fallen, and the island now imports almost all of what it consumes. The unemployment rate has generally ranged from fifteen to twenty-two percent.

The key problem of Puerto Rico's economy is its openness to imports, which has led to a situation in which wages, profits, and federal aid funds spent in Puerto Rico quickly leak out, paying for imported food, housing materials, hardware, clothing, durables, and so on. This economic structure of openness has led to a "dissociated economy" lacking links between consumption and production.

In spite of this, Puerto Rico has been able to maintain a degree of economic stability due to substantial increases in federal aid. According to 1988 figures, total federal spending amounted to $6.2 billion, comprising about thirty-four percent of Puerto Rico's $18 billion gross product. Around thirty-eight percent of the federal spending—about $2.4 billion—was in grants to the Commonwealth or its local governments. This includes welfare assistance, education, highway aid, and customs duties shared with the island. Another forty-seven percent was for direct payments to individuals, including those for retirement, disability, and veterans' benefits. Most of the remaining fifteen percent was for the wages of federal employees on the island, such as postal workers, and for procurement, such as military purchases.

In conclusion, during the last forty years, Puerto Rico engaged in Operation Bootstrap, attracting direct foreign investment in its export industries. This development model has led to an erosion of Puerto Rico's ability to achieve self-sustaining development. As a result, viable political status options are increasingly endangered. While this is obviously true of options that include a large degree of both political and economic autonomy, it is also true for statehood since statehood realistically can be contemplated only on the basis of a viable island economy.

Consequently, the United States faces a fundamental policy dilemma. On the one hand, growing support for Puerto Rican statehood has emerged. Much of this support is due to the development patterns produced by Operation Bootstrap. The local economy is closely tied to and increasingly dependent on the U.S. economy, and more than half of the population relies on federal aid to make ends meet. On the other hand, it seems increasingly clear that the U.S. Congress is reluctant to grant statehood. In short, the United States is steering the island down the path of dependency yet seems unwilling to accept the apparent outcome that lies at the end of that path. Therein lies the Puerto Rican paradox.

THE JURY ON TRIAL†

Hiller B. Zobel*

The distinguished lawyer could not restrain himself. Even in the somber pages of the American Bar Association's *Tort & Insurance Law Journal* late last year, his rage blazed and fulminated. Juries, he thundered, were more and more willing to accept scanty, insufficient evidence en route to awarding unmerited damages to undeserving plaintiffs.

This regrettable trend he attributed to "a decline in personal responsibility or accountability" and "the apparent inability of jurors in general to separate their feelings of sympathy for an injured person from the facts of the case."

His ire took ignition from a recent notorious case whose star, an eighty-one-year-old woman, based her suit on a fast-food outlet's filling a container with excessively hot coffee. Mixing drinking (the coffee) and driving, she allowed the coffee to slop over into her lap and suffered burns that under the circumstances the jury found serious enough to merit a $2.9 million verdict, including punitive damages.

Although the lawyer bemoaned the change from thirty years ago, when such a case would never even have been filed, and from twenty years ago, when most juries wouldn't have found the restaurant liable, in fact the issue is hardly novel.

Trial by jury as a procedure is, or so we like to think, a cornerstone of our temple of Justice. The very concept of the jury pervades the national mind-set, covering even matters far removed from the legal system. "The jury's still out," we say about everything undecided or uncertain, from the quality of a new movie to the performance of a recently elected official.

Devoted to the jury we may be, but we also perceive the difficulties inherent in expecting rational, fair decisions from a random group of twelve strangers who come by compulsion to a bitter dispute, unprepared and lacking experience in evaluating evidence, let alone in applying legal principles. The woes of the jury hearing the evidence against (and for) O. J. Simpson are but the most recent, most widely publicized example.

England, the jury's birthplace, has largely abandoned the institution, except in criminal matters and libel suits. Even the Gilbert & Sullivan one-act gem *Trial by Jury* hardly ever appears, now that the D'Oyly Carte opera company has vanished. The abolitionist pressure is mounting equally on this side of the

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* Associate Justice, Massachusetts Superior Court.

Atlantic. Besides the apparent foolishness inherent in asking the ignorant to use the incomprehensible to decide the unknowable, recognition seems to be growing that jury justice is delayed, inefficient, and tinged with unfairness.

Jury trials last twice as long as evidentiary hearings before a judge. Moreover, because judges have to give written reasons for their decisions, irrational conclusions are less likely to come from bench "findings" than from a jury's terse, anonymous verdict.

In the old days—the really old days of 1300 or so—jurors' duties encompassed giving evidence themselves as much as hearing the testimony of others. At the dawn of the common-law court system, jurors took their places as residents of the neighborhood where the pertinent events had occurred, who were assumed to possess special knowledge of the facts and, more important, of every witness's credibility.

Now, seven centuries on, that old model has vanished, leaving a successor so transformed that it bears only occasional marks of its distant origin, giving even those who best know it and most respect it an uncomfortable feeling about its defects. Listen to what a great advocate, Moorfield Storey, told Yale Law School students. He was speaking in 1911, but eighty-four years have not changed the issue:

> Today, actions to recover damages for personal injuries choke the courts. They have increased, and are increasing, at a rate entirely out of proportion to the increase of population. . . . This litigation, from every point of view, is wasteful and injurious to the community. . . . Leading lawyers . . . agreed that they had never known a case where the damages had really done anything but harm.

Moorfield Storey was what we would today call an establishment lawyer (he was president of the American Bar Association in 1896). Experienced and adroit, a participant in founding the NAACP and the Anti-Imperialist League (which sought to counter the expansionist, big-stick tendencies of turn-of-the-century America), Storey was anything but reactionary. He perceived nonetheless the inescapable difficulties that trial by jury presented. Jurors, he noted,

> are required, after a long trial and moving appeals to their passions and prejudices, upon evidence which must be remembered imperfectly, and under [the judge's] instructions on complicated questions of law at best imperfectly understood, to decide whether on the whole the plaintiff or the defendant should prevail. The real issues are obscured or forgotten, and a jury must often agree upon a verdict without really considering the vital questions upon which the rights of the parties depend.

Storey's concern that verdicts often rest on flawed understanding or even on no understanding at all merely echoed an observation of John Adams's in the

1770s, when litigation was infinitely less complicated. In some types of dispute, Adams said, a decision by the jurors "would be no better than a Decision by Lott." At the end of the 1890s, Justice Oliver Wendell Holmes, while still on the Massachusetts Supreme Judicial Court, expressed a similar awareness of the problem. "I think," he wrote an English friend, "there is a growing disbelief in the jury as an instrument for the discovery of truth."

Although Holmes's judicial preeminence rests entirely on his work as an appellate judge, he spent a great deal of time—especially in his early years on the bench—presiding over jury trials. The Massachusetts Supreme Judicial Court, unlike almost all other state courts of last resort, included in its regular jurisdiction a wide assortment of actual trial-level litigation. Thus Holmes sat with juries in homicide prosecutions, contract actions, and even divorce matters and cases involving wills (where, in his day, juries often determined the facts).

This familiarity with juries in life gave practical understanding to Holmes's deep knowledge of the common law's rules and principles. He recognized, for instance, that although jurors swear solemnly to decide the matters before them entirely on the evidence presented and the legal rules as the judge explains them, they regularly reach verdicts that disregard evidence, law, or both.

Today we call this phenomenon "jury nullification" and regard it as either laudable or deplorable, depending on our sympathy with the particular result. Whatever toleration we confer on the practice rests upon an understanding that it allows juries, as Holmes put it, "to let a little popular prejudice into the administration of law—in violation of their oath."

When deciding such necessarily cloudy issues as a defendant's intent, negligence, or even ability to control his or her actions, a jury can reflect not only the community but that community's quality of mercy. The jury can do this because it is for all practical purposes anonymous. It materializes from the public, hears the evidence, returns a verdict, and then (except in the rarest of cases) slips back into the general run of humanity. Jurors are in fact not accountable. If they convict improperly, the judge may allow a new trial; if a new trial is not allowed, an appellate court may think the judge committed a legal error during the trial and set aside the conviction. But if the jurors, for whatever reason, or for no reason, decide to acquit, no judge or panel of judges can change the outcome.

This right of the jurors to decide absolutely as they please became a part of English law a century before the Declaration of Independence. It was put there by the man who founded one of the original thirteen colonies, William Penn. In 1670 Penn and William Mead, both members of the Society of Friends—that is, Quakers—were addressing an open-air gathering in Gracechurch Street, London, their meetinghouse having been closed by the authorities because a statute criminalized holding services anywhere but in a church of the

established religion. Arrested for preaching to an unlawful assembly, Penn and Mead found themselves facing prosecution in the Court of Sessions at the Old Bailey before the Recorder of London, the Lord Mayor, several aldermen and sheriffs, and a jury. (Until well into the nineteenth century jury trials both here and in England often took place with a multijudge bench.)

Rex v. Penn and Mead hardly stands as a monument to due process. Harsh and vindictive, the Recorder and the Lord Mayor openly declared their belief in the defendants' guilt and at one point virtually banished them from the courtroom. After the evidence ended—the defendants, in accordance with then current practice, not having been allowed to testify—the judges submitted the case to the jury with clear directions to convict.

Then as now, when rendering a verdict in a case like this, where the only issue was whether or not the defendants had committed a proscribed act, the jury was limited to three choices: guilty (of the offense alleged), not guilty of the charge but guilty of some lesser offense, or simply not guilty. The directions are explicit: "If he is guilty, you will say so. If he is not guilty, you will say so. And no more."

The Penn-Mead jurors, however, speaking through the foreman, sought to return a different verdict: "Guilty of speaking in Gracechurch Street." This, of course, evaded the essential question, which was simply whether the defendants had taken part in a public Quaker meeting and therefore been engaged in an unlawful assembly.

Despite verbal eructation from the bench and a repeated insistence that they reconsider the verdict, the jurors resisted, even after the judges had threatened to imprison them without food and indeed had them locked up "without any accommodation." Finally, after two days, the jury capitulated, but only to return a straight not-guilty verdict for both defendants.

Furious, the judges took the unusual step of polling the jury (i.e., asking them individually to confirm the verdict), a procedure normally used only after a conviction. When the result remained the same, the irate Recorder fined them for acquitting against the judges' direction (essentially for contempt of court) and ordered them sent to Newgate Prison until they paid. Eight did so, but four refused. Instead they obtained a habeas corpus, the great writ, which was then and is now the strongest procedure for determining the legality of an incarceration.

In a decision that three centuries later still remains the charter of jury independence, Chief Justice John Vaughan, speaking for the eleven-judge Court of Common Pleas, freed the hungry, thirsty, and angry jurymen. Modern lawyers regard *Bushell*'s case, named for one of the recalcitrant quartet, as the source of the rule that jurors need never explain their verdict, that they may in fact

disregard the evidence, especially in a criminal trial, and (although it was not an issue in the Penn trial) that an acquittal is final, subject to no appeal by the unsuccessful prosecutor.

Bushell's case thus has come to stand for the jury's untrammeled right to return whatever verdict it pleases. The parallel American experience, prosecution of the New York editor John Peter Zenger, acquitted of seditious libel despite the court's manifest desire for conviction, lacks *Bushell*'s legal significance because unlike the Recorder and the Lord Mayor of London, Zenger's judges largely gave up, so the case furnished no written opinion or precedent. John Adams did not even mention *Zenger* when in 1771 he was arguing in support of the jury's absolute power.

In *Bushell*'s case, Vaughan, affirming the jury's nonaccountability, relied on a narrow rationale that reflected the very origins of the jury system: Because jurors, summoned to the service as they are from the vicinity, can very well possess information about the case different from the evidence adduced in court; by drawing on their own special knowledge of the witnesses' credibility or even of the pertinent facts, they may arrive at a verdict that in light of the testimony the judge might consider inexplicable.

We have of course entirely abandoned this concept. Nowadays we are not content merely to know that a jury candidate has formed no opinion about the case or its underlying facts; we want our jurors' minds to be even purer. Our desire to ensure the jury's absolute impartiality causes us to hunt for and to enlist only those citizens who, as in the trial of Oliver North, do not read newspapers, watch television, or even discuss the events of the day. Claiming to pursue the ideal impartial juror, we actually seek the impartiality of complete ignorance.

Worrying that exposing jurors to pre-trial publicity may render them permanently incapable of deciding the case on the evidence they learn during the trial is a reasonable and long-standing concern. Immediately after the Boston Massacre in 1770, Henry Pelham, a half-brother of the artist John Singleton Copley, executed a detailed and grossly inaccurate cartoon depicting the soldiers (who had in fact discharged their muskets almost at random) as lined up like a firing squad, with their officer, Capt. Thomas Preston, standing in the rear, sword raised (actually he had been in front of the men, sword sheathed, when the shooting started).

Paul Revere, the silversmith, acting without Pelham's approval, engraved the drawing and printed hundreds of vividly colored copies, which traveled throughout the colonies. Well might one judge at Captain Preston's trial complain that "there has been a great deal done to prejudice the People against the Prisoner." With Boston's population less than sixteen thousand and the popu-

lation of Suffolk County (whence the jurors would come) more than thirty thousand, the judge had good cause to protest.

Whatever might be the relative worth of pictures to words, the radicals also prepared *A Short Narrative of the Horrid Massacre in Boston*, accompanied by ninety-six "depositions" (affidavits), designed to establish that the massacre had resulted from a massive Tory conspiracy. Despite the Boston Town Meeting's vote to impound all copies not sent abroad, lest publication in Boston "give an undue Byass to the minds of potential jurors," the pamphlet somehow managed to circulate in Boston well before the trial.

Although we cannot measure how the print and the *Narrative* affected future jurors, we do know that at least two twentieth-century academic historians uncritically accepted this type of special-interest pleading. Oliver M. Dickerson took a similar radical propaganda effort as documentary evidence of bad behavior by Tories and soldiers, and Edward Channing relied on the Pelham-Revere print as proof that during the massacre someone had fired from a window in the Boston Custom House, this although the customs employees indicted for that offense had been acquitted by a jury that returned a verdict without leaving the box, and notwithstanding the chief prosecution witness's prompt conviction for perjury. If the propaganda could influence experts like Dickerson and Channing, writing with the advantage of hindsight, it is hard to believe that what people in Suffolk County were reading, seeing, and hearing did not shape the popular view of the soldiers' culpability and in some instances affect the future jury's impartiality.

Of course, despite pious protestations to the contrary, modern lawyers and their clients (including, in a criminal case, the government) do not want impartial jurors; they want jurors who will return a favorable verdict. Yet as anyone who spends working days around a courthouse knows, knowledge before the trial of the purported facts and even admitted prejudice do not necessarily equate with unfairness or a decisional bias. This was even true in 1770: After all, the massacre trial juries all brought in correct verdicts. It is true today, as an experience of my own sharply demonstrates.

The defendant had been charged with unarmed robbery. Because he was African-American and the complainant white, Massachusetts law required individual questioning of every prospective juror specifically to explore the possibility of racial bias. Accordingly I asked each one, "Would the defendant's being of a different race from the complaining witness in any way affect your decision?"

One woman replied: "I'm a middle-aged white woman, with a background that includes [and she mentioned where and how she was brought up]. If you are asking whether I have any bias against blacks, I have to say yes. But if the ques-

tion is whether my bias would prevent me from deciding *this* case entirely on the evidence, the answer is no." Both sides immediately declared complete satisfaction, and the juror took her place in the box. (The outcome, however, had nothing to do with the jury selection: In midtrial the defendant pleaded guilty.)

Unlike many states, Massachusetts does not ordinarily permit jury voir dire, the process of allowing counsel to question potential jurors, ostensibly to ferret out prejudice, but in reality to get a head start on the process of persuasion. The secondary object is to identify jurors the lawyer does not wish seated and then to bring each one to make a self-disqualifying admission. If this technique fails, the attorney can use a peremptory challenge, which requires no stated reason or justification, but of which each side has only a limited number.

It used to be that lawyers sizing up a jury panel relied on experience, intuition, and common sense. Over the last twenty years, however, science, or rather quasi-science, has taken a seat at the counsel table, with psychologists and pollsters supplying precise data that purport to assure a sympathetic jury for whichever side retained the experts—a development dissected and skewered in recent studies by Jeffrey Abramson and Stephen J. Adler.

With some justification, lawyers and judges like to believe that legal procedure has evolved and improved so much that trials are no longer like games. We ought nonetheless to admit that the execrated "sporting theory of justice" has merely given way to a different form of extrajudicial competition, a contest to produce the jury group most likely to bring in the *right* verdict. Sometimes, in a criminal case, which requires a unanimous verdict, the defendant aims for a jury that will deadlock, supposing that his defense will be sharper the second time around and the prosecutor duller, even hoping that after the first failure the government will quit or trusting, like Mr. Micawber, that by the second trial something (or someone) will turn up or, better, vanish.

This jury-picking tournament has gone on for centuries, even in Massachusetts. When John Adams was defending Captain Preston in the Boston Massacre case, he took special pains during jury selection to bring favorably inclined veniremen into the box. In this endeavor Adams received advice from a Tory merchant named Gilbert Deblois, a friend of Preston. So canny were Deblois's suggestions that five of the twelve jurors, including Deblois himself, ended up on the panel, having been drafted as "talesmen," or available bystanders, when challenges used up the original venire panel.

Despite the guidance for which eager litigants and their lawyers annually pay jury-selection experts $200 million, the whole process is only a high-stakes game of chance taking, as the Simpson case has shown, an inordinate amount of time. Indeed, sometimes an apparent disqualification turns out to be a badge of hidden worthiness. In a Massachusetts prosecution some years ago

for assault with intent to murder, one seat remained to be filled after the defense had expended its final challenge. The man called to occupy it was, as his informational questionnaire disclosed, a police lieutenant. In the "Remarks" section he had written: "I once investigated and prosecuted a case of assault with intent to murder."

Before the lieutenant could enter the jury box, defense counsel was, understandably, asking the judge to excuse the juror "for cause." However, because during the usual pre-empanelment routine, the juror had sworn to his impartiality, the judge denied the request.

As the trial went on, the evidence seemed to the judge exceptionally strong, and he silently anticipated a conviction. At the end he did not pick the foreperson (as many judges do) but instead left that choice to the jurors. They selected the lieutenant and returned after only an hour's deliberation.

"What say you, Mr. Foreman?" the clerk intoned in language unchanged since John Adams's day. "Is the defendant guilty or not guilty?"

Promptly and loudly the lieutenant replied, "Not guilty."

After the defendant's discharge several jurors, including the lieutenant, asked to speak to the judge.

"We were wondering," said a woman, "why the government brought this case; it seemed pretty weak to us."

"I'll second that," said the lieutenant. "It's the worst, sloppiest investigation I've seen in seventeen years as a police officer. They should be ashamed at having wasted everyone's time."

"Well," said the judge, "cases aren't always predictable." And, he might have added, neither are juries—or jurors.

Other factors besides counsel's use of challenges affect the jury's ultimate composition. For one, many valuable citizens—the intelligent, solid-thinking sort most desirable as triers of fact—have learned that excuses are not difficult to obtain. Even before the sternest judge, a juror's coy protestation of inability to decide fairly will always gain release.

One journalist famous for his swipes at the flaws in the local judicial system was called not long ago to jury duty in Massachusetts, where, as in many states, jurors need serve for only one trial or, if not empaneled, for just one day. Less anxious to participate than to criticize, he averred prejudice and thus evaded sitting on a simple, short case involving only the calculation of an injured commuter's damages. In his column the next day he boasted of his triumph, describing his disqualifying bias as a congenital hatred of railroads.

Sometimes a jury candidate will allege a moral aversion to "judging another human being." Judges usually honor that ground, at least to the extent of excusing the juror from criminal matters. I am not sure we are right; after all, in

many civil cases the jury must determine if the defendant was negligent—that is, whether he failed to act with reasonable care under the circumstances. Deciding whether or not someone was careless seems pretty close to passing judgment on a fellow mortal.

A more legitimate ground for exemption comes from the extraordinary length of time that modern lawyers require for even ordinary litigation. When the case has attracted serious media attention, the problem increases because judges fear—with good reason—that reading lurid newspaper accounts of the evidence (especially evidence the judge has for whatever good reason excluded) or seeing slanted television snippets may taint a juror's perception of the case as a whole. The remedy of necessity, if not of choice, is jury sequestration, popularly known as "locking up the jurors." The description does not exaggerate. Sequestered jurors are, in everything but exposure to brutality, inmates of a medium-security prison. They wake and retire on command, they eat their meals at specified times, they may make and receive telephone calls only in limited situations, their access to visitors is tightly restricted, they can watch only approved television programs, and their newspapers have large gaps where the court officers have clipped out stories about the trial. The risks that locking up a jury can pose to the orderly administration of justice (to say nothing of a fair trial) have come vividly to national attention during California's Simpson extravaganza.

Although it happens much more frequently these days than before, jury sequestration is not a peculiarly modern practice. The earliest American example occurred in 1770, when the jurors who sat on the Boston Massacre trials were confined to the courthouse for the week or so that each prosecution required. Their incarceration, however, resulted not from fear of mid-trial exposure to media accounts but from the fact that up to then no trial had ever lasted more than a day and no one knew how else to accommodate the common-law rule that a jury, once sworn, could not separate before rendering a verdict.

Occasionally throughout our history occurrences more sinister than pre-trial bias or news coverage during trial have influenced jury deliberations and produced unjust verdicts. During the heated period immediately following the Boston Massacre, an unpopular customs officer, an informer, was tried in Boston for firing a musket into a crowd besieging his home, killing an eleven-year-old boy. The courtroom spectators gave the proceedings scant respect. During Judge Oliver's jury charge, cries of "Guilty!" filled the courtroom; one man shouted, "Damn that Judge! If I was nigh him, I would give it to him." As the jury was going out to deliberate, the noise increased. "Remember, jury, you are upon oath!" "Blood requires blood!" "Damn him, don't bring it in manslaughter [which would have spared the defendant from hang-

ing].” “Hang the dog! Hang him!” “Damn him, hang him!” “Murder, no manslaughter!”

After deliberations that lasted until early the next morning, the verdict came in: guilty of murder. Later it developed that at least one of the jurors had had doubts but had abandoned them when assured by others that “if the verdict was not agreeable to Law the Court would not receive it.” The advice was incorrect. Once the verdict was in, the court was obliged to receive it; only a subsequent royal pardon saved the defendant.

A century and a half later, in 1915, Oliver Wendell Holmes, joined by Charles Evans Hughes (then an associate justice of the Supreme Court, later to become chief justice), dissented from a refusal to second-guess the Georgia Supreme Court’s decision that the conviction of Leo Frank had not offended due process. Frank, a New York Jew who had gone South to manage an Atlanta factory, had been indicted for the murder of a young girl. His religion and origin together with the nature of the killing had raised violent local prejudice. Holmes’s statement of the facts, sparse and unemotional, imparts with chilling effect the terror and violence that permeated the courtroom and the jury deliberations. Unhappily, other trials, in all parts of the country, have been similarly infected; none, however, has been so starkly detailed by such a detached master of prose:

> The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to [Frank]. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police in Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury.
>
> On the same day, the evidence seemingly having been closed, the public press, apprehending danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning.
>
> On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and clapping of hands, and the judge before beginning his charge had a private conversation with [Frank’s] counsel in which he expressed the opinion that there would be “probable danger of violence” if there should be an acquittal or disagreement [i.e., a hung jury], and that it would be safer for not only [Frank] but his counsel to be absent from Court when the verdict was brought in.
>
> At the judge’s request they agreed that [Frank] and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on till order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them.

The facts led Holmes to a severe conclusion: "Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. . . . Any judge who has sat with juries [as Holmes had] knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere."

The rest of the justices disagreed with Holmes and Hughes, in effect affirming the conviction. Gov. John Slaton courageously commuted Frank's sentence to life imprisonment, but within weeks a mob seized Frank, took him across the state, and lynched him. His legacy, as expressed by Holmes, did, however, triumph.

In 1923 the Supreme Court, with Holmes writing the opinion, reviewed the conviction of five African-Americans by "a white jury—blacks being systematically excluded from both grand and petit [i.e., trial] juries"—in a trial that lasted about forty-five minutes. "No juryman could have voted for an acquittal and continued to live in [the county]." This time the Court agreed that federal relief was available:

> If the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the [defendants] their constitutional rights.

"The administration of justice," the Boston attorney and legal philosopher Charles P. Curtis once wrote, "is no more designed to elicit the truth than the scientific approach is designed to extract justice from the atom." Maybe so, but as a society we have committed ourselves to the principle that justice operates more effectively, and achieves more acceptance, in direct proportion to its reliance on truth. Furthermore, we have taken the view, constitutionally and otherwise, that in general trial by jury maximizes the truth available for administering justice.

We trust the jury system, yet in many respects we distrust the jurors. The entire body of principles we call the rules of evidence rests on the assumption that ordinary people are too unsophisticated (or too foolish) to sort out the probable from the improbable and too naive to appreciate that an out-of-court statement not made under oath is less worthy of belief than a witness's testimony in open court. Until the late nineteenth century lack confidence in the jury's common sense even led to excluding from the witness box the defendant in a criminal case and all parties in civil litigation. The stated reason was

that their desire for a favorable outcome would irresistibly produce perjury, as if jurors would be less likely to detect false testimony from a party's lips than from those of an ordinary witness.

Perhaps our anxiety is misplaced. Maybe we should worry less about a jury's inability to spot liars and pay more attention to the way a juror must necessarily acquire information. We expect average untrained people to absorb evidence for days and weeks on subjects entirely foreign to them without explanation, clarification, or even the opportunity to take notes or ask questions. Thus we imagine that they can understand a judge's "instructions on the law," often read to them in a monotone and containing principles that law students take a term to master and whose meaning appellate judges often have palpable difficulty establishing.

On second thought, perhaps the jury's capacity to determine truth is indeed a cause for concern and even doubt. As far back as the early 1900s, the great experimental psychologist Hugo Münsterberg was noting the discrepancy between what people see and what they remember and the role that suggestibility plays in courtroom testimony. Modern researchers, notably Elizabeth Loftus, have carried on that work, although courts have shown themselves most reluctant to let jurors hear evidence on the subject. As Justice Herbert P. Wilkins of the Massachusetts Supreme Judicial Court has written, "State court opinions generally note that the matter is within the jury's knowledge and that the defendants' rights can be protected by cross-examination and appropriate jury instructions." As a result, science now places considerably less confidence in the human memory than does the court system, which assumes, and encourages jurors to assume, that although a witness may be mistaken, forgetful, or even dishonest, the recollective power is the principal source of trial-decisive materials.

Other research has begun to demonstrate that the decision-making process itself proceeds much less logically than we would like to believe. One recent study, for example, shows that by the end of opening statements—which come of course before the jury has heard any evidence at all—jurors have already begun to make up their minds. And having unconsciously taken a position, they typically begin to "filter" the evidence to fit the version of the case to which they have already attached themselves.

Does this mean that we should eliminate the jury's role as primary fact finder in our system of justice? The answer, I suppose, depends on what might replace jurors in administering justice. Short of some chance-activated machine, a juryless society would have to depend on one-person arbiters—that is, judges. Speaking from experience and from numerous conversations with siblings of the robe, state and federal, from all across the country, I have some

doubt that the tradeoff would be advantageous, and I am certain that the judges themselves would not recommend it. Whatever may be the flaws in trial by jury, and however ill adapted it may be for resolving drawn-out, technical matters, most judges consider a multiheaded determining body superior to a lone referee. Perhaps the jury, to paraphrase what Churchill once said of democracy, is the worst mechanism for trying cases except for any alternative.

When you reduce the problem to its basics, an unideological and astute nonlawyer seems to have had it just right when in the course of analyzing and bemoaning the vagaries of trial by jury recently he said, "Do you think maybe the only thing wrong with juries is that they're human?"

THE MEDIA AND THE TRIAL COURT†

Pete Williams*

It is a little intimidating to be one of the few nonlawyers here, but I am glad to be here for any reason, and I see many friends. When I was a reporter back in Wyoming, I had the great privilege of covering both Jerry Spence and Al Simpson. Wyoming is a small state; we all know each other. As a matter of fact, I'm Al Simpson's warm-up act this morning.[1]

Wyoming has produced its share of national figures, but I regret to say that our state has been severely underrepresented on one of the institutions that I now cover, the U.S. Supreme Court. The only justice from Wyoming was Willis Van Devanter, who served from 1911 to 1937. It was Justice Van Devanter who wrote the Court's opinion upholding the constitutionality of the eighteenth amendment and prohibition. Today what we like to think of as the Wyoming seat is held by Anthony Kennedy.

Pentagon Experience

In introducing me, Dick Day mentioned my tenure at the Pentagon, and I should say a little about that. Not long after I arrived at the Defense Department I was invited to speak to a group of young Navy public affairs officials down in Norfolk, Virginia, the headquarters of the U.S. Atlantic command. There I was, fresh from civilian life, having just come from Capitol Hill where I had worked for Dick Cheney for three years, and they were no doubt wondering what in the world I was doing there. The Navy captain who introduced me really threw himself into the introduction, and as he reached the end, he kind of worked himself into a froth and said, "Pete Williams is an inspiration to us all. He is proof that if you learn your craft and if you do your job well, you too could become the Assistant Secretary of Defense for Public Affairs, especially if the guy you're working for happens to become Secretary of Defense."

I was lucky to be at the Pentagon during a remarkably historic time. On our watch, the U.S. military was extraordinarily active. There was Operation Just Cause in Panama, Provide Comfort in northern Iraq, the humanitarian mission

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* NBC Legal Affairs Correspondent.

[1] *See* A. Simpson, *A Lawyer's View from the Senate*, 30 International Society of Barristers Quarterly 340 (1995).

in Sarajevo, and Restore Hope in Somalia. Those were on top of the collapse of the Berlin Wall, the breakup of the Warsaw Pact, the end of communism in the Soviet Union, and the end of the Soviet Union. Then came the Persian Gulf operations, Desert Shield and Desert Storm.

You might remember the briefings we did at the Pentagon during Desert Storm; two military officers came down each day to brief the public and answer questions. There is a little story behind that. During Desert Shield, the first thing that Secretary Cheney and General Powell, Chairman of the Joint Chiefs of Staff, would do when they arrived at the Pentagon every morning was to get a briefing on what had happened in the Gulf in the preceding twenty-four hours and what was supposed to happen in the coming twenty-four hours. The briefing was conducted by an Army lieutenant general, a former tank commander named Tom Kelly. When it became clear that the coalition forces were going to go to war, I went to see General Kelly and told him that we had decided to conduct daily press briefings in the Pentagon. This was going to be the biggest military operation since Vietnam, and we had some obligation to do a regular briefing in the Pentagon. We also had a briefing or two every day in the theater of operations in Saudi Arabia, but because of the time difference—roughly eleven hours—it just didn't work to have all the briefings in Saudi Arabia. Deadlines for major metropolitan newspapers and the television networks in the United States are about 4:30 or 5:00 in the afternoon, which is the middle of the night in Saudi Arabia. We decided to have the first briefing of the day there in the Gulf and then a second briefing in the Pentagon.

I told all this to General Kelly, and when I said we were going to have daily briefings in the Pentagon, he responded, "Yes, that makes a lot of sense to me. It's a great idea." Then I said, "And, General, I'd really like to have you do the briefings for the military." He said, "That's impossible. I can't possibly do that. I don't know if you looked at my title on the door when you walked in here, but it says Director of Operations for the Joint Staffs. I'm going to be too busy; I've got a war to run. There's a lot of preparation for those briefings. It takes time to get ready, and it takes time to do them. I simply don't have that time." I said, "All right, sir, thank you very much," and left. A few days later I returned and said, "Sir, Secretary Cheney would like you to do those briefings." He said, "Great idea, happy to do it." So the chain of command does work.

CHANGES IN JOURNALISM

If you think about the list of events that I mentioned—the Gulf War, the Berlin Wall, and all the changes in the Soviet Union—it seems like old history, events from another era, which is a sign of how quickly the world is changing.

The world of journalism is changing, too, as is the world in which you work, the world of law. When I returned to reporting, at NBC, I soon got my first lesson in how much journalism had changed during my intermission in government. It was just a year ago when I covered a story that now also seems long ago, the saga of Tonya Harding. I reported NBC's first stories on that case because I cover the Justice Department, and the FBI was involved in the early investigations in that case. Then NBC sent David Bloom out to Portland to cover the story. He did a fine job, but after he was there for about three weeks, he needed to go back home, so our bureau chief asked me to go out and cover the story for a while. I tried to explain: "You know I don't do that sort of thing. I cover the Supreme Court. I do stories about the Establishment Clause. I write little essays about the doctrine of collateral estoppel. [If I only knew what it was, I would be much better at it.]" I made such a good case for myself that I was on a plane to Portland the next day.

As it turned out, by the time I got there, it had become a legal story. The U.S. Olympic Committee had decided to hold a hearing; Harding filed a lawsuit against the Committee; they settled the case and then dropped it so she could skate; the criminal charges were pursued, and she appealed. It was unlike anything I had ever covered. It had an undeniable, unavoidable tabloid quality. I knew that it was time to leave when the following things happened in rapid succession: ABC News found out that the condominium next to the one where Tonya Harding was staying after she left her husband was vacant, so they rented it; the television program *A Current Affair* acquired a video of Miss Harding in which she revealed certain parts of herself that are not normally on display during a skating routine; and her mother collapsed on the set of the *Montel Williams Show*.

One of the final chapters in this story came this week in Portland, Oregon. Harding's former husband, Jeff Gillooly, successfully petitioned the court to change his name to Jeff Stone, and other people named Jeff Stone were there to object. One of the objectors was an actor who played a character named Jeff Stone on the *Donna Reed Show*! As Dave Barry would say, "I'm not making this up."

The lesson I learned from covering the Tonya Harding story was that the tabloid television shows, such as *Hard Copy*, *Inside Edition*, and *Current Affair*, have changed the environment on a big story for the rest of us. It was impossible to interview the people involved in the case or even those around them. They would not talk to mainstream news organizations like NBC News because we do not pay for interviews; those other shows do, and handsomely at that. Paying for the news is, I think, a very disturbing practice, and I hope that organizations like mine continue to resist it, but it is difficult to cover high profile stories fully.

The coverage of the Harding case also put lawyers for the parties in a tough spot; they might want to advise their clients not to do the tabloid interviews, but for many of the figures in the case, such interviews had become their sole sources of income. So the case with tabloid dimensions brings out the worst in the press, and it presents special challenges for the lawyers involved. We are seeing one of the worst extremes ever in the coverage of the O. J. Simpson case.

THE LAWYER IN A HIGH PROFILE CASE

What should you do if you are involved in a high profile case? I don't think anybody could come up with a satisfactory checklist for how any lawyer should conduct himself or herself in the O. J. Simpson trial. Let us hope that a sensational trial of that magnitude happens no more than once every fifty years. I do believe, however, that it is worth thinking about what you would do; my time as Pentagon spokesman convinced me that you need to plan how you or your firm would handle a high profile case. No military commander would go to the battlefield and improvise how he's going to get the bullets and the gasoline to the front. While it isn't possible to plan exactly what you as a lawyer would do on the media battlefield, there are a few things you can anticipate. (In the military they would call these "rules of engagement.")

The first thing that will surprise you, I think, will be the sheer volume of telephone calls. Your secretary will be going through message pads by the hour. You will certainly hear from the major newspapers and the television networks, and from the local reporters, and you may get calls from dozens of radio stations around the country and all the radio and television talk shows. So at the very least, you'll need somebody in the office to help you sort through the calls, decide which ones you want to field, and try to organize them. If you want to be scientific about it, you'll return calls by time zones, starting on the East Coast and working your way west.

It might surprise you that what most reporters want is simply the facts. Since I'm a television reporter and have a visual medium, I have to have pictures to go on the screen with the words. I want at least a picture of you and a picture of your client, and best of all, I'd like to have you talking on screen. It makes a better story. Can you talk about how you will plan the strategy? Can you say that your client isn't guilty? Can you say that the charge is unfair? Can you say *something*? Saying something, saying anything, will take the pressure off and help people like me put a story together.

I will give you a recent example. Dan Webb, a Chicago-based lawyer who is one of the lawyers Dan Rostenkowski has had, did just what I am suggesting last fall when Rostenkowski made his initial court appearance. It was a very poignant moment. Here was one of the lions of Congress, one of the

leaders of the Democratic regime in Congress for forty years, who had to walk into the federal courthouse in Washington, D.C. It is not very far, only about two blocks in distance; but for Rostenkowski it meant leaving the House, where he was still a powerful figure even though he had surrendered his committee chairmanship, and entering a world totally foreign to him. For years he had been accustomed to owning whatever room he entered, but he walked into that federal courthouse following his lawyers and looking downcast. When that initial court appearance ended, Rostenkowski and Webb came outside and made brief statements. Webb attacked the government's theory of the case, and Mr. Rostenkowski said that he had done nothing wrong and would prove it in court when he had his chance. Those brief statements helped them, I think, and were of enormous help in advancing the story.

You can probably help reporters and your side of the case by a willingness to provide documents that you filed in court. Some people are reluctant to go beyond the information that they have filed, and it would be very helpful if they just provided documents. You might feel like saying, "That isn't my job. I file them with the court. If you want them, go to the court." That's fair, but the clerk of the court isn't likely to want or be able to send copies to hundreds of reporters all over the country. The clerk's office might even be closed by the time we reporters hear that it's a big story, especially if you've filed your papers late in the day. This is a constant problem that can be avoided if you provide copies of your documents. Also, I can then read them myself, and you won't have to spend all that time explaining what you're doing.

When you appear in court, you can expect a mob of reporters outside the courthouse eager to talk to you. It helps to plan a sentence or two that you can use, and it helps to answer a few questions when you're there. It's often enough just to summarize what you said in court. In the federal system where a lot of these cases are tried, the courtroom is off-limits to cameras and microphones, so for people like me who depend upon pictures, getting you outside the courthouse is our only chance.

The next issue is what you say, specifically. I want to reiterate that most reporters just want the facts, and some of the facts they need may seem very elementary to you. If the case is in state court, for example, reporters from other states may not know the rules in your jurisdiction. They may not know exactly why you're doing what you're doing, and you may be able to explain that. Also, there are always rumors to be checked out. It's amazing how rumors pop up everywhere, and a reporter cannot simply dismiss them; we have to check each one because every once in a while they prove to be true. You, as the lawyer, can stop the false ones before they spread. Finally, the legal maneuvers that may seem natural to you are hard to understand for people who do not

cover the courts regularly. You can explain those; you can do your own play-by-play. You almost have to do that if it's a criminal case, because you can be almost certain that somebody on the state's side, whether it's a prosecutor or an investigator, will be leaking information, and reporters will be looking to you for a reality check.

You don't have to answer every question, but ask yourself this: Which is better for your client—a reporter who has the most complete picture possible or a reporter who hears only one side, which is the other side? In the majority of cases, you won't have to say much. You don't have to lay out your entire theory of the case or give away all the evidence; frequently all that's needed is a kind of mid-course correction. The O. J. Simpson case—we're all thinking about it—is really a study in how not to do it for all sides. Things got totally out of control from the very beginning. Both the prosecutors and Simpson's lawyers said way too much. Apparently, the lure of the case was just too much for everybody to resist, especially in a city like Los Angeles which is accustomed to being illuminated by klieg lights.

It might seem odd to you that a reporter would tell you the lawyers said too much, but I am speaking here not strictly from the point of view of a journalist. (Of course, for journalists, the more the better.) There are larger interests at stake here. Anyone who is concerned about preserving what's left of the sanctity of the courtroom should be alarmed about the growing trend of both prosecutors and defense lawyers trying to swing the compass of public opinion before the trial begins.

Undeniably, the news business rewards and encourages stories that get ahead of the legal process. The easiest way for me to get on the air is to bring in a story that a grand jury is about to indict somebody. But what is the public interest in that? How is the nation served? How is democracy advanced? How is justice served by telling the public thirty-six hours ahead of time about something that is going to happen anyway? Similarly, how is justice served by leaking evidence that is going to come out in the trial anyway? No public policy interest is served—but it's a surefire story.

My point here is that what the press needs and, even more, what the press wants is cooperation and information, but spilling out too much can erode the integrity of the trial, and I think it ends up cheapening the public view of the courts and lawyers. You cannot look to journalists to draw the line. We are never going to close our notebooks and say, "Okay, that's enough, thank you. You can stop talking now. Don't give me any more juicy stuff." You will have to draw the line. The more sensational the case, the less you can expect the press to show restraint. Even if serious journalists try to respect some limits, there will always be some of the other kind, because viewers and readers go

for it in a big way. We see this in the Simpson case. People repeatedly say, "I'm sick of the O. J. coverage," and then spend ten minutes telling you what happened the day before.

For excess of coverage, the O. J. Simpson story is in a class by itself, and I don't want to belabor it here, but there is one more point I would like to make about it. The single aspect of the case that has not been subject to wild sensationalism is what is happening in the courtroom, and that is due to the television camera; the television camera is the only thing that prevented the trial from spinning off into orbit. That's why it was astonishing to me that Judge Ito would consider shutting down the television camera.

QUESTIONS AND ANSWERS

In closing, I will turn the tables and give you a chance to throw questions at a journalist. I would be happy to answer any questions that you might have in the time that remains.

Q: How does Washington view David Souter?

A: I think that Court watchers are charmed by David Souter. One of the things that fascinate Court watchers is to watch a justice's philosophy realign itself. You see this over and over again. I was reminded of it just the other day when I had the privilege of interviewing Justice Brennan for a story we're doing about his career. When he was appointed by Eisenhower, he was thought to be a very conservative justice. I think people are watching to see whether David Souter will have a similar evolutionary journey. He already has become one of the swing votes on the Court.

He has a very good reputation. He is thought of as a rigorous thinker and is very good in questioning. There was an amusing incident the other day during argument in a reverse discrimination case. Justice Souter asked about the "floor" in the government's theory. Counsel said, "Excuse me, Mr. Justice Souter, the 'floor'?" Justice Souter said, "Yes, 'floor'—f-l-a-w."

Q: Are there any ethical standards prescribed for professional journalists?

A: The questioner assumes a fact not in evidence. Journalism is a funny occupation. It is not a profession in the sense that yours is. There is no required degree, there is no licensing, and that's the way the founding fathers intended it to be. I think that there are ethical *pressures*. The trouble, though, is that journalists are remarkably thin-skinned. They hate criticism and so they hate to criticize each other. To use a term from the military, they seem to subscribe to a theory of mutually assured destruction: "If you won't criticize me, I won't

criticize you." That is troubling because the press freely and robustly, and some would say irresponsibly, criticizes other institutions all the time, but you won't find in this country a really good piece of press criticism in a mainstream newspaper. Most members of the public don't subscribe to the *Columbia Journalism Review* or the *American Journalism Review* or any of the other publications that regularly skewer other news organizations.

If you go to a newsroom and listen to a discussion about whether a story should be on the air that night or in the paper the next day, you hear people argue and debate, and someone will say "I think it's unethical to do that." There are some general, understood guidelines, but there is no way to enforce them and there is no official or written code of ethics that every reporter has to sign or accept. The press is a very bumptious, anarchical bunch of people and organizations, and you see very different approaches and responses from different organizations. Some would say that's a strength. I would say it's a strength, generally. But there are times when a little bit of discipline wouldn't be a bad thing, and the press is not very good at policing itself.

Q: What lessons can be learned about the media or about the Senate from the Clarence Thomas confirmation hearings?

A: Whether you agree or disagree with the nomination of Clarence Thomas and whether you think he should have been confirmed, I think you would agree that the leadership of the committee made an enormous mistake in holding those hearings in public session. There is a way that the committee, in the course of a nomination hearing, can go into executive session to listen to personal attacks and untested testimony and things that come in over the transom. The Judiciary Committee, feeling very chastened by the Clarence Thomas hearings, now regularly does this for Supreme Court nominees. They have a public session and then they go into a closed session, whether they need to or not, and say, "Now, is there anything else?" Not going into closed session in the Thomas case was a huge mistake, because I don't think anybody thought the way those hearings went was good for anyone involved. It certainly wasn't good for the nominee or for Anita Hill, and it wasn't good for the U.S. Senate or for the Judiciary Committee.

UNTO WHOM MUCH IS GIVEN†

John W. Reed*

Dot and I are particularly happy to be with you in this neighborhood, because it was at the Cerromar Beach, just next door, that twenty years ago we first encountered the International Society of Barristers. At that time Jim Carrigan, now a federal judge, was your administrative director and editor. He and I had been colleagues on the University of Colorado law faculty, and he invited me to speak at the 1975 convention. It was at the Cerromar Beach that we first met so many people we have come to love and admire, people like Ray Pearson and Bill Frates and Craig Spangenberg . . . and delightful friends brought to mind by a statement of Niles Crane, Frazier Crane's psychiatrist brother on the sitcom *Frazier*: "Lawyers are wonderful patients; they have excellent health insurance and they never get better." Three years after the Cerromar Beach meeting, I spoke again, at Doug Hillman's convention at Boca Raton, and was elected the Society's first Academic Fellow. Two years after that, I became your editor and began my close and delightful working relationship with you, which now has lasted fifteen years.

As I think of my twenty-year acquaintance with the Barristers, it is hard to realize not only how much time has elapsed but how quickly it continues to speed by. Just before coming here, I received a copy of a letter sent by a National Conference of Bar Examiners executive to a new member of an NCBE committee. The appointment letter stated: "I am pleased to confirm your appointment to a five-year term as a member of the Evidence Drafting Committee for the Multistate Bar Examination, effective July 1, 1995 and running through June 30, 2000." Two thousand! With a two and three zeros, the figure looks so bare, so naked! When I was born, at the end of World War I, the futurists were writing about what life would be like at mid-century. When that mid-century arrived, George Orwell's *1984* was the alarming vision of the future—a future so remote, however that there was no sense of imminent doom. But that once remote future, which proved less grim than Orwell predicted, passed by eleven years ago. More recently, we have begun to hear about the twenty-first century, and dates in that century are used in various predictions—the budget will be in balance by 2002, the Social Security system will

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* Thomas M. Cooley Professor of Law Emeritus, University of Michigan; Academic Fellow, Editor, and Administrative Secretary, International Society of Barristers.

be bankrupt by 2029 (or earlier), Caucasians will be a minority of our population by 2000-something, and on and on. That future seems almost as remote today as 1984 seemed when Orwell's book was published. But it becomes very real when one gets a letter referring to a committee member's current term as running to June 30, 2000. A few weeks ago, the crochety comic page character Crankshaft, complaining about the radical change in popular music, observed: "It would be nice if life would honk or something when it passes you by."

I speak at almost every one of our conventions because I am already present as your editor and administrative secretary, and so it is an economy to have me as a speaker. If you have attended several of these meetings, you know that I nearly always manage to touch on the theme of individual responsibility for the character of the legal profession and, in particular, the trial bar. I keep preaching the same sermon. And today is no exception. I want again to urge on you a sense of responsibility for maintaining, or rather elevating, the aims and practices of the enterprise we all are engaged in: the enterprise of justice.

But this time I want to place that obligation that rests on you and me in the context of this group, the International Society of Barristers. The reason for that emphasis is, once again, the calendar—this time not my calendar but the Barristers' calendar. On August 2 of this year, the Barristers Society will be thirty years old. On August 2, 1965, John Alan Appleman, of Illinois, John Gordon Gearin, of Oregon, Murray Sams, Jr., of Florida, and Craig Spangenberg, of Ohio, signed Articles of Association that gave birth to the Society. John Appleman is deceased, but the other three founders are still Fellows of the Society. Of the twelve other members of the original Board of Governors, three remain: Donald Farage, Hugh Miracle, and Joe Tonahill.

The minutes of the first Executive Committee meeting recorded Craig Spangenberg's statement that "a number of attorneys . . . considered it important that a society be created in which advocates of high calibre could work together toward common objectives beneficial to the interests of justice and of the public." That is the policy statement that has guided the Barristers through the years. We are together as trial lawyers—not as plaintiffs' lawyers, nor as defendants' lawyers, nor as insurance lawyers, but as trial lawyers with "common objectives beneficial to the interests of justice and of the public."

Those same Executive Committee minutes also report a discussion of "when conventions should be held, if any. . . . [I]t was the consensus . . . that conventions and meetings should not be called merely for the purpose of conforming to the practice of other organizations, since our members all were busy and dedicated advocates, but that conventions should be held when they could serve a worthy purpose." A "worthy purpose" was quickly found. Murray Sams pointed out that "there were a great many hazards in air [travel]

safety . . . which ought to be considered, and that a seminar properly sponsored and conducted could help to produce changes conducive to the public safety." John Kennelly, of Illinois, was made chairman of that first meeting, held in 1967, two years after the Society's formation. Meetings were irregular until 1972. But, as Craig Spangenberg has said, the fellows so enjoyed the warmth and restorative powers of the gatherings that they agreed to meet annually. And thus began the series of wonderful meetings of which this is merely the latest.

The Society's now-venerable publication is also coming up on its thirtieth birthday: the 1995 issues of the Barristers *Quarterly* constitute volume 30.

And so we celebrate thirty years of life. But mere longevity is of limited importance. What *is* important is to remember what got us here and what that history implies for the future. It is necessary that we renew our commitment to the Barristers' purposes and ideals.

Each of you was chosen to be a Fellow of this society because your peers believe you are an excellent trial lawyer. You are among the best. You are elite. Whatever degree of modesty you have, you surely recognize yourselves as an elite and are willing to accept that fact—at least in this room. You need not acknowledge it in public, because it is unpopular to be elite; but it is a fact. It is the basis of your election into the Barristers.

You who were elected fifteen or twenty years ago would not have been troubled by the notion that this is an elite organization. You were joining it not only without shame but with satisfaction and commitment. And the Barristers Society has persisted in its commitment to excellence, notwithstanding that the idea of a self-defining elite has become politically incorrect.

The notion of a self-defining elite—people drawn together because in the estimation of their peers they are specially competent—has not played well in America in recent years.[1] Indeed, the idea of excellence has been placed at odds with the desire for an egalitarian society. It is as if the punishment of Adam for eating of the tree of knowledge was God's way of telling us that the acquisition of knowledge was an evil, a sin.

As pointed out by Geoffrey Hazard, Director of the American Law Institute, and by the late William Henry last year in his provocative book, *In Defense of Elitism*, disparagement of excellence is a relatively recent phenomenon in the United States. Although we have maintained a kind of Jacksonian populism, there has always been a theme of what Jefferson called a natural aristocracy—an aristocracy of "people who are especially capable, in virtue not of birth, not inheritance or social position, not in virtue of property, but in virtue of ability,

[1] For some of these ideas and their phrasing I am indebted to the address of Geoffrey C. Hazard to the 1990 meeting of the American Law Institute. 67 A.L.I. PROC. 131 (1990).

opportunity, energy, sense of responsibility, and—we should all say reflectively—good luck, for we are all fortunate well beyond our capabilities."[2]

But that natural aristocracy implies a correlative responsibility, a responsibility to use ability and energy in the public interest. Jefferson and his contemporaries clearly considered that their talents and training and energies were a trust for the benefit of the nation, not a private treasure for personal gain. But with the "dumbing down" of America and an increasingly pervasive sense that it is "each man for himself," we are in danger of losing that natural aristocracy. Hence the importance of an elite group like the Barristers, a group possessed of ability, opportunity, energy, a sense of responsibility, and—don't forget—luck. Because we are greatly privileged there is an inescapable obligation on us to serve the profession, the justice system, and the nation.

"Every one to whom much is given, of him will much be required." Well, you and I have been given much: intelligence, education, judgment, a way with words, a capacity for hard work, and a state's license to represent clients and help people with their troubles. Because we have been given much, much is required of us.

It is necessary that we carry out our daily tasks diligently and with excellence. It is necessary to do that, but it is not sufficient. More is required of us, as part of a natural aristocracy. Even as Jefferson and his contemporaries dedicated themselves to the large issues of their time, often at great personal cost, so you and I have the responsibility to use our abilities—the much that we have been given—in addressing the large issues of *our* time.

I do not suggest a corporate crusade by the Barristers. Unlike other trial lawyers' groups, the Society was not created as an action organization. But it does bring outstanding advocates together to think about the broader issues touching on the law and send them away restored and renewed in spirit and commitment. And, heaven knows, there is plenty in the legal sector that needs your renewed commitment.

One could start out with the so-called "Common Sense Legal Reform Act of 1995" (a fraudulent title if there ever was one), the wording of which would do credit to George Orwell, whose *1984* may be arriving though a decade late. Responsible improvement of the tort system continues to require your creative genius. If we fail at that, the result will be more of these throw-out-the-baby-with-the-bath-water measures.

And then there is the jury. The public appears to have less faith in the jury system than at any time in my memory. Partly that is the result of the media attention given to aberrant, unsupportable verdicts, especially those awarding obscenely large damages for apparently minor harms, without report of post-verdict or appellate correction. Partly, however, it is because of camera cover-

[2] *Id*. at 132.

age of sensational cases that strain the legal system and portray it poorly. The overexposed Simpson case is in point; so also is the Colin Ferguson case (the Long Island railroad gunman). Although never a fan of cameras in the courtroom, I rationalized their coming with the thought that broadcasting trials might educate the public about the judicial system. Well, it is doing that. The general public now knows what a sidebar is; and grocery baggers talk about the admissibility of evidence, while shoppers standing in line debate the pitfalls of an overzealous cross-examination. But broadcasting is also showing the system at its worst, with examinations and arguments that are inefficient, hypertechnical, mostly boring, cynical, and pandering. Broadcasting may well create more doubt about the courts than support for them.

Moreover, the abuse of jurors inherent in such long trials increases the public distaste for jury service, one of the great privileges of citizenship. If we do not work to improve the way juries are used, both logistically and substantively, we are likely to lose the civil jury in the lifetimes of some of us here.

I sense a growing skepticism about the importance, the value, of the jury. Each of us must become an interpreter of the jury system to the public. If you and I do not go to bat for the jury, who will? There are countless forums in which we can speak on behalf of the jury, from the Congress and the statehouse to the schoolroom. We are skilled in the art of advocacy. Why not employ that art in the service of the jury system?

In short, it is imperative that we work on the jury within and without—within to improve the functioning of the jury, and without to educate the public about the importance of the jury to the people.

It would belabor the obvious to discuss other concerns to which we should direct our energies—such matters as civility in the profession, the affordability of legal services, the bureaucratization of the judiciary, and the uncertain correlation between ADR and justice. On another day, we may consider these in depth, and also identify yet other areas that are in need of our special talents. But what I have said is enough to make the point.

We are vastly privileged and therefore bear an inescapable responsibility to look at the law and the legal profession from a public interest perspective. Self-interest cannot be the ultimate criterion for members of an elite, a natural aristocracy. If you were lesser men and women you might be forgiven for coasting along and making decisions on the basis of "how it will affect me." But you have been given much, and of you much is required.

As always, we feel frustrated that so much is to be done, yet we are so few. But I urge upon you the instructive parable of the small child walking on the beach with his grandfather. As the child picked up a starfish to throw it back in the ocean, his grandfather said: "There are millions of stranded starfish. What you are doing won't make any difference." Said the child: "It makes a difference to this one."