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ETHICS, MEDIA, AND THE O. J. TRIAL†

Gerald F. Uelmen*

My experience as dean of the law school at Santa Clara was excellent preparation to serve on the O. J. Simpson defense team. One of the attributes that is an absolute necessity for a dean is an ability to massage overblown egos, and I used to joke as dean that my faculty manual was the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. This came in handy very early in the proceedings in the Simpson trial. On one of the pretrial motions, we had an expert witness on the stand, a doctor who was testifying with respect to Battered Woman's Syndrome, and he stated that most batterers have a personality disorder known as narcissistic personality disorder. I immediately recognized the disorder because half of my faculty had it, and I turned to F. Lee Bailey and said, "Narcissistic personality disorder—Lee, we have a lot of those in academia." Without missing a beat, Lee turned back to me and said, "Jerry, we have a lot of those on this team."

The Defense Team and Preparation of the Case

I got the call to join the Simpson defense team on June 16th, the day before the infamous Bronco chase, and the call came from Bob Shapiro. I had worked with Bob previously in the defense of Christian Brando, Marlon Brando's son. When Bob took the Simpson case, the first thing he did was reassemble a lot of the team that had worked on the Brando case, including Dr. Henry Lee, Dr. Michael Baden, Alan Dershowitz, F. Lee Bailey, and me. I think Bob's assumption in reassembling that team was that each of us would play the same role he had played in the Brando case. My role in that case was to prepare and argue the legal motions, and the role of F. Lee Bailey was to be a kind of rabbi in the background, giving very good practical advice but not actively participating in the courtroom. A source of the tension that developed was that Bailey did not understand that that was to be his role in the Simpson case. A wag once said that the most dangerous place to stand in the courtroom is between Alan Dershowitz and a television camera. I think we have to amend that now: The most dangerous place in the courtroom is between F. Lee Bailey and the podium. And that is precisely where Bob Shapiro was standing. The resulting tension was never resolved.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Wailea, Wailea, Maui, Hawaii, February 19, 1996.

*Professor of Law, formerly Dean, Santa Clara Law School.

The size of the team allowed these two lawyers, who got to the point of not even speaking to each other, to continue to work on the case, because we divided up the case and each took particular portions. I know that goes against the conventional wisdom that you can't try a case with a huge team of lawyers and must have one person who's calling all the shots. But we did have one person calling the basic shots; and by bringing together a group of very experienced trial lawyers who could take pieces of the case and prepare them very quickly, we were able to get the case ready to go to trial within sixty days. That's really unheard of—to take a case of this nature and have it ready for trial within sixty days. I still think that of all of the tactical and strategic maneuvers that the defense employed in this case, the most important and the most significant in the long run was the decision not to waive the defendant's right to a speedy trial and to make the prosecution prepare its case as quickly as we were going to be prepared to defend the case.

ETHICAL ISSUES

I went to Los Angeles within a week after I got the call from Bob Shapiro, and my first assignment in the case presented me with the first ethical issue that I had to deal with in the case. It was an ethical issue that was not a new dilemma for me; I even used to teach students about it. The problem is this: What do you when you discover evidence that may be of enormous interest and use to the prosecution, although you're not sure? What do you do when your client walks in and hands you evidence that you may have to turn over to the prosecution? I think the best version of this I've ever heard was a joke that Professor Monroe Freedman from Hofstra University used to tell. A lawyer gets a call in the middle of the night, and the person at the other end of the line says, "Harry Levine?" "Yes." "Mr. Levine, I need your advice. I just shot my wife and I'm standing here holding the gun in my hand. What should I do?" There's a long pause, and then Levine says, "Oh, I think you want Harry Levine, the lawyer," and hangs up the telephone. Unfortunately, when I confronted the dilemma in the Simpson case, I couldn't hang up the telephone, and here's the way it happened.

Within a week after Mr. Simpson's arrest, all of the newspapers were reporting that he had gone into a cutlery store in Los Angeles and bought a big stiletto knife. The owner and a clerk who worked in that store were given a lot of money by the *National Enquirer* to tell their story. The police were so sure that that knife was the murder weapon that they went to the same cutlery store, bought an identical knife, and took it to the coroner, who very complacently said the wounds could have been inflicted by a knife just like it. The police

then got a search warrant and went back to search Mr. Simpson's home a second time, ten days after his arrest, looking primarily for the knife.

We, of course, asked Mr. Simpson whether he had purchased such a knife, and he said, "Yes, and I believe it's still right where I left it." As my first assignment on the case, I was given the task of going to see whether the knife was still there. I walked into Mr. Simpson's bedroom at the Rockingham premises and went directly to a mirror over the dressing table. Although the mirror was flush with the wall, you could see the hinges along the side, and I opened it. Lo and behold, there it was, sitting in an open box— the knife that I had seen in all of the pictures. When I opened that mirror, I remembered Monroe Freedman's joke and I thought, "What the hell do I do now?" I had the presence of mind to remember the California Supreme Court decision holding that if the defense takes possession of evidence and in any way interferes with the ability of the prosecution to locate that evidence, the evidence has to be turned over to the prosecution. But that case dealt with evidence that was obviously incriminating, and it was our belief that this evidence would actually be exculpatory, that an examination of this knife would prove that it was pristine and had never been used. This would rebut any inferences from the testimony of the clerks who sold the knife, testimony that was being presented at the preliminary hearing.

I just closed the mirror and went back to the office to talk to my colleagues. We decided we would go to the presiding judge of the Superior Court and ask to have a special master appointed to go to the premises and take possession of the knife and bring it back to the court so that it could be examined by a defense expert. If it turned out that it was incriminating evidence, it would be turned over to the prosecution, but if it was not, we intended to maintain the secrecy of this discovery and save it for possible use as rebuttal evidence.

The presiding judge to whom we presented this request happened to be Judge Lance Ito. This, of course, was long before Judge Ito was assigned to be the trial judge. He appointed a master; the master went out, put the knife into a sealed envelope, and brought it back to court; and that's where we thought it would stay until our expert had an opportunity to examine it. But in the midst of the preliminary hearing, Judge Ito went on vacation and his order appointing the special master got to the desk of the presiding judge of the Superior Court, who decided to take the envelope to the judge holding the preliminary hearing and say, "This may be of interest to the case. You may want to open this in court." When that envelope appeared in the middle of the preliminary hearing, the members of the press talked about what a brilliant tactical ploy this was by the defense—but the two most surprised people in the courtroom were Bob Shapiro and myself. It was through an error by the court that the existence of that envelope was exposed.

We were able to convince the judge not to open the envelope and not to let the prosecution know what was in it, although they didn't have to be rocket scientists to start guessing. Ultimately, the knife was examined by our expert, Dr. Henry Lee, and, as we expected, it was absolutely pristine; there was not a scratch on it, nor a trace of any blood or tissue or anything else. It was a brand new knife.

After Dr. Lee returned his report to the court, the judge—by this time Judge Ito had been assigned to the trial—raised the question of whether this would have to be turned over anyway under the reciprocal discovery law in California. We briefed that point and made what I thought was a very persuasive argument that because the prosecution doesn't have to turn over rebuttal evidence to the defense, neither does the defense have to turn over rebuttal evidence to the prosecution. The reciprocal discovery law is supposed to be just that, requiring the defense to turn over only the types of evidence they have a right to get from the prosecution. Judge Ito overruled us and gave the prosecution the report on the examination of the knife, and that is why the knife disappeared from the case.

This was an object lesson for us, in terms of the risks and pitfalls that the reciprocal discovery law could possibly hold in store for us in forcing us to be the source of evidence that would bolster the prosecution's case. And, of course, the last thing a defense lawyer wants to do is to deliver to the prosecution evidence that will actually strengthen the case against the defendant. That explains and puts in context a lot of the conflict that arose later in the case over the application of the reciprocal discovery law. We decided we were going to play it very cautiously and turn over only what the law absolutely required us to turn over. And we followed that course at some risk, in view of the later sanctions that were imposed with respect to reciprocal discovery.

A second ethical issue that arose very early in the case related to the appropriateness of statements to the press about the position of the defense. I know that a lot of the criticism directed at the defense team has focused on this—the extent to which press conferences were held and the press was informed of various aspects of the evidence and the strategy. Of course, there are two schools of thought about this, and I think both schools are well represented in the U.S. Supreme Court decision in *Gentile v. State Bar of Nevada,*[1] involving an application of the ABA's model rule to pretrial statements by lawyers. Dominick Gentile was a Las Vegas lawyer who held a press conference right after his client was arrested, asserting his client's innocence and asserting that his client in fact was the victim of a police frame-up. Gentile was disciplined for violating the ABA rule, as applied by the Nevada Bar. When the case got to the U.S. Supreme Court, the Court, by a 5-4 margin, declared the ABA

[1]501 U.S. 1030 (1991).

rule unconstitutional because it was too vague and didn't give lawyers enough guidance on what they could and could not say. The rule included an exception allowing a lawyer to offer a general description of the claim or defense, and it was unclear whether Dominick Gentile's statement came within that exception. As a result of the case, the ABA amended the rule. (I'm not sure that the amended rule really corrected the problem of vagueness, but I'll get to that in a moment.)

In California, we had not adopted the ABA rule, so there was no rule of professional conduct governing what the lawyers could or could not say. That was left up the judge. Of course, we were strongly opposed to the judge's entering any sort of gag rule attempting to control the statements of the lawyers because our experience was that such gag rules benefit the prosecution and are a disadvantage to the defense because the court cannot control the release of information by the police, the source of most of the disclosures in most cases. That certainly was true in the Simpson case.

From the beginning, we were faced with a situation in which a lot of information was being leaked by the police in an attempt to turn around public opinion. They were very concerned that they had a defendant with a great reservoir of public support and favorable public feeling. Even after the Bronco chase, the polls revealed that about sixty-five percent of the people believed that O. J. Simpson was probably innocent. That public support was turned around almost overnight by the release of the 9-1-1 tapes of the emergency calls by Mr. Simpson's wife. As soon as those tapes hit the airwaves, the polls shifted from sixty-five percent thinking he was probably innocent to the same proportion thinking he was probably guilty. We saw that reflected in our jury pool as well.

Later we had a problem with disclosure of the results of DNA tests. The results were appearing in the newspapers before they were even delivered to counsel. That stopped the day Judge Ito ordered that all of the testing results be delivered directly to him without being delivered to the police first. The judge then gave the results to the prosecution and to the defense. Because all of the DNA leaks stopped immediately, there was no question in anybody's mind that the source of those leaks was the Los Angeles Police Department.

In recognition of the problem of release of information by others, the new ABA rule has a provision allowing lawyers to make public statements where necessary to "mitigate" prejudicial publicity that has been released from another source. This rule now is in effect in California, directly as a result of the Simpson case; the state legislature passed a law mandating that our state bar adopt a rule governing pretrial statements by lawyers, and our supreme court approved as the rule for our state bar the new ABA rule. But the new

ABA rule does not define mitigation or make clear what lawyers can or cannot say. If you interpret mitigation as the right to undo the damage done by publicity released from other sources, that would mean we could have kept talking until we got the polls back up to sixty-five percent. To me, the lack of guidance on what you can say raises a serious question about the constitutionality of the new rule.

MEDIA COVERAGE

The journalism and television coverage of the trial created problems for everyone from the outset. When I got into the case, I had a clear vision in my own mind of the difference between the tabloid press and the legitimate press. As the case went on, the line between them became blurrier and blurrier, and I think we saw an application of the rule that bad journalism drives out the good. Bad journalism included checkbook journalism, where sources of information were paid enormous amounts of money. In some cases, this even resulted in the prosecution not calling some of these people as witnesses because their credibility had been tarnished by their contact with tabloid journalists.

I don't believe the television cameras themselves were the real culprits in the case, at least initially. I think it was the tabloid journalists who created the sensationalism that seemed to surround the case. Nevertheless, the television cameras have become the focus of a good deal of controversy since the conclusion of the case. In California, a committee now is reexamining our rule giving to the trial judge discretion whether to allow television cameras, and consideration is being given to replacing that rule with a flat prohibition that would keep television cameras out altogether.

I see arguments on both sides of this issue. I began as a proponent of televised coverage of the case but later realized that the cameras really were affecting the behavior of everyone involved. They affected the behavior of the lawyers, they affected the behavior of the judge, and most regrettably they affected the behavior of witnesses. We had witnesses who testified as though they were performing on stage, and we had other witnesses who wouldn't come near the courtroom because they didn't want the fifteen minutes of fame that would result from testifying in the case. On the other hand, the presence of the television cameras led to the discovery of valuable evidence for both sides. The prosecution, for example, found a parade of witnesses to testify that they had taken photographs of Mr. Simpson wearing gloves similar to those found at the scene when he was broadcasting football games. And the defense found Kathleen Bell, who was one of the key witnesses challenging the credibility of Detective Fuhrman; she saw him on television, recognized him as the

guy she had run into at the Marine recruiting station six years before, stepped forward, and agreed to testify.

On balance, I now believe that there is a limited category of cases, sometimes described as trials of the century, in which the television cameras should be kept out because their presence is like throwing gasoline on a flash fire. In other trials, the presence of television cameras is not going to do any greater harm than the presence of any other media, and discriminating against television may be unwarranted.

The problem is obvious: How do you know in advance that you've got a "trial of the century"? I actually did a little research to determine how many cases during this century—that is since 1900— have been called a trial of the century or have prosecuted what was called a crime of the century, and I came up with thirty-two cases. That means we actually have a trial of the century about every three years in this country, so there's still time for one more, maybe even two more, before the century is over.

QUESTIONS AND ANSWERS

In the time remaining, I'd like to talk about things that are bothering you about the case or questions that have occurred to you.

Q: A popular speculation in Los Angeles is that Howard Weitzman, one of the first attorneys on the case, withdrew because O. J. had said to him, "Yes, I did it, but I want to put on an alibi defense." Can you comment on that?

A: Yes, I can respond without hesitation. O. J. Simpson never admitted to any lawyer, Howard Weitzman included, that he participated in this murder. He asserted his innocence right from the beginning. In fact, the twenty-page statement that he gave to the police on the day he came back from Chicago was given in Howard Weitzman's absence because Mr. Weitzman apparently was confident that Mr. Simpson would be able to clear things up quickly. That statement was never offered in evidence. We could not offer it, and the prosecution chose not to, apparently believing it would hurt their case more than it would help it.

Q: Would you comment on the wisdom of Mr. Kardashian's reading the statement attributed to Mr. Simpson during or preceding the Bronco chase?

A: I think at that point in time the only concern was Mr. Simpson's safety; I don't think anyone was thinking about what influence the statement might have on the case. Ultimately, of course, the prosecution decided not to use the statement or the chase itself as evidence at the trial.

Q: There was testimony offered by the prosecution about a dream that Mr. Simpson had. Is there some California law that allows dreams to come in as evidence?

A: I think it was error to admit that evidence. In fact, I thought the admission of the dream was one of four very strong arguments we would have had on appeal if the case had come out the other way. Judge Ito did a good deal of back-pedaling on the issue by giving the jury a limiting instruction on the weight they could give to the dream evidence, but I'm not sure that would have corrected all of the prejudice of admitting that evidence.

Q: Was the prosecution's move in having O.J. try on the glove in open court as much of a turning point as it seemed to outsiders?

A: Yes and no. It certainly was dramatic visually, but frankly I think the prosecution overreacted. They seemed to spend the rest of their case trying to undo what had been done and made it more of a focal point than it actually might have been.

Q: You spoke of the conflict between Shapiro and Bailey. Could you comment on the conflict between Shapiro and Cochran regarding the role of race in the case?

A: Frankly, I was disappointed with Bob's remarks directed at Cochran because I would not characterize what was done by Cochran as playing a race card. I honestly believe the card that was being played was not a race card as much as it was a credibility card, and the law is quite clear that the racial attitudes of a witness may be relevant in assessing that witness's credibility. The credibility of Detective Fuhrman was a key issue in the case, and I think if there was any error made on this point, it was in keeping out the evidence of how virulent that racism actually was. Judge Ito's ruling on the Fuhrman tapes deprived us of showing the jury that Detective Fuhrman's racism was such that it actually could have motivated him to plant evidence or to create evidence; in those tapes he described incidents where he had actually done so, based on his racism.

If race cards were played in this case, I think they were played fast and furiously in the process of jury selection. It's fascinating that there has not been much comment on the degree to which the prosecution was using race as a basis for excluding jurors during the process of jury selection. They used ten peremptory challenges and nine of those peremptories were used to exclude black jurors.

The fact that we ended up with a jury as diverse as it was resulted from a combination of factors, including the prosecution's decision not to make this a death penalty case. If this had been a death penalty case, I think we would have

ended up with a jury of remarkably different composition because everyone opposed to the death penalty would have been excused and, as we all know, opposition to the death penalty is much more widespread among minorities than it is among whites. I think the Rodney King case also had an enormous impact because it affected where the case was tried. I think the district attorney was afraid to move the case to West Los Angeles or to the Valley because all of the criticism the prosecution got for doing that in the Rodney King case, so they left the case downtown, which contributed enormously to the diversity of our jury pool.

Although I found much fault with some of Judge Ito's evidentiary rulings, I would give the judge an A+ on how he conducted the jury selection process: He let the lawyers conduct voir dire, even though under California law that was discretionary; he could have done all the questioning himself. Also, he applied a standard of challenge for cause that led to the excusing of many jurors who had been exposed to pretrial publicity. All of those factors worked in our favor in terms of generating a diverse jury panel.

The biggest disappointment to me since the verdict has been the tendency of people to look at the race of the jurors and assume that what they were doing in delivering that verdict was sending some sort of message to "White America" that this was payback. Certainly nothing the jurors said or did gave any reason to read that into their verdict. I personally think that people looked at the reactions to the verdict and then attributed their interpretations of the reactions to the motivation of the jurors. When the verdict was announced, the television cameras showed black audiences cheering while white audiences appeared stunned by the verdict, and people immediately assumed that what the black audiences were cheering was that O. J. had beaten the system. I guess it didn't occur to many people that what they might have been celebrating was that the system worked—and knowing how rarely it works for a black man, they had reason to be jubilant.

I don't think the verdict was an example of jury nullification. Jury nullification was not argued to this jury, and there's no reason to believe that they were doing anything other than following the judge's instructions—like those in any criminal case—that they had to be convinced beyond a reasonable doubt of the guilt of the defendant. One of the jurors interviewed after the verdict said, "You know, I thought he was probably guilty, but they just didn't prove it to me beyond a reasonable doubt." When I heard that, I wanted to stand up and cheer that a juror could understand the jury's responsibility so clearly and follow it so faithfully. That's what we want jurors to do.

Q: I'd like you to comment on the aftermath of the trial in terms of the criticism of the judicial system, criticism of the jury system, the criticism of Judge

Ito's management of the trial, and the calls for reforms, including restrictions on the jury. This case would have been tried in a few weeks in federal court.

A: If the Simpson case was typical of anything, it was typical of a "trial of the century." As I looked at those thirty-two trials that have been called trials of the century, I realized that the only element that recurs is how aberrant they really are. For that very reason, I don't think this type of case should be the basis for any reform.

I do think, too, that many of Judge Ito's problems were created by the presence of the television cameras. A lot of time was wasted dealing with issues about what the television cameras were broadcasting and when they should be excluded and so on. I think the trial would have been a lot shorter if it had not been televised.

LIFE ON THE COLOR LINE†

Gregory H. Williams*

When John Lancione called to ask me to come to this meeting, he said that you were a friendly group, and that has proved to be true. I have seen a lot of old friends and I've made some new ones; but most importantly to me, I have seen in you the things I try to impart to my students at Ohio State: honesty, integrity, and a continuing commitment to the highest ideals of the profession. Lest you think yourselves somewhat alienated from your alma maters, and the law students of today, I would say to you that while they may be different in some ways—and these days approximately half the classes are women and ten to twenty-five percent are persons of color—those students still want to be you. They want to be people of honesty and integrity, and they want to be people who make a difference in society.

Every fall, when the members of the first-year class sit nervously in the auditorium at Ohio State and I look out over them, I ask myself, "What can I tell this group of people who will have the ability to shape and to influence thousands of lives? What can I give them that will make a difference in how they approach that responsibility?" I know that at Ohio State we can begin to develop the analytical skills they will need as lawyers. I know that we can begin to develop the advocacy skills they'll use to represent their clients. And I also know that they will soon develop the competitive edge if they don't already have it. What I worry about is whether they will develop the skills to be good citizens. So I challenge each and every one of them to take on the task of good citizenship along with donning the mantle of a lawyer, and I challenge them to begin to create in law school the types of communities they're going to create when they're out practicing law and living their professional and personal lives.

I do that because I believe that lawyers have a great role to play in healing the divisions that exist in our society. And I believe that you can represent your clients forcefully and ably and still work to bring society together. In these days of widespread bashing of lawyers and criticism of the justice system, there is, understandably, great reluctance among us to step into public debate about divisions in our society, and great reluctance to make oneself a target, but there's too much at stake to withdraw. There is too much at stake to let

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Wailea, Wailea, Maui, Hawaii, February 22, 1996.

*Dean and Professor of Law, Ohio State University College of Law; author, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK.

other people handle the problems. And I urge the students and lawyers to step out to help solve these problems because I know firsthand what a divided society is like; I tried to write about it in my book, *Life on the Color Line.*

At age nine, my life was truly privileged. I was the son of a wealthy, white restaurant owner in Virginia. I went to whites-only schools and whites-only skating rinks and whites-only theaters, and I bought whatever I wanted whenever I wanted it. And I took all of that for granted as part of my birthright. I saw no barriers in my life or in my future, and I felt that I could do or be anything I wanted to be.

Though I grew up in the rigidly segregated South, my family lived near black neighborhoods, and I saw the black schools, the black swimming pools, and the black movie theaters. I saw that they were very different from the ones I had access to. But I never considered the injustice of the situation until my own world began to unravel at the age of ten.

My father's drinking exploded into full-blown alcoholism, and my mother fled in the middle of the night from his beatings. She took a younger brother and sister with her and left me and my brother Mike with my father. I learned to cope with living with an alcoholic, and I saw the peaks and the valleys of emotion, the contrasting loving and hostile attitudes, and I daily lived the constant turmoil that is part and parcel of an alcoholic's family.

Up to the time my mother left, we lived a life of total economic security. My father's success was enormous. He had a restaurant, a beer tavern, and even a septic tank truck, which ironically he won in a craps game. In Alexandria, Virginia, he was the man with the Midas touch—everything turned to gold. In 1951 he had a gross income of $50,000, and everyone here knows that that was real money in those days. Six months after my mother left, he lost it all—the restaurant, the tavern, the Alexandria townhouse, even the septic tank truck—and we ended up ducking and dodging bill collectors and hiding the car from the "repo" man. My only meal each day was a twenty-five cent school lunch if, and I mean if, my dad could beg two quarters from passing strangers as my brother and I waited to go to school.

Although the loss of my mother and the hard economic fall were devastating, the greatest change in my life occurred in January of 1954. That change occurred as my brother Mike and I sat huddled together at the rear of a Greyhound bus racing from Washington, D.C., to Muncie, Indiana. Mike and I thought we were going to visit my mother's parents, who lived in Muncie and with whom we had spent every summer and every Christmas. And we thought that we were about to escape the poverty and the anguish of Virginia. As that bus sped across Ohio in the dead of winter, my mind was on Muncie because I knew without a doubt that it was the place where I was going to be saved.

So as we sat at the rear of that Greyhound bus, all of my thoughts were ahead of me. I was certain that my mother's parents would take care of me even though she had abandoned my brother and me. But just outside of Dayton, my father leaned across the aisle. "Remember Miss Sallie?" he asked. And I did remember her. She was a tall, thin black woman who had worked as a cook in our restaurant—a maid and helper, not a person of importance. He leaned even closer and said in a whisper, lest he be overhead by the white passengers on the bus, "She's my mama, and she's your grandmother." I was in a state of shock. The black woman I thought of as a cook was my grandmother and I never knew it. I resisted, I protested, I refused to believe him, but for the first time I looked closely at my father.

He had bronze skin and wavy hair. Mom had said he was Italian or Greek. It was all kind of fuzzy, but the memories started to filter back to me. I began to recall talk about his passing as a Greek boy called Jimmy Willmatis during the days he spent on the Boardwalk in Atlantic City in the 1930s. Then in Virginia he had become Tony Williams, an Italian paisano. It was all interesting, but that bus ride to Indiana, the ride that changed my life forever, occurred in January of 1954, before the Supreme Court's decision in *Brown v. The Board of Education*, and I did not want to hear anything about being black because I knew, even at the age of ten, how the rewards and the benefits of America are structured: Life is better if you're white.

Try as I might, I was unable to resist the truth of my life and the truth of my heritage: According to the social norms and the laws of America, I was black. And I remember my father's words that afternoon in January of 1954 after he revealed our heritage to us. He said, "Life is going to be different from now on. In Virginia you were white boys. Now you're going to be colored boys. But I want you to remember that you aren't any different today than you were yesterday. Still, in Indiana, people are going to treat you differently."

My brother and I arrived in Muncie that afternoon uncertain about our future. Once we stepped off that bus, we saw a Muncie we had never seen before. Instead of traveling to the new suburban housing development of our white grandparents, we trudged, forlorn and totally confused, down Muncie's racial dividing line, Madison Street. On the west side lived poor whites, on the east poor blacks. Even the projects were segregated in those days. And as we made our way deep into the heart of Muncie's black ghetto, I hoped that the change of address from Pitt Street in exclusive Old Town Alexandria to my black grandmother's home at 601½ Railroad Street in Muncie—a two-room shack that faced the tracks and shook every night when the freight to St. Louis roared by—would not change my life. I not only hoped; I prayed. But my father's words, "People are going to treat you differently," were prophetic.

I had not changed but everyone thought I had. Once my ancestry was discovered, America's "one drop" law and custom prevailed. I was treated differently. At first I resented it. I thought I had as much right to be white as my classmates. Hell, I had been white in a segregated society. But try as I might to be white, Muncie was dedicated to preserving racial boundaries, and there was always someone willing to police those lines and to reward merit only if the achiever was white. Though that was a lesson that I learned time and again in Muncie, the first person that I saw sacrificed on those razor-edged boundaries was my own father.

He had had a year of college at Howard University and was an excellent writer and speaker. We returned to Muncie in the middle of an election campaign and my father offered his services as a speech writer for a local political party, with the hope of a job after the election. We were hungry and we were destitute, and he would do anything he could to provide support for his family. He spent most of that first summer drafting and redrafting position papers, and I remember a glossy brochure that he brought home and proudly showed me. The party officials lavished praise upon him, patted him on the back, called him Shakespeare, touted his brain power and intellect. Then, when they took office, he too stepped forward to take his place in the winner's circle and was offered a City Hall job—as a janitor for $50.50 a week. After that he never made more than $1,000 a year. In 1954, at age forty, his life was over. Though he lived to age sixty-one, he was only a shell of the man of ambition, of wit, of skill and cunning who had taken the Virginia business world by storm. In Muncie he had hit the color bar.

We found Muncie still under the powerful influence of the Ku Klux Klan. The Klan was not only anti-black; it was also anti-Jewish and anti-Catholic, and led by some of Muncie's most prominent lawyers and public officials. In the midst of all this hostility and rejection, my brother and I tried to reach out to our white relatives in Muncie for a lifeline, for hope. And we pleaded with my mother's mother, my white grandmother, to take a message of our suffering to our mother, only to be rebuffed by her curt declaration that she didn't carry messages for niggers.

For most of us there is someone who reached out to us, and even in some cases saved our lives. My brother and I had our savior in the form of someone who understood injustice but lived commitment. She was a 52-year-old black woman from Grady, Arkansas, with an eighth-grade education, Dora Wheatley Terry. And she came into our lives as we struggled to connect with Miss Sallie, our black grandmother.

There had been no joyous reunion with my black grandmother when we stood penniless and broken at the door of her tar-paper shack at 601½ Rail-

road Street. She was angry. She had been denied by her son and daughter-in-law, and my brother and I had to pay the debt of humiliation and desertion that she had suffered from my family. It was in Grandma Sallie's hostile, angry, tension-filled shack that Miss Dora appeared as an angel to two affection-starved boys seeking a kind word or just a friendly face.

At first, deep in the depths of my own misery, I didn't pay much attention to her. But her daily visits soon became the bright spot of our day. Every evening between 6:30 and 7:00 we sat beside Grandma Sallie's potbellied stove, our stomachs rumbling from a sparse meal, and we raised our heads hopefully as we heard the smack of the gate against the fencepost. Miss Dora's smile filled the doorway and her shadow cast a calmness over that shack, but most of my attention was riveted on her tattered shopping bag. I relished the evenings when a small piece of homemade cake or pie, baked earlier in the day for the white family for whom she worked, was lifted gingerly from deep inside that bag. It was one of the few times in those days that I let a smile fill my face.

But the treats were more than supplements to meager meals; they were small acts of kindness that showed someone still cared about us. Later she told me that she could hardly hold back the tears when she walked into that shack and saw my brother and me cowering in the corner of the small room, absolutely bewildered by the poverty and the anger that we faced from whites and blacks alike. Today, when I think about that offer of love, tears come to my eyes. She was a 52-year-old widow, not related to us, working six days a week, ten hours a day, for $25. She had virtually nothing but was willing to share everything she had with us. And with no thought of reward or recognition, she took us into her home and made us her family.

There weren't any legal formalities—adoption, custody, guardianship. Those words were foreign to her. They are part of my profession now, but all she saw were two little boys in need. And she took my brother and me by the hand, gave us a home, and gave us love.

Often I'm asked how a mixed-race boy growing up in abject poverty, shunned by both blacks and whites, could earn five college degrees and become dean of a major law school, and there's only one answer to that question: Miss Dora. While I learned many great things during my years of school and twenty-five years of teaching, my most important lessons in life were learned from her. The one character trait that has carried me farthest is commitment, and I learned commitment from watching her walk to her domestic job six days a week, fifty-two weeks a year. She made that trek in winter and summer, in good weather and in bad, whether she was sick or not, because she knew that two little boys absolutely depended on her. And though she owed us nothing, she willingly accepted the responsibility of being our mother.

Often I waited for her on the so-called colored side of the railroad tracks, and I will never forget seeing her figure in the distance, just turning the corner, beginning the slow walk home, her dress softly flowing in the breeze, her shoulders drooping from the day's toil. Often it looked as if she could barely make it, but she would finally reach the railroad tracks and hand me the tattered shopping bag.

Not even once did I hear her complain about the meager salary she earned or the hours she labored to get it. She was a marked contrast to my father, who always exhorted me in his bombastic, alcohol-laced oratorical tones, "Never sell yourself cheaply, son. Your labor is all you have to give." While I marveled at his oratory and negotiation skill, I learned that he did not have much staying power, especially at the menial, mundane jobs that were standard for Muncie's blacks. Miss Dora knew that the coins tossed her way were what made the difference between starvation and survival for my brother and me. In the vernacular of our times, my dad talked the talk but Miss Dora was the one who walked the walk, and that made all the difference in the world.

She tried to do all she could, but the futility of our existence made Muncie a hard place to have dreams. And it is the futility of those times that I think of when I speak to each entering law school class. There were laws that might have rescued us and helped Miss Dora and laws that might have protected us from the harshness of life in the black housing projects, but the law was irrelevant. We had no way to learn what it was; we had no lawyer available to help. Miss Dora did the best she could, but we learned that many doors previously open to my brother and me as white boys were closed when we were black boys. And when I wanted to be admitted to an honors course in high school, the school officials would not recognize a request from Miss Dora to place me in those classes because she had no legal relationship with me, though in every real sense she was my mother. I had to find my father, sober him up, and drag him to school to make that request. A lawyer might have arranged legal guardianship for Miss Dora, a simple thing that could have changed our lives considerably. Although I do not know for sure, I now suspect that Miss Dora could then have gotten help from welfare officials with her nearly impossible job of raising two teenage boys on $25 a week.

As an adult, I returned to Muncie to look at my school records, and I saw that school officials had noted that I needed glasses as early as elementary school. The lack of welfare benefits meant that I was not able to get glasses until I reached adulthood. I did not walk into a dentist's office until I was twenty-one years of age, and the only time I went to a doctor's office was when my football coach wanted to make sure a wound on my head was stitched in time for a game. The only time black basketball or football players could enter

downtown restaurants was when our team pictures were posted on the inside of those plate-glass windows. Laws mattered only for those with the ability to enforce them. For us it was as if there were no laws; we were closed out.

Imagine my surprise when I learned in law school for the first time about the illegality of many of the practices that created such despair and hurt for me and those I cared about during those years in Muncie. I wondered then whether access to lawyers could have saved some of my friends whose lives were claimed by the Muncie housing projects.

I told you that from Miss Dora I learned one of the most important lessons that I would ever learn—commitment, even in the face of adversity. She taught me this in both her words and her actions. She also taught me not to let the anger build within me but rather to focus my energies on productive things. She gave me direction, or helped me keep my direction. Some of my boyhood friends lacked direction. When I think about them, I remember how many were lost to drugs, to alcohol, and to apathy. Doors were closed to some of them; others failed to take advantage of the opportunities available, but they're still a tragic loss. I remember them all. I remember their names, I remember their faces, and I remember their anguish.

The same year that I became a deputy sheriff at age nineteen I took one of my best friends to the Indiana State Reformatory in shackles and chains, to serve time for armed robbery and assault, and I took no solace in his last statement to me: "Greg, if somebody had to take me to prison, I'm glad it was you." All I could ask was how could everything have gone so wrong. I remember a cousin who died of a heroin overdose given to him by rival gang members. I remember his brother being sentenced to prison. And I remember my own brother, Mike, lost to the struggle, shot and blinded by a drunk in a barroom brawl in Indianapolis.

Many of my friends from Muncie could not deal with the poverty and the racism, the constant adversity. My own father, while he had hope for me, lacked the traits to stand up to the adversity he encountered and succumbed to a life of alcohol. My grandmother directed her anger at my brother and me for the injustice that she felt she had suffered from my family, and she showed little love because of the cloud of anger which had consumed her.

Also in the face of adversity, my mother's mother could not reach across Muncie's racial barrier to comfort her own grandchildren. Perhaps she was afraid of what people would think if they learned that she had two mixed-race grandchildren. Whatever the reason, she could not conquer her racism and her prejudice, even to reach out to her own grandchildren. My black grandmother and my white grandmother lived within two miles of each other until the '80s, yet they never spoke to one another.

It was Miss Dora who stared adversity in its face and did not shrink from it. She did not become angry and bitter. God gave her a large heart. Her goal was simple: to make life a little easier for the two boys who trudged along behind her. We all face adversity to some degree, and I learned it's how we choose to face it that shapes who we are. I've seen family and friends become bitter, angry, and broken, and I saw one humble woman rise to the challenge.

When Miss Dora saw the pain of two little boys, she did not say that people are happiest with their own kind; she did not say that it was not her job; she did not say that she lacked time or money; she did not say that it was just a drop in the bucket, though in a real sense it was. She endured the scorn of her friends and relatives and took in two black boys who appeared to be white. She did what I try to get my beginning law students to do—make a difference in their own communities.

Every responsible lawyer I know espouses the view that the poor as well as the rich should have access to lawyers, and we lawyers have not meant to alienate people who cannot afford us. We have not meant to leave them at the mercy of the unscrupulous, but that is what has happened because access to lawyers is inadequate. Our efforts head in the right direction; they're just insufficient.

In spite of the pain of my early years, my life has exceeded all my expectations. Still, while I am proud that the book I wrote about those formative years has become a best seller and will soon be made into a movie, I feel great pain for the thousands of children who are still mired in poverty. There are girls and boys out there who dream to be lawyers as I did, or to get any job, and yet have no real hope. Through no choice of their own, their families disintegrate. They have not chosen whether people will discriminate against them or take advantage of them. They did not create their own poverty. As one former senator said, "We seem to have a feeling in America that if you're poor you ought to be punished." He continued, "Well, I've been poor, and being poor is punishment enough."

It's hard to dream when you are closed out. It's hard not to become bitter and alienated. Whole segments of our society are closed out from the legal system. They are told, "Work through the system," but the fraud of that statement leaves a bitter taste when it is clear you are on your own, with no one to guide you over or around the obstacles that are placed in your way.

Let me close with a final thought: People often ask me, "What did Muncie do to you, Greg? What was its effect on your life?" When I was eighteen years old, I sat in a white lawyer's office where my dad had worked as a janitor from time to time. My dad, the lawyer, and I were trying to figure out a way that I could go to college even though I had no money. The lawyer suggested an appointment to a military academy, but as the son of an unemployed black janitor, I had no political connections. That lawyer picked up the phone and began

to dial the Indiana congressman in Washington, D.C. As he made that call, I sat in a state of shock, because in the eight years that I had lived in Muncie, the lesson I had learned from Muncie and had come to believe was that my life was not worth a long distance telephone call. It was at that moment that I knew I really wanted to be a lawyer, because I wanted to be able to make the same call one day for a kid who had absolutely nothing but dreams. I wanted to be able to show another person that his or her life had value and merit.

GLOBALIZATION AND ITS IMPACT ON LEGAL EDUCATION

Pamela Brooks Gann*

In the last few decades the United States has shifted from a domestic manufacturing economy to a global service economy. The shift is reflected in the evolution of American corporations to multinational corporations and the global leadership of United States firms in many service fields, including legal services. These shifts will only intensify as we move toward the 21st century.

Asia, outside of Japan, is expected to grow at seven to eight percent and to require $1 trillion in new capital investments in the next five years. These capital demands will be met from the private sector, which will take private savings from throughout the world and, through private capital markets and financial services institutions, deploy them where they are most needed. Areas outside the Organization for Economic Cooperation & Development and Asia are expected to grow rapidly also, causing a large demand for capital there as well. Even in the West, significant capital needs still exist, as illustrated by the privatization of the telecommunications industry in Germany. The financial services industry in the United States will be among the most important actors in these global capital markets.

International trade flows are also rapidly increasing. With the lowering of trade barriers in many of the fastest growing parts of the world, the development of regional trade areas like NAFTA, and the transformation of GATT into the World Trade Organization, international trade should expand, so long as open financial markets are maintained. These characteristics of the global economy enable nimble corporations to combine capital and labor in locations that favor the highest quality production at the lowest total cost and that take advantage of the lowest available trade barriers.

Parallel to these trends are the revolutions in information technology and the transformations taking place in global telecommunications, which will become the largest industry in the world. Capital and financial markets and telecommunications are still affected, however, by serious global issues: continued barriers to free trade and investment in these sectors; too much government monopoly; and lack of intellectual property protection and evolution to fit the new technology in most countries. Often domestic regulation, and international regulation to the extent that it exists, can retard the creation of natural linkages between financial markets and services and information technology.

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The major driver of what happens in the development of capital markets and financial services may be information technology and telecommunications. For example, we may discover in the future that Microsoft has become the largest financial services deliverer in the world.

At the same time, tremendous, darker issues exist. Development throughout the world is causing serious environmental degradation. The projected environmental goods and services market is expected to be at least $600 billion by 2000. The gap between the "haves" and the "have nots" is widening, both domestically and internationally. The income spread between countries creates a threat that demands assiduous attention, because if the "haves" do not share more with the "have nots," huge immigration and refugee flows can occur. If funds do not go into the "have not" countries, then people are going to come out. Serious ethnic conflict and human rights violations occur daily. Nuclear proliferation is a threat to world security.

All of these significant issues that I have just identified are global. Moreover, all are legally intensive problems for national governments, international organizations, and the huge private sector occupied by multinational corporations. The best law schools in the United States expect to work in the most dynamic and difficult parts of the domestic and world political economy. These fields—global capital markets and financial services, telecommunications and information technology, the environment, ethnic conflict and human rights, international security—present some of the most pressing issues that they will be addressing.

The curricula of the high status law schools unsurprisingly include a great deal of attention to business organization and the modern economic regulatory state, including the regulation of securities markets and financial institutions, telecommunications, the environment, and intellectual property. Many courses focus on international trade, business transactions, and forms of transnational dispute resolution. Most graduates of these schools will encounter international and foreign law in their practice. For example, a practitioner in civil litigation likely will encounter foreign parties, the need to discover evidence outside the jurisdiction of the United States, or the need to consider international arbitration. In all these instances, the U.S. civil litigator will come into contact with foreign legal systems and lawyers. A practitioner in corporate law increasingly works with American clients making outbound foreign investments and foreign clients making investments in the U.S. economy, thereby servicing the needs of global corporations.

Because transnational lawyers will inevitably work with foreign law and lawyers, law students are encouraged to study comparative law. It introduces students to other legal systems and the substantive law of other nations, and by showing how similar problems are handled differently by other legal systems,

it serves as a mirror back on our own system. Often, in fact, comparison shows the distinctive character of American solutions to legal problems and permits us to evaluate them more knowledgeably. Comparison, in short, permits us to see things we would otherwise take for granted.

Students who expect to engage in transnational practice are encouraged to continue to improve their foreign language skills and, in particular, to take law courses taught in foreign languages. The percentage of foreign students enrolled in high status U.S. law schools may well increase from 10 percent to 20 percent, thereby enabling American students to work directly with foreign students in the curriculum and to participate in a foreign language table at lunch. Imagine the cross-cultural understanding that is gained when law school classes composed of both American and non-American students are able to simulate transnational negotiations between lawyers from different countries.

Lawyers who service global corporations through large law firms are subjected to an extraordinarily demanding environment. Beginning associate lawyers in these firms are expected already to have mastered excellent legal writing and communications skills and to possess the finest analytical skills. They work in a fast paced environment, utilizing sophisticated computers and information technology through which their legal work is performed. To succeed, they must also possess the management and interpersonal skills required to be effective in a large, complex organization servicing the most talented and demanding clients in the world. Young lawyers must also be comfortable working in an environment that reflects a great deal of uncertainty. The internationalization of practice and the rapidity of technological and business change create significantly higher levels of business uncertainty for clients and law firms than in the past.

We already live in an interdependent world—economically, legally, and in other ways. It is perhaps false even to categorize really important problems and issues as domestic or international. But this distinction has not yet disappeared in the organization of the legal profession. Large U.S. law firms service global corporations. Their young lawyers, whether American or foreign, are almost all trained in American law schools, and mostly in high status law schools. These schools possess an educational comparative advantage in the training of lawyers, both domestic and foreign, for the 21st century. They seek young women and men who have taken the challenges of the global economy seriously in their undergraduate work in preparation for graduate professional training. The well prepared young lawyer—through a combination of undergraduate work and study abroad, and superb legal training—can be among the finest legal professionals in the global economy.

EXPERIENCES OF A FEDERAL PROSECUTOR†

Wendy Wysong*

I think I must have been predestined to become a trial attorney and perhaps even an Assistant United States Attorney. You can ask my former first grade teacher, Barbara Keating, Con's wife. It's reflected in my report card: "Never stops talking"—although I think the only thing I tried then was her patience.

Actually, my first legal jobs had a lot to do with my becoming a federal prosecutor. I clerked for a federal district court judge, Stanley Harris, who had been the United States Attorney for the District of Columbia. He told me that his term as a U.S. attorney had been the best years of his career, a statement echoed by Gerry Uelmen when I met him here two days ago. After my clerkship, I went to Hogan & Hartson, a large D.C. law firm, where I worked with a member of your society, Jack Arness. I learned that the best trial lawyers at the firm worked with him and that two of the best young trial lawyers had been assistant U.S. attorneys. That experience was great, but what it really did was whet my appetite for a steady diet of trial work.

So I left private practice and became an Assistant United States Attorney in the District of Columbia. In D.C., the U. S. attorney's office operates as a local district attorney, as well as the federal prosecutor, since the District is a federal city. Within two weeks of joining the office, the trial work diet that I had wanted looked more like an eating disorder. Our training consisted of being thrown to the wolves in D.C. Superior Court. I was put directly into Superior Court to try pickpockets and prostitutes, and petty thieves, drug abusers, and bullies. My favorite was a guy who called himself Sharkhead. Frighteningly apropos of his name, he had bitten his lover for touching his record collection. (I always wondered if the police had coined the nickname after the fact or if he was trying to live up to it).

In the beginning, I also tried a lot of gun possession cases, usually just concealment. I kept wondering how come, with all these guns around, no one was getting shot. After a short time I graduated to robberies and drug conspiracies and shootings. No murders yet; so instead of wondering why no one was getting shot, I began to wonder how come everyone had such bad aim, because no one was getting killed. A year later, I was "promoted" to homicides; and I hadn't been long into prosecuting mostly gun-related murders when I started wondering how come every time a gun goes off someone gets hit between the eyes.

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Working in the homicide section presented an interesting contrast between my work life and my home life with three kids in suburban Virginia. By day, I dealt with gruesome stabbings and maimings, crimes against innocent children the horror of which went beyond comprehension. By night, I attended PTA meetings and led two Girl Scout troops. You can see the potential for conflict: I remember the time I was enthusiastically discussing the details of my latest ax murder with a fellow prosecutor in a grocery store when I finally noticed the horrified looks of the nice people with civilized jobs in the line with us.

Working with noncooperative witnesses and those who were otherwise AWOL has improved my acting ability and sense of theater—an important skill for trial lawyers. One time, I was accused of intimidating a defense attorney and a defendant into forgoing the defendant's right to testify to facts contradicted by his own previous statements. I, of course, had disclosed the statements and the fact that I would use them to impeach if the defendant testified, as I am required to do. The defendant did not testify. On appeal before the D.C. Circuit, defense counsel presented a fearsome case of threats and intimidation by the prosecution, pounding on the podium which he had raised to accommodate his 6′11″ height. When my turn came, I decided not to lower the podium. Stretching to my full height, I peered over the top of it, like Queen Elizabeth. Even though the Court of Appeals is supposed to rule on the record facts, I can't help but think they took into account the facts facing them. Ultimately, they decided that defense counsel had understood exactly what I meant when I explained the meaning of suborning perjury. And besides, they added, if he was so intimidated and frightened why did he wait until after conviction to complain?

After three years in Superior Court, I realized it was time to move on when I stopped blanching at autopsy pictures and instead attended the autopsies, discussing camera angles, lenses and poses with the pathologists for more effective (or as defense counsel would say, "graphic") presentation to the jury.

I then moved up to federal prosecutions, with a section whose focus is on public corruption and government fraud. This is the section that prosecuted Marion Barry and began the investigations of the House Bank, the House Post Office, Joe and Enid Waldholtz, and Ruby Ridge.

Besides these highly publicized investigations, we also "do" local corruption. Typical of these investigations was the ring of prison guards I prosecuted who were smuggling drugs into the jail, to the prisoners I had spent the last three years convicting and sending there. Ultimately, through a two-year undercover investigation using cooperative prisoners, we convicted over twenty guards at the D.C. jail. In the lectures I give to new prosecutors on jury selection, I have added prison guards to my list of questionable jury candidates—maybe they just spend too much time with the career criminals they were guarding.

These are the typical cases prosecutors deal with in my section. But we deal also with corrupt elected officials. Besides Marion Barry, in the last few years we've prosecuted a city councilman and several members of Congress.

Compared with cases involving corrupt government bureaucrats, the issues raised in prosecuting legislative corruption are quite complex. Chaucer, very clearly but I guess somewhat optimistically, wrote, "The lawmaker ought not to be the lawbreaker."[1] In other words, the lawmaker wrote the law, he ought to know better than to break it. (The Supreme Court, by the way, declared this particularly obvious prosecution argument constitutionally off-limits—but I'll get to that.)

I am currently involved in the prosecution of this type of lawmaker/lawbreaker—three congressmen who are alleged to have embezzled funds from the House of Representatives post office, expensive merchandise from the House stationery store, and in one of the cases, funds from his official allowance to buy cars and pay employees for doing personal and campaign work. I cannot talk specifically about those cases, because the investigation and prosecution are ongoing—trial dates are now set for May and June, but I can talk about what I've learned about prosecuting legislative corruption.

My experience has taught me that what looks like thievery to taxpayers and to prosecutors can be characterized on Capitol Hill as a perk, a salary supplement, part of the job, "what everyone else does," and "nobody else's business, but ours."

Everyone understands that it's wrong for a private sector employee or government bureaucrat to charge his personal expenses such as his family's cars and his family Christmas gifts to his office account. If a private-sector employee puts people on his office payroll who do no work or personal work, everyone understands that guy is going to be in a world of hurt if someone finds out. The laws are pretty clear about embezzling money from a corporation or a government agency. And if he files false reports with a federal regulatory agency, like the EPA, and gets caught, the false statements statute[2] is pretty straightforward. It can get a little complicated if the corporation has internal rules that might be seen to allow for some of this, but no court is going to have any trouble interpreting those rules and applying the law to this offender's conduct.

It gets a lot blurrier, however, when it's a congressman doing all those things, instead of a private citizen. And it seems there are a number of reasons for that. One big reason is the constitutional separation of powers that prevents the executive branch—me—and the judicial branch from interfering with the legislative branch—the Congress. A prosecutor can't do anything that would

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[1] GEOFFREY CHAUCER, *The Man of Law's Tale,* THE CANTERBURY TALES (1386).
[2] 18 U.S.C. § 1001.

interfere with congressional business or with a congressman doing his job. More about that in a moment.

The other reason things are different in congressional corruption cases is more factual than legal. You'll hear it if you know anyone who has worked on Capitol Hill: "It's a different world there," they say. Basically, what this means is that normal rules of behavior don't seem to apply. This used to be more the case when patronage was still around, but even now everyone up there knows which side his bread is buttered on and how much is at stake if one loses favor. For those working in this sector for any length of time, the lines between what is done "officially" and what is "campaign" or "personal" can become virtually invisible. At least, that's what they say.

What the "welcome to my world" mind-set led to is the following abuses:

- Misuse of congressional staff: Rep. Charles Diggs was convicted in 1978 for putting on his congressional payroll people who spent their time working at his funeral home. He also artificially inflated his employees' salaries and required them to kick back part of it to pay his office rent. He never denied doing this; he just said he could because no one told him he couldn't, and what difference did it really make. The jury thought it mattered and convicted.
- Using campaign funds for personal expenses: Sen. Tom Dodd was censured for using $116,000 campaign funds to pay personal debts. The problem was, he didn't wait until he retired to use that money. Until 1992, members could keep whatever they had left in their campaign war chests upon retirement. No wonder the line between personal and campaign expenses seemed blurry. Campaign funds have been used for trips to Mexico and Europe, gym dues, cookbooks, bikes, a tuxedo and makeover, and I hate to tell you, golf expenses. Here's one idea: hire golf pros for a golf outing, call them "campaign consultants" for the outing, and charge it to your campaign. Believe me, it's been done.
- There used to be all sorts of allowances that could be cashed out and kept for personal use. Before 1978, a member could cash out his stationery, travel, and miscellaneous accounts to the tune of $10,000 as a salary supplement. Stamps were a particularly abused item. When members retired, some took hundreds and thousands of stamps with them, charged to their account on their last day in office. It was a sort of "postage for life" perk.

  Until two years ago, there was a taxpayer-financed stationery/gift room. Members could buy items at cost, though if the items were purchased for the member's personal use, the member was supposed to reimburse his account plus ten percent. The problem was that no one told the

members to reimburse the account, just as no one told them how to use the people on their payroll, etc. Besides paper, pens and pencils, and other standard office supplies, some of the items offered included jewelry, sculpture, clocks and watches, suitcases, wallets and purses, and Mont Blanc pens. At Christmas, you could do all your shopping there at cost or less. Lenox china was offered at half price. If they didn't have the pattern you wanted, they would special order it.

Which brings me to another sidenote about being the only woman on a four-person prosecution team. These guys are Harvard/Yale and very bright, but I must have spent four hours explaining what every woman who has planned a wedding or consulted a bridal registry would already know: 48 five-piece place settings of china in eleven different patterns purchased over a two-year period were not being used for congressional dinners at a member's home or office—they were wedding presents from the member to various happy couples. Don't even get me started about how long it took me to explain charger plates. Lest I be accused of sexism, it took me almost as long to explain car leases and freewheeling car dealership financing to my sheltered colleagues.

- Free checking, loans, and financing provided by the House bank were long-standing perks that members enjoyed until a few years ago. One reason for the Republican revolution, I think, was nothing more than the angry votes of every one of us not in Congress who has bounced a check and actually had to pay the fee.

What we hear as a result of these long-standing practices is the "everybody does it" defense—an interesting pre-trial argument, but it probably won't be very compelling at trial. As one defense lawyer described this defense, "People are going to recoil against the fact that it is so widespread in the same way they're recoiling about everything else Congress does these days."

Another factual pre-trial argument—the "no one told me not to" defense—doesn't create much empathy either. Of course no one told you. Who is in any position to tell a twenty-year member of the House how to interpret the laws and rules he wrote, thereby implying that he was breaking them?

The legal defenses raised in cases of congressional corruption are more challenging. The defendant legislator argues that the entire structure of constitutional government—the separation of powers—is jeopardized by judicial proceedings concerning their congressional funds because it interferes with their ability to do the job they were elected to do. In other words, how a member spends her congressional allowance is Congress's business alone.

Two constitutional provisions are relied on to make this argument.

First, the members are protected by the "speech or debate clause," which says that no member shall be "questioned in any other place" concerning a "speech or debate" in either house. This protection comes from the desire of the Constitution's framers to protect candor in legislative deliberations. It relates to "legislative acts," broadly defined to include committee work, communications with other members, and other acts directly relevant to deliberation about legislation. Thus, if conduct is linked to a legislative act, the member is protected.

This leads to the argument that the prosecution cannot question "staffing" decisions arguably connected to the exercise of legislative authority, such as hiring a legislative director. But taken to the extreme, any staffing decision can arguably be legislative so that any prosecutorial look-see into ghost employees, dog-walkers, and chauffeurs would violate the Constitution. For example, Wayne Hayes was never prosecuted for employing a mistress, Elizabeth Ray, who said, "I can't type, I can't file, I can't even answer a phone." It also protects against that obvious prosecutorial argument: "You wrote the law, you must have known what it meant when you broke it!"

The other protective shield is the "rule-making clause," which says each house shall make its own rules and punish transgressors. If there is an internal House rule that governs the conduct charged, the courts can't interpret the rule to determine a violation, because only Congress can interpret its rules. Going back to that corporate employee or government bureaucrat who charges his office for a car, the court can interpret the internal corporate rule to discern materiality and intent; but it's "hands off" the congressional rule. And even if the court is allowed to interpret the congressional rules, the rules as passed—so argues the defendant member—are so vague and transient that there can be no standards by which a court could decide whether a member has violated them.

The answer, of course, is, as Sam Ervin put it, "There is nothing in the Constitution that authorizes or makes it the official duty of a congressman to have anything to do with criminal activity."

So far, the immunity provided by the speech or debate clause has proved to be very limited. The Supreme Court and the D.C. District Court and Circuit Court of Appeals have held that the clause does not prohibit inquiry into conduct simply because it is done by a legislator, regardless of whether it is closely connected to the process of legislating. As one judge understated it, "precedent seems to be lacking for the proposition that immunity attaches to a congressman's decision to hire employees whose duties consist of photographing his daughters' weddings, mowing the grass or other duties."

As to the rule-making clause, courts have found that the Constitution does not prevent them from interpreting the congressional rules, so long as they can be confident of their interpretation. In other words, where conduct self-evi-

dently violates the rules, the case may proceed to trial. An ordinary criminal cannot escape the reach of the law merely because she holds legislative office.

There is, of course, a general ethics rule that prohibits the use of congressional funds for anything except the performance of one's official duties. They cannot be used for "personal, political or campaign purposes." To prevent such usage, more particular rules have been enacted prohibiting gift-giving, lavish office decorating, purchase of cars, employees doing campaign work for government pay, and the like.

This seems straightforward, but the life of a legislator is not seen as so easily divided among the political and official and personal as would be the life of a corporate CEO. As stated in a recent court opinion,

> The life of a congressman—as an incumbent legislator and perpetual candidate for office, whose official day ends only after a round of nominally social events at which he is obliged to appear, and whose weekends and holidays are only a opportunity to reconnect with constituents — makes the line between official work and personal life difficult to draw. Service in congress is not a job like any other, it is a constitutional role to be played upon a constitutional stage.[3]

And for some congressmen, all the world is a constitutional stage. Accordingly, just as having someone type and file helps members do their job, so too does having someone pick up laundry, drive family members around D.C., and work at campaign events vitally aid them in their performance.

The line between public job and personal life, you see, untied from reality, becomes invisible. In listing your tax deductions for business expenses, you and the IRS and your accountants can pretty readily figure out what are ordinary and necessary business expenses. Can you deduct lawn mowing at your vacation home and replacing the windows and reroofing your house as business expenses? Only if you really stretch. And you run a real risk. But if you were a legislator, you could make the argument, based on the Constitution, that you were just doing your job. An occupational hazard of the job, however, is that you may come to believe your own half-truths. But a jury would find it difficult to believe that even a legislator thought it permissible to charge vacation groceries to the campaign in case a constituent stopped by his beach house.

Although I'm not on the defense side of these matters, I've seen a lot, and there seem to be some clear lessons for defense attorneys with these types of high-profile lawmaking clients, which I give you for what they're worth.

1. The standard defense error of blustering and posturing during the initial conferences with the prosecution is compounded in these cases by attempts to throw the defendant's political influence around. It doesn't help move toward

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[3] U.S. v. Rostenkowski, Cr. No. 94-226, mem. op. at 22 (D.D.C. Oct. 14, 1994).

cooperation and resolution; it doesn't lead to open discovery; it hardens the battle lines and is really annoying.

2. Realize the case probably won't just go away. It will be assigned a high priority by the prosecution. Delay works in the defendant's favor in some cases as the evidence against him degrades, but it also allows the prosecution to discover new crimes to add to the indictment.

3. Be careful with joint defense agreements. Because everything your defendant client does is very public, it is going to look questionable for him and you, separate and apart from technical conflict violations, especially in the hypothetical situation where the congressperson is paying the lawyers for his staff members from his legal defense fund or where one lawyer represents numerous clients. These arrangements will be scrutinized based on required public filings, and if the staff members are not cooperative when they should be or their interests are not placed first, the lawyer will be seen as the pawn of the congressperson.

Even after the years I've put in investigating congressional corruption, I do not believe, as Mark Twain said, that facts and figures demonstrate that the only distinctly criminal class native to America is the Congress.[4] Nor do I believe that Congress is the last refuge of the scoundrel. These men and women, after all, are the ones who write the laws that keep me employed, and for that I am grateful.

In the final analysis, my job has provided me with a ready answer for the most difficult question a lawyer is asked. Most of you remember it. It's when your young child asks you, "What exactly do you do at work, Mommy?" When I was in private practice, I said, "I write briefs and I go to court." And then came the inevitable barrage of questions, "What's a brief, and what's a court, and why do you do this?" Now, I tell my five-year-old, "I put bad guys in jail." And it's with great relief that I note his satisfaction with my answer and an end to the questions. I'm obviously one of the Power Rangers.

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[4] MARK TWAIN, [1] FOLLOWING THE EQUATOR, ch. 8, epigraph at 98 (1897, repr. 1968) (vol. 5 of THE WRITINGS OF MARK TWAIN).

CHAOS IN THE LAW/THE LAW IN CHAOS†

Seymour Kurland*

Touch a flower and you disturb a star; a volcanic eruption in the Philippines damages a coral reef in the Red Sea; and the flutter of a butterfly's wings in the Brazilian rain forest results in a hurricane in Florida.

Examples of what is commonly called the chaos principle: All phenomena are interrelated, but events are never totally predictable or controllable—as in the movie "Jurassic Park," where dinosaurs could not be contained despite so-called foolproof security devices.

Well, what's so surprising?

Lawyers and judges are not strangers to chaos. Our very work is with the human condition, its unpredictability, adaptability, and constant change. We interpret and apply society's changing rules to adjust disputes and conflicts with some predictability of consequence and reward to preserve order and maintain society. So don't talk to us about dealing with chaos; it's our bread and butter.

But are we professionals confidently "moving with the music" and "hanging loose" in our daily dealings with uncertainty? I suspect not. Instead, it seems we are becoming ever more uncertain in our work and almost desperate in trying to impose some control on the uncontrollable.

For example, whatever happened to the contract that was less than fifty pages long, auditors' letters without page after page of carefully phrased qualifications, a simple will with some personal words of love and affection instead of one filled with technicalities that heirs can't understand, or even a simple one-sentence bill to a client for services rendered based on the fair value of the work done? Now, computers record what we do, timing each fraction of a minute, complexly billing it and even presuming to serve as a basis for our personal evaluation as professionals. Other machines immediately produce, reproduce, and transmit paper and messages with amazing speed. Has this, however, made life more productive, professional, simple, enjoyable, and less uncertain?

Trial work is even more extreme. Today in virtually every case, motions that have the slightest merit are routinely filed, and instead of a brief in support and response, we have added a reply, sur-reply, and, of course, follow-up letters of indignation to the court. Is it any wonder that judges with work tables piled high with stacks of white paper, facing heavy criminal dockets and bureaucrats constantly monitoring their disposition rates, devote so little, if

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any, time to oral argument, an institution we have always treasured? (One wonders whether personal dispositions suffer as case dispositions increase.)

In discovery, which was supposed to remove surprise and eliminate lawyer jousting to arrive at the truth sooner and fairer, we now have the following:

—Interrogatories, with prefatory pages of definitions, which are so voluminous and repetitive that most courts impose arbitrary limits despite legitimate variations of complexity in actual cases.
—Depositions, which, if uncontrolled in number and time, will go on for months on end.
—Thousands of documents that are computerized, categorized and summarized by topic, person, time, etc.
—Witness preparation by video with playback instruction, technical experts on the merits wherever permitted, as well as jury experts and mock trials where clients can afford them.

With all of this, have we attained any greater control and predictability in the disposition of any? Of course not!

In the real trial world, your best witness falls apart on the stand, even changing his testimony and hurting your case. Conversely, the nervous, quiet one becomes the unexpected star. The high-priced expert who prepared draft after draft of a report and was deposed for weeks becomes irrelevant and isn't even used. The judge unexpectedly decides to hear and rule on some issue, and you find yourself in the court of appeals on an interlocutory appeal that changes the entire nature and strategy of the case.

A key document is suddenly found or produced. Someone gets sick and postponement is not permitted, and an unsatisfactory settlement is necessary. The juror you personally picked and relied on is not on your side, and the one you were nervous about holds out for you until the very end.

The list can go on and on. But what better example than the O.J. Simpson trial, where the prosecutors' key witness carried the day for the defense. The fact of the matter is that it happens all the time no matter how much time and effort we spend in preparation.

I have come to conclude that in every case something completely unpredictable, something that could never have been anticipated when the case started, will always occur. I call this the Chaos Factor.

Ask lawyers with experience, and they will all agree. It has nothing to do with preparation. It has everything to do with life as it is.

Some years ago, I represented a manufacturer of computer chips. At a year-end Christmas party, the president of the company, feeling seasonally euphoric,

predicted an even better business year to come. His remarks were picked up by a stock analyst and published in a report to investors.

The company had decided to make chips for diode watches that were then popular, assemble the watches, and have a new, profitable product line. However, when production started, there was an exceptionally high and unexplainable rejection rate of chips as they were tested coming off the line. This delayed shipment of the chips to Bangkok, where they were to be assembled into watches. The chips finally arrived just in time for an unanticipated labor strike at the factory. By the time the watches reached the United States, it was too late to capitalize on the Christmas season and, soon afterward, the watches lost popularity. So instead of a banner year, the company reported a significant loss.

Federal Securities Act class-action cases alleging financial misrepresentations were immediately filed in six jurisdictions. Defendant filed motions to dismiss, and plaintiffs filed first-round interrogatories, document requests, and motions for appointment of lead counsel. Defendant countered with a motion to stay discovery, coupled with a motion to the multi-district panel for transfer and consolidation in one court. After argument before a panel of five judges, the motion was granted, the cases were consolidated in California, and the power fight among twenty or so plaintiffs' lawyers for lead counsel was resolved.

Discovery began. Next followed production of well over 100,000 documents (with, of course, objections, briefs, and arguments along the way) and the establishment of a document depository. First wave, second wave, and supplemental interrogatories, responses, responses to responses, and still more briefs and arguments. Depositions of more than 100 witnesses, some short, some for over a week, and many interrupted with calls to the court. Then came motions for summary judgment and for decisions on outstanding legal issues.

More than two years passed. As the trial was approaching, I happened, while at the plant one day, to reinterview a chemist in the production control department, who for the first time told me that on reviewing his records, he had discovered the cause of the extraordinary rejection rate of chips when manufacturing began. He had made a simple and elementary chemical error in the solution formulated for the test, which made it too strong and caused rejection of good chips.

I had finally discovered the butterfly that had become my legal hurricane.

This recognition of the Chaos Factor in law and the anxiety of ever-present uncertainly should not turn us into obsessive fact gatherers, paper preparers, and control freaks. Instead, it should serve to liberate us from the fear of uncertainty. It will always be present; so let's expect it, laugh a little at our own helplessness to control it, embrace it as still one more challenge in life and an essential part of our human condition. What fun would life be if it were completely predictable?

We can only expect even more to come. We are already a global community economically, and our next generation of lawyers will fly to Brussels and Tokyo on business, perhaps even more often than to New York and Los Angeles. So expect the Chaos Factor, and when it arrives, smile knowingly and use the positive energy of excitement to attack, rather than negative fear, in facing the ongoing challenge.

Good hard work prevails over chaos, which although significant, is never controlling in the long run. And that work, done with all we've got, is indeed our ultimate satisfaction.

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