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TRENDS IN JUSTICE, IN CANADA AND THE UNITED STATES†

Allan Rock*

I'm delighted to see so many Canadian barristers taking a prominent role in this Society. To my eye, the first and perhaps the most compelling evidence of your high standards is the pre-eminent quality of the Canadian members, some of whom you have inducted this week. By inviting them, you have secured the Society's reputation in Canada as a prestigious but collegial body that both acknowledges and encourages excellence.

Several years ago, I was "inducted" into the American College of Trial Lawyers. As Hymie Weinstein said, the term "induction" is not much used in Canada, and it caused some difficulty for me. When I received the good news that I was to be welcomed into the College, I was involved in a long trial and wasn't able to go the meeting at which the induction was to take place. The trial continued, and as the next meeting of the College approached, the meeting organizers were becoming impatient to know whether I would attend. They called from California one day when I had returned to the office after a long day in court. I was in the board room with clients. My secretary, not quite understanding the terminology, walked into the board room in a state of agitation and announced, "Mr. Rock, you really have to get on the phone. This is urgent. They want you to go to Miami to be indicted!" You can imagine the reaction of my clients. That took some explanation.

One specific benefit of the international aspect of your membership is that it is always valuable for lawyers, and indeed for judges, to have an opportunity to see how other countries are dealing with some of the same legal issues in different environments. In the case of Canada and the United States, that benefit is enlarged because our two countries, as you know, are close together in much more than just geography. We are two separate nations, but for much of our history, our ancestors walked a common road. Indeed, the founders of much of Canada outside Quebec were people from the thirteen original colonies who moved north as dissenters after your revolution. Now, more than two centuries later, our two nations comprise an interesting blend of similiarities and differences in institutions and national personalities. These characteristics are reflected in our justice systems.

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†Address delivered at the Annual Convention of the International Society of Barristers, Westin La Paloma, Tucson, Arizona, March 6, 1997.

*Minister of Justice and Attorney General of Canada.

With some exceptions, notably in Quebec, which has a different heritage and codifies civil law, the Canadian and American legal systems have common roots in the English common and statutory law. There are cultural and economic likenesses. We confront many of the same major legal issues. There are differences too, some of them subtle, some more obvious. I'd like to touch upon some of the features that are different and some that are the same.

THE ROLE OF ATTORNEY GENERAL

Let me start by explaining some of the differences that relate to my own portfolio in government and the career of my distinguished counterpart, Attorney General Janet Reno. The path to my job was quite different. Until about four years ago, I was a practicing trial lawyer in Toronto. Then in the general elections of 1993 I stood as a candidate, not to become Minister of Justice but to become a member of Parliament for the metropolitan Toronto riding in which I live. In that election a sufficient number of Liberal Party candidates were elected to constitute a majority in the Canadian House of Commons, and so we formed the government. It was after that election that the Prime Minister invited me to serve as Attorney General. This process takes longer and is more arduous than the one your Attorney General has to go through. I had to stand for nomination and be nominated by the party in my riding, run in the general election, become a member of the national caucus, and then take my chances on being appointed a member of the Cabinet. When I first met Janet Reno, I mentioned to her how much easier she had it just being plucked out of practice and named by the President as Attorney General of the United States. And then she reminded me of the process of Senate confirmation, and I decided our system isn't that bad after all.

There's another difference between my job and the role fulfilled by Janet Reno. The difference is well summed up in a cartoon I saw recently in the *New Yorker* magazine: A man at a cocktail party has two heads and he's good-naturedly answering the obvious question: "Well, actually, I wear two hats." I, too, wear two hats. I'm the Minister of Justice and the Attorney General of Canada. As Minister of Justice I'm the member of Cabinet who's responsible for framing policy relating generally to the justice system, and I'm assigned the task of developing new legislation touching on matters that relate directly to the administration of justice federally, the criminal code (which is national in Canada), matters such as human rights legislation, and aspects of family law. In addition, I'm required to certify personally, by signing a certificate, that any legislation brought forward by any member of the government is constitutional, assessed against our Charter of Rights and the Constitution of Canada. While Parliament is in session, a large part of my time is spent in the

middle of the political fray, on the floor of the House of Commons, advancing legislation and taking part in the debate—all in my capacity as the Minister of Justice. At the same time, I'm the Attorney General of Canada, chief law officer of the Crown, responsible for the government's interests in litigation, responsible for prosecuting or defending on behalf of the government of Canada. My role as Attorney General is apolitical by definition. It must be divorced from partisan politics. The question whether to commence or to stay a prosecution has to be addressed in the absence of partisan considerations.

The position of an attorney general who is both a member of a political cabinet and at the same time responsible for making independent decisions about prosecutions has preoccupied authors and commentators over the years. How can these apparently incompatible roles be reconciled? How should an attorney general approach a task that calls for impartial analysis in a sometimes highly charged political environment? Few have dealt with these subjects as insightfully as a man who is a former Attorney General of Ontario, Ian Scott. In the five years that he served in that capacity, he established a national standard for excellence among attorneys general. In 1989 he delivered a series of lectures about the nature of the office and of the role. A few words of his accurately and succinctly sum up the nature of the job:

> It's my thesis that an independent Attorney General should bring to policy making in government a particular concern for principle, for constitutionalism, and for rights. The Attorney General has a mandate in government apart from a prosecutorial role, a mandate to ensure adequate attention to issues of principle. It's wrong to imply that issues of principle cannot be a primary concern of persons in the political process. Indeed, my claim is that an Attorney General's special responsibility must be to ensure that issues of principle remain a central concern in policy making. An Attorney General's role, in other words, is precisely to ensure that democratic decision making in our community takes into account questions of human rights and constitutionalism.

The Attorney General must focus issues of principle on questions of politics. Those words are not just theoretical; they have an enormous practical significance, and there have been instances over the years when Attorneys General have had to confront them in a very real way. One thinks of Australia in 1977 when there was a prosecution against a former party leader, former Prime Minister Gough Whitlam. The Attorney General of the day had the power to stay the prosecution, and he was urged to do so by his Cabinet colleagues who were from the same party as the accused. In protest the Attorney General resigned, calling attention to his special role and the inappropriateness of the pressure. In your own country in 1973, Elliott Richardson refused on principle to follow instructions to fire a special prosecutor and instead went his own way. I am fortunate enough to hold office in a time when many of

these principles and standards are well understood and accepted; they are part of the creed, both in Canada and the United States. Recently, we Canadians adopted a Charter of Rights and Freedoms which enshrines many of the principles. The Charter begins with the words that Canada is founded upon principles that recognize the supremacy of God and the Rule of Law.

There's another element of the context in which I fulfill my role that is different from that of your Attorney General. A challenging feature of our parliamentary system in Canada, one that we inherited from the English, is the daily question period in the House of Commons. Cabinet ministers and the Prime Minister respond to any question that the opposition members wish to put relating to any aspect of the government's business. This is done in public, and the session is nationally televised. As a trial lawyer, of course, I have had some experience responding to questions about my brief, but at least that was done in the relative privacy of a courtroom, with only colleagues and perhaps a client to watch. In the House of Commons, by contrast, you're standing up in the national legislature, watched by the Prime Minister and the entire Cabinet, your own caucus, the opposition parties, the national press corps, and a million Canadians on television. The volumes of questions are of a different order of magnitude as well. Every year I confront 300-400 questions in the House of Commons relating to the justice portfolio. It's unnerving, especially for a newcomer. When I'm nervous, I remember the advice I got from a more experienced hand when I started. He said, "Remember, Allan, they call it 'question period,' not 'answer period.'" To grasp the political significance of the spectacle, imagine, if you will, that every day between two and three o'clock President Clinton and his entire Cabinet had to stand before Congress and respond live on national television to any question the representatives might want to put about the business of the federal government. It might outdraw even Oprah.

CONSTITUTIONAL LAW IN CANADA

A few moments ago I mentioned Canada's constitution. We've had a written constitution since the country began in 1867, but for most of the time it was a statute of the British Parliament, called the British North America Act. Until 1982, if we wanted to amend our own constitution, we had to go to Westminster and ask the British Parliament to pass an act amending it. All of that changed in 1982, when the British relinquished their authority over our constitution and we "repatriated" our own 1867 document. We added to it a Charter of Rights and Freedoms setting out the fundamental national principles of Canada, rights and freedoms possessed by all individuals in our country subject only to a collective interest in preserving our free and democratic society. Since then, the evolution of constitutional law in Canada has been in the fast forward mode.

Some of the evolution has moved us closer to you. In the area of constitutional criminal law, for example, there is now a close similarity between our two systems. The similarities include the requirement of warrant to search, the right of an accused to remain silent, the right to a trial within a reasonable time, the rights of indigents to be advised of access to state-funded counsel, an express prohibition against double punishment, and prosecutorial pre-trial disclosure of evidence. Still, differences between our systems remain. In our Charter, for example, constitutional rights are expressly stated to be subject to such reasonable limits as are demonstrably justified in a free and democratic society.

One author has compared the judicial interpretation of a constitution to the writing of a novel. If that is true, then it's fair to say that the United States in 200 years has written a long and a powerful story. In Canada since 1982, we have written only the opening chapters, but they have been absorbing and we are eager to continue. As we do, we undoubtedly will draw further on your experience, not slavishly but carefully. One of our most famous and accomplished jurists, the Honorable G. Arthur Martin, in a brilliant and often admiring analysis of the jurisprudence of the fourth amendment, concluded that there is much we can learn from the American experience although we have to avoid too hasty an embrace of all aspects of that complex body of law.

CRIMINAL JUSTICE

One more difference between us lies in the field of criminal law, and that is the matter of jurisdiction: In Canada, as I mentioned, the criminal code is exclusively federal. The administration of justice, however, is a provincial matter, done by each of the ten provinces. That makes it necessary for us to have a federal-provincial partnership, which often makes it difficult for us to achieve common objectives, especially because the governments of the provinces and of the federal parliament are often drawn from different parties and partisan differences complicate matters.

Against the background of different environments, I must say, the justice agendas of our two countries are strikingly similar. In areas such as gun control, concern about crime by young people, DNA testing, crime prevention, and court backlogs, we face many of the same challenges. And, like you, we increasingly value the sharing of information among police forces around the country. Just last week the federal government entered into a protocol with some of our provinces to firm up that sharing of information about crimes and criminals between police forces and between levels of government, to improve detection and prosecution.

In recent years one focus of the justice agenda in Canada has been young offenders. We have a separate federal statute that creates unique procedures

for those between the ages of twelve and seventeen who are accused of crime. There are special rules relating to confessions or statements, the range of penalties that can be imposed, and indeed the objectives of the criminal justice system as applied to them. We recently changed the rules for sixteen- and seventeen-year-olds, those at the top of the "young offender" age range. We've made it easier to transfer them to adult court for trial when they're accused of serious crimes of violence (and I know this is the subject of controversy in many American states).

We reformed the sentencing provisions in our criminal code, for the first time codifying the principles and purposes of sentencing. We stated a preference for noncustodial sentences for nonviolent crime, asking courts to look at jail as a last resort for those who are not a danger to the community. We rejected proposals to impose mandatory sentencing guidelines, favoring in almost every instance a discretion in the court to determine the appropriate penalty depending on the circumstances in the case.

In the area of DNA testing, we're doing our best to catch up with what you've learned. It was only two years ago that we amended our criminal code to provide a basis upon which police could obtain a warrant to take bodily substances from a suspect to test for DNA results, and we're about to introduce in the Canadian Parliament legislation to create a national databank for DNA samples. One of the controversies we had to face was whether to provide for the taking of samples from those who are arrested or to wait until after conviction, and we opted for the latter. We will take samples only from those convicted and even then only from those convicted of certain crimes, serious crimes of violence.

We are trying to deal more effectively with high-risk offenders. For the last fifteen years our code has provided a category of "dangerous offenders." These offenders can be jailed indefinitely with no prospect of release so long as they remain dangerous, and they are reassessed regularly to determine that. Currently, this is the only category carrying other than finite jail terms, and it is very limited. There are crimes, such as child molestation, that involve a high risk of re-offending as to which the Crown has not been able to establish dangerousness for purposes of indefinite jail terms; so we have had to release these offenders at the end of their finite sentences. To combat this problem, we've introduced legislation that will create a new category called "long-term offender" for certain persons not meeting the exacting standard of dangerousness. These offenders will still be given finite jail terms, but the court will be empowered at the time of sentencing to impose additional periods of up to ten years during which they will be supervised in the community in accordance with conditions that are intended to ensure that the police know their whereabouts, that they remain in treatment if that's appropriate, and that they refrain from certain activities or from going to certain places thought to raise the risk of re-offending.

In the area of gun control, we have over the last three years conducted a vigorous national debate. The result is, I believe, smart, tough regulation of firearms in private hands. It includes licensing of all firearms, whether handguns or long arms, and stiff penalties for the use of firearms in the commission of crimes. It respects the legitimate use of guns in sport or for hunting but prohibits them for self-protection except in the rarest of cases. It provides for keeping information about who has firearms and why.

THE VALUE OF SHARING IDEAS

As you can see, we have a great deal to learn from one another, which brings me back to the value of occasions such as this when I and colleagues from Canada have an opportunity to meet with you, to share experiences and to learn from your experience. I have believed always in what Oliver Wendell Holmes said about the importance of a free trade in ideas to strengthen the law; and I believe that's what we have between our two countries. We have a free trade in thought, in example, and sometimes in inspiration. It's a free trade that we value, even cherish, from which we've learned a great deal. May I say to all of you how very grateful I am to have had the opportunity to participate directly in that exchange this week.

JUSTICE IN THE MEDIA AGE†

Lord Taylor of Gosforth

I am delighted to have been asked to address this Symposium, organised under the auspices of the Commonwealth Magistrates' and Judges' Association and the Law Faculty of the University of Hertfordshire. The Association has a proud tradition in fostering links between Commonwealth jurisdictions, most of which share the rich heritage of the Common Law. The Law Faculty at Hertford also has an impressive record of achievement, not least in securing these magnificent new surroundings in which the Symposium will take place.

The theme of the Symposium is "Images of Justice—Differing Perceptions." I have chosen to illustrate an issue which confronts every jurisdiction in the free world: the relationship of the justice system to the mass media. I start by setting out three principles which I think are fundamental.

First, it is crucial in a democracy that justice be administered in public.

This principle is encapsulated in the well-known dictum: "Justice must not only be done but must be seen to be done." In practice the principle derived from the strictly local administration of justice in early times. Originally, trials (both civil and criminal) were before a judge or jury drawn from the locality, and the hearing itself would be likely to be attended by all interested members of the local community. The principle has survived the widening of that concept of "community" as communications have developed over the centuries. Now, the principle that justice must be seen to be done means not merely by those who can attend the trial but by the wider community via the media. Courts remain properly reluctant to accede to any request that proceedings should be heard in private, but the problem now is to prevent media coverage from not merely reporting proceedings but adversely influencing them.

This threat creates tension and potential conflict with the second fundamental principle, that citizens (including those who comment through the media) should enjoy freedom of expression.

The right to free expression is often enshrined in a country's constitution when it is written and it is specifically recognised by both the European and International Conventions on Human Rights. When the right is exercised not by an individual but by the mass media, its impact on public opinion and on

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†Address delivered by the then Lord Chief Justice of England and Wales to the Commonwealth Judges' and Magistrates' Association Symposium held at the University of Hertfordshire on April 15, 1996. Reprinted, with permission, from the November 1996 issue of *Arbitration*, the journal of the Chartered Institute of Arbitrators.

the legal process itself can be very powerful. There are, of course, constraints upon it such as contempt of court, the requirements of national security, or the law of libel. But, in general, democratic governments have been very reluctant to interfere with the freedom of the media to express views or criticism however extreme. This, it has to be said, may not only be through respect for the general principle, but also through fear of provoking the hostility of the press, an ever more influential shaper of public opinion.

Thirdly, there is the overriding importance of maintaining the integrity of the judicial process.

This demands that cases which come before a judicial tribunal for the determination of the rights and obligations of citizens as against each other, or as against the state, are dealt with entirely objectively. Decisions are to be made only on the basis of evidence put and tested before the tribunal itself. This principle underpins the whole concept of freedom in a democratic society. If a tribunal could be prejudiced or influenced in advance by the actions either of the parties or of others with an interest in the proceedings, the rights of the individual would become more theoretical than real, and the administration of justice would be undermined.

It is against this background that I would like to consider separately the way the media report individual cases, both before they have started and when they are under way, and, flowing on from this, the way they report the legal system as a whole. Both are important questions in understanding the way the mass media influence the perception of the institutions of the law of the public at large.

THE KILMUIR RULES

Well into the second half of this century, the judicial process and its results were, by and large, reported by the press and accepted by the public uncontroversially. As recently as the 1960s, any criticism of the judiciary was at most muted and tentative. Scandalising the judiciary (or in Scotland "Murmuring Judges"—recently the title of a successful play in London) was a special form of contempt of court. Even today, criticism of judges in both Houses of Parliament is constrained by strict conventions, breach of which may lead to suspension from the House.

It is axiomatic that the independence of the judiciary is of fundamental importance. The concern to protect this independence led Lord Chancellor Kilmuir to set out what was the clearly understood practice of the day in 1955 in the "Kilmuir Rules." They precluded judges from commenting publicly on almost any subject. The "Rules" were embodied in a letter from the Lord Chancellor to the BBC which justified the prohibition in these words:

> So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the performance of his judicial duties, must necessarily bring him within the focus of criticism.

Only the Lord Chancellor (because of his position as a Cabinet Minister) was free to talk to the press.

Though it may seem quaint now, this regime seemed to operate quite satisfactorily for over thirty years: the Kilmuir Rules themselves survived until as recently as 1987. So long as criticism of the judiciary in the media was scant, the judges had little need or incentive to opine or explain themselves out of court. Their role was to decide impartially the cases which came before them, and that was all. As for the media, they showed no less interest in the lurid details of crimes committed or cases tried than they do today. But the tone of their reports was markedly different since they almost universally stopped short of criticising the court, its procedures, or individual judges.

CHANGED ATTITUDES

Attitudes and perceptions have changed radically. Judges, like politicians, are today scrutinised and criticised not only by informed commentators, but by the public at large. "Accountability" is a key concept in modern democracy. Whilst judgments and sentences of the courts have always been matters of legitimate public interest, nowadays TV, radio, and newspaper critics do not shrink from substituting their assessments for those made by the court. They lambast the judiciary for failing to satisfy what they conceive to be and indeed aim to shape as the public's demands.

This raises the question of what the public actually wants from the judges. It might seem that the answer to that question could be simply stated in one word—justice. But what actually constitutes justice in any given case is not, as one might hope, agreed by every one. Still less is there agreement as to the proper procedure for achieving it. Increasingly, in recent times, high profile cases in the UK have been followed by heated debate about their outcome and the procedures adopted.

This increased criticism is part of a general trend in mature democracies to question the exercise of authority in public affairs and scrutinise closely those exercising it. Today, the media provide wide and instant dissemination of news coupled with saturation comment. Every topical issue is probed and debated by pundits in television interviews and discussions brought into every home. The public is invited to participate by phone-ins or as studio audiences. At one time, high office holders were seen and heard by the public only if and when they mounted the platform at local meetings. Seeing them now frequently and

at close quarters on the screen removes their former mystique and emboldens the nation to discuss and to criticise them as never before.

It is healthy that the media and through them the ordinary citizen should observe closely and critically how public institutions and services are run. In regard to the courts it is beneficial not only for the public but for the judges themselves that they should be open to criticism. The legal process should no longer be seen as so specialised and esoteric as to be beyond the comprehension and criticism of non-lawyers.

But, although public awareness and scrutiny of the judiciary is a healthy development, there is another modern trend which does not marry so well with the growth of critical comment. As personal and political expectations have risen, people have become more determined to realise them. If things do not go their way, they are not prepared, as our forebears often were, to accept disappointment philosophically. We see it even in sport when the decisions of umpires at major tennis tournaments or referees at football matches are increasingly challenged and if a team looks like losing, attempts are made by its supporters to abort the game by invading the pitch.

BROADCASTING TRIALS AND APPEALS

So far, I have spoken of media coverage after trials or judicial decisions, but the current zeal for scrutinising the legal process has led to demands for TV cameras to be allowed into the courts to film the proceedings. Where they have been admitted, for example in the United States, there is no shortage of viewers. This is hardly surprising since the material itself is often selected for its sensational appeal.

Anyone who doubts this has only to consider the media circus which surrounded the trial of O. J. Simpson in California, or indeed to tune in to BBC2 here on Saturday nights to see the trial process packaged as light entertainment.

In England and Wales the televising of court proceedings is prohibited by statute. Section 41 of the Criminal Justice Act 1925 states that: "No person shall take . . . in any court any photograph . . . of any person, being a judge of the court or a witness in or a party to any proceedings before the court, whether civil or criminal."

This provision antedates the invention of television, and is said to be due to what was thought to be salacious reporting, using still photographs, of a high profile divorce case. In England and Wales, S.41 is still in force but it was never applied to Scotland and during the last few months in closely controlled conditions, an experiment of filming trials for subsequent, but not live, broadcast has been permitted.

I would oppose a move to transmit coverage of any trial at first instance.

I am concerned about the effect it would have on witnesses. Giving evidence in court, in public, especially if the case involves sensitive issues, is in itself a very stressful experience. A victim of rape, the relative of a homicide victim, the defendant in any such case all have to cope with the ordeal of reliving the events and doing so whilst exposed to view in the witness box, often under persistent cross-examination. Adding to this the stress and anxiety which being televised would involve is in my view unjustifiable. It is said that once the cameras have been in place for a while they are unobtrusive and participants in the trial forget they are there. That may be so for judges and counsel who are there every day and feel comfortable in their workplace. It would be quite different for the witness who is probably giving evidence for the first and only time in his or her life and who may be greeted at the end of the day by neighbours commenting on having seen the programme on their screens.

The argument *for* televising proceedings is that just as the whole local community could at one time crowd into court to see justice done, so today, the whole nation should be entitled to see it. I do not accept this. The principle that justice must be seen to be done does not require that every household in the country should be able to watch it from their living rooms. It is sufficient that a quorum of the public can attend the courtroom and that press reporters can be there to observe and write up what has happened.

Even after verdict, and after every possibility of an appeal has been exhausted, there are still dangers in televising edited parts of a trial. To the participants—the parties, the lawyers, the jury, and the judge—the trial is a drama which unfolds at its own pace, each part falling into place gradually. Edited highlights would never convey the balance of the evidence and would thus often invite the viewer to substitute his or her own verdict for that arrived at in the case itself. It can be argued that newspaper reports of trials are also necessarily selective. But seeing and hearing extracts from a witness's evidence on the screen is much more dramatic and more readily tempts the viewers to form judgments in the belief that they have in effect been at the trial.

Where there is no jury, the arguments against televised hearings may be less cogent. There is less risk of the trial itself being prejudiced by its own reportage, and I have therefore an open mind as to whether we might consider televising some important appeals. There would remain the problem that if the whole argument in an appeal were to be televised, most viewers would hardly find it a gripping experience and the ratings would drop to an uneconomic level. If, on the other hand, only extracts were televised after the event, there would be problems in achieving a fair editorial balance.

In fact, we do have some experience of this in the UK, in relation to cases conducted before the Appellate Committee of the House of Lords—our final domestic court of appeal. In 1977, Parliament agreed to allow our principal

broadcasting organisations to broadcast proceedings of both chambers of Parliament on the radio. Judicial proceedings were exempted from this general permission, but provision was made for a broadcaster to apply to the Select Committee on Sound Broadcasting for permission. A similar regime was applied to TV broadcasts when television was introduced into Parliament.

Since 1978, permission to broadcast judicial proceedings has been sought on several occasions. In 1986 permission was given to broadcast a judgment on the radio. In 1989 a judgment was televised. And in 1994 permission was given for a judgment to be broadcast as part of a television documentary programme. But in each case, the Law Lords who are to hear the case weigh very carefully the nature of the case in question, and whether it is appropriate to consult the parties before granting permission.

EFFECT OF MEDIA COVERAGE ON TRIALS AND APPEALS

I come next to the effect of media coverage on the proceedings themselves. There is a fundamental distinction to be drawn between the functions of the press in hearing, observing, and reporting legal proceedings and decisions on the one hand and, on the other, using material relating to legal cases to influence their outcome. In relation to the latter, the press is constrained in the UK by the law of contempt. This exists to protect the integrity of the trial process by preventing disclosure of material which could prejudice the fairness of the proceedings.

In the context of trials at first instance, the risk of prosecution for contempt of court usually acts as a sufficient brake on media excesses, but some newspapers push that risk to the limits. There have been a number of recent high profile trials in the UK in which the court administration and the media have had to work closely together to ensure the essential borderline was not crossed.

Further difficult questions arise once a conviction has been brought in and an appeal is lodged. The test in the Contempt of Court Act in the UK is that matters may be reported unless their disclosure would cause "substantial risk of serious prejudice," and the view taken by the House of Lords has been that the threshold is very high where the tribunal is a bench of professional appeal court judges rather than a jury of lay people.

This has led to a disturbing tendency among some defence lawyers to use the media in the run-up to a major appeal in order to activate public interest and create a climate in which the case is widely perceived in advance of the hearing as a miscarriage of justice.

I believe this practice is to be deprecated, for three reasons.

First, it tends in the public's eye to undermine the appeal process which exists for the specific purpose of testing convictions to ensure they are safe

and satisfactory. Secondly, it may even limit the options available to the court of appeal, by prejudicing the outcome of any possible re-trial which would have to be before a jury. Thirdly, I believe it may be inconsistent with a lawyer's primary obligation to the court [not] to express in public his or her personal views about the guilt or innocence of the client, or indeed any other aspect of the case.

According to the *Law Society Gazette* this matter is of sufficient concern to the Lord Chancellor that he has referred it to his Advisory Committee on Legal Education and Conduct to ask whether the Professional Rules of the Law Society should not be tightened up. For my part I look forward to receiving the advice of the Committee in an area which I think is of great importance to the proper conduct of proceedings before the courts. To have lawyers standing on the steps of the courtroom expressing their personal belief in their client's innocence to the public at large threatens to escalate into the sort of media circus which disfigured the trial of O. J. Simpson.

Whether inspired by one of the parties or whether undertaken by the press on their own initiative, there can be no doubt that in recent years high profile cases have received more and more coverage, sometimes saturation coverage, before the trial. This has reached such a pitch as to create anxieties as to whether a fair trial can take place.

In a growing number of such cases in the UK the commencement of the trial itself is preceded by an application by the defence to abort the entire proceedings on the grounds that the degree, and tone, of prior media comment has rendered a fair trial impossible. For the most part such applications have been rejected on the basis that juries can be relied on to try cases only on the evidence and that they are unlikely to remember or be influenced by desultory reading of the press reports before they become personally involved in the case.

DETERRING MEDIA EXCESSES

What can be done to curb or counteract media excesses?

Although many sins and calumnies are committed in its name, freedom of expression must surely be maintained. One would hope that editing standards would aim at accuracy and fairness but circulation battles between rival newspapers tend to drive standards down. You will hear more tomorrow about the work of the Press Complaints Commission in trying to counter this trend from Lord MacGregor of Durris. It may be that tougher sanctions are necessary to deter gross excesses. Whether that should be by self-regulation or otherwise raises very difficult questions.

The need to counter inaccurate or unfair reporting has led in some jurisdictions to the appointment of judicial press officers, whose job it is to convey or

interpret the judgment of the court to the media and to correct or repudiate errors and half-truths.

Others have gone less far, but instead taken the first very tentative steps in this direction by judges themselves issuing, in very complicated cases, a summary of the judgment to the media, to assist reporters in explaining the decision of the court to their viewers, listeners, or readers.

There are, however, risks here too. It is a basic principle of the common law that the judgment of a court speaks for itself, and that its members are *functus officio* once the judgment is delivered. Justice should not need spin-doctoring. Allowing an official of the court administration or press officer to explain the judgment after it has been given, either orally or by way of written summary, can only violate this rule. Indeed it demonstrates the reason for its existence, since what is to happen if the official misstates the judgment's effect?

Another recourse is for the judges to be more forthcoming, and to show themselves to the public. There are good reasons why the judiciary should be more prepared than they previously were to talk to the media about the law and legal issues.

A legacy from past reticence is that judges have acquired and still retain a reputation for being aloof and for holding themselves apart. The media often couple this perception with allegations (not borne out by the facts) that judges in the UK are out of touch, being drawn from a rarefied educational and social background. To many, this detachment (which originally derived from the judge's obligation to remain independent and ensure objectivity) may give an impression of arrogance.

The traditional view, however, was that judges should avoid speaking in public outside their own courts. The Kilmuir Rules embodied this self-denying ordinance. In recognition of the extent to which times had changed, the present Lord Chancellor countermanded the Kilmuir Rules in 1987, and left it to individual judges to decide whether to speak out in public or not.

This more open approach was an essential response to the developments I have outlined. No doubt at one time it was acceptable for judges to restrict their pronouncements to giving judgment or passing sentence. But the shift in public attitudes under the growing influence of the media calls for a different approach.

It is simply no longer sensible to remain silent when so much attention, much of it highly critical, is focused on the courts and the judicial process. In the absence of any reply it would be assumed against the judges either that they were so arrogant and complacent as to believe they could ignore criticism or that they had no good answer to it.

So I believe that on suitable occasions, judges should be prepared to speak on matters affecting the law and the courts, to answer criticism and to explain policies. I also hope that if judges do speak out on topics which concern the

public, they may overcome the widely held belief (stemming, I think, from all those years of lofty reticence) that judges are out of touch or even, as has been said, "live on another planet."

There is in the UK at present a lively debate on sentencing policy, centering around proposals announced by the Home Secretary at the Conservative Party Conference last October, and set out in a White Paper just before Easter, to introduce into English Law mandatory and minimum sentences. I do not today wish to address the merits of these proposals. But I do think it is worth drawing attention to the way in which the debate is being conducted in, and largely by, the media.

No press or TV report of a trial in which there has been a conviction in the UK is these days complete without an interview with the victim (or their relatives) on the steps of the court. The typical comment will be along the lines of the following (which in fact appeared in the *Independent* newspaper this January): "My son died purely and simply because of that driver. If he'd gone out with a loaded shotgun he'd have got fifteen years. The courts don't treat death in a car seriously enough. It's thought to be bad luck."

If you believed what you read in the newspapers, the unanimous view of victims of crime, indeed of most of the population, is that sentences—all sentences—are too lenient. Again, I quote from the *Daily Mail* last week: "The judge has become like a glorified social worker . . . who sees law-breaking as the criminal's cry for help. He seems blithely unaware of the popular groundswell in favour of harsher penalties."

But is this right?

Some time ago, an academic called Joanna Shapland conducted a survey of victims of violent crime whose attackers had been convicted in the Crown Court. The survey showed that more than half of them thought the sentence "about right" or "too harsh." Even more remarkably, a survey of burglary victims found 80% wanted imprisonment for burglary in the abstract, but only 32% wanted it for "their" burglar.

More recently—indeed only a few weeks ago—the *Evening Standard* sent a team of journalists into crown courts in London and the surrounding area actually to sit in court listening to real cases, and reporting on what happened. They produced two pages of what to my mind were remarkably fair, if rather bald, case summaries. The editorial summed up the exercise as follows: "The broad picture is of judges whose sentences are fair, firm, and fit the crime."

Perhaps of even greater interest was a recent article outlining the conclusions of a recent study conducted under the auspices of the Nuffield Foundation. Among other things, it found that half the public think 50% or fewer convicted rapists are sent to prison. The correct figure is in fact 91%. Half thought that 20% or fewer convicted burglars are sent to prison. The correct figure is

41%. Half thought that 20% or fewer convicted muggers were sent to prison. The correct figure is 50%.

THREE CHALLENGES

The subject of Justice in the Media Age is multifaceted and there are many issues I have not addressed but, before concluding, I would like to summarise the three main challenges facing us.

First, we must recognise that the right of the public to information, and of the media to report and express views freely has to be balanced against the right of the parties, and in particular of the defendant in a criminal case, to a fair trial. One very real danger raised by irresponsible or merely excessive reporting of the judicial process or in advance of it is that the process itself may become impossible: "trial by television" then ceases to be an admonitory slogan and becomes a real and dangerous threat to the rule of law. Courts must be vigilant to deal firmly with contempts where media coverage imperils the fair administration of justice.

Secondly, the right of the media to criticise judicial decisions should be exercised only on the basis of the facts as established in the trial, not on the basis of unsubstantiated allegations, or on a slanted selection of the facts. I personally would add to this that well-founded and balanced criticism is of more value to society as a whole than pure "knocking copy" which is, whether intentionally or not, simply anarchic in its effect.

Thirdly, there is a need for the judiciary to be more open with the media and the public by explaining what they do and how they do it. This can also include expressing opinions on topics of current concern which affect the law and its institutions. It should not be done too often, but it can and does have a role to play in the evolution and development of a sound legal system in which the public can have confidence.

THE CRIMINAL TRIAL OF O. J. SIMPSON†

Vincent Bugliosi*

The criminal trial of O. J. Simpson generated over 55,000 pages of transcript, and I've written a book on it, *Outrage: The Five Reasons Why O. J. Simpson Got Away with Murder*. This is going to be kind of an informal chat in which I will hit some of the highlights. You should know in advance that I have very little good to say about anyone associated with the case, because of either their offensive conduct or their abject incompetence. When you combine this with the facts that I'm still very upset, as many Americans are, with the not guilty verdict and that I am by nature a highly critical person, you would be wise not to expect me to be mellow or diplomatic in my comments.

THREE SHOCKS

One way, among many, to look at this case, in very broad terms, is to break it down into three areas of shock, two of which have been experienced by millions of Americans and the third by those lay people who have read my book *Outrage*. The first shock came when we heard that O. J. Simpson was a suspect. He was one of the most popular, admired American athletes we've ever had, and these were particularly brutal murders. Poor Nicole, his former wife, was almost decapitated. One of the veteran detectives told me it was the bloodiest murder scene that he'd ever been to. And yet we know he did it—even though it's a shock. We were almost sure he was guilty by 6:30 in the morning the day after the murders, when the L.A. police called him in Chicago and told him that his wife had been "killed" (not "murdered"), and he didn't ask how, when, or where. Then, when his blood was found at the murder scene, as Simpson's was conclusively determined to be by DNA tests, that was the end of the ball game. Furthermore, not only was his blood found at the murder scene, but the victims' blood was found inside his car and home.

Under those circumstances, the question to me has never been, "Is Simpson guilty or not guilty?" The question was whether it was possible under those circumstances for him to be innocent, and the answer, unequivocally, is no, not in the world in which we live. To deny guilt when your blood's at the murder

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*Prosecutor of Charles Manson; author of *Helter Skelter* and *Outrage: The Five Reasons Why O. J. Simpson Got Away with Murder*.

scene reminds me of a story that the comedian Richard Pryor tells about a man who is caught with another woman and says, "Who are you going to believe, me or your lying eyes?" Other than a case where the defendant was caught during the commission of the homicide, I have never seen a more obvious case of guilt. I was talking to Tom Leen, a former prosecutor who has three people on death row in Nevada. He said that in all three of those cases put together, he didn't have as much evidence as there was against O. J. Simpson.

The second shock was that this person we knew was guilty was found "not guilty" by the jury. He was able to walk out of court a free man with a smile on his face. Either the next day or two days later he was in Florida playing golf. And I really think the verdict in this case caused psychic trauma to millions of Americans. Millions were profoundly angered, shocked, and shaken by this verdict. A man brutally cut down two people in the springtime of their lives, and he's out there playing golf. We can't have that type of thing in America.

The third shock is the one being experienced by those lay people who have read my book *Outrage*. They are learning for the first time about the unbelievable incompetence of the L.A. County D.A.'s office, and obviously they are absolutely staggered by it. Most Americans have blamed the jury for what happened in this case—and the jury was bad, unquestionably. Many have blamed the Los Angeles police, on the ground that they botched the case before it came to trial. But in my opinion, the main reason this case was lost was the unbelievable incompetence of the prosecutors. In many instances it went way beyond incompetence. Today, we can touch on only a few of the errors.

PRELIMINARY ISSUES OF APPROACH

Before I turn to specific prosecutorial errors, I want to be sure you know that I was not predisposed to be hard on these prosecutors from the very beginning; in fact, no one that I know of was more supportive of them than I was in radio, television, and print interviews. I even sent them a telegram, trying to pump them up, on the morning of their final summation. But my publisher, W. W. Norton, talked me into writing the book, and I had to be candid.

There is another preliminary point that is important to me: I support every charge I make. That is something I do instinctively and something I take pride in. How often do you read a declarative statement or strong assertion in a magazine or newspaper article and search in vain for the support or find that the support is very weak? You won't have that experience with anything I have written. You may not agree with my support, but I always give a lot of support for my statements. In *Outrage* I give page after page, example after example of staggering incompetence. I want to read the last paragraph in the review of *Outrage* in the *Los Angeles Times*:

> No one who reads this book will ever again believe that the most publicized acquittal in the history of American jurisprudence was solely the result of juror prejudice or the machinations of unscrupulous defense attorneys. In *Outrage* the D.A. and the prosecutors have been called before the bar of justice.

PROSECUTORIAL ERRORS

Overcoming Jury Problems

As I suggested before, when the prosecutors in this case presented scientific DNA evidence that Simpson's blood was found at the murder scene, they did in fact prove Simpson's guilt—not just beyond a reasonable doubt, but beyond all doubt. An average jury would have convicted Simpson. This jury was below average: The jurors may not have been bright, and many of them may have been biased in favor of Simpson from the beginning. However—and this is the important point—a powerfully presented case in summation normally can overcome both of these problems. The only type of jury you couldn't turn around would be a jury whose state of mind was, "Even though we know O. J. is guilty, we don't care. We like O. J., and blacks have been discriminated against by whites throughout the years, so we're going to give O. J. two free murders." It would be extremely difficult to find even one juror with that outrageous state of mind, much less all twelve. To believe that, you have to believe that all of those people were just bad people. But looking at the backgrounds of the jurors, listening to what they said on the radio and television, and reading a book written by three of them, I got no sense that any of them had that unconscionable state of mind.

What happened here is that the prosecution, in my opinion, allowed this jury to live with their consciences. One of the jurors said, "All I wanted was to be able to live with myself." When you prosecute a case, you have to address yourself to every issue and eliminate all possibilities of the jury coming back with a not guilty verdict. You have to be so powerful in your presentation of the evidence in your final summation that the jurors feel they have no choice but to convict, that if they don't convict, they're going to have to live uncomfortably with that decision for the rest of their lives. The prosecutors didn't even begin to do that in this case.

People tend to forget that as bad as this prosecution was, the first vote that the jury took, an hour into their deliberations was ten to two. One black juror and one white juror voted guilty on the first ballot. You can imagine by extrapolation what would have happened if there had been a first-rate prosecution in this case. At least in my opinion, even this jury would have responded with a guilty verdict. At an absolute minimum, we would have had a hung jury.

Blood Evidence

Let's look at how the prosecutors handled the evidence of Simpson's blood at the murder scene. The defense attorneys—who claimed that blood on the rear gate at the murder scene was planted, that a glove at Simpson's estate was planted, that blood on the socks in Simpson's room was planted—never had the guts to claim that the five drops of Simpson's blood at the murder scene were planted by the police. Four of those drops were immediately to the left of the killer's bloody shoe prints leaving the crime scene. What the defense did claim was that those five blood drops had been exposed to the elements, bacteria, etc., and had lost all their DNA. And they said that back in the crime lab of the L.A.P.D., a "cesspool of contamination," maybe the blood from Simpson's reference file had contaminated the five drops of blood on five cotton swatches. (Those cotton swatches were on a table fifteen feet away and enclosed in envelopes, so even flying DNA couldn't have gotten in there.)

How did the prosecutors respond? If you're a halfway decent prosecutor, don't you come back and tell the jury, "Wait, folks, there could not have been cross-contamination here. The defense attorneys claim that there was a residue of E.D.T.A. [an anticoagulant, a preservative, that's added to reference blood] in the blood on the back gate and in the blood on the socks found in Simpson's room, but they have not claimed that there was any E.D.T.A. in those five blood drops. There couldn't have been cross-contamination here, because if there had been, there would have been E.D.T.A. in those five blood drops."? The prosecutors did not make that argument, even though they had the assistance of two DNA prosecutors, one on special assignment from San Diego and another one from Oakland. They also didn't make the argument that if there had been cross-contamination, the DNA content in those five blood drops would have been much much higher than it was. Why? Because the reference blood hadn't been exposed to the elements.

Every time the defense attorneys came up with some bogus argument to try to explain away incriminating evidence, the prosecutors either didn't respond at all or responded in a very anemic fashion.

Venue

No matter where we look in this case, we find mind-boggling incompetence. Let's talk about the change of venue. Los Angeles County has eleven judicial districts, and the policy is to try a case in the judicial district where the crime happened. These murders happened in Brentwood, in the Santa Monica judicial district, so the trial was supposed to be handled in Santa Monica. (The civil trial was in Santa Monica.) I was interviewed in *Playboy* magazine, in the issue that was on the stands on November 1, 1994, and I criticized the district

attorney for transferring the case downtown. He called me on the phone on November 4 and said, "Vince, that was a great interview in *Playboy*, but I want to explain to you why we're downtown. It may not have been this way when you were in the office, but today, when you take a case to the grand jury, there's only one grand jury, and its located downtown, so you're stuck downtown." I said "Gil, not only was it not that way when I was in the office, but it's still not that way. Just because you take a case to the grand jury doesn't preclude you from thereafter taking the case back to the judicial district where the crime happened for the trial." His reply: "I was under the impression that we were stuck downtown." The district attorney made a momentous decision based on an *impression* instead of having his staff research the matter. In the book, I give several cases where the indictment took place downtown but the trial occurred in the local district.

Evidence Not Offered

Another important factor in this case was the evidence not offered. I've never seen another case where the prosecution has decided not to introduce such a tremendous amount of incriminating evidence against the defendant. (All of the evidence that I'm going to talk about now *was* introduced during the civil trial.) And then I'll tell you their reasons for not offering it.

First, the suicide note: This is two days before the slow-speed chase. Simpson learned he was about to be charged. An innocent person—999 out of 1,000 innocent people—would be very angry and yell, "How dare you charge me with murders I did not commit?" He also would desperately want to prove his innocence and find out who murdered the mother of his two children. Simpson didn't do that. He became very passive and wrote a farewell letter that reads like a suicide note, referring to himself as a lost person. An innocent person charged with murder would not write a note like that—but the jury never saw that note.

After the slow-speed chase (which was not offered), the police found in Simpson's possession a gun, a passport, a disguise, and several fresh changes of underclothes. Simpson's friend who was driving the Bronco had "bulging pockets," so the police asked him to empty his pockets; he had $8,750 in currency that he said Simpson had given him inside the Bronco. All of this was extremely incriminating evidence, and none of it was offered.

The day after the murders, the police interrogated Simpson for thirty-two minutes and said to him, "O. J., we've got a problem here. You've got blood in the Bronco and the driveway of your home." (Note: This was before they withdrew any blood from his arm. They would not have had any opportunity to sprinkle or plant it.) Simpson had to say something. He said, "I cut myself last

night, and I reopened the cut in the hotel room in Chicago." "How did you cut yourself, O. J.?" "I don't know." Later in the interview they asked him again, "How did you cut yourself last night." His exact words: "I have no idea, man."

Stop to think about that just for a moment. We are not talking about a little nick or scratch here; this was a deep cut to the knuckle of the left middle finger. (Actually, he had four cuts and seven abrasions on his left hand, but the worst cut by far was the deep one to his knuckle. It was bandaged at the time they were interrogating him.) He said he had no idea how he got that cut. As prosecutors have argued in many cases, that ridiculous statement all by itself shows an unmistakable consciousness of guilt. But more importantly, at least to me, it seems extremely improbable that around the same time that Nicole and Ron Goldman were brutally murdered, Simpson innocently cut himself very badly on the middle finger of his left hand. And when you do cut yourself, unless you're in a frantic, frenzied state (as we can assume Simpson was), you immediately stop the bleeding with your hand or your handkerchief, and you put on a bandage; you don't bleed all over the place. Here we have Simpson admitting that he was dripping blood on the night of the murders and saying he has no idea how he got cut—and the prosecutors never presented that evidence to the jury.

Why didn't they offer all of this evidence? In the suicide note, Simpson denied guilt. During the slow-speed chase that led up to the seizure of the passport, cash, and other items of evidence that I mentioned earlier, he was on a cellular phone talking to his mother and friends, asserting his innocence. During the thirty-two minute interrogation he didn't expressly deny guilt, but the obvious implication was that he denied guilt. The prosecutors said, "We didn't offer all of this evidence because we didn't want the jury to hear Simpson denying guilt without his taking the witness stand and being cross-examined."

That is absurd. As everyone knows, it means nothing at all that the defendant denied guilt. Anyway, the jury already knew that Simpson denied guilt; that was his plea. You don't keep out extremely powerful evidence of guilt just to prevent the jury from hearing something they already know. But that was the mentality of these prosecutors. They didn't offer any piece of evidence that was less than 100% pristine. As you know, lawyers balance the advantages of evidence against the disadvantages and offer the evidence if the advantages greatly outweigh the disadvantages. Not these prosecutors. If they perceived any disadvantage, the evidence was out.

In his book, *In Contempt*, Darden gave a second reason for not offering the slow-speed chase and all the evidence seized thereafter. (He told Barbara Walters this, too, on T.V.) Doing so would have caused the jury to focus in on Simpson's state of mind during the chase. At that time, Simpson was very upset; he was crying and threatening suicide. Darden said the prosecutors

feared that Johnnie Cochran would use that during his final summation to garner sympathy for Simpson by arguing to the jury that the Los Angeles police almost caused O. J. to blow his brains out. That is ridiculous. Even those defense attorneys, who elevated audacity to symphonic and operatic levels, would not have made that argument, and if they had, the prosecutors could have responded, "Wait a minute. He was trying to escape. Don't we have a right to go after him?"

The Conspiracy Theory

To believe the conspiracy argument, you'd have to believe that two teams of police detectives from different divisions of the L.A.P.D., who didn't work with each other and didn't even know each other, arrived at the murder scene in the middle of the night and suddenly agreed to let the true killers go and frame O. J. Simpson. Simpson had always been a friend of the L.A.P.D. He went to the Christmas parties at the West Los Angeles division and he autographed footballs for them. Some of them swam in his pool and played tennis on his tennis court. The police liked him and had pampered him. It doesn't make sense that they would decide to frame him, and in the process jeopardize not just their careers but their very lives—because under section 128 of the California penal code, if you plant evidence and testify falsely in a capital case, you can get the death penalty yourself. Phil Vannatter, in particular, had spent twenty-six years on the force without a single citizen complaint against him and was about to retire with his wife to their farm in Indiana in a couple of months. I wouldn't believe that he would conspire to frame O. J. Simpson if you shouted it into my ears for a hundred years.

The prosecutors had ample notice of the conspiracy theory. Before the trial started, the defense attorneys were screaming conspiracy, frame-up, planting of evidence. Cochran made the allegations in his opening statement. During the cross-examination of virtually every prosecution witness, the defense attorneys suggested that something conspiratorial was going on. More than half of Barry Schecks's final summation dealt with the conspiracy allegation, and eighty percent of Johnnie Cochran's did.

If you're a halfway decent prosecutor, don't you prepare nine, ten, eleven, or twelve powerful arguments to knock down the heart of the defense case? What if I told you that during the eight hours of final summation, these two prosecutors gave one minute of argument to the conspiracy theory? Out of 600 pages of final summation transcript, about one page was devoted to trying to knock down the conspiracy allegation. (Most people watching the trial didn't realize that.) For all intents and purposes, these prosecutors conceded the main issue of the trial. They literally failed to contest the heart of the defense case.

The Prosecutors' Summation

I confirmed—and this is inexcusable—that these prosecutors were up until 4:30 in the morning preparing their closing argument. I prepare my summation before the first witness has been called. People ask how it's possible to prepare a summation before the trial has started, and I tell them it's the simplest thing in the world. You're the prosecutor, you know the strengths and weaknesses of your case, and you immediately start to work on how you're going to argue the strengths and what you are going to say in response to the defense's attacks upon the weaknesses. Every night during the trial, of course, you polish, you add, you delete, you modify to adjust for developments in the courtroom. Then the night before you give your summation, you go over it one last time, and you try to get a good night's sleep. These people were up until 4:30 a.m. like college students cramming for an exam.

Perhaps because they were tired, the final summation was pathetic. Millions of people were watching; two people were in their graves; the prosecutors were supposed to be fighting for justice—and this is what Marcia Clark said: "Vannatter and Lange came out to Bundy, and I guess they showed up around 4:00 or 4:30 I think it was." That one statement alone tells me one of two things: Either she did not go over her argument even once (if she had, she would have seen that she needed to get that information) or, even worse, she knew she didn't have the information and she didn't care. Another example: "And that instruction is 2 . . . , 280. Do you have it on the bench, your Honor? Wait, I have it, thank you." When you talk to a Rotary Club, you don't do stuff like that; if you're going to point to a particular exhibit or photograph, you have it with you.

I could give you many similar examples, but I'll stop after a few more. After a break, Clark said, "I forget where I left off." "I can't remember exactly—you can have it read back." "There was some testimony, I think, from Doctor Baden that . . . ." "At the end of the trial, or the end of the people's case, or maybe it was the end of the whole trial . . . ." "The testimony from Mr. MacDonell and from Dr. Lee, I believe, but certainly from Mr. MacDonell . . . ."

Mark Fuhrman

Let me say right away that Mark Fuhrman never planted that glove at Simpson's estate. I could give you ten reasons, but I'll give you the conclusive one. Fourteen police officers had arrived at the murder scene before Mark Fuhrman did, and all of them saw only one glove. There was no second glove at the murder scene for Mark Fuhrman to pick up and deposit at Simpson's estate.

What about the use of the "*n* word"? If you're a decent prosecutor, you sit Fuhrman down in a room for half an hour and you tell him the facts of life. You don't ask him whether he used the "*n* word"; you *tell* him that he did and

that he's going to testify to the truth on that witness stand. You tell him that he's not going to jeopardize the prosecution by denying it. How do you know he's used that word? Because under the reciprocal discovery law in California, you have already received statements from two witnesses, credible people with no axe to grind, that Fuhrman had used the word. You also have his disability pension hearing transcripts from 1981 in which he used the word.

Then in the trial, you put that evidence on yourself to preempt the defense. That way, it becomes a dead issue, and you put it behind you. If the prosecution had done that, the Fuhrman tapes wouldn't even have surfaced, or they would not have been admissible because they wouldn't have been impeaching testimony.

Not only did the prosecution fail to do that, but they went to the other extreme and joined in the vilification of Mark Fuhrman. Again, we turn to Marcia Clark's final summation to the jury. "Do we wish this man [Fuhrman] did not exist on the face of this planet? Yes."

People who have read *Outrage* learn to their great surprise that Fuhrman's not that bad a guy. He used to be a racist. There's no question about that. But even though those Fuhrman tapes go all the way up to 1994, the last time he used the "*n* word" in the tapes was 1988. In 1994 Mark Fuhrman had black friends. He was getting up at 5:00 a.m. two or three mornings a week to play basketball with fellow officers, black officers. Most significantly—and I have confirmed this—in 1994 Mark Fuhrman worked very hard to free a black man by the name of Arrick Harris who had been charged with the murder of a white man, when Fuhrman came upon evidence favorable to Harris. Fuhrman got the D.A.'s office to dismiss the charges against Harris.

Shouldn't the prosecution have countered the Fuhrman tapes with the evidence that Mark Fuhrman had worked hard to free a black man charged with the murder of a white man? (I know they had the evidence because I asked Ron Phillips, Fuhrman's partner, whether Clark and Darden knew about the Harris case, and he said, "Of course they did. I gave them the Harris file.") They also should have argued this: "Folks, he's been with L.A.P.D. for twenty years. He has arrested hundreds upon hundreds of black people. After all, he used to work South Central, which is almost completely black. If he frames black people, how come the defense didn't bring in a parade of black people to testify that Mark Fuhrman framed them? Not one black person took the stand at this trial to testify that Mark Fuhrman framed them. No such person took the stand because no such person exists." Once again, the prosecution failed.

The Gloves

I need not remind you that you don't conduct an experiment in court unless you know what the result is going to be. As all America knows, the prosecu-

tors violated that elementary rule when they had Simpson try on the incriminating Aris Leather Light gloves, and the experiment backfired.

It was the position of the prosecutors that even though the gloves had shrunk, and even though Simpson was wearing latex gloves, the Aris Leather Lights would have fit if he hadn't prevented the fit by the way he positioned his hands and fingers. But if you want to engage in such a dangerous experiment, how do you conduct it? Darden gave the defendant the gloves and told him to try them on. He was saying, in effect: "If these gloves fit, you're in trouble; if they don't fit, you might be able to walk out of here and play golf. Now tell us, O. J., do these gloves fit?" And the pictures show Simpson, hands encased in latex gloves, struggling to pull on the Aris gloves over splayed fingers.

You don't even have to be bright to know that you don't turn evidence over to the defendant and ask him to tell whether it fits. You have a third party—the bailiff or some such person—put the gloves on him, feeling his hands and fingers along the way to ensure that he doesn't do anything to inhibit the fit. That's just common sense.

CONCLUSION

I could go on and on with additional examples of prosecutorial failings in this case. I do so in my book. I think I have said enough, though, to show why I believe that O. J. Simpson is a free man largely because of the prosecution's incompetence.

DOES TIME MAKE ANCIENT GOOD UNCOUTH?†

John W. Reed*

Reflections on the Millennium

The somewhat arch title of my remarks, which I'll explain later, came to me at the end of December, when all forms of the media were filled with references to the fast approaching turn of the calendar when we shall greet a twenty-first century and a third millennium. Whether it comes in with the year 2000, as popularly believed, or, more properly, the year 2001, it will be a time for reflection, for taking stock of ourselves and our world. Predictably, we already are inundated with pronouncements from pundits and politicians, from scientists and seers, from philosophers and fools. I predict that we shall be sick of it by that notable New Year's Day of the Third Millennium of the so-called Christian era.

At the same time, we should be grateful for any opportunity which stimulates reflection on the meaning and condition of our lives. In the familiar phrase, the unexamined life is not worth living; yet most of us are so caught up in the every-dayness of living that we fail to give thoughtful attention to what is really happening to us and to our lives. Happily, the approach of a milestone gives occasion to think about those things, especially a milestone as portentous as this one will be.

That kind of introspection comes to me rather easily at the moment because of several milestones in my professional life. The session of my evidence class on the day after Labor Day last September was, to the day, the fiftieth anniversary of my first class—at the University of Oklahoma in 1946. In June I expect to attend the fifty-fifth reunion of my law school class at Cornell. And this year one of my students who became a colleague on the Michigan faculty, and for a time its dean, will retire from the faculty. When your students retire, you become acutely aware of the passing of the years; and that awareness is a powerful impetus to think about what you have done and also what you have yet to do. The impending millennial celebration simply strengthens that urge.

By your leave then, I want to share with you some reflections on our lives in these last years of this century and this millennium.

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SCIENTIFIC PROGRESS IN THE PHYSICAL WORLD

The hallmark of this century has been scientific and technological progress. I used to marvel at the enormous scientific strides during the time of my mother and father, who began their lives with kerosene lamps and horse-drawn vehicles and lived to see color television and transoceanic air travel. Now I marvel at the even greater strides in my own lifetime: space stations, satellites, the Internet, heart transplants, in vitro fertilization, and now a cloned mammal: a manufactured sheep named Dolly. Christina Rossetti began one of her poems with the tender question, "Little lamb, who made thee?" Now we know. It was a Scottish geneticist.

I read someplace that with cloning there is no change in the genetic development; it just plateaus, and whatever evolution has been going on stops at the cloning time. That article brought to mind a favorite cartoon of perhaps twenty years ago. It shows a table in what I would describe as a quiche-and-hanging-fern café, and around the table are a half-dozen effete-looking young adults visiting over their wine glasses One of them says plaintively, "Is evolution still going on, or is this about it?"

Communication is spectacularly easy and fast. We have friends in Dunedin, New Zealand, near the jumping off place for the South Pole. When I send them an e-mail message in mid-afternoon our time, their response arrives by supper time and is on the screen of my computer when I turn it on the next morning. We use cellular telephones and cordless telephones and take those miracles for granted. (I assume you read about the maternity ward that was so high-tech that the baby came out cordless.)

The extent of technological change is symbolized by the juxtaposition in this week's program of native Indian handcrafts on the one hand and the Hubbell telescope and the hypertechnology of information warfare on the other.

In many ways life has been transformed in these years. We haven't banished illness and ignorance and want, but we've reduced them, and millions and millions are better off than their forebears. Diseases have been conquered. Smallpox is essentially gone from the face of the earth. Polio is rare. Health has been preserved in millions who, fifty years ago, would have died from causes not then understood. We have expanded physical and intellectual access so that one can go anywhere and learn anything with a speed that just a few years ago would have been found only in science fiction. This is a rich and amazing time, an exciting time to be alive. Despite very real concerns about degradation of the environment and overpopulation, we are physically better off than ever before. And if anything is certain about our condition, it is that these almost miraculous inventions and developments will continue.

And so we're getting better and better, with more and more "gee whiz" technology. If this is not quite yet Utopia, it will be in just a few years. Or will it?

HUMAN NATURE—IS IT BETTER?

The problem—you already know it—is not the physical world in which we live. The problem is those of us who live in it. In Pogo's words, "We have met the enemy and he is us." We see a transformed physical world, with the most marvelous inventions and cures and devices and gadgets, getting better and better. But what is harder to foresee is a day when human nature will have been commensurately transformed. Science can perfect objects and processes in the physical world, but there is no way we can perfect ourselves. Indeed, science typically makes its discoveries first—in such life and death areas as cloning and cryogenics—and asks the ethical questions later.

Are men and women better than a millennium ago? Or more decent, more humane? I would like to think so, and there is some evidence of that in the acts of kindness and generosity and heroism that we see around us. But just when I am about to conclude that modern man is getting better at making moral choices, I see *Schindler's List*. I hear Special Agent Hagmaier describe unspeakable crimes against children. I see terrorist killings of the innocent. I see ethnic hatreds in the Balkans and the Middle East and Central Africa and Ireland—and in our own inner cities. And, most dangerous of all, I see the widening immoral gulf between the world's haves and have nots. These are big and obvious human failings.

But let me also remind you of some developments that are less global and less dramatic, and less important than war and genocide and famine, but which stand in similarly stark contrast with the spectacular advances in science and technology.

Coarsening of Culture

The arts, for example: Public support for the arts has diminished markedly in the last few decades. Music appreciation programs and music performance have all but disappeared from the public schools; the National Endowment for the Arts is on life support; and we are raising a generation of persons whose primary exposure to the graphic arts is *Beavis and Butthead*. Whereas in simpler, less democratic and presumably less enlightened times, artists and composers were publicly supported and nurtured, we now leave them to their own devices; and the market, driven to the lowest common denominator, produces little of lasting quality. We have a brilliant young friend at the University of Michigan, in music, who argues persuasively that culturally we are entering upon a new Dark Ages.

On every hand there is a coarsening of culture, a world that is going to MTV in a hand basket. In January Dot and I acquired one of those technological marvels, an 18-inch satellite dish and a high definition television set. The quality of the pictures and sound is simply astounding; but the majority of the programming is, to put it charitably, junk. One of the first things we saw on the new equipment was a highly touted Bette Midler special, which was dreadful: ugly, noisy, boring, and crude. In the same week we saw the inaugural gala—the variety show presented to honor the President the night before the inauguration. Though not crude, it too was noisy, boring, and cheap—surely not the best we can do to honor the leader of the most powerful nation in the world.

We delight in exposing the faults and foibles of our leaders, our entertainers and athletes, and other public figures. No embarrassing personal detail is off limits. By demystifying our heroes, both past and present, we lose the all-important power of myth and symbol to inspire; and without inspiration, we are little more than clods. The culture clearly is more coarse.

Focus on the Near View

And then there is our compulsive focus on the near term. Although we are prosperous, everything is short term. Directors and managers of enterprises place supreme importance on the current quarter. There is no support for long-range research and development. Delayed payoffs down the road will do the current management no good since those managers will be long gone because they didn't run up the stock price quickly.

For the same instant-result, bottom-line reasons, employees are expendable, and hundreds and thousands of workers live with the daily specter of work-force reductions in the name of profitability. Employees have become so expendable that the Massachusetts textile mill owner whose plant burned became the executive of the year and the darling of the press simply by keeping his workers on the payroll until things got straightened out.

For many who are laid off, of course, self-employment becomes the only option, and working for oneself is not without its problems. In a recent newspaper cartoon captioned "The Trouble with Being Your Own Boss," the self-employed worker said, "I had to fire myself today; I called in sick but I knew I was lying."

Changes in the Academy

These bottom-line influences have penetrated the academy. No longer ivory towers, universities are not immune from pressures for cost-cutting and, especially, for quick results, even though quick results are the antithesis of the traditional scholarly life, where thoughtful contemplation is generally under-

stood to be the path to discovery and to revelation. Certainly since the time of World War II there has been a partnership between the government and the research universities premised on the need for technological superiority in national defense. Now with the Cold War gone and China not yet at the level of an immediate threat, the partnership between the government and the universities, which was characterized by trust, has been replaced by an arm's length, contentious, contractual relationship, and the research universities are overrun by government auditors and lawyers. Meanwhile, economic pressures are leading to the creation of virtual universities, that is, classes and library resources made available off-campus by Internet and satellite feeds (those wonderful technologies again). Students already can put together, with elements from among several universities, a tailor-made degree program of courses, and graduate without ever having been on campus or having sat in a traditional classroom. In the academy as in life we seem to be moving away from community ideals. As we retreat from each other we not only know less about one another, we also care less for one another. With higher education increasingly justified as training for employment, rather than training for life, there is high risk of what John Cobb calls "the moral collapse of the university."

As an aside, while thinking about universities, you may be interested to know that this year there is another substantial decline in law school applications, even though the number of 22-25 year-olds is flat and the number of college graduates is slightly up. Since 1990 the number of persons taking the LSAT has declined dramatically, by almost a third. This steady decline is good news for the layman who thinks there are too many lawyers and for the lawyer who thinks there is too much competition. But it highlights two troubling phenomena: the public's diminished esteem for the profession and the loss of recruits from among the brightest and best of our young people.

By the way, you may wonder what we really teach in law school. We're fond of saying that we teach the student to think like a lawyer, to develop what's called "the legal mind." Harvard's Thomas Reed Powell defined the legal mind this way: "If you can think about something that is inextricably connected with something else without thinking about the something else, then you have the Legal Mind."

The Legal Profession

All this leads me, as you might expect, to brief comments about what is happening in our profession and our professional lives. The adversary system, for example—what's happening to the adversary system, the continuation of which is one of the stated objectives of the International Society of Barristers? Criticism of the adversary system of resolving disputes continues to mount. Litigation is a popular whipping boy blamed for many of our nation's ills. And

no one can deny the excesses, at times egregious, in discovery warfare, unmanageable class actions, foolish lawsuits, and the like. Mediation and arbitration and other forms of dispute resolution are touted as more economical and less abusive. I don't argue with the usefulness—indeed, the virtual necessity—of alternative modes of dispute resolution in some settings where truth and accuracy of result are of secondary concern; but much of its use is the result of imposing an economic model on everything, and I remain unpersuaded that the adversary system should recede further. Sidney Harris recently wrote: "It is impossible to learn anything important about anyone until we get him or her to disagree with us; it is only in contradiction that character is disclosed." In similar vein, it is often in contradiction that *truth* is most likely disclosed. In the analogous political sphere, Christopher Buckley argues that what we need is not bipartisanship and healing but principled advocacy.

You may remember the classic motion picture, *The Third Man*. If so, you will recall Orson Welles's statement to Joseph Cotton in the scene on the Ferris wheel. "In Italy," said Welles's character, "for thirty years under the Borgias, they had warfare, terror, murder, and bloodshed, but they produced Michaelangelo, Leonardo da Vinci, and the Renaissance. In Switzerland, they had brotherly love. They had five hundred years of democracy and peace—and what did that produce? The cuckoo clock."

Obviously I don't argue for "warfare, terror, murder, and bloodshed," nor do I think Welles's statement is necessarily an argument for the adversary system, but I do believe there are losses in our pell-mell rush toward softer ways of resolving disputes.

And what about our professional lives? As we near the end of this millennium as a profession made more efficient and productive by specialization and advertising and marketing and computerization and technology, what is happening to the profession, to the lawyers themselves? The bottom-line mentality increasingly infects the practice of law. The economic model controls us. Rainmaking is what counts. Billable hours is what counts. Nobody makes partner for an especially good piece of pro bono work. Advertising and marketing, the effects of automation and high-tech equipment, the inexorable tension between income and expense, all managed by efficiency experts—these reek more of the cash register than of the library lamp. This insistent business orientation of the law profession has led to emaciation of the essential trust between attorney and client, between attorney and associate, and even—perhaps especially—among partners themselves.

The notion of a law firm as a place where one spends his or her entire professional life is by and large almost gone. In its place we find lawyers more mobile and transitory than ever before in our history. The glue that held the firms together, large and small, was the overriding fiduciary obligation we felt

to each other and that we felt in common to our clients. Today lawyers are hopping and skipping and jumping from one firm to another. And they are moving in groups and sections: Real estate departments, bankruptcy groups, merger and acquisition units, whole litigation teams are moving en masse as lawyers chase the almighty dollar.

In this milieu clients, not surprisingly, are learning to protect themselves. You undoubtedly know the story of the lawyer trying to impress his prospective client. "Yes," he said, "you've got the best case I've ever heard." "Thanks," said the man, grabbing his hat and heading for the door. "Where are you going?" asked the lawyer. "I'm going to settle out of court." "But I told you, it's the best case I've ever seen." "Yeah, well, what I just told you was the other side's version."

Not very long ago, in any of the professions, such as law, medicine, and education, professional status was defined as much by a sense of ethical and professional responsibility as by specialized knowledge. Today professionals increasingly define themselves strictly in terms of their command of technical matters, by their marketable skills and knowledge. I saw a recent televised interview with Desmond Howard, the former Michigan football player who was named Most Valuable Player during this year's Superbowl (and who, just yesterday, bolted the Green Bay Packers, the team that helped him win the MVP award, and signed on with the Oakland Raiders—just like lawyers jumping from firm to firm after big verdicts). Howard repeatedly spoke of his "profession," which, of course, it is if profession means only a high degree of marketable knowledge and skills. There is a real loss in this shift of what it means to be a professional. The older notion of professional may have been susceptible to arrogance, but it also represented important nonmarket values that gave moral balance to whatever commercial elements were inevitably present. By contrast, both in economic matters and social matters the new professionals have largely replaced public-spiritedness with private-mindedness. As a pessimist put it, the legal profession is rotting away into an occupation.

Lester Thurow, in his recent book, *The Future of Capitalism*, observed that capitalism is about making money. That is all it is—a system for making money. It has no built-in morality. Indeed, one role of government is to ameliorate the excesses of capitalism through such devices as consumer protection, securities regulation, antitrust, and some redistribution of wealth by way of taxes. Lawyering is similar to capitalism. That is to say, legal skills have no built-in morality. The role of professionalism is to provide moral balance to our enterprise.

All of this leads me, a little belatedly, to the main point and to the obscure title of my remarks. The title "Does Time Make Ancient Good Uncouth?" is derived from an abolitionist poem by the nineteenth century American poet, James Russell Lowell. With obvious reference to slavery, he began his poem:

> Once to every man and nation
> Comes the moment to decide
> In the strife of truth with falsehood
> For the good or evil side.

And then in a later stanza he wrote:

> New occasions teach new duties,
> *Time makes ancient good uncouth;*
> They must upward still and onward
> Who would keep abreast of truth.

As that poem came to mind, I found myself wondering how far one can legitimately take Lowell's point, which is that what is right, or at least what is thought to be right, changes with the passage of time. As for the point at issue in the poem, none of us would argue that slavery was good; and to the extent that there had been intellectually respectable arguments in favor of it, Lowell was right to say that changing understandings over time had made that good uncouth, that is to say, outlandish and no longer acceptable. (There were better words than "uncouth" but he had to rhyme with "truth.") There is no question that some of our perceptions of what is good and what is true will always be imperfect. They will mutate over time. But the flow of dilemmas never abates and, I submit, the fundamental values are immutable.

I have reminded you of a number of technological changes and social and economic changes, a mere sampling of the vast, irreversible changes happening all around us—and to us. Inevitably we worry. We worry, for example, about the law of unintended consequences, the bad things that can happen from well-intentioned measures, when a blessing is accompanied by a curse—the pesticide or medicine or energy source that cures or saves but also simultaneously sickens or kills. With these and countless other worries we have a mood of anxiety-ridden satisfaction.

All these changes make us wonder about the possible need for a corresponding change in ourselves. Do these remarkable physical world developments imply corresponding changes in human values, in what is right and wrong? The great Czech leader, Václav Havel, has observed that experts can explain anything in the objective world to us, yet we understand our own lives less and less; and that we live in a post-modern world, where everything is possible and almost nothing is certain.

The uses to which fallible people put scientific marvels will be the issue. As Einstein said about the dangers of physics after Hiroshima, "The world is more apt to be destroyed by bad politics than by bad physics." As lawyers and opinion makers we necessarily will participate in resolving conflicts over the

uses to which the new technologies will be put—conflicts that cannot be resolved by science but only by the exercise of moral choice. In medicine, illustratively, who will get the benefit of a life-saving treatment that is extraordinarily expensive or rare? Who determines triage priorities and on what basis? Who makes the decision to spend a million dollars per patient for a high-tech treatment for just a few instead of millions for food and public health that perhaps on another continent would save thousands of lives?

As we face these choices and countless other choices posed by scientific advances, guess what? It's the same old us with the same old weaknesses. The plot may be different but the characters are the same. The choices are new but we are not. And we will apply age-old values of justice and compassion and charity and love—and as much wisdom, however limited, as we can muster.

Although the changes in the practice of law and in the trials of lawsuits are not of the same dramatic order as changes in the supersciences, the issues are analogous. Have the changes we know so well in law and lawyering changed what is right and wrong? Alas, for many it would seem so, hence the declines in civility, in trust, in generosity of spirit that are apparent on every hand. Indeed, the steepness of those declines makes us less and less a profession, and it challenges us to resist that decay and to preserve the ancient "goods" that we know: honor, honesty, diligence, dignity, courage, skill, and the like—ancient goods that time has *not* made uncouth.

In that endeavor, surrounded as we are by a culture that places a dollar sign in front of every choice, we need all the help we can get to maintain a moral compass. Each of us has his own conscience, his own pole star; and the values that we espouse are in the abstract high-minded and ethical. The problems come in our diurnal decisions, in our responses to the day-by-day issues that we face. And I speak not of the big, obvious ethical dilemmas, but of the moment-by-moment choices we make that constitute the fabric of our lives.

You will derive your guidelines and your strength from whatever source you have chosen—your religious faith, your system of ethical values, your humanity—but each of us needs the support of like-minded persons to stand for the high values, to preserve the ancient good. And that is one of the main reasons for the International Society of Barristers. The Society's founders, and particularly Craig Spangenberg, saw the Barristers as a haven (Joel Boyden this morning used the metaphor, "an oasis"), a place where those bloodied by their service in the law might come together for a restorative fellowship, reminding each other what it means to spend oneself in the service of others—the hallmark of a professional. We come together to reassure each other that time has not made ancient good uncouth.

We are not a "cause" organization, lobbying or mounting projects. But neither are we alone. One among us lamented this week that the battle for profes-

sionalism seems to be lost. I think not. I certainly hope not. But I am sure that the Barristers can make a difference. The Torah says that God promised Abraham to save Sodom if even ten righteous people could be found. Though not alone, we Barristers may well be part of the saving remnant of our profession.

If that sounds pretentious, if that task seems too great, remember the folk wisdom, "Life by the yard is hard, life by the inch is a cinch." As Harold Leventhal used to say to his law clerks "Seize the inch!" The improbability of total success is not reason to sit still. To paraphrase Leon Higginbotham, you should aim for the top of the mountain; you may not get to the top, but you won't be left in the valley of despair.

There is reason to be dismayed about our beloved profession in the near term, but lawyers like you give high promise for our future. I commend to you an optimistic word from that great Minnesota philosopher, Garrison Keillor:

> To know and to serve God of course is why we're here, a clear truth that, like the nose on your face, is near at hand and easily discernible but can make you dizzy if you try to focus on it hard. But a little faith will see you through. What else will do except faith in such a cynical and corrupt time? When the country goes temporarily to the dogs, cats must learn to be circumspect, walk on fences, sleep in trees, and have faith that all this woofing is not the last word.

FUN AT THE BAR, OR THE DEVIL QUOTES SCRIPTURE FOR HIS PURPOSE†

Scott Baldwin*

Since I speak to you out of my experiences as a Marshall, Texas, trial lawyer, I should begin by telling you where Marshall is: It is ninety miles north of Nacogdoches, which is an old Indian word that means, "It's a long walk to El Paso." As I understand it, today it's my job to talk and it's your job to listen. If you get through before I do, let me know. This may be my good fortune and your misfortune, which reminds me of a story about Disraeli. When asked if he knew the difference between misfortune and calamity, Disraeli said, "If Gladstone were to fall into the Thames, that would be a misfortune; but if someone pulled him out, that would be a calamity."

I'm just going to relate some experiences I've had, in the hope that you can benefit from some of my mistakes. These are all true stories—or they were at one time, anyway.

EXPERTS

I just got back from a high-tech trial over a Mitsubishi airplane crash. Three sets of defendants' lawyers came in from Dallas to Fort Worth, and you can imagine the electronic gear and paraphernalia that we had in that courtroom. I kept telling all these Dallas boys, "You can have your Elmos, and you can have your videos; all I want is my screen and overhead projector." I have a screen that's ten feet wide and ten feet tall. By about the third week of the trial, everyone was using my screen.

During that same trial, I had my expert on the stand, and I was asking him questions about an FAA report that I had put up on my screen. The lead lawyer for the defendants was a very good, capable lawyer, but he was highly technical; during the four weeks of trial he made something like forty motions for mistrial. He was particularly wont to make an objection for leading the witness. When I was going through this report with my expert and pointing to it with a small laser pointer, I said, "All right, Doctor, you see this line up here? Let's see how that reads . . . ." "Objection, objection, your Honor [he always objected that way]. He's leading the witness with his little red dot." To the judge's credit,

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he responded, "Very interesting objection, but I think I'll overrule it." (Speaking of Mitsubishis, a good friend, George Tompkins, who defends a lot of airplane cases and knows I like to fly, came to me and said, "You know a real cheap way to get a Mitsubishi MU2? Buy a big tract of land and wait.")

I had a case in the federal court in Fort Worth with a judge, since deceased, by the name of Hill. He had quite a reputation for allowing only five minutes for voir dire. My case involved a man who was driving one of those little tractors that you used to see pulling baggage carts around in railroad stations. In my case, the man was backing up at the Chance Vaught plant there in Fort Worth to hook onto a fighter plane and pull it out of the hangar. This was one of those fighter planes with an antenna-like thing sticking out of the nose just like a harpoon. The man's foot slipped off the brake and hit the accelerator, and he was harpooned. When I heard about Judge Hill's five-minute rule, I got the defense lawyer, went in early to meet with the judge, and said, "Judge, this is a complicated case. I've got two experts, and that's a lot for me. There's no way I can explain the complicated engineering part of this case to that jury in five minutes. I've got to have more time." He said, "All right, you've got ten minutes." Then I went out to face the jury. It's always been my view that I should keep a case as simple as I can and get the jury to follow my simplicity, so as I started the voir dire, I said, "Ladies and gentlemen of the jury, this is really a very simple case." Immediately, Judge Hill said, "Mr. Baldwin, would you approach the bench?" I approached the bench, and he said, "You've got five minutes." Lesson? Don't contradict what you told the judge.

The next lesson has to do with whether the jury really listens to what we say. The story involves an expert, an old country doctor. Sometimes we go out and hire the Ph.D.s of the world who are smart but don't know how to testify. I'll take an old, plain-talking doctor any day. This case was out in the piney woods of east Texas, in an old, unairconditioned courthouse. My client had what is known as a compression fracture, and if you've ever had a compression fracture case, you know that nine radiologists will give you at least seven different answers about what is or isn't a compression fracture. My case was going to develop into what we in east Texas call an old-fashioned swearing match about whether my client did or didn't have a compression fracture. It was going to be a battle of the X-rays.

I found out that the defense lawyers were bringing the head of the radiology department at Baylor Hospital in Dallas, while my expert was old Doc Pope, a general practitioner, and it dawned on me that I had to qualify this man to read X-rays. So I said to my witness, "Now, Doc, let's talk about this X-ray stuff. Did you study about X-rays in medical school?" "Oh, yeah." "Are you capable of reading X-rays?" "Oh, yes, sir." "Have you ever had any other experience with X-rays?" "Oh, yeah. Mr. Baldwin, let me tell you. Right after World War I

[that's how old he was], I stayed in Switzerland with the Army for a year, and all I did was read X-rays." I thought, "This is news to me, and it sounds good." Out loud, I said, "Tell us more about this, Doctor." He went on and on about all these X-rays. It turned out he had read thousands of X-rays, hundreds of them a day, and we talked about it a long time. Then we turned to the X-ray of my client. Old Doc Pope went over and held up the X-ray by the window; he disdained the view box. He said, "There it is right there, Mr. Baldwin. See that fracture?" In those days you often had to "prove up" an X-ray, prove that it actually was the plaintiff's X-ray. "How do you know that's the plaintiff?" Doc Pope said, "Like a farmer knows his hog."

The defense brought in their board-certified head of the radiology department from Baylor, with his red pencils and protractors and rulers and all that measuring stuff; and we finished the trial. The jury went out and found everything in our favor. Afterwards I was talking to one of the jurors. I said, "Tell me something: How did you all come to the result that you did?" He answered, "Mr. Baldwin, it was that expert you brought over here from Switzerland. I guarantee he knew what he was talking about."

This next story is another showing that you don't have to have the most qualified expert in the world. One hot Texas day, when the temperature was about 110°, a young lady who lived in Nacogdoches got in her car at about noon. There was a bottle of perfume sitting on the dashboard. She picked it up to move it to the seat, and it exploded. We were in federal court in Marshall. By country practices in those days, the judge came twice a year, in November and in spring. It wasn't unusual to have six or seven trials on the docket, and once the judge started, he kept going because he couldn't go back to Beaumont until he finished the docket. That meant that you might be number seven and find yourself up for trial all of a sudden on the second day because everything else settled. That's what happened to me in the case of the young woman from Nacogdoches.

She had a bad cut in her eye, and I had sent her to see Dr. Koenig, an internal medicine doctor who had testified for me a lot in sore back cases. He was not board certified; he had just decided one day that he'd be an internal medicine doctor, and that's what he became. Lo and behold, before we had even taken a deposition, the docket cratered, I was up for trial, and all I had was Dr. Koenig.

I talked to the doctor privately just before he testified. "Doctor, what are you going to say about my lady's eye?" "Well, it's 20/400." I said, "What does that mean?" "That means she's legally blind." I said, "Wait a minute, Doc, you can't say that. You'll get both of us put in jail if you say 'legally this, legally that.'" "All right, all right." He got on the stand, and I said, "Doc, did you examine this young lady?" "Yes, I did." "Do you find it necessary to make eye examinations in your practice?" "Oh yes, I treat heart patients and I find it

very necessary that I make eye examinations." He added, "And besides that I examine for the FAA." Again, as with Dr. Pope's X-ray experience in Switzerland, that was the first I had heard of the FAA. I said, "Tell me about that." So we talked about his eye examinations for the FAA and got him qualified. "All right, Doctor, when you examined the plaintiff, what did you find?" "Well, I found she was 20/400." I said, "What does that mean to you as a doctor?" "That means she's *medically* blind." "Pass the witness."

The defense lawyer was a great friend of mine, and we had done battle over the years. Before this case, I had passed Doc Koenig off to him as a back doctor, and he could hardly wait to attack his qualifications as an eye expert. He began, "Doctor, you're not an eye specialist, are you?" "No, I'm an internal medicine man." "Are you board-certified as any kind of eye doctor?" "No, sir." "You say you're an internal medicine man. Are you a board-certified internal medicine man?" "No." "Are you board-certified in anything?" You won't want to believe what I'm about to tell you, but it is the absolute truth. Dr. Koenig reached into his back pocket, pulled out his billfold, opened it, and pulled out a card. He said, "I'm a board-certified scuba diver. Do you want to see my card?" If that lawyer had been smart, he would have quit right then. He continued, however. "All right, Doctor, you say that she is 20/400. How do you know she is 20/400?" Dr. Koenig looked at him and said, "She couldn't see the big E." Then it got worse. The defense lawyer said, "I see here she was 20/40 at one time. What is 20/40?" I thought, "He's got him now." Dr. Koenig said, "Half of 20/20." Then the defense lawyer pulled out a note that said something about 20/30. (He wouldn't quit.) He said, "All right, Doctor, what is 20/30?" "Third line from the bottom." You can make them understand if you don't muddy the water.

Parenthetically, let me tell you this story from the same trial. The defendant brought in a man who said the perfume bottles were safe. On cross-examination, I said, "Isn't it true that when you tested these bottles at 100 pounds per square inch, you got about a 40-50% breakage rate?" "Yes, but we fixed that; we remedied that." I said, "How did you remedy it?" "We changed our test, lowered it to 50 pounds per square inch."

One more story about experts involves Will Watkins, a great friend of mine. Will tried a lot of railroad cases, and he knew I tried a lot of railroad cases. One day he called me and said, "Scotty, I need an expert." "What kind of expert do you need, Will?" "An expert in switching operations. Think you can help me?" I had just tried a case for a guy who was a switcher and who was pretty articulate. I told Will, "I think I've got just the guy for you. His name is Shelton. I'll call him first." He said, "The case is down in Brownsville, and I'll be going to trial in about a month." I called Shelton, but I was in a hurry and probably didn't take as much time as I should have. I said, "Shelton, would

you like to pick up a little change?" "Whatever you say, Mr. Baldwin. What have I got to do?" "I've got a friend down in Houston who's got a railroad case in Brownsville, and he needs a witness. I told him you'd be glad to help him." "That's fine, Mr. Baldwin. What do you want me to do?" I said, "His name is Will Watkins. When he calls you, just do whatever he tells you." "All right, Mr. Baldwin, but let me ask you one thing." "What's that?" Shelton said, "I ain't going to have to swear I saw it, am I? I ain't never been to Brownsville."

THE PREACHER'S WIFE

The next story explains the part of the title of this speech about the devil quoting Scripture for his purpose. This case involved a man, a good friend of mine, who was working at a basket factory in the 100+° heat in Texas. He was found prostrate in an old storeroom; he had had a heart attack and died. I brought his worker's compensation suit for his widow. In Texas in those days you got a jury trial, and the case was openly against the insurance company—the jury knew there was insurance. But there was a sticky quirk in the comp law; in order to recover death benefits, which were quite substantial in those days, you had to show that death was a result of an accident suffered on the job. That was quite a trick for an unwitnessed heart attack.

As I left the office for the trial, I grabbed a young associate who had just joined our firm. I said "Get your yellow pad and come on down to the courthouse with me. You just might learn something." A preacher's wife was on the jury. Everybody figured that she was going to be the foreman and everybody was playing up to her. It came time to argue the case, and the judge gave forty-five minutes to each side. I opened, and then the defense lawyer started out with a Bible quotation, obviously aimed at the preacher's wife. I had to stay focused on what the defense lawyer was saying, so I wrote a note to my new associate: "Please give me a Bible quote that I can use to answer his Bible quote." Five minutes went by. Ten minutes went by. Nothing. I wrote him another note: "Please give me a Bible quote that's apropos." Time went by again. I was getting a little desperate and wrote him a third note: "Just give me any Bible quote. I'll make it fit." Well, the defense's forty-five minutes ended, and I had to speak. I wrote my associate one last note: "Does this tell you anything about the law firm you just joined? Two lawyers in 45 minutes can't come up with one Bible quote!"

The Holy Ghost must have taken over after that because I don't know where this argument came from. I got up and looked right at the preacher's wife and said, "I could give you lots of Bible quotes if I wanted to but I ain't going to do that because religion don't have anything to do with this lawsuit. I've got just one thing to say about religion and you're not going to hear anything else

about it from me, and that's this: If Jesus Christ was here today, he'd be sitting right over there by that widow lady. He wouldn't be sitting by that insurance company, I can tell you that."

The Assistance of Local Counsel

I have to tell you a story or two about my great friend, Joe Jamail. This goes back to a long time ago. In El Paso a man walked into a building and lit up a cigarette, there was a tremendous explosion, and the man was killed. We claimed that a valve about a mile up the pipeline leaked and caused the explosion. It was a pretty complicated case, and trial was to be in Houston. A young lawyer in my office did most of the work getting our case ready, and I got Jamail to help me locally. The young lawyer needed to be in Dallas on the morning we were to start, so I told him, "You go on to Dallas and tend to your business. You'll be through by the middle of the morning, so you can get to Houston by noon or so. We'll have the jury picked by then, and you'll be there to help us with the trial."

Jamail and I went in on the day of the trial. We met the widow and the four children, and we talked the judge into letting us split the voir dire on the theory that I was going to handle the liability issues and Joe was going to deal with damages. We began voir dire with the first four or five people. I talked about the liability part of the case, and then said, "Now Mr. Jamail is going to tell you about the damages." This approach worked pretty smoothly for a while, but about the third time through, I noticed that Joe was talking a little about liability. (He is a quick study.) He kept getting a little further in, and it sounded pretty good to me so I just eased over and sat down on the bench in a corner. Joe took over the whole thing.

About that time my associate came in and sat down by me. He listened for a few minutes as Jamail waxed eloquent and then leaned toward me and asked, "When's our case going to get up?" I said, "This *is* our case. This is Jamail's version of our case, and I like it better than I do ours." He said, "Yes, but how are we going to prove that?" I said, "That's your problem." Fortunately, Joe scared them enough that they paid us some money and we got the hell out of Houston.

One more Jamail story: I was a young lawyer, and my partner Franklin and I had gotten what I considered our first really important case. (Actually, it was our senior partner's case, but he had gotten tired of it and was about to retire, so he gave it to us.) A train had broadsided a gasoline truck on a crossing in Houston, and a tremendous fire, an inferno, had resulted. The engineer and fireman were killed. We were representing their families and hired Jamail to help us locally. We tried the case, and when it came time to argue it, the judge again gave us

forty-five minutes to a side. My partner and I were very jealous of this case and decided that three people cutting up forty-five minutes was just too much, so we decided that he would open and I would close. I told Jamail, "Sorry, Joe."

Franklin opened and asked for a lot of money, which you would, given two deaths and four or five children. Then the defense lawyer got up and said, "They come in here and ask you for all this money. You know, anybody can do that. Do you know what it reminds me of? It reminds me of when I was a little boy, and I would go to my daddy when I wanted to go to the show, and I'd ask him for a dollar, hoping he might give me a quarter." At that point, I got a note from Jamail: "I'll give you $15,000 of my fee for five minutes." I said to myself, "Anybody who wants to say something that bad is bound to have something to say." I answered, "You've got it." He got up and delivered five minutes of the most slashing argument I ever heard in my life. The highlight of it went something like this: "They float this lawyer in here from Dallas who admits to you that he'd cheat his own daddy." I knew right then he had the makings of a great lawyer.

I'll digress and tell you another story about this case and the senior partner who gave it to us. The jury was out a long time because we had about seventy-five special issues. I had had to fly home when the jury went out, and my senior partner and I were on the phone talking to Jamail and Franklin down in Houston when the jury came out for lunch. Franklin, who was always pessimistic, said it didn't look good. I said, "What do you mean, it doesn't look good?" He said, "Well, that old maid really looked mad. I think she's against us." At that point, my senior partner said, "Old maid? You mean you all took an old maid on the jury? Don't you know that if she'd ever said yes to anything in her life, she wouldn't be an old maid?"

SIMPLICITY

Let me close by saying you've got to keep things simple. I guess that's my hallmark, and here is a good example of why it's necessary. This is from a transcript of a trial that happened in Dallas so long ago that it involved the street railway. There was a big question about the cause of death. Question: "Now, Doctor, in language that the ordinary layman can understand, you will please tell the jury just what the cause of this man's death was." Answer: "Well, in plain language, the man died of an edema of the brain that followed a cerebral thrombosis or possibly an embolism that followed in turn an arterial sclerosis combined with the effect of a gangrenous coleocystitis," at which point a juror said, "Well, I'll be God-damned." The judge said, "Let's have order in the court. Ordinarily I'd fine a juror for saying a thing like that in my court, but I cannot in this instance justly impose a penalty upon you, sir, because the court was thinking exactly the same thing."