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. . . AND THE INVENTION OF THE FUTURE TENSE†

John W. Reed*

I. Millennial Angst

This is the last session of the last meeting of the International Society of Barristers in the 1900s. Though the Third Millennium technically does not begin until 2001, the turn of the "odometer" from 1999 to 2000 leads us all to think of this as the end of a century and of a millennium. The pivotal date is yet ten months away, but the pundits are already issuing their lists, both profound and trivial—the greatest inventions, the best books, the worst natural catastrophes, the trial of the century (of which there are at least a half dozen), the most influential thinkers, and on and on.

Often there is in these lists the implicit question whether, over time, the world is becoming a better place or is mired, perhaps permanently, in man's inhumanity to man. There is, indeed, a great deal of millennial angst.

For most of us in this room, the sources of that angst range from the general to the professional to the personal.

General

Our dissatisfactions with the world in general include the decline of dignity and civility and excellence. In the words of the title of Jack Liber's recent article in the *Barristers Quarterly*, we live in a world that is "rude, crude, and lewd."[1] Indeed, there was a commercial during the Super Bowl telecast advertising a forthcoming movie starring Eddie Murphy; the movie's title is "Life," and—you're not surprised—it's rated R. Life seems increasingly brutal and coarse. You may have seen the recent cartoon showing a man entering a yogurt shop; the cartoon's caption read: "The closest Earl ever came to getting some culture. " We seem to be in the midst of a great dumbing down, in danger of entering a new cultural Dark Ages.

And with our laudable desire to be tolerant of others, our own society is being balkanized—a term never more fraught with meaning than now.

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 5, 1999.

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

[1] Liber, *Professionalism in Our "Rude, Crude, and Lewd" Society*, 33 International Society of Barristers Quarterly 409 (1998).

Around the world, and in our own country, ethnic and religious differences create more divisions and less harmony than I can remember in my lifetime. As the comedian Bill Maher put it:

> There used to be magazines everyone read, like "Life" and "Time." Now there's "Gay Indian Biker" magazine. You don't just get your coffee; you get your decaf frappucino latte. Everybody has a magazine and a channel. There are 500 channels and 500 magazines, and we wonder why we're not united as a country.[2]

We live in the midst also of a loss of faith in long-established institutions. The government, schools, the church, charitable organizations—their flaws have been revealed to us and we feel betrayed and cast adrift. There is even a loss of faith in the traditional concept of family. To what and to whom, then, can we turn?

Professional

We are also troubled professionally as we come to the end of the millennium. There are many developments that make life uncertain for us as lawyers: the growth of alternative methods of resolving disputes, for example (if there are no trials, how can there be any trial lawyers?); the bureaucratization of the judiciary, for example; the management of litigation by the budget officers of insurance companies, for example; the migration of lawyers, even partners, from firm to firm, for example. And, for example, the tendency to equate zealous advocacy with insolence and arrogance—the type of advocacy that someone has called "ice hockey in business suits." Now we may be headed for the practice of law not out of Suite 725 in the National Bank Building but out of a virtual office whose address is www.reed@lawyer.com (especially "com," for commerce).

Pervading all these problems—perhaps causing them—is the economic shift. In our profession there is a tension between the practice of law as a means of livelihood and the practice of law as a means of public service. That tension is inevitable; it has always been there, and always will be. But as this century and millennium have waned, the balance has shifted, and the economic model of the profession, the bottom-line mentality, has gained greater and greater ascendancy. I know, personally, many lawyers who are profoundly troubled by that shift and who find the practice of law, though lucrative, ultimately unrewarding.

Professionally, then, there is millennial angst.

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[2] MOTHER JONES, Jan./Feb. 1998.

Personal

And, finally, the personal. I do not presume to think that I can know and describe your own personal feelings at the millennium's turn—whether angst or not. I'm sure that as members of this accomplished group you take some pleasure in the high degree of your achievements, though I would remind you that it is hard to be sure what is achievement and what is good luck since good luck looks so much like something you've earned. Certainly, though, you are justifiably proud of your accomplishments. But tempering that joy of achievement are elements of anxiety about the uncertain future of the world, of our country and, surely for each of us, anxiety about the future of our families, our loved ones. And, course, there is stress—the stress of faster communication and overcommitment of our time and strength. Stress, someone has said, happens when your gut says, "No way," and your mouth says, "Sure, no problem." Things have come to a pretty pass when the best part of waking up is nothing more than "Folger's in your cup."

Even those for whom religious faith is an anchor sometimes find it difficult to reconcile that faith with the messy world we live in. They smile knowingly when they read E. Y. Harburg's little verse:

> No matter how I probe and prod,
> I cannot quite believe in God.
> But oh! I hope to God that He
> Unswervingly believes in me.
> . . *The Agnostic*

I suspect many of us, in our rational selves, look forward to the excitement of the brave new world ahead but also, in our emotional selves, are loath to leave the known of this century for the unknown of the next. And the danger is that in looking back with nostalgia we will, like Lot's wife, turn into useless pillars of salt.

As society changes, institutions must change and the legal system is no exception. It too is changing, apparently faster than ever before—everything about it: the courts, the lawyers, the law schools, the laws themselves. I would bet that, like me, you somehow have the feeling that we're moving to a new structure of the profession and that, if we're just patient, the changes will end, the profession will settle down again, and we can adjust to it. But that won't happen, of course. The only constant is change, and you and I simply live during a segment of that change, which will not end in our time, or for that matter, ever after. As Robert Frost said, "In three words I can sum up everything I've learned about life: It goes on."

So, with what frame of mind do we dismiss this millennium and its final century? With what attitudes, what goals, what commitments do we practice law in the year 2000 and beyond?

At last year's meeting in Orlando, Pat Williams, general manager of the Orlando Magic basketball team, spoke of "five secrets for a magical, miraculous way of life."[3] I am not a so-called motivational speaker and I have no list of dos and don'ts for you—no advice for you, like "don't sweat petty things, and don't pet sweaty things," or advice like "don't resent change, since, as Malachy McCourt said, 'Resentment is like taking poison and waiting for the other fellow to die.'" But I do offer some thoughts about your professional and personal lives as we move across the divide into the Third Millennium.

Recently I encountered a poetic phrase in a book by the Englishman George Steiner that caught my attention and provided the title for my remarks. Like those who ask the familiar question, "How can a good God let bad things happen to good people?," Steiner states that the injustices and unspeakable cruelties that abound in this world justify atheism insofar as they prevent God from what would be even a first coming. "But," he then says profoundly, "I am unable, even at the worst hours, to abdicate from the belief that the two validating wonders of mortal existence are love and the invention of the future tense. Their conjunction, if it will ever come to pass, is the Messianic."[4]

". . . the two validating wonders of mortal existence are love and the invention of the future tense."

II. THE FUTURE TENSE

There is in each of us a strong tendency to live in the past and the present, and to pretend that the future will simply be more of the same. We expect to wake up each day and, as in the movie "Groundhog Day," find that it is yesterday all over again—day after day after day. Lawyers, as a tribe, believe that to be true more than does the general population because, beginning in law school, we have been trained to look at precedent—at what courts *have* done—and to divine from that precedent what courts likely will do in the future. As a consequence, we are more backward-looking than most people. We are like passengers in the railroad observation car at the back of the train, watching the low hills recede behind us, unaware of the majestic mountains ahead.

I went to law school in Ithaca, New York. Cornell's campus—far above Cayuga's waters—is on high ground above Ithaca's business district. A main

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[3] 33 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 419 (1998).
[4] G. STEINER, ERRATA: AN EXAMINED LIFE 171-72 (1997).

route from campus to town is an uninterrupted six blocks of steep decline known as Buffalo Street. Snow and ice frequently coat Buffalo Street hill, making descent a perilous adventure. It is part of Ithaca lore that in the early days of the century "Mrs. Tichenor," a wealthy, elderly woman of great dignity and reserve, was seen being driven down Buffalo Hill in her two-horse sleigh. Her horses were shod for the ice, but the rails of the sleigh were smooth; and though the horses continued to go down the hill, due west, the sleigh with its human burden skidded almost sideways, facing south. As the horses moved on down the hill as intended, with the sleigh at almost a right angle, Mrs. Tichenor and her driver looked steadfastly straight ahead—south—refusing to acknowledge that their world was askew.

What a wonderful parable for so many in our profession! The enterprise is moving one way and we are facing another, clinging determinedly to the illusion that nothing is amiss.

> [Too many of us] hold certainty dearer than truth. We want to learn only what we already know, to become only what we already are. And some of us even embrace "The Principle of the Dangerous Precedent," put forth by the British academic who said, "Nothing should ever be done for the first time."[5]

Our profession desperately needs the imaginative ministrations of its most creative practitioners, men and women such as yourselves. It *is* being reshaped, and the question is whether you and I are role players in that reshaping, or mere observers going along for the ride. As Yogi Berra said, "Predictions are hard to make, especially about the future." But the future will be more predictable if you and I address it, if we lift our heads out of the sand, out of our own daily concerns, and participate in shaping the changes that are taking place.

The unknowns of the future tense create stress, of course. I jokingly referred to stress a few moments ago, but I submit that a degree of stress, obviously within limits, is not a negative but a good. We do much of our most creative work under stress. The oyster produces the valuable Mikimoto pearl when it is irritated by a grain of sand. Left in its own contented state, the oyster produces nothing greater than an hors d'oeuvre on the half shell.

Another analogy is the vineyard. One of my sons-in-law is a knowledgeable wine salesman. He tells me that the best wines come from vines grown in rocky, shaley soil, in areas of limited rainfall. With less water, the vines put down roots as far as twenty feet and the grapes have less sugar and are less fleshy. The vinedressers trim the vines and hope for stress in terms of water

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[5] William Sloan Coffin, *Diversity and Inclusion*, MT. HOLYOKE ALUMNAE QUARTERLY Winter 1999, at 23.

shortage. The grapes then draw more nutrients from the soil and develop more concentrated flavor. The best grapes come from vines under stress. (Speaking of grapes and wines, you perhaps have heard the statement by the feminist sociologist: "Men are like fine wines. They all start out like grapes, and it is our job to stomp on them and keep them in the dark until they mature into something you'd want to have dinner with.")

Pearls of great price and grapes of distinguished vintage are the products of stress. Each of us surely would like less stress, but never doubt the relationship between a degree of stress and creativity. And facing the future tense provides plenty of stress. Let the Barristers welcome that future creatively. The characteristics and abilities that, by definition, qualified you to be Barristers qualify you to take lead roles in determining the future. They not only qualify you, they charge you with that responsibility, because each of us is accountable for the faithful stewardship of his or her talents. And you are an extraordinarily talented people.

III. LOVE

But talent is not enough; and here is where we come to the other part of Steiner's aphorism: The validating wonder of our mortal existence is not only the fact that there is a future—what he calls the invention of the future tense—but also love. Is it illegitimate to speak of love in a professional setting like this? It is simply sappy? Merely maudlin?

Not for me it isn't. First of all, I love this organization and I love its members and their wives and husbands. I have been privileged to be a part of you for twenty years. Individually and in the aggregate I count you as dear friends and even as family. I am led to believe that each of you, over time, has found similar friendships and warmth among your fellow members. There are few things more important than friends, and these relationships strengthen us, and arm us as we return to meet the challenges of daily practice and private lives. Indeed, this warm and caring fellowship is the genius of the Barristers.

But I want us to think about love as being part of one's professional qualities, part of a lawyer's equipment. It may seem strange for those of us who are trained in the craft of careful thought and rational discourse to talk about love. How is it relevant, to use the lawyer's term? Is love part of a Barrister's answer to the uncertainty of the Third Millennium?

I suggest that love is a part, an essential part, of being a true professional, a true Barrister. I use the term "love," of course, in the sense of charity—what the theologians call agape, what Noah Webster calls "unselfish and benevolent concern for the good of another." Love in the sense of affection for and commitment to another.

Love in the sense of caring is not only relevant, it is central to being a good person and to being a good lawyer. A different world cannot be built by indifferent people. Love animates; it gives purpose and leads to dedication. It is not mere tolerance of others. I think it was Garrison Keillor who said of one of the citizens of Lake Wobegon, "Olaf learned to behave without making people mad at him, which is not the same as being a good person."

Every one of us knows that the state of mind with which a person does something is critical to its meaning. Intent, purpose, motive—these make a difference in the legal effect of the thing done. Not only the legal effect but the personal and social effects as well depend on intent, purpose, motive. Referring to Don Quixote, Oliver Wendell Holmes said, "If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist, he will make . . . his world ideal." If our daily work is the mere performing of professional tasks—research, depositions, trials, negotiations, even personal counseling of clients—then that work, no matter how skillfully done, is Sancho Panza's work; and we are likely to feel unfulfilled. But if, despite the corrosive effect of our years in the trenches, we can do that work with the soul of an idealist—that is, with generosity and helpfulness and caring—that is to say, with love—then we will make our profession more nearly ideal, and our personal lives as well.

Mentioning Mr. Justice Holmes reminds me of another Holmes—Sherlock Holmes—who well knew that one's purpose affects meaning. Holmes and Dr. Watson went on a camping trip. After a good meal and a bottle of wine, they lay down for the night and went to sleep. Some hours later Holmes woke up, nudged his faithful friend, and said, "Watson, look up at the sky and tell me what you see."

Watson replied, "I see millions of stars."

"What does that tell you?"

Watson thought for a moment and replied, "Astronomically, it tells me that there are millions of galaxies and potentially billions of planets. Astrologically, I observe that Saturn is in Leo. Horologically, I deduce that the time is approximately a quarter past three. Theologically, I can see that God is all powerful and that we are small and insignificant. Meteorologically, I suspect that we will have a beautiful day tomorrow. What does it tell you?"

Holmes was silent for a second, then spoke: "Watson, you idiot, it tells me that someone has stolen our tent. "

It *is* essential to know what the real question is. And that's a lawyer's skill.

All of this brings me to my constant theme, as I have spoken to you over the years: the importance and the responsibility of the individual, especially the talented individual. A year ago we lost the presence of Craig Spangenberg, a founder of the Barristers and one of the great men of the American

trial bar. He was talented, skilled, and he bore in himself these two validating wonders of mortal existence—love and the future tense. He cared about others, not only his family and friends and fellow Barristers—which was easy for him, as it is for us—but he cared deeply about the future of his profession, about the legal system and the law. He not only served his clients with dedication but he had a noble vision for the profession and he gave of himself prodigiously to the controversies of his time. He cared—that is, he loved—and he mightily affected the future. Like the poet's description of the original St. Nicolas—Nicolas, the Bishop of Myra—Craig was "prodigal of love." And when I identify love as a central theme of his life, I do not mean talking about it but translating it into action. He embodied the words of Eliza Doolittle's wonderful song to Professor Henry Higgins, in *My Fair Lady:* "Don't speak of love. Show me!"

In the late fourth century, St. John Chrysostom, a church father and the patriarch of Constantinople, stated a theory of ethics in which one learns how to behave by imitating or copying exemplary models. Although that self-evident truth is at least 1600 years old, too many believe that ethics and civility can be taught by lecturing, by preaching—that lawyers can be hectored into behaving professionally. "Do as I say," not "Do as I do." But as a teacher, if I am shallow in my thinking, shoddy in my preparation, disrespectful of my students, too busy to deal with them personally, what good will it do to lecture them on the qualities of a responsible, caring lawyer? And so I have an obligation to offer them, in Chrysostom's terms, something to imitate, to copy.

And so does each of you. Each has the obligation to be a model, an exemplar. You are being watched by young associates, by colleagues, by clients, by judges and juries, by the public. You are only one, but you *are* one. That's what the International Society of Barristers is all about—not just having delightful, restorative times together, as here, but serving our profession as a leaven, a leaven made up of those two validating wonders of mortal existence: love and the invention of the future tense.

Is there cause to be hopeful? Does optimism depend on memory loss? There is indeed much fear and hatred and injustice in this world and therefore much cause for pessimism. But Israel's Abba Eban once said, "We do the right thing only after exhausting all the alternatives." Like Eban, I am a short-term pessimist but a long-term optimist. We will do the right thing in the end.

The good news is that we live in a moral universe, and the point is to love, to hope, and to have courage. Welcome to the Third Millennium!

EFFECTIVE MEDIATION†

Yaroslav Sochynsky*

Lawyers and sophisticated clients increasingly have embraced mediation to resolve legal disputes. As an example, many companies now incorporate mediation into their personnel policies and procedures.[1] The reason for this is obvious: Mediation works. Most mediations result in a settlement (well over ninety-five percent in the author's experience). Mediation also avoids litigation expense, drain on personnel resources, and the uncertainty of trial. But the purpose of this article is not to sing the praises of mediation. Rather, it is to offer some practical advice for litigators on both sides of the aisle on how to prepare for mediation and improve their odds for a successful and rewarding mediation experience. These observations will draw on the author's background both as an advocate and as a mediator in over 300 mediations involving various business, technology, and employment disputes.

Some Preliminary Thoughts on Attitude

Many litigators still do not appreciate the subtleties and full range of the mediation process. They view it simply as a competition for the heart and mind of the mediator, thinking if they can persuade the mediator to their point of view through effective legal argument, the mediator in turn will prevail on the other side to throw in the towel.

But mediation is not a contest. It is a facilitated negotiation. While some evaluation of the merits by the mediator (usually in private caucus) certainly is part of the process, there is a lot more to it. The object is to get the other side to enter an agreement, not to vanquish them. Changing roles from litigation advocate to the lead negotiator in a mediation does not come naturally to everyone. Litigators should consciously try to adjust their attitudes and to put on their negotiating hats before even beginning to prepare for a mediation.

It is also important for the lawyer in a mediation to be comfortable with the process. If the lawyer is tense or guarded, this can poison the atmosphere for a successful negotiation. Some litigators may feel ill at ease on the open playing field of mediation, where, unlike litigation, there really are no procedural

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† Reprinted, with permission, from *San Francisco Attorney*, August-September 1999, p.28.

* Landels Ripley & Diamond, San Francisco, California; co-author, California ADR Practice Guide; member, A.A.A. President's Panel of Mediators and International Panel of Neutrals.

[1] Howard A. Simon & Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, Employee Relations Law Journal Vol. 21, No. 1 (1995).

rules. This apprehension also can be fueled by a fear that the litigator somehow will be giving up control in mediation. The paradox, of course, is that in mediation, the parties and their lawyers have total control because no one can force a party to settle, whereas, in litigation, ultimate control of the outcome is given over to the judge or jury. The key to gaining the necessary degree of confidence lies in understanding and eventually mastering the various aspects and nuances of the mediation process. A better understanding can be gained by reading the extensive literature on the subject of mediation,[2] by getting basic mediation experience either through mediation training programs or volunteer community dispute resolution programs, and, as discussed in this article, through the right kind of careful preparation.

Mediation actually can be an exhilarating and rewarding experience for the lawyer. If approached with the right frame of mind, it provides an opportunity to be creative and intuitive and also to bond and work closely with clients toward what is likely to be a positive outcome.

SELECTING THE MEDIATOR

Mediators should not be viewed as a commodity. It is important to select the right mediator for your case. Ideally, you would like to select a mediator who has both proven process skills and some familiarity with the subject matter of the dispute. If one has to choose between mediation skills and subject matter expertise, the former is by far the more important. An inexperienced or inept mediator, no matter how well versed in the finer points of the particular technology, business, or area of law involved in the dispute, could easily and irretrievably blow the opportunity for a settlement. Check references carefully and make sure you and your client have a good understanding of the proposed mediator's particular style, experience, and success rate. It is entirely appropriate to interview the mediator and to ask the mediator about his or her particular approach or style, provided both sides are given the same opportunity. Every mediation will be different, and you should look for a mediator who has the talent, experience, and full range of skills to manage the dynamics of your particular dispute.

If the mediator represents himself or herself as having specialized expertise in the particular subject matter of the dispute, make sure you know which side of the aisle that expertise is derived from. Also, be wary of self-proclaimed experts who may be more interested in showing off their expertise than in facilitating the negotiations.

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[2] *See, e.g.*, YAROSLAV SOCHYNSKY, J. JANE BADER & FRANCIS O. SPALDING, CALIFORNIA ADR PRACTICE GUIDE (LEXIS-NEXIS Publications 1992).

A mediator who is too quick to be evaluative or directive sometimes can hinder settlement opportunities by polarizing the parties or losing credibility with one side in favor of another. A strong-arm mediator whose only equipment is a hammer occasionally might be able to force a settlement, but experience teaches that using a range of tools and the right tools at the right time is more likely to produce a settlement. By the same token, a mediator who sees his or her role solely as a go-between or carrier of messages between the parties can be completely ineffectual.

A good mediator will know when it is best to be a patient listener and when it is important to provide some guidance and direction. The mediator should have a well-managed ego and not have an overbearing need to take center stage or to control the entire process. A good mediator will know when to stand back and let the process take its course and when to intervene. People skills are also important, as are stamina and the ability to listen patiently, and to do whatever it takes to close the deal. In the end, an effective mediator has to be persistent and a good closer.

In selecting a mediator, try to avoid the pitfall of reactive devaluation, i.e. the tendency to reject the mediator automatically simply because the other side proposed him or her. So long as you can satisfy yourself that the proposed mediator has the necessary skills and experience, it actually may be an advantage to you that the mediator has built-in credibility with the other side.

MEDIATION STATEMENTS

Once the parties have agreed on a mediator and after a mediation date is set, they will exchange mediation statements prepared by counsel that set forth the parties' positions as to the relevant facts, the legal issues, and the merits of their claims and defenses. Key documents, such as the contract in a dispute, important correspondence, and the like, often are attached as exhibits. These written statements should be presented both to the mediator and to the other side. Confidential matters can be communicated to the mediator in a private side letter, provided both parties understand they have the opportunity to do so.

Some lawyers choose to give their mediation statement only to the mediator and not to the other side, for fear of giving their opponent some tactical advantage by revealing their position on the merits. They forget that the ultimate object of the process is to convince the other side, not the mediator. This can waste time, because it requires the mediator to spend the better part of the day as go-between, conveying basic information that will have to be digested by the other side before there can be any serious settlement negotiations. Again, any matters that a party is reluctant to disclose to the opponent at the

outset of the mediation can be conveyed to the mediator in a private side letter, or later, in private caucus.

The mediation statement should be relatively short and to the point and free of inflammatory rhetoric. There is no set form for a mediation statement. Some lawyers use a legal memorandum style with headings, while others prefer a letter format. Toward the end of the mediation statement or in a confidential side letter, it is helpful to review the prior history of any settlement negotiations. But in most cases the mediation statement should not be used to communicate a new settlement proposal or to draw lines in the sand.

PREPARING FOR THE SESSION

Many lawyers do not take preparation for a mediation seriously. Preparing for mediation is different from preparing for court. You must of course do what is necessary to present effectively the merits of your client's position both on the facts and the law. But since mediation is a negotiation, the focus of preparation also should be on how you and your client will negotiate. The art of negotiation is an important subject about which much has been written and that is beyond the scope of this article. A few practical comments on the subject that may be helpful are offered here.

Part of the challenge of negotiation is to gain an understanding of the motivations of the opposing side. Consider what the world may look like from the other side of the table. Ask yourself how you would analyze the merits of the case if you were counsel for the other party. Think about how the client on the opposing side might view the case. Try to identify what the other side's expectations and needs may be. Is the dispute just about money? For example, if you are representing the plaintiff in a wrongful termination case, consider the potential concern of the employer defendant that settling might encourage similar claims by other employees—and how you can address that convincingly in the mediation. If you are representing the defendant employer, give some attention to the emotional needs of the terminated employee that may need to be addressed. Decide whether you will direct comments to the client on the other side in the opening session of the mediation and, if so, what you will say.

Give some thought to identifying the interests of the individuals on the other side, as opposed to their positions. This interest-based aspect of negotiation is discussed at length in Fisher and Ury's classic text, *Getting to Yes*.[3] In the simplest of terms, it means focusing on needs (i.e., interests) as opposed to wants (i.e., positions). For example, the plaintiff employee may want a million dollars, but may only need a fair severance, outplacement services, an apology,

[3] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1983).

and something to cover attorneys' fees. On the other side of the coin, the defendant employer may want to avoid paying anything to send a chilling message to all other employees to discourage similar lawsuits, but realistically may need only to resolve the matter confidentially and on a rational economic basis to avoid even greater litigation expense and the risk of an adverse outcome.

In trying to identify needs, also give some thought to what information or documents opposing counsel reasonably will need to evaluate the case and what you are prepared to make available voluntarily at the mediation. There is no sensible reason why basic information or documentation that is easily obtainable through discovery should be held back in mediation. A degree of openness in exchanging clearly discoverable information early can build bridges of confidence that will improve the chances for an agreement.

Think about what your opening position will be in the inevitable bargaining that eventually will occur in the mediation session. Work on a sensible opening demand or offer that is not so overreaching or low that it will drive the other side away from the table, but will still leave you some maneuvering room. Think about a range of likely outcomes with which you and your client would be comfortable. Don't cast your feet in stone by pegging an absolute bottom-line number beyond which you will never go. Be prepared to adjust your risk analysis and settlement calculus based on new information or insights that you and your client may gain in the course of the mediation. Brainstorm possible constructs for a settlement that would involve something other than just an exchange of money. Make a list of things you and your client might be able to do for the other side that do not involve the payment of money; make the same list for the other side.

Most important, take the time to prepare your client for the mediation. As seasoned lawyers we often forget that for many clients the legal process is the psychological equivalent of going to the dentist for root canal work. The better your client knows what to expect at the mediation, the more comfortable he or she will be. With inexperienced clients, show them a training video of a mediation reenactment (such tapes are available from ADR providers such as the American Arbitration Association). Explain to the client what is likely to happen at the mediation. Preview the various stages of the mediation, such as opening joint sessions and private caucuses. Tell the client what you know about the mediator and his or her particular style. Talk about what should or should not be revealed to the mediator in private caucuses. Explain who is likely to be present at the mediation and what the appropriate behavior should be. Discuss, for example, whether your client should shake hands with the opposing party when you enter the mediation conference room.

Prepare for the unexpected. Every mediation is different and it may be necessary at times to adapt to changed circumstances. Prepare the client for

the possibility that the mediator may ask the client questions or try to engage the client in a dialogue about the case. Also, coach your client to be patient and not to be in a rush to get to the bottom line. Explain that there will be long stretches of time between private caucuses when the mediator is meeting with the other side. Some of this may sound very basic, but the more your client knows about what to expect in the mediation, the more comfortable he or she will be with the experience.

Give some thought to and have a discussion with your client about the psychological dynamics of the dispute. Almost every dispute has an emotional component, something that we lawyers typically are not very well trained to handle. Emotional and personality issues clearly are a factor in most disputes, and especially so in employment cases, where issues of competence or personal worth, or even inappropriate or offensive physical conduct, are involved. Be prepared for a certain amount of emotional catharsis on both sides. Venting is a natural and important part of the mediation process. A good mediator, as well as a good negotiator, will not be intimidated by this emotional component and will be prepared to deal with it and acknowledge it, rather than ignore or try to suppress it.

Experience shows that every mediation will have a distinct emotional dynamic and texture. Most mediations start out with a certain degree of posturing by each side. Over the course of the day, however, an effective mediator will manage the process in a way that eventually shifts the dynamic to a more collaborative mode in which the parties are working to reach agreement as opposed to arguing positions. In most mediations there will be a turning point or breakthrough or emotional fulcrum, not always apparent in the moment, when the dynamic of the process shifts, and one can sense that the parties are genuinely moving toward an agreement. This shift may be the result of something as simple as an apology or a gracious acknowledgment of responsibility by a party, or a humorous moment, or even a blowup or tantrum that clears the air. Good lawyers and good mediators will know how to act at such pivotal moments and how to manage them effectively.

Coordinate your negotiating strategy with your client and make sure that both of you are on the same page. Decide how to allocate your respective roles. Manage your client's expectations about the start of negotiations and the likely outcome. Anticipate that negotiations will start with the other side opening at what surely will seem like an excessively high or low number.

Also consider the importance of "principled negotiations," another aspect of the negotiating process discussed by Fisher and Ury.[4] In shorthand terms, this means that when settlement proposals are communicated, they usually

[4] *Id.*

should be articulated in terms of some objective fact, calculation, analysis, or rational explanation. In other words, parties will tend to question the validity of arbitrary offers that are merely a dollar amount without some plausible accompanying explanation. To give a basic example in the technology context, a $1 million settlement demand in a trade secret misappropriation case that is articulated in terms of a market-based royalty calculation, reduced to present value and then discounted by some stated percentage of litigation risk, will be digested very differently than a bare demand for a million dollars presented without any explanation.

Think about who should be the client representative at the mediation table. Should you bring the supervisor who made the decision to terminate the employee, or the software engineer who worked on the code for the system that continues to crash, who may feel the need to justify their conduct? Or is it better to bring a CFO or a senior vice-president who will be able to make a rational and dispassionate evaluation of what a fair settlement should be?

If you happen to have a capable client, this can be a potent weapon in mediation. A well-prepared and articulate client, who actively participates in the mediation, often will be much more effective in communicating the right message to the other side than you the lawyer can possibly be. This is because decision-makers at a mediation will to some degree discount the remarks of the lawyer on the other side as the mere posturing of a paid advocate. But when the client speaks and does so effectively, people are often surprised, impressed, and more likely to listen.

Consider bringing experts to the mediation, especially if the dispute involves technical issues. If you decide this will be helpful, take it up with the other side in advance of the mediation session or with the mediator to insure that the participation of experts at the mediation will be reciprocal.

PREPARING OPENING STATEMENTS

Many lawyers squander the opportunity for an effective opening oral statement in mediation simply by saying they have little to add to their written mediation statement. Remember that the object in mediation is to motivate the client on the other side to enter an agreement. The opening statement is the lawyer's opportunity to give the client on the other side a preview of how the case may play in trial, and at the same time leave the door open to the possibility of a negotiated agreement. It is a mistake to start the mediation with your closing argument to the jury. Don't make a bombastic speech that will completely alienate the other side. Remember that at the end of the day you hope to be able to shake hands with the other side on a deal. Communicate the strengths of your case and the weaknesses of the other side's case in your

opening statement. But do so without personal attacks or inflammatory language. Make sure to convey that you and your client, while confident about your position, are reasonable people and are willing to listen to and take into account what the other side has to say.

If your client is prepared and comfortable doing so, he or she also can make a prepared statement or presentation in the opening session. A genuine statement by the client about what happened and how he or she feels about the dispute can be very effective. Also prepare your client for the possibility that the mediator may ask questions at the joint session.

PREPARING FOR PRIVATE CAUCUSES

Most mediations involve private sessions between the mediator and each side. This is the opportunity for parties to collaborate with the mediator on strategies for resolving the case and for the mediator to gain a better understanding of the parties' expectations and needs. Most mediators, quite appropriately, will try to engage the client representative in a dialogue during these sessions. Often, this becomes an opportunity for the parties to bare their souls with the mediator about their concerns and expectations.

Make absolutely sure that you have a clear understanding with the mediator as to what the ground rules are as to the degree of confidentiality that applies to these private sessions.

It is unreasonable to expect that everything discussed with the mediator in these private caucuses will be kept confidential from the other side. Most experienced mediators will indicate to the parties that they will not disclose matters that have been communicated to them confidentially, but that the burden will be on the parties to identify to the mediator that which must be keep confidential from the other side. If the mediator does not clearly articulate the ground rules of confidentiality for the private caucus, make sure that you as the lawyer clarify this. Also, it is good practice for both the mediator and the lawyer representing a party to review carefully at the conclusion of a private caucus exactly what proposal the mediator is authorized to communicate to the other side.

Some mediators will be eager to ascertain the parties' bottom lines early in the game and then to use this information as a matrix for forging a further compromise. Other mediators prefer not to discuss the parties' stated bottom lines—either because getting this information (perhaps only from one side but not the other) can skew the process, or simply because parties never really tell the mediator what their true bottom lines are. In any event, consider carefully and discuss what you and your client are prepared to say to the mediator on this important subject.

MEDIATOR EVALUATIONS AND PROPOSALS

Most parties at some point will want to know what the mediator thinks of their cases and also what the mediator thinks a fair settlement should be. This kind of input from the mediator can be helpful at the appropriate time if communicated privately and skillfully. But be cautious about asking the mediator to pick a settlement number. The so-called mediator's proposal is an impasse-breaking technique used by some in which the mediator privately communicates a settlement proposal to each side. If both sides accept the proposal, that becomes the settlement. But this can be risky because, if the mediator's proposal is off the mark and one side or the other does not accept it, it can make settlement more difficult because the position of the party that accepted the mediator's proposal is likely to become entrenched. This technique is best used as a last resort for breaking deadlock when the parties are not that far apart.

CLOSING AND DOCUMENTING THE SETTLEMENT

Think ahead about the terms you will require in a settlement agreement at the conclusion of the mediation, such as the scope of the release, a confidentiality agreement, or a stipulated judgment or arbitration award. Communicate to the mediator early on any special terms you may need, such as indemnification for tax liability due to characterization of the settlement payment by plaintiff. If these issues are identified early, the mediator can prepare the other side ahead of time and avoid annoying roadblocks or potential deal killers in the final process of documenting the settlement.

You should not leave a mediation session in which a settlement has been reached without documenting a binding settlement in some fashion. Often, it is not practical to draft a formal, typewritten settlement agreement at the mediation. What is usually adequate is a brief handwritten memorandum setting forth the essential terms of a binding settlement, reciting that it is intended as a binding settlement agreement, but that it may be superseded by a more formal document which the parties agree to negotiate in good faith and in a manner not inconsistent with the essential terms. Sometimes parties may appoint the mediator to mediate and/or arbitrate any drafting issues.

Some lawyers prepare a comprehensive settlement document in advance of the mediation, or have one at hand on a laptop computer. While it is a good idea to draft a settlement agreement in advance so that you can anticipate the terms you will need in the final document, one should think twice before springing a full-blown settlement agreement on the other side the instant you have reached a final agreement after a day-long negotiation. The parties on the other side might think that you were planning to settle all along and that they should have held out for more.

Occasionally parties may require some form of board approval that precludes the client representative at the mediation from signing a fully binding agreement at the conclusion of the mediation. Typically, this does not become an insurmountable problem—especially if it is disclosed in advance. Usually this is handled by providing in the written settlement document that the settlement is contingent solely upon obtaining formal board approval and that the party representative signing the document will unequivocally recommend to the board that the settlement be approved. In these circumstances, it is highly unlikely that a board of directors would not follow the recommendation of their appointed representative in the mediation.

A REVIEW CHECKLIST

Here is a quick review checklist of practice points to keep in mind when preparing for mediation:

1. Remind yourself that the goal of the mediation process is not to win, but to persuade the other side to enter an agreement on terms your client can accept.
2. The key to success in mediation is careful preparation. Know your case, but also think about what your negotiating strategy will be and try to identify the true interests, i.e., the legitimate needs both of your side and of the other side, that must be addressed in a settlement.
3. Exercise care in selecting the mediator. Know your mediator's style. Check references. Ideally you should be working with a mediator with whom you feel comfortable and who has the range of skills and experience to address whatever might come up in your mediation.
4. Prepare your client for what to expect at the mediation. Discuss your negotiating strategy and coordinate your respective roles. Be prepared for some bargaining, and don't get wedded to an absolute rock-bottom line.
5. Dare to be a little creative and imaginative. Try to keep track of the emotional undertone of the mediation. Look for unspoken signs of what is really going on.
6. Consider writing a private letter to the mediator in advance of the mediation communicating confidential matters you would prefer not to include in your mediation statement exchanged with the other side.
7. Draft a settlement agreement before the mediation to use as a checklist of the terms you will need in the final document, and disclose early on to the mediator any special terms you may require so that he or she can help you negotiate them.

OUR AMERICAN CIVIL JURY SYSTEM: THE MOST DEMOCRATIC INSTITUTION IN THE HISTORY OF THE HUMAN RACE†

J. Kendall Few*

PERSONAL BACKGROUND

My interest in the preservation of the jury system is personal; it stems from family history. My great-times-six grandfather James Few, a captain in the Regulators War at the Battle of Alamance near Hillsboro, North Carolina, in 1771, was captured by the British and hanged on the battlefield. He was given the option to submit or swing, and he chose to swing. (He was, in the time before acronyms were popular, a VHQ—very hostile Quaker.) George Bancroft in his *History of the United States* was kind enough to call him the first martyr to the cause of American independence, which was no consolation to him but of great social pride to his descendants.

James Few's descendants fled into the dark corner of Greenville County, South Carolina, where I grew up. My great-times-five grandfather decided that though he was Few in name, he would cease to be few in number and had sixteen children. (He wore out two wives in the process.) I grew up a humble farm boy. When I was asked in 1973 to write an autobiographical sketch, I hadn't really done anything I could write about, so I took my cue from "The Farmer's Boy," written before 1689:

> Though little, I'll work as hard as a Turk,
> If you'll give me employ,
> To plow and sow, and reap and mow,
> And be a farmer's boy.[1]

I wrote this:

> Far from the city's maddening noise,
> I shared the hopes and dreams and joys
> Of simple quiet country boys,
> When I was young down on the farm.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 5, 1999.

* Few & Few, Greenville, South Carolina; Founder, American Jury Trial Foundation.

[1]Anon., *The Farmer's Boy*, in BARTLETT'S FAMILIAR QUOTATIONS 777 (16th ed. 1992).

Back where the baldhead buzzard soars
O'er cow-hitch sheds built of two-by-fours,
I said my prayers and did my chores
When I was young down on the farm.

Before my curly head was cropped,
I gathered the eggs that the chickens dropped,
And by these hands the pigs were slopped,
When I was young down on the farm.

Like a knight in search of the Holy Grail,
Each day to the cow shed without fail
I went to fill my milking pail
When I was young down on the farm.

But in those precincts, rough and raw,
Somehow within myself I saw an inclination to the law
And so I left that cow barn filled with straw
And dried cow dung down on the farm.

Now I live with ease, bound by decrees
Laid down by the Court of Common Pleas;
But I often dream of old Louise,
Whose dangling udder I did squeeze,
And I heard music fill the breeze
When her cowbell rung
When I was young down on the farm.

My second great aim in life, after the preservation of the jury system, is to remind the world that there was a time when metrical verse was a recognized art form, and I regret that I've set it back at least seven centuries by what I have written.

When I began my work in the law, I had the great fortune to work with Joe McLeod.[2] I especially remember a time fifteen years ago when we sat together in a crowded Fayetteville, North Carolina, courtroom and looked over to see the great bastion of the jury system seated before us—eighteen fine, upstanding citizens of that community in the jury box. Joe knew the name and address and occupation of each one of them, and he looked deep into their

[2] The McLeod Law Firm, Fayetteville, North Carolina; Fellow and Second Vice-President, International Society of Barristers.

hearts and he knew their thoughts. He looked at Sergeant Smith—he knew to focus on Sergeant Smith—and he said, "Sergeant Smith, we are asking you here for a verdict of $7 million. Now, Sergeant Smith, that is a lot of money, but if we prove to your satisfaction, Sergeant Smith, based upon the law and the evidence in this case that we are entitled to a verdict of $7 million, are you willing to write a verdict in that amount?" Sergeant Smith looked him dead in the eye and said, "Yes sir, Mr. McLeod, that and more!" I sometimes refer to my adversaries as fungible, but this was a non-fungible defense lawyer, and he had the good judgment to raise his hand and say, "Your Honor, may I make a telephone call?" We were liberated from that courtroom shortly thereafter.

DEFENDING THE JURY SYSTEM

My personal interest in and experience with the jury system led me to compile a book in defense of the jury system[3]—a system which William Blackstone said was coeval with the very civil government of England[4] and which others have said can be traced back to the *kenbet* of ancient Egypt or the *dikasts* of ancient Greece or the Twelve Tables of Rome or the edicts of Louis the Pious, the son of Charlemagne, in 829 A.D.[5] This work started out as an eight-page pamphlet of quotations but grew into an absolutely biased, two-volume account of the jury system. You can find quotations from over three hundred great leaders and statesmen dating back as early as Sir John Fortescue in 1468 and moving up through Sir Edward Coke, John Locke, Matthew Hale, David Hume, William Blackstone, Samuel Adams, Thomas Payne, John Jay, Thomas Erskine, Patrick Henry, Thomas Jefferson, George Washington, James Madison, Alexander Hamilton, Joseph Story, Alexis de Tocqueville, John Quincy Adams, Daniel Webster, Salmon P. Chase, Elihu Root, Joseph Choate, John Marshall Harlan, William Holdsworth, John Henry Wigmore, Hugo Black, Roscoe Pound, William O. Douglas, Winston Churchill, and William H. Rehnquist—almost every figure of historical significance to the development of our Anglo-American system of civil jurisprudence with the possible exception of independent counsel Kenneth William Starr.

One aspect of the book that I am proud of is the inclusion of vignettes from five of the most famous trials in the history of mankind, starting with the trial of Sir Nicholas Throckmorton in 1554. He was charged with conspiracy in the Wyatt Rebellion and was called before a hostile court. Throckmorton said

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[3] J. K. FEW, IN DEFENSE OF TRIAL BY JURY (1993) (2 volumes) (published in Greenville, South Carolina, by the American Jury Trial Foundation).
[4] *Id.* at 9.
[5] *Id*. at 12-14.

to the jury, because this was the only thing left to him, "[T]he determination of my fate now lies in your hands. . . . Lift up your minds. Believe that the Queen and her magistrates are better served with impartial justice than with rash cruelty."[6] That courageous jury in 1554 then had the backbone, and the temerity, to stand up before that hostile court and say "not guilty," for which the jurors were later called into the Star Chamber and committed to prison.

Their temerity planted a seed in the receptive soil of the human mind. It has come down through the great trials in the seventeenth century, including "The Seven Bishops Trial" in 1688, in which the bishops were charged with seditious libel for failing to publish the Indulgences of James II of England. Perhaps you've heard the ballad commemorating the imprisonment of the famous and well beloved Bishop Trelawney and the consequent public outcry:

> And shall Trelawney die?
> Here's twenty thousand Cornish men
> Will know the reason why.[7]

But Trelawney did not die, because the jury brought back a verdict of acquittal, and effectively brought down the House of Stuart. That verdict helped set in motion what is known to Englishmen as The Glorious Revolution and the Bill of Rights of 1689 that guaranteed for every Englishman the right of trial by jury.

Can we rest on those laurels today? My answer to you is no. Beginning in the middle of the nineteenth century, notwithstanding the admonition of Blackstone that the jury system is the cornerstone of our judicial process, it has been whittled away to such an extent that when my wife Judy and I went to England, Wales, Ireland, the Isle of Man, and Scotland for one month each year from 1994 through 1996 and interviewed more than 400 of the citizens of those great realms, we found that less than five percent had ever served on a jury and not one person had served on a civil jury.

Will the civil jury survive? I said in 1993 that it would not, but it has survived thus far, and perhaps it will. When Rudyard Kipling wrote *The Reeds of Runnymede* in 1911, he said:

> "At Runnymede, at Runnymede,
> Your rights were won at Runnymede!
> No freeman shall be fined or bound,
> Or dispossessed of freehold ground,
> Except by lawful judgment found

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[6] *Id*. at 101.
[7] R. S. Hawker, *The Song of the Western Men* (1825).

And passed upon him by his peers.
Forget not, after all these years,
The Charter signed at Runnymede."

And still when Mob or Monarch lays
Too rude a hand on English ways,
The whisper wakes, the shudder plays,
Across the reeds at Runnymede.
And Thames, that knows the moods of kings,
And crowds and priests and suchlike things,
Rolls deep and dreadful as he brings
Their warning down from Runnymede!

That is no longer true in England but it *is* true in, and only in, the United States of America; and if you and I are to leave to our children the most democratic institution in the history of the human race, we must act now. As Justice Sutherland said in 1937, the saddest epitaph that can be written in memory of a vanished liberty is that those who possessed it did not lift their hands in time to save it.[8]

As an example of the diligence and ardor with which we should defend our most precious institution, I offer you the oft-told story of the extent to which a young District of Columbia lawyer pursued the interests of his client. Back in the days when we were fighting the anachronistic doctrine of charitable immunity, the lawyer had as a client a beautiful lady in her 70s who had been grievously injured when she fell at the prayer rail of the National Cathedral in Washington, allegedly because of the negligence of the Diocese. Thinking of himself as a modern day Don Quixote riding forth to tilt against the windmills of injustice, he filed his complaint in the Court of Common Pleas for the District of Columbia, and the case went up to the District's Court of Appeals. That court declared that the doctrine of charitable immunity was alive and well.

The young lawyer went home that night completely disconsolate, until his wife said: "Is this the man I married, the man who would change the world? Is he so easily defeated by a little group of men in Washington?" So he took courage and went back to his office. In reviewing the text he had won in law school for the best grade in Agency, he turned to the chapter that said if you are unsuccessful in suing the agent, sue the principal. With a joyful heart he filed a new complaint—against the Lord God in Heaven. He accomplished service of process by serving the Jimmy Swaggarts and Oral Robertses and

[8] Associated Press v. N.L.R.B., 301 U.S. 103, 141 (1937) (Sutherland, J., dissenting).

Jerry Falwells of his time—every famous preacher who held himself out as an agent and servant of the Lord God in Heaven. The appellate court held as a matter of law that the preachers were not agents and servants of the Lord God in Heaven.

Persisting, the young lawyer then served the Lord God in Heaven by publication in the *Washington Post*. This time, the appellate court held not only that the *Washington Post* was not a paper of general circulation in the vicinage in which the Lord lived, but also that the Lord was not doing sufficient business in the District of Columbia to satisfy the minimum requirements of jurisdiction!

IS YOUR SENSE OF HUMOR UNEMPLOYED?†

Carl Grant*

I appreciate the generous introduction I was just given, particularly in contrast to one I received at a meeting in England a few years ago. The chairman's introduction there was brusque and to the point: "We've heard that Mr. Grant is quite a good speaker. If that's true, we might as well be getting on with it. And if it's not true, we might as well be getting it over with."

I've been asked to speak about the benefits of humor, particularly for lawyers. I speak to a lot of groups, and normally I try first to sell them on the importance of humor. But I think I need to rewrite my speech for this group because I have discovered that you already know its importance. You are prime examples of the value of humor. The only thing I might need to say about it here is that even those of us who have an appreciation of humor, a love of humor, sometimes find ourselves in situations in which we may lose the sense of humor, at least for the moment. We think that seriousness is called for when that is not necessarily the case.

For example, a woman attorney in a seminar of mine described her first trial, just out of law school. She was completely prepared, she was wearing her power suit, and she was doing everything by the numbers; but about halfway through the trial she began to feel that the jurors were not tuned in, were not paying attention, didn't find her credible. Those were her feelings, and she probably was correct. In any event, seated at counsel table, she needed something from her briefcase, which was behind her chair. As she reached for the briefcase, her chair tipped over. Lying on the floor, feet sticking up in the air, struggling to disentangle herself from the chair, she said, "Your Honor, I object!"

The reaction was great. There was laughter, of course, but once she got past the laughter, she found she had established rapport with the jurors, and the trial went very well from that point on. She said that she thought the biggest benefit came from realizing that once she'd fallen out of the chair, there wasn't much point in pretending that she was a perfect legal machine. All of a sudden she was relating to the jury, to the judge, to everybody more as a human being. A lot of times we get into situations that we consider serious, and we become a little too solemn, a little too efficient.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 2, 1999.

* Humorist and lecturer, Seattle, Washington.

People think that at any moment you are either serious or humorous but not both—as though they're mutually exclusive. But of course you can be perfectly serious and still be humorous at the same time. Consider Winston Churchill. No one would doubt that he was serious, yet he had a terrific sense of humor and playful attitude. Right after the Apollo landing on the moon, Sir Winston, retired by this time, was making one of his rare visits to Parliament when it was announced that "the Americans have just landed on the moon." Sir Winston's query was: "All of them?" Albert Einstein is another who certainly would not be accused of being non-serious. A genius, he accomplished many important, serious things during his life. But he also had a great sense of humor, of playfulness, of fun. He began one of his lectures on the serious subject of relativity by saying, "I suppose you want to know, if I know so much about gravity, why does my hair always stand up?"

I'd like to share with you some ideas about humor and what makes it work. When I tell stories as a comedian, people often say, "He's making that up; that's all invented." Well, I rarely invent things. I'm far too lazy and maybe not all that imaginative. Most of my humor comes from simple observation. We all do strange things from time to time. For instance, you recognize a friend walking down the street in the other direction. You go after him trying to get his attention. "Hey, John! John? Hey, John?" You finally catch him, he turns around, and it's the wrong person. What do you do? You say, "You're not John." He knows that. Indeed, he's probably really glad that he's not John, because if he were John, he'd be a friend of yours, and you're obviously an idiot.

I think humor is something that is all around us, and it's really a matter of tuning into it and finding the humor that is in life. It is simply a matter of looking at life with a more lighthearted attitude.

I get material from all over. Our political leaders, in particular, provide me with tremendous amounts of material. One of the best sources was the former governor of Georgia, Lester Maddox. When he was under fire because of the horrible state of Georgia's prison system, his response was marvelous. He said, "I think that we are doin' the best we can under difficult circumstances. But realistically we're not gonna see much improvement until we start gettin' a better grade of prisoner." Here's a man who's gotten right to the heart of the problem: We've been letting all this riffraff into our jails, and that's why we're having trouble.

I read somewhere that in 1995 Bill Gates's earnings for the year came to $365 million. I thought, "This is astounding; this comes to a million dollars a day." Now, I don't know about you, but I figure that if you're earning a million dollars a day, you don't yawn when you get up in the morning, right? You yodel. You can afford to spend 280 thousand dollars just on breakfast, and you don't really mind the month with 31 days—that's an extra million. Of course,

February is kind of a drag—only 28 days. You might want to economize a little in February, maybe take in some washing.

This is the type of humor that is called understatement. With understatement, you take something extreme, such as making a million dollars a day, and put it into ordinary terms. You immediately get an understated effect because your audience pictures whatever it is you're talking about and sees the incongruity and the humor—and, powerfully, the point.

One of the fascinating things about understatement is that it is not just humor; it is a communication technique. And for purposes of persuasion, it is one of the most overlooked and under-used communication techniques we have. In a hard-sell society full of pushy exaggeration, understatement has many benefits. It's great for building credibility, for one thing; when you're understating something, you can never be accused of exaggerating. Another benefit is that you get your audience to make your point for you. They're doing the work, they're involved, they're thinking, they're picturing the real thing. If Joe has a Rolls Royce limousine, how does he refer to it? Is it "the limousine," "the Rolls"? No. Probably "the car." Once you have a Rolls Royce limousine, you don't need to emphasize it; it speaks for itself. That's the way understatement works. The tools of humor can be used in a straightforwardly humorous way or as simple communication; and if it doesn't get a laugh, that's all right—you were just making a point.

Exaggeration humor, the opposite of understatement, has its own place. You take something ordinary and exaggerate it to the point where the audience knows you must be joking. Suppose you are on the golf course and miss a shot or two. You might say, "I'm the worst golfer in the world." That's an exaggeration, of course—for all but one poor, sorry individual on the planet, that's an exaggeration. It isn't a line that a comedian would use; it isn't A-class material. But in a real situation, if the delivery and timing are right, you'll probably get a smile or a laugh. Even if you don't, you make an all-important point: You don't take your golf too seriously and you don't take yourself too seriously. Sometimes, just demonstrating, as that woman did in the courtroom, that you have a sense of humor can be incredibly valuable. In Victor Borge's words, laughter is the shortest distance between two people.

I love golf. In Monterey, California, last month, I was speaking to a contractors' association. The chairman called me and said, "We're having our association golf tournament tomorrow, and we'd like you to join us." I'm not really that great at golf, and I said, "I don't know if I should do that." He said, "Don't worry about it, because we're just going to have some fun. We're going to give away prizes, we'll have handicaps, we'll provide you with some golf balls, and we'll provide you with a caddie. Just come along and have some fun." So I said, "Sure, why not?"—because I was thinking they were going to

provide me with a "Caddie"—an automobile. But he just meant a young man who was going to carry the golf clubs and help me look for golf balls.

We played at Spyglass. It's a tough course, unbelievable. Golfers know what I'm talking about. The fairways are narrow and incredibly long, there's water all over the place, and there are traps around the traps. Frankly, I was a little nervous and wasn't playing well. By halfway through the third hole I had lost all six of the brand-new golf balls they'd given me. I also was a little fed up because it's the caddie's job to watch the ball, and my caddie wasn't keeping track of mine very well. At one point, I said, "You've got to be the worst caddie in the world." He said, "Oh, I don't think so, sir; that would be just too much of a coincidence."

One of the best ways to develop comedy material is to watch what's going on and think about what could happen. It's great to be on this wonderful island, but I had to fly to get here. I was just happy to get off the plane alive because I'm a bit of a nervous flier. A lot of times they say that flying is one of the safest, maybe the safest, form of transportation, but I notice there rarely are people selling life insurance at the bicycle shop or the car dealership. Then you get to the gate, and while waiting for your final boarding call, you read a newspaper article about a plane that has gone down. The story reports that they've recovered the black box, which is perfectly constructed so that it absolutely will not break on impact and they can find out what went wrong. This does not make me any more relaxed.

Then the first thing they do on the plane is give the safety lecture. "In the unlikely event of a water landing . . . ." Wait a minute, I didn't see any pontoons on this plane. We aren't "landing" on the water; we're crashing in the water. But my favorite part of the safety lecture is the vague manner in which the stewardess will point out the location of the emergency exits. You've seen her waving her arms, like she's saying she doesn't really know where the emergency exits are—which is pretty much her way of saying, "If I'm not getting out, no one's getting out." One time I made the mistake of asking the flight attendant, "How often do aircraft of this type crash?" She said, "Once."

I was flying in one of the relatively small planes and wondered whether the designers really knew what they were doing, because some of the features are a little strange. For instance, in the bathrooms they always have a special little slot for used razor blades. Is it really safe to shave on the plane? I mean, here you are at 40,000 feet, you get a little turbulence, and you come out looking like Van Gogh. The other item they always have in the airplane bathrooms is a call button for the stewardess. I mean, really, who would have the nerve? "Yes, miss, there's a crossword puzzle in my jacket. I wonder if you could get it for me?"

A few nights ago I was watching *License to Kill*, a James Bond movie. Everybody knows who James Bond is. He's Agent 007 with the British Se-

cret Service. And the "00" means that he has a license to kill. Of course, I couldn't help wondering, are they really issuing these in England? What does the average London policeman think of this? "Hey, you just shot that bloke. Oh, you've got a license! Is this your current address? Well, what about those corrective glasses? You've got contacts, eh? Well, sorry to trouble you. Nice shot." By the way, what type of humor was that? Understatement, right? You take something extreme and you put it into ordinary terms, and you get an understatement effect.

Something closely related to understatement is *reductio ad absurdum.* It's a type of argument in which you take a line of reasoning and apply it to such an extreme situation that it points out the argument's inherent absurdity. I notice, for instance, that people who are selling a possession such as an automobile will frequently post a sign that says "For Sale by Owner." I have to wonder why they feel it necessary to specify that it's the owner who's going to sell it. Who else would? "Marge, the Robinsons haven't been using their boat much lately. What do you say we sell it?"

In San Francisco I passed a jewelry store that had a sign in the window saying "Ears Pierced While You Wait. " What is the alternative here? Another store down the street where you leave your ears overnight?

When I am driving, I sometimes kill time by looking at license plates. A lot of the plates say strange things. My favorite is the New Hampshire plate: "Live Free or Die." That is a pretty hard-core attitude for a state to take. And what about the poor guys who have to make those plates?

I frequently shop at K-Mart, and I've noticed that in their shoe department they always have the shoes tied together. Is this really going to foil shoe thieves? I like to kid around with the salespeople, so I'll put on a pair of shoes, leaving them tied together, and walk over to the clerk. "Look, these are really nice shoes and I think I'd like to get them, but, uh, do you have a pair with longer laces?" The clerk usually says, "Well, I'll have to check with my manager."

One thing I've noticed when leaving the store is a sign over the door that says "This door to remain unlocked during business hours." I find myself thinking that's a really shrewd marketing technique, but I've got to wonder about the meeting in which they made this decision. "Well, we've been open for nine months, we've got a lot of good people on board, our advertising campaign is really great, but so far we haven't sold anything. I think we should unlock the front door."

When stress levels rise and we become a bit obsessed, humor is a good way to back off and improve the quality of what we're doing, whether it's in the office, at home, or elsewhere. A sense of humor can give joy to life. I learned this the first time I was scheduled to be on the Letterman show. Before the

show, I was obsessing about my material, about my delivery, about the whole thing. Should I choreograph the gestures? What should I do? Finally I thought: You know, you're a comedian; if you're not going to have some fun with this, why bother? All of a sudden, just by changing that attitude, I immediately got an entirely different result. It wasn't a crazy or foolish thing to do. It was a conservative thing to do—to enjoy, to love what I was doing. As a result, the whole week before the performance became an adventure instead of a nightmare of nerves. I was going to enjoy what was happening, what goes on behind the scenes. I would either meet or not meet Letterman backstage—it didn't matter. Either way, I was going to have fun. I performed much better under those circumstances, and that's true in most situations. I've done it both ways, and I know.

Most of the greatest athletes we've ever had—Babe Ruth, Michael Jordan, for example—loved their sport. People say, "Well, if I had Michael Jordan's talent, of course I'd be having a good time." But the fact is, loving what they're doing is what gets them to that level. Joe Montana, a great quarterback, says the thing that makes him great is not his physical abilities, which are not really at the top, but it's his love of the game. This applies to lots of situations. Life is far too important to be taken too seriously. (When people say "serious," what they usually mean is "solemn" or "somber.") Even in matters of great moment and importance, you can be light, have fun, and be effective.

Humor is often created by incongruity. Pat Paulsen, for instance, used to don a white lab coat, stand in front of a blackboard with a pointer, and give "scientific" lectures. It immediately was funny. He would also deliver self-help therapy lectures: "Happiness and How To Avoid It," "Creative Suffering," "Guilt Without Sex." A lawyer wrote a best selling book that consisted simply of nursery rhymes in legalese. Jack, of "Jack and Jill," became "the party of the first part, hereinafter referred to as Jack." Any attorney in this room could do the same thing; simply put these two incongruous things together and you get a humorous result.

I watch politicians all the time. I listen to their speeches. I have found that politicians frequently say the same thing—nothing. Have you noticed this? Well, I have written an all-purpose political speech which any of you who might be thinking of going into politics is free to use:

> My friends, and you are my friends, I feel that the time has come to speak out. For I believe, as I've always believed, that we will—all of us. We have before and can, nay, must if we are to be. And make no mistake about it. We can't afford not to be. For—and let's be perfectly clear about this—in the past few months, we have proven beyond a

shadow of a doubt that we do. And will continue to do, strongly, firmly, yet gently, as we have in the past, and are quite capable of doing yet again. Need I say more? But—and this is a big but—now, and at the same time, this is a decision only you can make. Shall we? But I can hear you saying, oh—if only it were that clear. Now I know, and here I must disagree for a moment, for where would this country be without this great land of ours? And I have the facts to bear me out. But we can't do it alone, for we believe, as we've always believed, that without the future, there can be no tomorrow. Should we go on supporting foreign dictators, or take better care of the ones we have at home? No. I feel that we—and when I say we, I mean us—strong in our weakness, yet weak in our strength, never fleeing from fear but never fearing to flee. Thus, so strive to preserve, nay, strengthen the pillars of apathy and corruption that we have labored so long to build and prove to the world that there are bigger and better crises ahead. Thank you.

LEGAL LORE X

VIGILANCE COMMITTEE HANGS WOODARD

Alfred J. Mokler

In 1902, Wyoming vigilantes, frustrated by the supreme court's stay of execution of a convicted murderer, executed him themselves. Alfred J. Mokler, editor of The (Casper) Tribune Herald *and grandfather of Barristers Past President Richard E. Day, witnessed the hanging. His vivid account, published two decades later in his* History of Natrona County, *reflects the views of the time.*

Vigilance committees and "lynch law" are terms of similar and familiar meaning in the American vocabulary. But this summary method of dealing with offenders who would otherwise go "unwhipped of justice" sometimes is excusable and a public necessity. Such was the condition in Natrona county when, goaded and outraged beyond endurance, well-disposed citizens determined to become a law unto themselves and to administer that law in the interest of justice and self-protection with promptness and decision. Numerous cold-blooded murders had been committed in Natrona county and not once had the assassin been required to pay adequate punishment and in a number of cases they were turned scot-free.

The first and only case where the extreme punishment was meted out by an organized body of men to a person with whom the law seemed too lenient occurred on Friday, March 28, 1902, forty minutes after midnight when twenty-four masked men went to the county jail, knocked on the door of the sheriff's office and told Sheriff Warren E. Tubbs they had a prisoner to be put in the jail; and when the sheriff appeared at the door he was overpowered, bound and gagged, and taken into one of the private rooms where two men stood guard over him. The keys to the jail were taken from him and Charles F. Woodard was taken from his cell and hanged to the gallows which had been built for his legal execution. Woodard had been given a trial in the district court, found guilty, and sentenced by Judge Charles W. Bramel to be hanged on the day the vigilance committee did its work, but the condemned man had been granted a stay of execution by the supreme court in order that it might review the case to decide upon a new trial, application for which had been made by the condemned man's attorney.

Woodard made no outcry or resistance when the masked men appeared at the door of his cell, but when he was being taken out he asked to be allowed

to put on his clothes. He was told that he would require no clothing, and that he need not be afraid of freezing to death. A tight-fitting flannel shirt was all that covered his body and this was considerably shrunk from frequent laundering and left the nether man exposed to biting blasts of the severe March weather. There were several inches of snow on the ground.

The gallows had been constructed on the north side of the jail and a stockade had been built around it. The condemned man had to walk about twenty yards in the snow from the door of the jail to the gallows. A rope was placed around the man's neck as soon as he was taken from his cell, and, surrounded by the men, he was thus led up to the death trap. The other end of the rope was thrown over the cross-bar and it was then that the trembling and frightened man cried out:

> Boys, let me kneel down and pray for you; I want to pray for all of you!
>
> These are the last words to my blessed little wife: Tell my dear little wife that I loved her dearly. Won't you tell her that, boys? I pray that you have the papers print this. O, God, forgive me for my sins. I pray for myself and I pray for Charley Ricker. I never had any grudge against him in God's world.
>
> Don't choke me, boys. For God's sake, you are choking me. Don't choke me to death. O, God, have mercy on me. God have mercy on my soul and I pray for my blessed little wife. Don't choke me to death, boys! You are choking me. Please don't choke me. I did not shoot Charley Ricker on purpose. Lord, have mercy on me and my dear little wife.

With the rope tightly drawn about his neck he was then lifted on the trap, but he gave a spring off from it before the lever could be pulled and in making the jump, he slipped and fell. He was then picked up by several of the men and thrown over the railing on the north side of the gallows. When the rope was drawn to full tension, there were a few fearful struggles and nervous twitches of the body dangling in the air, and two of the men caught hold of his feet and gave them several hard jerks. They then drew the body toward the north and let loose the dangling and almost lifeless form of the wretched man; it swung back and struck the framework of the gallows.

They then all stood back and watched the writhing form. A gurgling sound came forth, which was the most sickening noise human being ever heard. He was choking to death. Everybody was silent for a moment and the gurgling sound kept getting fainter and fainter, until life was extinct. A card was pinned on the man's shirt which read as follows:

Process of law is a little slow,
So this is the road you'll have to go.
Murderers and thieves, Beware!
PEOPLE'S VERDICT

The men then filed out of the stockade and scattered in all directions. It was just one hour from the time Woodard was taken from his cell until his lifeless body was cut down from the gallows and taken to the town hall. E. H. French, Steve Tobin, and John Grieve were impaneled as a coroner's jury and they returned a verdict to the effect that Charles Francis Woodard met his death from strangulation by being hanged by the neck with a rope by a vigilance committee, the names of the men being unknown to them.

Governor Fenimore Chatterton the next day wired Prosecuting Attorney Alex T. Butler to make every effort to ascertain the names of the men of the vigilance committee and vigorously prosecute them for "debauching the state's fair name." The prosecuting attorney could no doubt have easily discovered who most of the members of the vigilance committee were, but he, like most of the citizens, considered that the vigilance committee had done a good job and the matter of an investigation was overlooked entirely.

Woodard was arrested during the month of November, 1901, on a charge of grand larceny. He was bound over to the district court for trial, and being unable to procure bondsmen, was incarcerated in the county jail. On the night of December 30, he, with several other prisoners, escaped from the jail by sawing off one of the bars in the corridor window and crawling through.

Sheriff W. C. Ricker and a number of deputies went to the Woodard ranch, near Garfield Peak, about seventy-five miles west from Casper, in search of the escaped prisoners, reaching there on the evening of January 2. The sheriff and his men put their horses in the stable and went to the house. Woodard arrived at the ranch shortly afterwards, and seeing the horses in the barn, he knew the officers were waiting for him. He went into the barn intending to take a horse belonging to one of the officers and ride away. Sheriff Ricker told his men he thought he heard a noise in the barn and that he would go down and investigate. When the sheriff was within ten feet of the barn door, Woodard fired at the officer, shooting him through the body, and while the sheriff was lying on the ground in a dying condition, Woodard emerged from the barn and struck him in the face with his six-shooter, thus knocking the last spark of life out of the already dying man. He then robbed the dead officer of forty-five dollars in money and took his six-shooter and a belt filled with cartridges. The deputies at the house by this time commenced shooting toward the barn and Woodard fired at them, preventing them from coming to the rescue of their fallen comrade.

During the night, Woodard made his escape from the barn on one of the officers' horses. He traveled over the country for about ten days, sleeping in

some abandoned cabin when he slept at all and his sustenance consisted of rabbits that he killed and half-cooked. A posse of more than one hundred men was organized to apprehend him, but he managed to elude them. A reward of $1,000 was offered by the county for his capture and cards giving a description of the criminal and announcing the reward were sent broadcast.

He reached Arvada, a small station on the Burlington railroad in northern Wyoming, after about ten days and there abandoned his horse, and mounting a freight train went to Billings; from Billings he went to Laurel, Montana, where he met a man named Owens and went to the Owens ranch to work, giving his name as Bill Gad. Owens had read about Woodard's crime and recognized him, but promised to protect him. However, after writing to the authorities in Casper and being assured that he would receive the reward if he captured Woodard, he and a man named Berkheimer set about to turn him over to the authorities. One day as the three men were eating their dinner, Berkheimer got up from the table, pretending that he was sick. He went behind Woodard's chair, and at the same time Owens arose and pointing a gun at Woodard ordered him to surrender. Woodard started to get up and he was struck on the head with a gun by Berkheimer and a terrible fight ensued. Woodard's head was cut open in three places, both eyes were blackened, and his face was bruised and cut in such a horrible manner that he could hardly be recognized by the people who knew him. He was taken to Billings and there placed in jail. The authorities of Natrona county were notified of the capture and Sheriff Tubbs and Deputy Sheriff James B. Grieve went to Billings and brought him to Casper. They arrived here at 11 o'clock on the night of January 29. There were over 300 people at the depot, most of whom were bent on taking the prisoner from the sheriff and lynching him. About thirty men formed a V at the steps of the passenger coach when the officers and the criminal emerged and they surrounded the three men and escorted them to the county jail, but the large crowd followed the party to the jail determined to lynch the murderer if they could get hold of him.

District court was in session at the time, and Woodard was given a speedy trial. Judge Bramel appointed C. de Bennet and John M. Hench to defend the prisoner and Alex T. Butler prosecuted the case. The trial was held in the town hall which was then located on Center street directly opposite from where the Consolidated Royalty Oil company building now stands. The little room was filled to overflowing every day of the trial. After all the evidence was adduced and the attorneys made their arguments, the court gave his instructions. It did not take the jury long to return a verdict of "Guilty of murder in the first degree," and in pronouncing sentence upon the condemned man, Judge Bramel said:

> To pronounce the dreadful sentence which is to cut a fellow mortal off from society, to deprive him of existence, and to send him to the

bar of his creator, and his God, where his destiny must be fixed for eternity, is at all times, and under any circumstances, most painful to the court. But to be compelled to consign to the gallows a man in the full prime of manhood presses upon my feelings with a weight which I can neither resist nor express.

If, in the discharge of this most painful duty which can ever devolve on any court, I should in portraying the horrid circumstances of this case, make use of strong language to express the enormity of your guilt, and the deep depravity which it indicates, I wish you to rest assured it is not with any intention of wounding the feelings of your relatives, nor for the purpose of adding one pang to your own afflictions which the righteous hand of an offended God is pressing so heavily upon you. But it will be for the purpose, if possible, of awakening you to a proper sense of your awful situation, and to prepare you to meet the certain and ignominious death which shortly awaits you. It is to endeavor, if possible, to soften your heart, and to produce a reformation in your feelings; that, by contrition and repentance you may be able to shun a punishment infinitely more dreadful than any that can be inflicted by human laws—the eternal and irretrievable ruin of your guilty soul.

From the testimony which was given at the trial, there is no room to doubt the certainty of your guilt, and the aggravated circumstances of the bloody deed. The man you murdered was an officer of the law, and treated you kindly while you were in his custody. In following you up after your escape from jail, he was simply performing a duty imposed on him by law. On the evening when you perpetrated this crime, he was unconscious of the hatred for him which found lodgment in your heart, and walked towards the stable where you were lying in wait for him; he believed that his treatment of yourself as well as the other prisoners who escaped with you, insured him protection at your hands. Instead of this you waited his approach, concealed by the darkness of night, you prepared for the crime, and as he approached the stable door you deliberately shot him down. Following this, and while he was in the throes of his death agony, you struck him with your six-shooter to finish him, as you yourself have expressed it, and then you robbed his remains like a ghoul. While in your own statement upon the stand you have denied doing some of these things, the conclusion that you did do them is inseparable from the evidence.

The punishment of death has been pronounced against the crime of murder, not only by the laws of civilized nations, but also by the

law which was written by the pen of inspiration under the dictation of the unerring wisdom of the Most High. And as God himself has prescribed the righteous penalty for this offense, so there is strong reason to believe that very few murders are committed which are not ultimately discovered, and the wicked perpetrators thereof brought to justice.

Wretched and deluded man, in vain you have attempted to escape the consequence of your act; in vain have you ridden through the winter storms to elude the vigilance of your pursuers; in vain have you attempted to impress upon the hearts of twelve good and true men who sat upon your trial, that you should have clemency.

One can almost see the hand of God, in the weaving together of the remarkable chain of evidence, that makes your escape from the punishment that waits you impossible. The sword of human justice trembles over you, and is about to fall upon your guilty head. You are about to take your final leave of this world and enter upon the untried retributions of a never-ending eternity. And I beg of you, do not delude yourself with the vain hope of pardon or executive clemency, which can never be realized. Your destiny for this world is fixed and your fate is inevitable. Let me, therefore, entreat you, by every motive, temporal and eternal, to reflect upon your present situation, and the certain death that surely awaits you.

There is but one who can pardon your offenses; your creator. Let me, therefore, entreat you to fly to him for that mercy and that pardon which you must not expect from mortals.

When you have returned to the solitude of your prison, where you will be permitted to remain for a few short weeks, let me entreat you by all that is still dear to you, in time, by all that is dreadful in the retributions of eternity, that you seriously reflect upon your present situation and upon the conduct of your past life. Bring to your mind the horror of that dreadful night, when the soul of the murdered sheriff was sent unprepared into the presence of his God, where you must shortly meet it as an accusing spirit against you.

Bring to your recollection the mortal struggles and dying groans of the man who had been kind to you and yours. Think of the situation of your wife, and your aged mother who nursed you in the lap of affection and watched over the tender years of your infancy. Then think of the widow and orphan children of the murdered sheriff, left alone as they are to battle the storm of life, by your hand, and when by such reflections as these your heart shall have become softened, let me again entreat you, before your bloodstained hands are raised

in unavailing supplication before the judgment seat of Christ, that you fly for mercy to the arms of the Savior and endeavor to seize upon the salvation of the cross.

Listen, now, to the dreadful sentence of the law, and then farewell, forever, until the court and you, with all this assembled audience shall meet together in the land from whence no man returneth.

> *You, Charles Francis Woodard, are to be taken from hence to the county jail of this county, and therein confined, under proper guard as provided by law, until the 28th day of March, 1902, at which time, between the hours of 9 a.m. and 3 p.m. you are to be taken to an enclosure, specially prepared within the jail yard of said county, and that at said time and place you be hanged by your neck, until you are dead.*
>
> *And may that God whose laws you have broken, and before whose tribunal you must then appear, have mercy on your soul.*