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CONDUCT UNBECOMING: INSIDE THE JONBENET RAMSEY CASE†

Charles Brennan*

The night of Christmas 1996, my daughter and I capped off our celebration in unconventional style. We attended a showing of the movie *Mars Attacks,* a completely silly, if sometimes brutal tale of an alien invasion that nearly succeeds in toppling man as master of his earthly domain. The pratfalls, the horror, the cheesy dialogue, and the theater-of-the-absurd temperament of the story were all too fitting—if not entirely adequate—preparation for the next three years of my professional life.

For it was the very next evening that I received a call at my home in Boulder from my editor at the Denver *Rocky Mountain News,* where I had labored since 1984. There had been a kidnapping, I was told. But the child was dead—and still in her parents' home. "Get over to 755 15th Street in Boulder and tell us what you find," were the orders. And that is how I was pulled through the looking glass, into the JonBenet Ramsey case.

BOULDER, COLORADO

I was recruited by the *Rocky Mountain News* sixteen years ago specifically to serve as the paper's one-man Boulder bureau. My new bosses told me that, although covering the nuts and bolts of newsworthy items in this university town of some 90,000 was important, my primary mandate was to ferret out what they called the "only-in-Boulder stories."

Boulder, for the uninitiated, has been called "twenty-seven square miles surrounded by reality." It has also been called "the People's Republic of Boulder" and "Baghdad by the Rockies." When Mork descended to earth and set up house with Mindy, no one who knew Boulder was surprised to learn that Boulder was where they made their home.

During the halcyon days of the somewhat politically somnolent Reagan presidency, while much of the country napped through "morning in America," I was among dozens of people tear-gassed while covering the arrests of more than a hundred people protesting visits by CIA job recruiters to the University of Colorado campus. To say that Boulder at times marches to a different

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Aviara, Carlsbad, California, February 28, 2000.

* Author (with Schiller), PERFECT MURDER, PERFECT TOWN; journalist.

drummer might be inadequate. In many respects, the town is listening to a whole separate orchestra.

My very first day on the job I still remember vividly—because that was the day tabloid reporters from far and wide parachuted into Boulder upon discovering that the young lady who posed in recreational posture with then-Miss America Vanessa Williams—thereby costing Miss America her crown—was from Boulder. Of *course* she was!

Four years later, when I was moved to the paper's main office in Denver, I remained a resident of Boulder County and was living in the city of Boulder when the Ramsey crime occurred. So, it was with the perspective of a person living out his life in the community and as someone whose job had once been to know the town intimately that I saw very early on that the JonBenet Ramsey case was the quintessential only-in-Boulder story.

BASICS OF THE RAMSEY CASE

Even the bare facts of the Ramsey case raise more questions than they answer. Girl kidnapped. Girl found dead in her own house. As a prosecutor told me that very first night, "It doesn't add up."

Quickly, for those of you who don't have television, a Ramsey case primer: Patsy Ramsey, a former Miss West Virginia four days short of her fortieth birthday and in recovery from stage-four ovarian cancer, called 9-1-1 at 5:52 a.m. on December 26, 1996, to report that her child, six-year-old JonBenet, was missing and that there was a ransom note. At about the same time, she made a series of calls to close family friends. Although the first patrol officer arrived in seven minutes, a couple of the Ramseys' friends were already there. The first detective didn't show up until 8:10 a.m.—two hours and eighteen minutes after the call to 9-1-1. John Ramsey, the child's father, told police that all doors and windows had been locked the night before, and the police reported finding no sign of forced entry.

An initial search of the house turned up nothing of significance—and certainly no bodies. The ransom note, however, was the veritable *War and Peace* of ransom notes, at two and a half pages in length. The FBI has said they have never seen a ransom note of this length in a legitimate kidnapping case.

The note purported to be authored by a group of individuals representing "a small foreign faction." One wonders what foreign faction, no matter how small, would want to advertise its diminutive stature. It demanded $118,000 for JonBenet's safe return—this for a girl whose father was president and CEO of a company that had just been reported in a Boulder newspaper to have cleared $1 billion in 1996 sales. In the same note that threatens the beheading of JonBenet, the authors take time, curiously, to tell John Ramsey,

"We respect your business, but not the country that it serves." Also odd was the use of several phrases that apparently had been lifted from, or inspired by, recent action films such as *Speed* and *Ransom.*

Shortly after 1:00 p.m., only one officer was in the Ramsey home, and that was Detective Linda Arndt. For company, she had John and Patsy Ramsey, two other couples from their social circle, and the family's minister. There were seven civilians roaming free at the crime scene, with one detective calling periodically for backup, and it was three hours past the time kidnappers were to call with delivery instructions for the ransom money. No call had come.

It was at that point that Detective Arndt asked John Ramsey and his friend Fleet White to make a tour of the house to see if they could find anything unusual. They did, and it didn't take long. John Ramsey led Fleet White straight downstairs to the basement. After first pausing by a broken basement window, John Ramsey went quickly to a former wine cellar the family used for storing Christmas decorations. He pushed the door open, and there lay JonBenet. She'd been strangled by a garrote with such fury that the ligature appeared buried in the flesh of her neck. Yet, at the same time, a matching cord around her wrist was tied so loosely that it left not even the faintest abrasion.

John Ramsey promptly grabbed his daughter's body, already rigid with rigor mortis, her face blue. He rushed her upstairs, asking, "Is she dead?" There wasn't any question about it.

Was his moving of the body the understandable reflex action of a horrified parent, desperate to get help for his child? Or were his actions the calculated bid by a guilty man to render a crime scene useless for the purpose of investigation? Linda Arndt subsequently said that as soon as she saw John Ramsey return from the basement, carrying JonBenet's body, she knew what had happened.

And yet even now, more than three years later, no one—except the killer—truly knows what happened.

PERFECT MURDER, PERFECT TOWN

From October 1997 to January 1999, I collaborated with a gentleman named Larry Schiller on a book about the Ramsey case, entitled *Perfect Murder, Perfect Town.* I would amend that title to add *"Imperfect Book."* Early in the case, I observed that, to a great extent, those who knew the facts weren't talking and those who were talking often didn't know the facts. It was in that climate that we launched our work.

Friends would ask, "How can you write a book when you don't know how it ends?" Indeed, our work on the book began a full ten months before a de-

cision was even made to take the case to a grand jury. Critics' most common complaint about the book, surprisingly to me, was that we failed to say who we thought was the guilty party. Frankly, I was shocked that anyone would have expected us to do so. As a journalist, I felt nothing would have been more inappropriate or presumptuous than to leapfrog the criminal justice system by assuming the responsibility of pronouncing guilt, making a mockery of each citizen's presumption of innocence.

When the grand jury was disbanded on October 13 of last year, with no indictments returned, I felt a certain level of vindication—and noted that no literary critics stepped forward to scold grand jurors for failing to say "who did it."

But yes, it's an imperfect book. We produced 621 pages on the case with no cooperation from JonBenet's parents and only limited assistance from some in law enforcement—and much of that came rather late in the game, after certain people developed confidence that we weren't in this for some quick-hit, sensationalized version of the story. And so, while *Perfect Murder, Perfect Town* stands for now as the definitive book on JonBenet's murder, it is far from perfect—but we gave it our best shot under difficult circumstances. (CBS has made an imperfect movie, based on the imperfect book. I had no direct involvement in the movie's script, story line, or production, but I did take part in the filming of two brief scenes. My cinematic debut ended up on the cutting room floor. I think the saying goes something like this: As an actor, I make a good journalist.)

THE INCONCLUSIVE EVIDENCE

The JonBenet Ramsey case resembles nothing so much as a criminal Rorschach test, a seemingly endless series of evidentiary inkblots. There are precious few, if any, pieces of evidence that speak clearly to one conclusion or another. What one sees in each picture is inevitably colored by the lens through which each picture is filtered. Few chapters of the Ramsey saga demonstrate this better than the story of Bill and Janet McReynolds, subtitled "The Day that Charlie Thought He'd Cracked the Case."

Because this was a situation in which investigators were saying virtually nothing publicly, many journalists covering this case found themselves collaborating and cooperating frequently with other colleagues who were not head-to-head competitors, on a level rarely seen in journalism. So balkanized were the factions that developed in this drama, among police, lawyers, journalists and family friends, that the more people you could talk to, the better you would fare. As an example of journalistic collaboration, I developed a friendship and two-way dialogue on the case with Dan Glick of *Newsweek.* I got to know him on the set of *Larry King Live* and had ample chance to chat

since we were bumped from the show that night by a chatty Richard Jewell. Because I worked for a daily paper and Dan at a national newsweekly, our roles did not make us natural competitors.

Two months into the case, Dan called me to say that he'd been probing the background of Bill McReynolds, a retired University of Colorado journalism professor and Ramsey family friend who had played Santa Claus at parties around town for several years, and in fact had done so at the Ramsey home just two nights before the murder.

"Were you aware McReynolds's daughter was once kidnapped?" Glick asked me. I was not. Dan explained that he'd seen a short piece in the *Globe* tabloid, in which McReynolds had discussed this.

"I wanted to explore this a little further," Glick said, "so I went to see if I could find the original police report. It was on microfilm, but I was able to get it."

"And?"

"And it's interesting to note," said Glick, "that Santa neglected to tell the *Globe* the date this abduction occurred: December 26, 1974."

That put the McReynolds girl's kidnapping exactly twenty-two years to the day before JonBenet's death. The *Twilight Zone* music started playing in my head.

"Do me a favor," Glick went on. "Go to your paper's morgue, and see if you guys gave it any coverage at the time."

I couldn't get to our archives quickly enough. Under Bill McReynolds's name, I found nothing, but I saw that we had a thick file on Janet McReynolds. Curious, I pulled out the envelope of yellowing news clips. It turned out that Janet McReynolds, Bill's wife, had been a writer for a local newspaper and also had achieved modest success as a playwright. She'd even won a few awards for her play *Hey, Rube*. The play, based on a real event, concerned the 1966 torture-murder of a teenaged girl found dead in a basement.

If the hair on the back of my neck has ever stood on end, that was the moment. "They killed her," I said under my breath.

Dan and I, our hearts racing, drove to a rustic mountain cabin west of Boulder to visit St. Nick and his wife, unannounced. In a forty-five-minute visit, the McReynoldses claimed they'd never made the connection between the dates of JonBenet's murder and their own daughter's kidnapping, from which their own child had been released unharmed in less than two hours. They admitted that it was an odd coincidence, but that was all it was. I thought it odd that they would not have made the connection.

Regarding the play, Janet McReynolds dismissed it as having any possible significance. She pointed out several dissimilarities. In her play, the victim

had been tortured over an extended period of time by a group of assailants from her neighborhood whose identities were known to her. Further, those assailants had been promptly apprehended.

Dan, a photographer, and I drove away from the McReynolds residence that day impressed with the kind and gentle nature of this couple. In a potentially confrontational situation, they had been cooperative and accommodating. At the same time, however, we found incredible their claims that they hadn't considered the parallels to their own lives until presented with them by a couple of journalists. Perhaps most alarming was that although both had previously been interviewed by police, and Bill McReynolds had previously been asked to supply non-testimonial evidence such as handwriting samples, the police had not broached with them the subject of either the McReynolds girl's kidnapping or Janet's bizarre play.

Dan and I headed straight to the office of Boulder District Attorney Alex Hunter. While the police department had pulled up its drawbridge and bolted its doors against virtually all press contact early in the case, District Attorney Alex Hunter remained far more receptive to journalists. While dispensing little information about the investigation himself, Hunter remained willing to meet with just about anyone who he felt might have even a shred of information worth hearing.

Dan and I were ushered into Hunter's office, were seated in his plush, leather easy chairs, and proceeded to outline the eerie parallel threads that we believed might tie the McReynoldses to the crime. Hunter responded by telling us that the police were already aware of the connection in dates between the McReynolds girl's abduction and the Ramsey murder, but had put little stock in it. As for Janet McReynolds's play, Hunter said the police didn't know about it. He claimed that his own office was aware of it but had learned of it only very recently. I suspected then, and still do, that this was a face-saving white lie on his part. But the important fact, as Hunter emphasized with some force, was that the police were continuing to focus on John and Patsy Ramsey to the exclusion of everyone else. "They [the police] don't understand that every lead has to be run to the ground," Hunter lamented. "They have to try every door until we're confident all doors can be closed. As soon as you two leave here, I'm going to be on the phone to the cops and tell them to follow these leads wherever they take them."

Dan and I learned subsequently that the police did indeed interview the McReynoldses in the days that followed, and obtained blood and hair samples from both. To this day, the McReynoldses have not been formally cleared as suspects in the case—but then, few people have. At the same time, they were never officially labeled as suspects, either. Only two people have been: John and Patsy Ramsey.

Privately, I am told that the police dismissed the McReynoldses as suspects based in part on their full cooperation with police, but, more significantly, on the fact that Bill McReynolds had undergone multiple-bypass heart surgery just a few months before the crime. He would have been too infirm to carry out the crime, they reasoned. And yet, it was because of that same infirmity that Janet McReynolds had accompanied her husband to the Ramsey home two nights before the murder, to assist Santa in his duties at their holiday party. Could she not also have been Santa's helper the night of the crime?

And allow me this aside: Remember I mentioned that the ransom note included snatches of phraseology seemingly lifted from movies? It's interesting to note that one of Janet McReynolds's earlier jobs was the position of film critic at the *Boulder Daily Camera* newspaper.

Three years into this saga, it might be fair to ask, haven't we heard all there is to hear? Don't we know all there is to know—apart from who committed the crime? Fair to ask, but no, we haven't and we don't.

There was a young man living in Boulder at the time of the slaying who came to the attention of the police, courtesy of his estranged girlfriend. She had become convinced he was the killer of JonBenet Ramsey. She told police and prosecutors and anyone else who would listen that her ex-friend, Chris Wolf, had developed a seeming obsession with the case. There were other reasons, too, for suspecting Chris. Employed at the time as a journalist, he had written a story months before the murder about John Ramsey's company, Access Graphics, so he was potentially aware of John Ramsey's financial status. He had an arrest in his past for indecent exposure, which he told me resulted from urinating in public one night while intoxicated. One year into the Ramsey investigation, 361 days after the death of JonBenet, a young University of Colorado student whom Chris had dated a few times was bludgeoned to death late one night in a downtown Boulder alley. Chris's estranged girlfriend told police something else: He had left their home late on Christmas night in 1996. She didn't see him again until early the next morning, when she found him showering at about dawn, an unusual time for him to be awake, she said. His clothes from the night before were in a pile on the floor, dirtied.

Chris's accuser, however, had her own credibility problem. Upon meeting and speaking with her, as I did, one could see that she was unstable, mentally and emotionally. By the time she reluctantly agreed to be interviewed for our book, I decided not to do so, so uncomfortable did I feel at the prospect of somehow exploiting someone who clearly was not entirely competent.

Still, I learned very recently that Chris has yet another link to the case, one his former girlfriend never mentioned (and one that has never been reported, anywhere). I mentioned that Chris had worked as a journalist. Where, of all places, did he study journalism? The University of Colorado. Who, of all peo-

ple, was one of his professors there? Bill McReynolds. In fact, I'm told that Chris and Santa Claus became fast friends as teacher and student. That friendship continued after Chris's tenure as a student and McReynolds's as a professor.

Let me emphasize: Investigators don't believe JonBenet was killed by Santa Claus—even though, as our book revealed, JonBenet told a playmate's mother, shortly before her death, that Santa Claus had promised her a second visit, *after* Christmas. It was to be their little secret, she was told. What did she mean by that? Which Santa Claus was she talking about? Was she just voicing some childish holiday fantasy? We may never know.

But it is only in Boulder, I would suggest, that you'd actually have Santa Claus, and Mrs. Claus, for that matter, as suspects in a Christmas night murder.

THE TEDDY BEAR EPISODE AND OTHER SURPRISES

It also is likely that only in Boulder would the silence of a grand jury proceeding be interrupted by an all-points bulletin for a stuffed teddy bear.

The grand jury had been meeting on and off for four months when, in January of this past year, I was tipped to the bulletin that the next day's session would be an important one not to miss. For months, journalists had been camped in the justice center corridors, maintaining a grand jury vigil. Prosecutor Michael Kane joked that it reminded him of members of the Vatican waiting for the puff of white smoke. Most days, we were waiting in vain. There was usually little, if anything, to report. But this day in January would be different, I was promised. And it was.

Suzanne Laurion, hired by the district attorney's office as a media liaison, greeted us mid-day with glossy color photographs of a small white stuffed bear in jaunty Christmas attire. A prepared statement accompanying the picture declared that authorities wanted to hear from anyone with information on where such bears might have been manufactured, distributed, or sold—not bears *similar* to this bear; only these exact bears. The statement did not explain why the information was sought. I will forever remember standing in that hallway with several other journalists, clutching our pictures of teddy bears, looking at one another, and thinking that this case was finally crossing way over into the farcical. As an active, full-bore homicide investigation, it was becoming increasingly difficult to take seriously.

One week later, District Attorney Alex Hunter reported that his office had received 130 e-mails, 160 phone calls, four faxes, and twenty pieces of mail. His web site had registered 28,000 hits in the wake of the bear BOLO. Further, he had received the information he'd been seeking.

What that information was, we've never been told. I did, however, subsequently write the story of why the bear's vitals had been sought. In looking at

police photographs of her daughter's bedroom during an interrogation, Patsy Ramsey reportedly let out an exclamation upon looking at one picture and noticing on the bed a bear that she didn't recognize. She had never seen it before, she said. Where did it come from? What did it mean? Those questions remain unanswered to this day.

That episode is thoroughly representative of what we who lived with this case soon came to expect. The unexpected.

This, after all, was a case in which, when the body was finally recovered, an ambulance dispatched in response raced to a house a block away from the Ramseys'. This also is a case in which the first detective on the scene, Linda Arndt, would tell ABC News three years later that, when she first saw the girl's body, her "mind exploded," and she saw "thousands of lights." It was the story that never stopped surprising.

It keeps surprising us, to this day. Earlier this month I learned from diverse sources that not only is there a mystery bear that appeared from nowhere, but there could be a Christmas ornament that disappeared. The Ramseys are wondering what happened to a small paper ornament JonBenet gave her parents on her final Christmas. They've been given assurances that authorities have it in their possession, but for some reason those authorities won't or haven't produced it. The Ramseys consider it strange that the police have claimed it but now won't or can't return it.

Some might find it suspicious that the Ramseys have flagged such items as worthy of detectives' scrutiny. Unlike suspects who need to alibi themselves away from a crime scene, however, the Ramseys were the only people, along with their son, known to have been at the crime scene; their need, if you will, is to alibi others *into* the picture. Mystery stuffed animals and vanished family ornaments could be a way of doing that.

Call me cynical, but if the person who killed this child is someday proved to have also left a stuffed bear on the victim's bed and swiped an ornament, I'll come back before this assembly in some future year and eat the text of this speech, page by page. To me, the bear and the ornament smack of diversionary tactics, and they smack of trying too hard. The spot of unidentified DNA on the child's underwear is, for me, a much more compelling justification for the state's reluctance to proceed with a prosecution in this case.

TABLOID REPORTERS; INFIGHTING BETWEEN POLICE AND PROSECUTION; GUBERNATORIAL INTERVENTION

Perhaps the greatest surprise for many people in reading *Perfect Murder, Perfect Town* was the degree to which tabloids successfully burrowed into every corner of the investigation, and the degree to which players in the

drama actually cooperated with and in some cases effectively deputized tabloid reporters and even mainstream journalists to do their work for them, or at least to carry heavy loads of water.

It is widely known to those who paid even cursory attention to this saga that the district attorney's office and the police department clashed so severely, especially during the first two years, that both sides actually agreed to sit through group counseling sessions, in an effort to work through their anger and attempt to restore some level of working relationship. To listen to the prosecution was to hear that this investigation was being driven off a cliff by a police department ill-equipped to handle even a routine murder investigation, much less one of this complexity, and that the detective division commander, John Eller, was a control freak, and not a very smart one at that. To listen to the police was to hear that Alex Hunter was a prosecutor loathe to take anything to trial, that the standard for probable cause in his office was whether there was a videotape of the defendant committing the crime. In fact, early in the 1980s, a veteran sheriff's sergeant quit his job in protest over Hunter's handling of a high-profile murder-for-hire case, calling Hunter the Alex Trebec of prosecutors. It would be far from the last time Hunter suffered such criticism.

I found myself caught in the middle of this dysfunctional family feud when it came to light that Detective Division Commander John Eller had applied for a job as chief of police in Cocoa Beach, Florida. In doing a story about this, I acquired a copy of his resume. The district attorney's office, upon learning that I had the resume, requested that I forward them a copy. I saw no reason not to; it was a public record, and I was only sparing them the inconvenience of an extra phone call.

Several days later, I found myself on the phone with Hunter. The district attorney called my attention to a eight-month segment during which Eller had been on loan to a state enforcement consortium. "If you look into his tenure there," Hunter said, "you may find there's a sexual harassment complaint or something to that effect. He was supposed to be there for a year, but it was cut short."

I worked that tip hard. If true, it would have been a legitimate story, given the degree to which this case was under the nation's microscope. It didn't pan out, however. Yes, Eller's tenure in that program had been cut short. Yes, a few people with knowledge of the situation said Eller's personality might have rubbed a few people the wrong way; he wasn't warm and fuzzy. But no, there was no record of any formal complaint against him, for sexual harassment or otherwise. There was no story to write.

It was only when I worked on the book with Schiller that I learned the district attorney had run the same tidbit past at least one other reporter, Jeff

Shapiro of the *Globe* tabloid. Shapiro wasn't able to do anything more with it than I had.

This is the point in the story where most folks' ability to suspend disbelief, if they've maintained it to this point, finally expires. That an elected seven-term district attorney would not only grant meetings to a tabloid reporter but actually tease the reporter with information that could compromise or undermine another high-ranking law enforcement officer in the midst of such a sensitive investigation is something many objective observers find virtually impossible to contemplate.

But it happened, and Shapiro was far from the only tabloid scribe whom Hunter allowed into his office for discussions about the case. Moreover, he granted several meetings to a writer named Steven Singular, a published author who was contemplating doing a book on the Ramsey affair. Singular had been pressing Hunter on whether authorities were giving adequate consideration to the possibility of a connection to Internet child pornography rings. Singular said he left his meetings with Hunter feeling that he'd been tacitly deputized to probe that angle himself. Singular did, in fact, go on to write a book in which he developed his thesis, albeit in rather unconvincing fashion.

Of course, Hunter wasn't the only one granting private audiences to the tabloid reporters; Shapiro also developed a relationship with Steve Thomas of the police detective division, who ultimately caught Shapiro on a hidden wire talking about his private conferences with Hunter.

All of this was conduct unbecoming, in the eyes of many. It's said that those inside a fishbowl have no concept of how their world looks from the outside. Those of us inside this particular fishbowl knew what it looked like to outsiders—because we heard it every day, on Larry King, Geraldo Rivera, the Web, the morning talk shows, page six of the New York Post, and in the tabloids. The rest of the country had figured out within one week, after carefully weighing the headlines available to them, that "the parents did it" and that Boulder law enforcement was incompetent and corrupt. People in the immediate community, we observed, seemed to care about the entire matter much less than people in other cities; but among the locals who did care, opinions were no more flattering than those in the national discussion. As recently as two weeks ago, I ran into a Boulder artist with whom I'd shared office building space years ago. She asked me what in the world had really happened in this case; but before I could speak, she answered the question herself, saying, "I figure somebody got paid off."

Detective Steve Thomas, formerly of the Boulder police department, will be publishing his own memoir of this case shortly. It's likely to be quite a read; Detective Thomas's departure from the case was accompanied by a five-page, single-spaced letter in which he found a dozen ways to say that Hunter's office

had betrayed the police and facilitated the denial of justice. His outburst brought the infighting into such sharp focus that the governor of Colorado sat down with Alex Hunter and four other metro-area district attorneys who'd been advising Hunter since early in the case. Governor Roy Romer demanded to hear privately their responses to the laundry list of improprieties alleged by Detective Thomas. As a result of that meeting, Hunter remained in control of the case, but two of his prosecutors were pulled off the case and Hunter was told both that he'd be taking two new deputies on loan from other jurisdictions in the Denver area and that he'd need to hire another outside prosecutor with expertise in grand jury procedure—because, as Governor Romer himself announced that day to the public, the case was going to a grand jury.

The grand jury worked for thirteen months, disbanding last fall with the announcement that there would be no indictments. For all the complaints from near and far about Alex Hunter the reluctant prosecutor, the fact is that twelve grand jurors, plus five alternates, considered the evidence and heard testimony from dozens of witnesses, and were no more prepared than the district attorney to point an accusing finger.

When the grand jury packed up and went home without returning a true bill, Colorado's new governor (a Republican, which we don't really have in Boulder) answered a public outcry by initiating his own review of the Ramsey investigation. This was the first time I had seen that happen in any criminal matter I'd covered in twenty years as a journalist. In three sessions totaling more than nine hours, Governor Bill Owens met with local and state police officials as well as all prosecutors who had any involvement in the case, with an eye toward appointing a special prosecutor and taking the case away from Hunter if the facts warranted such a move. But the conclusion, after all the shouting and the noisy resignation letter and all the tabloid infiltrations, was that the case had been in good hands all along—and that it should stay with Boulder authorities. The governor also chided the Ramseys for their lack of cooperation and challenged them to return to Colorado (from their new home in Atlanta) and help bring the case to a successful resolution. The state's highest official, absent an indictment or, apparently, even adequate evidence, labeled John Ramsey "the prime suspect" and all but accused John and Patsy Ramsey of murdering their daughter.

OBSERVATIONS AND CONCLUSION

I never believed that the prosecutors in this case were corrupt. I never believed they were afraid to take rich, well-lawyered defendants to trial, and I don't see the lack of a resolution as proof of the general ill health of our criminal justice system.

What was District Attorney Alex Hunter doing, sitting down with tabloid journalists? He was keeping an open ear and open mind with anyone, if he thought it might result in learning information he hadn't heard previously. The seemingly greatest impropriety of which he can be accused—his prompting of both me and Mr. Shapiro to carry out a background check on his adversary in the police department—I feel sure is something he did for the betterment of the case. He saw John Eller as an impediment to a professional and thorough investigation into one of the most savage murders in his twenty-five years in office, and I believe he felt that if Eller was removed from the equation, there might eventually be justice for JonBenet Ramsey. Eller, incidentally, would resign from the department and leave Colorado within a year.

What were the police thinking, not getting a detective to the scene sooner and then leaving her to fend for herself in the hours leading up to the discovery of the body? True, it was a department poorly versed in the art of handling kidnappings or murders; five days short of the end of 1996, this was their first—and only—murder of the year. In addition, however simplistic this point might seem, this was bright and early the day after Christmas. Think about your own office at six or eight in the morning on December 26; is everything clicking on all cylinders?

People were surprised in the weeks after the murder to hear that John and Patsy Ramsey had not subjected themselves to extensive questioning by the police; they did not do so until four months later. People were surprised and offended to hear that within days of the slaying, they were communicating with police only through their squadron of lawyers. "Don't they *have* to talk to police?" intelligent, college-educated people would ask me. For many, the developing story became a little lesson in the Constitution. On two different occasions I was forced by my editors to write a story reminding our readers that our right to remain silent is real, and that it is not conditional or qualified.

It may sound capricious or cavalier, I fear, to dismiss much of what has happened in this case with the popular observation that (paraphrasing) "stuff happens," but it's true. And often, the most gripping or troubling events in our world do not lend themselves to quick and tidy closure.

Dr. Henry Lee, a consultant for police and prosecutors since early in the case, has commented that this is the most complex crime he has investigated in his long and illustrious career. The answer to the riddle, which appears so obvious to lay people following the story long distance, has eluded one of the most well-respected criminal analysts of our generation.

A bumper sticker I occasionally see around Boulder reads, "Don't die wondering." (I think it's connected to one of the several dozen religious sects in town.) It expresses a goal that is laudatory but hard to realize. The world is filled with mysteries that we can't or at least so far haven't unraveled. It's

poignant and painful when those mysteries include the brutal murder of a beautiful little girl; but if dozens of good men and women give three years of their lives to answer this one and fail, for now, it doesn't mean someone is on the take. And if evidence in a case has been contaminated or altered in any way, through the possibly innocent reflex actions of a grieving father, the highest level of good intentions and inter-agency cooperation may not be able to overcome the damage.

Larry King had me appear on his program twenty-three times to talk about this case, and on at least twenty-two of those shows, King at some point in the conversation likened this case to an episode of *Columbo* and lamented the absence of a tidy resolution, as always occurs in the final two minutes of that show. I never liked the analogy and considered it an insult to the grieving family and to the hardworking professionals who poured into the case everything they had. (It has cost some of them their marriages and has sent others into therapy.) To date, no fewer than fourteen people have faced some kind of criminal charge for actions in the wake of the murder; the charges have ranged from harassment and obstruction of justice to attempted arson and extortion. Several more people have been sued in civil cases for Ramsey-related matters. A member of the district attorney's office labeled the case a tar baby—everyone who touches it comes away tainted.

There has been conduct unbecoming, to varying degrees, on the part of virtually everyone connected to the case. Few are without some fault and none are without regrets. Conduct unbecoming—or perhaps just people proving their humanity, their fallibility, their ability to disappoint or redeem themselves at the very best and worst moments. What saddens me is that for now, the legacy of this case is lingering doubt, hanging like a dark cloud over many whom it touched.

Perhaps the most sobering thought of all, as we gather here more than three years after the crime, is that the story could well be far from over. It already seems destined to be one of the enduring criminal sagas for the ages, up there with the debates that still swirl around the Kennedy assassination and the Lindbergh kidnapping. And truthfully, we still may be in the early chapters of the story.

This event has changed dozens and dozens of lives, including mine. I left the newspaper in January after fifteen and a half years, largely because after the experiences of the last three years I needed to step back and take a deep breath. I'm honored to have been invited to spend some of my new free time with you. As a writer, I am always looking for fresh and challenging stories to tell, so if you should have one—particularly one that involves no child beauty queens—feel free to bend my ear.

ELECTRONIC PEARL HARBOR†

Scott Charney*

First, let's put cybercrime in some perspective. We're in the midst of a revolution, the third major revolution in human history. We began as hunters and gatherers; then we became agrarian; then we became industrial; now we are in the information age. As each revolution came, people embraced the benefits and then had to face the problems. For example, in the Industrial Revolution everyone embraced technology, mass production, widespread availability of cars, and labor-saving appliances. It wasn't until we were well into it that we recognized the dark side of the Industrial Revolution—environmental pollution, labor union disputes, child labor issues, repetitive stress injuries.

The same sequence has occurred in the cyberworld. People embraced the information age because it allowed them to communicate, do e-commerce, share videos. Then the bad stuff began. Some people started abusing the technology.

THE SEVENTY-FIVE-CENT DISCREPANCY

This really takes us back to 1986. In that year Cliff Stoll, an astronomer at Berkeley, was asked to solve a small but vexing problem in the computer science department. Berkeley was running two programs to keep track of computer usage, and at the end of every month computer users were billed for their computer time. All of a sudden there was a seventy-five-cent discrepancy between the two programs, even though both programs were tracking computer usage and should have produced the same results. Stoll was asked to figure out why there was a discrepancy. He looked at the programs and at the math and found no problem. Then he figured something out: Someone had broken into the Berkeley system. Someone had created an account under the name "Hunter" in one of the accounting programs, but this hacker didn't realize that Berkeley was running a second computer program, accessed by an account number. Any legitimate Berkeley user would sign on by both account name and account number, and both accounting programs would regis-

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ter the usage. When the hacker signed on, he used just the name and was tracked by one program but not the other—hence the seventy-five-cent discrepancy.

Cliff Stoll called the federal government to report that someone had broken into the Berkeley system. We asked what the damage was and then told him, "We don't do seventy-five-cent cases." Stoll then investigated on his own and traced the intrusion back to the source, which turned out to be a group of hackers in Germany led by a guy who was paid by the KGB to steal sensitive information off the military's Internet. In other words, we had KGB espionage and we had declined the case!

This gives us lesson number one: In a network environment your information is not safe. In the old days, law firms and businesses could protect their data fairly simply. Everything was on paper. You stamped it "Confidential"; you put it in a safe; you locked the safe; you locked the safe in an office; you locked the office building. You could add guards, gates, guard dogs if you wanted even more security. Then the Internet came and all the data went into the computer. People still tended to look to the locked doors and guards for security, but the thieves weren't coming in through the doors anymore; they were coming in through the phone lines.

THE MORRIS WORM

Shortly after Cliff Stoll uncovered KGB espionage, we had the "Morris worm." Robert Morris was a graduate student at Cornell University who read the UNIX source code. UNIX is the operating system of choice in academic environments, and a lot of mainframe environments, popular because it was the first (and some consider it the best) multiuser, multitasking operating system. That means many people can sign on to the computer at the same time and have the computer do a lot of different jobs, seemingly at the same time. UNIX gives everybody a little processor time and rotates all of its assignments so that everybody's work gets done. When Robert Morris read the UNIX source code, he figured out that there was a flaw in it, a bug that could be exploited. To show the world that UNIX had this flaw, he wrote a program and sent it out on the Internet. The problem was that he made a programming error, and his code replicated itself far more than he had intended; instead of hitting a few machines, he shut down 6000 computers around the world in twenty-four hours.

When the worm started spinning out of control, Morris said to a friend, "Ohmigod, it's out of control," and he called his father, who was, ironically, the chief scientist at the National Computer Security Center, part of the National Security Agency. His father called the FBI and suggested that they talk

to his son about the worm. Robert Morris was arrested and ultimately was convicted in a jury trial in Syracuse, New York.

From Robert Morris, we learned lesson number two: Your hardware isn't safe either; the machines that make it all work can be shut down. More recently, we've seen the denial-of-service attacks designed to shut down specific systems.

THE LEGION OF DOOM

The third case in the evolution of cybercrime was the "Legion of Doom" case in Atlanta. Three hackers figured out that they could access the telephone company's computers through the maintenance ports. (Phone technicians who come to your homes use these ports to dial into the phone company's network and place commands and instructions.) As a result, these hackers had the ability to shut down the phone system for the entire southeastern United States. This was our first introduction to what we call "phone phreakers"—people who attack the telecommunications network, which is a network on which dozens of other networks rely. For example, the banking and finance systems cannot operate without the phone networks because electronic fund transfers go over telephone wires. Certain networks, then, are critical networks, or what are now called critical infrastructures.

Since the Legion of Doom case, we have seen other phone phreakers, some of whom have been pretty interesting. For example, there was a hacker named Kevin Poulsen in California. One of the things he did was listen to radio shows on which they were giving prizes to certain callers; he would hack the phone switch for the radio station to ensure that his was the winning call. As a result he won thirty thousand dollars in cash, a Porsche, and a forty-one month prison sentence for fraud.

He did more than defraud radio stations, however. He figured out that he could ask the phone company computers for information. How did he use that information? In a lot of law enforcement investigations we will get a court order that commands the phone company to give us the numbers that a suspect dials from his phone. The phone company then configures the computer to give law enforcement a copy of the tones dialed. Kevin Poulsen figured out that he could ask the computer whose phone had been set up in this way, and then he called a target and said, "You don't know me, but someone is interested in you; they're recording the numbers you call." Wire taps work much the same way; Poulsen traced a physical wire tap and called the target, although in that call he did not disclose the existence of the tap. How do we know? We were listening. He also figured out that the government was doing electronic surveillance on a foreign consulate. The plea agreement he signed

included a non-disclosure clause guaranteeing that if he writes a book, he will not disclose the name of the consulate we were wiretapping.

Beginning with the Legion of Doom case, we had a new concern with critical infrastructure protection—the protection of services such as power and gas delivery, telecommunications, and transportation, the interruption of which could devastate the United States. There actually are two concerns. One is the direct impact of shutting down a critical infrastructure, and the second is what we call the cascading effect, or how an attack on one infrastructure cascades into others. For example, if you shut down power and have no electricity, then other things such as banks and phones stop working. If you shut down the phone network, the banking network fails.

Is this theoretical? No; we have already had a case. It involved a juvenile, a kid in Worcester, Massachusetts. He hacked a telephone switch in the town of Worcester, and the switch asked him this question: "Do you wish to reinitialize the switch? Yes or No." He had a fifty percent chance of guessing right. He guessed wrong. He said, "Yes." To realize what that meant in practice, think about the last computer you bought. When you pulled it out of the box it had all sorts of default settings built into the system. You didn't leave those default settings; you changed them to make the machine do what you wanted it to do. A phone switch works the same way. When it comes out of the box, the phone company installs it and sets it up to do the things that that switch has to do. By saying "Yes" to reinitializing the switch, the kid in Worcester blew out all the phone company's settings and sent the switch back to its default mode. What happened? A certain segment of the town lost phone service. Why is that an example of the cascading effect? That phone switch serviced a regional airport with an unmanned tower. As planes came in, they radioed the tower, and the tower was supposed to send a signal across the telecommunications network to turn on the landing lights. When the phones went out, a plane came in and signaled the tower; the landing lights didn't go on; the airport shut down; planes were diverted. A transportation failure occurred, not because of an attack on the transportation system but because of an attack on a phone system.

WHY THE INTERNET IS VULNERABLE

Needless to say, people are starting to think about the implications of all this. Many also are wondering why we are having such problems. How can hackers and kids wreak such havoc? The answer to that goes back to the history of the Internet. If you understand how the Internet was created and why it is the way it is, you will understand why there is no security on the Internet.

During World War II, one of the biggest problems the United States had

was moving troops around the country—getting troops from the east coast to the west coast and from north to south. There was a lot of concern about keeping lines of transport open. In response, Eisenhower and his people developed the interstate highway system. It's just a grid of roads going north and south, and east and west. The theory is this: If I need to go from New York to San Francisco, I can get on Interstate 80 and go the whole route; but if, by the time I get to Chicago, the rest of Interstate 80 has been bombed, all I have to do is take Interstate 55 to Interstate 70, go to Los Angeles, and drive up Interstate 5 to San Francisco. I have multiple ways of getting from point *A* to point *B*.

The military started thinking about this model for the telecommunications network because they were heavily reliant on telecommunications and worried about disruption in part of the system. The phone companies also started to think about networks and realized not only that widespread loss of service could occur if key points were bombed or otherwise disrupted but also that the telecommunications network was incredibly inefficient. The old telecom network was what we call circuit-switched, which meant that a telephone conversation effectively took place on two cans connected by a string. If I picked up my phone in Washington to call Gene in Virginia my local office gave me a dial tone, I dialed Gene's number, and the phone company created a circuit by going from my carrier to a long distance carrier, then to Gene's carrier. When he picked up the phone, we essentially were on two cans connected by a string. That was the way the phone company worked. There were two problems with that. First of all, if someone cut the "string," the call was lost. That was the problem that worried the military. The other problem was the inefficiency, which I can illustrate by continuing my hypothetical conversation with Gene. Suppose Gene asked me a difficult question that I needed to think about for a few minutes. If we sat there silent for five minutes while I thought, we would still be tying up the string; no one else could use it.

Finally, in 1969, the military, working with some private companies, came up with the idea of packet switching, which now is used for both the Internet and voice calls. Here's how it works: I call Gene and say, "Hello, how are you?" My phone has a device called a PAD, a packet assembler disassembler, that breaks my "Hello, how are you?" into little packets, like envelopes. One packet will have "Hello" in it, the second packet will contain "how are," and the third packet will carry "you?" There's information on each packet—where it originated (me) and where it is going (Gene). The packets are shipped individually. The first packet might go from Washington right to Virginia. Then a switch or router might break so the second packet can't go directly; it might go via Dallas, and packet three might go through San Fran-

cisco. If for some reason packet two got there before packet one, Gene would not hear "How are hello you?" because one of the things on each envelope is sequence information. In Gene's phone, another PAD puts the message back together in the right order.

How does this packet system solve the problems of the military and the phone companies? First of all, if someone bombs a line or cuts a wire, it doesn't matter; as on the interstate highway system, every packet can take off in a different direction and still get where it has to go. Secondly, we can now share lines. Suppose I'm talking to Gene and he asks me that tough question, and someone in the office next to me is talking to a colleague of Gene's in the office next to him. I say, "Hello, how are you?" My neighbor says, "Hello, how are you?" My "Hello" goes, his "Hello" goes right behind mine. My second packet goes, his second packet goes. My third packet goes, his third packet goes. We're now having two conversations on that same wire, sending envelope after envelope. And my long pause to think about Gene's tough question doesn't block my colleague's call. In fact, hundreds and thousands of calls can go on one piece of wire now, so it's far more efficient.

Using this packet switching, the military built the forerunner to the Internet called the ARPANET (for Advanced Research Project Agency Network), and all the early users were military people, or government contractors who did military work and academicians who did military work. That meant it was a "trusted user community"; everyone using the network could be trusted because they were all military or tied to the military. Therefore, they did not build any security into the network. None. In 1980 two things happened. IBM introduced the personal computer, and the military said the Internet—an expanded and updated ARPANET—should be a public resource. As a result, everyone got onto the Internet and there was no security. Thus we got a massive crime problem.

THE INTERNET AND CRIME

Computers play three different roles in criminal activity. Role one is computers as targets. That means that the actor's conduct is designed to steal information from or cause damage to a computer system. What we usually talk about in a computer environment is protecting CIA, referring not to the agency but to confidentiality, integrity, and availability. This means that in a computer network your information should remain confidential, no one but you should be able to change it, and it should be available when you want it. The denial-of-service attacks, for example, were availability attacks. The espionage case uncovered by Cliff Stoll was a confidentiality attack in which defense information was stolen. And you have to understand that in a net-

work environment those thefts are very hard to detect. Why? If I steal something physical such as your car, it's easy to detect; your car is gone. But if I steal your information, it isn't gone; I just make a copy of it, and it's still there for you.

The integrity attacks are also a problem. In the old days when programmers talked about GIGO, it meant "garbage in, garbage out"; if you put bad data in, you got bad information out. Now it means "garbage in, gospel out"; if a computer says it's true, it must be. Did you ever try to contest your phone bill or a credit card bill? I'll give you a classic integrity attack. A hacker in Seattle had stolen computer equipment, and he was sentenced to state prison. The judge let him have thirty days before starting his prison term, to get his affairs in order, which is not uncommon. During his thirty days of freedom, this guy decided to hack into the state courthouse system and commute his own sentence to probation. That was a good plan. His implementation was defective, however. He found an access point in Boeing, through a computer that designed software to fly planes. From there, he hit the courthouse, but here's the sad part: He was convicted in state district court, the courthouse he hit was federal district court and he got convicted again. That was one integrity attack, albeit not the intended one. There was a second, incidental integrity attack. The Boeing people didn't think he did any damage to their system, but they didn't dare run the risk; a plane might go down if he either did something he didn't admit or accidentally corrupted their data. Boeing spent $75,000 simply to confirm that nothing had gone wrong.

The second role of computers in criminal activity is as tools to facilitate traditional offenses. Child pornographers distribute materials over the Internet all the time now. They can encrypt it, or scramble it, so that only intended recipients can see it, and they can hide who they are. We also see fraud cases. We had one case involving some travel agents who figured out that if you book a person on a plane after the plane has left the gate, you don't have to pay for the ticket. They were doing bookings on plane after plane after plane right after the plane had left the gate. Why would they do that? They didn't have to pay for the tickets but they still got all the frequent flyer miles. Then they cashed in all the frequent flyer miles.

The third role is computer as storage device. More and more evidence is found on computers. In fact, a lot of my work today is with law firms when a client of one firm sues a client of another firm. The first thing they ask for is all the e-mails and electronic records pertaining to various matters. I'm asked to go into a large organization that has thousands and thousands of back-up tapes, to figure out how to get out the relevant information in scientifically valid ways.

IMPLICATIONS OF THE WORLD-WIDE WEB

Besides the lack of security, the other aspect of the Internet that you have to keep in mind is that it's global. Countries or governments don't think that way. Companies think globally but act locally because they're subject to all the laws of each jurisdiction where they do business. One of the big problems we're going to spend a lot of time on in the next five to ten years is international relations on the Internet. In fact, I chaired a group at the G-8, a subgroup on high-tech crime, and the issue we dealt with was something called transborder searches. What happens when agents in one country get on the computer with a court order and download data from another country? This is fairly complicated because countries protect their sovereignty and their own soil vigilantly. Let me tell you a couple of true stories on this issue.

Back in 1992, when President Clinton first took office, one of the things he wanted to do was reform health care. One of the models the administration studied was the single-payer system: Everyone would put money into the federal government, and the federal government would pay all health care claims. While that was being debated, I got a call from a fellow with the Justice Department in Canada, who wanted to meet with me to discuss computer issues. I invited him down, and he came with a member of the Royal Canadian Mounted Police (RCMP). He began by describing the Canadian single-payer health care system and then said, "We have fraud in the health care system in Canada." I said, "So?" He said, "So we do fraud investigations." I said, "So? We do health care fraud investigations, too." He said, "Well, all of the health care records in Canada are government records, but we still have to get a search warrant to get those records because of the privacy interests in health care records." I said, "That makes sense." He continued, "What happens in practice is that we go to the system administrator, another government employee, we give him the search warrant, and he gets the records and gives them to us. The problem that occurred to us, though, is that the system administrator could become involved in the fraud, perhaps by getting kickbacks or something as part of a massive fraud scheme. Then he wouldn't produce the right records or he would destroy records." I said, "And . . . ?" He responded, "What we've decided to do, if we believe that the system administrator is involved in the fraud, is to have the RCMP get down off their horses, arrest the guy, and execute the warrant by taking the records themselves." I asked, "Why are you telling me about this?" He answered, "All of our records are stored in Ohio." I immediately said, "You can't do that. You have no authority to execute a Canadian search warrant on U.S. territory." He replied, "But they're my records." I said, "Then you shouldn't have put them in my country. Why *did* you put the Canadian health care records in Ohio,

anyway?" He said, "Well, it's really funny, but storage is a lot cheaper in Ohio."

We had another incident recently in which the French were investigating two French citizens in Paris for a violation of French law. In committing the crime, these French citizens had used AOL, so the French authorities went to AOL in France and asked for subscriber information, names, addresses, credit card numbers. AOL in France provided the information. Then the French authorities went back to AOL in France, and said, "We want their e-mails." This time, AOL in France could not respond, and eventually the U.S. government sent the French officials a letter saying, "We've received your request for mutual legal assistance [the term for helping another country get evidence]." The French officials said, "We don't want mutual legal assistance from the United States. We want the e-mails of these two French citizens who were on AOL in France committing a crime against the French state." We said, "That's all well and good, but AOL stores all their e-mails in Virginia, so you can't have them unless we get them for you." The French responded, "We don't understand this. If we have two French citizens who have never been to America, don't speak any English, live in Paris, and commit a crime over the e-mail system in France, we need U.S. assistance?" We said, "Now you've got it."

It's very tricky. If we say, "Let's let the French have those e-mails," what will happen? The French authorities will go to AOL with a French warrant signed by a French magistrate, and they will start seizing e-mails, perhaps not just French ones but American as well. You would think that you were protected by the fourth amendment and by the Electronic Communications Privacy Act, but once the French are in there with a search warrant, it's hard to limit them. If the U.S. government allows the French government to search your e-mails on less than probable cause, we're allowing the French to do to you what we could not do to you ourselves. On the other hand if we tell the French they cannot get the e-mails, what will happen? Criminals everywhere will just use service providers to store their data in other countries, and nobody can be investigated or prosecuted. This is already a big problem and will get bigger; and various governments have such diverse views on how to handle it that it is difficult to reach the needed international resolution.

PRIVACY

I will leave you with one last burning issue, which is privacy. With all this cybercrime, with all these people doing bad things to and through computers, and with the need to hold bad people accountable for what they do, one of the things that you're seeing on the Internet today is increased security. What

does security mean in an Internet environment? It means monitoring people: Who signed on for how long, and what did they do when they were on line? That means surveillance. And privacy versus surveillance is a source of tremendous tension in America today.

I was in Denver talking about cybercrime, and after my talk a gentleman came up to me and said, "I work for a company that gives each employee a beautiful pen like this." He showed me a beautiful gold pen. I said, "That's very nice." He said, "It tells us where you are in the building at all times." I said, "What if I go to the bathroom?" He said, "We know you're there." I said, "You know, if I worked for your company, you'd think I was lying prone in my desk drawer because that's where you'd find the pen." He said, "Then you'd be fired."

You have to think about the implications of new technologies. Consider the intelligent transportation systems that we are building. We put computer chips in your car and we put receivers at every mile marker. To describe the ITS systems during my talks, I first say, "Here's what happens. You get a flat tire. It's late at night. You press a button on your dashboard. It sends a signal to the mile marker. The mile marker sends that signal to a database that finds the nearest tow truck. In three minutes you have assistance at the roadside." People respond, "We *love* intelligent transportation systems." I continue, "And then you drive from Washington to New York, and when you get home you receive a nice letter noting that you did it in three hours at an average speed of eighty miles an hour and requesting that you pay the enclosed ticket." People then say, "We *hate* intelligent transportation systems."

As we use this marvelous network called the Internet, we need to keep in mind that it is global, it is insecure, and it's not going to be secured soon. One of the big issues for everyone is what we can do about the crime problem and how can we secure and monitor these networks when necessary without violating the privacy of law-abiding people.

THE INNOCENCE PROJECT†

Barry C. Scheck*

This talk, of course, arises out of my work reported in the book *Actual Innocence,* about people who were wrongly convicted. Written with Peter Neufeld and Jim Dwyer, the book really is not about DNA testing. It's not really news that DNA technology can both exonerate the innocent and identify and convict the guilty. Instead, the book is about how innocent people were convicted. These are the stories of ordinary people who got caught up in the most Kafkaesque kinds of experiences that you can imagine.

Kirk Bloodsworth, an oyster fisherman in Maryland, was convicted of killing a young girl. He was a former Marine who had alibi witnesses. Right up to the moment he heard the judge pronounce the death sentence on him, he couldn't believe that he could possibly be convicted of this of horrible crime that he did not commit. Eventually, he was retried and sentenced to life before we were able to get DNA testing to exonerate him. His story is our chapter on the death penalty.

A high school science teacher in Oklahoma received life, and his buddy, a former minor league baseball player and one of the best prospects to come out of Oklahoma since Mickey Mantle or Bobby Mercer, got a death sentence for a rape-homicide they did not commit. The former baseball player, Ron Williamson, came within five days of execution; hence the subtitle of our book "Five Days to Execution, and Other Dispatches from the Wrongly Convicted."

On it goes: an oil burner repairman from Virginia, a construction worker from Oklahoma City, a young man from a wealthy family in Tulsa, Oklahoma. These are extraordinary stories, not only about the individuals but also about their families. Take the wealthy young Oklahoman, Tim Durham. He was convicted of a crime that took place in Tulsa when at the time of the crime he was with his father and eleven other people at a skeet shoot in Dallas, Texas. Tim's father was an older man who needed to have Tim carry the guns for him. At the same time, in Tulsa, a man who had some resemblance to Tim conned his way into a home and sexually molested an eleven-year-old girl. Months later, due to a suggestive identification proce-

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dure, a bad DNA test, and microscopic hair analysis purportedly showing that Tim's hairs had characteristics matching those of the perpetrator's hair—and despite eleven alibi witnesses—Tim wound up convicted. His sentence was 3,220 years, knocked down by 100 years on appeal. He served five years before valid DNA testing freed him. And Tim Durham's family had to watch him get convicted when they knew he could not have committed the crime because he was with them nearly three hundred miles away.

Incidentally, one of the things that would interest you is that DNA testing now is showing that microscopic hair comparison is junk science. Frankly, judges should have known that in the first place and kept such "evidence" out of court, because under the lens of *Daubert,* or even under the older standards, this stuff was never properly validated. The DNA testing is showing that it is unreliable both for inclusions and for exclusions, which the microscopic hair analysts always said were absolutely reliable.

In all of these stories, we try to put you in the shoes of the wrongly convicted. This effort was greatly helped by the participation of Jim Dwyer, a Pulitzer Prize-winning columnist now with the *New York Daily News.* He not only wrote this book with us, but he had been involved in working on a number of these cases, writing articles to help get the innocent people out of jail. I think journalists have an essential role to play here. Publicity can not only help to free innocent people but also stimulate support for changes in the system.

STATISTICS SHOWING THE NEED FOR ACTION

What's important about the stories we tell is how and why these people were convicted in the first place and what we can do about the system. We identify what we believe are the causes of wrongful convictions and, in an appendix, present mainstream solutions. Statistics also are in an appendix. In about seven or eight years, seventy people in North America—sixty-four in the United States and six in Canada—have been exonerated through post-conviction DNA testing. Eight of these people have come off death row. More broadly, in connection with the debates about the death penalty and the criminal justice system, I want to point out that since the reinstitution of the death penalty, eighty-five people have been exonerated off death row on grounds of new evidence of innocence. This means that in this country today, for every seven people we execute, one person comes off death row on grounds of new evidence of innocence. That is a staggering statistic. In Illinois alone, thirteen people were exonerated while twelve people were executed. That was one reason why the governor of Illinois, even though he supports the death penalty, declared a moratorium on executions.

Thousands more could prove their innocence with a DNA test if we could get the testing done. My basis for that statement is a statistic from the F.B.I. itself. In 1989 the F.B.I. began doing DNA testing in rape and rape-homicide cases in which someone had been arrested or indicted on eyewitness identification or other circumstantial evidence. The DNA was sent to the F.B.I. before the trial, and the amazing statistic is that in twenty-five percent of the cases for which the F.B.I. got results, they excluded the primary suspect or suspects. That is a conservative number because it is percentage of cases, not percentage of potential defendants; if, for example, a case involved four suspects and all four were excluded by the DNA testing, the case was still counted as just one case in which DNA testing excluded the primary suspect(s). Think about that statistic for a minute, and ask yourself how many of the twenty-five percent would have been convicted if there hadn't been DNA testing to exclude them. We're not talking about just a few cases; in the ten years that the F.B.I. has been doing this testing, there have been more than 18,000 cases. Even if you hypothesize that only a small percentage would have been convicted, extrapolating that to the hundreds of thousands of people previously convicted in these crime categories yields, conservatively, thousands of people in jail who could probably prove innocence with a post-conviction DNA test. Incidentally, these statistics have been replicated by private labs that report, in an anecdotal way, even higher numbers of exclusions than the F.B.I.

One problem faced by us at the Innocence Project at Cardozo Law School and by others who do similar work is that in many of the cases the evidence is either lost or destroyed. Sometimes when you're told that it's lost or destroyed, you can find it if you really look; these are old cases, and people just don't want to go to the trouble to track it down. So we need help in that regard.

Another problem, frankly, is that we don't have money to get tests for a lot of these people. It costs three to five thousand dollars for a test in the average case, and it costs more than that if you do mitochondrial testing. Weighed against a person's freedom and the costs of incarceration, however, that isn't much money at all.

Time is the critical factor. DNA testing became routine in most of the appropriate cases around 1994; the F.B.I. and the Innocence Project agree on that date. So we're looking back more than six years. Theoretically, you can go back twenty or thirty years; but, realistically, we're trying to get to the people convicted between 1980 and 1994.

We have taken on 200 cases at Cardozo alone. (And we have thousands of letters backed up that we haven't even been able to read. This is an effort that needs more commitment and more money on many levels.) Initially, we go through a very time consuming process to determine whether, in a par-

ticular case, a DNA test would be determinative of guilt or innocence. Then we have to find evidence to test. What are the results in the cases that we do get to the lab? Two-thirds of the time, the results exonerate the inmate. This does mean that in one-third of the cases, the inmate has lied to us and cost us a lot of time and money, even though we warn them at the beginning not to pursue the test if they are guilty because we give the prosecutor the results, and it could lead to linking them to other uncharged crimes when the DNA data banks get rolling. The false claims of innocence are aggravating, but a two-thirds exoneration rate is pretty good.

CAUSES OF WRONGFUL CONVICTIONS

What are the causes of wrongful convictions? Each cause is illustrated by a chapter in the book. We've done a fairly extensive study of sixty-two of the seventy exoneration cases at this point, and we've found that the leading cause by far is mistaken eyewitness identification. Mistaken identification is involved in eighty-four percent of these cases. What's especially frightening about that figure is that the kinds of cases we're dealing with involve biological evidence that can serve as a check on the eyewitness, but many cases do not have such evidence. We've always known that mistaken identification has been the leading cause of the conviction of the innocent, but DNA is showing us that the problem is much worse than we believed.

A lot of the mistaken identification cases are cross-racial identifications. It is common knowledge that there is a greater incidence of mistake in cross-racial identification, but again the level is frightening. If you look at the statistics on reported rapes in the United States, you find that white men rape white women and black men rape black women; only 10.7% of the reported rapes in this country over the last decade involved black men raping white women. Yet among the sixty-two exonerations that we studied, close to 45% involved the conviction of a black man for raping a white woman.

When that happens, there's always the danger of other misconduct occurring in the case. Writing about the Calvin Johnson case, we noted that in Georgia, between 1930 and 1977, sixty-two men were executed for rape, and fifty-eight of them were black men.

False confessions were involved in 24% of the cases. This refers not just to coerced confessions: it also covers the all-too-common situation where an officer claims that the defendant made some kind of admission but the defendant asserts, "I never said that." Other inmates' reports of confessions are also used.

Fraudulent or defective forensic science figured in one-third of the cases. There's a chapter in the book about Glen Dale Woodall, a grave digger from

West Virginia who was convicted of the abduction and rape of two women. His convictions were based in large part on the testimony of Fred Zain, who was in charge of serology at the state's crime laboratory. Zain testified that there was serology matching Woodall with semen evidence, and red hair that also matched Woodall. Subsequently, after DNA testing exonerated Woodall, focus started to shift to Zain because there were real questions as to how he came up with the results to which he testified in the Woodall case. The West Virginia Supreme Court launched an investigation, which found that for a period of ten years Zain had faked data in every case. In many cases he had not performed any tests. When he did do tests, they didn't support the conclusions he reached. He just gave the police the results they wanted to hear; he was known as a miracle man. By the time the West Virginia court heard the results of its special investigation, Zain had moved to Texas, where he was doing the same things he had done in West Virginia. And even though Zain finally is under indictment in the state of West Virginia for his substantive frauds, he was never indicted in Texas, and he has yet to be brought to justice.

Fred Zain is not alone; there are even more stories of Fred Zain-like characters that have been allowed to flourish in the criminal justice system in this country. The chapter on white-coat fraud will raise the hair on your head. It says a lot, not just about the failure of the forensic community to have peer review or an audit system, but also about the lawyers and the prosecutors. How is it that prosecutors and defense lawyers did not effectively challenge some of Zain's results over a decade of time?

Police misconduct has been involved in half of the subsequent-exoneration cases, prosecutorial misconduct in 42%. We don't give a statistic for bad lawyers, but many of the wrongly convicted were represented by lawyers who were underfunded, getting court-appointed rates for representing people in capital and felony cases. You know full well that those rates are not enough to pay office overhead. In Illinois, they found that 20% of the lawyers who had represented people currently on death row had been suspended or disbarred subsequent to the trials in those capital cases. I don't mean to excoriate public defenders. I started as a public defender in South Bronx, and I know there are great public defenders in this country; but when they don't have the resources and they're overwhelmed, they cannot do their job, and then the adversary system breaks down.

As trial lawyers, you know that the prosecution has to be put to its proof, the crime labs have to be examined and challenged, the police have to be tested. If that isn't happening, the system doesn't work. Take the Rampart cases now in Los Angeles. Forty convictions tainted by police misconduct have already been overturned, and hundreds of cases have been targeted for review.

What's extraordinary is that in most of these cases the people had pleaded guilty even though they had been framed and faced mandatory minimums without bail. They had immigration problems or prior records, looked at what they faced in police opposition and legal representation, and decided to plead guilty to something they didn't do and take some time in jail.

SOLUTIONS

As I indicated, we also suggest solutions to these problems, because it would be irresponsible not to and, most importantly, there are solutions, ones that Republicans and Democrats, prosecutors and defense lawyers, and judges all can get behind. For example, in the area of eyewitness identification, a recent report from the Justice Department contains simple guidelines developed by experts in the field such as defense lawyers, prosecutors, social psychologists, and clinical psychologists. One recommendation is that you don't have the detectives who are investigating the case do the photo array or the lineup because they might unintentionally make suggestions. Have a professional arrange it in the right way. Then, when the witness is brought in, the professional simply says, "I'm going to show you a series of pictures or a series of individuals. You might or might not recognize the person you saw at the time of this crime. If you don't recognize anybody, the investigation will continue." There are other sound suggestions along those lines to which everybody agrees.

What about interrogations? Some jurisdictions already require that an interrogation be taped (video or audio). The widespread adoption of this requirement would get rid of a lot of coerced confessions and would cut down on claims that the defendant made an admission when in fact he made none. Prosecutors in jurisdictions that already have the requirement of taped interrogations like it, too, because they can present the tapes to the juries. It's a win-win situation, as so many of these reforms are.

We also need DNA statutes. Incredibly, in thirty-three states in this country there's a statute of limitations of six months or less on the presentation of newly discovered evidence of innocence. Our system just doesn't contemplate the problem of actual innocence, and this has been a tremendous procedural block to getting access to the evidence to perform DNA tests. We have to litigate in virtually every state in this country. The Justice Department is coming out with recommendations that prosecutors should consent to testing in cases where DNA could raise a reasonable probability that somebody was wrongfully convicted or sentenced and that the tests should be done even if the inmates cannot afford to pay for them. Only two states, Illinois and New York, have legislation giving an inmate a DNA test if

it could prove innocence. Not coincidentally, we've seen fourteen exonerations in Illinois and seven in New York, the two highest totals in the country.

Two weeks ago, Senator Leahy introduced a bill called the Innocence Protection Act that would require states to pass DNA legislation if they wanted to participate in the DNA data bank system. This would push the states in the right direction, but we still need state-by-state legislation. We hope people will get behind it. In addition to freeing the innocent, it will help identify the guilty; now that we are entering an era of DNA testing and data banks, law enforcement personnel will be able to stick the DNA profiles into the data bank and find the real perpetrators.

In sum, this is a key time for re-examination. The problems are present in every jurisdiction. Contrary to some current political rhetoric, the process is not worse in Illinois than in Texas. Believe me, I've seen the Texas Criminal Court of Appeals affirm a conviction in a case where the defense lawyer was sleeping in the courtroom—the "sleeping lawyer case." You look at their public defender system and the absence of money for capital attorneys, and you know that their system is not better than in Illinois. Nor are things better in Florida, in Alabama, Mississippi, Georgia, California (and I'm a California lawyer). They aren't. People are just kidding themselves if they believe otherwise.

As we go across the country talking about the book, we are trying to get law students and journalism students and journalists and lawyers motivated to dedicate their time and talents to this issue of actual innocence, because it is a serious problem, not only in capital cases but in non-capital ones as well. We also need to raise money for the DNA tests and otherwise to support these efforts. Much work remains to be done, but I think something exciting has begun. Advances in science are helping us do something to change the system for the better. I welcome your help in this effort.

THE PRACTICE OF LAW AND GENERATION X†

Meredith Hellicar*

I am in the unique position of having joined a law firm as its leader without having worked in one before and, indeed, without ever having really practiced law. I thought when I started at university some thirty years ago that I would spend my life in the law, but the call of the big wide world was just too much for me. But now that the legal profession, or at least Corrs Chambers Westgarth, is recognizing the need to be part of the big wide world and really care about its clients and staff and prepare for a different future, I thought it was time to come full circle and return to the law.

I don't imagine any of you have heard of Corrs. We are the sixth largest full service corporate law firm in Australia, with 116 partners and over 1000 employees. Whilst our constituent law firms date back to the turn of the century, we have existed as a national law firm only since 1991. Our strengths are in corporate advisory work, mergers and acquisitions, commercial litigation, technology, telecommunications, competition and intellectual property law, health law, and workplace relations law.

The legal profession has been privileged to attract considerable respect from the general community, respect that is increasingly being questioned by the clients we serve and the people we employ. It has insulated itself from competition, from change, including leading edge technological change, from having to really understand its clients' own business strategies, and from having to work hard to retain its people. Law firms at the top level provide truly excellent legal advice, achieve very high standards of service, and offer challenging intellectual work for their people; but most have not grasped yet that this is simply not enough in today's world, for clients or lawyers.

And yet the legal services industry is showing all *four* of the early indicators that the eminent management consultant Peter Drucker claims are near certain warnings of imminent major structural change in an industry. For your consideration, these four indicators are:

- recent sustained experience of rapid growth;
- the industry's inappropriate perception of its services and its market;

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- a convergence of technologies that previously were seen as distinctly separate, and rapid change in the way business is done;
- significant dissatisfaction within as well as outside the sector.

I suggest we ponder Drucker's uncanny perceptions about structural industry change:

> Industry and market structures last for many, many years and seem completely stable. . . . Actually market and industry structures are quite brittle. One small scratch and they disintegrate, often fast. . . . [T]o continue to do business as before is almost a guarantee of disaster. . . . Again and again when market or industry structure changes, the producers or suppliers who are today's industry leaders will be found neglecting the fastest growing market segments. They will cling to practices that are rapidly becoming dysfunctional and obsolete.

With Drucker's comments in mind, I'd like to comment on two issues which our firm is addressing in an effort to improve client care and change the way the game is played and thus to be in business throughout this century: attracting and retaining "Generation X," and improving practice management through effectively harnessing technology. I'll include in my remarks comments on the role of values in addressing both the needs of our people and the improvement of client care.

GENERATION X

Of course, Generation X refers to our lawyers under the age of thirty-five. They must be making an impact. Even our Law Society has recently released a paper calling on lawyers to get a life. Too few of our younger lawyers want to be partners. They're happy to work their guts out in their twenties and early thirties, but at about the time they would be into the thick of the fray of partnership, they want a life! This doesn't mean they don't want to work hard, but they don't want to grow up in only one firm as workaholic, unidimensional slaves to the billable hour. Except for the most devoted technicians, they don't relish the prospect of another twenty or thirty years of working in the same area of specialization in the same firm, filling in six-minute time slots on green forms, trapped in the same routine for their entire careers.

These members of Generation X grew up as the indulged children of us Baby Boomers, having it all, but watching at least some of their relatives face middle-age retrenchment as mainstream industry downsized, restructured, and re-engineered in the 1980s and on into the early 1990s. They

learned early that loyalty is not repaid in job security, and they have the wherewithal to make changes in their careers as they wish, given that they are far more likely than their parents to be still childless at thirty and often not yet married. Some even still live with their parents! As a result, in America currently, the average thirty-two-year-old "knowledge worker" has changed jobs nine times.

Don't think law firms are immune from this. These young people seek a career *web* to build a portfolio of skills and experiences; they don't pursue a career *ladder.* They not only want the variety and complexity of legal work that they know they'll continue to get within a major law firm, but they also want to experience different working environments such as overseas work or placement with a client (and not necessarily as their lawyer), to have flexible working arrangements at various stages of their careers (for males as well as females and not just to care for children's needs), and to receive some in-depth management and leadership training and experience. (Much to the shock of some of our partners, some of our youngsters have even suggested they'd like, during their time as articled clerks, to do a rotation in the marketing department of the firm!) They want constant feedback on how they're doing, and their favorite way to learn is by spending time with partners—partners who are not only excellent in the law but also good, strong, ethical, and good communicators.

I should add that the spurning of partnership disappears if the young lawyers actually do stick around long enough to become senior associates. At that point they most dearly want the so-called "reward" of partnership for having survived the hard, focused slog!

And what do law firms offer these young lawyers? Relatively low rates of pay—although recent salary offerings are spinning out of control as firms try to attract and keep them. (I have heard that firms in California are offering new graduates $160,000!) Even good money doesn't compensate them for the relatively inflexible career track, lack or sterility of performance management systems, lack of real retention and career development strategies other than the cannon-fodder, up-or-out approach, neglect of practice management, obsession with billable hours, and the imposition on even the newest lawyers of a personal budget despite their lack of control over what work is given to them. As a result, employees of law firms are viewed as more or less expendable components of a revenue production machine, assumed to be putting job and career first, last, and everywhere in between. When parts of this machine wear out, you replace them. The trouble is that, despite the growth in numbers of law graduates, the profession around the world has for some time been experiencing a dearth of excellent lawyers with three to four years of experience; and retention levels at that stage are

unacceptably low. Yet too many firms continue to evince the arrogant attitude that "If we don't kill you, we'll make you partner."

Furthermore, several studies in the U.S.A., the U.K., and Australia have found widespread ignorance of or indifference to the cost of solicitor dissatisfaction and consequent turnover in the profession. At its most basic level, the cost to the profession of solicitor turnover is horrendous. A study in our country noted that one major city law firm calculated that the cost to them of turnover at the fourth-year-solicitor stage was roughly equal to the firm's annual profit, after allowing for hypothetical partner salaries. The idea that a firm could double its profit by stemming solicitor turnover has powerful appeal!

And what of the impact on clients? I commend to you a 1997 book by Heskett, Sasser, and Schlesinger, *The Service Profit Chain,* which provides strong evidence of the link between employee satisfaction and client satisfaction, profits, and growth. I am convinced that the law firm that truly listens to its clients *and* employees and that shapes a working environment and career path that elicits satisfaction and loyalty will create the virtuous circle of delighted employees, delighted partners, and delighted clients that is the key to future success. Moreover we might just succeed in giving our people a life as well as a career.

The more enlightened professional firms, including my own, are responding with a long, hard look at the way they develop and reward their employees. These firms are recognizing that people need to be developed, supported, and nurtured into their most valuable assets. At Corrs we are undergoing an exciting process of transformation. We are developing an organizational philosophy based on listening to our staff and shaping the working environment and career path in accordance with what we hear. We have also recognized the need for a broader range of characteristics for partnership. These include the need for partners to be leaders, and to be not just excellent technical lawyers and arm's-length instruction-takers (from clients) and instruction-givers (to staff) but also relationship-builders, internally and externally. In addition to legal excellence, our partners are now required to demonstrate leadership of people, in the practice and in the business; to show care for their clients by taking the time to understand their business strategies and the needs of *their* customers; and to have a guiding vision, passion, integrity, trust, curiosity, daring, and emotional intelligence. Many of our current partners acknowledge that they wouldn't measure up today!

At Corrs we have also embraced values-based leadership, and we are undergoing a major revolution to integrate our values throughout the firm. We have focused our firm on client care (rather than merely client service). Supportive, collegial relationships amongst staff are both expected and

rewarded. We operate on the basis of trust and openness. And a team-based approach to work must be the norm. We're recruiting people at all levels who embrace similar values, and we teach them the firm's principles through induction, and enhance the firm's culture through ongoing mentoring and performance development. What we hope to achieve is a "values relationship" with our employees and clients (implying an ongoing exchange of principles, beliefs, and knowledge) that will enhance the firm's culture and their satisfaction.

We are working in such a way that our shared values drive our day-to-day behavior and guide all-important decisions. In great firms, the shared values really count, are enforced, and dictate the nature of the firm. Indeed, at Corrs they have formed the essence of our new partnership agreement; they'll be far more powerful drivers of the business than such documents usually are. Moreover, partners and employees who don't adhere to the values are being helped to do so; and if they are unwilling to try, they will be asked to leave, regardless of their billings.

The test of a firm's values comes in the way they shape key decisions such as these: Do you keep a partner even though he treats his teams badly? Do you pay a bonus to someone because she has high revenues even though she acts in a disruptive way and doesn't help her colleagues? Do you recognize and reward people who put the firm's and clients' interests ahead of their own, or do you pay them less because such people are less likely to quit?

Whilst I wish our organizational philosophy were as easy to implement as it is to talk about, in my mind there is simply no alternative for the firm that wants to win the battle for staff satisfaction and loyalty and retention. Quite simply, our people have too many other options for us to be complacent. And on a practical level, offering your people a real career—breadth as well as depth, variety of context as well as variety of intellectual challenge, more opportunities to work in different ways with clients (including from within the client and not necessarily as a lawyer), training in people and leadership skills, and true delegation with coaching, counseling, and responsibility whilst seeking from them legal excellence and the highest value input they can give to the firm—will not only give your people greater satisfaction, but will also give the firm an outstanding level and quality of input from them and thus the virtuous circle of delighted clients, staff, and partners.

TECHNOLOGY

Another issue threatening the future of legal services is our failure to harness various technological advances. Law firms, the bar, and courts lag well behind most industrial and service sectors in their exploitation of technolo-

gy to add value for clients and improve profitability for partners. Unfortunately, the constraints of the medieval partnership structure and annual profit distribution to partners bear much responsibility for this.

The manufacturing sector has used information technology to improve vastly the quality and yield of manufactured products. The resources sector uses it to analyze and pinpoint where to mine with higher success rates. The logistics industry relies on information technology to secure a competitive edge between competing supply chains. The media have exploited it to turn the world into a real-time global village. Management consultants rely on it so that global teams of people from diverse locations can add value to a particular client. In the medical profession, highly skilled surgeons thousands of kilometers away from an operating theater direct robots in performing leading edge surgical techniques via a continuous digital communication loop. Where are the equivalents in the legal profession?

Whilst I readily acknowledge the fine work done by many firms in developing and using databases and precedents, we are hindered in taking full advantage of technology not only by a partnership structure that militates against ongoing capital investment due to its year-by-year profit distribution but also—and here I'm going out on a limb—by our culture. As the profession has developed into an industry over the years, lawyers have accumulated a support structure—junior lawyers, paralegals, legal secretaries, and other administrative assistants—but they remain essentially sole practitioners, even in large firms, with the full weight of responsibility for correct outcomes resting squarely on their shoulders. As a result, I would argue, the lawyer's identity and ego are wrapped around this role as the ultimate keeper and processor of knowledge.

Still, we probably are at a point where the medieval system has reached its limits and will soon start to buckle under the relentless and disrespectful pressure of technology-driven change.

In the last twenty years, the impact of digital technology on the practice of law has been incremental only, focused on improving and accelerating communication. In the last ten years, we have made some exciting progress in the design and use of databases to support our libraries, our access to precedents, and our management of documents; and we have done some pioneer work in knowledge sharing. Many lawyers have discovered the Internet and use it well and in innovative ways to find relevant information, keep up with developments around the world, and enlarge their network of colleagues. For the most part, however, technology is used to mechanize, automate, or accelerate something that largely is done for us by someone else, without requiring our involvement, let alone leadership. But sometime in this millennium, the pressures of our clients and the demands of our young

people, who have already embraced the benefits of technological change in many other areas, will force us to stop procrastinating and open up to a sweeping restructuring of our service delivery systems and, with that, our industry's economic structure.

Sometimes we take a great leap forward, only to shrug it off afterwards and go back to business as usual. For example, my firm was a pioneer in a case heard in 1997, resulting from the collapse of the Estate Mortgage Trust in 1990. This complex case involved more documentation than would physically fit in any courtroom in the country. We lobbied the judge and other participants to cooperate in building a shared database for the use of all participants in the trial. On the one hand, this seemed to be just the logical extension of the reasonably well accepted scanning technologies that lawyers use to compile databases in their own offices. On the other hand, it resulted in a number of quite varied events and effects:

- Both sides agreed up front, via a contract, to share the costs of the agreed technology. The court then appointed a service provider to scope and build the required platform and a courtroom set-up, including sixty terminals accessing 1.5 million pages of CD ROM;
- The courtroom, far from bursting at the seams, was rarely full, as firms "tuned in" and participated from Sydney and London, and spectators used dial-up digital lines.
- The trial, originally expected to continue over two years, was completed in one year.
- The resulting award was $416 million; the shared cost of the technology was $600 thousand; and savings in legal costs just for the time that otherwise would have been spent fetching documents were estimated at $2-3 million.

The CEO of the court-appointed service provider, Ian Chivers of Systematics, was quoted in the *Australian Financial Review* as saying, "If we go around halving the cost of running civil litigation, we can reasonably deliver a lot more justice, a lot more product out of the legal system . . . . This technology will become all pervasive in the courtroom."

Mr. Chivers was wise in not assigning any particular time frame to this expected revolution; when the $600-thousand network that was paid for by these clients was dismantled and packed up, the question in the air was, "So who will pay next time?" That's a thorny question to answer in an industry where there are so many stakeholders with such limited individual input and influence. In this particular case, payment for the technology was a side bet to the case, a wager that guaranteed that the loser would lose less than he would otherwise. Legal services are paid for by consumers while the courts are funded by taxpayers. Neither group has thus far found a common rally-

ing point to start to press demands. Legal practitioners have a conflict of interest—we sit at the top level of a profit pyramid that we perceive can be funded only by a continuation of the status quo. We need to seriously examine the economic structure of our industry, and define and move toward a new value base for our products and services which will allow us to make investments that will result in better products and services for our clients and more rational and sustainable profits for ourselves. And if, as Mr. Chivers says, the serious uptake of information technology can "deliver a lot more justice, a lot more product out of the legal system," then investment in technology has to be a key factor in the new equation.

We can at least continue to mechanize, automate, and accelerate the things we do now, at reduced cost, and supplement them with centralized research and document facilities that operate twenty-four hours a day, giving clients as well as lawyers direct on-line access and moving lawyers increasingly into the role of facilitators and deal structurers and real specialists in their chosen areas of the law. This also will open new opportunities for our Generation X lawyers. A lawyer with particular expertise will be able to provide it from anywhere on earth, not just from the glass and steel towers of the cities.

CONCLUSION

We face many other issues that time doesn't permit me to address, including the inroads that are being made by the accounting and professional service firms, and we have a long way to go as a profession. We have no choice but to change if we want to be relevant to our clients and staff in this new century. The health of our industry is absolutely critical to the health of our economy and society. Our industry is overripe for structural change, given the state of the economy and society surrounding us; the retention of our young people is critical to our survival; and the effective use of technology can offer greater value at a lower cost, within the reach of a greater percentage of the population, than has ever been possible before. We, as key stakeholders, can drive the change or be driven (or driven over) by it.

At this point, the choice is ours. I suggest that we recognize the approaching crossroads and actively map and plan our future.

MAKING A CASE FOR CIVILITY†

Alan G. Greer*

These days it seems we are in danger of losing our civility as lawyers because far too many of us practice negative gamesmanship rather than positive professionalism. And what worries me is that most of us tolerate this behavior.

Our dilemma is typified by the ever increasing incidence of rude Rambo-like attorneys who look for the smallest technical defects in their opponents' cases or conduct, and then elevate them to the level of capital crimes with uncivil phrases like "lie," "Rule 11 violations," and "misrepresentations." These are the same attorneys whose oral agreements are not to be trusted and who intentionally misconstrue what their opponents say to them. Yet, when these individuals inevitably miss a filing deadline, they expect you to give them a break, and act startled when you refuse.

They remind me of the story of the baker who was sure that the farmer who sold him butter was shortchanging him on the deliveries. The baker hauled the man into court where the magistrate asked the farmer, "How do you weigh the butter you sell?" The farmer answered, "By putting one of the baker's one pound loaves of bread on the other side of the scales."

To me, this "one-way street" kind of thinking typifies the attitude that is dragging down the bar. It is up to us individually, and as a profession, not to let this happen. We may never completely change the repeat offenders, but if we continue to tolerate uncivil behavior, we will have only ourselves to blame. By raising our threshold of tolerance, we can elevate these delinquent practitioners to what we hope is acceptable standards of conduct.

How do we do this? One way is by not allowing ourselves to descend to the same levels of negative practice through tit-for-tat responses. Another is to call the offenders up or even take them to lunch. Tell them that sort of conduct is unacceptable. Explain in a polite manner how you intend to conduct the case or negotiation and that you expect them to do the same.

When I am confronted with discourteous behavior, I often reflect on John F. Kennedy's remark in his 1961 inaugural address, "Civility is not a sign of weakness," and Eric Hoffer's words in *The Passionate State of Mind,* "Rudeness is a weak man's imitation of strength."

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Many of the offenders we encounter have inner compasses that are out of whack, partly because we've given them room to cut corners and to be rude. They start out on a small scale and then, step-by-step, increase the severity of their transgressions. When we don't reprimand them for their conduct, they think this is the way that the "game" is played. In short, we've accepted them as they are and systematically given in, when we don't have to accede.

As a result, these attorneys believe this is how to move forward in our profession, even though they're really on a treadmill of negativism to nowhere. This leaves them unhappy, trying to justify their harmful behavior by thinking the whole profession acts just like them. So they do it even more. It is like the teacher who asked the overly aggressive youngster, "George, what would your classmates think of you if you were kind, polite, and followed the rules?" George promptly replied, "They'd think they could beat me up." Like George, too many of us accept being condemned for rudeness out of fear of being laughed at for civility.

We act like civility and ethics are the deceased at an Irish wake: Their presence is required for the party to take place, but nothing is expected of them. This is the kind of mentality we must change, especially among our newer members of the bar when they are most susceptible to "friendly" advice. The courts and organized bar can go a long way to making this happen if we as individuals make it clear that we'll back their efforts. Let our judges and bar leaders know we are not willing to accept the lowest common denominator as our standard of professionalism. As that newscaster in the movie *Network* so eloquently put it, "We're mad as hell and aren't going to take it any more."

If our own efforts at reasoning and peer pressure won't change the Rambos, we need to demand that judges not hesitate to slap them down, good and hard. And for repeat offenders, perhaps the bar should seriously consider lifting their licenses. The codes of ethics and civility necessary to set the standards are already in place. They simply need to be enforced by all of us. But remember, we cannot demand that others follow the rules if we don't adhere to them as well.

If we are willing to do this, I am convinced we will be doing a favor for those attorneys who are on that one-way road of negativism leading inevitably to Rambodom. Look at them. Most are sour, unhappy human beings who in their hearts despise themselves and the practice of law as well. They know they have offended the practice, and the rest of us.

To quote Lord Tennyson's "Aylmer's Field":

> He that wrongs his friend
> Wrongs himself more, and ever bears about

A silent court of justice in his breast,
Himself the judge and jury, himself
The prisoner of the bar ever condemned.

Just substitute "fellow members of the bar" for "friend" and you have our situation. Those who practice rude, uncivil conduct are driving down a one-way street to nowhere. It is up to us to set them on the right path by ensuring consequences for their unacceptable conduct.