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John W. Reed, *Editor*

MEDIATION: FAST, FLEXIBLE, CREATIVE, CATHARTIC†

Robert M. Smith*

As was mentioned in my introduction, I was part of the American delegation to the World Court in *United States v. Iran,* the hostage case, and I think you will appreciate a story about something that happened behind the scenes. We wrote the brief for the United States overnight on the plane from Washington, D.C., to Amsterdam; this was a rush job. The Attorney General was going to deliver the argument, and we were very concerned about what the questions would be. When we got to the court, I went in to talk to the bailiff about the podium, which was one of the most sophisticated electronic podiums I had ever seen. You know how equipment mechanics can mess you up in a trial, of course, so we wanted to be sure we understood the mechanics of this podium. The bailiff showed me what various buttons did, and at the end he said, "You push these buttons for the interpretations, because the justices speak different languages." I said, "Well, that's going to be a problem. The Attorney General speaks only English so we have to be very clear about these buttons." He replied, "Well, you really don't have to worry about that." I asked, "Why not?" He said, "Because the justices are not going to ask any questions." I said, "Are you utterly certain of that? Absolutely certain of that? I want to be sure we're not running into a language barrier here." He said, "No, no, they're not going to have any questions." I then dashed back to the reception area where the Attorney General was waiting, and as I ran, I thought about how nervous I would have been if I'd been he; this was not a case of minor consequence. When I saw him, I said, "Mr. Attorney General, I'll show you how to use the podium, but the main thing I learned is that there are not going to be any questions for you. Don't worry." His response? "Damn, no questions!" Now, that's a trial lawyer!

Speed of Mediation

The "goose" sat in the middle of the table, melting away, disappearing before our very eyes. This goose was worth millions of dollars, but in a while it probably would be worth a lot less, and in a while longer, it wouldn't be

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Aviara, Carlsbad, California, February 29, 2000.

* Lawyer, mediator, and arbitrator, San Francisco, California; President, The Mediation Society; Fellow, Chartered Institute of Arbitrators (London, England); International Academy of Mediators; American College of Civil Trial Mediators.

worth anything at all. The goose was an Internet domain name, or rather a series of them, having a value in the millions of dollars, but the owners couldn't agree on certain things. They disagreed so much that they were frozen; they were completely paralyzed. They couldn't sell or do anything at all with these valuable names. Some of them had filed a lawsuit, and others had counterclaimed, and the suit was lurching on through the usual motions and depositions. Trial was down the road—and the goose was disappearing. One thing was certain: By the time the trial was over, there would be no goose.

The owners of the goose and their lawyers came to commercial mediation, and they brought the goose. The mediation lasted two full days, from nine in the morning each day until one-thirty the following morning. At the end of the two long days, they were done. The goose was saved, and they all went on to become multimillionaires—all of them, that is, except me and the goose.

What settled the case? The recognition by some folks at the table that there was another way to get where they wanted to go, not just commercially but with their lives generally. If they wanted to achieve their larger results, they needed to reach a quick resolution about the goose while the goose was still alive.

I'm being deliberately vague, of course; as a mediator, I have to be discreet. My point is that speed is required in certain disputes, particularly in high-tech lawsuits these days. In that field an entire product cycle can be measured in minutes, it seems. There just isn't time to try a lawsuit.

While I'm talking about trials, I want to pass on something I learned last week. This surprised me because for years I had thought that ninety-five percent of cases got settled and five percent got tried. I learned that in this country only 1.2% of civil cases filed in courts of general jurisdiction go to jury trials. Out of the thirty million lawsuits filed each year, then, only 300,000 go to trial.

THE MEDIATOR'S ROLE

As most of you probably know, when I serve as a mediator, I don't have any power. When I sit as an arbitrator, which I don't like to do, I decide the case, or the panel does. As a mediator, I don't decide anything. I just facilitate the negotiations among the parties, and the skills I use are the ones I developed as a trial lawyer.

As a trial lawyer, I served both as a county prosecutor in California and as an assistant U.S. attorney, and I thought being a county prosecutor was more fun. Why? Because we didn't have discovery, so I didn't have any idea what a defendant who took the stand was going to say, and my whole life experience came to bear on cross-examination.

The same thing is true in mediation. When I begin, I don't know a lot about the case, and I certainly don't know what really underlies the dispute. This brings my whole life experience into play, and I have to be able to deal with developments as they come. I delve into somebody else's conflict for hours on end, with no breaks. The mediator has to stay there. The parties get their breaks, and they meet in their several caucuses, and they can go for walks, but the mediator is just there. As a mediator, your ardent hope is that you come out of the conflict unscathed and go on to the next one a day or two later. Does that remind you of trial work?

FLEXIBILITY IN MEDIATION

A personal injury case involving a pilot and an airline came to arbitration, not mediation. I was the sole arbitrator. I had already heard all the evidence and I was engaged in writing the award, when I got a call from counsel. The parties had decided that they wanted me to mediate the case rather than arbitrate it; they wanted to see if they could work it out themselves. (I still don't know what scared them out of arbitration.) This caused me some ethical concerns because there are problems that I won't go into here with my having heard this as an arbitrator and then becoming a mediator, but we did make the change.

The case was quickly resolved, except for one difficult issue—the plaintiff's lawyer's compensation. The parties and counsel were stumped. I met privately with plaintiff's counsel and just talked to him about his life. I learned that he was going to get married, so I said, "That's wonderful. Where are you taking the bride on the honeymoon?" He said they hadn't yet decided where they would go. I said, "Well, if you could go anywhere in the world that you have dreamt of going, where would it be?" He thought about it for awhile, then said, "The Greek Islands." I said, "Just a minute, don't move." I ran across the hall to the airline group and told them that they could settle the case immediately for two round-trip, first-class tickets to Athens. They said, "Hey, that's not a problem. That's a no-cost item." Unfortunately, there were ethical barriers to my saying, "Make that three tickets," but the lawsuit was resolved.

No court could have ordered that result. No jury could have awarded airline tickets. Mediation is flexible, and you can use your imagination. This should appeal to the members of this organization because you're some of the most imaginative men and women in the country. As trial lawyers, your job is to produce, write the script for, act in, and direct plays. Mediation gives you another theater.

I am aware of your rule against telling war stories from your trials, but I'm going to bend the rule a bit and tell one story from my days as a trial lawyer.

I was representing a large bank in a mediation dealing with an allegation of sexual harassment of a junior officer by a senior officer. I had not met the plaintiff before the mediation, and when I walked into the mediation room and took one look at her, I knew we had trouble. Why? She was drop-dead gorgeous—a willowy blond with a cheery smile. As you know, people tend to think that if someone is drop-dead gorgeous or handsome, there's a stronger probability that sexual harassment took place. This plaintiff did have one oddity though; on the advice of her psychiatrist, she actually carried—and she had kept on the chair next to her at the bank—a large teddy bear.

We began, and the mediator wisely allowed her to tell her story at length. The story was chilling to me as defense counsel, and it would be chilling to most people who would listen to it. Then the mediator looked at me—it was my turn. I gulped. What would you do? Finally, I leaned over the table and looked into the plaintiff's delft-blue eyes and said, "I've listened with care to everything you've said. I've heard it. I must say that our bank has policies against that kind of thing, and we try hard to enforce those policies, so you'll understand if I find it hard to understand how these things could have happened; but if anything like that happened, I need to say that we're sorry—really, very sorry." And I stopped. To my relief and my client's, the case was settled by lunchtime, and I think because of the apology, the case settled for a lot less than it otherwise might have. As trial lawyers, we sometimes forget that the power of an apology can be enormous.

In another mediation between a large utility and an African-American C.E.O., the parties were stuck on issues of both liability and damages. The atmosphere in the room was hot, and there didn't seem to be much room for them to maneuver. The utility feared a precedent, and the C.E.O. was wedded to principle. I wrestled with this one at length, and finally I got the sense that the dispute, at its base, was not about money.

Let me digress for just a minute to a point that's important to an understanding of mediation. We mediators spend a tremendous amount of time trying to find out what really underlies a case. This sometimes seems pointless to the parties, especially if one party is sent to another room while the mediator explores background with the other party. You see, as a problem or dispute moves into the relatively rigid legal system, it has to be labeled and tagged and squeezed into a certain box. Part of the job of the mediator is to get it out of the box.

Now we'll return to the utility and the African-American C.E.O. I asked the C.E.O. if this dispute was really about money, or about something else. He told me he didn't care about the money, and I believed him. I pointed out that if the case went to court, money was all he would get, and I asked what

would be a good use of any money he might receive. He thought about it and thought about it but could not give me an answer. I suggested that he go out into the San Francisco fog and think about it some more. When he came back in from his walk on that dreary San Francisco day, he had his answer. There was a small, all-black cemetery in the southern town where he'd grown up, and he knew that the cemetery was in a state of massive disrepair and dilapidation. He said that repairing that cemetery would be a good use for any money he got.

You can guess the rest. I went to the utility's lawyers and representatives and said, "You don't have to worry about precedent. You don't even have to worry about a lot of money. Here's what we're talking about. . . ." The utility ponied up the money; the cemetery got spruced up; the lawsuit got dismissed. Speed, flexibility, imagination—the imagination of the parties and lawyers, not just the mediator's—are some of the advantages of mediation.

THE ROLE OF ADVOCACY

Sometimes trial lawyers apply trial-type advocacy in mediation. Wrong. I can illustrate this by describing a recent mediation I had in Silicon Valley. The case involved the premises of a bio-technology center, seventeen parties, and seven lawyers. I have to change some of the facts in this example (and in these examples in general), but one of the lawyers had flown in from Chicago. He was a large, three-cell-phone, take-charge kind of guy who was barking out orders to his assistants and directing trial strategy in another matter back home while participating in this mediation. The mediation went on for two days. There was a break in the logjam at around 2:30 or 3:00 on the afternoon of the second day, and I started a marathon series of meetings with each of the parties to shut down what were really interrelated, interleaved disputes—very complicated. I was going from room 431 to room 429 and then from 429 to 428, and so on, to work with each party in quick succession. I discovered that while I was in room 428, the lawyer from Chicago was busy in room 431 undoing what I had just done. What did I do then? I met with the C.E.O. of the large company he represented, and I said, "Look, you need to make a decision here. Do you want to resolve this or not? Because if you want to resolve it, I can't have him following me around and undoing everything I've done. I want you to place this guy under house arrest with one of your corporate officers in a conference room on the lowest floor you can find, and keep him there until we're finished. It's the only way this process is going to work. I don't mean to be disrespectful to anybody, but I'm supposed to be the superintendent here." House arrest it was, and the suit got resolved.

In brief, when you're working your advocacy magic in this fast, flexible, imaginative process, please remember what theater you're in. It's different. There's no judge, there's no jury, and the negotiations are being filtered and orchestrated by a hapless soul—the mediator—who is likely the only person who really knows at any given time everything that's happening. Use your advocacy on him or her, or at least keep the mediator in the loop.

Also, keep in mind that I know you're manipulating me. Any good mediator knows that. That's fine; that's what you're supposed to be doing. There usually comes a time in the process, however, when I sidle up to one of the lawyers and say, "The time has come to stop manipulating me and be candid." It's always interesting to see what happens then. It reminds me of experiences I had in France. Recently, I spent two years living in France, and I speak French fluently. When I moved into a little town, I would go into a shop or some other place of business for the first time and begin speaking to them in French—and the reaction was like a rabbit caught in headlights; they were stunned by having somebody who's not French, particularly an American, speak their language. I see the same reaction when I tell a lawyer that I want him (or her) to stop manipulating me; I can tell that the lawyer is thinking, "Candor? What should I do? Do I take the risk, or not?" Usually, we are able to get to candor.

THE POWER AND CATHARSIS OF MEDIATION

Everyone has noticed that the U.S. Postal Service seems to have a few employment problems, but not everyone realizes that it is the world's largest employer. It has recently begun a massive employment mediation program, and I've done some work for them. They don't care whether the case or the particular dispute gets resolved; their goal is to have the disputing employees—the supervisor and the employee, the manager and the employee, or the postmaster and his or her deputy, for example—come to understand one another's positions. Usually the specific dispute gets resolved in the process. When you think about it, it is rather amazing that the world's largest employer has instituted such a widespread mediation program.

My first postal case was about a bright yellow, thirteen-dollar, plastic radio. This radio was a workplace culprit. It sat on the floor of a sorting area and blared out Spanish music and the wisdom of the Spanish-speaking disc jockey for eight hours each workday. The Hispanics in the sorting area loved it. The WASP supervisor didn't. Finally, the supervisor had heard it too much and banished the radio. Mediation resulted.

The culprit, "la radio," sat in the middle of the conference room mediation table, like the goose in my opening story. Three hours later the supervi-

sor and the mail sorter had managed to talk to each other and explain that the radio wasn't the real issue between them. They had managed to talk about what really bothered them about their workplace relationship, in confidence and with complete certitude that this disagreement was going to stay between them and me. They buried the hatchet and agreed to have a vote on what kind of music would entertain the sorters and supervisors. At the end, they literally hugged each other—and one of them, to my discomfort I must confess, hugged me.

Mediation, then, can be powerful, but beyond that, it's satisfying to me. It's powerful because you can get beyond dealing with the radio; and the number of times I have seen people cry, people hug, people get reconciled is remarkable. I don't have any special background for this. I am not a clergyman. I am not a psychiatrist. I was an ordinary commercial litigator when I was in trial practice. What I do in these mediations most of the time is give one side the jury summation of the other, in private caucus, and then go to the other side and give them the jury summation of the first. All of you could do it; it's a dose of reality-testing. So I'm not getting soft or sentimental in my old age, but it is remarkable to watch the level of emotion that often ends these disputes.

You know, we're in the same business—the story business. There is a law professor at Harvard who thinks that American civil justice is about the telling of stories, and not in the sense that the trial lawyer should tell a story in presenting the case. Rather, he thinks that what's important is the opportunity for the parties to tell their stories. You have some person—maybe cheated, maybe not, maybe hurting, maybe not, but certainly offended—who has to tell his or her story and get it out. The trial system provides a catharsis. You shape that catharsis as an advocacy tool every day, and I use that story-telling, too, to provide catharsis. That and cash on the barrelhead are the core of the system.

Last week, I had a mediation between Spanish exporters and California importers. The two sides had agreed to mediation on the condition that they'd never have to be in the same room together, and one of the Spanish executives spoke little English. Can you guess what happened? They couldn't resist the temptation. Within two hours they were in the same room, with each side telling the other exactly how it had been wronged (and with me struggling to translate, with a little less emotion, the thoughts of the Spanish executive).

In mediation, the catharsis can be just as powerful as it is in trial with twelve good and true sitting in the jury box. Sitting across from each other, talking directly to each other in a safe setting (assuming they have a reasonably competent mediator), the parties can have their say, at long last. And

they can have it, dare I submit, without what is sometimes the tremendous torment for the parties of preparing for and going through trial. When I had my own law firm, we represented a lot of banks, so I dealt with a lot of bank presidents and general counsel. The number of times they told me about not sleeping . . . ! Mediation allows the parties to have their say without quite so much of the pain. Fast, flexible, imaginative, powerful, and cathartic, mediation can provide the theater for the story-telling without the trial.

REALISM AND INCREASING USE OF MEDIATION

When I work as an arbitrator, not as a mediator, I face the frustration you all face as advocates in contracts cases and sometimes in commercial cases generally. The task often is to give effect to what the parties intended when they originally wrote their agreement. Sometimes you can't figure out what the intent was, but even more often, once you figure out what the intent was, you realize that it doesn't make sense anymore in light of the current commercial realities. Mediation lets these hapless parties make sense of the current commercial situation and not be locked into the original intent, whatever it might have been. So it's fast, flexible, imaginative, powerful, cathartic, and realistic.

This ability to respond to current reality has contributed to the increase in the use of mediation, not just in the United States but in other jurisdictions with substantial commercial practices as well. In the United Kingdom, where I am qualified as a solicitor, mediation has trebled since last June when the U.K. changed its civil procedure rules. As I witnessed firsthand a couple of weeks ago, Hong Kong also has a bustling commercial mediation practice. This isn't an American phenomenon.

YOUR CONTRIBUTION

In mediation we need you to tell your stories masterfully and produce your theater pieces artfully. Outside of mediation we need you to continue to get the trial results, because without them there couldn't be any A.D.R. By that I mean something more than the simplistic notion that it wouldn't be *alternative* dispute resolution if there weren't trials for which it could be an alternative. Rather, trial results provide the benchmarks or standards that guide effective mediation. A realistic prediction of what would happen in trial—a quintessential trial lawyer's judgment—is a key to mediation. Without trials, mediation would be a stroll in a big park, at night, with no flashlight, no compass, and no map—and no compensation when you got mugged.

HMOs: CREATED BY CORPORATIONS FOR CORPORATIONS†

Michael J. Bidart*

Recently, a friend sent me an appropriate cartoon by a cartoonist named Wiley Miller. It showed a lawyer in a three-piece suit standing in front of a jail cell, and inside the cell, hunched over his cot, was a really bad-looking character with tattoos all over his arms. The caption was "How You Know You've Really Been Bad," and the lawyer was saying to his client: "I gotta tell you, Bob, it's not good news. The jury deliberated and came in with their verdict. They feel that lethal injection and execution are far too lenient, and you are sentenced to be treated by an HMO for the rest of your life."

This reminded me of another joke. Three medical doctors die on the same day and go to the Pearly Gates to appear before Saint Peter. Of course they all want to get into Heaven. The first doctor introduces himself, and Saint Peter says, "Tell me about yourself." The doctor responds, "Well, I was a pediatric oncologist, and I taught at the medical school for thirty years and did a lot of pro bono work. I really cared about my patients. Even after I started to have my income reduced, I stayed with it, fighting the HMOs all the way." Saint Peter replies, "Enough. Come on in. Welcome to Heaven." The next doctor introduces himself and says, "I went to work with the Peace Corps, I had military experience, and then I was in emergency room surgery the rest of my life." Saint Peter: "I've heard enough. You're welcome in Heaven." The third doctor, a little sheepishly, says, "You know, Saint Peter, I too care very much for patients, but there came a time—I had expenses, and the HMOs had a greater and greater stranglehold on me, and I decided I just had to maintain my standard of living, so I went to work for an HMO as a medical director in utilization review." Saint Peter responds, "Oh, is that right? Because of the compassion that we have here in Heaven, you're also allowed in. Yes, you can come into Heaven; but you can stay for only three days, and then you can go to Hell."

THE *GOODRICH* CASE

In preparing for this talk, I asked a couple of questions about the kinds of speeches you normally have and whether this is formal legal education. I was

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Aviara, Carlsbad, California, March 3, 2000.

* Shernoff, Bidart, Darras & Dillon, Clarement, California.

told that you do not want a formal talk but would like to hear a little bit about the *Goodrich* case and my impressions of what's going on in the health care world.

The *Goodrich* case perfectly exemplifies why it is fair to say that HMOs were created by corporations for corporations. These corporations that we're fighting have lost sight of what they're dealing with—that is, people's health care. To set the framework for the case, I want to tell you something about Dave Goodrich. He was two years behind me at Pepperdine Law School. He became a public servant; he was a prosecutor. Earlier in my career I did some criminal defense work, and I had cases against him. He was a really nice guy, understated, very conscientious, and he was a very competent trial lawyer. Dave met his sweetheart Teresa while she was working in the DA's office in the victim program; she is not a lawyer and she has since become a kindergarten schoolteacher. They got married and wanted to have children.

Unfortunately, in 1992, Dave collapsed, bleeding from the mouth, while he was in court. He had a rare form of stomach cancer called leiomyosarcoma. At this time Dave was forty-one years of age, otherwise completely healthy, in the prime of his life, still wanting to have children. His insurance was provided by his employer, with Aetna U.S. Healthcare, so, as is typical with these plans, Dave had to go to the in-plan doctor. That doctor said, "This is really over my head, Dave. All I know to do is surgically remove the tumor; I was not trained in any adjutant therapy for this. But there are programs available at UCLA and City of Hope and S.C. here in California." The in-plan doctor and the out-of-plan doctors recommended a high-dose chemotherapy procedure. Aetna took five months to reach a decision and then took the position that the procedure was experimental/investigational; they wouldn't pay for it. By the time they made the decision, Dave was beyond his window of opportunity to gain any benefit from the treatment; in the interim his cancer had metastasized to the liver, and all the experts agreed that once it metastasized to his liver, it was terminal. He had a life expectancy of eighteen months to two years.

Dave spent the next two years after the initial surgery trying to find out what could be done. He did this on his own because the HMO basically said "no care" and abandoned him. He found out about a procedure called cryoablation surgery being done with good success by a very competent team of doctors at St. John's Hospital in Santa Monica. Once again, as he was required to do, he went to his in-plan, primary care physician, and once again the primary care physician did the right thing and said, "Go over there to have the procedure." Once again, the HMO denied it. Finally, after two and a half years of struggle, Dave became very, very ill; he had huge tumor masses in his stomach, he was having trouble eating, and his body was shutting down:

he was dying. His in-plan physician referred him once again to St. John's, and at St. John's the doctors went ahead and did the surgery even though the HMO had not responded. While Dave was on a ventilator in the ICU the day after his surgery, with his wife and his sister at his bedside, he received a hand-delivered letter that said, "This is out of plan. You're not covered." Actually, his wife read the letter and didn't tell him about it until he was more coherent. That is the sort of thing she had to deal with throughout this ordeal.

Dave never did leave the hospital. He spent two months at St. John's until he died on March 15. He went to his grave knowing that his kindergarten schoolteacher wife had over $500,000 in medical bills.

What was the HMO's defense? The basic defense, in a nutshell, was this: "You didn't follow our rules; our rules require that you get your care inside the plan." They clung to this even though their own doctors in the plan had said that Dave needed to go outside of the plan because the treatment was not available within the plan. Nurses were rubber-stamping the denials. (The extent of review in this case, and in many of the cases we see, is nurses' review of written requests for authorization from treating physicians. These nurses say simply, "St. John's Hospital, Santa Monica? Let's see if that's on our list. No, that's not a contracting facility, it's not in our group. Denied.")

Because of those facts, it didn't take a great lawyer to win the case. The jury brought in a verdict of $120 million, including $116 million in punitive damages.

Aftermath of the Case

The next day, the CEO of Aetna, Richard Huber, was quoted in Aetna's hometown paper, the *Hartford Courant*, as saying: "This is what you get when you have a weeping widow and a skillful ambulance-chasing lawyer." Of course, I received a call from the paper asking what I thought of Mr. Huber's comments. I didn't know about them, but when I saw the quotation, I was shocked. Everyone knew that Dave Goodrich and I were personal friends; I certainly did not chase any ambulance. Also, the so-called weeping widow was actually very composed, and I didn't overbake that cake; I put her on the stand for just a little while. The defense lawyer did beat her up on cross-examination in front of the jury, and she started crying after about half an hour of that, but that had to be expected. Mr. Huber's comments merely reflected the arrogance we had faced throughout this case.

The longer term consequences have been somewhat gratifying. As you might have seen in the *Wall Street Journal* or other sources, there has been a great deal of discontent with Aetna's stock performance. Since the verdict in our case, the stock price has gone from $100 to $40 a share. (And Huber, who

has 800,000 shares of Aetna stock, has lost $48 million in the value of his own shares of stock in the company.) As a result of this decline, major business people in the country have criticized Huber, and he has lost his job—not because of what I did and not because Aetna, like many HMOs, is unfair and unconcerned with the health of their members, but because of money, because of the performance of the stock for shareholders. Huber resigned under pressure, and Bill Donaldson, a founder of Donaldson, Lufkin and Jenrette who's been on the board of Aetna for twenty-seven years, took his place. Donaldson has brought in Steve Miller, a turnaround specialist.

Ironically, Huber had been brought into Aetna when the company sold its book of property and casualty business to Travelers in 1996, to concentrate on the health care business after Aetna acquired U.S. Healthcare that same year. U.S. Healthcare was a very successful east coast HMO, and its acquisition made Aetna U.S. Healthcare the largest healthcare model in the country. That business has now gone down to a fraction of its former value, while Travelers has made a fortune with the business it acquired from Aetna.

HMOs Present and Future

How do I know that this HMO was created by corporations for corporations? Because in yesterday's *Los Angeles Times* and *Wall Street Journal*, the new CEO of Aetna was quoted as saying, "I'm here to turn this company around. We want to restore the confidence of our shareholders." He did not say, "We think that by treating patients better, we're going to have a better company." He said nothing about patients. The only concern is the confidence of the shareholders. So long as that's the purpose behind HMOs, and so long as they are geared toward maximizing profits—basically by depriving their beneficiaries of health care—they will remain corporations created by corporations for corporations.

One of the biggest scandals in this country, I think, has to do with health care after retirement. Even those who have done well in their careers and saved money have to be concerned about catastrophic illness during the period of retirement. Despicably, the insurance industry and the HMOs deliver deficient health care to the senior population. Over the last ten years in our office, we have seen case after case after case in which a member of the senior population has been cheated out of treatment for cancer. Because of the financial incentives and limitations, the review procedures, and other factors, HMO doctors are not diagnosing cancer in a timely fashion, and when they have diagnosed it, they are not treating it. I have had numerous cases in which HMOs failed to tell people they had cancer—only when you look at the records retrospectively can you see what was going on—and the reason is that

cancer treatment costs money. Also, in California at least, we are having to fight administrative review requirements. The HMOs argue that if the beneficiaries were in Medicare, they would have to go to third-party review and would not be able to go to court. The HMOs want to insist on the same process because by the time the beneficiaries get through the third-party administrative review, they're dead or it's too late for treatment.

The HMOs do have voluntary accreditation under the National Commission of Quality Assurance, but they never obey the rules and regulations promulgated by the N.C.Q.A., which are very pro-patient. Under the N.C.Q.A. regulations, for example, routine, written requests for care are to be acted on within forty-eight hours, and urgent requests for care within twenty-four hours. The HMOs I have dealt with don't even take requests out of the fax machine for forty-eight hours, let alone act upon them within that time.

I am encouraged that the future holds better things. You wouldn't have heard anything about all of this five or six years ago. Now you see cartoons about it, you hear jokes about it. Nearly every candidate for national office is calling for a "patient bill of rights"; the politicians have done the polling and they realize that people are concerned about this. The fire has been lit, and it's not going to go out until something is done. I think there's going to be a change.

Questions and Answers

Q. Do you believe that as long as there's a profit incentive in health care, we'll continue to have these problems?

A. Yes, absolutely. I think that is widely recognized. Of course, the current situation developed because at one time there was a profit motive favoring testing and treatment, and there was abuse in that direction—but at least the abuse was slanted toward giving care rather than depriving people of care. The financial reward has an inevitable impact on the direction of care. That is why I believe that cases like Dave Goodrich's, where punitive damages are awarded, do serve as a deterrent; they call attention to the problems, and they hit the HMOs financially. I know from personal experience that Aetna is changing its methods. We went through a similar process with claims handling by insurance companies several years ago. Insurance companies really do a better job now than they used to, at least in California.

Q. What do you think will happen to the *Goodrich* verdict on appeal?

A. My prediction is that we're going to win. The appeal is going to a notoriously conservative panel, but three of the seven judges are former DAs who used to work with Dave Goodrich. I don't know what impact, if any, that will

have. The most important point, honestly, is that it's a clean verdict. Also, the verdict itself has already had a beneficial effect on the broader issues, irrespective of what happens down the line.

Q. Why is a patient bill of rights necessary to get around ERISA?

A. I could talk for two days on this subject, but I will give you a quick overview. ERISA was never intended to have anything whatsoever to do with the regulation of insurance or HMOs. In fact, there's a specific exemption, in a "savings clause," for securities, banking, or insurance. Unfortunately, in a bad faith case that came out of Mississippi, the Supreme Court in 1987 held that a person who had insurance provided as a fringe benefit of employment had no rights to state court remedies, that ERISA preempted state court jurisdiction.[1] As a result, HMOs have felt essentially immune from liability. That certainly has contributed to the attitude that they can do whatever they want. Interestingly, two federal judges, one in Colorado and one in Oklahoma, have recently held that ERISA is not preemptive. We think that many of the federal court judges are getting fed up with all of the ERISA cases clogging their courts. There also are legislative maneuvers in various states. In California, for example, Governor Davis signed a bill that takes effect on January 1, 2001, which effectively says "this is the business of insurance; therefore, it comes within the ERISA savings clause, and you can go to state court." (This is modeled after the Texas bill, which Governor Bush never signed; he let it pass into law because it was politically expedient, but he never signed it. Now he's taking credit for it.) With all of these developments, the ERISA preemption is eroding now and is going to be overcome eventually.

[1]Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

THE GOOD THAT LAWYERS DO†

Susan Illston*

I titled this talk "The Good that Lawyers Do" to assure you that it would not be unduly long! But seriously. . . I plan to tell you three stories drawn from history about good works that lawyers have done. Actually, two of the stories are about unqualified good works by lawyers. The third involves patents, so it's a mixture of good and bad, but I'd like to talk about it because it constitutes an interesting illustration of the development of American business culture.

JOHN ADAMS

Interestingly, the first story that I'll tell you is one that I discovered in the course of preparing for my Senate confirmation process. When I was nominated by President Clinton in January of 1995, control of the Senate had shifted to the Republicans, so confirmation scrutiny had become somewhat sharper. To prepare for my hearing, I did some reading to bone up on constitutional law issues because I thought those would be the focus of the Senate inquiry. Of course, the Senators proved to be concerned about other things altogether; but in the course of my constitutional law review, as a by-product, I also refreshed myself on American history and came across the story I will tell you in a moment.

When I was in Washington for my confirmation hearing, I went to the Holocaust Museum, an extremely moving, even breathtaking experience. That night I went to see a play called *The Kiss of the Spider Woman,* which is about people who get locked up in a politically repressive country without hope of getting out of jail and without hope of any legal process. Both of these experiences made me think: Where were the lawyers? Where were the lawyers in Nazi Germany? Where were the lawyers in the repressive country depicted in *Kiss of the Spider Woman?* Part of the answer to those questions is that in Nazi Germany, Hitler deliberately set out to repress the legal community. He knew that the legal community might block the things that he was doing, so one of the first things he did was to make it illegal for Jews, communists, and women to be lawyers. Thereafter he started a cam-

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paign to make it disgraceful to be a lawyer so that other people would not participate in the legal profession, or at least would not speak out as lawyers. He realized that those measures were necessary in order to keep the repression going in the way that he wanted.

Our experience in the United States has been quite different. Lawyers have been at the center of the political process in this country since the beginning, which brings me to my first lawyer story. This one is about John Adams, our second president, the first one-term president we had, and the first president to preside over a change in political control of the government—all at what was actually a very dangerous time in our country's history. We survived it, for a lot of different reasons, but partly because Adams was there.

My story predates the Adams presidency. Before he became president and before the Revolution, Adams was a lawyer in Boston. He earned his income through the support of the community, and people brought him cases because they respected him, but his income was rather meager because he had a prickly kind of personality. As the Revolution approached, dramatic things began to happen, and one of those was the Boston Massacre. As you will probably recall, in this incident British soldiers fired on an unruly crowd. They killed three people instantly and injured several others, two of whom later died. The community in Boston was outraged, and this was one of the events, of course, that led to the Revolution. The British soldiers were charged with murder; they needed lawyers. No one wanted to represent them. These soldiers were as unpopular as you can possibly imagine. But then, against the advice of friends, John Adams stepped up to the challenge and took on the representation of the soldiers. He took the case not for the money, as some critics alleged; he didn't know that he would get paid at all, and such payment as he did ultimately receive was far below his usual rate. Rather, he took the case because of his belief that everyone deserved representation.

The trial itself bears some comment, I think, in light of our modern experience. The trial took almost two weeks. It took one morning to pick the jury, twelve jurors out of a panel of thirty-three available. John Adams used his peremptory challenges to get rid of everybody who lived in Boston, so the jury was composed only of country folk from outside the city limits. It then took a week for the prosecution to put on its case and a week for John Adams to put on his defense. (This was an extremely long trial for the time, when trials rarely lasted longer than a day.) The jury was out two and a half hours, and the soldiers were acquitted of the murder charges, although two were convicted of manslaughter. After that Adams's popularity in Boston was at a low point and his legal practice dropped off. Perhaps that's why he went into politics.

It's worth noting, by the way, that the election campaign in 1800, when John Adams lost to Thomas Jefferson, far surpassed in bitterness and gener-

al rancor anything that we see today. It's very interesting to go back and look at events in our country's history, to compare them with the current state of affairs. Truly, the more things change, the more they stay the same. The 1800 election was really interesting and extremely acrimonious. We're having a kind of cakewalk this year, by contrast.

JOHN QUINCY ADAMS AND ROGER BALDWIN

My second good lawyer story took place some seventy years after the first. It is a story that I became familiar with when I was preparing a talk for the Legal Aid Society in San Mateo County. In preparing those remarks, I did a little bit of research and went to see the movie *Amistad*, which many of you have seen. It was a dramatic portrayal of a shipboard slave revolt.

In 1839 Portuguese slave hunters had kidnapped a large group of Africans and shipped them to Cuba, a center for slave trade. This abduction violated all treaties then in existence. In Cuba a number of the Africans had been purchased by two planters; these Africans had been placed aboard a Cuban vessel, the Amistad, for shipment to the plantations. On the third night of this voyage, the Africans had revolted, killing the captain (who also owned the vessel) and the cook. Two crew members had jumped overboard. The two planters were not killed, because they were needed to help sail the ship. The Africans attempted to sail east, to return to Africa; but each night the planters turned back to the northwest. Eventually the ship was seized off Long Island, New York, and the Africans were taken into custody and sent to New Haven, Connecticut.

This situation caused incredible consternation, and the issues raised were complex. In being seized off New York and taken to Connecticut, the ship and its contents had landed in the center of abolitionist sentiment in this country. The ship was Spanish (because Cuba was still a colony of Spain), as were the planters, which implicated all kinds of federal treaties and sovereignty issues. The federal courts were the locus of the litigation of this whole matter. The questions were to whom the ship belonged and what to do with the people on board. The incumbent president was Martin Van Buren, who was finishing his first term and wanted to win a second. He desperately needed the support of the South, so he wasn't interested in helping the Africans solve the problems they faced.

This is where the good lawyer story begins. A young man named Roger Baldwin, a property lawyer in New Haven, stepped forward to represent the Africans and to litigate what was almost more important at the time, which was ownership of the ship. That isn't quite as heartless as it sounds, because the determination of the ownership of the vessel would affect the status of

the individuals on the ship. As with John Adams seventy years before, Baldwin was paid little or nothing for his efforts and subsequently watched his practice drop off, so this was a completely unsung and unrewarded service. Indeed, Baldwin was called an antebellum ambulance chaser.

Baldwin persuaded the trial court, a federal district court in New Haven, that the Africans were African citizens who had been kidnapped. This was critical. The issue here was whether they were from Africa or had originated in Cuba. Under the rules of the time, if they had originated in Cuba, their kidnapping and slavery were legal, but if they had originated in Africa, their abduction and slavery violated treaties. Baldwin managed to prove to the satisfaction of the trial court that these individuals were from Africa, their confinement was illegal, and their violent acts were justifiable as their means to liberate themselves from illegal bondage.

As the case proceeded through the appeal process and approached the Supreme Court, Baldwin enlisted the services of John Quincy Adams, the son of John Adams. Like his father, John Quincy had been a one-term president. He also had been a U.S. senator; and after he was president, he returned to the U.S. House of Representatives as a congressman from Massachusetts. Roger Baldwin asked the seventy-three-year-old Adams for help because Baldwin had never argued in the United States Supreme Court. The issue that was most important to John Quincy Adams at the time, the issue to which he was devoting most of his attention, was abolition of slavery, so he agreed to assist Baldwin in arguing his case in the Supreme Court.

Baldwin made his argument to the Court first. He focused closely on the facts and the property issues in the case. Then came John Quincy Adams. He argued for eight hours, over a span of two days. He didn't talk a lot about the details of the case, but he did talk a lot about slavery. The Supreme Court thus provided Adams with a unique platform for addressing the issue most important to him. Baldwin and Adams did win the case in the Supreme Court.[1] Eventually, the Africans who remained alive were returned to Sierra Leone.

As I already indicated, Baldwin's practice thereafter went completely downhill; he was rewarded not at all for having provided this very important and good service. It is something that we lawyers can be proud of now, and it certainly reflects the way the legal profession has consistently come forward in time of need and in unpopular causes in this country.

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[1]The Amistad, 40 U.S. 518 (1841). When this case was argued, there were no recording devices, of course, and no court reporter recorded the arguments verbatim. Instead, notes were taken on arguments before the Supreme Court. Interestingly, the official notes of the arguments in this case reflect Roger Baldwin's argument but not that of John Quincy Adams.

THE PATENT STORY

This story, which I got from a book called *The Americans: The Democratic Experience,* by Daniel Boorstin,[2] holds special interest for me because of the work I am doing now. I sit in San Francisco, which is very near the Silicon Valley, and there's an enormous amount of patent work going on there now. Every patent case that comes in, over which we of course have no control (unlike the Supreme Court, we have to take whatever walks in the door), seems to involve something really complicated, such as recombinant DNA or satellites or computer codes—things I've spent my entire life avoiding learning. The court is called upon to construe these patents and try to understand the technology, and it's very difficult. I *have* learned that there is a lot of intrigue, a lot of greed, and a lot of human competitiveness in the patent field. In fact, one probably could write a book about American history through patent cases, and it would be surprisingly interesting.

This patent story involves a lawyer, it involves America's love affair with the automobile, and it involves Henry Ford. The lawyer's name was George Selden. His father was a lawyer in Rochester, New York. After studying classics at Yale, George Selden apprenticed with his father. He later opened his own office as a patent lawyer and represented George Eastman, whose company was in Rochester and ultimately became Eastman Kodak.

Selden was a good patent lawyer but he was also a tinkerer; he spent a lot of time in his basement tinkering with things. He actually got a patent for a machine that made barrel hoops, and he got another patent for an early form of typewriter. What he really wanted to do, though, was develop a self-propelled road vehicle. At the time, back in the 1870s, there were some "road locomotives," but these were steam-powered and weighed three tons, so, needless to say, they were of limited utility.

In 1873 George Selden began experimenting with internal combustion engines. He then went to the Centennial Convention in Philadelphia in 1876, and there he saw a prototype of an internal combustion engine developed by an Englishman living in Boston, so of course he copied it. Then he went back home and worked on improving it. By 1878 he had devised an engine that weighed only 370 pounds and produced two horsepower. This was a breakthrough in the development of the internal combustion engine. From that time forward, in the words of Boorstin, "Selden diverted his energies from the effort to improve his vehicle to his attempt to secure the maximum

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[2]D. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE (1973).

legal protection of his imagined right to profit from all future self-propelled road vehicles."[3] To do this, he used his knowledge of the way the patent system worked. On May 8, 1879, he filed his patent application in general outline, long before he knew how he was really going to make this engine work. Under the rules of the time, an inventor got protection from the date of filing an application, but the seventeen-year period of control over the patent ran from the date the patent was granted. Selden knew his initial application wasn't adequate, but he kept amending the application, adding bells and whistles. It took sixteen years before he finally got his patent; but during that entire sixteen-year period he had legal protection over this idea in the United States. Then, once he got his patent in November of 1895, he had another seventeen years of control.

At first Selden was pleased with the result. In 1903, when the whole automobile industry was beginning to develop, ten of the leading automobile makers got together and formed the Association of Licensed Automobile Manufacturers, which purchased the right to use the Selden patent for a royalty of one and a quarter percent of the purchase price of each vehicle sold by the members. Things were just going smoothly for George Selden, and he stood to make a lot of money, until he ran into Henry Ford.

As Henry Ford began developing his assembly-line production of automobiles, he applied for a license to use Selden's patent. He was turned down, however, because he was viewed as merely assembling things; he wasn't really a manufacturer. Believing that what he was doing was the "'product of his own brain'"[4] for which he owed no one, Ford decided to make his cars anyway, without a license under the Selden patent. So, in 1903 the Selden group started a patent infringement case against Henry Ford.

The suit went on for eight years, which was an enormously long period of time for a lawsuit at that time. The landmark decision in 1911 by Judge Walter Chadwick Noyes was described by Boorstin as "a wonderfully legalistic anticlimax to what may have been the most expensive single litigation in American history."[5] The court found that the patent itself was valid but that Ford had not infringed the patent. The Selden patent covered a two-cylinder engine while Ford—and really everyone else—had been manufacturing four-cylinder engines based on a different design. For George Selden, it was a classic example of winning the battle and losing the war.

By the time the decision came down, Selden's patent had only a few months to run, and of course the automobile industry had far surpassed the

[3] *Id*. at 59-60.
[4] *Id*. at 60-61.
[5] *Id*. at 61.

initial designs, so Selden received no more royalties. Henry Ford, however, did not let the issue rest there; he had found a cause to champion. He actually ran for the United States Senate in 1918 on a plank that proposed the abolition of all patents. (To me, there's a certain surface appeal to that proposal, because then I wouldn't have to deal with the patent cases I have now.) Selden died in 1922, still feeling that the moral victory was his.

As is not unusual in litigation, there were people for whom this Selden victory was not Pyrrhic—the lawyers. It was one of the most expensive cases ever litigated in American jurisprudence. The Selden patent had generated about $5.8 million in royalties, but after the subtraction of various fees and expenses, George Selden personally had received only about $200,000. By contrast, the lawyers for the Selden side in the lawsuit were paid about $450,000 in legal fees—serious money around 1910—and Ford paid his lawyers about $250,000. The major result of the case, then, was the displacement of funds from one pocket to another. There was little significance to the declaration of the validity of the patent, which promptly expired and which had not in any event been infringed. Perhaps that's what happens when lawyers get involved in patent litigation as clients rather than as litigators.

AN OPPORTUNITY FOR YOU TO DO GOOD

I would like to end by mentioning an opportunity for you to use your prodigious legal talents in a way that will earn for you the undying appreciation of lots of judges. One of the things that surprised me when I took the bench was to discover just how many cases we have involving pro se litigants. As you know, even for a lawyer it isn't easy taking a case to court, particularly to federal court. Yet many non-lawyers try to file cases representing themselves. Most of these are filed by prisoners claiming civil rights violations. These cases often survive summary judgment; if there are any questions of fact that can't be resolved on the papers, these cases need to be tried—and they're very hard on the prisoners and the courts.

This provides a wonderful opportunity for lawyers—young lawyers especially—to try cases with absolutely no downside to them. The trials don't take very long, they're not expensive, and they give young lawyers opportunities to stand up and try cases in front of juries. The chances of winning favorable verdicts are small, but if you do win, there is a fee provision. It isn't very much, but it's something. Also, not only is trying these cases a way for lawyers to get some trial experience but it also helps the court a lot; there's nothing harder than trying a case with an unrepresented litigant, and you worry about whether justice was done. (It might have been a losing case only because the pro se litigant did not know how to present it or frame the

right legal arguments.) You can perform a wonderful service if you get the young lawyers in your firms involved in this work and provide them with support and guidance.

So these are illustrations of the good that lawyers have done and the good that they can do.

WORDS OF THE LAW†

George Vetter*

With words convention is all. They get their meanings from the way people use them. They do not have inherent meanings. A powerful group of philosophers once thought they did. A word from the Greeks puts a point on this.

"Ostracism" means banned or shunned. It comes from the Greek word *ostrakon,* meaning oyster shell. The Greeks thought a potsherd resembled an oyster shell. They extended *ostrakon* to mean that too. From marine biology to constitutional law. In their general assembly, the Athenians could vote to banish a citizen from the polis. To cast their vote they would mark a potsherd. Melding the ballot into the deed, they extended ostrakon to mean banishment.

The Stoics would have none of this. They believed a word had a natural meaning called an *etymon.* Discover it for an insight into the very nature of the thing the word described. They would search words for their *etymons* as part of their ongoing effort to understand the nature of the universe. They called this search *etymology,* the science of true meaning. Their view held sway for centuries. We still use the words they coined, but upside down. "Etymon" now means the early form of a word, "etymology" its origin and development.

Common extension, the process *ostrakon* illustrates, can take a word far from its cradle. The trouble a Florida couple brought down about their ears shows how far indeed.

They picked up on a police scanner and taped a Republican Congressman confabulating on his car phone with several of his colleagues. They gave the tape to a Democratic Congressman. He took it public. Overnight a hubbub erupted in Congress about eavesdropping. Did the couple eavesdrop?

Early on the English built their houses with wide eaves instead of gutters and downspouts to keep the rain running off the roof away from the foundations. They called this runoff the *eavesdrop* or *eavesdrip.* Houses also stood close together in those days. The *eavesdrop* from one house could fall on the property of the house next door. To keep the peace the law stepped in to require a permit for a trespassing runoff. Without ado people extended *eavesdrop* to describe the servitude on the adjoining property.

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† Reprinted, with permission, from *Voir Dire,* Spring 2000 (originally titled "More Words of the Law").
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Soon they extended the word again, this time to describe the space of ground beneath the eaves. Enter the snoops, and the journey of the word to the present. Snoops would sneak into the *eavesdrop* and, lurking there, ear to the wall, listen secretly to the private conversations inside the house. People dubbed these worthies *eavesdroppers* and their furtive activity, *eavesdropping.*

As one early writer put it, "Eavesdroppers are such that stand under walls and windows . . . to hear news." They would use this "news" to gossip. That was bad news, big time back then. In tightly packed communities gossip could be severely disruptive. It was regarded as a particular evil that had to be controlled. To keep the peace the law stepped in once more to make *eavesdropping* a crime.

Times changed but not snooping. The word shed its limitations but kept its core meaning, "to listen secretly to private conversations." Despite its being so graphic, it has become a remarkable jack-of-all-trades.

Describing the Topkapi Palace a journalist could say its many fountains helped keep the harem cool and as well discouraged eavesdropping on the Sultan.

On the eve of Bosworth Field, Richard III could say:

> Under our tents I'll play the eavesdropper,
> To hear if any mean to shrink from me.
>
> —Shakespeare, Richard II, V, iii.

When charged under the Electronic Communications and Privacy Act, the Florida couple discovered that eavesdropping can take place electronically and from afar and ruefully could say, "You've come a long way, Baby."

And in World War II sloganeers could say, harking back to good old-fashioned eavesdropping, "Walls have ears."

According to George Bernard Shaw, "A good cry is half the battle." He could have been speaking of "hubbub."

The ancient Celts had a cry *ub ub ubub* to express contempt. The ancient Irish shouted *abu* going into battle. These words have weathered the years virtually intact as our "hubbub" meaning din, uproar, tumultuous confusion, a babble of voices.

In their law the ancient Welsh recognized the "hue and cry." They called it the *hubbub.* The colonists in early Rhode Island did too, at least as a synonym for "hue and cry." Why precisely is not clear. However, the Algonquins played a noisy dice-like game which they punctuated with shouts of *hub hub hub.* The colonists called the game *hubbub.* Roger Williams once described a fracas between the settlers and the Indians as a "great hubbub in these parts."

Shakespeare used the word in *The Winters Tale,* only he spelled it *whoo-bub.*

The common law "hue and cry" comes from the Angle-Norman *hu e cri. Hu* may also have been a pure shout, an inarticulate hunting cry to be specific.

Shakespeare used many words of the law. But the palm for injecting a word of the law smack into the vernacular may belong to another English playwright. The word is "ignoramus," the playwright George Ruggle.

The first English grand juries acted upon personal knowledge. When they did not know personally whether to indict a person they plainly said so. They endorsed *ignoramus,* meaning "we do not know," on the bill of indictment.

In 1615 Ruggle weighed into a longstanding feud between town and gown in Cambridge. He wrote a farce attacking the chief legal officer in the town, the Recorder, one Brackyn, to the gown the person chiefly responsible for their woes. Ruggle wrote his play "to expose the ignorance and arrogance of the common lawyers." He named his lead character Sir Ignoramus and the play after him. Ruggle tore into Sir Ignoramus with gusto. He depicted him as a pompous old fool but who thought himself shrewd, subjected him nonstop to insults and humiliations, and dispatched him to a monastery to wind up his career.

Ruggle timed his play for a visit of James I to the University. The King had lots on his mind, his struggle with Edward Coke, the Lord Chief Justice, over the prerogative courts bubbling up into still another crisis. The University sided with the King to a don. On opening night, the moment Sir Ignoramus trod the boards, the audience hooted, taking him to be no other than Lord Coke.

A smash hit, the play went through seven printings. It drew the King for a return performance. And it nettled Lord Coke, reportedly dour even for a judge, and his allies beyond endurance. They sounded off, affording the King's men another round twitting them about not being able to take a joke.

With all this to propel it, *ignoramus* vaulted into day to day speech meaning a foolish, arrogant, and ignorant fellow. As its jocular associations faded, it became irremediably derogatory, so much so that it reentered the law. In some courts to call a lawyer an *"ignoramus"* defames that luminary *per se.*

Technically, *ignoramus* never left the law but led a fossilized existence. English grand juries continued to use it long after they had scrapped personal knowledge for neutral evidence. Not until the 1930s did they substitute "no true bill" or "not found." *Amour propre,* that great engine of change, engineered this change too. People had begun to call a grand jury that did not indict in a case where people thought it should indict an ignoramus jury.

To round out the picture, in Latin *ignoramus* is the first person plural present indicative of *ignōrāre,* a compound of *in* meaning "not" and *gnarus* meaning "aware" or "know." Earlier in its borrowings, English bodily took *igno-*

rant, the present participle of *ignōrāre,* for its word "ignorant." This points up one of the charms, or traps if you will, of etymology. We get different words at different times from different inflections of the same root word.

Our word "ignore" incidentally, also from *ignōrāre,* also originally meant "not to know." In time, if you did not care to know somebody, you would ignore that somebody.

The Town of Cambridge has an etymological cachet. It illustrates why even the most obvious etymology must be, as one linguist has put it, "proven to the hilt."

Cambridge lies on the banks of the river Cam by a bridge. Hence its name? Not quite. The river had an older name *Granta,* a name it still bears upstream. The town on the banks of the river Granta by a bridge also had an older name, *Grantabrigge.* By phonetic changes the name became *Gantabrigge, Cantabrigga, Cantabrigge* and finally *Cambridge.*

The river became rechristened from the name of the town!

But not the residents or students of the town or its university. They are *Cantabrigians,* as are their counterparts of Cambridge, Massachusetts and Harvard University. And *Cantabs,* the diminutive of that mouthful, has delighted sports writers for decades as a frisky nickname for Harvard teams.

People take some words for granted. Other words pique their curiosity. They want to know about them. If a word lacks a history they will concoct one. Linguists call this folk etymology. Greenough and Kittridge give an example. A little girl who had heard many stories about the mischievous doings of an imaginary Wilhelmina asked whether this personage was not so called because she was so mean.

They warn us to go slow on etymologies based on names or anecdotes. A word of the law jumps out here. "Shyster."

For years scholars ventured that a particularly unscrupulous lawyer practiced in New York in the 1840s. Now scholars doubt Mr. Scheuster ever lived. They also doubt two fallback explanations for the word. That it comes from adding the suffix *ster,* which means "one who is," to shy either with its meaning of "shady" or as the first syllable of "Shylock."

Scholars now mostly agree "shyster" comes from the German *scheisser* meaning bastard or son-of-a-bitch, literally a defecator.

A "shyster" is a professionally unscrupulous lawyer. A "pettifogger" is an underhanded and disrespectable lawyer who quarrels over insignificant details. The two words are synonyms but with that nuance. Whatever, "pettifogger" may be related to the earlier *pettifactor,* a petty underhanded lawyer, from *petty* meaning "small" and factor meaning an "agent." The majority view about the etymology drops *factor* but keeps *petty* and combines it instead with the German word *fogger* meaning a "monetary trickster." That word comes from *Fugger*, the powerful clan of Augsberg traders

and money men, importantly, the financiers to the Hapsburgs, in the 1400s and 1500s. Elizabethan dramatists fancied the expression, "rich as a fugger."

Did big time financial magnates in those days make their big pile disreputably? From the etymology of *fogger,* the public thought so. When the public saw a small bore business man making his small pile disreputably they called him a *pettyfogger.* When they saw a small time lawyer practicing disreputably they extended the name to him. By a back formation they gave his name to the practice.

In *Alice In Wonderland* Lewis Carroll said of "pettyfogulizing" lawyers:

"In my youth," said his father, "I took to the law,
And argued each case with my wife;
And the muscular strength, which it gave to my jaw,
Has lasted the rest of my life."

Words can converge in meaning from improbably different sources. "Pettifoggery" comes from financial high jinks, "chicanery" from unsportsmanlike conduct.

English borrowed the French *chicane* meaning sharp practice in law suits. That meaning evolved from an earlier meaning of a dispute in games, especially a croquet-like game called *mall.* Gallic sportsmen played tricks in their disputes. Earlier yet *chicane* itself meant the game of *mall.*

Chicane may go back to the Persian *chaugan*, the crooked stick used in polo, reaching French via the Greek for polo or golf. The OED sees no evidence of that link up. No other Romance language has the word *chicane.*

Chicane entered English at least three more times. Twice in its own name. A bridge hand containing no trumps, the "esses" on a motor race track. And once under its pseudonym *mall*. English courtiers used to play *pale-maille,* ball and mallet, in an alley way that became and gave its name to Pall Mall, the elegant west end thoroughfare in London.

As for "petty," Middle English borrowed *petit* and *petite,* the masculine and feminine forms of the Middle French word meaning "small." Petite has come down intact meaning a small, trim woman and the sizes she wears.

Petit split. One branch became anglized into *pety* then into *petty*. At first the word kept its original meaning. Thus *pety* plus *cote*, meaning "coat," described a short outer garment women once wore. Spelled "petticoat," it describes the undergarment women wear nowadays. "Petticoat Lane," the flea market in London, got its name from the trade in petticoats carried on at that locale.

In time *petty* standing alone came to mean small-minded, of scant importance.

In the other branch, petit kept both its spelling and its respectability. In the law we have "petit jury" and "petit larceny." In the bakery, we have "petit fours" from the French word for small oven.

Some years ago two barristers enjoyed fabulous success at the London bar. It was win, win, win. As their fame grew, people caught up in some des-

perate enterprise or another would vow, "I'm going to win by hook or by crook." Alas for this sprightly etymology, Mr. Hook and Mr. Crook no more existed than did Mr. Schuester. In fact three other professionals besides barristers vie for the etymology. Shepherds use crooks, sticks with a hook, to snag sheep, wood gatherers to bring down branches from a tree, and petty thieves to snatch clothes from a line or items from a table.

Speaking of barristers, Dorothy Parker deemed them as lively a lot out of court as in court. When told that a certain London actress had broken her leg, she said, "How terrible, she must have done it sliding down a barrister."

Not all words or expressions attributed to names or episodes wobble at their foundations. Some rest rock solid on a real person or an actual event. To mention four from the law:

In the 1440s Thomas Littleton compiled all of English land law into a daunting treatise. Years later Lord Coke distilled it into a simpler volume. His commentary *Coke upon Littleton* inspired a bibulous expression "a coke upon littleton" meaning a strong drink diluted with a weaker one. *Brewer's Dictionary* calls the expression 18th century slang for a mixture of tent (a deep red Spanish wine) and brandy.

In 1447 the Duke of Exeter, Constable of the Tower of London, introduced the rack in England. It soon came by a nickname, "the Duke of Exeter's Daughter." World class gallows humor of a piece with "the widow," in England slang for the gallows and in France as "red widow," slang for the Guillotine.

Thomas Derrick fits in here. In the 1600s he played a key role in the administration of justice. He worked at Tyburn. He hung people. He did such a sterling job at the gallows that his name became a synonym for the gallows. Then, because a derrick resembled a hoist, the word also became a synonym for hoist. It keeps that meaning today. It has all but lost its meaning as gallows.

The word belies its lineage. The name *Derrick* apparently stems from the Dutch *Dierryk,* itself akin to the Late Latin *Theodericus* or its variation *Theodoricus,* that name considered to be from the Gothic *thuidareiks,* meaning "people's king."

A famous lawyer once won a stunning victory in a celebrated cause. In a twinkling people coined a phrase, "Philadelphia lawyer." Bare bones, it means an exceptionally competent lawyer, especially one versed in legal verbiage and adept at legal technicalities. Does that imply a brilliant attorney or a legal trickster? It can imply either. An old New England saw captures the ambiguity, "Three Philadelphia lawyers would be a match for the devil."

In 1735 Andrew Hamilton, approaching eighty, a lawyer renowned throughout the colonies, designer of Independence Hall, came out of retirement in Philadelphia to defend John Peter Zenger against a charge of seditious libel.

Zenger published the *New York Weekly Journal.* From the first issue in November 1733 he exposed the corruption of the Royal Governor. Zenger ran a print shop. When the citizens opposing the governor decided on a newspaper they enlisted Zenger. They provided backing and articles. Nonetheless he as the printer would be the governor's target. The governor did strike back, but ineffectively. Not until he suborned an illegal writ could he get Zenger before the court.

Zenger faced grim prospects. Truth was not a defense to seditious libel. In fact, "The greater the truth the greater the libel." To make matters worse, the chief justice, the governor's cats-paw and hatchetman, disbarred Zenger's counsel, two able and experienced lawyers, replacing them with an inexperienced young lawyer who, to boot, had strings to the governor.

The chief justice had blundered. Zenger's attorneys approached Andrew Hamilton about defending Zenger. He agreed, and he agreed to do so at his own expense. On August 4, 1735, the day of the trial, he dumbfounded the judges and the prosecutors when he stood up in the court room, identified himself and said he was there to defend Zenger. He then dumbfounded everybody when he conceded Zenger had printed the materials and said he would prove the articles true. Zenger's court-appointed attorney had intended to put the prosecution to its proof that Zenger had printed the articles, hardly a defense. Hamilton then proceeded to outmaneuver the chief justice on the basic issue in the case: whether the jury only had power to decide whether Zenger had printed the materials, it being for the court to decide whether the materials were libelous. That was the black letter law at the time.

The jury did not doubt the facts Zenger had published. Nobody in New York did. Hamilton argued brilliantly for Zinger's right to publish them.

The jury quickly found Zenger not guilty. News of the victory raced through the colonies. People came to say, "If you are innocent, trust in God; if you are guilty, get a Philadelphia lawyer." The verdict defied the odds. Much as they cherished the verdict, people could only put it down to legal chicanery. Hence the dark side of the idiom.

But likewise people could not stint Hamilton's stupendous achievement. Hence the bright side of the idiom.

The Zenger case helped implant freedom of the press in our law. It also helped implant jury nullification. Hamilton argued that doctrine, famously laid down in *Bushel's Case,* of 1670, to convince the jury they had the right and had the duty to decide the law as well as the facts.

William Penn had been arrested for conducting a meeting in London that, the authorities charged, led to riot, disturbed the peace, and cast contempt on the law and the King. The judge ordered the jury to accept these facts as true. They refused. The judge fined each juror. To put teeth into the fine he impris-

oned each juror until the juror paid the fine. One juror, Bushel, stood steadfast. He took his case to court. In 1670 the Court of Common Pleas upheld Bushel, holding that a court could not punish a jury for not finding a verdict as told they must by the court.

Andrew Hamilton gained immortality anonymously. Others have gained it eponymously.

In 1880 an English land agent, newly arrived in Ireland, raised the rents on the estates he managed in County Mayo. Straightaway he ran into trouble. The tenants balked at the increases. Local shopkeepers refused his business. Vigilantes blocked his mail and supplies. Vandals damaged and destroyed his properties. Finally, despairing of his life, he bolted the Emerald Isle for the Sceptered Isle. The episode made headlines throughout the British Isles. The public snapped up John Boycott's surname as a colorful synonym for "ostracism."

Spelled with a small "b," the hallmark of a surname becoming a popular word with staying power, "boycott" took root in everyday speech. It entered the legal vocabulary to describe an illegal business practice, becoming along the way a staple violation of antitrust law.

Boycott has colorful synonyms. "To be in Coventry" or "to be sent to Coventry" means to be excluded from society for objectionable conduct, socially objectionable conduct in particular. According to the popular explanation, at one time the citizens of Coventry heartily disliked soldiers. If they saw a woman speaking to one they would taboo her on the spot. A soldier posted to Coventry would be cut off from society. The OED calls the sources conjectural.

Coventry has an earlier claim to fame. In 1040 the Earl of Mercia and Lord of Coventry imposed still more taxes on his already burdened tenants. His wife asked him to remove them. He said he would if she would ride naked through town. Lady Godiva did. The Earl kept his promise.

Centuries later some proper soul burnished the legend and gave it a moral. During her canter, the citizens all stayed indoors but one of them, a tailor, peeped through his window. He was struck blind. He figures in the legend as the "Peeping Tom of Coventry." Since 1768 "Lady Godiva" has ridden annually in a commemorative re-enactment of that long ago tax protest, to no effect on tax authorities far more flint hearted than the doting Earl.

Another synonym for boycott, "blackball," also comes from a ballot. In clubs, members commonly place a white ball or a black ball in a box or urn to vote yes or no on a new member.

Boycott itself has generated a synonym. With "boy," its masculine head, chopped off, and "girl," a feminine head affixed, a wordsmith coined "girlcott." In its Spring 1999 issue, *American Speech* describes the word as a

"feminist euphemism purged of [a] putative male morpheme." Semble, "shero" from "hero, "reported in the same issue.

The pioneers in the woman's movement, the suffragettes, did not coin a word but pumped new life into an old saying. They often wound up in prison. They often went on hunger strikes. Not wanting any martyrs, in 1913 Parliament passed the Prisoners Temporary Discharge for Ill Health bill. When a striker's health faltered the authorities would release her; when her health returned they would reimprison her. Some say they had discretion about that. Either way people thought the bill let the authorities toy with the prisoners. They nicknamed the bill the "Cat and Mouse Bill."

The technical vocabulary of the law has contributed many words to popular speech. In *English Words and Their Background* George McKnight lists a baker's dozen: purchase, size, convey, assets, improve, attach, distress, abate, claim, quit, privilege, culprit, and alibi. Writing in 1923, he speculated that through slang, "alibi" stood a chance of making its way into standard speech with the meaning "excuse."

These words still lead a life in the law. Other words of the law became everyday words but died out in the law.

Take "paraphernalia." In Greek *para* meant "besides" and *pherne* meant "dowry." The combined form *parapherne* meant "besides the dowry." The Romans freighted that word into Latin as *parapherna* with the same meaning. In Greek and Roman law the word meant the goods of her own a woman brought with her into her marriage which she could keep if the marriage dissolved, as distinguished from the goods she brought with her as dowry, the gifts of her parents to her husband upon the marriage which he could keep if the marriage dissolved.

Later legal systems adopted that rule of law and that word to describe it. At common law "paraphernalia" became limited to strictly personal things, like jewelry and clothing. Later at common law it came to include what a widow could claim if her husband died intestate. Perhaps John Gay, author of *The Beggar's Opera,* had this in mind when he wrote, "The comfortable estate of widowhood is the only hope that keeps up a wife's spirits."

In time the word began its metamorphosis: First came personal effects in general belonging to whomever, then furnishings, mechanical articles or accessories, and finally miscellaneous things and appurtenances.

In his *Dictionary of Word Origins* Joseph Shipley opined on that development, "From the common tendency of the man, however, to treat all possessions in the house as jointly owned, i.e., as his own, the word came to mean just belongings."

The Old Norse had *log,* a form of *lag,* meaning "law." In many early languages, at its core the word "law" meant something laid down. In early

English *doom* or *dom* meant a statute or decree, the law laid down by King or witan. Hence, the *Doomsday Book,* a compilation by King Alfred in the tenth century of governing enactments and not a litany of ill-fated ends. That sense we owe to the courts. They applied the law and rendered civil judgments, but they also passed criminal sentences, some of them grisly indeed. *Doom* took on that bleak meaning too. "O! Partial Judge, Thy Doom has me undone," from the *Tattler.* The formal sense has died out but the dire sense lives on.

Old English had *ae* for "law." In the eleventh century King Canute of Denmark became King of England too. The Danish had *lagu* (from the Old Norse *log*) for "law." The Danish word ousted the Old English word and in time became "law," the word we use today.

A person practicing "law" became a "lawyer." The suffix *er* means a person occupationally connected with. But consider this. In 1365 for the first time in 300 years Parliament opened in English. That same Parliament outlawed French in the courts. French had become the governing language in 1066 with the Norman invasion. The English continued to speak English. Dialects arose. And both tongues influenced each other.

The Hundred Years War with France had two conspicuous results. England had lost all of France but Calais. The English, ruling class and commoner, began to feel a national identity and their Englishness. How better to express this than by reinstating English as the governing language and the common language of all.

But which dialect to choose? Perhaps it never came to choosing. The East Midland dialect, the dialect of London, Oxford and Cambridge Universities and Geoffrey Chaucer, may have been inevitable. But what if? Of the other dialects, the East Sussex has the word "lawyer." It means "thorny bramble."

When it comes to thorny brambles the law has a doughty competitor: grammar. An example from each for the reader to choose the thorniest. First, the law, a snippet from a statute:

"In every telephone directory . . . there shall be printed in type not smaller than any other type appearing on the same page, a notice preceded by the word "warning" printed in type at least as large as the largest type on the same page. . . ."

Second, grammar, the lament of a co-ed about her educational expectations:

"I came to school to be went with, but I ain't."

HOW WE CAN CUT CRIME IN AMERICA†

Eugene H. Methvin*

In 1958 I became a reporter for the *Washington Daily News* covering crime, courts, and general assignments. This was at a time when the streets of Washington were safe. Crime had gone down for a decade. Police from all over the nation came to see how the police did it. It was also the first year after the Supreme Court began to experiment with the Federal City's police. Graphs of Washington's crime counts show a perfect "V," and that year was the bottom. Crime has soared since.

In the 1960s crime went up all over the nation. Five major forces were at work. Four of them hit American society full-force in the 1960s, and the last struck in the mid-1980s.

Forces Causing Increase in Crime

The first force was federal judicial power. The Warren Court carried out what liberal commentators hail as "the due process revolution." That is, the justices took control of state criminal procedures—all the way down to teachers disciplining pupils in the first grade. The justices knocked prayer out of the schools. They ruled out posting the Ten Commandments in classrooms. They subjected teachers, principals, and school board members to federal court suits if they violated vaguely defined federal rights. Not surprisingly, educators started turning their backs on disorderly conduct, and the bullies and bad boys took control in many classrooms and whole schools.

The justices wrote a criminal code so favorable to defendants that it would never have passed any elected legislature in America. The two key decisions were *Mapp* in 1961[1] and *Miranda* in 1966,[2] federalizing standards for police searches and seizures of evidence and for interrogations of criminal suspects.

In *Miranda,* Justice White wrote a blazing dissent in which Justices Harlan and Stewart joined. He warned: "In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity."[3]

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[1]Mapp v. Ohio, 367 U.S. 643 (1961).

[2]Miranda v. Arizona, 384 U.S. 436 (1966).

[3]*Id*. at 542 (White, J., dissenting).

Justice White was right. Clearance rates for homicide and other crimes show how tragically right he was. Police effectiveness dropped sharply. They used to solve more than ninety-one percent of the nation's murder cases. After *Miranda,* unsolved murders quadrupled. Clearance rates on robberies dropped by more than a third. The proportion of violent crimes that went unsolved increased nearly sixty percent. Thus, by 1991 the Supreme Court's unreasonableness on reasonable interrogation was costing America more than 4,000 additional murders and 70,000 unsolved robberies every year.

The second force was liberal theories about crime and its remedies. In the 1960s liberal theory dominated our courts and correctional systems. Rehabilitation was a shibboleth, and probation and early parole were the norm. While crime soared on the streets, parole boards were turning prisoners loose everywhere. Prison population declined steadily to about 195,000 and stayed there through 1972, when the incarceration rate hit a forty-five-year low.

The third force was demographics. The postwar baby boomers hit the streets as teenagers in the mid-1960s, and crime soared. The proportion of criminals in any year's birth cohort remains about constant; the predatory minority stays about the same size. They have grown, however, in the frequency of offending, and the violence of their offenses, and the power of their weapons.

The fourth force was violence in television programming, which began bathing entire generations of preschoolers in the 1950s. Dr. Brandon Centerwell, an epidemiologist and psychiatrist, has produced studies of homicides in the United States, Canada, and South Africa which strongly suggest that violent television programming has caused a doubling of our rates of homicide, aggravated assault, robbery, rape, and so on.

A fifth force has stimulated juvenile crime sharply since 1986: technology. Chemistry brought crack cocaine, the most addictive drug ever invented, to our city streets. Weapons engineering brought automatic handguns—small, hand-held machine guns.

For a dozen years before 1988, the nation's juvenile arrest rates for violent crimes were largely stable. Then in two years the rate jumped more than a third to 430 per 100,000, the highest ever. The trend lines in arrests for guns, drugs, and murder spiked upward precisely together on FBI charts. Juvenile gang killings almost tripled.

The crack epidemic produced a paradox. Magically, robbery became the only violent crime for which the juvenile arrest rate declined in the late 1980s. The 1990 black juvenile robbery arrest rate fell sixteen percent below 1980. Burglary arrests declined too—by a third for whites and a whopping fifty percent for blacks. But murders soared. In the dozen years before 1985

the black juvenile arrest rate for homicides had dropped by more than half. Then it zoomed to an all-time high in 1990.

What was going on here? It was Adam Smith's "invisible hand" at work. The criminal minority shifted from robbing and burglarizing to trafficking in drugs—and killing one another in battles for market share or to collect debts.

Counterforces

Happily, some counterforces were at work against crime. One was the American voters. Winston Churchill, who was proud of his American mother, said, "The American people can always be trusted to do the right thing—after they've tried everything else." Former New York Mayor Edward Koch tells about a liberal judge who was mugged. The judge said to the press, "This mugging of me will in no way affect my decisions in matters of this kind." At that point, an elderly lady stood up in the back of the room and said, "Then mug him again!"

In the 1980s, the American voters began mugging governors, mayors, legislators, and judges who could not or would not figure out how to stop crime. California's Chief Justice Rose Bird and New York's Mayor David Dinkins were exhibits *A* and *B*. When Governor Michael Dukakis was the Democratic presidential candidate in 1988, his folly of releasing a vicious rapist named Willie Horton to rape again came back to destroy him. In 1992 Democratic nominee Governor Bill Clinton got the message; he interrupted his campaigning in New Hampshire to fly home to Arkansas to preside over the execution of a murderer. Even in East St. Louis, one of the worst sinkholes in America, the heavily African-American electorate in 1991 threw out an inept mayor for another who vowed a war on crime. And the new man, Mayor Gordon D. Bush, delivered a sixty percent reduction in homicides over the next five years. Other judges, mayors, and governors got the message, too. And so did lots of criminals.

Voters in Texas and California approved multibillion dollar bond issues to build prisons. In Kansas City, Jacksonville, and Tampa, voters approved higher taxes to install preventive programs and hire more cops.

A second potent anticrime force is new knowledge. In the last three decades Congress has spent millions on studies of crime. That investment finally bore fruit in the 1990s. Aided by powerful new computers crunching reams of data, social scientists have learned a lot about criminal careers, how they develop, and how we can derail youngsters from the track that leads to prison or early violent death. Thanks to some of these pioneering criminological studies, we know that young criminals generally hit their peak in rate of offending and violence at ages sixteen to eighteen. The hard-core young thug starts stealing

from his mama's purse before he's ten. Later he starts alcohol use and then drugs. He is into burglaries by about age fifteen, armed robberies at sixteen, and he's most likely to kill somebody when he's eighteen, though every day's headlines teach us that these are only approximations. We're getting armed robbers at age ten and killers at thirteen nowadays.

We have also learned that our criminal problem may be smaller than we think. University of Colorado sociologist Delbert S. Elliott tracked a nationally representative sample of 1,725 youths who were ages eleven to seventeen in 1976. By 1989 a total of 369 had committed one or more serious violent offenses, but only thirty-two were persistent high-rate offenders. Year after year this small group committed an average of thirty violent crimes each and hundreds of lesser crimes. Less than two percent of the total, they accounted for half of the serious crimes committed by the entire group.

In Miami, sociologist James A. Inciardi took a close look at such high-rate juvenile predators. He sent researchers into high-crime neighborhoods. They interviewed 611 youngsters ages twelve to seventeen who admitted to multiple crimes and repeated drug use. Typically, they had begun alcohol use at seven and crime and drugs at eleven, and almost two-thirds had participated in a robbery by age thirteen. The interviewees confessed to having committed 429,136 criminal acts during the year prior to their interviews, a stunning 702 each, almost two a day. But even among this violent crowd, 361 of the 611 committed the bulk of the robberies—an average of nineteen each. One admitted two killings of suspected police informants, and associates claimed that he had actually murdered four. He was seventeen years old.

Can we identify these persistent young offenders and incarcerate them? If sociologists can find them, the police can, too. They proved it in New York. Voters there in November of 1993 elected Rudy Giuliani mayor, and he hired a new police chief, Bill Bratton. Together they began a revolution in crime-fighting that spread across America. New York City alone accounted for one-third of the nation's post-1990 decline in homicides, and in 1995 the N.Y.P.D. accounted for seventy percent of the entire national decline in serious crimes.

Another city turned in a spectacular record. Boston averaged ninety-two homicides yearly in the 1980s. The killings zoomed to 152 in 1990. But when the FBI's 1992 crime statistics came out, Boston presented an eye-popping picture of declining crime and violence. In the space of two years, murders dropped by nearly half, to the lowest level in fourteen years. Robberies dropped twenty percent and burglaries thirteen percent, to the lowest levels in two decades. No other big city came close. It happened because the prosecutor and police went after violent gang members, and the judges sent 553 of them to prison. In 1998 the city recorded only thirty-four

homicides, the lowest body count since 1961. That's a seventy-eight percent decline from the 1990 level, nine percent greater than the more highly publicized New York City reduction.

Savannah was the only other city to exceed New York in murder reduction in the 1992 statistics. Savannah had a murder epidemic starting in 1989 when one eighteen-year-old named Ricky Jivens started a drug gang. He was from an intact family of good, hard-working parents, but he wanted the high life and set out to get it fast, through violence. To get into his gang, would-be members had to kill somebody. Sometimes they just picked victims off the street at random. Murders shot from nineteen and twenty in 1988 and 1989 to thirty-three in 1990 and fifty-nine in 1991. That's a tripling in two years! But in late 1991 a joint D.E.A.-Savannah P.D. task force put Jivens and sixteen of his gang members behind bars. The next year, Savannah's murders dropped back to twenty-three, a sixty-one percent decline.

The 1990s anticrime revolution proved we *can* cut crime in America. The cities that had the biggest success did it by locking up criminals, particularly by grabbing them younger and getting them off the streets before they hit the violent peaks in their careers.

As the 1990s began, those who argued that we needed to divert money from building costly prisons to education and prevention were selling pie-in-the-sky they could not deliver. If spending more money on education would work, crime would have gone down since the 1960s. The only prevention program that had been proven effective was imprisonment, and rehabilitation was an impossible dream. In 1979 a National Academy of Sciences panel of experts had concluded that the lesson of "thousands of extant studies" was this: "In short, we do not know a single dependable way of effecting rehabilitation." That grim conclusion was still true as we entered the 1990s.

But prisons do work. After 1972, prison population soared from 195,000 inmates to today's level of 1.5 million (plus 500,000 in jails). We added more than half a million prisoners in the 1990s (from 1991 to 1998) alone. Legislators responded to voter disillusionment with liberal parole boards and judges by passing mandatory sentencing laws and "three strikes" laws, and in some states they abolished parole entirely. As prison population increased, crime decreased. Most academic criminologists resisted the obvious conclusion for a long time, but the experience of the 1990s made it irresistible: Put more criminals in jail, and crime goes down. From 1980 to 1992, the ten states that increased their prison populations the most cut their crime rates nineteen percent. In the ten states with the lowest increases in prisons, violent crime soared fifty-one percent.

New Hampshire provides a dramatic case in point. New Hampshire's legislators in the 1980s executed one of the sharpest policy reversals in the

nation. For the previous twenty years they had added little prison capacity, and crime had soared 579 percent, the highest increase in the fifty states. All that changed after convicted killer Edward Coolidge, who had murdered Pamela Mason, a fourteen-year-old babysitter, and left her abused body in a snowbank, was released after eighteen years with "time off for good behavior"; he had been sentenced to twenty-five years to life. Pamela's family started a statewide petition drive for a "truth in sentencing" law. In 1984 legislators voted to require convicts to serve their minimum sentences in full, and they voted $65 million for new prison construction to make it stick. As a result, in the dozen years from 1980 to 1992, New Hampshire's incarceration rate increased more than any other state's. Prison population increased sixfold. And wonder of wonders, crime declined thirty-four percent, the steepest overall drop in the nation. Similar turnarounds—with similar results—happened in Texas and Florida after notorious crimes in those states.

The anti-prison crowd still likes to argue that "prisons don't work" because two-thirds of those released land back in prison again after two or three years, but that is a how-to-lie-with-statistics error. It is true that about two-thirds of any batch of convicts released return to prison, but that's counting the wrong bunch. The fallacy lies in counting all convicts released—those released for the first time and those who keep recycling. To evaluate correctly whether prisons are effective, you have to count only those released for the first time. Two-thirds to three-fourths of those will never return. As the late sociologist Robert Martinson declared: " This is a mind-bending discovery, and it shows where we went wrong. A century ago nearly every felon went to prison. We abandoned a sound system that works for the happy idea that we do not have to be so nasty as to lock anybody up."

A 1994 *Journal of Criminology* study shows how the revolving door for criminal repeaters devastates our society. The researchers traced the careers of 6,310 California prisoners released in 1962-63 and revealed an astounding picture. These were hard-core criminals; fifty-six percent had been in prison before, and forty-four percent were in for violent crimes, burglary, or robbery. Over the next twenty-six years, these convicts were arrested 30,464 times; and we know from other studies that criminal repeaters get away with ten to twenty crimes for every arrest, so these convicts probably contributed over a quarter of a million unsolved crimes to the state's crime rates. Over half the offenses charged were nuisance offenses such as parole violations, drunk driving, and disorderly conduct, but the group also scored arrests for 10,000 serious crimes—including 184 homicides, 2,084 assaults, 126 kidnappings, 144 rapes, 2,756 burglaries, 655 auto thefts, and 1,193 robberies. California could have kept all 5,192 second-termers locked away for an estimated cost of only $2.1 billion—a real "buy" in public safety. (One offend-

er was incarcerated twenty-eight times in the twenty-six years!) Even among the criminal repeaters, consistent and escalating punishments slow down the rate and seriousness of offenses. These chronic offenders are the group we need to concentrate on in developing plans for reducing crime.

Possibilities of Prevention

Does this mean we are condemned to end up with a prison on every corner? Not at all. The results of several long-term prevention studies became available in the mid-1990s. A Syracuse University study found that caring for high-risk, single, teen-age mothers, providing home visits by specialists who teach parenting skills, and giving their children free day care designed to develop their intellects and social skills cut the youngsters' delinquency rate at age fifteen by an astounding eighty-nine percent. In Montreal a training program for disruptive kindergartners and their parents cut delinquency at age twelve by ninety percent. In Ypsilanti, Michigan, home visits and special training for poor black youngsters produced $7.16 in benefits—mostly in savings from crimes prevented—for every dollar spent, and the youngsters grew up to be employed taxpayers and good family people instead of jailbirds. In Seattle's most crime-ridden neighborhoods, teachers and parents were coached on how to help children in school, manage anger, and settle disputes. The program reduced dropouts and improved classroom performance. By age eighteen the children were significantly less likely to drink heavily, to have become pregnant or caused a pregnancy, or to have committed violent acts.

So now for the first time we have preventive programs that have been proven to work. We know how to derail youngsters from the crime track of classroom failure and disruption, truancy, dropping out, and joining street gangs on the way to prison or early violent death.

We also have a new tool for identifying the incorrigible offenders who must get maximum sentences and can't be risked on parole. These are psychopathic personalities, a mysterious and poorly understood disorder, and they comprise a large proportion of our hard-core criminal repeaters. Psychopaths become our serial killers, rapists, robbers, con men, and other criminal predators. The best estimates are that they comprise one to two percent of our general population. The leading researcher on psychopathy, Dr. R. D. Hare at the University of British Columbia, has developed a "Psychopathy Check List" that has been tested in Canada's prisons with remarkable results. Fewer than twenty percent of the low-scoring parolees return to prison or are rearrested within three years, but more than eighty percent of the high scorers quickly land back in prison.

The Hare check list is a powerful tool for prison administrators, parole boards, judges, and others who must cope with this extraordinarily destructive population. Maryland prison officials have used the check list to assess some 10,000 inmates, which has enabled them to divert low scorers from maximum-security facilities into lower-cost units or parole. They have also avoided building a costly new forensic hospital, freed up an estimated 11,000 beds, and saved millions of dollars.

OPTIMISM FOR THE FUTURE

We can congratulate ourselves that we've had a twenty-six percent decline in America's violent crime rate in the past nine years. We have a long way to go, however, before we return to the safe society that was America in 1960; violent crime is still three and a half times what it was then. Thanks to the new knowledge we have today, we do know how to reduce crime even more. We can do it through a national strategy combining prevention, punishment, and incapacitation. We start with prenatal care for high-risk mothers, home visits to teach them parenting skills, and preschool programs for their children. We identify other troublemakers in the first and second grades and concentrate special intervention programs on them and their parents. We punish every juvenile caught violating the law. We don't have to punish severely, but we must do something perceived as punishment. And we must increase the punishment for every subsequent offense. At the second offense we bring to bear our best efforts at intensive supervision and family intervention. If all these efforts ultimately fail and offenders prove to be incorrigible, in the words of the late sociologist Robert Martinson, "Lock 'em up and weld the door shut!" and we will see our crime rates plummet.