International Society of Barristers

Volume 36 Number 3

Quarterly

International Society of Barristers Quarterly

Volume 36 **July 2001** **Number 3**

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International Society of Barristers Quarterly

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Volume 36
Issue Number 3
July, 2001

The INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY (USPS 0074-970) (ISSN 0020-8752) is published quarterly by the International Society of Barristers, University of Michigan Law School, Ann Arbor, MI 48109-1215. Periodicals postage is paid at Ann Arbor and additional mailing offices. Subscription rate: $10 per year. Back issues and volumes available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1911. POSTMASTER: Send address changes to the International Society of Barristers, University of Michigan Law School, Ann Arbor, MI 48109-1215.

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LIFE IN THE BUBBLE: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA†

Robert A. Stein*

My limited waiver of the admonition against telling war stories came with several caveats. Mike Bromberg told me to be relevant. My former professor, John Reed, told me to be educational. Dan Kelly just said, "Do your own thing, man, do your own thing." And my wife, Claire, warned me not to be boring and to try to inject some humor.

Moreover, there are some constraints on what I can say about my experiences before the International Criminal Tribunal for the Former Yugoslavia located in The Hague. The Tribunal imposed a gag order, or "order of protection," on all participants.

With all these admonitions in mind I will tell you a little about "life in the bubble."

How I Was Selected

In the fall of 1998 I was pondering the great issues of life, such as why David Nixon gets all the great personal injury cases, whether New Hampshire will ever have a broad-based tax, and whether medical school is still an option for me, when I received a call from a friend of mine named David Geneson, who is a partner at Hunton & Williams, a large Virginia law firm with offices in Washington, D.C., and throughout the world. I have taught with Dave for many years at the National Institute for Trial Advocacy. Dave asked me if I had a passport, and I said yes. He then asked how I felt about defending people charged with murder and torture—lots of murders and tortures. That got my interest. Dave asked me to get involved in the training of several Croatian lawyers and judges who were part of the defense team in a case to be tried in The Hague, before the international war crimes tribunal located there. The client's name was Dario Kordic. Mr. Kordic, along with his co-defendant, Mario Cerkez, had been indicted and was to appear before the International Criminal Tribunal for the former Yugoslavia.

When I took the assignment to help train defense counsel, I never guessed I was going to end up wearing a robe and bib, and little did I know that I was

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Nevis, Charlestown, Nevis, West Indies, March 13, 2001.

*Stein, Volinsky & Callaghan, Concord, New Hampshire; Fellow, International Society of Barristers.

going to end up spending eight months in The Hague, appearing on behalf of an alleged war criminal.

THE END RESULT

The trial began on April 12, 1999, and ended on December 25, 2000. Judgment was rendered on February 26, 2001. There were 240 trial days, 241 witnesses (122 for the prosecution, 117 for the defense, and two court witnesses), 4,665 exhibits (2,721 from the Office of the Prosecution, 1,643 from us, and affidavits and transcripts from other cases from the International Criminal Tribunal). There are over 30,000 pages of transcript.

The written judgment in this case runs 240 pages, with 1,857 footnotes, and six appendices. It is a book. I was in trial from April of 1999 until nearly the end of prosecution's case in February 2000. At that point in time, my lovely wife called and said, "It's February, the power is out, it is cold, and we are out of wood. Get home." (Additionally, I had a substantial case to try in New Hampshire that summer.)

The trial was not held on contiguous trial days, and during the gaps we would prepare for the next segment, interview our own witnesses, or fly home to visit our families. The trial lasted longer than both the Nuremberg and Tokyo trials. The prosecution sought life imprisonment for our clients. There is no death penalty under the applicable international law.[1]

HOW DOES ONE PREPARE FOR A MARATHON WAR CRIMES TRIAL?

So how does one prepare for the defense of an alleged war criminal? I had to learn about the court, the court rules, the Geneva Convention, Yugoslavian history, the civil war in Bosnia, the politics of that civil war, Yugoslavian morés, Yugoslavian lawyering, and prior Tribunal decisions. I had to wrestle with all the indictments, which remain the strangest charging documents I have ever seen. Finally, I had to set up an office from scratch. Let me touch very lightly on each.

Historic Background of the Tribunal

The Tribunal was begun on May 25, 1993, having been created by United Nations Security Council Resolution 827. Its historical underpinnings were the 1864 Geneva Convention, which covered the Treatment of the Sick and

[1]Ultimately, the court acquitted my client on half of the charges, including the major "command responsibility" charge, convicted him on the remainder, and sentenced him to 25 years in prison, with credit for time served.

Wounded in Wartime, and the 1899 Hague Convention codifying the Laws of War. Neither Convention had been used in a trial since the aftermath of World War II. They had been used in November 1945, when the International Military Tribunal in Nuremberg opened its cases against twenty-two Nazi leaders, ten of whom were hanged a year later, and again in May 1946, when the International Tribunal for the Far East in Tokyo put on trial twenty-eight Japanese leaders, all of whom were convicted. Seven Japanese defendants received death sentences, and seven were sentenced to life imprisonment. We studied those judgments. I can tell you that it is one thing to read those cases as a student of history, and quite another to read them as a lawyer about to go into a war crimes trial. The term "victors' justice" does come to mind, but that is another topic for another day.

On May 7, 1996, the first international war crimes trial since Nuremberg and Tokyo opened in The Hague against Dusen Tadic, a former Bosnian-Serb police officer. Beginning with the Tadic trial and judgment, new decisional law was created routinely, and we had to keep up with the ever-shifting developments as defenses were accepted or rejected and processes explained.

Court Rules and Processes

One of our first tasks was to learn the Tribunal's rules. These are an unhappy amalgamation of rules from common law and code jurisdictions. The judges came from both of those cultures and systems of training, and they had difficulty crossing over. In order to appear before the Tribunal, one must be a member of the bar of his or her home state or jurisdiction. Those on the defense side must adhere to the Tribunal's code of professional responsibility for defense counsel. There is no similar code for the prosecution. One must speak either French or English, the two official languages of the Tribunal. The language also being used of course was BCS (Bosnian Serbian or Croatian) which was translated to the participants. That language presented an interesting political problem in and of itself. If you were representing a Bosnian, the language spoken was called Bosniac. If you were representing a Serb, the language spoken was called Serbian. If you were representing a Croat, they were very unhappy if you called the language anything other than Croatian. So the blend became BCS.

The attorneys generally dressed in their national home garb, whatever that is. Since the court deemed the American custom of business suits to be uncivilized, however, we had to adopt some sort of dress code. Consequently, we ended up in robes and bibs like our European and Canadian counterparts.

Under the rules of the Tribunal there are no juries. The Tribunal sat in panels of three "professional" judges. The judges consider themselves above the foibles of juries. They are not subject to the "passions" of juries. They

claim to be individuals of superior judicial training and/or experts in international law. In fact, only about half had ever been judges. Some were international lawyers with no judicial experience, some were mid-level politicians, and some were law professors. As a result, the trial became one in which all the evidence was admitted, also known as "death by a thousand cuts." Although there was an evidence code, very few rules of evidence were followed, and fewer yet were followed consistently.

There is an appeals chamber. Both the prosecution and the defense have a right of appeal, and there were a variety of interlocutory appeals taken throughout the course of the trial on a variety of issues. Members of the appeals chamber were rotated on a regular basis with members of the trial bench. Hence, trial judges also sat on appeals, although not on any case on which they were bench members at trial. Apparently, this procedure is going to change.

There is no plea bargaining. There is no separate phase for sentencing once someone is found guilty. Guilt, mitigation, and all other issues are tried simultaneously. If you have ever tried a criminal case, you will know that putting on your mitigation evidence at the same time as your substantive defense is bizarre.

Initially, there was no bail. Individuals who turned themselves in or who were arrested remained in confinement for the entire time. The rule on bail did change midstream, and bail is now allowed in limited cases. It was at that point in time that I had one of my many out-of-body experiences. I will mention a couple of others later.

As the bail change suggests, the rules of the Tribunal may change, and they did so on a regular basis.

The accused is entitled to counsel. If an accused cannot afford to hire his own lawyer, then two lawyers and an investigator are appointed.

Hearsay is admissible. All reliable evidence is admissible. At one point, the prosecution successfully urged on the court the distinction between rumor and pure rumor, the former being admissible and the latter, of course, not admissible.

The Tribunal is bound by the European Convention on Human Rights, which is probably the hottest legal topic on the continent right now; as of October 10, 2000, the European Convention on Human Rights became applicable to all EU countries. (Subsequent to my appearance at The Hague, I was in both Ireland and England, teaching solicitors who now have rights of advocacy in certain circumstances. We met with Crown judges, and the European Convention and its implications were the topic in all our meetings.)

There is pretrial "discovery" of the prosecution's case. The Office of the Prosecution (OTP) supplied us with four feet of discovery before trial—dis-

covery that had little, if anything, to do with the case we tried. We received new discovery on a regular basis: weekly, daily, and usually the morning of or right before the offered testimony. The only sanctions for presenting late discovery were some trial delays.

The duty of the prosecution is to provide exculpatory evidence to the accused, just as in our system. Yet, our prosecutor was quite clear that with the reams and mountains of information, paper, and documents available to the prosecution in warehouses in Zurich and New York and other parts of the world, he would make no representation that we had all the exculpatory evidence, nor was he going to look for it, and there was nothing the Tribunal could do to make him do so.

Another example of this cavalier approach to processes involved our co-defendant, who was to testify on a Monday morning. On the preceding Thursday at the close of court, the OTP gave the co-defendant two feet of new documentary evidence against him. Since our co-counsel could not visit the client at the detention center over the weekend, that defendant elected ultimately not to testify at all.

Ex parte applications were made on a regular basis. The prosecution took advantage of chats with the bench about a variety of issues. The first time this happened was another in a series of out-of-body experiences for me. In the middle of trial, the prosecutor announced that he needed to see the court ex parte. We were ushered to the hallway. It happened so fast, the defendants themselves remained in the dark as the prosecutor was making this ex parte application.

The most unique and inherently prejudicial procedure that the Tribunal allowed was the application for "protective measures." Upon application, the witnesses may be afforded a degree of anonymity, ranging from pseudonyms to a closed session of a particular witness's testimony. The OTP would ply the court with reasons as to why the witness was in fear of the defendant and his cohorts. If protective measures were granted, instead of saying the witness's name, the OTP would write the witness's name on a piece of paper, which was shown to defense counsel and the court, but the witness was called "Witness *A*." We had witness *A*, witness *B*, witness *C*, all the way through *AA, AB, AC* . . . . Additional protective measures included voice or facial distortion, and, as I already indicated, some of the sessions were closed to the public altogether. There was even a series of witnesses called "confidential witnesses." These witnesses were so highly confidential that their identities were allowed to be known only by a limited number of the defense team (in our case it was four). No one else could know their identities or the purport of their testimony. The result was a minefield of evidence about which you could not comment, and persons you could not reference

in open court. It was very difficult indeed to remember what was in evidence, what was in evidence but by way of pseudonym, and what was in evidence by way of confidentiality. Thirty-seven percent of the evidence was subject to some form of protective measures. The result was that more than a third of the trial transcript contained evidence from unspecified people or excluded altogether from public scrutiny. So much for history.

Yugoslavia: A Short History

After studying the Tribunal's rules, we had to learn about the break-up of Yugoslavia and the civil war in Bosnia. Allow me to give you the two-minute course: The republics of Yugoslavia were held in a semi-Communist iron fist by Marshal Josip Broz Tito. When he died, first the Slovenes and then the Croats demanded separation from the federation, and independence. They were the first republics to be recognized as independent. Ultimately, Serbia, Kosovo, Macedonia, and Albania hung together politically. The result was a brutal, awful civil war, when the Serbs crossed through central Bosnia into Croatia to attack, and to try to make Croatia and Bosnia part of the republic again. That attack failed.

Beyond this, the modern history of Yugoslavia is about three men: Franjo Tudjman, now deceased, the President of Croatia and a Ph.D. in history; Alija Izetbegovic, who is the Bosnian President; and Slobodan Milosevic. Before Yugoslavia's break-up, both Tudjman and Izetbegovic were jailed by Marshal Tito for their views on nationalism. As a result of that incarceration, Tudjman wrote widely on Croatian historical claims and was known to have great desires for an expanded Croatia in central Bosnia. Izetbegovic, who is a Muslim, extolled the concept of "Holy Jihad" or war against all Christianity, a tenet he has never rejected. Of course, so much has been written about Milosevic that I could not do the topic justice. Slobodan Milosevic is in many ways a brilliant politician and a lawyer. Suffice it to say that "blind territorial ambition" comes to mind.

In the geographic center of the former Yugoslavia is the republic of Bosnia and Herzegovina. Bosnia and Herzegovina are about the size of West Virginia, with a population about the same as that of South Carolina. What makes this particular republic so unique, and created such a bastion of hatred, is that all of the nationalities within Yugoslavia—the Croats, the Serbs, and the Muslims—laid claims of historical rights to Bosnia. There is no popular ethnic majority in Bosnia. In the former Yugoslavia, if you were Croat, you lived in Croatia, if you were Slovene, you lived in Slovenia. The Macedonians view themselves as Macedonians. The people have strong ties to those cultures historically, geographically, and socially. Bosnia and Herzegovenia are the only provinces among the republics in which there was no ethnic majority. The sta-

tistics are varied, but there were roughly twenty-two percent Croats, forty percent Serbs, and thirty-five percent Muslims living in Bosnia.

The project of understanding an enormously complicated civil war was further complicated by the ever-shifting alliances of the pugilists. One example is most interesting. Initially, the Bosnian Croats and Bosnian Muslims were allies against the invading Serbs. When the Serbs retreated through Bosnia, that alliance broke down, and the Bosnian Croats and the Bosnian Muslims started to fight each other. One day in court, an artillery officer claimed that on a given day the Bosnian Croats "borrowed" artillery from the Serbs for 10,000 Deutschemarks a day to use against the Muslims. That seemed beyond bizarre to me. I turned to my colleague, Mitko Numovski, a wonderful guy who was a Croatian judge before he got involved in the war crimes tribunal. (In the classic European tradition, he wrote down nothing but kept a reservoir of facts in his head.) I whispered to him, "Borrowed artillery?" and he closed his eyes and nodded in affirmation. It was just amazing.

At its core, the dispute was about gaining geo-political and ethnic control over Bosnia. From the Croat side, Tudjman had laid down historical claims to Bosnia. On the Serbian side, Milosevic wanted this part of the world because Bosnia is rich with munitions. Munition manufacturers dot the landscape. Parenthetically, it is a beautiful, wooded, mountainous country. From the Muslim perspective, Bosnia was to be a homeland in Central Europe.

So ethnic issues, political and historical claims all were involved. We had to separate each out. We read and we read and we read. It was akin to cramming for a final exam in a completely foreign discipline.

There were also minefields of language, pronunciation, and abbreviation. This was very important because we had to figure out people's names and proper pronunciations so as not to insult them. We used a little chart for pronunciations and abbreviations. For example, HVO stands for the Croat Council of Defense, and JNA stands for the former People's Army in Yugoslavia.

The Players

Our client was a Bosnian Croat, a former journalist whose parents were a pediatrician and a veterinarian. He never lifted a gun. He was, in fact, a mid-level politician who was accused by the prosecution of being a high-level politician. Hence, the command responsibility charges.

The Office of the Prosecution consisted mainly of British, Canadian, and Australian barristers. There were also some American lawyers who were former U.S. attorneys or military JAG officers. The OTP had nine lawyers on our file, plus a case manager. The prosecution began with an investigative team working up the file. They passed it to a case manager, who presented the case to the barrister. I watched this process break down regularly,

as the case unfolded and the barrister in court was "surprised" by his own file. It was fascinating to me, and I am still not sure why or how the hand-off works, but the English and Irish barristers with whom I spoke had mentioned the disconnect inherent in this method. Information passing from a pretrial team to the case manager and on to the barrister, who is supposed to digest it all and then provide it to the Tribunal, might work in a small case, but here, there were four years of war to synthesize. Additionally, every time there was a peace plan proposal, all the various players on the ground reconfigured. I thought the prosecution was at a tremendous disadvantage as a result of the terribly complicated shifting set of facts, and the manner in which they divided prosecution responsibilities.

As I already indicated, the bench consisted of judges, law professors, mid-level politicians, and legal attachés. Our particular panel included a Moroccan law professor, a British judge with a brilliant mind who had written a treatise on evidence, and a Jamaican judge. They were lovely people, very well educated, but each had a different outlook on the world, and each certainly had a jaundiced view of American defense lawyers. Dutch lawyers acted as defense counsel for the first few defendants, but normally, the defense counsel were Croatian or Serbian. Few Americans appeared. (There was a rumor circulating that in order to represent a Serb, you had to guarantee that half of the income from the representation would be kicked back to the defendant's family. This was never confirmed.)

At various points in time, our team consisted of up to eight lawyers. It included the wonderful Mitko Numovski as co-counsel, and our paralegals, all of whom spoke Croatian. The co-defendant was also represented by two Croatian attorneys and a Croatian investigator.

The Indictment

What I found most intriguing, although it would bore most of you to tears, was the indictment itself. Finding out the law to be applied was not simply a matter of reading the indictment, then going to a law library and reading statutes. The Tribunal borrows the decisional law, as well as what is called customary law, both of which are superimposed and subsumed in the indictment. The indictment in this case is twenty-two pages long. It was difficult to understand. It was multiplicitous. We challenged it in a variety of ways. We did not get very far. It contained forty-four counts and charges, with each accused being charged with eight Grave Breaches of the Geneva Conventions, ten Violations of the Laws or Customs of War, four Crimes Against Humanity. The first two counts charged the accused with Persecution, a Crime Against Humanity. The other charges were Murder, Inhumane Treatment, Detention, and Destruction. The indictment alleges that the accused participated in a

widespread or systematic campaign of persecution of the Bosnian Muslims in the region known as the Lashva Valley, which is in the heart of central Bosnia. The indictment was amended several times. Consequently, it was a difficult document with which to work, in order to assert jeopardy and to determine the relevance of the evidence.

Setting Up an Office

We had to set up an office from scratch, which, as anyone who has ever tried to do business in Europe knows, was a project in and of itself. Getting the phone lines and the fax lines and everything else to work was a daunting task. Our work papers, when shipped, were delayed and inspected. Translating documents, organizing documents, and correlating the discovery to the witnesses were all complicated tasks. Our database needed to be updated daily in both English and Croatian.

The Daily Grind

There is an International Court of Justice in The Hague. It is a beautiful building that sits back on a high reach. It was built with Andrew Carnegie's money. I did not work there. About half a mile down the road is an old insurance building. That was the International Criminal Tribunal for the Former Yugoslavia.

Security abounds. There is an iron fence all the way around. Observers would get into the building through a checkpoint at which their passports were shown. We were issued security badges. Defense counsel had to go through a first door where all belongings and briefcases were searched. We then came to a series of lockers. In the lockers were our daily "new discovery," applications, other motions, and our daily messages from the prosecution. To enter the main building, we had to wait for a guard to open the defense counsel door. Members of the prosecution, the judges, and members of the Tribunal passed through a different door with a card swipe. We would wait, and watch them pass by us. Separate but equal was alive and well. It was a very strange experience, to be kept waiting while our adversaries trotted right through. When we cleared that door, we went into the main lobby of the courthouse. It was filled with cigarette smoke. Next was a second security checkpoint, at which the guards again searched us and our belongings. Parenthetically, the guards were great folks, and as we got to know them, they would let us pass through with a cursory search. Most were soldiers, MPs, police officers from all around the world. They all spoke English. They worked really well together, which was great to see. Finally, we would climb the stairs to the robing room and "robe up." However, when the defendants arrived, escorted by half a dozen uniformed and armed guards, everyone else

had to remain out of the halls as they passed. The defendants wore blue U.N. flak jackets and helmets, were shackled at the hands and feet, and were escorted into the courtroom by, now, at least a dozen guards.

I called this talk "Life in the Bubble" because there is a bulletproof glass wall that separates the courtroom from the audience and general public. There were no windows in the courtroom itself. The judges' benches were elevated, in the front of the courtroom. The video booth and translators' booths were around the perimeter. The registrar and legal officers and court clerks were in front of the judges. French and English court reporters were around the perimeter. The defendants sat in the dock surrounded by guards and away from counsel. In order to speak with counsel, a defendant would write down what he wanted to say and a guard would deliver the message to us. The office of the prosecution had three benches to the right, and defense counsel was to the left. The witness stood or sat in the middle. The glass walls could be curtained off if the proceedings were to be hidden from public view. There were three courtrooms in the Tribunal.

Each morning, everyone would come in and gather, as in any courtroom. At some point, the court clerk came in with robed court officials, which signaled that the judges were next. Then there would be a knock on the door, and in French it was announced: "The International Criminal Tribunal for the Former Yugoslavia is now in session." The judges entered wearing their resplendent red robes, and they bowed. We were expected to bow back. After that little bowing ritual, everybody was seated. The presiding judge would lean forward and say, "The registrar may call the case." The registrar would call the case, "Prosecution v. Dario Kordic," whereupon the presiding judge would lean forward and say, "Yes, Mr. Stein." There was a Rumpole of the Bailey quality about the whole thing.

HIGHLIGHTS OF THE TRIAL ITSELF

Most of the witnesses were victims or soldiers. The Bosniacs (as the United Nations wanted them to be called) are simply incapable of answering a direct question. That was problem one. Problem two was that the Bosniacs had a tradition of collective knowledge. They would testify as if they had witnessed some event or atrocity themselves which, in fact, they never had. The prosecution and the court were frustrated by this phenomenon, particularly when we would clarify in cross-examination that the witness had never seen or heard what he was testifying about but rather had been told about it by somebody else. As a result, the prosecution was urged, and finally ordered, to prepare or vet each witness with a series of point-by-point writings about what the witness was going to say. The points were set

out and provided to the court and defense counsel. It then fell on defense counsel to delineate what was controverted and what was not. We dubbed those memos "cheat sheets," and pretty soon, everybody was calling them cheat sheets. We would receive the cheat sheets early in the morning, and the witness would testify from them as if they were a script. Despite the cheat sheets, and despite the fact that the witnesses were supposedly vetted by the prosecution, I would estimate that twenty percent of the witnesses who gave damaging testimony on direct examination recanted when confronted by the accused who was present in court. Those witnesses often acknowledged that what they had just said on direct was told to them by somebody else, and that they had not really seen it; or they agreed entirely with what was put to them in cross-examination.

As I previously mentioned, rumor had its place in the Tribunal. The OTP successfully urged the court to admit evidence of rumor as distinguished from evidence of pure rumor.

Witnesses also included spies, diplomats, and many military officers from the U.N. troops. From generals to sergeants, all were called. The British officers were known as "Brit Bat," for British battalion, Canadian officers were known as "Can Bat," and the Dutch officers as "Clog Bat."

Let me touch a little more on cross-examination. The art of impeachment, American-style, was disrespected. We were told to cross-examine British style, and we were expected to "put it to the witness." So, we "put it to the witness." That means that you first present to the witness the result you want to achieve. For instance, you say, "I put it to you that you are lying," and then you prove up that he is lying by some inconsistency, etc. I concluded that the reason for this procedure is that the British judges, who write all their own opinions, utilized this method and would write down, "Witness is lying," and then fill in the blanks as to whether or not it was proven.

Consistent with the British approach was that the defense tables were angled away from the witness. The purpose was to keep defense counsel and the prosecution from looking at the witnesses; the witnesses were supposed to direct their entire attention to the judges. Those of you who try cases know that eyeballing the witness is an important part of cross-examination. I have been accused of hypnotizing witnesses. I assure you that I do not, but I do try to look them in the eye and cross-examine without paper. The configuration of the court would not allow that tactic, unless you went all the way to the left-hand side, and then sometimes the witness would start to look at you.

Moreover, if you spoke with the speed with which I am giving this talk, the translators could not keep up with you. So, if you were doing rapid-fire cross-examination, you would fail because you would hear, "Mr. Stein, you are going too fast," as the reporters interrupted. This was very hard for me

to get used to, until I had a stroke of genius. I thought to myself, "Whom — do — I — know — who — speaks — so — slowly — that — soon — the — witness — *wants* — to — say — something?" I adopted my hero Gene Mac Winburn's approach to cross-examination. The only problem was that when I spoke that slowly, I found I had a Georgia accent.

The bench continually asked questions, as was their right, but every time you had a perfect examination nicely completed, they would try to undo it.

Ours was also a high-tech courtroom. There were computers on each station, each programmed to provide a rolling transcript so that within twenty-four hours you could download the semi-final version for your office use. This was also a high-tech courtroom with regard to television, and the U.N. programmed the proceedings, albeit with a half-hour delay, which were then broadcast over the Internet. The irony was that with all the high-tech ELMOs, computers, and other equipment, things did not work. The prosecution could not provide a decent map or a good three-dimensional blow-up of Bosnia. Last, because of all the television cameras and lights, the courtroom was always bloody hot. It was not exactly the high-tech courtroom of the future.

As I mentioned, the witnesses were fascinating. There were ambassadors, knights, generals, and spies. For me, however, the most fascinating ones were the OTP experts, because I had to cross-examine them. In my view, the prosecution needlessly called four experts. They called a stockbroker who had a Ph.D. in history from my alma mater, the University of Michigan. He had left Michigan during a Ph.D. glut and ended up with Merrill Lynch because he could not get a job in academia. He was to talk about the history of Bosnia. I hope he is a better stockbroker than historian!

The OTP also called a sociologist who was to opine on all manner of evil things about Croatian political culture and the top-down political power vacuum that our client filled. The power of the Internet is amazing. His cross-examination was basically this:

"Dr. Alcott, what was the title of your Ph.D.?"

"Oh, I do not recall."

"You do not recall the title of your Ph.D.?"

"Oh, it was something, I am sure you can remind me."

"Well, Doctor, your Ph.D. was 'Tourism in Yugoslavia,' that was your Ph.D. title, wasn't it?"

"Well, yes, that's right."

That information came right off the 'net. But then, I violated the first rule of cross-examination and asked a question to which I did not know the answer: "By the way, what was your Master's thesis?" His answer was, "Oh, that was 'Nuclear Power Protests in Canada circa 1964.'" We waived further cross-examination of him; there was nothing more we had to do with that witness.

The OTP also wanted to call a spy, a true spy, a fellow who worked for the CIA and taught spying. He had written a book on Yugoslavia. His whole testimony was to be an "analysis" of newspaper articles that appeared during the past four years in the region. We broke down his report by hearsay, secondary hearsay, third-level hearsay, fourth-level hearsay. It was all color-coded, and we gave it to the court and argued against its admissibility. The court ultimately agreed with us.

My first and most profound out-of-body experience occurred when the prosecution suggested that if the defendant was going to take the stand, he must be the first defense witness in order that "we know his defense." I was scheduled to argue in opposition. It was the first day of the trial, April 12, 1999. I tried to make a very simple point: In our system of fifty states and four hundred or so federal judges, there has been a lot of judicial thought about the timing of the defendant's testimony. Hence, the Tribunal might want to consider this wealth of common law and experience, which uniformly holds that the defendant may testify on his own behalf, or not, and his testimony may be at the end of the case, or in the middle of the case, or whenever he chooses. The British judge's response was, "Well, Mr. Stein, this is, after all, the International Court of Criminal Justice, and we are not bound by these national jurisdictions." Next, the Moroccan judge turned his microphone to me and started speaking French—a language I do not understand, do not read, and do not speak. I did not have my headset on; I was listening to his question, expecting to suddenly be bestowed with the gift of tongues, to understand and be able to speak beautifully fluent French. Suffice it to say that did not happen. I scrambled, put on my headset, and read the computer transcript. I was able to catch up with where he was going, and answered his question.

My last out-of-body experience occurred while listening to Steve Sayers, one of my colleagues from Hunton & Williams, cross-examine another expert. A Brit by birth, first in his class at Oxford, then a student at Georgetown Law School, Steve Sayers is proud to be an American. He is the hardest-working lawyer I have ever known. He was called upon to cross-examine a *Slovenian* law professor on Bosnian constitutional law, before a *Jamaican*, a *British*, and a *Moroccan* judge. The result was layer upon layer of esoteric abstraction.

There is one other bizarre argument that I would like to share, and this is bigotry in reverse. The prosecution urged that since my client was of Croatian lineage, although he was born and raised in Bosnia, he was "affiliated" with the country of Croatia, and since the country of Croatia was fighting with the OTP about producing documents, the court should presume that my client was in league with Croatia, that the documents were adverse

to him, and therefore, the Tribunal could draw adverse inferences about him. It was all too strange.

RELEVANCE TO THE REST OF US

The relevance of my experience is that now there is to be a permanent international criminal court located in The Hague. The site has been proposed, and $130 million of U.N. funds have been allocated to build it. It is proposed that this be a permanent sitting court, the jurisdiction for which is to be all international armed conflict. Our American military is justifiably concerned about periodically being forced to appear there, given the kind of process I have just described.

DIVERSIONS

My experiences in The Hague were not without humor, or at least pleasant moments. I would bike to and from work. The Dutch love to bike and have wide biking lanes. It is a wonderful way to travel. As I biked home, I would take out my cell phone and call Claire, so we'd be chatting about the day, and I would give her a guided tour of The Hague.

Then, of course, there were the coffeehouses, where coffee is an afterthought. On Sunday mornings there were fresh-baked breads. The food was wonderful.

There were also co-ed spas. The Dutch are very big on spas, and when you walked in, you found only one locker room, and only one spa area, and no bathing suits. Everyone simply undressed and went into the shower and then to the various whirlpools and saunas and steams. It is a lovely experience once you get over the cultural shock. One of my female colleagues from Texas said that when she was in the steam room one day, she saw two of the judges from her panel also in the steam room, which gave new meaning to the term "naked truth."

Then there were the coffeehouses.

There were the Dutch holidays. The Dutch are very professional and very formal at work. When they call it off for a weekend, or on the Queen's birthday or other holiday, however, it is "party time," and the streets are wild.

Then there were the coffeehouses.

Finally, there were the beaches to visit. European beaches, God bless them. There is only one form of attire at those beaches. I have gone topless all my life, but it was a little different when everyone else was topless, too.

And, of course, there were the coffeehouses.

CONCLUSION

Let me end with some conclusions about Bosnia. There will be peace in Bosnia only if the United Nations continues to have 30,000-plus troops actually present there. The cost thus far has been $198 *billion*, with the United States contributing roughly $13.8 *billion*. I will give you an example of the pervasive sense of unrest and threat. When I interviewed witnesses in central Bosnia, I talked to a federation major. He said that he wanted to be a teacher more than anything, and that he was then attending college to become one. However, he would not leave the army to be a teacher unless or until he could keep his guns, because he was not about to live without them.

Contrary to U.N. propaganda, the people in Bosnia had no social interaction in any way with folks outside their ethnic groups. They led parallel lives. There were two or three barbershops, there were two or three butcher shops. The people did not relate in any fashion except in the public high schools. Tito's "brotherhood and unity" commanded that each group tolerate the others. This was the law under which both Izetbegovic and Tudjman were jailed. It was imposed on the ethnic groups at gunpoint. While there was some social interaction in Sarajevo and some of the other cities, in more urban settings in central Bosnia, it just did not exist in the lovely wooded hills and mountains.

I ultimately concluded that the role of religion was not to unify but to destabilize, and there is a Christian-Muslim fault line that runs right through central Bosnia. One Islamic Oxford scholar opined that this demarcation is where the next world war will start because, on one side there exists Christianity, and yet on the other side, there exist Muslims who swear holy allegiance to making their faith the majority rule. Let me be clear: I am merely reporting what I observed.

I concluded that democracy is not necessarily exportable.

I also concluded that evil is the lack of empathy. Crimes against humanity happen when people are unable to empathize with their fellow men and women.

Nationalism is an excuse for exclusivity. Countries that preach nationalism—Croatia, Serbia, and some of the Muslim nations—preach exclusivity. Exclusivity breeds lack of empathy.

In the new world order, the role of sovereignty is becoming anachronistic, and the sovereignty of nations is yielding to a concept of humankind. Whether this is good or bad only time will tell. Certainly in Europe, with the continuing vitality of the E.U., that whole concept of sovereignty is breaking down. The United Nations and the growing role of international law contribute to the demise of sovereignty.

There is huge antipathy toward the United States, U.S. attorneys, U.S. rights, our jury system—especially the jury system. The intellectuals who study our legal system think that our Bill of Rights is the most advanced in the world, but that our drug laws are the most backward and misplaced.

Relative to due process, I have concluded that if the process is flawed, even a correct result is a flawed result. If the process is fair, then the result, whether correct or not, will be just. Moreover, prosecutors do a disservice to all once they become enamored of the righteousness of their cause and the desire to seek retribution for the victims of atrocities.

Last, the uniqueness of the North American experience is that nearly all of us are immigrants. Each one of us is Irish, English, German, Russian, Hungarian, French. We have overseas roots and heritages, of which we can be proud. But our origins do not dictate the way we relate to each other, nor do they dictate the joy with which we honor each other. We are southern and northern, eastern and western, black, white, Jew, Gentile, but we are all card-carrying believers in democracy. We are unique among the nations and people of the world in that we extol each other's differences as virtue, and do so without fear. We should be enormously thankful, for we are truly blessed as a result of those differences.

WHO IS THE LAWYER OF THE CENTURY?†

Gerald F. Uelmen*

I. INTRODUCTION

Every lawyer should have a hero. Mine has always been Clarence Darrow. As a high school student, it was reading Darrow's biography by Irving Stone,[1] and reading the closing arguments in his famous trials,[2] that inspired me to pursue a career as a lawyer. I discovered I was not alone. Thousands of other lawyers had found the same inspiration and also looked to Darrow as their hero. For fifteen years I kept a portrait of Darrow hanging over my desk, and I frequently found myself gazing up and asking, "Would Clarence Darrow turn down this case? What would Clarence Darrow have to say about that?" That's what heroes are for: to inspire us and to serve as role models.

Then, in 1993, Professor Geoffrey Cowan published an account of the 1912 Los Angeles trials of Clarence Darrow for jury bribery.[3] The charges were brought in the wake of a case in which two labor organizers, the McNamara brothers, were accused of dynamiting the Los Angeles Times building on October 1, 1910. Police detectives observed Darrow's chief investigator, Bert Franklin, delivering a $500 down payment to a juror at a busy Los Angeles intersection, although negotiations were under way to have the McNamara brothers change their plea to guilty. One of the detectives who arrested Franklin later testified that immediately after the money was delivered to the juror, Darrow himself came running up and exclaimed, "They're on to us, Bert."

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†Professor Uelmen's article, reprinted, with permission, from 33 LOY. L.A. L.REV. 613 (2000), formed the basis of his address under the same title delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Nevis, Charlestown, Nevis, West Indies, March 15, 2001.

*Professor of Law, Santa Clara University School of Law; Academic Fellow, International Society of Barristers. Professor Uelmen was co-counsel for the defense in two "trials of the century": the "Pentagon Papers" trial of Daniel Ellsberg, and the trial of O.J. Simpson. He would like to acknowledge the inspiration and insight provided by Yale Kamisar, the Clarence Darrow Professor of Law at the University of Michigan School of Law, and Donald Fiedler, the Omaha, Nebraska actor and lawyer who has portrayed Clarence Darrow over one hundred times, and who portrayed William Jennings Bryan in the one-man play authored by Professor Uelmen. Sam Kiamanesh, Santa Clara Law School class of 2000, assisted in research for this article.

[1]IRVING STONE, CLARENCE DARROW FOR THE DEFENSE (1941).

[2]The best collection of arguments from Darrow's famous trials is still ATTORNEY FOR THE DAMNED (Arthur Weinberg ed., 1957).

[3]GEOFFREY COWAN, THE PEOPLE V. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER (1993).

Although Darrow was never convicted of jury bribery,[4] Professor Cowan presents convincing evidence that he was, in fact, guilty as charged. In a review of Professor Cowan's book, Professor Alan M. Dershowitz[5] concluded that "the convincing evidence that he bribed jurors in the McNamara case forever disqualifies Darrow from being a role model for lawyers."[6] Proclaiming that there is never any justification possible for corrupting the legal system, Dershowitz pronounced final judgment on Darrow: "He does not deserve the mantle of honor he has proudly borne over most of this century."[7] I briefly contemplated removing the portrait hanging over my desk and looking for another hero.

The purpose of this Essay is to identify the defense lawyers who may have a legitimate claim to the mantle of honor as the "lawyer of the century," and assess those claims next to the claim of Clarence Darrow. Should Darrow continue to serve as a role model for the lawyers of the next century? I conclude that despite the evidence that he may have been guilty of jury bribery, Clarence Darrow fully redeemed himself in his subsequent quarter-century as a trial lawyer, and continues to inspire countless lawyers to pursue the highest ideals of the legal profession. He deserves to be recognized as the twentieth-century lawyer who, more than any other, should serve as a role model of what lawyers should strive to become.

II. THE CRITERIA

I believe that five criteria are relevant to determine who should be recognized as the lawyer of the century: (1) professional reputation; (2) participation in high-profile trials, especially those ranked as "trials of the century"; (3) public recognition; (4) current accessibility of information about the individual's career and accomplishments; and (5) adherence to ethical standards.

The criterion of professional reputation assesses the lawyer's standing among fellow lawyers. Lawyers are likely to be most familiar with the quality of a defense lawyer's work, and in a better position to judge that quality.

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[4]Two separate trials resulted in an acquittal and a hung jury. In the first trial, which resulted in an acquittal, Earl Rogers, the legendary Los Angeles defense lawyer, represented Darrow. Joseph Ford, who later served as the first dean of Loyola Law School in Los Angeles, headed the prosecution. *See* Gerald F. Uelmen, *The Lawyer Who Saved Clarence Darrow,* CRIMINAL DEFENSE, May-June 1983, at 28. Darrow represented himself at the second trial, in which the jury hung eight to four for conviction.

[5]Professor Dershowitz is himself a contender for honors as "defense lawyer of the century." *See infra* at Parts III, IV, VI, VII, & VIII.

[6]Alan M. Dershowitz, *Tipping the Scales of Justice,* WASHINGTON POST, May 16, 1993, at X1 (reviewing COWAN, *supra* note 3).

[7]*Id.*

This criterion relates to the lawyer's suitability as a role model for other lawyers. Unlike public recognition, which measures a lawyer's media "fame," the criterion of professional reputation measures the level of respect a lawyer has achieved among those who share the same values. Professional reputation also relates to accessibility, but accessibility to the legal profession rather than the public at large.

The criterion of participation in high-profile trials requires that we limit our candidates to those lawyers whose performances were tested in the demanding arena of close public scrutiny. Many outstanding trial lawyers concluded successful careers without ever appearing in a high-profile case. The lawyer of the century, however, should be a lawyer who is remembered for his or her battles. Lawyers are commonly identified by reference to the cases in which they appeared. This requirement will exclude many eminent trial lawyers who practiced primarily in the civil arena. Lawyers like Louis Nizer and Morris Dees would certainly rank high on a list of great American trial lawyers, but the trials of the century have, with few exceptions, been criminal trials. To some extent, this simply reflects the prurient interest of the media. The grisly details of maiming and murder, and the drama of an individual on trial for his or her life or liberty, have always attracted more public attention than suits for damages.

This criterion will also exclude some truly great trial lawyers whose practice was confined to one local region. Moman Pruiett, for example, probably compiled the most impressive record of success in death penalty cases of any lawyer in America. From 1900 to 1935, he defended 343 persons accused of murder. Three hundred four of them were acquitted—not one was executed.[8] But with rare exceptions, Pruiett tried all his cases in the Indian Territory which became Oklahoma.

My list also excludes prosecutors. Hopefully, someone will attempt to identify the "prosecutor of the century." Lawyers like Thomas E. Dewey and Vincent Bugliosi have not gone unrecognized, but extolling the virtues of great prosecutors is beyond the scope of this undertaking, and a task best left to a lifelong prosecutor.[9]

The criterion of public recognition means that the lawyer of the century must be a name that is already familiar to the public. Just as public familiarity helps define the trials of the century, it can help define the lawyer of the century. But participation in a "trial of the century" by itself does not guar-

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[8]*See* Gerald F. Uelmen, *Moman Pruiett, Criminal Lawyer,* CRIMINAL DEFENSE, May-June 1982, at 35. *See also* Pruiett's autobiography, MOMAN PRUIETT, CRIMINAL LAWYER (1944).

[9]I have noted elsewhere that prosecutors in trials of the century usually fare better with the public than do defense lawyers. For prosecutors, performance in a trial of the century is often a prelude to political office or judicial appointment. *See* GERALD F. UELMEN, LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON 206-07 (1996).

antee public recognition that lasts. Who ever heard of Delphin Delmas?[10] Who ever heard of Edward J. Reilly and C. Lloyd Fisher?[11]

Some defense lawyers, of course, actively seek fame and celebrity. Selecting the lawyer of the century, however, should not be reduced to a process of identifying the "most famous" lawyer of the century. We should inquire into how the lawyer achieved public fame. Was it by virtue of his or her appearance in a long succession of highly publicized cases? Was it by self-promotion and self-aggrandizement in boastful books and frequent appearances as a television "commentator"? Was it by participation in public controversies outside of the courtroom?

The criterion of current accessibility is closely related to public recognition, but it gives special attention to the ready availability of information about a lawyer's career and achievements. The lawyer of the century should be an individual whose accomplishments are celebrated, who can serve as a continuing source of inspiration and enlightenment. A lawyer's fame may be short-lived if it is not preserved in our libraries or enshrined in our theaters.

The criterion of adherence to ethical standards is the most difficult to assess, for two reasons. First, the ethical standards to be applied must be the standards of the criminal defense bar. The public tends to associate lawyers with the clients they represent, and the greatest defense lawyers may be those who take on the most unsavory clients. Secondly, the ethical standards of the criminal defense bar have undergone a remarkable change in the course of the past century. We cannot apply contemporary standards in judging lawyers who practiced a century ago. On the other hand, personal honesty, courage, loyalty to clients and respect for their confidences, and independence are timeless values that will always define greatness in lawyers.

III. PROFESSIONAL REPUTATION

To assess professional reputation, three surveys were conducted, in which respondents were asked to list five lawyers, living or dead, whom the respondent considered to be "the greatest criminal defense lawyers of the twentieth century." Twenty-five responses were obtained from lawyers

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[10]Delmas was the California lawyer who represented Harry Thaw in his first trial for the murder of New York architect Stanford White. Delmas, with nineteen acquittals in nineteen murder cases, was known as "The Napoleon of the Pacific Bar." He was a graduate of Santa Clara University. *See* GERALD LANGFORD, THE MURDER OF STANFORD WHITE (1962).

[11]Reilly and Fisher were lead trial counsel for Bruno Richard Hauptmann, convicted and executed for the kidnap-murder of Charles Lindbergh, Jr. *See* SIDNEY B. WHIPPLE, THE TRIAL OF BRUNO RICHARD HAUPTMANN 390-541 (1937).

attending the annual Bryan Scheckmeister Death Penalty College at Santa Clara University in August 1999,[12] twenty-two responses were obtained from lawyers attending the annual convention of Arizona Attorneys for Criminal Justice in September 1999, and twenty-five responses were obtained from law students enrolled in classes taught by the author at Santa Clara University School of Law in August 1999.

The death penalty lawyers ranked their top ten choices as follows:

1. Clarence Darrow (19)
2. Thurgood Marshall (10)
3. Steve Bright (7)
4. Gerry Spence (6)
5. Millard Farmer (5)
6. Michael Tigar (5)
7. Johnnie Cochran (4)
8. Earl Rogers (3)
9. Edward Bennett Williams (3)
10. William Kunstler (3)

The Arizona criminal defense lawyers ranked their picks as follows:

1. Clarence Darrow (19)
2. Gerry Spence (17)
3. William Kunstler (10)
4. Thurgood Marshall (9)
5. F. Lee Bailey (7)
6. Edward Bennett Williams (7)
7. Michael Tigar (5)
8. Alan Dershowitz (4)
9. Leslie Abramson (3)
10. Johnnie Cochran (3)

The law students ranked their top ten choices as follows:

1. Clarence Darrow (13)
2. Johnnie Cochran (10)

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[12]The Bryan Scheckmeister Death Penalty College is conducted each summer on the campus of Santa Clara University to train defense attorneys with pending pre-trial capital cases in the skills required to adequately represent defendants charged with capital crimes. The College is directed by Professor Ellen Krietzberg, Professor of Law, Santa Clara University School of Law.

3. F. Lee Bailey (9)
4. Alan Dershowitz (8)
5. Gerry Spence (5)
6. Thurgood Marshall (3)
7. Barry Scheck (3)
8. William Kunstler (2)
9. Leslie Abramson (2)
10. Melvin Belli (1)

While Darrow topped the list in all three surveys, four other lawyers appeared on all three lists: Johnnie Cochran, William Kunstler, Thurgood Marshall, and Gerry Spence. Five more lawyers appeared on two of the lists: Leslie Abramson, F. Lee Bailey, Alan Dershowitz, Michael Tigar, and Edward Bennett Williams.

The criterion of professional reputation should be our starting point, and this criterion yields a list of ten lawyers who could be called contenders for the honor of lawyer of the century. It is the same list I would compile without the benefit of surveys. I have been an avid student of famous trials and legendary lawyers for many years, and have my own collection of transcripts, biographies, and trial accounts which occupy a sizable proportion of my leisure reading. In teaching courses in Criminal Law, Criminal Procedure, Evidence, and Trial Advocacy, I have gained some familiarity with the work of many of these lawyers. I have also had the opportunity both to meet many of these lawyers through active membership in California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers, and to work directly with some of them in my own limited forays into the world of criminal defense practice. The ten lawyers we should consider contenders, ranked in the order of the composite results of the three surveys, are:

1. Clarence Darrow (51)
2. Gerry Spence (28)
3. Thurgood Marshall (22)
4. Johnnie Cochran (17)
5. F. Lee Bailey (16)
6. William Kunstler (15)
7. Alan Dershowitz (12)
8. Michael Tigar (10)
9. Edward Bennett Williams (10)
10. Leslie Abramson (5)

IV. PARTICIPATION IN HIGH-PROFILE TRIALS

Appendix I to this Essay lists thirty-seven cases that have gained so much public attention they were all called, at one time or another, trials of the century. Each of the contenders on our list has participated in at least one of these trials, with the sole exceptions of Thurgood Marshall and Gerry Spence.

Thurgood Marshall is principally remembered for his work in the landmark school desegregation cases, and his tenure as the first black Justice on the United States Supreme Court. Often overlooked, however, is the fact that he represented dozens of criminal defendants in trials and appeals in courtrooms all across the United States. None, however, was a trial of the century. Most were capital cases in which the defendants were black and penniless.[13] No one on our list of contenders argued more cases before the United States Supreme Court. As Director and Chief Counsel for the NAACP Legal Defense and Education Fund, Thurgood Marshall argued a total of thirty-two cases before the highest Court, and won twenty-nine of them.[14] He argued many more as Solicitor General. While *Brown v. Board of Education*[15] has a strong claim to being the "case of the century" to emerge from the United States Supreme Court, it was not a trial that captured national attention. The strategic planning and appellate strategy that preceded the landmark decision are admirably presented in *Simple Justice,*[16] which describes the key role Thurgood Marshall played in achieving a successful result.

Gerry Spence served as lead counsel in many high-profile trials, including the Karen Silkwood case, the trial of Randy Weaver for the Ruby Ridge F.B.I. stand-off, and the criminal trial of Imelda Marcos, but much of his public acclaim is attributable to his high visibility as an author and legal commentator. He also devotes considerable energy to inspiring and training trial lawyers in the skills he has mastered. His high standing in terms of professional reputation suggests that his message resonates among today's lawyers, and that message is remarkably similar to the message conveyed by Clarence Darrow: that lawyers must take up the cause of the underdogs in modern society.

Three of the contenders appeared in a single trial on the list: Abramson (Menendez), Cochran (O.J. Simpson), and Williams (Hoffa). Four of the contenders appeared in two trial-of-the-century cases: Bailey in the Patty Hearst and O.J. Simpson cases, Dershowitz in the same two cases, Kunstler in the

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[13]See Gerald F. Uelmen, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court,* 26 ARIZ. ST. L.J. 403 (1994).

[14]*See* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 3069 (Leon Friedman & Fred L. Israel eds. 1969) [hereinafter JUSTICES].

[15]347 U.S. 483 (1954).

[16]RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977).

Chicago Seven trial and as appellate counsel for Jack Ruby, and Tigar in the Chicago Seven and Oklahoma bombing trials. However, in terms of the sheer number of trials of the century in which he participated, no one comes close to Clarence Darrow. He defended Bill Haywood in 1907, the McNamara brothers in 1911, Loeb and Leopold in 1924, and Thomas Scopes in 1925.

In early 1999, NBC's *Today Show* conducted a public survey to determine which of the twentieth century's high-profile trials should be labeled the trial of the century. The *Today Show* received nearly 4000 responses, and the results demonstrated much more public familiarity with recent televised trials than with the historical cases that occurred earlier in the century. The top five choices for trial of the century, with the percentage of votes earned, were as follows:[17]

1.	O.J. Simpson	24%
2.	Nuremberg War Crimes	21%
3.	Clinton Impeachment	20%
4.	Scopes Evolution	14%
5.	Lindbergh Kidnapping	7%

The high ranking given to the Clinton impeachment "trial" can only be attributed to the fact that the trial was going on while the survey was being conducted. It can only loosely be called a trial, and will surely fade in public memory as quickly as last winter's snow.

The fact that a trial in which a lawyer advocated is picked as *the* trial of the century should not, of course, make that lawyer the lawyer of the century. But, the fact that the O.J. Simpson trial is the popular choice for trial of the century means that the claims of "dream team" members F. Lee Bailey, Johnnie Cochran, and Alan Dershowitz must be carefully weighed against that of Darrow.

Despite the Simpson trial's status as the popular choice, there is a compelling argument to be made that the high-profile trials in which Clarence Darrow participated have stronger claims to the label of trial of the century. Professor Douglas makes a persuasive argument that the true trial of the century was the Scopes trial because of its enduring visibility, its "superstar" participants on both sides, the brilliant display of cross-examination skills during the testimony of William Jennings Bryan, its subsequent dramatization, and the important competing ideas that the trial implicated.[18] While the Scopes trial occurred in an era preceding the mass media saturation made possible by modern television, the newspaper coverage was intense, and it was the first trial ever broad-

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[17]The survey results can be found on the Internet at <http://www.law.umkc.edu/faculty/projects/FTrials/Today survey.html>.

[18]*See id.* Professor Linder, who has compiled a valuable Web page on famous trial, offers his assessment of "What is the trial of the century?" on the Internet. *Id.*

cast by live radio from the courtroom. The trial's portrayal on Broadway and in the popular film *Inherit the Wind,* although grossly inaccurate, imprinted an indelible image of Darrow on the American consciousness.[19]

One could plausibly argue, however, that the O.J. Simpson trial captured a wider audience, showcased its own galaxy of superstars, featured some brilliant cross-examination and oratorical splendor, and inspired a glut of books unmatched by any other trial on the list. Where the Simpson trial falls short is on whether anything important was at issue, other than the liberty of a celebrity. The racial issues were confronted only in a muted and tangential fashion. The Scopes trial, on the other hand, featured a pitched battle between science and religion, between the Biblical story of creation and the Darwinian theory of evolution. The issue was far from settled by the Scopes trial, but the trial served to define the issues for a debate that continues to this day.[20] Further, books are still written today regarding the impact of the Scopes trial nearly seventy-five years after its conclusion.[21]

Apart from the Scopes trial, however, the other trials of the century in which Darrow participated also involved highly important issues, and are still the subject of considerable study and scrutiny. For example, the 1907 trial of Bill Haywood was a "showdown" between the forces of organized labor and capital that was closely followed throughout the nation. The victim was a former governor of Idaho, and the defendant was one of the most colorful characters in American history. The saga was recently recounted in an outstanding narrative by the late J. Anthony Lukas, a Pulitzer Prize winning author.[22] The McNamara trial arose from what was widely labeled the "crime of the century," the detonation of a bomb that destroyed the Los Angeles Times building and killed twenty workers. As noted in the Introduction of this Essay, Professor Geoffrey Cowan recounted the events of the McNamara case and the subsequent trials of Darrow for bribing jurors in a critically acclaimed book published in 1993.[23] The Loeb and Leopold case was the subject of an excellent contemporary account,[24] as well as a novel which was made into a film starring Orson Welles as Darrow.[25] Darrow's classic plea against capital punishment in that case is widely available.

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[19]*See* Gerald F. Uelmen, *The Trial as a Circus: Inherit the Wind,* 30 U.S.F. L. REV. 1221 (1996).
[20]*See* Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom,* 85 VA. L. REV. 503 (1999).
[21]*See e.g.,* EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997). Larson's account won the 1997 Pulitzer Prize for History.
[22]*See* J. ANTHONY LUKAS, BIG TROUBLE (1997); *see also* DAVID H. GROVER, DEBATERS AND DYNAMITERS: THE STORY OF THE HAYWOOD TRIAL (1964).
[23]*See* COWAN, *supra* note 3.
[24]*See* MAUREEN MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB (1924).
[25]*See Compulsion* (Darryl F. Zanuck Productions, Inc., 1959). The film is currently available on video from Fox Video, Inc. in their "Studio Classic" series.

One might argue that the performance of the O.J. Simpson defenders demonstrated trial skills superior to those demonstrated by Darrow in his trials of the century. While Darrow won an outright acquittal for Haywood, he entered pleas of guilty for the McNamaras and for Loeb and Leopold, and lost the Scopes verdict. But winning or losing cannot be the principal measure of performance in these cases. The guilty pleas in both the McNamara and Loeb and Leopold cases were part of a calculated and successful strategy to avoid the death penalty, and the Scopes conviction was reversed on appeal.

Three other trials have strong claims to recognition as the trial of the century. The Lindbergh kidnapping trial captured enormous public attention, especially since it took more than two years to identify a suspect. Whether justice was achieved has been the subject of ongoing debate ever since. The Nuremberg War Crimes trial was certainly a defining moment of the twentieth century, since it was the first public exposure of the horrors of the Holocaust. The Chicago Seven trial will always stand as a monument to the hypocrisy of American political leadership during the era of the Vietnam War. None of these trials, however, really served as a showcase of lawyerly skills. What distinguishes the trials of the century in which Clarence Darrow participated is that his presence was the most important element that *made* them trials of the century. He led the parade of public attention into the courtrooms where he performed, and his performances usually lived up to their advance billing.

Accordingly, with respect to the level of participation in high-profile trials, especially those labeled "trials of the century," Clarence Darrow's record surpasses that of any other contender for recognition as lawyer of the century. Regardless of what trial is deemed the trial of the century,[26] no lawyer who appeared in American courtrooms during the twentieth century matched the sustained performance of Clarence Darrow in the glare of public scrutiny, spread over a forty-five year period.

V. PUBLIC RECOGNITION

The databanks for online research provide a simple tool to gauge current "fame." The News Library of Lexis-Nexis, for example, includes full text for major newspapers, including the *New York Times,* the *Los Angeles Times*, the *Chicago Tribune*, and the *Washington Post*. Getting your name in the newspaper is certainly one measure of fame, although it does not provide century-wide coverage. As a result, lawyers who made their mark earlier in

[26]Having participated as counsel in two trials of the century myself, my own pick for *the* trial of century is the 1946 Nuremberg War Crimes trials. The horror of the Holocaust will qualify as the crime of the millennium, not just the twentieth century. The trial that exposed it and seared its images on the consciousness of the world also established a precedent that will reverberate in future centuries.

the twentieth century are not likely to appear in the news with the frequency of lawyers currently engaged in high-profile cases. Thus, this device is more a measure of current notoriety than lasting fame. Nonetheless, it provides some useful comparisons.

In a Lexis-Nexis search conducted July 28, 1999, the number of news stories in which our top ten contenders have appeared in the ALLNWS library breaks down as follows:

1.	Thurgood Marshall	25,426
2.	Johnnie Cochran	22,516
3.	F. Lee Bailey	10,390
4.	Alan Dershowitz	10,095
5.	William Kunstler	5,315
6.	Edward Bennett Williams	4,500
7.	Clarence Darrow	4,402
8.	Michael Tigar	3,933
9.	Gerry Spence	3,180
10.	Leslie Abramson	2,439

Two positions on this list are especially remarkable: the position of Johnnie Cochran, and the position of Clarence Darrow. Cochran can confidently be labeled the most famous living lawyer in America today, and his fame (or infamy) can just as confidently be attributed to his role as lead defense counsel in the trial of O.J. Simpson. He has remained in the news since the Simpson trial as host of a nightly television show on Court TV, and as counsel in some newsworthy lawsuits alleging police misconduct in New York and Los Angeles. The position of Clarence Darrow is equally remarkable. The appearance of a man who has been dead for sixty years in the news on a daily basis reflects two things: the continuing popularity of the one-man play based on his life,[27] and his continuing stature as a popular icon. One recent news article was a mock interview of Clarence Darrow as to how he would have handled the O.J. Simpson trial, utilizing quotations from his autobiography.[28]

The positions of Gerry Spence and Leslie Abramson at the bottom of this list may also seem surprising, since they are among the most recognizable lawyers in America. The explanation, of course, is that both achieved that

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[27]Nearly half of the news articles mentioning Darrow were reviews of the David W. Rintels play, *Clarence Darrow,* which is still widely performed. A video of Henry Fonda's memorable portrayal of Darrow on Broadway in this play in 1974 recently became commercially available from Kino Video, <http://www.kino.com>.

[28]*See* David Andrew Lloyd, *Expert Advice from Grave: Clarence Darrow Joins Simpson "Dream Team,"* THE PLAIN DEALER, May 28, 1995, at 1J.

recognizability as television commentators. The frequency of their television appearances is not reflected in the Lexis-Nexis database.

Some might suggest that self-generated publicity should reduce a lawyer's stature, rather than raise it; that self-promotion is "unseemly" or "unprofessional." While some of the contenders on our list might be deemed more aggressive than others in this regard, all of them have engaged in unabashed self-promotion, and all of them appear to have relished the spotlight. Clarence Darrow thoroughly enjoyed being the center of controversy, and when he wasn't in the courtroom, he was frequently on the stage, lecturing and debating issues such as capital punishment and evolution. The lawyer of the century should be a public figure, with a public persona.

Not all lawyers have the appetite for celebrity. For many excellent attorneys, public recognition may be a hindrance to effective and competent representation of their clients. They prefer to work behind the scenes. Edward Bennett Williams achieved much of his success as a Washington "insider," avoiding media attention unless it could be utilized as a tool on behalf of his clients. Johnnie Cochran, on the other hand, combined his law practice with a television career. The fact remains, however, that both are recognized by the public as great lawyers because of their courtroom performances, and the same can be said of every lawyer on our list of contenders.

With rare exceptions, all of the news stories concerning Thurgood Marshall related to his service as an Associate Justice of the U.S. Supreme Court, rather than his work as a trial lawyer. Four of the contenders on the list are deceased: Darrow, Kunstler, Marshall, and Williams. While Marshall, Kunstler, and Williams surpassed Darrow in frequency of news stories, all three died during the approximate fifteen-year period covered by the ALLNWS library, and a substantial portion of the news coverage devoted to them was obituaries and stories related to their deaths.[29]

In terms of public recognition, it can certainly be said that all of the names on the list are readily recognizable public figures. While Clarence Darrow currently ranks seventh on this list, the list is only a measure of current public recognition at the close of the century. The enduring nature of Darrow's celebrity is unique. The fame of others has yet to meet the test of time. Darrow has met it and endured.

VI. CURRENT ACCESSIBILITY OF INFORMATION

The lawyer of the century should be one whose life is an open book, to be read by future generations seeking inspiration and enlightenment. In our

[29]Thurgood Marshall died in 1993, William Kunstler in 1997, and Edward Bennett Williams in 1988.

modern world, a movie or a Web page may make the lawyer even more accessible than a library book. To what extent is information readily available in the media about the contenders on our list? Every lawyer on the list, with the regrettable exception of Michael Tigar, is the subject of a readily accessible biography or autobiography. Many of them also authored books brimming with advice for other lawyers or commenting on current social issues.

Leslie Abramson's autobiography, co-authored with Richard Flaste, was published in 1997.[30] It is a candid and lively account of her life and path-breaking career, including a colorful account of her years as a Deputy Public Defender in Los Angeles. There is very little about which she does not have a strong opinion, and her account of the Menendez trials is a heavy dose of the blistering advocacy that characterizes her courtroom performances. As the only female on our list of contenders, Ms. Abramson provides revealing glimpses into how she managed to balance marriage and motherhood with a fast-paced career as a top-ranked trial lawyer.

F. Lee Bailey's career has included too many fascinating cases to pack into one book, so he has authored three for popular audiences. The best was his first, *The Defense Never Rests.*[31] It chronicles his representation of Dr. Sam Shepard, the "Great Plymouth Mail Robbery," the Boston Strangler, and Dr. Carl Cappolino. What is most remarkable is that Bailey handled all of these cases during his first ten years out of law school. His second book, *For the Defense,*[32] focuses principally on his representation of Captain Ernest Medina, the army officer who commanded the troops accused of the My Lai massacre in Vietnam, and his own defense when he was indicted for mail fraud with a former client, Glenn Turner. More recently, Bailey packed his years of accumulated wisdom into a book aimed at law students and young lawyers, entitled *To Be a Trial Lawyer.*[33] The book includes an appendix listing and describing twenty-nine murder cases in which Mr. Bailey was engaged prior to the O.J. Simpson trial, claiming a rate of conviction in those cases of only 4%. Bailey never wrote a book about the Patty Hearst trial, though, an embarrassment he would probably prefer to forget.[34]

Johnnie Cochran's autobiography,[35] published in the wake of the O.J.

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[30]*See* LESLIE ABRAMSON & RICHARD FLASTE, THE DEFENSE IS READY: LIFE IN THE TRENCHES OF CRIMINAL LAW (1997).
[31]F. LEE BAILEY & HARVEY ARONSON, THE DEFENSE NEVER RESTS (1971).
[32]F. LEE BAILEY & JOHN GREENYA, FOR THE DEFENSE (1975).
[33]F. LEE BAILEY, TO BE A TRIAL LAWYER (2d ed. 1994).
[34]Patty Hearst, a kidnap victim who allegedly aided her kidnappers in a subsequent crime spree, was convicted and sentenced to prison after a trial in which she repeatedly invoked the fifth amendment privilege against self-incrimination during her testimony. The conviction was affirmed in *United States v. Hearst,* 563 F.2d 1331 (9th Cir. 1977).
[35]*See* JOHNNIE L. COCHRAN, JR. & TIM RUTTEN, JOURNEY TO JUSTICE (1996). Co-author Tim Rutten is married to Leslie Abramson.

Simpson trial, is more than an account of the Simpson trial. Cochran describes his efforts on behalf of Geronimo Pratt, his work as a prosecutor, and his extraordinary success in handling civil cases alleging police misconduct. Cochran's three-year run on a nightly television show for Court TV offered trenchant commentary on current legal controversies. The show was cancelled September 30, 1999.

Clarence Darrow authored an autobiography five years before he died[36] and has been the subject of two excellent biographies since.[37] One of the most popular books about Darrow, however, is a collection of the arguments he presented in his most famous cases, edited by Arthur Weinberg.[38] A website devoted to Darrow also includes excerpts from his writings and speeches, a comprehensive list of books about his career, and links to related websites.[39] Professor Douglas Linder also maintains *The Clarence Darrow Home Page*.[40] The most rewarding way to encounter Clarence Darrow, however, is by seeing the one-man play about his life, now available on video starring Henry Fonda,[41] or by watching the fictionalized portrayals enacted by Spencer Tracy in *Inherit the Wind*, or by Orson Welles in *Compulsion*. Three of America's most accomplished actors, all now deceased, have left us with memorable portrayals of Clarence Darrow in the courtroom.

Certainly the most prolific author among our contenders is Harvard Law Professor Alan Dershowitz. He writes almost as compulsively as he speaks. Like Bailey, his best book was his first, *The Best Defense*.[42] And the best part of that book is his description of the work he did with F. Lee Bailey in Bailey's defense of the mail fraud charges lodged against him, and in the defense of Patty Hearst. Dershowitz deftly critiques Bailey's performance in the Hearst trial without offering any personal judgment. In *Reversal of Fortune,* Dershowitz describes his brilliant presentation of the appeal on behalf of Claus Von Bulow, a performance that became a popular film with the same title.[43] Jeremy Irons won an Academy Award as best actor for his portrayal of Von Bulow, but the portrayal of Dershowitz by Ron Silver was equally outstanding. Dershowitz played a key role in fashioning the strategy utilized in the defense of O.J. Simpson, and his book *Reasonable Doubts* offers a compelling defense of the verdict.[44] Dershowitz has also authored

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[36]*See* CLARENCE DARROW, THE STORY OF MY LIFE (1932).
[37]*See* STONE, *supra* note 1; KEVIN TIERNEY, DARROW: A BIOGRAPHY (1979).
[38]*See* ATTORNEY FOR THE DAMNED, *supra* note 2.
[39]*See* <http://ourworld.compuserve.com/homepages/delao/darrow.htm>.
[40]*See supra* note 17.
[41]*See supra* note 27.
[42]ALAN M. DERSHOWITZ, THE BEST DEFENSE (1982).
[43]*See* ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE (1986); *Reversal of Fortune* (Warner Bros. 1990).
[44]*See* ALAN M. DERSHOWITZ, REASONABLE DOUBTS (1996).

two popular novels[45] and a number of provocative commentaries on a wide variety of social issues.[46]

William Kunstler authored or co-authored a total of twelve books,[47] several of which provide valuable commentary on his work as a lawyer. *My Life as a Radical Lawyer*[48] is remarkable for its candor. Kunstler reviews every aspect of his life with honesty and insight. In *The Trial of Leonard Peltier,*[49] Kunstler's seventeen-year effort to free the leader of the American Indian Movement is described. Although key ballistics evidence that discredited the prosecution's theory of the case was withheld, the conviction for murdering an FBI agent was upheld. In *Trials and Tribulations,*[50] Kunstler describes how his participation in the Chicago Seven trial radicalized him. Two excellent accounts of the Chicago Seven trial by other authors also describe the incredible obstacles the lawyers in that case had to overcome to achieve justice for their clients.[51] Kunstler, more than any of our other contenders, resembled Darrow in both substance and style and took up the causes Darrow would certainly have espoused. We can still see Kunstler in a courtroom today, in the Spike Lee film *Malcolm X*, where Kunstler played the judge.

Over forty biographies of Thurgood Marshall have been published, many for children. Most of them focus on his career as a Justice of the United States Supreme Court, although there are excellent accounts of his work as Chief Counsel for the NAACP prior to his appointment to the bench.[52] That work included numerous death penalty cases at both the trial and appellate level. Marshall's exposure to the way the death penalty operated "in the

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[45]*See* ALAN M. DERSHOWITZ, THE ADVOCATE'S DEVIL (1994); ALAN M. DERSHOWITZ, JUST REVENGE (1999).
[46]*See* ALAN M. DERSHOWITZ, ABUSE EXCUSE (1994); ALAN M. DERSHOWITZ, CHUTZPAH (1992); ALAN M. DERSHOWITZ, CONTRARY TO POPULAR OPINION (1994); ALAN M. DERSHOWITZ, TAKING LIBERTIES: A DECADE OF HARD CASES, BAD LAWS, AND BUM RAPS (1989); ALAN M. DERSHOWITZ, SEXUAL MCCARTHYISM: CLINTON, STARR, AND THE EMERGING CONSTITUTIONAL CRISIS (1998); ALAN M. DERSHOWITZ, THE VANISHING AMERICAN JEW (1997).
[47]*See* WILLIAM M. KUNSTLER, AND JUSTICE FOR ALL (1963); WILLIAM M. KUNSTLER, BEYOND A REASONABLE DOUBT (1961); WILLIAM M. KUNSTLER, FIRST DEGREE (1960); WILLIAM M. KUNSTLER, THE HALL-MILLS MURDER CASE: THE MINISTER AND THE CHOIR SINGER (1980); WILLIAM M. KUNSTLER, HINTS AND ALLEGATIONS: THE WORLD IN POETRY AND PROSE (1994); WILLIAM M. KUNSTLER, TRIALS AND TRIBULATIONS (1985); WILLIAM M. KUNSTLER & SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER (1994); WILLIAM M. KUNSTLER & SHEILA ALAN ISENBERG, REBEL AT THE BAR: AN AUTOBIOGRAPHY (1994); GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995) (foreword by William M. Kunstler); BRUCE JACKSON, DISORDERLY CONDUCT (1992) (foreword by William M. Kunstler); MAURICE KENNY, GREYHOUNDING THIS AMERICA (1988) (foreword by William M. Kunstler); JIM MESSERSCHMIDT, THE TRIAL OF LEONARD PELTIER (1983) (foreword by William M. Kunstler).
[48]*See* KUNSTLER & ISENBERG, *supra* note 47.
[49]*See* MESSERSCHMIDT, *supra* note 47.
[50]*See* KUNSTLER, *supra* note 47.
[51]*See* JASON EPSTEIN, THE GREAT CONSPIRACY TRIAL (1970); JOHN SCHULTZ, MOTION WILL BE DENIED (1972) (reprinted under the title THE CHICAGO CONSPIRACY TRIAL in 1993 by Da Capo Press).
[52]*See, e.g.,* JUSTICES, *supra* note 14; KLUGER, *supra* note 16.

trenches" was unique. No one else on the Supreme Court, and no one since, brought such experience to bear in the writing of Supreme Court opinions.

In one case, Marshall was trial counsel for an African-American man accused of raping a white woman. The prosecution offered a life sentence in exchange for a plea of guilty. Marshall conveyed the offer to his client, who exclaimed: "Plead guilty to what? Raping that woman? You gotta be kidding. I won't do it." Marshall later recounted, "That's when I knew I had an innocent man." Marshall told that story to his fellow justices, concluding, "The guy was found guilty and sentenced to death. But he never raped that woman." He paused, flicking his hand, and added, "Oh well, he was just a Negro."

In a tribute to Justice Marshall after his retirement, Justice Sandra Day O'Connor reflected that stories like these "would, by and by, perhaps change the way I see the world."[53] While we're still waiting for the "by and by," it is clear that Thurgood Marshall's experiences as a criminal defense lawyer strongly influenced his work as a Supreme Court Justice and at least entertained his fellow justices. The hundreds of opinions he authored as a Justice on the Supreme Court should be included in the legacy that keeps Thurgood Marshall accessible today.

Gerry Spence is immediately recognized by his buckskin fringe, and is well known to television audiences for commentary on pending cases. He is also a popular author, and his books recount a legal career with strong parallels to Darrow's.[54] Clarence Darrow abandoned a career as a railroad lawyer to take up the cause of Eugene Debs and his rail workers' union. Spence is a lawyer once retained by insurance companies who became a feared nemesis of insurance companies. Equally confident in civil or criminal cases, Spence cultivates the image of the lone gunfighter. "Dream teams" are not his cup of tea. His writing is not confined to spinning stories about his cases, either. He offers practical advice on a wide variety of issues.[55]

Michael Tigar became a familiar figure during the trial of the Oklahoma City bombing case, where his spirited defense of Terry Nichols avoided a death penalty. His handling of the media was a textbook example of the lessons taught by Edward Bennett Williams, his mentor—not flashy, but solid and credible. Tigar argued the landmark case before the United States Supreme Court dealing with the limits the First Amendment permits on out-of-court advocacy by lawyers.[56] Tigar affects a folksy, cowboy boots style,

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[53]Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur,* 44 STAN. L. REV. 1217, 1220 (1992).
[54]*See* GERRY SPENCE, THE MAKING OF A COUNTRY LAWYER (1996); GERRY SPENCE & ANTHONY POLK, GUNNING FOR JUSTICE (1982).
[55]*See* GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME (1995); GERRY SPENCE, O.J.: THE LAST WORD (1997).
[56]*See* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

but he is a brilliant scholar with a commanding grasp of history and political science.[57] His two books on trial skills for lawyers are filled with examples of brilliant advocacy from his own work, as well as that of Edward Bennett Williams.[58]

Edward Bennett Williams was very careful and selective about the cases he accepted. Had he chosen to do so, he could have easily surpassed Darrow in the number of trials of the century he took on. He also was guarded and circumspect in his public commentary. His only book, *One Man's Freedom,* is a classic description of the duty of a criminal defense attorney to take up the cause of the unpopular and despised, even at the personal cost of being identified with one's client.[59] Williams's clients included Senator Joseph McCarthy, racketeer Frank Costello, and Teamsters president Jimmy Hoffa. Since his death, two biographies of Edward Bennett Williams have appeared, both providing rich detail into the exacting preparation that preceded his appearances in court.[60]

The body of literature left by our contenders runs rich and deep. Lawyers and law students will find lots of ore worth mining in this lode. Having consumed most of it, I believe the most accessible lawyer among our contenders is still Clarence Darrow. Reading the transcripts of his trials still fills me with awe for the depth and breadth of his humanity as well as his ability to communicate it. No matter how many times I watch it, I still get goose bumps seeing Orson Welles speak the words of Clarence Darrow pleading for life in the Loeb and Leopold case.[61]

VII. ADHERENCE TO ETHICAL STANDARDS

Few of our contenders survived their contentious careers as trial lawyers without accusations of unethical behavior. Darrow was not the only one who was indicted. Indeed, participation as a defense lawyer in any trial of the century is a risky venture. The defense lawyers rarely emerge with their reputations intact. Frequently, they end up as defendants themselves in subsequent proceedings. Before weighing this factor or making comparisons, it might be useful to briefly summarize the ethical challenges with which each of our contenders has been confronted.

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[57] *See* MICHAEL TIGAR, LAW AND THE RISE OF CAPITALISM (1990).
[58] *See* MICHAEL TIGAR, EXAMINING WITNESSES (1993); MICHAEL TIGAR, PERSUASION: THE LITIGATOR'S ART (1999).
[59] *See* EDWARD BENNETT WILLIAMS, ONE MAN'S FREEDOM (1962).
[60] *See* ROBERT PACK, EDWARD BENNETT WILLIAMS FOR THE DEFENSE (1983); EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS, ULTIMATE INSIDER, LEGENDARY TRIAL LAWYER (1991).
[61] *See Compulsion, supra* note 25. The script for *Compulsion* is remarkably faithful to Darrow's actual words, and the death penalty argument to the judge consumes a full twenty minutes of the film. Modern films targeting the short attention spans of today's audiences simply do not allow this kind of presentation.

During the penalty phase of the retrial of the Menendez brothers for the murder of their parents, defense psychiatrist Dr. William Vicary testified that Leslie Abramson had instructed him to alter his notes of conversations with Erik Menendez and threatened to take him off the case if he disobeyed. When inquiries were directed to Ms. Abramson by the court, she invoked the Fifth Amendment privilege against self-incrimination. This invocation of privilege was later withdrawn, and Ms. Abramson explained that Dr. Vicary was instructed to "redact" his notes to protect material she believed was protected by attorney client privilege.[62] An investigation was launched by the State Bar of California, which announced two years later that no grounds were found for any disciplinary action. Ms. Abramson attributed the accusations to exaggeration inspired by her celebrity:

> I'm Jewish, I'm feisty, I'm aggressive, I'm tough. I take no prisoners and I'm a defense lawyer. And I'm a girl, and girls aren't supposed to be any of the above. . . . If you're going to be a defense lawyer you can't intend to win popularity contests or go into politics. . . . People tend to associate us with the crimes of our clients, and they see us as standing in the way of convictions.[63]

F. Lee Bailey was indicted in 1973, along with former client Glenn W. Turner, for mail fraud. After sitting through a lengthy trial in federal court in Florida, he was granted a severance. The trial then ended with a mistrial as to the remaining defendants. The indictment was subsequently dismissed. Bailey attributes this indictment to vindictiveness resulting from his criticism of federal postal inspectors in the Plymouth Mail Robbery case.[64] In 1976, Bailey's credibility was challenged after a speech to a group of Los Angeles executives in which he recounted an alleged exchange with Thurgood Marshall when Marshall was Solicitor General in which Marshall referred to himself as "head nigger." Marshall denied the story, calling it "the most deliberate lie I ever heard."[65]

After the O.J. Simpson trial, Bailey found himself in hot water on two occasions in which the government claimed he had taken forfeited assets as legal fees. In the case of Claude Duboc, a drug trafficker who amassed a fortune in excess of $100 million smuggling marijuana and hashish into Canada, Bailey claimed that the government allowed him to hold $6 million

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62. *See Lawyer Defends Herself Against Accusations,* TELEGRAPH HERALD (Dubuque, Iowa), Apr. 22, 1996, at A9.
63. *Id*.
64. *See* BAILEY, *supra* note 32, at 276.
65. Ben Bradlee Jr., *The Great Defender*, BOSTON GLOBE, Aug. 25, 1996, at Mag. 16 (quoting Barry Farrell, NEW W. MAG., May 10, 1976).

in stock in a Canadian pharmaceutical firm in order to guarantee his fee. When the stock increased in value to $27 million, Bailey claimed he was entitled to the profit since he assumed the risk of a loss. He was jailed for forty-three days for contempt of court when he failed to meet a deadline for returning the stock to the government from a Swiss holding account. Ultimately, he dropped his claim to the stock, saying he would seek recovery in a breach of contract suit in the Court of Claims.[66] Robert Shapiro, co-counsel in the O.J. Simpson trial, testified as a witness against Bailey in the fee forfeiture dispute. Three years later, another Florida judge threatened to hold Bailey in contempt for failure to turn over a $2 million Cayman Islands trust fund established by another client to pay legal fees after it was ordered forfeited in a money-laundering case.[67]

Johnnie Cochran has never been the recipient of any professional discipline, although an official investigation was launched against him by the State Bar of California after the O.J. Simpson verdict. The sixteen-month investigation concluded with public reprovals of Carl Douglas for not having personally signed two witness subpoenas, and of Barry Scheck for not reactivating his California bar membership after entering the case.[68] Cochran was criticized for "playing the race card" in his closing argument, for allegedly rearranging pictures in Simpson's home prior to the jury visit, and for blasting Judge Ito's ruling on admissibility of the Fuhrman tapes at a mid-trial press conference. None of these incidents merited professional discipline, and all were defensible in the realm of vigorous advocacy.[69]

Both William Kunstler and Michael Tigar were subjected to the erratic injustice of Judge Julius Hoffman during the Chicago Seven conspiracy trial. Tigar entered an appearance in the case for the purpose of pretrial motions related to electronic surveillance. When a dispute over the availability of Charles Garry to represent Bobby Seale threatened to sidetrack the trial, Judge Hoffman issued warrants to arrest the lawyers who had entered appearances in the case but were not present at the commencement of the trial. Tigar had notified the court of his withdrawal by telegram earlier in the week. Nonetheless, he was taken into custody in Los Angeles and transported to Chicago to face a charge of contempt of court. Tigar was quickly released and permitted to withdraw as counsel.[70] Kunstler was convicted of twenty-four counts of contempt of court for various incidents occurring during the Chicago Seven trial.

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[66]*See id.*
[67]*See* Jim Leusner, *Bailey Must Pay $2 Million by May 3,* ORLANDO SENTINEL, Apr. 2, 1999, at D1.
[68]*See Simpson Lawyer is Reprimanded and a Second May Be Censured,* N.Y. TIMES, June 14, 1997, § 1, at 6.
[69]*See, e.g., Symposium, Responsibilities of the Criminal Defense Attorney,* 30 LOY. L.A. L. REV. 1 (1996).
[70]*See* United States v. Seale, 461 F.2d 345, 357 n.21 (7th Cir. 1972).

These convictions were set aside on appeal, but several counts were remanded for retrial before a different judge.[71] On retrial, Kunstler was again convicted of two counts of contempt for outbursts over the court's refusal to allow him to call Dr. Ralph Abernathy as a witness. The outbursts were described as "diatribes" that served no purpose other than venting Kunstler's spleen. After the ruling, Kunstler insisted on calling Abernathy to the stand and embracing him in front of the jury. The convictions on these counts were affirmed on appeal, although no jail time or fine had been imposed.[72] William Kunstler was unrepentant, however, and regarded his performance in the Chicago Seven trial as his proudest moment and as a turning point in his life. In what he described as "one of the most impassioned orations of my life," these are the words he spoke when he was sentenced on his contempt charges:

> I have tried with all my heart faithfully to represent my clients in the face of what I consider—and still consider—repressive and unjust conduct toward them. If I have to pay with my liberty for such representation, then that is the price of my beliefs and my sensibilities. . . . I have the utmost faith that my beloved brethren at the bar, young and old alike, will not allow themselves to be frightened out of defending the poor, the persecuted, the radicals and the militant, the black people, the pacifists, and the political pariahs of this, our common land. . . . I may not be the greatest lawyer in the world . . . but I think that I am at this moment, along with Len Weinglass . . . the most privileged. We are being sentenced for what we believe in.[73]

Edward Bennett Williams was known as a Washington insider, a close friend to those in power through six presidential administrations. As a lawyer, however, he projected an image of spotless rectitude. That image was tarnished only once, during the trial of Jimmy Hoffa. Williams, just like Johnnie Cochran, was accused of "playing race cards." Ten of the jurors seated in the Hoffa case were black. During the trial, a young black female lawyer from Los Angeles, Martha Malone Jefferson, made a brief appearance in the courtroom, and posed for a picture with Williams and Hoffa. That same week, a leading black newspaper, the *Afro-American*, carried a large advertisement extolling Hoffa as a champion for the 167,000 black truck drivers who belonged to the Teamsters Union. The ad included a photo of Williams, Hoffa, and Jefferson, with a caption explaining that the "famous West Coast lawyer" had joined the

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[71]*See In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).
[72]*See* United States v. Dellinger, 502 F.2d 813 (7th Cir. 1974). The denial of a writ of *coram nobis* challenging these convictions after disclosure of documents demonstrating government misconduct was upheld in United States v. Dellinger, 657 F.2d 140, 146 (7th Cir. 1981).
[73]KUNSTLER & ISENBERG, MY LIFE AS A RADICAL LAWYER, *supra* note 47, at 39.

defense team. The same issue also had a front-page story headlined "L.A. Woman Attorney in Hoffa Case." The newspaper was delivered to all ten of the black jurors on the case.

One week later, former heavyweight champion Joe Louis appeared in the courtroom. While he had been subpoenaed as a character witness, Williams never called him to the stand. Before Louis left, however, Hoffa embraced him in the presence of the jury. Williams denied any foreknowledge of either event, but his denial appears to be inconsistent with the absolute control over everything going on in the courtroom upon which Williams ordinarily insisted.[74] F. Lee Bailey credits Williams's denial, however, saying that Hoffa, whom he also represented, was notorious for thinking he was smarter than his lawyers and making "arrangements" behind his lawyers' backs.[75]

The careers of Alan Dershowitz, Gerry Spence, and Thurgood Marshall contain no blemishes of an ethical nature. While Dershowitz is frequently criticized for saying too much, he has never been cited for violating a gag order in any case in which he entered an appearance. While I have criticized Spence's performances as a television commentator,[76] I have nothing but admiration for his courtroom performances. Thurgood Marshall survived very intense scrutiny throughout two Senate inquiries during his judicial nominations. When he was nominated to be a judge of the U.S. Court of Appeals for the Second Circuit, he was subjected to severe hazing by southern senators on the Judiciary Committee, including Senators Olin Johnston of South Carolina, Sam J. Ervin, Jr. of North Carolina, James O. Eastland of Mississippi, and John L. McClellan of Arkansas. They dwelled on charges that the NAACP had stirred up litigation, used lay intermediaries, and engaged in the unauthorized practice of the law. None of these activities were directly linked to Marshall, and he was confirmed by a vote of fifty-four to eighteen. The disgusting performance of racist southern senators was repeated when Marshall was nominated to the Supreme Court, this time led by Senator Strom Thurmond of South Carolina. Marshall's Supreme Court nomination was confirmed by a vote of sixty-nine to eleven.[77]

This summary of the attacks upon the character of each of our contenders is a useful context in which to assess the questions that have been raised about the ethics of Clarence Darrow. It demonstrates that taking up the defense of unpopular defendants is indeed a hot kitchen in which to be

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[74]*See* PACK, *supra* note 60, at 226-34.
[75]Telephone Interview with F. Lee Bailey (Sept. 20, 1999).
[76]*See* UELMEN, *supra* note 9, at 94; Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996); Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997).
[77]*See* JUSTICES, *supra* note 14, at 3077-88.

employed. Nonetheless, the fact that one is subjected to unjustified attack might explain unethical conduct, but it cannot excuse it.

Nor is it any justification or excuse that "the other side" is just as unethical. If it were, Clarence Darrow would have had ample justification. In his marvelous account of the Haywood trial, J. Anthony Lukas provides some revealing glimpses of the ethical climate in which high-profile cases were tried in the early part of this century.[78] The line between private and public control of the prosecution was a blurry one, with private detectives on the payroll of large corporations playing a major role.[79] The confession of Harry Orchard, which was the keystone of the prosecution's case in the Haywood trial, was elicited in interrogation by Pinkerton Detective James McParland, who also engineered the abduction of the defendants from Colorado to Idaho to stand trial. Despite official denials, Lukas verifies that many of the costs of the prosecution were borne by mine owners, whose avowed goal was breaking the miner's union that Haywood headed. The "back dooring" of judges was also endemic. For example, to ensure that the state supreme court would not grant a writ of habeas corpus when he abducted the defendants, Detective McParland showed Harry Orchard's confession to one of the justices, revealing that the justice himself was an intended victim of a bomb. The justice nonetheless participated in rejecting the defendants' appeals.[80]

Many of these elements resurfaced in the McNamara case four years later. There, the City of Los Angeles hired Private Detective William J. Burns to illegally abduct the defendants and bring them to Los Angeles to face trial. The Merchants and Manufacturers Association retained Earl Rogers to assist in the grand jury investigation. If Clarence Darrow did conspire to bribe jurors, it was surely because he thought he was facing the same opponents he faced in Idaho, who would stoop to any measure to defeat him.

According to Professor Cowan's account, many of Darrow's contemporaries assumed he was guilty of the jury bribery charge because they assumed Darrow would fight fire with fire, and believed that the justice of his cause warranted any means, fair or foul, to prevail. That was not the defense Darrow presented at his trial, however. He argued that he was made a target of the prosecution after they arrested Bert Franklin, and the focus of the defense strategy was to challenge Franklin's credibility.

Even though that defense succeeded, Professor Cowan concludes not only that Darrow knew of the bribery attempts, but that his subsequent strategy

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[78] *See* LUKAS, *supra* note 22.

[79] In *People v. Eubanks*, 14 Cal. 4th 580, 927 P.2d 310, 59 Cal. Rptr. 2d 200 (1996), the California Supreme Court held that financial contributions to the costs of prosecution by a corporate victim of the theft of trade secrets created a conflict of interest that required disqualification of the district attorney.

[80] *See* LUKAS, *supra* note 22.

in handling the McNamara defense was dictated by self-interest. After Franklin's arrest, Darrow quickly concluded a deal to plead the McNamaras' guilt. Darrow's primary motivation for that deal, Cowan suggests, was to save his own skin, so he could argue he had no motive to engage in the bribery of jurors. For a defense lawyer, that would be a greater sin. It's one thing to commit a crime in a misguided attempt to save your clients, but to sell your clients down the river to save yourself is unforgivable. Cowan even alleges that "apparently Darrow made a secret effort to win a lighter sentence for himself by offering to testify against Samuel Gompers."[81] For a defense lawyer, that would be the greatest sin of all: to become a snitch for the prosecution. Cowan's documentation for that charge is highly suspect, however.[82]

Perhaps the harshest assessment of the moral character of Clarence Darrow was the poem by his former law partner, Edgar Lee Masters. It was written in 1916:

> You can crawl
> Hungry and subtle over Eden's wall,
> And shame half grown up truth, or make a lie
> Full grown as good . . .
> A giant as we hoped, in truth a dwarf;
> A barrel of slop that shines on Lethe's wharf,
> Which seemed at first a vessel with sweet wine
> For thirsty lips. So down the swift decline
> You went through sloven spirit, craven heart
> And cynic indolence. And here the art
> Of molding clay has caught you for the nonce
> And made your head our shame—your head in bronze!
> One thing is sure, you will not long be dust
> When this bronze will be broken as a bust
> And given to the junkman to resell.
> You know this and the thought of it is hell![83]

Even Masters may have concluded that Darrow was capable of redemption, however. Six years later, he wrote another poem about Darrow, much more sympathetic:

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[81]COWAN, *supra* note 3, at 298-99, 440.

[82]Cowan cites the papers of Walter Drew, a director of the National Erectors' Association, engaged in an effort to mount a nationwide prosecution of labor union leaders for the dynamiting conspiracy. The alleged "plea bargain offer" was leaked to the press and published in the *L.A. Times*, most probably in a prosecution effort to weaken Darrow's defense. *See id.* at 299.

[83]EDGAR LEE MASTERS, SONGS AND SATIRES (1916).

> This is a man with an old face, always old . . .
> There was pathos, too, in his face, and in his eyes,
> And early weariness; and sometimes tears in his eyes,
> Which he let slip unconsciously on his cheek,
> Or brushed away with an unconcerned hand.
> There were tears for human suffering, for a glance
> Into the vast futility of life,
> Which he had seen from the first, being old
> When he was born.
> This is Darrow,
> Inadequately scrawled, with his young, old heart,
> And his drawl, and his infinite paradox
> And his sadness, and kindness,
> And his artist sense that drives him to shape his life
> To something harmonious, even against the schemes of God.[84]

If all other factors were equal, and the lawyer of the century turned on the question of adherence to ethical standards, Clarence Darrow would not be the winner. The sense of professional propriety and ethical conscience displayed by Thurgood Marshall and Edward Bennett Williams outclasses Darrow. At the same time, Darrow's lapses cannot disqualify him. He picked himself up from the ashes of 1912 and spent the rest of his life pursuing justice in the midst of mobs that hissed and hated. He deserves to be a role model for the things he did after he left Los Angeles, and he was a more convincing advocate of forgiveness because he himself had fallen.

If Darrow had slunk off the stage of history after the McNamara case, Professor Dershowitz's harsh assessment would be correct. But Darrow overcame a period of deep, dark depression to emerge a greater advocate than before. The ability to pick yourself up and forge ahead after a setback is an essential quality for a trial lawyer, and Darrow's life is an extraordinary example of human redemption. The need for redemption may have been what drove Darrow to his greatest conquests. As he reflected in his autobiography,

> [w]hat we are is the result of all the past which molds and modifies the being. I know that the sad, hard experience made me kindlier and more understanding and less critical of all who live. I am sure that it gave me a point of view that nothing else could bring.[85]

There truly were two Clarence Darrows. The Clarence Darrow who should be offered to young lawyers as a role model is not the Clarence Darrow of 1912,

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[84]Edgar Lee Masters, *Clarence Darrow*, THE NEW REPUBLIC, May 27, 1957, at 16.
[85]DARROW, *supra* note 36, at 207.

who apparently succumbed to a momentary delusion that the end could justify the means. The Clarence Darrow who should be offered as a role model is the haggard, weary man who pleaded for the lives of Loeb and Leopold in 1924:

> I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.[86]

VIII. THE CONTENDERS' CHOICES

As a final measure, I surveyed the surviving lawyers who are themselves contenders for the honor of lawyer of the century. Who, I asked, other than themselves, would they rank as the greatest lawyer of the century? There was little consensus among them, other than the fact that they all picked lawyers who are now dead.

Leslie Abramson would pick Earl Rogers as the lawyer of the century. Rogers fell off our list of contenders, largely because so few are still familiar with his exploits today. Abramson describes Rogers as a "real" trial lawyer, who fought in the courtrooms day in and day out, dazzling juries with his persuasive powers. In Rogers's day, the evidentiary battleground was the admissibility of fingerprint evidence, not DNA. Rogers fought that battle with all the wit and intelligence today's lawyers can muster. As Leslie put it, "He was the Johnnie Cochran of his day, but smarter." She dismisses his legendary drinking problem by saying, "He could do better while drunk than most of us can do while sober."[87]

F. Lee Bailey's choice is Edward Bennett Williams. Soon after he passed the bar, Bailey sought an opportunity to meet Williams, and asked him how he managed to pull a rabbit out of a hat so consistently. Williams told him, "If you want to pull rabbits out of hats, you better have fifty hats and fifty rabbits, and get lucky." Bailey later represented a co-defendant while Williams was defending Otto Kerner, a U.S. Circuit Judge and former Governor of Illinois charged with accepting bribes. Thus, he observed Williams's legendary preparation and consummate trial skills first-hand. Bailey says that he has met or worked with every lawyer on our list of contenders with the exception of Clarence Darrow. He dismisses Darrow as a "polemicist" who shamed himself with his exploits in Los Angeles. Based upon his personal observations, Edward Bennett Williams is his "clear choice."[88]

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[86]ATTORNEY FOR THE DAMNED, *supra* note 2, at 86-87.
[87]Telephone interview with Leslie Abramson (Aug. 12, 1999).
[88]Telephone interview with F. Lee Bailey (Sept. 20, 1999).

Johnnie Cochran did not hesitate for a second. His personal hero, and choice as lawyer of the century is Thurgood Marshall. Marshall's work left a legacy that few lawyers can claim, he said. He combined great academic skills with great courtroom skills. Cochran met Marshall on the day Cochran was admitted to the bar of the Supreme Court, in 1968. What impressed him most about Marshall was that "the man never forgot where he came from."[89]

Alan Dershowitz also picked Edward Bennett Williams as the lawyer of the century. He also placed F. Lee Bailey and Clarence Darrow near the top of his list, making it clear that only Darrow's ethical lapses would deny him the top spot. Dershowitz concluded Williams fits his "Man for All Seasons" mold because of his intelligence, tactical brilliance, and the impact of his work. When asked whom he would call if he were indicted, however, Dershowitz said his choice to represent him would be Michael Tigar.[90]

Gerry Spence's pick for lawyer of the century is Clarence Darrow. Spence says Darrow has always been a "light" for his life. He found so great a parallel between Darrow's words and his own thoughts that he actually checked when Darrow died to see if he might have been a reincarnation of Darrow's soul! (He found he was born before Darrow's death.) While Spence does not believe in reincarnation, he certainly believes in heroes, and Darrow is his role model. He points to Darrow's passion for justice for the underdog and championing the causes of the common people as virtues for today's lawyers to emulate. He dismisses the claim that Darrow bribed jurors as unfair, since Darrow can no longer defend himself, and was acquitted when he could. He also suggests that even if Darrow was guilty, his conduct must be viewed in the context of the class warfare that prevailed at the time, in which the crimes of the ruling class far outweighed anything Darrow might have done.[91]

Michael Tigar would also pick Clarence Darrow as the lawyer of the century. "No lawyer so effectively spoke to the social and historical context in which legal controversies are decided as did Darrow," he says. For him, Darrow stands in the middle of history, choosing to represent clients whose causes defined the most significant issues of the twentieth century. Tigar attributes the earliest ambitions that defined the kind of lawyer he wanted to be to reading about Darrow:

> I recall telling my father, when I was about eleven, that I was thinking of becoming a lawyer. He thought for a time, then went back to his room and came back with a copy of Irving Stone's *Clarence Darrow for the Defense*. "This," he said, "is the kind of lawyer you

[89]Telephone interview with Johnnie Cochran (Sept. 20, 1999).
[90]Telephone interview with Alan Dershowitz (Sept. 17, 1999).
[91]Telephone interview with Gerry Spence (Sept. 29, 1999).

> should be." Through high school and college I devoured books on Darrow: his autobiography, the Weinberg collection of trial excerpts, *Attorney for the Damned*, the fictionalized *Inherit the Wind*.[92]

Tigar firmly believes that a lawyer is ultimately defined by the clients he or she chooses to represent. Even the most unpopular client can present an opportunity to advance the cause of justice. In defending Terry Nichols, Tigar re-read many of Darrow's great arguments to find inspiration. With regard to the charge of jury-bribing, Tigar reflects that many great lawyers were accused of unduly influencing juries, but Darrow is the only one "with a certificate saying he is not guilty." "If we believe in our system of justice," he concludes, "we have to assume Darrow was innocent."[93]

The selections of those who are themselves contenders for the honor of lawyer of the century should weigh heavily in our assessment of the criterion of professional reputation, with which I began this Essay. From the contenders' perspectives, Edward Bennett Williams may have an equal claim with that of Clarence Darrow. Yet none of our contenders was closer to Edward Bennett Williams than Michael Tigar. His selection of Darrow is based upon the causes Darrow served, and the issues he litigated. Williams and Darrow represent two very different images of the American lawyer. Williams was ultimately the Washington insider, who carefully picked clients who would enhance that image. Darrow, however, had no qualms about being perceived as a radical who was ready to challenge conventional wisdom, and he picked clients whose causes challenged the prevailing hypocrisy. Williams had great impact upon the law, especially in areas of privacy rights and wiretapping. But Darrow's causes spoke to a broader audience. He did, indeed, "plead for the future."[94]

IX. CONCLUSION

There are few lawyers alive in America today who personally knew Clarence Darrow. The only lawyer known to me who was personally acquainted with Darrow is Quentin Ogren, Professor Emeritus of Loyola Law School in Los Angeles. Professor Ogren met Clarence Darrow as a teenager in a small Illinois town, when Darrow assisted in the successful defense of a fellow townsman sentenced to death. Professor Ogren's reflection on his meeting with Darrow is attached to this Essay as Appendix II with his permission. But thousands more American lawyers, who never met Darrow, have read about his work in famous cases and been inspired by

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[92]TIGAR, PERSUASION: THE LITIGATOR'S ART, *supra* note 58, at xv.
[93]Telephone interview with Michael Tigar (Sept. 13, 1999).
[94]ATTORNEY FOR THE DAMNED, *supra* note 2, at 85-87.

Darrow's arguments and written works. Admiration for Clarence Darrow, and familiarity with his work, is common to many of today's leading practitioners. Morris Dees, the heroic civil rights lawyer from Alabama, attributes an actual "conversion" experience to his reading Darrow's autobiography while snowed in at an airport in Cincinnati:

> I stopped at the airport's snack bar, picked up a hot dog and Coke, and then browsed the newsstand. One book, *The Story of My Life* by Clarence Darrow, caught my eye. . . . I bought the paperback, a reprint of the 1934 original, and found a seat to eat my supper. Before daylight I finished Darrow's story of his life. It changed mine forever. I was reading my own thoughts and feelings. . . . On the flight to Chicago the next morning, I thought a lot about Clarence Darrow . . . . I had made up my mind. I would sell the company as soon as possible and specialize in civil rights law.[95]

Arthur Liman, a power litigator who died in 1997 after a spectacular career with the esteemed law firm of Paul, Weiss, Rifkind, Wharton & Garrison, wrote in his memoirs:

> My image of the trial lawyer remained Clarence Darrow, who had sided with the working man, with minorities and radicals, and who had fought for due process and a fair trial and against bigotry, ignorance, and hate. But Darrow was larger than life, a man of impassioned eloquence whose power I could never imagine equaling.[96]

The criteria of professional reputation, participation in trials of the century, public recognition, and accessibility of information all point to Clarence Darrow as the lawyer of the century. Only in assessing the criterion of adherence to ethical standards do blemishes appear in Darrow's record. It appears that American lawyers are willing to overlook those blemishes, and still look to Darrow as their role model.

The runners-up are Thurgood Marshall and Edward Bennett Williams. Both have achieved heroic dimensions comparable to Darrow, and both have become role models for thousands of other lawyers. Both have impeccable records when it comes to adherence to ethical standards. While Marshall lacked the consummate trial skills of Williams, his legacy looms as large as any American lawyer of the twentieth century. Williams was a better-prepared lawyer than Clarence Darrow ever was, but the clients he served never measured up to the causes espoused by Darrow. Darrow put his skills to greater use.

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[95]MORRIS DEES, A SEASON FOR JUSTICE 95-97 (1991).
[96]ARTHUR LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY 22 (1998).

This exercise of selecting a lawyer of the century will certainly not end the debate over who was the greatest lawyer of the past century. Hopefully, lawyers will continue to press the claims of their personal heroes, and robustly argue the relative merits of other contenders. There really needs to be a "Lawyer's Hall of Fame," like the baseball Hall of Fame in Cooperstown, New York, where the achievements of great American lawyers can be enshrined. The legal profession has produced a remarkable panoply of heroic lawyers, and the turn of this century should mark the moment we recognize that fact in a tangible way.

APPENDIX I

THE TRIALS OF THE CENTURY

YEAR	CASE	LOCATION	OUTCOME
1901	Leon Czolgosz: McKinley assassination	Buffalo, NY	Convicted & Executed
1904	Harry Thaw: Stanford White murder	New York, NY	1. Hung 2. Acquitted
1907	Bill Haywood: Murder conspiracy	Boise, ID	Acquitted
1908	Abe Ruef: San Francisco graft trials	San Francisco, CA	Convicted
1911	McNamara Bros.: L.A. Times bombing Clarence Darrow: Jury bribery	Los Angeles, CA	Convicted (Guilty Plea) 1. Acquitted 2. Hung
1918	Eugene Debs: WWI sedition	Chicago, IL	Convicted (Pardoned)
1921	Sacco & Vanzetti: Robbery murder	Dedham, MA	Convicted & Executed

YEAR	CASE	LOCATION	OUTCOME
1921	Fatty Arbuckle: Rape and murder	San Francisco, CA	1. Hung 2. Hung 3. Acquitted
1924	Loeb & Leopold: Bobby Franks murder	Chicago, IL	Convicted (Guilty Plea)
1925	Thomas Scopes: Teaching evolution	Dayton, TN	Convicted (Reversed)
1927	Albert Fall & Edward Doheny: Teapot Dome Oil Scandal	Washington, DC	1. Acquitted (conspiracy) 2. Doheny Acquitted (bribery) 3. Fall Convicted (bribery)
1931	Scottsboro Boys: Rape	Scottsboro, AL	Convicted (Reversed)
1931	Al Capone: Tax evasion	Chicago, IL	Convicted
1935	Bruno Hauptmann: Lindbergh murder	Flemington, NJ	Convicted & Executed
1936	Lucky Luciano: Prostitution conspiracy	New York, NY	Convicted
1944	Charlie Chaplin: Paternity	Los Angeles, CA	Convicted
1946	Nuremberg War Trials	Nuremberg, Ger.	Convicted & Executed
1949	Alger Hiss: Perjury	New York, NY	1. Hung 2. Convicted
1950	Harry Bridges: False citizenship application Vincent Hallinan & James MacInnis: Contempt	San Francisco, CA	Convicted (Reversed) Convicted
1951	Julius & Ethel Rosenberg: Espionage	New York, NY	Convicted & Executed
1957	Jimmy Hoffa: Bribery	Washington, DC	Acquitted

YEAR	CASE	LOCATION	OUTCOME
1959	Appalachia Organized Crime Conspiracy	New York, NY	Convicted (Reversed)
1964	Jack Ruby: Lee Harvey Oswald murder	Dallas, TX	Convicted (Reversed)
1969	Sirhan Sirhan: Robert Kennedy assassination	Los Angeles, CA	Convicted
1970	Chicago Seven: Conspiracy	Chicago, IL	Convicted (Reversed)
1971	Charles Manson: Tate & LaBianca murders	Los Angeles, CA	Convicted
1972	Daniel Ellsberg: Pentagon Papers	Los Angeles, CA	Dismissed
1973	Watergate Conspiracy	Washington, DC	Convicted
1976	Patty Hearst: Robbery	San Francisco, CA	Convicted (Pardoned)
1978	Dan White: Moscone & Milk murders	San Francisco, CA	Convicted
1981	John Hinckley, Jr.: Reagan assassination attempt	Washington, DC	Acquitted
1984	John DeLorean: Drug conspiracy	Los Angeles, CA	Acquitted
1986	Bernhard Goetz: Subway shootings	New York, NY	Acquitted
1993	Menendez Brothers: Patricide	Los Angeles, CA	1. Hung 2. Convicted
1995	O.J. Simpson: Murder	Los Angeles, CA	Acquitted
1997	McVeigh & Nichols: Oklahoma City bombing	Denver, CO	Convicted
1999	President Bill Clinton: Impeachment	Washington, DC	Acquitted

APPENDIX II

An Encounter with Clarence Darrow†

by Professor Quentin "Bud" Ogren

The idol of my high school days in the Depression-ridden early '30s was Clarence Darrow, America's most hated and most loved trial lawyer. By 1933 Darrow had fought most of the famous battles of his career, and he came to Rockford, Ill., out of retirement at the urging of my father's friend, Fay Lewis, to defend Russell McWilliams, age 16, charged with first-degree murder of a street-car conductor in an armed robbery. The State's Attorney demanded the electric chair.

Throughout the lengthy trial, the issue among Rockford's good citizens wasn't so much McWilliams as Darrow. Though George Gallup was yet to invent his poll, a conservative estimate would be that 98 percent were against him and 2 percent for. If there were any undecideds, I never encountered them. My father, long an opponent of the death penalty, was a vocal part of the tiny, unpopular minority.

One day as the trial was drawing to a close, I happened to be in the vice principal's small office when Chester Bailey, the commercial law teacher, dropped in. Pointing to a headline on the front page of the morning paper, he exclaimed, "Look at that! Why, that Darrow ought to be run out of town on a rail!" Since the vice principal was part of the 98 percent, there was no argument, just conversation. I knew my place, which was off to the side, and I bit my lip.

The talk got hotter, and finally the teacher said, "If Darrow gets his way and McWilliams is let out, it won't be safe to walk the streets of Rockford." My lip was raw; I could bite no more, and I exploded: "I'd rather be seen on the streets of Rockford with Russell McWilliams than with some of the teachers I know." Within minutes I was expelled from school.

It was in the last half of my senior year. I was proud to have spoken out for justice, and I knew my father would be pleased. But I was hardly a wise son, for I didn't know my own father. Where would I be if I didn't graduate from high school? No diploma, no college, even if we could somehow scrape up the money. After a couple of days' reflection, I ate humble pie and was reinstated.

Then an exciting thing happened. Fay Lewis invited Dad and me to dine with him and Darrow. I was strongly impressed with Darrow's relaxed and easy manner, his friendliness, his humor, and his utter lack of bitterness

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†Professor Ogren's description of his encounter with Clarence Darrow originally appeared in the *San Luis Obispo Telegram & Tribune. See* Dan Krieger, *Times Past: Encounter with Clarence Darrow Leaves Its Mark,* SAN LUIS OBISPO TELEGRAM & TRIB., June 5, 1999.

toward his countless detractors. "I never wished any man dead," he told us, adding with a characteristic twinkle, "but I confess that I have read a few obituaries with considerable satisfaction."

Darrow lost the case, both the trial and the appeal. The boy was sentenced to die in the electric chair at the Joliet penitentiary. The day before the scheduled execution there was to be a hearing before the state Board of Pardons and Paroles, which had authority to recommend commutation to the governor, and the expectation was that the governor would follow the recommendation, whatever it might be.

Early on the day of the hearing, Fay Lewis, Dad and I drove to Joliet to be with Darrow at the hearing, to be held at the prison. Before the hearing we went with Darrow to see the warden, who told us candidly that he hoped for a commutation, because he was certain the execution would set off a riot, so intensely did the inmates identify with the boy, by now only 17.

The 10 men on the Board took their seats facing us at a highly polished table. The State's Attorney, B.J. Knight, displayed the murder gun and the conductor's bloodied shirt. He talked loud and persuasively about what a cold-blooded, premeditated killing it had been, what a fair trial the defendant had had, and their solemn duty to fulfill the command of the law, which was death. After two histrionic hours, he sat down.

It was Darrow's turn, and he began by asking permission to address the board sitting down, which was readily granted. In no time the contrast in style was absolute. No flamboyance here, just man-to-man, come-let-us-reason-together conversation, delivered in such a soft voice that some had to lean close to hear. Nothing sensational, nothing even novel, either. Merely a suggestion that they put themselves in the shoes of the young lad, penniless, his mother dead, his father long without work, living in a shanty out at the edge of town, utterly without hope of earning a few dimes so he could take his girl out for a good time, never in trouble before, like the street-car conductor a victim of evil social forces and frustrations that deny life and breed crime and death. The boy hadn't intended to fire the gun, but the conductor, surprised, reacted in a nervous, menacing way; the boy panicked, and the gun went off. After 15 or 20 minutes Darrow said he was getting tired, and the chairman granted a short recess.

I had been sitting in the front row, and as he started up the aisle Darrow beckoned to me to join him. When we reached his destination, the water cooler, he said to me, "Bud, did you see their eyes?" "No," I said, "I was watching you." Ignoring my response, he said, "If Russell McWilliams dies tomorrow, I'm going to sue 10 men for breach of promise."

The hearing resumed. Darrow talked in the same low-key manner for less than five minutes, and it was over.

After the hearing we returned to the warden's office, where Darrow arranged to have one of the guards escort me to death row. Why me? I didn't ask, and to this day I don't know the answer.

McWilliams' cell was tiny, with barely enough room for his cot, a toilet and wash-bowl, and a small table.

McWilliams, a Caucasian, was so pale, he was literally the whitest person I have ever seen. His pink eyelids confirmed what he told me, how for three nights he had not slept, he had just prayed and read his Bible. I told him then what Darrow had said at the water-cooler, and he needed no interpretation.

"Thank God," he said, "Now I can sleep."

We compared our ages, and I was only a few days older than he. Late that afternoon the governor, following the board's recommendation, commuted the sentence to life.

In 1951 I was practicing law in California, and my parents sent me a clipping from the *Rockford Morning Star*: Russell McWilliams, a model prisoner for 18 years and a trustee on the landscaping crew, was released on parole to take a job as a gardener in Vermont.

BELIEVING IS SEEING†

John W. Reed*

It is always an honor to be in this good company. Because of our many years together, you have become like family to Dot and me—some of you twenty years or more, others just this year. I particularly appreciate the renewal that comes from the new Fellows. One of the great benefits of working in a university setting, as I have for fifty-five years, is the renewal, the rejuvenation that comes from meeting each new class of bright, ambitious, idealistic, young men and women. And the same is true in the Barristers setting, as, each year, we not only revel in the friendships made here over the years but also find new life and new hope in the new Fellows who have just cast their lot with us. Dot and I thank you again for having made us a part of this profoundly wonderful enterprise.

You have invited me to speak to you with some regularity, probably as an economy measure. And the invitations suggest that I should offer some reflections on our profession and our professional lives. As a consequence, I fear I often repeat myself. If I were asked to lead you in a discussion of one of my substantive subjects—such as why judges don't understand the hearsay rule—I could speak about different topics year after year. But the message I have gotten is that I am to continue to worry aloud about you and about our beloved profession, and so that is what I shall do—today, at least. And in part, I want to say to you some of the same things I said to the members of the American College of Trial Lawyers at their fiftieth anniversary meeting last October.

The title listed for my remarks looks like a typographical error: Believing Is Seeing. It's a turnaround of a familiar phrase, of course, like the editorial commentary on the mayor's race in a small midwestern town as "a choice between the evil of two lessers." We don't say "believing is seeing." The folk wisdom is the other way around, "seeing is believing." I'm from Missouri, born a couple of blocks down the street from Harry Truman's house. Missouri is the Show Me state, suggesting that its sons and daughters are skeptics, who will believe only what you can show them. If you can't see it, you needn't believe it.

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Nevis, Charlestown, Nevis, West Indies, March 16, 2001.

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That show-me skepticism is not limited to those of us from Missouri, of course. It's a common characteristic across our society, but it is honed to a particularly sharp edge in the legal profession. We lawyers are trained throughout our careers—from those first days in Socratic-method law school classes onward—to be skeptical, to ask questions, to get at the facts, to have a show-me attitude. If we can't see it, we don't believe it.

But, paradoxically, the phrase "seeing is believing" connotes not only skepticism but also a certain gullibility. When we see it, then it's permissible to believe it. You undoubtedly have heard of the elderly Vermont farmer who was asked, "Do you believe in infant baptism?" and replied: "Believe it? Lord, I've *seen* it."

We do tend, all of us, to believe what we see.

SEEING IS BELIEVING

Well, what *do* we see? This meeting is very much about the legal profession, so let me narrow the question to ask: What do we see in our profession here at the beginning of the century? Let me list several things that I see, and, I assume, we all see.

1. *I see lawyers advertising their services*, described less bluntly as "marketing." Lawyers employ staff members and public relations consultants to seize every opportunity to bring themselves to the attention of prospective clients and to inform present clients of achievements and honors. Some of this is in self-defense, as consumers of legal services increasingly shop around for better deals. "Beauty contests" are no longer limited to the boardwalk in Atlantic City.

I see lawyers wedded to the billable hour. Begun, with the best of intentions, as a way to rationalize the charges for our services, the billable hour has taken on a life of its own, driving all kinds of decisions—personnel decisions, litigation tactics, client development, and the like.

I see lawyers moving toward multidisciplinary practices, to provide one-stop service for clients, with the consequence of a dangerous decline of the bar's indispensable independence.

I see law firm personnel practices driven almost exclusively by their dollar impact, such as the large rewards for rainmakers, such as the forced early retirement of long-time partners.

I see a decline in firm loyalty, with a high degree of mobility, indeed with whole departments moving from firm to firm, almost always motivated by money, by self-interest.

Since seeing is believing, when we see all these things and see also their mostly lucrative effects, what do we believe? I suggest that these phenome-

na cause us to believe that the law is not so much a profession as it is a business, that economic considerations drive the decision-making processes, that the bottom line trumps all. When I say "cause *us* to believe," I use the word "us" to include the public generally, but also a large portion of the bar. Thus, these things cause the general public and much of the bar to believe, as I said, that the law is more business than profession.

But I see more, and you see it too.

2. *I see zealous advocacy out of control*, characterized by incivility, arrogance, and sharp practice—what someone has called "ice hockey in business suits." I see a return to the ancient ritual of trial by ordeal—the ordeal of discovery abuse and scorched-earth tactics.

When we see these things and see that they often produce favorable outcomes, what do they lead us to believe? I suggest that they cause us to believe that in litigation practice, winning is not everything, it's the only thing.

3. *I see lawyers practicing law by fax and e-mail*. Only last fall a former student of mine, now a highly successful West Coast lawyer, told me that he has several clients for whom he does much work whom he has never met. The venues of their relationships are the telephone, telefax, and the Internet. The clients want immediate advice, and they expect instantaneous electronic response to their electronic questions.

When we see this development, what does it cause us to believe? I suggest it causes us to believe that law is not a personal profession but rather a black box spewing out answers to submitted questions—that law is merely another Internet service business.

4. *I see management of courts by statistics*, with judges being judged by and held responsible to lay court administrators. I see sentencing guidelines and other legislatively imposed limits on judges' discretion. I see judges charged with management of quasi-judicial staffs, dealing often with matters moved over from the administrative arm of government.

When we see these things, what do they cause us to believe? I suggest they cause us to believe that the courts are simply a part of the governmental bureaucracy, not an independent branch of government.

5. *I see tremendous growth in extra-judicial modes of resolving disputes*—the so-called ADR movement. While no one denies that arbitration and mediation and the like are beneficial in certain settings, ADR is broadly employed—is imposed, not chosen—in other settings where it produces inequities and disadvantageous consequences for the parties and for the judicial system. Though described as "alternative," I see arbitration and mediation becoming the norm, with court trials, especially jury trials, as the real alternative mode of dispute resolution.

When we see ADR settling in as the norm, what does it cause us to believe? I suggest it causes us to believe that it is more important to decide something quickly and cheaply than to decide it right.

6. *I see the civil jury playing a diminishing role*. Calendars favor nonjury dispositions, as do jury election rules; cases are diverted from the courtroom to the ADR room; counsel are denied meaningful voir dire; juries are reduced in size; jury awards are reduced in size; appellate reversals of jury awards have doubled in a decade; and the like. And I see growing popular (and sometimes judicial) skepticism about the jury's competence.

When we see these things, it causes us to believe that the storied role of the jury as a bulwark of our liberties and a means of the people's direct participation in the processes of justice is of less importance than is the efficiency of the resolution of disputes by a single, professional judge. Seeing this, we believe that the jury is an inefficient, unaffordable, and possibly irrational relic of a simpler time.

7. *I see that those lawyers who are single-minded about their profession get ahead*—that those who strive for a balance between the professional and the personal aspects of their lives typically receive fewer professional rewards.

When we see this, what does it cause us to believe? I suggest it causes us to believe that the right professional-personal balance is ten to one, and that the law is a career, not a calling.

8. Finally, *I see lawyers trying to satisfy clients when instead, in the words of Elihu Root, they ought to tell the client he's being a damned fool and should stop it!* As lawyers, they suspend their own principles in the service of the client's principles. It's as if they had seen the garbled English translation on the sign in a Parisian hotel elevator which read, "Please leave your values at the front desk."

When we see this, what does it lead us to believe? It causes us to believe that lawyers are mere agents of their clients, not their counselors.

You can reasonably complain that I have overstated some of these points, that the characterizations are academic exaggeration; but I submit that they are a roughly accurate depiction of the legal profession's landscape at the turn of the century. That is what we see. And, if seeing is believing, then those things produce in us—that is, in the public and in a large portion of lawyers—these beliefs:

— that the bottom line trumps other considerations;
— that winning is the only thing;
— that lawyers are losing the personal relationships with their clients;
— that courts are simply part of the governmental bureaucracy, mere cogs in the governmental machinery;
— that deciding disputes quickly is more important than deciding them right;

— that the jury is at best an unaffordable luxury;
— that a good lawyer is single-minded about the law and need not be a whole person; and, finally,
— that values are negotiable.

These things, again conceding overgeneralization, are some of the widely held beliefs about our profession. Many lawyers hold those beliefs, and you know that the public holds them too. From what people see in us, this is what they believe about us. When I think of the public's view of our profession, I am reminded of a recent episode in the cartoon strip "Beetle Bailey" involving the hapless and henpecked General Halftrack and his wife. She says: "Answer me one question, will you?" "Of course, my dear." She says: "What do you think your biggest fault is and why don't you stop doing it?"

Once again, let me make the point that seeing leads to believing; and with so many unfortunate things to see, it is no wonder that the resulting beliefs are less than exalted.

BELIEVING IS SEEING

Now, let's turn things around. I ask that you, with me, approach things from the opposite direction and consider how what we believe affects what we see. We see not simply what the world presents to us but what our minds project onto it. Psychology has repeatedly demonstrated that truth empirically. For example, a poor person, shown a coin, estimates the coin's diameter to be larger than does a rich person. Another example: Many subjects are shown a picture of a man with a drawn knife on a subway car; when questioned about the picture afterward, the overwhelming majority remember him as a black person, though in fact he was white. Innumerable experiments and experiences show that we tend to see what we believe, what we expect to see.

To use the psychological jargon, "the world is mediated by cognitive structures and processes that actively shape how we perceive and evaluate the world around us." Believing is seeing. If we believe bad things, we will see bad things. If we believe the good, we will see the good, not only in ourselves but also in others. When teachers believe in their students' abilities and their possibilities, those students do, in fact, achieve more; they tend to become what their teachers believe they can become. When I say believing is seeing, I use "believe" in the sense of believing *in* something, in the sense of having a vision that something can be brought to pass. I need not belabor the importance of vision before an audience of Fellows of the Society of Barristers, where a high vision of the pursuit of justice is its animating force. The only

limits, as always, are those of vision. In the Biblical phrase, "Where there is no vision, the people perish."

I grant that it is possible to overstate the extent to which one's belief, one's vision, may produce a parallel reality. Rose-colored glasses, after all, may simply produce a rose-colored illusion. But it is undeniable that if we believe in something, we are more likely to see it; and if we don't see it immediately, we are nevertheless more likely to bring it into being. Referring to Don Quixote, Oliver Wendell Holmes once said, "If a man has the soul of a Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist, he will make . . . his world ideal." Notice that Holmes didn't say that he will *find* his world ideal. He said that if a man has the soul of an idealist, he will *make* his world ideal.

Powerful ideas, such as democracy, liberty, the worth of the individual, have changed whole continents. What we affirm is the power of great ideas to change enterprises as surely as they change empires. What are the ideas—what are our ideals—that shape how we see our profession and what we want it to be? If believing is seeing, what do we believe?

- Do we believe the law is not merely a business but in fact a true profession? If so, will we make it so?
- Do we believe the jury is an indispensable guardian of our liberties? If so, will we work to preserve it and improve it so that it matches our vision?
- Do we believe the profession of law is a humane enterprise? If so, will we practice humanely?
- Do we believe independent courts are essential to the preservation of our democracy? If so, are we willing to fight for their independence?
- Do we believe trial lawyers can be zealous advocates but at the same time officers of the court? If so, are we willing, ourselves, to be exemplars of civil advocacy?

If we do not hold these as truths, if they are not our vision, most assuredly we will not see them. But if we believe in them, in their value, in their essential goodness, we are more likely to see them come to pass, to *bring* them to pass. When we recover our sometimes lost idealism—the idealism with which every one of us entered upon the study of law and entered the profession—then, in Holmes's words, we will make our world ideal. Poetic hyperbole? I suppose so, but it is nevertheless an ultimate reality. A romantic vision? Yes, but, in the words of the composer Giya Kanchelli, "Romanticism is a high dream of the past, present, and future—a force of invincible beauty which towers above and conquers the forces of ignorance, bigotry, violence, and evil." Making our world ideal—is it a myth? Yes, but like so many myths, profoundly true.

Mention of myths brings to mind James Thurber's delightful story entitled "The Unicorn in the Garden," which appears in his satiric *Fables for Our Time*. One morning, the husband—husbands usually are one-down in Thurber's world—the husband sees a white unicorn with a golden horn quietly cropping roses in the garden. When he tells his wife what he has seen, she says, "You are a booby and I am going to have you put in the booby-hatch." He had never liked the words "booby" and "booby-hatch," and he said, "We'll see about that." He returned to the garden, but the unicorn had gone away and he sat down among the roses and went to sleep.

As soon as he had gone out of the house, the wife got up and dressed as fast as she could. She was excited and, in Thurber's delightful phrase, "there was a gloat in her eye." She called the police and a psychiatrist and told them to hurry and bring a straitjacket. When they arrived, she said, "My husband saw a unicorn this morning"; and as the police and the psychiatrist looked at each other, she provided the details: a white unicorn with a golden horn eating the flowers. At a solemn signal from the psychiatrist, the police leaped from their chairs and seized the wife. She put up a terrific struggle, but they finally subdued her. Just as they got her into the straitjacket, the husband came back into the house.

"Did you tell your wife you saw a unicorn?" asked the police. "Of course not," said the husband, "the unicorn is a mythical beast." "That's all I wanted to know," said the psychiatrist. "Take her away. I'm sorry, sir, but your wife is as crazy as a jaybird." So they took her away, cursing and screaming, and shut her up in an institution. The husband lived happily ever after.

Since this is a fable, there has to be a moral. Thurber's moral: Don't count your boobies until they are hatched.

There are many who believe a moral, caring legal profession to be, like the unicorn, a product of a mythic imagination, the romantic vision of what could be. I plead with you not to lose that vision. Some things must be believed to be seen. I think unicorns do exist, or can be made to exist, just as I think our profession can take new forms of service and excellence through the power of imagination and spirit, especially the imagination and spirit of so talented an assembly as the International Society of Barristers. In seeing the law as a noble calling you may constitute only a minority of our profession. But a prophetic minority always has more impact than a passive majority, "moral" or "silent." The will *can* do the work of the imagination. If you believe, you *will* see. I guarantee it.

RIDING THE BENCH†

Joseph P. Kennedy*

Addresses at Barristers' meetings sometimes deal with serious issues in lighthearted ways. Justice Kennedy's humor is so delightful that we have chosen to publish not only his thoughtful comments about the Canadian justice system but also the anecdotes (and affectionate roast of Board member Harry Wrathall, who introduced him) that accompanied them.

Thank you, Harry, for the terse introduction. I sent Harry about a fourteen-page c.v. but he found the need to edit, apparently. Harry, next time you have the urge to edit, why don't you edit your briefs? That would be good. You omitted the Victoria Cross and the Peace Prize—you don't care about peace, Harry?

Ladies and gentlemen, in fairness, I wouldn't be here if it were not for Harry Wrathall, and I want to make that point clear. Over the last several years, he apparently has consistently and obnoxiously lobbied your executives to invite me to speak to this organization, and I am very pleased about that, Harry. Thank you. I'm also very surprised because, to be perfectly candid, I never liked you that much, Harry. I liked Bette a lot but I . . .. I shouldn't be hitting on Harry. He's having a hard time back in Nova Scotia; his partners are leaning on him–they put a motion detector in his office and it hasn't gone off for six months. Why wouldn't you just throw a cat in there now and then?

I don't know whether it's noticeable or not, but I'm a little shaky up here because I got here a little late. The room we're in has a sign in the bathroom that says "Put curtain inside tub before showering." It took me half an hour to get all those little hooks off.

Seriously, ladies and gentlemen of the Barristers Society, it is with a great deal of pleasure that I speak to you this morning. Perhaps not with a great deal of pleasure—I haven't had a great deal of pleasure since about 1967—but it's some little pleasure just being here with Harry.

I wasn't always a judge, I used to have a real job. I used to be a criminal lawyer. I said that recently to a lady at a cocktail party and she said, "Aren't they all?" But no, they aren't all, though I was. And I had a pretty good prac-

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†Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Nevis, Charlestown, Nevis, West Indies, March 15, 2001.

*Chief Justice, Supreme Court of Nova Scotia, Halifax, Nova Scotia, Canada.

tice. Fortunately, most of my clients were recidivists. They were the kind of guys who used to find stuff before people lost it. I'm still fondly remembered by some of them. I got a postcard the other day from a federal institution in Nova Scotia, from a former client doing life. He said, "Having a wonderful time. Wish you were here." It's nice to be remembered.

I had a client one time charged with arson in Kentwell, Nova Scotia. During the course of the trial I produced beautiful color photographs of the building before, during, and after the fire, and the judge turned to the crown prosecutor and said, "Mr. Kennedy on behalf of the defense has produced these wonderful photographs. They are significant. Does the crown have any photographs they wish to produce?" And the prosecutor said, "No, m'Lord, we have no photographs; we didn't know there was going to be a fire." That was a short trial.

I had a client charged with forgery before a very blunt judge named Charlie Archibald. I said, "Your Honor, the man cannot be guilty of forgery. I will tell you that he cannot even write his own name." Charlie said, "Mr. Kennedy, he's not charged with writing his own name."

Defending a guy from Quebec City who had robbed a bank in the Halifax suburb of Fairview, I demanded that the trial be conducted entirely in French, which would take our system in Nova Scotia a couple of years. The judge said, "Does he speak any English at all?" I said, "Only enough to get by, m'Lord." He turned to my client and said, "Say something in English." And my client said, "Gimme all the money." That was another short trial.

Even as a judge, I don't seem to be able to overcome that kind of situation. In a matter arising out of divorce, the lady was very upset, jumping up and down and complaining. I said, "Madam, if you will calm down, we will look after your situation." And she said, "I simply want to be put back in the situation that I was in before I married this man." I said, "That's what we do. We can do that." And she did calm down. I then said, "What situation were you in?" She said, "I was a widow."

A man came back after a thirty-day psychiatric remand and appeared in my busy arraignment court. I knew him and I saw him sitting over there. We called his name, he didn't respond. We called his name again, and again he didn't respond. I said, "Mr. Smith, I see you there. Come forward. Microphone, please." He did. I said, "We called your name, but you didn't answer." He said, "Well, m'Lord, since you sent me to that hospital, I now realize I'm not Mr. Smith, I know I'm the Son of God." And I said, "That's great. We won't be able to deal with you now because I think we might be related."

Things just happen. I was driving down a street called Spring Garden Road—true story—a couple of Saturdays ago. I got to a crosswalk, I stopped for the pedestrian, the lady in the car behind me ran into me. I got out to check and there wasn't any damage. I just waved at her, got back in the car,

moved on. I then got to a red light, stopped, and she ran into me again. I went back and rapped on the window. I said, "Madam, I'm not angry, I simply want to ask you one question: How do you stop when I'm not here?"

Nobody respects me. I was concerned about the weather—I wanted to know what it was going to be like driving to the airport. We live quite a ways and Nova Scotia weather this time of year can be unpredictable. I made the mistake of phoning Environment Canada, and they told me there was a seventy-five percent chance of snow. I said, "That means nothing to me. What the hell does seventy-five percent chance of snow mean?" And the guy said, "It means there are four of us over here and three of us think it's going to snow."

I don't like modern art. I'd like to own a Picasso, but I wouldn't keep it in the house. I was at the art gallery in Halifax a while back and I was standing in front of this thing that was so godawful it was actually scary. I turned to the guide and said, "Madam, I suppose this is one of your abstracts." And she said, "No, sir, that's not an abstract, that's a mirror."

Ladies and gentlemen, I want to be briefly serious. I am capable of being serious for short periods of time, as a number of federal inmates might confirm. I would be remiss when speaking to this wonderful group of such good lawyers if I didn't make some observations about judges and lawyers and justice. I am a trial judge and I have been a trial judge for twenty-two years. I went on the bench when I was thirty-three years old, which is much too young to be a judge. (I could give you a speech on that subject.) I'm from Nova Scotia, one of Canada's smaller provinces; we are about a million people. But we make up for our size by being the most reasonable and the best looking of all Canadians, as our Vancouver friends will be forced to admit—with, of course, the remarkable exception of Harry Wrathall. I sit on the Supreme Court of our province, which is the superior trial court. We have thirty-seven judges and unlimited jurisdiction, including what we call inherent jurisdiction—a gift from our English superior court forebears. By inherent jurisdiction we mean that we can do justice in circumstances where we believe that justice is required even though there is no law, either statute or common; and we play with that toy quite a bit. As a result, the judges of our court have been accused of having a healthy sense of self. It has been said by judges of other courts that we can strut sitting down (which you can't do, by the way). I know how those other courts think of us because I was on one of them for eighteen years.

I used to be on the Provincial Court of Nova Scotia. That is a first instance criminal court—the emergency room of the Nova Scotia justice system. That is where the action is, and I loved it there. But I jumped at the chance to come to the superior court because the provincial court does not sit with

juries and I had spent eighteen years dealing with fictitious juries and wanted to deal with a real jury for a change. I had had some bad luck with fictitious juries. Of course I mean the kind of jury that we use with respect to the directed verdict test and other motions of that nature. One time I charged a fictitious jury and it stayed out for two weeks and then came home with me and drank all my beer.

These are difficult days for trial courts. I think you of the United States will recognize some of the things I say. We are trying to cope with an onslaught of self-represented litigants, and they are overwhelming our facilities. It is an access to justice issue. Some of them cannot afford counsel, nor can they get public legal aid. (I speak to the young lawyers in our jurisdiction. I say, "You know, 'pro bono' is not the guy who was married to Cher.") Others are self-represented because they are demented and they have realized that the courtroom is the only place in society where they can speak their crazy agendas and be listened to. So they come into our courtrooms and we do listen to them, and we try to respond appropriately. Some come before the court because they watch Judge Judy on American television; they think it would be fun to sue people and they do it with abandon and glee. We work very hard at allowing and trying to allow access to these self-represented people without sacrificing impartiality, and it's very difficult to do. We're going to have to respond because they are overwhelming our resources.

Let me speak of the media for a moment. They are a regular frustration to our trial judges. We are convinced that we have to do a better job of explaining what we do and why we do it—public information. We know how significant is the maintenance of public support, confidence in the judiciary and the courts, and the rule of law. We are working at that—initiatives as simple as judges going into the high schools, talking to the law classes; as advanced as Internet broadcasts of trials. And to the extent that the media represent that public in our courts, we have worked very hard to understand their needs and we have tried to make it easier for them to do their jobs. We have a judicial-media relations committee that meets regularly. But we have decided that we will ask the media to make up their minds. Are they in the news/information business or are they in the entertainment business? Because, ladies and gentlemen, too often the coverage of complex trials is restricted to what the losing side said about the decision, and I don't know how to give a decision that makes both sides happy—I've never been able to master that. Somebody is usually unhappy with my decision, and no doubt that is legitimate news. But is it the only news? Does that characterize the decision? Does that make it either a bad or a good decision? If it does, if that is the only news, then every decision we give is a bad decision and every judge is incompetent, and we're tired of that.

Talk about the young people, the young offenders who are coming before our courts charged with serious offenses like never before—offenses involving gratuitous violence, cruelty. They laugh and giggle during sentence hearings. They don't seem to care what we do. They've been described as having little fear of dying because they've never had a concept of life. They are a phenomenon, but they are not a mystery. All of the pre-sentence reports say the same: dysfunctional families. Dysfunctional families produce dysfunctional children. Don't ever wonder about that; it is true. These children are not being raised. No one ever showed them how to throw a sinker or a curve ball, no one ever took them to ballet class, no one ever went to their Christmas concert, or returned the stolen candy bar. No one ever fixed strict rules and made difficult decisions about enforcing those rules. In short, no one ever gave a damn about them after the novelty wore off, and they know that. And when they get to be thirteen and fourteen and fifteen, they don't function the way normal, rational people are supposed to function; but it shouldn't surprise any of us. There are so many of them, and they are before the courts daily. Our judges want to do positive things, but we don't have the resources and we've got to protect the public from them because they are dangerous. We can't simply lock up a generation. That is the kind of easy answer response you get from the radio talk show crowd. We need some options.

So, yes, trial judges in Nova Scotia, and I suppose in your jurisdictions, face difficulties; but you don't see many of them quit. It's a good job. The rewards override the difficulties. The reward of taking twelve people off the street through a month-long trial and watching them "morph" from not wanting to be there to the recognition that they are involved in one of the most significant things that they will ever do, to see them grow into a fact-finding jury, listening and deliberating and coming back, inevitably, time after time, with the right verdict—that's a trip. That is satisfying. Being upheld on appeal when you push the envelope, that's good too. (Sooner or later I know I will be.)

Ultimately, the best part of being a trial judge, without question, is watching good lawyers work, week in and week out—what a pleasure that is. Lawyers take a pounding; everybody's beating on us. An acquaintance of mine, a doctor, recently speculated, as doctors are apt to do, about what a wonderful world it would be if there were no lawyers. I said: "Not so. If there were no lawyers, Doc, who would prosecute the felons and perverts and degenerates you're always talking about? Who would defend those felons and perverts and degenerates, some of whom occasionally are innocent? Who would protect minorities in a white-dominated society? Who would look after the kids in acrimonious divorces? Who would set up char-

itable trusts? Who would get compensation for people whose lives have been ruined by carelessness and indifference? Who would get damage deposits back for single mothers? Who would protect us from the Canadian politician who said recently that he would like to 'stuff our Charter of Rights'—who would protect us from him if there were no lawyers? Who would incorporate the doctors? Who would do the countless, thankless charitable hours of public service that lawyers do, giving back?" (And if there were no lawyers, who would sue the doctors?)

Any of you ever wish you'd been a dentist? Have you ever heard the phrase "You'll hear from my accountant in the morning?" I don't think so. And behind closed doors when we are together, when we are honest with one another, we can say this: It is the lawyers, the seekers after justice, that make our societies work. And we American and Canadian lawyers are the luckiest in the world to serve the rule of law that has allowed the citizens of our two great countries to be the freest, the most empowered people on earth. Lawyers did that. Don't ever question what we do. And when we are together, when we are by ourselves, when we are away from the doctors and the accountants and the media, we can say that to one another. And trial judges have the great pleasure of watching you work.

I see by my watch that it's time to wrap it up. This watch, ladies and gentlemen, has a great deal of sentimental value for me. (I don't know why I'm sharing this with you, but I will.) When I was on vacation a couple of years ago, I went back to St. Johns, New Brunswick, and my grandfather—Thomas Kennedy, Irish out of Cork—passed away while I was there. As he lay dying, he sold me this watch. But I talked him into monthly payments.

I want to thank Harry Wrathall, Q.C., particularly, for his efforts and his kindness. He is one of Nova Scotia's very best lawyers, and he is a gentleman. I want to thank this wonderful group for your kindness and for your attention. I have been speaking mostly to judges lately, so it has been much fun to speak to a live audience for a change. Thank you very much.