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EDITOR'S NOTE

If this issue has a theme, it is first, broadly, two facets of justice: that sought within courtrooms—corrective or retributive justice, which is redress for wronged individuals—and distributive (and, ideally, restorative) justice, which redresses and remedies wrongs done to society.[1] Corrective or retributive justice takes place before judges, juries, or arbitrators; the second may, or may not, begin or end in courtrooms.

The lead piece in this issue addresses the manner in which justice is, or should be, sought in the courtroom. It is the first chapter of the Canadian treatise, *Sopinka on the Trial of an Action*. which Ken McEwan has recently revised and which concerns "principles that should guide counsel's approach to the dual role she holds as an officer of the court and advocate for the client."[2] Fairness and efficiency undergird the first duty; a "courageous commitment to the client's interests"[3] undergirds the second. That second, "zealous advocacy," at its extremes tests one's duty to the process.[4]

Yet the adversary system is our means to corrective justice, and, as John Reed observes in the article that follows, "zealous advocacy is necessary to make a system work well."[5] Going too far, into abusive "Rambo tactics,"[6] is what gives "zealous" its stink.

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[1] *See generally* Legal Punishment, Stanford Encyclopedia of Philosophy (Spring 2009), https://plato.stanford.edu/archives/spr2009/entries/legal-punishment/. John Reed, in an address reprinted here, pulls out just two threads of philosophers' web on the topic, flagging two categories of justice: retributive or corrective, sought chiefly by lawyers in courts, and distributive, whose objective is to "maximiz[e] fairness in society." John Reed, *Addicted to Justice, infra* p. 32.

[2] Kenneth McEwan, *Sopinka on the Trial of an Action, infra* p. 1.

[3] *Id*. at 12.

[4] "Excessive zeal" can be described as "behaviour that is in derogation of the higher and controlling obligation as officer of the court." *Id*.

[5] Reed, *supra* note 1, at 37.

[6] *Id*.

Rambo knew nothing of civility—behavior that modulates zealousness to the "diligence" the ABA prefers.[7] The bar has labored, John noted in 1970, "to recover some of the civility that was once more common among the trial bar."[8] In an essay praising his mentor Fred Tausend, which follows, Harry Schneider illustrates exactly how this recovery of civility might best have gone: he recalls how a greenhorn's pitbull zeal in conducting a deposition was immediately and forever checked by a gentle, kind, empathetic remark from an older, wiser advocate.[9]

Harry also recounts an example of justice inside and outside the courtroom that led to the founding of the King County Bar Association. A Seattle mob, including lawyers, had forced hundreds of Chinese workers (whose jobs the mob believed "rightfully belonged to 'Americans'"[10]) onto a ship for their deportation. A number of other lawyers sought a writ of habeas corpus requiring their release. The writ was resisted and a riot ensued, quieted only by the President's and Washington

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[7] See Rule 1.3 of the ABA's Model Rules of Professional Conduct: "A lawyer shall act with reasonable diligence and promptness in representing a client." Yet "zeal" survives in both the Preamble to the Rules ("As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system.") (emphasis added) and in the Comment to Rule 1.3:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with **zeal in advocacy** upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (emphasis added).

[8] Reed, *supra* note 1, at 37–38.

[9] Harry Schneider, *Ours Is a Proud Tradition*, *infra* p. 43.

[10] *Id*. at 45.

governor's imposition of martial law. The incident led to Seattle attorneys forming a bar association to bring charges of unprofessional conduct against the lawyers who had participated in expelling the Chinese. The group's "very first resolution . . . focused on the legal profession's obligation to always respect the Rule of Law rather than bow to mob mentality, and the need to ensure that inclusion would always triumph over ethnic persecution and exclusion"[11]—in short, a commitment to justice inside and outside courtroom doors.

Such justice thrives on the zealous pursuit of what is true. (And if that be the client's case, then zealous representation.) Both retributive and restorative justice need zeal, the impulse, *and* civil discourse, the medium of communication. Civil discourse happens when parties on either side of a contentious issue listen carefully to what their opponents say, knit that into the context of their thinking and the discussion, and put forth their own cases truthfully and as persuasively as they are able. But the fire still flames in the belly and ignites the advocate's rhetoric.

In *Two Lawyers from Birmingham*, which follows, Harry Schneider introduces William J. Baxley and C. Douglas Jones, civil-rights leaders who prosecuted the men who had bombed the Sixteenth Street Baptist Church in Birmingham on September 15, 1963. This was a pivotal moment in the American consciousness—when, if you weren't already living under the noxious cloud of Jim Crow (cultivated by a zealotry deaf to civil discourse), you could now see it, smell it, feel its sting from everywhere in the country.

Mr. Baxley's and Sen. Jones's address to the Society in 2005 is reprinted here because the prosecution they led sought retributive justice and because the case became one solid brick in the edifice of distributive justice, an edifice that has been built, battered, bombed, and rebuilt in this country for over 400 years. Their recounted experience can help us see now what that edifice is made of and to understand, as Martin Luther King explained in

[11] *Id*. at 46.

Letter from a Birmingham Jail, "why we find it difficult to wait" for it to stand solid and strong.[12]

The state of that edifice today drove an opinion piece by Macy Gray, a Grammy Award–winning singer of R&B and soul, written for Juneteenth.[13] What, she asks, has social justice to do with the American flag? When insurgents waved Old Glory on January 6th, she suggests, the message received was that all the "tired" Stars and Bars represents now taints the Stars and Stripes—as if it's the mind whose hands carry the flag that speaks its meaning. The white stripes, she says, no longer mean what they were intended to mean: white for purity and innocence. In a new design, Ms. Macy writes, we can retain the red stripes representing valor, and the stars' blue backdrop representing vigilance and perseverance (and justice). But not white—"off white," perhaps. Add two stars to the fifty to include Washington, D.C., and Puerto Rico, which have long lobbied for statehood. And the stars should be not white, but the shades of our skin—"like the melanin scale?"

Ms. Gray's opinion piece is not reprinted here, but Chris Duggan's response is. In an eloquent letter of his own,[14] he reminds her, and us, that the flag has stood for more than aspirational abstractions: it has been the patriotic fire the eyes of soldiers, airmen, and astronauts, of native Americans and immigrants, and of leaders in the fight for civil rights. We must not surrender those colors—colors that inspired so many in our common quest for liberty—to those who would deny justice and equality for all. The flag does not, nor was ever expected to, represent perfection: "[Its] colors proclaim the hopes and aspirations of a nation that will never fully achieve them, because the

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[12] Martin Luther King, *Letter from a Birmingham Jail* (1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

[13] Macy Gray, *Opinion: For Juneteenth, America needs a new flag that all of us can honor*, MARKETWATCH (June 17, 2021), https://www.marketwatch.com/story/for-juneteenth-its-time-for-a-new-flag-11623958522.

[14] Christopher A. Duggan, *Opinion: An Open Letter to Ms. Macy Gray, infra* p. 79.

country is rooted in the human experience."[15] It does, however, demand that we continue to seek justice and freedom for all and correct ourselves when we fail.

Joan Ames Magat
Associate Editor

[15] *Id*. at 80–81.

SOPINKA ON THE TRIAL OF AN ACTION: THE TRIBUNAL [*]

J. Kenneth McEwan[**]

Chapter 1
CALIBRATING THE TRIAL

A. INTRODUCTION

§ 1.1 While the reasons for a continuing decline in the number of civil trials heard by our courts, and the time and cost attendant on those remaining is the subject of much discussion, the trial remains the primary method by which our courts resolve disputes based on contested facts. This chapter addresses the overall structure of the civil trial, and the relationship of its core officers, being the judge, with or without a jury, and counsel. Most importantly, it will offer a view as to the principles that should guide counsel's approach to the dual role she holds as an officer of the court and advocate for the client. The courtroom is where we seek to actualize the principles of our system of justice; the trial is a vehicle of the rule of law in action. The degree to which a trial succeeds in delivering to the parties a

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[*] Part 1 of *Sopinka on the Trial of an Action*. a treatise recently revised by Kenneth McEwan. John Sopinka, a leading Canadian trial counsel and the original author of the treatise, was directly appointed from private practice to the Supreme Court of Canada. Ken McEwan has updated the last two editions of this leading, and perhaps only, handbook on civil jury practice in Canada. The chapter reprinted here is Ken's original work, recently added to the treatise.

Editor's note: Citation form and typographic conventions are as in the original.

[**] J. Kenneth McEwan, Q.C., of McEwan Cooper Dennis LLP, in Vancouver, B.C., is the immediate past president of this Society.

resolution to their dispute consistent with its underlying principles and objectives depends in no small part on counsel playing her part in a properly calibrated way. The judge and counsel have a shared responsibility in that regard; and counsel's undoubted duty of full commitment to her client's case (I avoid use of the term "zealous representation" for reasons that will become apparent), is conditioned by her duty to the court to protect and advance the proper administration of justice. Indeed, the latter duty inheres in the role of counsel, and is both consistent with and should shape the ends of skilful advocacy. The judge's role, beyond making necessary rulings and rendering judgment, or instructing a jury, is taking active steps to ensure that a trial is conducted without disruption, undue delay or distraction. This is not interference in the role of counsel, but an important part of the due administration of justice.

B. THE INSTITUTIONAL FRAMEWORK

1. The Rule of Law

§ 1.2 Lord Bingham's conception of the rule of law includes amongst its seven principles accessibility of the law.[1] Not only must the law itself be accessible, a concept returned to below, but in more general terms it has been stated that access to the courts as a public forum for the resolution of civil disputes "… is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. … Any action that interferes with such access by any persons or groups of persons will rally the court's powers to ensure the citizen of his or her day in court."[2] Lord Bingham's seven principles also embrace the right to a fair trial in civil as well as criminal proceedings, and the timely and economic resolution of civil disputes.[3] That is to

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[1] Tom Bingham, *The Rule of Law* (London: Penguin, 2010) at 37-47.

[2] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1985] B.C.J. No. 1939, 20 D.L.R. (4th) 399 (B.C.C.A.), affd [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.).

[3] Tom Bingham, *The Rule of Law* (London: Penguin, 2010) at 85–109.

say, the rule of law contemplates the just, speedy and inexpensive determination of every proceeding on its merits.[4]

2. Fairness: The Adversary System and Party Autonomy

§ 1.3 In structural terms, the civil trial meets the rule of law's condition of fairness by incorporating other fundamental principles, including the adversary system and its handmaiden, party autonomy. While a detailed historical analysis of the development of the structure of the civil trial is beyond the scope of this text, a brief description of the development and essential features of the adversary system provides useful context. In the "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England",[5] Stephan Landsman chronicles the evolution of judicial procedure and the reconceptualization of the trial through the 18th and into the 19th century to reflect adversarial principles. Prior to this evolution, criminal trials in Tudor and Stuart England were, in the words of J.S. Cockburn, "nasty, brutish and essentially short."[6] Virtually no trial lasted more than 20 minutes, and up to 25 trials were heard in a day by a single judge and jury.[7] The opening of the 18th century saw a non-contentious process in which judges participated actively and often aggressively in the examination of witnesses; rules of evidence were extremely limited and appellate procedure virtually non-existent. In civil proceedings, technical issues of pleading and procedure predominated, with fact-finding having a subordinate place, and used only when a single narrow question had been framed.

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[4] These terms, or similar, are the traditional statement of the objective of various Rules of Court. See, for example: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 1.04(1); *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 1-3(1).

[5] Stephan Landsman, "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England," (1990) 75:3 CORNELL L. REV. at 497.

[6] J.S. Cockburn, *A History of the English Assizes 1558–1714* (Cambridge: Cambridge University Press, 1972) at 109.

[7] J.S. Cockburn, *A History of the English Assizes 1558–1714* (Cambridge: Cambridge University Press, 1972) at 124-125, 137-138.

Jurors were free to rely on private information to resolve those factual issues.

§ 1.4 By the early 19th century, the traditional non-contentious (and non-regulated) approach to adjudication had been supplanted by a system characterized by the essential elements of an adversarial process. That shift both enabled and was furthered by efforts of reformers, such as the Wilkites, who used the courts to protect the rights of citizens against abuses of government authority, an area in which an adversarial process was essential to enable citizens to assert and protect their rights.

§ 1.5 In this way, the adversary method was created by judges and lawyers who sought through incremental reforms to build a more equitable court system. With this evolution came a more passive role for the judge and increased litigant responsibility for the production and quality of evidence and proof. Party direction and control as a cornerstone of the adversary system contributed to the establishment of a professional bar to represent the litigants. The evolution was also marked by the development of a set of rules to govern the trial and the behaviour of the advocates. As explained by Landsman, these rules of evidence and procedure were "needed to guard the integrity of the process as well as to ensure that the cases brought to court are resolved in an expeditious manner".[8]

§ 1.6 These principles remain foundational to our trial system. The Supreme Court of Canada has stated, for example, that "[t]he requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome".[9] The continued primacy

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[8] Stephan Landsman, "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75:3 Cornell L. Rev. 497 at 501.

[9] *Borowski v. Canada (Attorney General)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342 at 358-359 (S.C.C.); see also *R. v. Cook*, [1997] S.C.J. No. 22, [1997] 1 S.C.R. 1113 (S.C.C.); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

of party control of the conduct of a case is reflected in such authority as *R. v. Jolivet*.[10] Similarly, *R. v. Swain*[11] emphasizes personal autonomy of the individual as a foundational principle of our judicial process. While these cases arise in the criminal context, the principles are of more general application. When considered in the historical context it is likely that the adversary system, like the rule of law and the independence of the judiciary, is one of the foundational principles underlying the architecture of the Constitution and which must inform its interpretation.[12]

3. Accounting for Institutional Inefficiencies

§ 1.7 In considering the qualities of a properly functioning trial, we must recognize that the process is designed to protect these principles, which stand as conditions of justice, and that limitations are thereby inherently, and intentionally, imposed on unbridled "efficiency". The call for a reduction of cost and delay which is heard on all sides (and which—like "freedom" or "democracy"—all support) must be placed in the context of the basic institutional setting at stake. As was stated by the Honourable J.J. Spigelman AC, Chief Justice of New South Wales:

> Those who emphasise the significance of "value for money" often put aside issues of justice and freedom on the assumption that the process of planning for, and measurement of, performance will not seriously affect the attainment of such values. In my opinion, the pressure of the "value for money" approach and the use of performance indicators in the way it is frequently

[10] *R. v. Jolivet*, [2000] S.C.J. No. 28, [2000] 1 S.C.R. 751 (S.C.C.).

[11] *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

[12] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.); *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.); *Reference re Senate Reform*, [2014] S.C.J. No. 32 at paras. 23-26, 2014 SCC 32 (S.C.C.); *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.).

> advocated they be used—particularly as a basis for allocation for resources or determination of remuneration—will inevitably impinge on the quality of justice, particularly the requirements of a fair trial. The effects may slowly accumulate over a period of time, but it is quite wrong to assume them away as is often done. Public confidence in the administration of justice will be undermined by the creeping bureaucratisation of judicial decision making.
>
> The "value for money" perspective appears to assume that improvements in productivity are always available without compromising quality. Even in the case of reducing delays there are limits. Speed is like light. Too much of it obscures rather than illuminates. I am reminded of the microeconomic reformer who noticed that a Mozart string quartet takes as long to play in 2001 as it did in 1801. In 200 years there has been no improvement in productivity. This, of course, could only occur by an anticompetitive agreement amongst professional musicians. The antitrust authorities must investigate.
>
> Some things take time. Justice is one of them.
>
> The requirements of open justice, in which the quality of justice is the primary consideration, cannot be measured. Those requirements, not statistics, must continue to be regarded as the basic mechanism of judicial accountability.
>
> . . .
>
> Open justice does not provide the most efficient mode of dispute resolution. Nor, indeed, does democracy provide the most efficient mode of government. In both respects we have deliberately chosen inefficient modes of decision making.[13]

§ 1.8 There are inefficiencies in the process that, as stated by Chief

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[13] Hon. J.J. Spigelman, "Judicial Accountability and Performance Indicators" (Paper delivered at the 1701 Conference: the 300th Anniversary of the *Act of Settlement*, Vancouver, British Columbia, May 10, 2001) at 15-17.

Justice Spigelman, "are not unintentional"[14] and arise from values significant enough to be protected constitutionally—while many other spheres of government activity are not. There is no doubt but that by sitting *in camera* or *ex parte*, by adopting processes that eliminated the right to cross-examine on contested facts, by otherwise overlooking the conditions of a manifestly fair trial, or by foregoing the requirement that a judge rendering a decision give reasons to the parties, structural measures could be adopted that would increase the efficiency of the trial, but at the expense of quality of justice. But these "inefficiencies" are inherent in the process; they are a condition of its very ends. The determination of the legal rights of citizens in accordance with law and on the basis of fair procedure is inviolable.[15]

4. Beyond Structural Fairness: Other Institutional Objectives

§ 1.9 The structure of the civil trial is designed to achieve the fairness that Lord Bingham's framework demands. Fairness and resolution on the merits are also served by a variety of rules some of which are addressed in the chapters of this text, including ones which exclude from the proper scope of the trial irrelevant and prejudicial matters.

§ 1.10 But while proceedings are to be determined in accordance with fair process, it is also an aspect of the rule of law and objective of any trial, as has long been reflected in rules of court, that the resolution be "speedy and inexpensive".[16] More recently, the principle

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[14] Hon. J.J. Spigelman, "Judicial Accountability and Performance Indicators" (Paper delivered at the 1701 Conference: the 300th Anniversary of the *Act of Settlement*, Vancouver, British Columbia, May 10, 2001) at 16.

[15] This is the starting point of *Hryniak v. Mauldin*, [2014] S.C.J. No. 7 at para. 23, 2014 SCC 7 (S.C.C.): "This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised."

[16] In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.), the majority of

of proportionality has been incorporated to give a renewed emphasis to, or perhaps make more explicit, the need to balance "to the extent practicable" these imperatives.[17] Their reconciliation is best achieved by recognizing that while inefficiencies arising from the structure of the trial are necessary to its proper ends and thus, acceptable if not desirable, ones that arise from other causes are not.

§ 1.11 Despite its objectives, there is no doubt but that our trial process is often too slow, expensive, and suffers breakdown and failure. Failure to adhere to rules limiting what is permissible in opening, examination or argument, may be believed to be warranted or advantageous (and may be tolerated by the court), but will delay proceedings and impair trial fairness. Interlocutory procedure, including excessive discovery, can serve to inhibit, rather than facilitate the ability of parties to access the courts and obtain a resolution of the dispute on the merits; summary procedure can readily disintegrate into a false economy. Generally, and evoking the military metaphors that often accompany dialogue surrounding the trial, processes can be wielded in ways that may advance a client's battle against the adversary precisely because they promote delay, cost, or both, without any corresponding benefit to the quality of justice. What is counsel's responsibility in relation to these issues?

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the Court held at para. 39 that "[t]he s. 96 judicial function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provides some degree of constitutional protection for access to justice."

[17] See *Hryniak v. Mauldin*, [2014] S.C.J. No. 7 at para. 23, 2014 SCC 7 (S.C.C.) concerning proportionality generally. The phrase "so far as is practicable" is found in r. 1-3(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 in recognition that proportionality of process must give way, as necessary, to the right of any litigant to a decision on the merits.

C. THE RULE OF LAW, THE RULES OF COURT AND THE ROLE OF COUNSEL

1. Counsel's Office Defined

§ 1.12 While it is well-understood that counsel has a duty to represent the client before the court fearlessly, and with conviction, breakdown in the administration of justice often arises from counsel's failure to recognize that this representation is not as servant of the client, but officer of the court. The point has been put as follows:

> Failure to appreciate the dual role of the lawyer as an officer of the court and the representative of his or her client has been responsible for much misunderstanding of the lawyer's true function. The bar is an important part of the court. Originally, the serjeants were on an almost equal footing with judges and, as fellow members of the great guil[d] which administered the law, they and the judges addressed one another as "brother" and lodged together at the Serjeants' Inn. To this day the lawyer is not the servant of either the client or the court. The lawyer is, in the words of Lord Eldon, "an officer assisting in the administration of justice" and the status of lawyers as officers of the court has been one of the most important influences in formulating the ethical principles which govern their conduct.[18]

There is not, properly viewed, any conflict between these obligations. It is no part of the role of counsel, having the right of audience in the courts, to take steps which do not advance the proper administration of justice. Rather, it is only the legitimate interests of the client, those that are consistent with the trial process, that counsel is entitled to advocate, and only through legitimate means. The function of an advocate was classically described by Justice Crampton as follows:

> I would say of him as I would say of a member of the House of Commons—he is a representative, not a delegate. He

[18] Mark Orkin, *Legal Ethics*, 2d ed. (Toronto: Canada Law Book, 2011) at 11-12.

> gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer.[19]

§ 1.13 Fulfilling the role of counsel may accordingly entail refusing certain instructions, or even failing to advance the client's interests. In the leading Australian decision, *Giannarelli v. Wraith*, Chief Justice Mason stated in this respect:

> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary.[20]

Rondel v. Worsley remains the leading case on the nature of the relationship between the duty of commitment to the client, and the paramount duty to the cause of justice that inheres in the role of counsel.[21] In his judgment in the Court of Appeal, Lord Denning stated the basic position as follows:

> [An advocate] is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No one save [h]e can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility he must . . . do all he honourably can on behalf of his client. I say "all he honourably can" because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is

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[19] *R. v. O'Connell* (1844) 7 Ir. L.R. 261 at 312-313.

[20] *Giannarelli v. Wraith*, [1988] H.C.A. 52 at para. 12.

[21] *Rondel v. Worsley*, [1966] 3 All E.R. 657, affd [1967] 3 All E.R. 993 (H.L.). This case remains authority for this proposition, notwithstanding that its *ratio decidendi*, that barristers are immune from actions for negligence, is no longer the law in England. Nor is it the law in Canada.

> the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.[22]

On further appeal, this relationship between counsel and the court was confirmed. The various speeches of the law lords catalogued matters that fall outside counsel's role, properly understood, and in respect of which counsel must disregard the client's wishes, or what the client may perceive to be his best interests. They include not misleading the court, not casting aspersions on other counsel or witnesses without a proper basis, and not withholding authorities or documents which are contrary to his client's interests but which the law or standards of the profession require him to produce.[23] Further, they include not taking instructions from the client to cross-examine where it is not in accordance with the usual principles and practice of the bar, but "in the hope that the opposition may be frightened into submission", not to keep irregularities for appeal, but to take the point then and there, and not to call witnesses to placate a client if counsel believes that they will do nothing to advance the client's case.[24] It is a "duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices. To a certain extent every advocate is an 'amicus curiae'."[25]

§ 1.14 If counsel uses the process, deliberately or through lack of professional discipline, to frustrate rather than to facilitate an efficient resolution of the proceeding on the merits, she thus necessarily impairs the rule of law and thwarts a purpose of the trial process itself. This includes the attempt to lead evidence which it cannot reasonably be argued to be both relevant and admissible, whether intentional or through ignorance. Likewise, if counsel

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[22] *Rondel v. Worsley*, [1967] 1 Q.B. 443 at 501 (C.A.).

[23] *Rondel v. Worsley*, [1967] 3 All E.R. 993 at 998 (H.L.), *per* Lord Reid.

[24] *Rondel v. Worsley*, [1967] 3 All E.R. 993 at 1034 (H.L.), *per* Lord Morris.

[25] *Rondel v. Worsley*, [1967] 3 All E.R. 993 at 1011 (H.L.), *per* Lord Morris.

exercises procedural rights for the purpose of causing the other side unnecessary delay or expense, and thereby to frustrate or delay rather than to facilitate the process, she impairs the rule of law, the objects of the rules of court and violates the proper role of counsel itself.

2. Independence of Counsel

§ 1.15 If, as Mark Orkin suggests, a failure by counsel to appreciate her "dual role" leads to much misunderstanding of counsel's true function,[26] a corresponding failure to maintain an appropriate degree of independence from the client only exacerbates the issues that arise. Counsel's duty to the client is often expressed as a duty of "zealous" representation. It is worthwhile, however, to pause and reflect on the meaning of the term:

> Zealous, *adj.*: full of or incited by zeal; characterized by zeal or passionate ardour; fervently devoted to the promotion of some person or cause; intensely earnest; actively enthusiastic.[27]

While the use of the term "zealous" bespeaks the foundational duty of undivided loyalty to the client (free from conflict, either personal or to another client), which itself facilitates courageous commitment to the client's interests, if used without qualification, the single-minded devotion which some of its meanings import may contribute to an erroneous view that the lawyer's duty to the client is a paramount obligation, rather than one that is suborned to service of the administration of justice. While it perhaps bears the quality of an oxymoron, the courts have thus described "excessive zeal" as behaviour that is in derogation of the higher and controlling obligation as officer of the court.[28]

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[26] Mark Orkin, *Legal Ethics*, 2d ed. (Toronto: Canada Law Book, 2011).

[27] *Oxford English Dictionary* (Oxford University Press), *sub verbo* "zealous".

[28] *R. v. Dunbar*, [2003] B.C.J. No. 2767 at para. 339, 2003 BCCA 667 (B.C.C.A.), leave to appeal refused [2004] S.C.C.A. No. 30 (S.C.C.).

§ 1.16 Michael Code (now Justice Code) has noted that the "traditional adversarial model" may work badly in the hands of irresponsible or inexperienced counsel due to a failure to maintain an appropriate degree of independence from forces, including the client, that may conflict with the proper administration of justice:

> In particular, the traditional adversarial model allows counsel for the Crown and the defence to prepare and then call the case with little or no judicial supervision. This model generally works well when counsel for both sides act responsibly in the sense that they consistently exercise good judgment and maintain an appropriate degree of independence from their client and/or from the influences of the media and popular opinion. However, it is a model that works badly in the hands of irresponsible or simply inexperienced counsel.[29]

Summarizing what is required of responsible counsel, particularly in a long or complex trial, Justice Code continues:

> It is obvious that long and complex trials place a particularly high premium on counsel's ethical duties as officers of the court. Making responsible admissions of matters that cannot realistically be disputed, refusing to make frivolous arguments that have no real basis in fact or law and treating your opponent with respect and courtesy are all hallmarks of the professionally responsible lawyer. When counsel abide by these ethical duties in large complex cases, their conduct will invariably shorten and simplify the trial and the pre-trial motions. The result will be a better quality of justice both for the client and for the overall administration of justice.[30]

When it comes to placing the duty of counsel to the client within the context of the paramount duty to the proper administration of justice, a measure of independence from the client's interests, rather than

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[29] Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomena" (2008) 53 Crim. L.Q. 42 at 456.

[30] Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomena" (2008) 53 Crim. L.Q. 42 at 463.

blind devotion to their pursuit, is required of counsel. To maintain an appropriate degree of independence can be challenging, particularly with a difficult client. It is, however, not something that can be appropriately swept aside or justified in the pursuit of "zealous representation".

§ 1.17 Otherwise, Justice Code's reference to the "traditional adversarial model" relates to the degree of autonomy that the adversary system provides to the parties in conducting a trial, and limitations, perceived or real, on the trial judge's ability to control that conduct. This topic is addressed in the following section.

D. JUDICIAL CONTROL

1. The Challenge of Difficult Counsel

§ 1.18 There is no question but that the trial process regularly presents opportunities for irresponsible counsel to use it in ways that frustrate rather than facilitate the ends of justice. They include acting without civility to all participants in the process, including the making of unfounded attacks on witnesses or opposing counsel for any purpose. They also include such matters as the misstating of evidence, the omission or misstatement of governing authorities, argument of the case during opening and the making of frivolous arguments generally. Yet others include any attempt to delay the hearing of a matter simply to avoid the day of "reckoning" for the client.

§ 1.19 It is also a reality that it is frequently difficult for the trial judge to monitor these bounds closely. While there are certain remedies available,[31] judges are often reluctant to resort to them given the fundamental construct of the adversary system and because it is often difficult to know when a line has been crossed. For a trial judge, "unknowns" may lie behind the way a case is being conducted, arising

[31] See discussion in Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L.R. 97.

from the manner that it unfolds through witnesses over time, as well as the restrictions on transparency imposed by solicitor-client and litigation privilege. A presumption of good faith also operates to make the judge, who must also be concerned with avoiding any perception of partiality, reluctant to intervene at too early a stage. As a result, it is often said that "great latitude" is given to counsel in examining witnesses and making arguments. Nevertheless, there is a role for the judge to play to control abuse and inefficiency.

2. Interference with Substantive Fairness: The Merits

§ 1.20 The first dimension of a judge's control arises from the individual litigant's perspective as a participant having a right to a "fair trial" in civil proceedings, with the outcome being a determination on the merits. Leaving aside the extent to which the legislature may be able to impair the common law conception of a fair trial as a matter of constitutional law,[32] it is incontrovertible that a party to civil proceedings is entitled to a fair trial, in accordance with the process as generally understood. In this regard, appellate intervention based on a breach of the principles of trial fairness will only occur where there has been a "substantial miscarriage of justice" or where there is at least a justifiable lack of confidence in the integrity of the outcome.

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[32] In *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, 2005 SCC49 (S.C.C.), the Supreme Court of Canada suggested, in *obiter dicta*, that there is no individual right to a "fair trial" in civil proceedings, reasoning from the absence of a parallel provision to the protection afforded criminal trials under s. 11(c) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Leaving aside the *Charter*'s explicit protection of individual rights, and following the decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.), the extent to which the structure of the Canadian constitution, the principles on which it is based and the requirements of the administration of justice require a substantively fair trial process (including summary trial proceedings) is an open question. Certainly, *Imperial Tobacco* itself recognized that Parliament could not impair the adjudicative function of s. 96 courts and the strength of the right to a fair trial at common law is clear.

When it comes to appellate intervention, any review is by definition retrospective, and viewed through the prism of the time and cost already invested by the parties and the court in arriving at a determination. This leads to further reluctance to intervene. And as to issues which arise from conduct of the trial, which simply occasion undue delay and cost, there is little remedy for the individual litigant by way of retrospective control.

§ 1.21 These limitations are well illustrated by *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*[33] and *R. v. Felderhof.*[34] Civility, given its ordinary meaning, is a word which in all its aspects imports commendable behaviour by counsel, including acting with courtesy and refraining from rudeness of any kind. It is a precept of all professional codes of conduct and practicing with civility to all participants in the process is good advocacy, as will be returned to below. However, incivility has come to bear a narrower and more significant meaning, in relation to trial and other court proceedings.[35] In *Marchand* and *Felderhof*, the Court of Appeal addressed incivility, which included invective and unjustified personal attacks against opposing counsel, the nature of which were not only found to be improper, but which were alleged to have impaired the fair trial of the proceedings.[36] It was argued on both appeals that the failure of the trial judge to intervene, or intervene

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[33] *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428, 51 O.R. (3d) 97 (Ont. C.A.), leave to appeal refused [2001] S.C.C.A. No. 66 (S.C.C.).

[34] *R. v. Felderhof*, [2003] O.J. No. 4819, 68 O.R. (3d) 481 (Ont. C.A.).

[35] Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L.R. 97 at 103.

[36] In neither *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428, 51 O.R. (3d) 97 (Ont. C.A.) nor *R. v. Felderhof*, [2003] O.J. No. 4819, 68 O.R. (3d) 481 (Ont. A.) was the appellate court considering the consequence of incivility in the sense of mere rudeness, use of sarcasm or other like discourtesy, which could not reasonably be argued to result in substantive trial unfairness. It is invective of a form that can have the effect of impairing a fair trial.

sufficiently, to restrain the incivility caused or contributed to a reasonable apprehension of bias on the part of the trial judge, and a loss of jurisdiction.[37]

§ 1.22 In *Marchand*, the Court of Appeal confirmed that, while the conduct was deplorable "for this court, the question must be whether in light of what went on in the courtroom there was a reasonable apprehension of bias on the part of the trial judge, thus depriving the appellants of a fair trial".[38] While censuring counsel, the Court of Appeal in both *Marchand* and *Felderhof* found that a fair trial had not been prevented and dismissed the appeals.[39] This illustrates both the inherent limits of appellate intervention, particularly in civil matters,[40] and that a litigant's right to a fair trial on the merits does

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[37] See Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L.R. 97 at 105. In Code's paper, which considered the development in the law as reflected in these decisions, he identified distraction of opposing counsel from her proper function, distraction of the court from its proper function, delay in the proceeding directly and indirectly by poisoning the relations between counsel and loss of confidence of the parties in the process as the consequences of such misconduct that may impair a fair trial.

[38] *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428 at para. 149, 51 O.R. (3d) 97 (Ont. C.A.), leave to appeal refused [2001] S.C.C.A. No. 66 (S.C.C.).

[39] In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428, 51 O.R. (3d) 97 (Ont. C.A.), the successful defendants were denied a substantial costs award.

[40] See Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L.R. 97 at footnote 92. Justice Code expresses concern at the limits of appellate remedies, given the severity of the conduct in these cases, referencing *R. v. O'Conner*, [1995] S.C.J. No. 98, 103 C.C.C. (3d) 1 (S.C.C.) and *United States of America v. Cobb*, [2001] S.C.J. No. 20, 152 C.C.C. (3d) 270 (S.C.C.). He notes the obvious distinction between the available remedy against the Crown addressed in those cases (a stay), and the defence. In civil cases, of course, as private litigation, it is difficult to conceive of circumstances where appellate control is not ultimately driven by the end of a resolution on the merits.

not provide a standard with which to measure the metes and bounds of counsel's duty to the proper administration of justice.

§ 1.23 In *Groia v. Law Society of Upper Canada*,[41] the Supreme Court of Canada addressed when uncivil conduct in the courtroom amounts to professional misconduct. Mr. Groia, in acting as criminal defence counsel in the *Felderhof* trial, was involved in a series of in-court disputes with the Ontario Securities Commission prosecutors.[42] The Law Society initiated an independent investigation that led to a disciplinary hearing which found Mr. Groia guilty of professional misconduct.[43] Mr. Groia appealed the Law Society's decision until it reached the Supreme Court of Canada, which overturned the finding of professional misconduct.[44] The *Groia* case clarified the approach and standard for determining when incivility in the courtroom meets

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[41] *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27, 2018 SCC 27 (S.C.C.).

[42] See *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at paras. 20-26, 2018 SCC 27 (S.C.C.). Mr. Groia's uncivil behaviour stemmed from a misinterpretation of the law of evidence in relation to the document disclosure obligations of the Ontario Securities Commission prosecutors and of the correct process for raising abuse of process allegations.

[43] *Law Society of Upper Canada v. Groia*, [2012] L.S.D.D. No. 92, 2012 ONLSHP 94 (Law Society of Upper Canada), affd [2013] L.S.D.D. No. 186, 2013 ONLSAP 41 (Law Society of Upper Canada Appeal Panel), [2013] L.S.D.D. No. 38, 2013 ONLSHP 59 (Law Society of Upper Canada Hearing Panel), [2014] L.S.D.D. No. 43, 2014 ONLSTA 11 (Law Society Tribunal Appeal Decision).

[44] *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at paras. 122-125, 2018 SCC 27 (S.C.C.). The majority found that, although on its face, Mr. Groia's courtroom conduct was uncivil and seemingly amounted to professional misconduct, when assessed in light of the contextual factors, including Mr. Groia's misinterpretation of the law, the "hands-off approach" taken by the trial judge and the lack of direction provided from the trial judge to correct Mr. Groia's error in raising abuse of process allegations, Mr. Groia acted in good faith and had a reasonable basis for his allegations. The majority noted that the Appeal Panel failed to consider contextual factors, specifically the presiding judge's reaction to the lawyers' behaviour, in its finding of professional misconduct.

the standard of professional misconduct.

§ 1.24 Of the place of civility in the trial process, Moldaver J., writing for the majority, stated:

> The trial process in Canada is one of the cornerstones of our constitutional democracy. It is essential to the maintenance of a civilized society. Trials are the primary mechanism whereby disputes are resolved in a just, peaceful, and orderly way.
>
> To achieve their purpose, it is essential that trials be conducted in a civilized manner. Trials marked by strife, belligerent behaviour, unwarranted personal attacks, and other forms of disruptive and discourteous conduct are antithetical to the peaceful and orderly resolution of disputes we strive to achieve.
>
> By the same token, trials are not—nor are they meant to be—tea parties. A lawyer's duty to act with civility does not exist in a vacuum. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour. Care must be taken to ensure that free expression, resolute advocacy and the right of an accused to make full answer and defence are not sacrificed at the altar of civility.[45]

§ 1.25 Importantly, the Supreme Court of Canada affirmed the duty of the trial judge to intervene.[46] The majority, referencing *Marchand*, stated that "[t]his duty includes controlling uncivil behaviour that risks undermining the fairness—and the appearance of fairness—of the proceeding".[47] In *Marchand*, civility was said to be the responsibility not only of counsel, but also "very much the responsibility of the trial judge".[48] Similarly, in *Felderhof*, it was

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[45] *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at paras. 1-3, 2018 SCC 27 (S.C.C.).

[46] *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at para. 104, 2018 SCC 27 (S.C.C.).

[47] *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at para. 104, 2018 SCC 27 (S.C.C.).

[48] *Marchand (Litigation guardian of) v. Public General Hospital Society of*

further noted that "counsel was bound by the standards of the professional to keep his rhetoric within reasonable bounds. If he was unable to do so, the trial judge has the responsibility referred to in *Marchand.*"[49] In *Felderhof*, the Court noted the disruption caused by such submissions distracted counsel and the court from the real issues in the trial. *Marchand*, *Felderhof* and *Groia* all speak to the professional obligations, written and unwritten, by which lawyers are expected to abide while conducting themselves inside a courtroom.[50]

3. The Due Administration of Justice

(a) Focusing on institutional values

§ 1.26 Before turning to the question of trial fairness to which it was substantively limited, the Court of Appeal in *Marchand* stated that the trial judge, while well aware of the acrimony in the courtroom, chose to largely ignore it and had thereby been probably "too passive."[51] The

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Chatham, [2000] O.J. No. 4428 at para. 148, 51 O.R. (3d) 97 (Ont. C.A.), leave to appeal refused [2001] S.C.C.A. No. 66 (S.C.C.). In *Marchand*, a separate element of the appeal was an allegation that the trial judge failed to control defence counsel's incivility to the plaintiff. In rejecting this ground, the court held that certain conduct, while unprofessional, did not impair the fairness of the trial, and otherwise held that aggressive, even loud cross-examination, short of intimidation, is not unfair.

[49] *R. v. Felderhof*, [2003] O.J. No. 4819 at para. 96, 68 O.R. (3d) 481 (Ont. C.A.).

[50] See also The Advocates' Society, *Principles of Civility and Professionalism for Advocates* (February 20, 2020), online: https://www.advocates.ca/Upload/Files/PDF/Advocacy/ InstituteforCivilityandProfessionalism/Principles_of_Civility_and_Professionalism_for_AdvocatesFeb28.pdf, the prior version of which was endorsed by the Ontario Court of Appeal on several occasions: *Male v. Business Solutions Group*, [2013] O.J. No. 2669 at para. 19, 2013 ONCA 382 (Ont. C.A.); *Groia v. Law Society of Upper Canada*, [2016] O.J. No. 3094 at para. 13, 2016 ONCA 471 (Ont. C.A.). The latest version of these principles has been endorsed by the court in *Christian-Philip v. Rajalingam*, [2020] O.J. No. 1332 at para. 43, 2020 ONSC 1925 (Ont. S.C.J.).

[51] *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428 at para. 147, 51 O.R. (3d) 97 (Ont. C.A.), for leave to appeal refused [2001] S.C.C.A. No. 66 (S.C.C.).

Court of Appeal then stated:

> Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is a shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves. Unfortunately, we have no doubt that the failure to satisfactorily discharge this responsibility in this case tarnished the reputation of the administration of justice. This case underlines the importance being given by leaders of the bench and bar to improving civility in the courtroom.[52]

§ 1.27 The concern that the conduct "tarnished the reputation of the administration of justice" is also a feature of the court's reasons in *Felderhof* and *Groia*.[53] In *Groia*, Moldaver J. states:

> [I]ncivility can erode public confidence in the administration of justice—a vital component of an effective justice system: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689. Inappropriate vitriol, sarcasm and baseless allegations of impropriety in a courtroom can cause the parties, and the public at large, to question the reliability of the result: see *Felderhof ONCA*, at para. 83; *Marchand (Litigation guardian) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, at para. 148. Incivility thus diminishes the public's perception of the justice system as a fair dispute-resolution and truth-seeking mechanism.[54]

Similarly, in *Landolfi v. Fargione*,[55] the court considered the impact of

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[52] *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428 at para. 148, 51 O.R. (3d) 97 (Ont. C.A.), leave to appeal refused [2001] S.C.C.A. No. 66 (S.C.C.).

[53] See *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at para. 5, 2018 SCC 27 (S.C.C.).

[54] *Groia v. Law Society of Upper Canada*, [2018] S.C.J. No. 27 at para. 67, 2018 SCC 27 (S.C.C.).

[55] *Landolfi v. Fargione*, [2006] O.J. No. 1226, 79 O.R. (3d) 767 (Ont. C.A.).

ad hominem attacks by counsel against his opponent, the court noted that "[s]uch attacks are not only uncivil and unprofessional, left unchecked they also endanger trial fairness and stain the administration of justice".[56]

§ 1.28 Thus, a second dimension of judicial control views the matter not simply from the perspective of the individual's right to a fair trial, but from the perspective of the protection and advancement of our institutional values. And while it cannot be seriously contended that a trial judge does not have the power to control conduct that would stain the reputation of the administration of justice, *Marchand*, *Felderhof*, *Groia* and *Landolfi* make clear that, where such conduct can be identified, the trial judge has not only the power but also a duty to intervene. The due administration of justice is a "real time" institutional imperative deserving of ongoing protection by the trial judge and counsel. Even though measured substantively two trials may have "fair" outcomes in the sense that the outcome cannot be shown to be incorrect, they may be unequal in the degree to which they achieve access to justice and other process values, and importantly, the extent to which the public's confidence in the process is enhanced or damaged by the manner in which it is conducted by its officers.

(b) Fulfilling institutional objectives

§ 1.29 And if the trial judge has a power and duty to intervene to protect the due administration of justice, that power is not properly limited to misconduct deserving censure. The purpose of this aspect of judicial control is not to discipline counsel, but to protect and advance institutional values. In *R. v. Snow*, the Ontario Court of Appeal stated:

> ... a trial judge is certainly entitled to control the proceedings and to intervene when counsel fail to follow the rules or abide by rulings. A trial judge is not a mere

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[56] *Landolfi v. Fargione*, [2006] O.J. No. 1226 at para. 88, 79 O.R. (3d) 767 (Ont. C.A.).

> observer who must sit by passively allowing counsel to conduct proceedings in any manner they choose. It is well recognized that a trial judge is entitled to manage the trial and *control the procedure to ensure the trial is effective, efficient and fair to both sides. …*[57]

The trial management power is justified by the end of ensuring fairness and efficiency in the administration of justice. While the cases discussed above largely relate to conduct worthy of censure, more commonly, counsel's failure to use the court's process efficiently and effectively arises from a lack of experience, or application. Failure to understand a case, or to distil it to its essential aspects, may cause adjournments and delay, including through inadequate court time being reserved for a matter. Where actual adjournments do not occur, similar issues can give rise to irrelevant or unnecessary evidence being called, including the entry into evidence of excessive documentary evidence and prolix argument. Where identifiable, it is again certainly within the purview of the judge by questioning counsel or otherwise by encouragement and exercise of a measure of control to work to limit matters leading to delay and attendant expense where, although it does not threaten the fairness of the trial process, it is also unnecessary for resolution on the merits. It is only consistent with the joint responsibility of judge and counsel to the due administration of justice that both play a part effecting this end.

§ 1.30 In *Hryniak v. Mauldin*,[58] in calling for a "culture shift", the Supreme Court of Canada noted that the expense and delay of a full trial can prevent access to justice. And while the Court was addressing the use of summary process, it further stated that this culture shift requires judges to actively manage the legal process in line with the

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[57] *R. v. Snow*, [2004] O.J. No. 4309, 190 C.C.C. (3d) 317 at 327 (Ont. C.A.) [emphasis added]. The trial judge was again faced with counsel misconduct, which he actively tried to control. The Court of Appeal found the interventions warranted, although noted that it was regrettable that the trial judge's frustration with counsel caused him to lose judicial demeanour.

[58] *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, 2014 SCC 7 (S.C.C.).

principle of proportionality. Picking up on this theme, in *Trial Lawyers*, and although in dissent on the issue of the constitutionality of British Columbia's court fees scheme at issue, Rothstein J. noted the corresponding power of the trial judge to control proceedings and, specifically, to prevent unnecessary delay:

> ... Active judicial case management is critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants. I agree with the trial judge that courts must be careful, in situations involving self-represented litigants, not to appear to refuse relevant evidence (par. 19). But judges must enforce the requirement for relevance so that evidence that does not bear directly on the issues will not prolong a trial. In this context, judges are entrusted with the obligation to manage the resources of the court in the interests of justice and, with respect to hearing fees, to have regard for the interests of the litigants. As this Court has recently noted in the context of summary judgment proceedings, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 61, quoting *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 60). There is no reason to think that this case-management principle of *Hryniak* should not extend to all court proceedings, especially those involving self-represented parties.[59]

The remarks directed to the particular issues posed by self-represented litigants are noteworthy not only in their expression of the breadth of the judicial case management power, but also, more importantly, in that they throw into sharp relief a critical component of counsel's value to the court and the client. The difference between counsel and an in-person litigant is not simply training in the law and

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[59] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59 at para. 110, 2014 SCC 59 (S.C.C.).

experience as an advocate, but also counsel's very status as an officer of the court whose agency includes the obligation to ameliorate unnecessary delay. The ability to use the process in ways that further the expeditious resolution of the matter is an integral part of what counsel has to offer not only to the court, but also to the client, as is the ability to explain to the client that participation in the process entails conformity with its objects. Conversely, counsel who does not maintain this attitude and relation to the client, gives up this vital distinction, and impairs not only the process, but also her own value.

E. ACCESSIBILITY OF THE LAW AND DELAY

> *As to precedents, to be sure they will increase in the course of time; but the more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles.*
>
> Boswell, *Life of Johnson*[60]

§ 1.31 As noted above, when speaking of accessibility of the law, Lord Bingham "means it must be knowable, that is to say generally prospective, and to the widest extent available and understandable."[61] Today written judgments are the norm, except in jury trials, and the ready availability of decisions of all levels of court on all subjects of legal inquiry, and the lack of textbooks or digests to distil them, result in a legal machine where the reinvention of the wheel is the norm rather than the exception.

§ 1.32 This proliferation of precedent in our time and the lack of tools to systematically distil it is an enemy of clarity in the law, and by complicating the task of counsel and the court, is an engine of delay and cost. One can only speculate on the full extent of the multiplication

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[60] James Boswell, *Life of Johnson* (United Kingdom: Everyman's Library, 1791).

[61] Martin R. Taylor, Q.C., "The Rule of Law and the Judicial Process in Canada" (2013) 71:4 The Advocate 503 at 507.

of effort undertaken for clients by individual counsel on issues which may be of first impression to counsel eager to do a proper job for their client, but which are regularly encountered across the profession as a whole. The proliferation of documentation of all kinds in this age has a similar consequence. Our ability to readily manage information has not kept pace with our ability to produce or reproduce it. The time and effort necessary to distil the available information, both legal and factual, is a challenge that too often is pushed down the track toward the trial court, where the distillation, belatedly must occur. But the challenges of a busy practice notwithstanding, it is the very nature of the role of counsel to do the necessary distillation as part of trial preparation to advance accessibility of the law and avoid unnecessary cost and delay.

F. GOOD ADVOCACY

§ 1.33 It is also a reality that practicing in a manner which is consistent with both the principles of the trial process and its objectives in relation to cost and delay is good advocacy—it works. It aligns counsel not only with the demands of the administration of justice, but with the natural sympathies of the judge. One need only stop and reflect on the characteristics of most leading counsel to recognize this reality. As stated by the authors of *Making your Case: The Art of Persuading Judges*:

> An ever-present factor, however, and one that you can always influence, is the human proclivity to be more receptive to argument from a person who is both trusted and liked. All of us are more apt to be persuaded by someone we admire than by someone we detest. In the words of Isocrates: "[T]he man who wishes to persuade people will not be negligent as to the matter of character; he will apply himself above all to establish a most honourable name among his fellow-citizens; for who does not know that words carry greater conviction when spoken by a man of good repute?" Aristotle further noted that character makes a special difference on disputed points: "We believe good men more fully and more readily

> than others: this is true ... where exact certainty is impossible and opinions are divided."
>
> Your objective in every argument, therefore, is to show yourself worthy of trust and affection. Trust is lost by dissembling or conveying false information—not just intentionally but even carelessly; by mischaracterizing precedent to suit your case; by making arguments that could appeal only to the stupid or uninformed; by ignoring rather than confronting whatever weighs against your case. Trust is won by fairly presenting the facts of the case and honestly characterizing the issues; by owning up to those points that cut against you and addressing them forthrightly; and by showing respect for the intelligence of your audience.
>
> As for affection, you show yourself to be likable by some of the actions that inspire trust, and also by the lack of harsh combativeness in your briefing and oral argument, the collegial attitude you display toward opposing counsel, your refusal to take cheap shots or charge misbehavior, your forthright but unassuming manner and bearing at oral argument—and, perhaps above all, your even-tempered good humor.[62]

Similarly, and more directly, Demarest J. noted that in her experience incivility generated negative results:

> Surprisingly, some advocates seem to believe that demeaning others with sarcasm or ridicule adds weight to their position. In most cases, such tactics divert attention from the real issues and provoke *animus*. I make this observation, not in the abstract, but from daily experience of watching litigator's behaviour in my own courtroom and from noting my own reactions. I have often

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[62] Antonin Scalia and Bryan A. Garner, *Making your Case: The Art of Persuading Judges* (St. Paul, MN: Thomson/West, 2008) at xxiii-xxiv [quoting Isocrates, *Antidosis* (ca. 353 B.C.; George Norlin trans.) in *Readings in Classical Rhetoric*, 47, 49 (Thomas W. Benson & Michael H. Prosser eds., 1988); Aristotle, *Rhetoric*, Book 1, Ch. 2 (ca. 330 B.C.), in *Rhetoric and Poetics of Aristotle* 25 (W. Rhys Roberts & Ingram Bywater trans., 1954)].

> appreciated the merits of an argument or objection only after rendering an adverse decision because counsel's baiting, sarcasm, rudeness and general disrespect have distracted me from the legal issues.[63]

In a process which discourages appeal to passion and prejudice as the basis for decision-making, persuasion is best achieved by fostering the conditions of rational discourse and agreement.

§ 1.34 To these observations may be added that firmness and courtesy are quite compatible. Courtesy in response to incivility, rather than like for like escalation, will mark out the latter for what it is. Incivility or bullying towards witnesses may please clients but is not likely to impress a trier of fact. That is not to say that the ability to control an examination and persistence are not necessary tools of a skilled counsel when confronted with a recalcitrant witness. But obtaining a seemingly favourable answer from a frightened or confused witness is often of little impact.

G. CONCLUSION

> What has been is what will be,
> and what has been done is what will be done,
> and there is nothing new under the sun.
> Is there a thing of which it is said,
> "See, this is new"?

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[63] C.E. Demarest, "Civility in the Courtroom from a Judge's Perspective" (1997) 69 N.Y.S.B.J. 24. More generally, as noted by Chief Justice Burger of the United States Supreme Court, civility is a condition of "rational discourse" and "deliberative process":

> Without civility no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat.

Warren E. Burger, "The Necessity for Civility" (Address to the American Law Institute May 18, 1971) in 52 F.R.D. 211 (1971) at 2, 6.

It has been already
in the ages before us.

Ecclesiastes 1: 9-10

§ 1.35 In a 1906 address to the American Bar Association, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice", Roscoe Pound, Dean of Harvard Law School, argued that:

> ... in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point ... .
>
> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors and particular cases, but to give the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We may not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abetters of lawlessness.[64]

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[64] Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (Presented at the annual convention of the American Bar Association in 1906) at 7-8.

These words, of Professor Pound should give all participants in the justice system pause for reflection.

ADDICTED TO JUSTICE*

John W. Reed**

Those of you who have attended earlier conventions will recall that I usually speak lightheartedly about the lawyer's life. Today, for a change, I ask you to think with me about something serious—something fundamental, something that underlies all that a trial lawyer does, something that is in our genes. From the listed title, you know that I am going to talk about "justice."

Among the many words in a lawyer's lexicon, one of the most exalted is the word "justice." It is also one of the least used instrumentally. We tend to invoke it on ceremonial occasions, often thoughtlessly, or in philosophical discussions. We use the term "justice" to characterize aspirations or results. But we are skeptical about its usefulness as a persuasive dynamic in the course of advocacy in individual cases, because what appears just to one party often appears unjust to his adversary—one person's justice may be another person's injustice—and to use the term "justice" rhetorically in an adversary setting seldom carries much weight.

But we rightly celebrate justice as a systemic concept. "EQUAL JUSTICE UNDER LAW" is inscribed above the main entrance to the

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* Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Peninsula Papagayo, Costa Rica, March 9, 2007; first published in the *International Society of Barristers Quarterly*, vol., 42, no. 2 (2007), at 163.

** Formerly the Thomas M. Cooley Professor of Law Emeritus, University of Michigan Law School; Academic Fellow, Editor, and Administrative Secretary, International Society of Barristers. John Reed died on March 6, 2018, nine months short of becoming a centenarian. A man of sagacity, eloquence, and wit, John knew just what to say in just the right way at just the right time. We miss his voice, but we can happily revisit his words.

United States Supreme Court Building. Systems of laws and courts are called justice systems—we speak of the criminal justice system, the civil justice system. We bestow the title of justice on the judges of our highest courts. (Fortunately, we no longer have justices of the peace, whose short titles, "J.P.," often stood for "judgment for the plaintiff.") The pledge of allegiance to the U.S. flag proclaims a nation "with liberty and justice for all." But however noble the concept, we use the term "justice" in so many contexts and so mindlessly and casually that it has little meaning for us, and certainly no fixed content.

CATEGORIES OF JUSTICE

Any philosophical discussion of justice breaks the concept into two broad categories: retributive justice and distributive justice. Retributive justice—sometimes called corrective justice—is concerned with the proper response to wrongdoing. It is the reordering of relationships between parties where they come into conflict. Distributive justice—social justice—is concerned with the proper distribution of good things-wealth, power, reward, respect—among different people. It is the ordering or reordering of societal relationships to provide optimum fairness and equity within a population.

Corrective justice is the goal of lawsuits and other forms of dispute resolution. Distributive justice is the goal of social arrangements at large—of maximizing fairness in society. Various means may be used to achieve that fairness in the broad society: primarily legislation and social movements, of course, but also on occasion individual cases that create or change doctrine. *Brown v. Board of Education*, for example, not only provided corrective justice for particular school children in Topeka, Kansas; its doctrine also provided distributive justice in the field of education throughout this nation.

Although few of us get to try cases with such an impact on society, trial lawyers often promote distributive justice as legislators,

or as active members of civic and professional bodies. Most of you work at justice-producing tasks as bar presidents, chairs of task forces, members of nonprofit community boards, and on and on—working for a fairer and more just society.

Although many, and perhaps most, trial lawyers acting as citizens in the public arena concern themselves with social justice—with maximizing fairness in our society—all trial lawyers seek retributive justice, corrective justice, case by case. By definition, that is your work.

A BRIEF HISTORY OF CORRECTIVE JUSTICE METHODS

So, how may we seek corrective justice? By what modes and devices and systems can disputes best be resolved? By what means can guilt or innocence be most fairly determined and justice most surely achieved?

Over the centuries there has been a considerable array of methods, most of them based on superstition, and all of them unacceptable to modem minds.

Not so long ago, many controversies were settled by duel—duels with swords or, later, pistols. You well remember that Aaron Burr, offended by Alexander Hamilton's defamatory remarks at a dinner party, challenged him to a duel, and in that duel killed Hamilton. I don't know what the insult was. There are memorable insults floating around for anyone to use. Do you remember Billy Wilder's classic insult about a music critic? "He has Van Gogh's ear for music." Groucho Marx said to his hostess, "I've had a perfectly wonderful evening. But this wasn't it." And Samuel Johnson said of someone, "He is not only dull himself, he is the cause of dullness in others." I don't know what Hamilton said about Burr, but whatever it was, death by duel does seem an extreme response to a dinner table conversation. Occasionally, justice was dispensed by drawing lots to decide winners and losers—admittedly an economical way but also

an irrational way of resolving disputes, with no relationship to the merits.

Most dramatic were trials by ordeal, where the guilt or innocence of an accused was determined by subjecting him to a painful task. If the task was completed without injury, or the injuries sustained healed quickly, the accused was considered innocent. Dating back to at least Hammurabi, these modes of trial came later to be based on the premise that God would help the innocent by performing miracles on their behalf.

Most common of the ordeals were fire and water—fire mostly for the nobility and water for commoners. The fire ordeal required the accused to walk nine paces over red-hot ploughshares or holding a red-hot iron. Innocence could be established by a lack of injury—absence of blisters, that is; but the more usual procedure—since almost always the flesh was seared—was to bandage the wound and have it examined three days later by a priest, who would pronounce either that God had intervened to heal it, or that it was festering. In the latter event the poor soul would be exiled or executed.

Ordeal by water was even worse. The accused was thrown into water and if he sank, he was declared innocent (though drowned!), but if he floated—that is to say, if the water rejected him—he was guilty and taken out and hanged. A real no-win situation.

In only one of all the ancient modes of dispute resolution that I have mentioned thus far—the duel—did the accuser have to undergo the ordeal together with the accused. But there was another: the ordeal of the cross, introduced in the early Middle Ages by the church in an attempt to discourage duels. In the ordeal of the cross, accused and accuser stood on either side of a cross and stretched out their arms horizontally. The first one to lower his arms lost.

Most of these ancient, irrational, often barbaric practices disappeared by the late Middle Ages, but at least one was not abolished in England until more recently. That was trial by combat, which embellished the option of a duel by permitting the accused to engage a champion to fight the accuser. So the ninety-pound-weakling

defendant could hire a muscled, athletic champion to fight for him. Although this mode of resolving disputes had been in disuse for a long, long time, a British defendant discovered that through oversight it had never been abolished and claimed the right of trial by combat as recently as the early nineteenth century, whereupon Parliament waked up and promptly abolished it.

This brief tour of extinct dispute resolution mechanisms is intended to make you feel better about the way we do things now, although I feel sure that you can characterize some aspects of modern trial practice as ordeals themselves. Ordeal by discovery may be nearly as barbaric as ordeal by fire.

Anyway, let's move to more modern times. We have abandoned the former modes and, in the Anglo-American tradition, we resolve disputes—that is, we seek corrective justice—by a process we call the adversary system.

Each party to a conflict presents his case as strongly as he can, and in response to those presentations, the tribunal decides who shall prevail. The issues are formed and articulated by the parties themselves; and the evidence is gathered and presented by the parties themselves. Except for government lawyers, a lawyer has no obligation to reveal weaknesses in his own client's case. Each advocate seeks to present his client's position in the most favorable light possible, with the judge, or jury and judge, required to choose between them. And, in the development and presentation of the case, to a large degree the judge plays the passive role of an umpire or a referee. (I'm painting in bold strokes here. We all know judges who leave the umpire's position and step into the batting box as a player. But in concept, the adversary system calls for the judge to respond to the adversaries, who themselves are responsible for developing the case.)

As you well know, the adversary system's primary alternative is the inquisitorial or magisterial system, employed in much of Europe and elsewhere. Although the differences are often exaggerated, the so-

called continental system assigns a more active role to the judge and mutes counsel's fierce loyalty to the client.

There is a considerable body of criticism of the adversary system, often based on the assumption that there is an objective, knowable truth and that strong partisan arguments—competing arguments—are a bad, irrational way to find that truth. If one seeks the sum of two plus two, allowing one party to argue that it is four and another that it is five is a stupid way to determine the true sum. But, obviously, the answer to a human conflict is not a mathematical four. And for several centuries now, the dominant belief has been that corrective justice in the messy world of human action and human frailty is best determined in the adversary arena. Just as democracy has been said to be the worst form of government except all the others that have been tried, so the adversary system may be the worst way to resolve disputes justly except all the others that have been tried. Indeed, the familiar elaborations of the defense of the adversary process conclude that "it is the most accurate engine of truth and justice that legal science can design and implement."[1]

Writing fifty years ago, Harvard's Lon Fuller and ABA President John Randall said:

> [T]he role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment [that is to say, justice] can attain its fullest realization.[2]

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[1] D. Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1382 (2006).

[2] L. Fuller & J. Randall, *Professional Responsibility: Report of the Joint Conference on Professional Responsibility*, 44 ABA J. 1159, 1161 (1958).

KEYS TO AN EFFECTIVE ADVERSARY PROCESS

Now, in order to deserve that high praise—that the adversary process is "the most accurate engine of truth and justice that legal science can design and implement"[3]—at least two conditions must obtain. The first is that the quality of the parties' lawyers should be somewhat comparable. A just result is far less likely if one party is represented well and the other badly. Assuring adequate representation for all parties is an issue for the profession, especially in criminal matters. It is there that you and I have a particular responsibility, to serve or to help create and sustain entities that provide competent counsel who will make the adversary system work as it should.

The other necessary condition for the adversary system to provide just outcomes is that trial lawyers truly understand their role in that system. Lawyers must provide their clients with zealous advocacy, and they must do so for instrumental reasons; that is to say, zealous advocacy is necessary to make the system work well. And what does it mean to be a zealous advocate?

A zealous person, according to the *Random House Dictionary*, is "ardently active, devoted, or diligent," and the listed synonyms are "enthusiastic, eager, intense, passionate, and warm." These all are qualities that most clients (as well as most observers of the legal scene) would agree are admirable in a lawyer. But critics of the adversary system—those who would like to see the judges' role enlarged and the lawyers' role reduced—equate zealous advocacy with over-the-top advocacy and charge that it produces irrational, unjust outcomes.

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[3] 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM EVIDENCE IN TRIALS AT COMMON LAW § 1367 (1904) ("[Cross examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.")

This criticism, not necessarily new, gained great currency when film brought the character Rambo to life. His name became an adjective with which to characterize abusive tactics in litigation. The bar, as a whole, generally agreed that widespread Rambo tactics had besmirched the profession and did not reliably produce justice. Properly stung by these charges, courts and bar associations and trial lawyer groups sought to recover some of the civility that was once more common among the trial bar. Articles were written and speeches made. Codes of ethics and good practice were proposed and, occasionally, adopted. Judges were urged to rein in and discipline the Rambos among us, and some did. You will know better than I whether abusive tactics have been significantly reduced. I rather think so; I certainly hope so.

But in the process of trying to rein in the abusers of the system, the so-called civility movement metamorphosed into an attack on zealous advocacy—that necessary element of a properly functioning adversary system. Critics of zeal as a quality of an advocate essentially equate zeal with hyperpartisanship, dishonesty, confrontational work styles, rudeness, and disregard for the interests of adversaries, the courts, and the public. With or without zeal, those qualities are unprofessional; they are simply wrong. But they have no connection whatever with the lawyer's obligation to represent his client "zealously" within the bounds of the law. Nevertheless, we seem to have played down the lawyer's obligation of zealous advocacy, and careful observers are beginning to speak, not of Rambo tactics, but of "the zeal shortage."

Among the culprits causing the zeal shortage is the growth of alternative modes of dispute resolution. Some devices, notably mediation, have a softer edge than trials, leading, it is maintained, to softer results—to less residual animosity after resolution. And it is easy for an advocate to relax in such a setting and lose sight of the need to represent his client zealously even there. In many instances, ADR seems to celebrate not the culture of justice but, rather, the culture of kumbaya.

But legal education—my own bailiwick—may be a significant contributor to the zeal shortage. Neutrality is a virtue in the law school curriculum. It looks like purity, without corruption or blemish. But it flourishes at the expense of zeal. Very few law teachers in today's law schools have had significant experience advocating for clients; indeed, there are increasing numbers of faculty, especially in the so-called elite law schools, who are not even lawyers but instead are historians, economists, psychologists, and the like. The highest professional rewards go to those faculty members who produce ostensibly unbiased, dispassionate publications. Such faculty members are unlikely to expose law students to concepts of zealous representation. Courses in professionalism, in my experience, tend to approach professionalism on the one hand and zealous advocacy on the other as being in tension, if not indeed in opposition to each other. And trial advocacy courses, where they exist at all, tend to be off in a corner of the curriculum, with their teachers having low status because they are not considered scholars.

My point is that the culture of present-day legal education values and promotes a kind of detached scholarship and may well provide excellent preparation for twenty-first century transactional practice; but it is not conducive to developing a sense of the critical role, the essential role, of passionate, zealous advocacy as a means to justice in our adversary system.

And things don't get much better when our students graduate. Many of the best become judicial clerks—which are no-zeal positions. If they join a firm of substantial size, they have limited client contact, where zeal can most easily flourish. Mentoring of young lawyers that might teach the real meaning and importance of zealous advocacy has declined markedly under the cost pressures faced by all lawyers today. What it means to be a zealous advocate must be taught, I suggest, by trial lawyers like yourselves; I do not believe it will taught by so-called transactional lawyers, even though zealous representation should be the right of transactional clients as well.

I trust you understand what I have been saying:

> First, that the adversary process is "the most accurate engine of truth and justice that legal science can design and implement"; and,
>
> Second, that the effectiveness of dispute resolution under that adversary system largely depends on the quality and zeal of the lawyers for the disputants.

Thus, as individuals, you play an indispensable role in providing corrective justice. By definition, by your selection to be a Barrister, you embody the abilities and zeal that make the adversary system work. A stated purpose of the Barristers Society is "[t]o encourage the continuation of advocacy under the adversary system." It is the aspiration of each of us to achieve just results—to achieve justice, in individual cases and in the justice system. The legal profession is the justice profession. Yes, you think and work case by case, zealously representing your clients one by one; but in your heart of hearts, you want to believe that you are part of an enterprise that produces the maximum possible justice.

Some years ago, I encountered a cantata by Benjamin Britten, based on the life of the fourth-century bishop of Myra, the real-life St. Nicolas. The cantata's librettist, Eric Crozier, said of Nicolas that he was "prodigal of love, a spendthrift in devotion to us all." Those phrases caught my attention because they use words that we normally interpret as bad qualities. Prodigal—the prodigal son, right? Not someone to emulate, not a good guy. Prodigality—a foolish characteristic. Spendthrift—not something you want to teach your children to be. A spendthrift can get into real trouble in the probate court. But how marvelous, what wonderful praise when the words are attached to something good, like love and devotion. "Prodigal of love, a spendthrift in devotion to us all."

As I was considering the advocate's role in the adversary system, I remembered the poet's language and thought of another word that, like prodigal and spendthrift, has bad connotations. That word, of course, is addict. An addict is one who devotes or surrenders

himself to something habitually or obsessively—or permits himself to be consumed by. The word "addict" has terrible connotations.

I suggest, however, that just as it is good to be prodigal of love and a spendthrift in devotion, it is good for you and me to be addicted to justice—to have a burning, zealous, irresistible passion for justice in every client's case, a passion for justice in all that we do in our professional lives. Our daily lawyer tasks will have more meaning and nobility if we understand them to be not isolated but rather parts of the larger whole—our search for a juster justice.

I ask you to recall with me the clichéd story of the three masons, working at a construction site. A bystander asked each what he was doing. One said, "I'm laying bricks"; the second said, "I'm putting up a wall." The third—you well remember—said, "I'm building a cathedral." I put it to you that that simple little story is a metaphor of the trial bar. One lawyer says, "I'm examining a witness." The second says, "I'm trying a case." The third says, "I'm seeking justice."

I hope you are building a cathedral of justice.

* * *

OURS IS A PROUD TRADITION—
THANKS FOR THE INTRODUCTION, FRED TAUSEND*

Harry H. Schneider Jr.**

More than thirty years ago, I met Fred Tausend. He taught me two important lessons that have served me well and made my life as a lawyer more rewarding.

The first occurred when I was defending a third-party witness in a deposition. Fred was asking the questions. I don't remember who was opposing counsel. I was there as the lawyer for a non-party witness who happened to be the Managing Partner of my law firm. I was eager. I was young. I wanted to do well in front of an important audience. And I was determined that no possible objection to Fred's questions would slip by without me making a statement on the record. (In those days, speaking objections were still within the bounds of accepted procedure.) I objected early and often.

When a recess was taken, Fred caught me in the hallway. Outside the presence of anyone else he said simply, "When I was your age, I used to do the same thing." He didn't scold me. He hadn't responded in kind on the record. He didn't embarrass me in front of others. He could not have been more cordial. Nor could he have been more effective.

I have not defended a deposition that way since. Fred probably never gave it another thought. But I will never forget it. He didn't offer his advice to make his deposition more orderly or his job any easier. He was going to obtain the evidence he needed despite my antics. Fred

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* Originally published as the President's Page in the *Bar Bulletin* for the King County Bar Association, July 18, 2018. It was Harry's acceptance speech when he became President of the KCBA.

** Harry H. Schneider Jr. is a litigation partner at Perkins Coie and a past president of this Society.

offered that advice for my benefit, not his. As a seasoned, well-respected litigator, as prominent as any lawyer in the State of Washington, he took the opportunity to help a young attorney be a better lawyer. I've considered Fred Tausend a friend ever since.

The second lesson came years later when I was in a management position at my law firm. Fred phoned early on a Monday morning. Having heard that two of my partners had departed the previous Friday night, Fred wanted to know the inside story. Then he told me the real reason he had called, saying, "You know, one of your former partners was on the King County Bar Foundation Board of Trustees." Fred explained that he was President of the Foundation and, given the number of lawyers in our firm, he wanted a Perkins Coie partner on the Board. "We need one of your partners on our Board and, as of this morning, we don't have one. Will you help me identify someone?" Feeling empowered and somewhat self-important, I responded quickly, "Fred, just tell me who you want and I will make it happen." Even if Fred was not so affected, I was pretty impressed with what I said and how I said it. Without hesitation, Fred replied, "In that case, I want you."

As usual, Fred Tausend was more than a few steps ahead of me. I could do nothing but graciously acquiesce to take a position on the Board that I did not seek, and which I probably was not qualified to assume.

That's how I first became involved with the King County Bar Association, by accident. Prior to that conversation I had not had any involvement, and not much exposure, to either the KCBA or the KCBF. I'm embarrassed to say it, but I didn't even know the distinction between the two organizations. But because of Fred Tausend, I spent the next twelve months learning, and I spent the next twelve years serving on the Foundation's Board of Trustees.

Although my first introduction to the KCBA was inadvertent, my involvement has been quite deliberate ever since. I liked what I learned. I discovered that the KCBA was an organization of motivated individuals who championed principles that all lawyers should revere, whose commitment to service focused on supporting and

assisting practicing attorneys, our judiciary, and the communities in which we live, all for the public good. I learned that the core values of the KCBA dated back to its very founding in the late 19th century, and that those principles remain as relevant today as they were when first adopted.

ORIGINS OF THE KING COUNTY BAR ASSOCIATION

The predecessor organization of what we know as the King County Bar Association was created in the mid-1880s. The founders were prominent Seattle attorneys who were offended and alarmed when a group of fellow lawyers actively participated in a vigilante effort to force Chinese immigrants to leave town. In the view of the instigators, these immigrants were taking jobs that rightfully belonged to "Americans."

Tensions spiraled out of control in February 1886. Hundreds of Chinese workers were rounded up, apprehended by outlaw groups of Seattle citizens including lawyers, and forcibly marched to a ship docked in Elliot Bay waiting to take them away.

Acting *pro bono*, a handful of other Seattle lawyers, including the U.S. Attorney, intervened to liberate the detained Chinese men. They went to court and successfully obtained a writ of habeas corpus ordering the release of those immigrants who were being held against their will. Yet the detainees remained captive on the dock. Ultimately, a skirmish escalated, fighting erupted, shots were fired, and several individuals were wounded. One died of his injuries. The Governor of Washington and the President of the United States, Grover Cleveland, had to impose martial law before order was restored.

Appalled that some of the more prominent agitators and vigilante leaders taking the law into their own hands were fellow attorneys, a majority of Seattle lawyers organized themselves into a formal bar association for the purpose of taking action to censure or penalize those attorneys who had incited the riots and participated in the efforts to expel the Chinese workers. By a vote of 37 to 1, the newly organized bar brought charges of unprofessional conduct against the

lawyers involved and sought to suspend them from the practice of law in Seattle. The lone dissenting vote was cast by one of the attorneys whose own conduct was at issue.

The very first resolution passed by this newly organized group focused on the legal profession's obligation to always respect the Rule of Law rather than bow to mob mentality, and the need to ensure that inclusion would always triumph over ethnic persecution and exclusion.

The origins of the KCBA say a lot about the character of the Association and the lawyers who are members. And perhaps there is no more appropriate time than right now to reflect on that history and to appreciate the mission and purpose of the KCBA. We find ourselves today at a time in our history when the path to immigration is under heightened scrutiny. Patriotism is defined, by some, based on whether we are willing to suppress freedom of expression and keep our opinions to ourselves. Observance of the Rule of Law is being tested and challenged as an impediment and unnecessary obstruction to necessary executive action. It is a time of unprecedented attacks on our judiciary from the highest levels of elected government, by people who consider it appropriate to ridicule and insult a judge's intellect and integrity based solely on whether executive action was found to have passed constitutional muster.

Lawyers have a unique and important role in our society, a role that is ever more important in times when threats to our national security and public safety are urged to be so imminent and real that we might consider dialing back our traditional notions of due process, equal protection under law, and access to justice. A nation that prides itself on adherence to the Rule of Law is nothing without lawyers.

Throughout its history, the KCBA has done its part in our little corner of the world to assist our lawyers engaged in civil discourse; to promote inclusion, acceptance, and greater diversity in our profession; to ensure access to justice for those without means who otherwise would be unrepresented; and to support our independent

judiciary charged with the considerable responsibility to decide important questions of liberty while dispensing justice equally and without favor.

Ours is a proud tradition. Thanks to Fred Tausend, I'm proud to be part of it.

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TWO LAWYERS FROM BIRMINGHAM*

Harry H. Schneider Jr.

Those of us who are not from the deep south may forget, or perhaps we never fully appreciated, just how difficult a delivery was involved with the birth of the Civil Rights Movement in our country.

Many lawyers in the United States rose to the occasion and participated in various ways to make positive contributions. The example of two such lawyers from Birmingham, Alabama, is as inspirational today as it was more than forty years ago. Indeed, as we continue to experience increased activity by self-avowed advocates of white supremacy, and as we continue to observe more and more racially charged violence against innocent victims targeted because of their race or religion, the story of these two lawyers from Birmingham could not be more timely.

Each of the two men witnessed firsthand the prejudice and hate in the 1960s that gave rise to unprecedented violence focused on defeating racial integration and halting the grant of basic civil rights to African American citizens. And, when the opportunity arose, they used their considerable skills as lawyers to do something about it.

At a time and in a place when it was neither popular nor career enhancing to take a public stand against the opponents of integration, they chose to do so. They worked to heal the wounds and help the country emerge from that difficult time with integrity and renewed confidence in our constitutional system of justice. They worked to make real the promises in our Constitution to guarantee equality among all Americans of any color, and to impose penalties equally on

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* Originally published as the President's Page in Bar Bulletin for the King County Bar Association, April 1, 2019. These same two lawyers from Birmingham addressed the ISOB in March 2005. That address follows.

all those who offend. When they saw "white nationalism," they did not look away or pretend it wasn't happening.

The early 1960s was an extraordinary time in Birmingham, Alabama, and it was not that long ago. It was a time when African Americans could not drink from the same water fountain, sit in the same part of a bus or movie theater, eat at the same lunch counter, or use the same public restroom as white people. Nor, with the exception of preaching and teaching (and that only of fellow African Americans) could they be employed in any other than the most menial jobs, no matter what their education or ability.

It was a time when an elected governor would proclaim to a cheering audience gathered to hear his inaugural address, "segregation now, segregation tomorrow, segregation forever!"[1] ln defiance of a federal court order, that same governor would later personally block African American students from entering a public school in which they were to be enrolled.

It was a time when municipal leaders would choose to close an entire city park system rather than obey a federal judge's order that its facilities must be opened to black residents as well as white.

It was a time when those African Americans who assembled and marched peacefully in protest, or even those who just stood on the sidelines observing, were likely to be arrested, detained, dispersed by fire hoses so powerful they could take the bark off a tree at 100 feet away, or held at bay by snarling police dogs trained to attack.

It was a time when police officers kept their distance as a bus load of Freedom Riders pulled into Birmingham right on schedule, Mother's Day, 1961, so white supremacists could assault the occupants.

It was a time when a small group of white pro-segregationists frightened and harassed the African American community in hopes of

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[1] George Wallace, Inaugural Address Jan. 14, 1963 ("[A]nd I say[,] segregation today . . . segregation tomorrow . . . segregation forever!"), https://www.blackpast.org/african-american-history/speeches-african-american-history/1963-george-wallace-segregation-now-segregation-forever/.

convincing them to abandon their efforts to integrate. They did so by terrorizing African Americans with bombs planted in their motels, their homes, and their churches. Over the seven years preceding the bombing of the Sixteenth Street Baptist Church in downtown Birmingham in 1963, twenty racially motivated bombings occurred in the city of Birmingham alone. All were unsolved.

The Sixteenth Street Baptist Church, the first home of the National Association for the Advancement of Colored People (NAACP), was a symbolic and important gathering place for those involved in desegregation and civil rights activities. On the very day white supremacists placed an estimated ten to twenty sticks of dynamite below the steps of that church, one of their number said to his family, "Just wait until Sunday morning and they'll . . . beg us to let them segregate."[2]

That bomb took the lives of four young girls who were in the basement of the church, getting ready to serve as ushers for a special Youth Day Sunday service. It exploded on Sept. 15, just ten days after five federal court judges in Alabama, including the legendary U.S. District Court Judge Frank Johnson, had ordered the enrollment of twenty-four African Americans in schools that had previously been all white. The bombing appalled Bill Baxley, then a third-year law student, and it frightened Doug Jones, then only nine. The crime left a deep and lasting impression on each of them.

The bombing also galvanized the nation. It drew increased attention to the Civil Rights Movement. It triggered a federal criminal investigation that was larger than any since the pursuit of Public Enemy No. 1, John Dillinger, in the 1930s. But, after five years, and despite dozens of FBI agents conducting hundreds of interviews, no arrests were made. No suspects were publicly identified. And FBI Director J. Edgar Hoover declined to prosecute those suspected of committing the crime. By 1968, the federal government considered the case officially closed.

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[2] *16th Street Baptist Church Bombing*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/16thstreetbaptist.htm.

But the case was never closed, as far as Bill Baxley and Doug Jones were concerned. In three trials, Bill Baxley's of Robert Chambliss fourteen years after the bombing and Doug Jones's of Robert Blanton Jr. and Bobby Frank Cherry more than thirty-five years after, each undertook to make sure that justice was served by successfully prosecuting those responsible. Those efforts resulted in the first murder conviction anywhere in the deep south for a racially motivated homicide.

Bill Baxley was all of twenty-eight years old when he was elected Alabama's Attorney General, the youngest person ever to serve as attorney general in any of our fifty states. Upon taking office, he hired the first African American in the state's history to serve as an Assistant Attorney General, a Yale Law School graduate named Myron Thompson, who would later become a well-respected federal district court judge. Baxley called his entire staff into his office to tell them an African American lawyer would be joining the team, and that additional African Americans would be hired in the future. He said to those gathered, "Now if any of you have a problem with that, you better find another job." He also hired the first African American woman to serve in that office.

Seven years later, he personally led a team of lawyers to try the case against Chambliss for planning and executing the bombing of the Sixteenth Street Baptist Church. Sitting in the gallery was a young law student, Doug Jones, who skipped a week of classes to watch the entire trial, from start to finish, from jury selection to Bill Baxley's closing argument to the jury that convicted Chambliss of murder.

In 1997, Doug Jones was appointed by President Clinton to serve as U.S. attorney for the Northern District of Alabama. Based on evidence developed in the intervening years, in 2000 he led the prosecution that tried two more individuals for the same crime, convicting Blanton in 2001, and Cherry in 2002, almost forty years after the bombing.

Bill Baxley and Doug Jones achieved justice—against long odds—for the victims of one of the most appalling hate crimes to scar the American Civil Rights Movement. They both came of age, in more

ways than one, during a turbulent time in our nation's history, when the need to advance the cause of racial equality was paramount, but resistance in some areas of the country was pronounced. Their experience demonstrates why, ultimately, we should have faith in our system of justice, particularly in frightening times. Their experience shows how individuals of sound intentions can make a difference.

They did so at no small sacrifice to their own security and safety, and at the cost of subjecting themselves to unwelcome attention and ridicule, or worse. Doug Jones would later write that Bill Baxley's decision to prosecute the case probably cost him the election for governor of Alabama the next year. Yet their example is proof that the rules don't change when our domestic, or personal, security is threatened; the rules just become clearer to people of principle—people like Bill Baxley and Doug Jones.

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PROSECUTING THE BIRMINGHAM BOMBERS*

William J. Baxley and C. Douglas Jones*****

BACKGROUND: MR. JONES

Forty years ago today—March 7, 1965—marchers crossing the Edmund Pettus Bridge in Selma, Alabama, were getting beaten by Alabama state troopers—yet another event that changed history and changed our course as a nation. For Bill and me, it has been an interesting walk, over the last forty years. Growing up in essentially segregated communities and coming from vastly different backgrounds, we both have been able to reach respected positions and to right a wrong, which is really what all of us do as lawyers, or what we should be doing.

I'm going to walk back through history and tell you a little bit about what was going on in Alabama, to set the stage for discussing the cases Bill and I prosecuted. We need to go back further than just the events around September of 1963, when the notorious Birmingham church bombing occurred. I believe we have to go back to 1954, when the Supreme Court of the United States said in *Brown v. Board of Education* that separate is not equal and that schools across the nation should desegregate with all deliberate speed.

As we all know, that didn't happen with any speed, and in Alabama it took a long time. I believe that a lot of the violence we saw

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* Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Hualalai, Kona, Hawaii, March 7, 2005, published in the *International Society of Barristers Quarterly*, vol. 40, no. 2 (2005), at 345.

** Baxley | Jackson; Attorney General of Alabama from 1971 to 1979.

*** Former U.S. Attorney, Northern District of Alabama. Doug Jones was elected to the U.S. Senate in 2018. He left that office in January of this year and joined Arent Fox LLP in Washington, D.C.

in the South and other places had its inception in tension over school desegregation. Blacks wanted to go to schools with white people, to get a decent education and to be a part of society, but there were people who did not want that to happen, who somehow felt that if white children and black children went to school together, it would be the end of civilization as they knew it. In 1957 one of the great civil-rights heroes in Alabama, Reverend Fred Shuttlesworth, tried to desegregate the Birmingham city schools; he tried to enroll his daughters in an all-white high school. He was met by a mob of white men. Fortunately for history, a man who had just graduated from that high school and who was working for a television station had gone back to get a transcript and saw that something was about to happen. He grabbed his little 8 mm. camera and caught on film what happened to Fred Shuttlesworth and his wife.

Reverend Shuttlesworth got beaten down by the mob, and one man in the mob reached into his back pocket. A witness thought that man was pulling out a roll of quarters to use in hitting Reverend Shuttlesworth, but Reverend Shuttlesworth had hurt his wrist when he got beaten to the ground, and he had to speed away in the car. Much later, we realized that the man who had reached into his back pocket was Bobby Frank Cherry, one of the men later involved in the church bombing. At the time of the attack on Reverend Shuttlesworth, Cherry was in his late twenties and had no children at that high school. This was an early indication of the level of violence that men like that would use. Right after that attack Reverend Shuttlesworth decided that he had had enough of the beatings and filed a federal lawsuit to desegregate the Birmingham schools.

We now fast forward to 1963, which was a big year in Birmingham. It was the year that Dr. King brought the movement to Birmingham. He had been to Albany, Georgia, and other places, and in the spring of 1963 he arrived in Birmingham to desegregate the most segregated city in America. Many of the adults in Birmingham's black population worked in the factories or foundries or as domestic help, so the adults couldn't take to the streets to participate in any marches or demonstrations, because they knew they would lose their jobs, and

they would not have the money to feed their families. Someone came up with the brilliant idea of having the children march. The Birmingham marches became known as the children's marches because it was teenagers and college students who took to the streets of Birmingham. They would gather at the Sixteenth Street Baptist Church to plan the strategy for the peaceful marches. But as soon as they left the church and crossed into Kelly Ingram Park across the street, Bull Connor and his dogs and fire hoses met the kids. All of those images of Birmingham are ingrained in the memories of many of us to this day, and Birmingham still has a hard time overcoming the impressions the world received then. Bull Connor even had an armored personnel carrier to keep people in their place. At one point in the spring there were 2000 black children in the Birmingham city jails—so many children that they had to set up a makeshift jail at the state fairground. For the first time Dr. King and Reverend Shuttlesworth were not the only focal points and symbols of the movement in Birmingham; the children and the Sixteenth Street Baptist Church also became focal points and symbols in the spring of 1963.

Dr. King, Reverend Shuttlesworth, and Reverend Abernathy announced a modest settlement in April or May. City officials took down the colored and white signs from the restrooms and the water fountains. They integrated the public facilities and allowed black people to sit next to white people at a lunch counter downtown. They repealed laws that made it illegal for a black man and a white man to play checkers together in public. But they wouldn't hire black police officers; they wouldn't go that far.

The night after the settlement was announced, Bobby Shelton, the Imperial Wizard of the Ku Klux Klan, who lived in Tuscaloosa, announced that it would be Dr. King's epitaph. A few hours later a bomb blew up at the A.G. Gaston Motel where Dr. King had been staying. Fortunately, Dr. King had left, but that summer saw more bombings. The home of Dr. King's brother, Reverend A. D. King, was bombed. The home of Arthur Shore, who was a great civil rights

lawyer and later the first black on the Birmingham city council, was bombed twice.

In August Dr. King gave his "I Have a Dream" speech in Washington, D.C., and the country was being galvanized. Klan members in Birmingham—and we had a lot of them at that time—were beginning to see their segregated way of life slipping away, and they wanted to do something about it. The culmination, for them, came in September of 1963, just days before the bombing, when the lawsuit started by Fred Shuttlesworth in 1957 finally reached a decision. The federal courts mandated that the Birmingham city schools be integrated.

This did not involve shutting down schools and bussing people; this involved three or four black children going into a school. Still, crowds would gather to try to stop the black children, and in each crowd you would see the Confederate flag being waved. When you see the pictures of these crowds, you have to understand what that flag means and how that historical symbol has become a symbol of hatred, because it was used in the attempt to stem the tide of civil rights.

On September 10, school started, and once again children and the Sixteenth Street Baptist Church were coming together, because Reverend John Cross of that church had decided to have a youth worship service on September 15, 1963. He had advertised it on the billboard, so the youth service was known to the public. Just before the service, a few young ladies who were going to be a part of the service gathered in the ladies' lounge in the basement. Addie Mae Collins, who was fourteen years old, had gone to Sunday school and church with her sisters that morning, without a care in the world. Cynthia Morris Wesley, also fourteen, had an interesting story. She came from a very large family, abandoned by her father when she was young. A social worker who knew that the children were all truant and having problems saw something special in Cynthia. She convinced Cynthia's mom to let Cynthia live with the Wesleys, who were educators—a principal and a teacher—and had no children. After Cynthia's death, the Wesleys took in another girl the same age, and she is now a successful social worker in Texas. When you look at what

she has accomplished, you get a sense of what we lose when children die. Denise McNair was the youngest of the girls who died; she was eleven, almost twelve years old, and the daughter of Chris and Maxine McNair. Chris McNair is a great friend of mine and Bill's, and one of the great public servants of Alabama. The fourth young girl was Carole Robertson, who was also fourteen. These four gathered in the ladies' lounge to do what young girls do when they are having a big day—primp.

At about 10:24 a.m., the clock across the street at Denise's grandfather's stopped when the bomb set underneath the church steps rattled a three- or four-block area in Birmingham. It was a strong bomb. Although we're still not sure exactly what it was, we think it was dynamite. The window of the ladies' lounge took the brunt of the blast, but the bomb blew debris across the street throughout the block. It broke all of the windows in the buildings across the street, and rubble was on the sidewalk for the entire block. One car on the street thirty feet away was crumpled by the concussion, while others were hit with bricks and mortar. Fortunately, no one was outside within close proximity to the church or they would have been killed, too. In a now famous stained-glass picture of Jesus as the Good Shepherd, on one side of the Sixteenth Street Baptist Church, only the face of Jesus was blown out, which took on incredible symbolic significance for the people of that church and for people throughout the movement.

Inside the sanctuary the adult Sunday school classes were meeting. There were a number of injuries, but fortunately none were serious. Inside the ladies' lounge, however, there was total devastation. Reverend John Cross testified about going in and finding the bodies of those young girls stacked on top of each other—in his words, "almost stacked like cordwood." The defense lawyers in my case tried to assert that somebody might have thrown the bomb, but we were able to show that it had to have been planted.

After the bombing there was an incredible effort to solve the case. The FBI often gets a bad rap about this because they never did solve it, but as lawyers you all know that there are unsolved murders

all across this country, and they did yeomen's service. But for their work, Bill couldn't have had success and I couldn't have had success in our later efforts.

The FBI had zeroed in on a number of suspects in the case, a group of Klansmen who were members of the Eastview Thirteen klavern but who also met outside the Klan because they thought the Klan was not doing enough to stop civil rights. Robert Chambliss was chief among this splinter group. He was known as "Dynamite Bob," thought to be responsible for many of the twenty to thirty bombings that had occurred in the black community over a twenty-year period. Birmingham was known as "Bombingham," and the black community was known as "Dynamite Hill." These bombings had triggered virtually no investigation and fortunately very little injury (and no deaths)—until 1963. Also in the Chambliss group were Tommy Blanton, the youngest (just in his twenties in 1963) and a Chambliss protege, and Bobby Frank Cherry, the cockiest of the group. Not only did these men meet outside their regular Klan meetings to plan extra actions, but they also went to a place underneath a bridge just outside Birmingham—just like the trolls that we heard about as kids. They became known as the Cahaba River bridge boys. The FBI thought, and I think, that the church bomb plan was hatched under that bridge. The person we believe was the bomb maker, who is long since dead, lived not far from there. (This group also would meet at the Modern Sign Shop, where the owner let them make their George Wallace bumper stickers and all of the signs and Confederate flags they would use in their protests.) These were the FBI's suspects, but despite the Bureau's best efforts, they couldn't develop enough evidence. The case was closed in 1968, and it was thought to be dead.

Then in 1970 something special happened. Bill Baxley, a young district attorney in Dothan, was elected Alabama's attorney general. Bill Baxley was twenty-eight years old when he was elected, and he had run on a platform to try to make Alabama better. When he got into office, he reopened the case. I will let him tell his story, which led to the trial of Bob Chambliss in 1977.

THE CHAMBLISS CASE: *MR. BAXLEY*

Personal Background

I think I ought to start by telling you a little bit about my roots; you'll see why. I was born in the southeast corner of Alabama, and I was educated from the first day of the first grade through the last day of law school in the public schools of Alabama. In fact, I was twenty-one years old before I ever went further north than Chattanooga or Memphis. All four of my great-grandfathers fought for the South in the Civil War. Three of them were wounded, one of them twice, and two of them were captured. In fact, my grandfather Baxley was one of four boys, and all four Baxley brothers went off and fought. Two of them were killed, and the other two were wounded. The last Baxley that wasn't born in Alabama was born in the 1700s—and he was born in South Carolina.

So you can see that I'm a native Southerner and native Alabamian as far back as you can go. But from the earliest time I can remember, I thought that the way we were treating people who had different colored skin wasn't right, and it didn't jibe with what I was being taught in Sunday school. In the Methodist church I attended, I would see pictures of little children of different colors who were holding hands and dancing around Jesus; but when I went out on the street, it wouldn't be like that. My parents were good people. They taught me and my brother to treat people nicely and fairly, and they taught us that all people were equal, in principle. But when I asked them questions about the unfair treatment I saw, I never got satisfactory answers. My parents would say, "You can't do anything about it; that's just the way things are." As I got older, I continued to ask these questions, and my dad would tell me, "You can't do anything about it, and you're going to ruin yourself." As a teenager at the time of *Brown v. Board of Education* and the Montgomery bus boycott, I got more and more interested in trying to learn why we had this injustice and how good people such as my parents somehow could block out what was happening.

The violence increased in the early 1960s. The worst incident, though, was that day in September of 1963 when the bombing killed those four little girls. I remember exactly where I was when the news was broadcast just before lunchtime and I almost got physically ill. Until then, my feeling was that I wanted to leave the South because I couldn't live with the injustice. But when those girls were killed, I made a vow that I was going to stay in Alabama and do what I could to change things. I vowed that I was going to do what I could to help bring the people who did that terrible deed to justice. Bear in mind, when I made that vow, I was not yet a lawyer, and nobody thought the state of Alabama was going to arrest anybody; but I thought the federal government would, and soon. I planned to go to the U.S. attorney, with whom I had worked in the Kennedy campaign, and volunteer to bring coffee and Cokes and cigarettes to the lawyers and FBI agents, and do some legal research. As you already know, however, nobody got arrested then—and through good fortune and being in the right place at the right time and having a lot of good friends, I was elected state attorney general a little over six years later.

The attorney general in Alabama is one of the most powerful attorneys general in the country. He is the head prosecutor in the state, and he can take over any case from any district attorney anywhere in the state. The day before I got sworn in as attorney general, I was given a little card with various phone numbers in different parts of the state that I could call to reach the state switchboard and have them place calls for me. (This was before WATS lines and telephone credit cards.) I knew I would be using that card often and would have it with me at all times, so I sat down and wrote the name of one of those four little girls in each corner of that card. I was about to be sworn into an office where I could do something about bringing the perpetrators to justice, and I wanted to have a frequent reminder of that.

Investigation of the Bombing

A few days after I was sworn in, I got all of the bombing files from the public safety department and started going through them.

Then I went to the Birmingham police department and asked if I could have access to their files, and they let me have them since the case was closed. I also got the files of the sheriff of Jefferson County. What was incredible to me was how many man-hours [had been] spent by investigative agencies, both local and state, trying to prove that black people themselves had set off the bomb. The ludicrous theory was that they had bombed their own church and killed their own children to "get sympathy for their cause." Some people, even some who were otherwise decent people, really believed that. There were a few good nuggets of information in those files, but they were a pretty haphazard mess.

We did go on a couple of wild goose chases. We got a tip that a group out of Georgia called the National States Rights Party, headed by J.B. Stoner, had done the bombing. We spent the better part of a year going after J.B., but it turned out that although J.B. and his group had done a lot of bombings, including one in Birmingham, they didn't do this one. Still, this wasn't exactly a dry hole because we did find enough to charge Stoner later with bombing Reverend Shuttlesworth's church. Actually, we couldn't charge him directly with bombing that church because nobody was injured, so the statute of limitations had run. That church, however, was located about six or eight inches from a house on both sides, and by statute in Alabama, setting off explosives dangerously near an occupied dwelling had no statute of limitations, so we were able to charge Stoner with setting off explosives dangerously near those occupied dwellings. The second wild goose chase occurred when somebody said that the Montgomery Klan had come up and done the bombing. That turned out not to be true, of course, but again we did solve another crime. Back in the 1950s, members of that Klan had made a young truck driver jump off a bridge, which killed him. His family had never known what happened to him.

After a year and a half or so, we had pulled together enough information to feel confident that Chambliss and his group were the ones who were responsible. (Bear in mind this was not a situation where we could assign a task force to this case. We had other duties,

and this was something we did on the side, when I had a little time or could draw in other people. It was not well focused or organized.) The more certain we became that we were on the right track, however, the more we realized that from the very beginning Chambliss and his group had been the FBI's prime suspects, and we realized we had to have access to the FBI's files, not only to help us in our investigation but to make sure that people who were talking to us were being consistent with what they had told the FBI. I didn't anticipate having any trouble getting access to the files because I had a good record of cooperating with the FBI—but I was wrong. They kept giving me runaround after runaround and refused to help, both before and after the death of J. Edgar Hoover.[1] I wasted about two years trying to convince the FBI to give us access to their records, and I feared that we would not be able to go any further toward prosecution if we didn't have access to their files.

One day I was in Washington on another matter. A friend of mine, Jack Nelson, who was originally from Alabama, was the chief of the Washington bureau of the *Los Angeles Times*, and we got together that evening. He knew that I had been working on the bombing case and asked if I was still working on it. I told him I was but we might have reached a dead end because we had to have FBI's help but couldn't seem to get it. He said, "Do you want me to try to help you? I think I can help you." I said, "Sure." By then Gerald Ford had become President and Ed Levi was the Attorney General. Nelson went to Levi and told him that the *L.A. Times* had planned a series of stories (I didn't know whether they had or not) that would run on the front page of the *Times* for a week, saying that the Alabama attorney general had solved the bombing case, and the FBI was blocking the prosecution of

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[1] *Editor's note:* J. Edgar Hoover had blocked much evidence discovered by FBI agents from being divulged to the Justice Department and discouraged cooperation of any kind between agents assigned to the Birmingham office and Justice. Kenneth O'Reilly, *The FBI and the Civil Rights Movement During the Kennedy Years—From the Freedom Rides to Albany*, 52 J. S. HIST., No. 2 (May 1988), at 244. Worse, Hoover memoranda showed him to feel that fault for the bombing lay not with the Klansmen of Cahaba River Boys, but with "Negro elements." *Id*. at n. 70.

the murderers. Nelson said he was going to bring the families of the victims to Washington and take their pictures outside the FBI building, and he said that the *Times* planned to submit the series for a Pulitzer. Levi, or someone at the Justice Department, said, "Would you hold off; can you give me a couple of weeks?" Nelson said, "Well, yeah, I'll do that." They called Nelson back and told him they would cooperate. The FBI called me and said they were willing to give me access to the files. I was on the road when I got that call. I called Bob Eddy, an investigator in my office, and said, "Bob, we've been running this thing in a haphazard way. You go to Birmingham, get a motel room, plan to stay there for the rest of my term if it takes that long, and make this the only thing you're working on. Close out all your other cases, give them to other people, and let's solve this bombing case." Eddy did that; he took our files and started working with the FBI. We learned much later the FBI didn't cooperate fully with us, but whenever we knew what to ask for, they provided it, and had it not been for their help we would not have been able to prosecute anyone.

Eddy spent about a year in Birmingham. He came back and said it was not the strongest case in the world, but he thought it was all we were going to be able to put together. I went to Chris McNair, Denise's father, and said, "Chris, we know who did it, but I'm afraid that we've got much less than a fifty percent chance of a conviction. A lot of people know about this, and one of these days somebody's going to talk. There are people who are telling us things but can't testify. It might be better not to do anything and wait until other people start to talk and provide a stronger case. If you try them and they get acquitted, you can't ever try them again." Chris replied, "I'd rather you go ahead if you think you've got the right people. I don't have any confidence that when you're out of office, anybody else will come along that will even try." So we proceeded.

The Trial of Chambliss

We chose to indict only Chambliss because our strongest case was against him, and he was the instigator and ringleader. I believe that if Chambliss had not been there, the others would not have been

quite as bad. We indicted him in four separate cases and started to prepare for trial.

One potential witness was Kirthus Glenn, who was staying in an apartment right behind the church at the time of the bombing. The day after the bombing, she came in and picked out a picture of Chambliss as one of the three men she had seen near the church at about 2:00 a.m. on September 15, the morning of the bombing. She also described Blanton's car perfectly. She couldn't identify the others, although she thought one was Blanton; but she identified Chambliss and Blanton's car. She lived in Detroit, so I sent investigators up to Detroit to see if we could get her to come back and testify. They reported that she would be a great witness but refused to come back to Alabama. (Back then you couldn't make witnesses return.) I asked why, and they said she was afraid and would never come back to Alabama.

I ended up going to Detroit to try to convince Mrs. Glenn to testify. I made an argument that was as good as the best jury argument I ever made, and she still refused. I was about to despair when I noticed that she had a *Jet* magazine from the Fifties on her coffee table. I picked it up and started thumbing through it and found pictures of Dr. King and Mrs. Rosa Parks and their attorney, Fred Gray—your member and my friend. I asked, "Why do you have this out on the coffee table?" She said, "I've always saved it." I said, "Do you see this guy right here, Dr. King's attorney?" She said, "Yeah." I said, "If he comes up here and tells you it's all right to go back and testify, will you go?" She said, "I'd consider it." I left Mrs. Glenn's and immediately called Fred, who was in the legislature by then. I explained the situation to Fred and he agreed to visit Mrs. Glenn. Fred and I went to Detroit the next week. When Mrs. Glenn saw Fred, she opened that *Jet* magazine and looked back and forth between Fred and the picture several times. (Thank goodness Fred is one of those people who don't age; he looked just like the young man in the picture.) Finally, she said, "It is you." Fred talked to her, and she agreed to come testify. She was a terrific witness. We couldn't have convicted Chambliss without her, and we couldn't have gotten her without Fred.

I'm going to tell a few other stories about interesting aspects of the Chambliss trial and then turn it back to Doug. Chambliss was defended by former Birmingham mayor Art Hanes and his son Art junior, who were very good lawyers. They had called Chambliss's nephew, who had been a Birmingham police officer, as a witness. I had a lot of good information to use against him in cross examination, and I was on a roll that day, so I ripped him apart in the cross-examination. When he stepped down, Art Hanes Sr. stood up and announced that they were going to call Mr. Chambliss to the stand. Mr. Chambliss said, "Nope, I'm not going." I said, "What did he say?!" Hanes started yelling, and Chambliss kept repeating, "Nope, I'm not going; nope, I'm not going." The jury was hearing all of this because it erupted without warning. Finally, the judge sent the jury out of the room. This was an interesting situation because, of course, we could not have commented on his failure to take the stand, but here Chambliss said it himself, in front of the jury.

Once the testimony ended, we were getting ready for final arguments, and my summation was going to be right after lunch. At lunch time I walked around downtown Birmingham for a little while, tried to eat a hot dog, and returned to the courtroom. One of my assistants, John Young, beckoned to me. I said, "Young, I'm busy; I'm trying to get my thoughts together for my argument." He said, "You've got to see this. Look." He handed me State's exhibit number one, which was Denise McNair's death certificate. We had elected to try Denise's case partly because her father Chris was well thought of in the community at large in Birmingham and was a witness for us, of course. I said, "So? That's the death certificate for Denise." He said, "Look at the birth date, you idiot." I looked—and that day was Denise's birthday. So, at the end of my closing argument I pulled up State's exhibit number one and said something to this effect: "Today would have been the twenty-fifth birthday of Denise if it had not been for this cruel act. There would have been a very different function tonight at the McNair house. There might have been a birthday celebration; there might even have been grandchildren there." I continued in that vein for a few minutes, and I started feeling pretty good about my case

because I saw several of the jurors start crying. I closed by saying, "You can give Denise a birthday present; you can bring her killer to justice." Sure enough, the jury of nine whites and three blacks convicted Chambliss.

The next morning was when the jury returned with the verdict. Art senior sent Art junior to tell Mrs. Chambliss. What they didn't know was that Mrs. Chambliss had been cooperating with us (and had cooperated with the FBI right after the bombing, although we didn't know about that). She and her sister and many other relatives of Chambliss and of others involved had cooperated with investigators. Chambliss was a bad guy to his family as well as [to] other people. Art junior didn't know any of this. When he arrived at the Chambliss home, the blinds and curtains were drawn, and it was dark and dusty. He knocked on the door, and a voice said,

"Come in." Mrs. Chambliss was lying on the couch with a towel on her head.

Art said, "Mrs. Chambliss, I'm sorry to tell you, the jury just came back and convicted Robert. Dad said to come out here and tell you Robert won't be coming home. [He'd been out on bond all this time.] They took him to jail."

She said, "What does that mean?"

"He can't get bond. We're going to appeal the case, but he won't be able to get out on bond unless it's reversed. We're afraid that it doesn't look good to get it reversed, and at his age he might not ever come home."

"You mean he's not going to come home tonight?"

"No, Ma'am."

"You think he's not going to come home ever?"

"Well, it's not likely."

"He's not going to come home again?"

"I don't think so. You'd better pack up some stuff and go see him in the jail."

"You mean you're sure, young man, he's not coming home?"

"That's what our opinion is."

She jumped up, threw that towel across the room, opened the blinds and curtains, started dancing, and sang, "Hallelujah, hallelujah, hallelujah!"

I went out of office soon after that. We'd had a long delay in getting the records and it had taken us six years of investigation, so my two terms were nearly at an end. Sure enough, for almost twenty years, nothing more was done. During the Chambliss trial, however, a young law student in Birmingham named Doug Jones had come down to watch. He saw a good bit of the trial and watched my final argument. When Doug Jones became a United States Attorney many years later, he did what I was unable to do: He finished the job of prosecuting the murderers, and he will always be one of my heroes for doing that.

THE BLANTON AND CHERRY TRIALS: *MR. JONES*

As Bill mentioned, as a second-year law student I had watched the Chambliss trial and closely observed Bill. Then I practiced law in Birmingham for a number of years. Just as my nomination to be a U.S. Attorney was wending its way through the Department of Justice, I noticed an article in the morning newspaper about the case being reopened; the FBI and the U.S. Attorney's office were conducting a new investigation. I sat down on the wall by my driveway for a minute to absorb the news, and then I went inside where my wife was fixing breakfast for our children. I showed her the picture and the article, and her response was the common one: "Why, that's great. I hope they can do something." I said, "No, you don't understand. Remember how you've been asking me why I want to go back into public service? Well, this is the reason. This is *my* case, and if we don't do something now, it's not going to get done."

When I became U.S. Attorney, I told the staff, "This is our last roundup." No one really believed that thirty-four years after the fact, we could have any success, but it was our last opportunity. And just as the planets had lined up for Bill, the same thing started happening for us.

When we finally indicted Blanton and Cherry, we had to try the cases in state court, and I was lucky to be able to do that as a presidentially appointed U.S. Attorney.

The Blanton Trial

We started our first trial, of Blanton, on an April day in 2001. Our first witness was a wonderful lady, Mrs. Alpha Robertson, the mother of Carole Robertson, and she set the tone for the whole case, in both the Blanton and the Cherry trials. She had not gone to Sunday school on the fateful day, so she had been at home just a few blocks away. She said that when she heard the blast, it was "like something shaking the world all over." And truly, I believe that the whole world *was* shaking. The ripples from that bomb went out of Birmingham throughout America and throughout the world as people asked, "Why? How could this happen on a Sunday morning to innocent children in a house of God?" From her wheelchair, Mrs. Robertson first testified on a day that would have been Carole Robertson's fifty-first birthday. You can imagine the impact on the jury when they heard about the death of her child that had occurred so long ago.

We followed Mrs. Robertson with Reverend John Cross, who was an amazing preacher and an amazing man who kept the lid on Birmingham. As you can imagine, on that September 15 morning in 1963, things started to simmer, and riots could easily have erupted. Reverend Cross grabbed the bullhorn and stood on the front porch of the church to recreate and reproach that morning's Sunday school lesson, which ironically was "The Love that Forgives." And the lid stayed on Birmingham, unlike many of the other places in the country. Reverend Cross was truly a hero of a lot of people. In court, he identified the powerful pictures of the damage and the young girls, and he told about finding the bodies. What was most fascinating to me about Reverend Cross was that he had carried a lot of guilt. He felt that by allowing his church to be used as a base for the marches, he had made it a focal point, and that resulted in the deaths. Being able to testify even after he had had a series of strokes was therapeutic for him.

Many family members who had avoided the public eye for so long came to our trials. Junie Collins, who was Addie Mae's sister, and Eunice Davis, who was Cynthia Wesley's sister, came. Eunice had heard about the bombing on the radio and had to go to the Wesley home to find out that her sister had been killed. Maxine McNair, the mother of Denise, testified. She had taken Denise, in her new dress and new shoes, to church that morning. They parted at the steps. Denise went below to the ladies' lounge, and Maxine went upstairs to the choir loft for her Sunday school class meeting. In testimony that was absolutely riveting, she talked about the bomb going off right below them. She didn't scream, "Oh, my God, what has happened? Is it a bomb? Are we being attacked?" She screamed, "My baby, my baby!" As she testified, the tears came down; a mother's heart never stops weeping for the death of a child. Chris McNair also testified. He had gone to another church that morning but heard about the bomb, and he had to go identify his daughter. Denise still had a piece of mortar embedded in her skull, a piece of mortar that today is in a special room at his photography studio, along with the dress and shoes Denise wore that day, to honor her memory. All of the families were there to help. They had waited all those years for the wheel of justice to grind ever so slowly, but to grind ever so rightly.

One of the new witnesses in the Blanton case, James Lay, was part of a civil defense group that would patrol the black neighborhood and churches. After working their regular jobs in the daytime, they would spend their nights on watch, to try to protect the homes and churches of the black leaders. Two weeks before the bombing, Lay, a postal worker, went by the church at one o'clock in the morning, and he saw a Ford parked there and two white men, one sitting in the car and one standing by the steps holding a satchel. When the men realized someone was watching, they turned the lights off and drove away quickly. Lay then got a friend of his to help him look around, but they didn't see anything. They called the Birmingham police, but the Birmingham police, of course, wrote no report and told Lay to go on home, that he didn't see a damn thing. Two weeks later Lay was three blocks away when the bomb exploded. He went to the church and

helped pull out the bodies. He told the FBI what he had reported to the police two weeks before, and the FBI agents showed him pictures of about a hundred Klansmen. Out of all those pictures, he picked out two—Bob Chambliss and Tommy Blanton. Blanton was the one standing by those steps with a satchel in his hand at one o'clock in the morning. Obviously, Lay was a critical witness for us.

There also was an informant, Mitch Burns, of whom Bill had never heard because the FBI kept him under wraps. Mitch was an old Klansman, but he was not a violent guy, and when he saw the morgue pictures of the girls, he broke down and cried and said he would do whatever he could to help. For two years he rode around with Tommy Blanton; they would go out drinking and carousing. Even though Blanton drove, they'd always take Mitch's car because Blanton was convinced his car was bugged by the FBI, which was funny because it was actually Mitch's car that was bugged. We had all sorts of tape recordings of Blanton, and one of Cherry because they picked him up one time, and they were vile. Blanton always wanted to drive by the church, and he would laugh about what "they" would do when he bombed his "next church." And at one point when they were picking up Cherry, Blanton turned into an alley behind Cherry's house and said, "I almost missed this alley the night we bombed the church." When it came time for cross-examination, the defense lawyer did a great job and tried to impeach Burns, but he couldn't impeach the tapes. The tapes spoke for themselves.

The cross-examination of Mitch Burns provided one of the few light moments of the trial. The FBI had picked up on him because, married himself, he was dating a married waitress who lived next to Blanton. Defense counsel questioned him in detail and at length about his trysts with her, and finally asked the $64,000 question: "Isn't it a fact that you were having an affair with Marie Aldrich?" (Remember, this was 2001.) Mitch just looked at him, leaned into the microphone, and said, "I did not have a sexual relationship with that woman."

At the time of the bombing, Blanton had a regular Friday night date with a high-school senior named Jean Casey, but he had broken the date on the Friday before the bombing. They went out on Saturday

instead. After the bombing, when Blanton was questioned by the FBI, he realized that he had to get his alibi straight, but he and Jean couldn't seem to coordinate the details. Lo and behold, he married Jean in the spring—a move with privilege implications, of course. In 1964 an FBI informant rented the apartment next to the Blantons' and posed as a truck driver. The FBI tore out a wall and put a little microphone in a hole right into the Blanton's kitchen. I won't tell you now exactly how we got that tape into evidence—that's a story for another day—but this was a crucial piece of evidence that had been buried in a back corner of the FBI. This is a conversation between Jean and Tommy in their kitchen:[2]

"You never bothered to tell me what you went to the river for, Tommy."

"What did you tell 'em I did?"

"They asked me what you went for, and I told them I didn't know."

"They were interested in the meeting I went to; they knew I was at the meeting."

"What meeting?"

"The big one."

"What big one?"

"The meeting where we planned the bomb."

"Tommy, what meeting are you talking about?"

"You had to have a meeting to make a bomb."

You can see the significance of the various tapes. Three times Blanton, in his own voice, had referred to being part of the bombing. The jury took only two and a half hours to convict him.

The Cherry Trial

As I said at the beginning, Bobby Frank Cherry was the cockiest member of the group. For so many years he had beat his chest saying he had not been involved in the bombing. He had given some twenty

[2] *Editor's note*: The tape as played during Mr. Jones's presentation was not entirely clear.

statements to the FBI and about five or six to Bill's investigators. The statements weren't consistent, and by 1977 he even had a new alibi for where he had been that weekend. He admitted that on the Friday and Saturday nights before the bombing, he had been at that sign shop I told you about, and Chambliss and Blanton had been there, too (although Cherry claimed he didn't really know them). But he said he went home early on Saturday night because his wife was dying of cancer and he had to go take care of her, and also he never missed the live studio wrestling on television. We were able to prove that poor Mrs. Cherry didn't get diagnosed with cancer until 1965, two years after the bombing, and the broadcasts of live studio wrestling also didn't start until that year.

After we interviewed Cherry in 1997, he did what Cherry did best; he called a press conference to proclaim his innocence and berate me and others for chasing him again. When that press conference was shown on television, the phones started ringing. The first call came from a young lady, Teresa Stacy, who was Bobby Cherry's granddaughter. Her first words to the FBI dispatcher were, "Thank God somebody's looking at this case. Everyone in my family knows that my grandfather blew up that church. He's bragged about it to the family. We all talked about it. He talked about it on the porch." No one else in the family would help us, but Teresa Stacy, who was estranged from the family, came to Birmingham twice and helped us.

Another person who came to us was Willadean Brogdon, Cherry's third wife. She had married him in 1970, but they got divorced in 1973, and she had never been heard from again. Baxley had tried to find her, and we tried to find her but could not. Then a story about Cherry got on the AP wire, and Willadean Brogdon picked it up in a little town in Montana. She drove about two hundred miles to her local FBI office and said, "I know something about this case. I know something about this man; I was married to him. Let me tell you about the time when the car broke down by the church, and he pointed out where they planted the bomb. And he threatened me and said he had killed and would kill again. And he talked about it over and over." She introduced us to her brother, to whom Cherry had also

made admissions. I said, "Willadean, where have you been for so long?" She said, "Let me tell you something: this man was mean. I left him once and went to Chicago, and he tracked me down, and like a fool I took him back. We were moving back to Birmingham, and I made up my mind I was going to leave, so I drove the family station wagon, and I pulled up in front of my sister's house, and he got out and slammed the door, and I slammed the gas, and I never looked back." She drove all the way from Montana to be a witness for us.

Michael Goings worked with Cherry out in Texas. There were conversations with Cherry and others about how to take care of the Hispanic problem that was on the rise in Texas, and Cherry said he had been a part of the group that bombed the church that killed those little children. At least once, Cherry boastfully said, "You know, I bombed that church." Goings, too, called the FBI. Finally, there was a fourth new witness in Cherry's case, Bobby Birdwell, who was eleven years old in 1963. He was playing at the Cherry household with Cherry's son Tom. Birdwell saw Cherry's Klan robe, and he saw a group of white men including Cherry sitting at a table. He heard the men say something about "Sixteenth Street" and "bomb." He was asked on cross, "Why didn't you tell someone about it?" He said, "I was an eleven-year-old kid in a Klansman's house. I was scared to death. And I knew I couldn't tell my parents because they wouldn't understand. Then we moved away, and I never really knew what had happened until I saw the news about the new investigation." All of these people who came back to testify were heroes of our time, for these cases. Cherry, too, was convicted.

Justice Nearly Denied

We were fortunate to bring these cases when we did. We nearly missed having the critical testimony of James Lay. Two months before the trial in the Blanton case opened, Lay had a stroke, and then had another. He had been an incredible witness in front of the grand jury—a soft-spoken, lean-over-the-chair kind of witness—but he was in a nursing home by the time of the trial. Although his body was ravaged, his mind was still fine, and he wanted to testify; but I was

worried about how weak he was. I made a deal with the defense lawyer: He allowed me to have someone read Mr. Lay's grand-jury testimony, and I allowed him to use some hearsay and try to impeach Mr. Lay in ways he couldn't otherwise have done because of the passage of time. Shortly after the Blanton trial ended, Mr. Lay died. If our case had been delayed just sixty days, his vital testimony would have been lost.

Somewhat similarly, we had an FBI agent who was an important witness because he had interviewed Blanton shortly after the bombing and could testify that Blanton [had] lied about his whereabouts on the weekend of the bombing. When this agent (former agent) was in Montgomery on his way to Birmingham to testify in our trial, he suffered heart failure. He survived and was all right but, to enable him to testify, the cardiologist who treated him in Montgomery canceled other appointments and came to sit with him during his testimony. We also had two paramedics with a full crash cart and defibrillator in the courtroom.

The agent who authenticated some of the critical FBI tapes in both trials died about forty days after the Cherry case ended; Mitch Burns died about six months after the end of the Cherry trial; Michael Goings, who had emphysema, died about a year after that trial; and Cherry himself died after serving a little over two years in prison. Again, our timing was just right; if justice had been delayed by more than a few weeks, it truly would have been denied.

Most sadly for me personally, Alpha Robertson died shortly after the end of the Cherry trial. The trial ended in May of 2002. That August, Mrs. Robertson was supposed to be in New York with me, to give a talk and receive an award. She could not make the trip because her cancer had flared up with a vengeance. She passed away on a Sunday afternoon. At the memorial, her son gave me one of the greatest rewards a lawyer ever gets. He said, "Because of you, she died with a smile on her face."

The Fifth Victim in the Ladies' Lounge

I always like to end any discussions of the bombing and trials with this reminder: Everyone talks about the four little girls, but there were really five in that ladies' lounge that Sunday morning. Sarah Collins (now Sarah Collins Rudolph) was there with her sister Addie Mae. As our last witness, Sarah testified about going to the church that morning with her sisters, without a care in the world. They skipped on the way to church and then she and Addie Mae went down to the ladies' lounge to do all the things that little girls do.

I asked, "Sarah, what did you do?"

She said, "We were all getting ready, and I went over to that sink. I was going to wash my hands."

"What did you do there?"

"I turned around."

"What did you see when you turned around?"

She said, "Well, I saw my sister tying the sash of Denise McNair's new dress."

"What happened?"

"Well, then there was the explosion, and I got covered with debris. I couldn't move, and I could barely breathe, and I couldn't see."

"Sarah, what did you do?"

"I just called out to the person I knew to call out to and that was my sister."

The courtroom got dead quiet.

I said, "What did you say?"

She said, "I called out 'Addie, Addie, Addie.'"

"Did you ever see her alive again?"

"No, sir."

And with that, the State of Alabama rested its case.

The defense lawyers did a remarkable job of trying to poke holes in our case, but they couldn't overcome their own clients, neither of whom could take the stand. They couldn't overcome the hate that was revealed that morning in 1963, and we now had black and white jurors who looked at the evidence in a whole new light, a light under

the sunshine instead of the old black and white images. And they couldn't get away from a beautiful picture of Denise McNair, taken by her father, in which the brightly smiling Denise was hugging a white-skinned Chatty Cathy doll. That picture, which couldn't help but remind us of death, of injury, of a mother's pain, was also a picture of hope, a hope that we all can live together. In my closing argument, I showed that picture to the jury and reminded them that in 1963, it was the hope of a race of people, but today, with all that is going on in the world, it is the hope of us all. And today, we, as lawyers, have to remember that everything we do, we do for truth and for justice. Sometimes it takes a long time, but we have to treat each client as if he or she is Addie, Carole, Denise, or Cynthia. When you do that, truth will prevail, and at the end of the day truth is a good thing. It is never too late to seek that kind of justice.

OPINION:

AN OPEN LETTER TO MS. MACY GRAY*

Christopher A. Duggan**

"Like the Confederate, [the American flag] is tattered, dated, divisive, and incorrect. It no longer represents democracy and freedom."[1]
Macy Gray

Dear Ms. Gray:

You have a right to your opinion. More importantly, you have a right to express your opinion freely, with no government repercussions. Michael Strank, Harlon Block, Frank Sousley, Ira Hayes, Harold

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* Written in response to a piece by Macy Gray, *Opinion: For Juneteenth, America needs a new flag that all of us can honor*, MARKETWATCH (June 17, 2021), https://www.marketwatch.com/story/for-juneteenth-its-time-for-a-new-flag-11623958522. Ms. Gray's piece is summarized in the Editor's Note, *supra*, xi–xii. *MarketWatch*, a website published by Dow Jones & Co., reports "business news, personal finance information, real-time commentary[,] and investment tools and data." *About MarketWatch*, https://www.marketwatch.com/site/info.

** Chris Duggan is a Massachusetts trial lawyer. He is the founder of the *James Otis Lecture Series*, a program produced on Constitution Day and sponsored by the American Board of Trial Advocates for high-school seniors. The series is named for the man John Adams claimed began the American Revolution in the *Writs of Assistance* case. Mr. Duggan is a member of the Massachusetts Historical Society and a frequent guest lecturer for the National Constitution Center as part of its Scholar Exchange program. He is also a Fellow of the International Society of Barristers.

[1] Macy Gray, *Opinion: For Juneteenth, America needs a new flag that all of us can honor*, MARKETWATCH (June 17, 2021), https://www.marketwatch.com/story/for-juneteenth-its-time-for-a-new-flag-11623958522.

Schultz, and Harold Keller made sure of that when they raised that flag on a remote Pacific Island on February 23, 1945. Strank was born in Slovakia. He, Block, and Sousley never left that island. Hayes was a Pima Native American. He, Schultz, and Keller returned.

You have that right because the 99th Pursuit Squadron and the 332nd Fighter Group, sometimes called the "redtails," engaged in places like Monte Cassino and Normandy under those colors that do not appeal to you. You may know them by another name: the Tuskegee Airmen.

You have that right because 3,800 men of the 442nd Regiment, all Japanese Americans, walked behind that flag for about 237 miles in 1944, earning the moniker "the Purple Heart Regiment," while other Japanese Americans remained unjustly interred because of the color of their skin. The 442nd was the most decorated American regiment in a war against evil, despite the prejudice Americans of their background faced at home.

You have that right because 1,100 men of the 54th Massachusetts, including one of Frederick Douglass's sons, followed Robert Gould Shaw to the parapet of Fort Wagner carrying those colors on July 18, 1863, taking 40% casualties in an effort to set other men free.

You have that right because Abraham Lincoln was convinced that government of the *People*, by the *People* and for the *People* should not perish from the earth.

You have that right because John Lewis marched in front of that flag and crossed the Edmund Pettis Bridge in March of 1965 and later urged us all to seek out good trouble.

You have that right because an ordained minister with a degree from Boston University spoke at the Lincoln Memorial, before its statue of Mr. Lincoln, facing a sea of listeners from all backgrounds, many who waved that flag, and spoke aloud his dream that our nation would one day live up to its creed that all men are created equal.

The flag you do not like is red, white and blue; red for hardiness and valor, white for purity and innocence, and blue for vigilance, perseverance, and justice. Those colors proclaim the hopes and aspirations of a nation that will never fully achieve them, because the

country is rooted in the human experience. But the flag challenges us to strive for these virtues and yields a damning reflection when we fall short.

The colors, and what they represent, were embodied by people like Sgt. Isaac Woodard[2] and Dr. Sally Ride who wore them on their sleeves and who carried their values where they could not be seen but could easily be observed.

Our country is by no means perfect. We continue to be plagued by injustice and poverty. Many of us find leaders who have been selected under our Constitution to be distasteful or worse. But there is still a statue in New York harbor, beckoning the world to "give me your tired, your poor, your huddled masses yearning to breathe free." Those masses continue to come because they see in the colors flying at the feet of that statue the promise of a life in freedom.

As imperfect as it may be, the flag, and the country it represents, offers a hope for better future. It, and the country it represents, have inspired untold generations from across the globe to strive for liberty and justice.

Ms. Gray, you wrote "It's not fair to be forced to honor" the American flag. We are not. We can ignore it, desecrate it, burn it. That is our right. Many sacrificed much to bequeath us that privilege.

Christopher A. Duggan
Acton, MA
June 26, 2021

[2] For the atrocities suffered by Sgt. Isaac Woodard, which awakened the consciousness not only of President Truman, but of the nation as a whole, see Richard Gergel, *Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring* (2019). Judge Gergel is an ISOB Judicial Fellow.

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