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REFLECTIONS ON THE 9-11 COMMISSION REPORT†

Slade Gorton*

On the morning of September 11, 2001, four groups of terrorist hijackers took over four U.S. airliners in Boston, Newark, and Washington, D.C. Three of those hijackings were completely successful in accomplishing their mission, destroying two towers in New York City and crashing into the Pentagon in Arlington, Virginia. The fourth did not succeed in its ultimate goal—and that, from the beginning of the work of the 9-11 Commission, was both the most agonizing and the most inspiring part of the story for me and for my colleagues.

What happened differently with the Newark hijacking of United flight 93? First, it was the last of the four aircraft to take off; it had to wait in line at Newark thirty minutes past its takeoff time. Second, it had the one reluctant pilot among the group of hijackers, one who had just returned home to Germany to see his wife, one not trusted by Mohammed Atta, the leader of the group, and one who, we believe, waited until he had heard that the other three hijackings had been successful before he made his move. Third, that hijacking was missing its fifth hijacker: The other three all had five; flight 93 had only four. Some still think that Moussaoui was to have been the fifth hijacker on board flight 93, and some also thought that he was a potential backup pilot. Fourth, the extra time created an opening for the intelligence and thoughtfulness of a United Airlines dispatcher who, as he heard successively of the first three hijackings, began to e-mail each of his pilots to tell them to watch out for a hijacking and to secure their cockpits. The tragedy here is, first, that flight 93 was about the sixth of his flights that he e-mailed and, second, that the flight 93 pilot did not understand the message and asked for clarification. It was in the two minutes after he asked for clarification that the hijacking took place. Finally, of course, just as the hijacker pilot had heard of the success of the other three hijackings, so had several of the passengers; and that led to the partly successful but partly unsuccessful attempt by brave and resourceful passengers to retake the cockpit of that plane. The result, of course, was that the plane crashed in a field in Pennsylvania rather than into the Capitol of the United States, which we believe was its intended target. A strike at the U.S. Capitol might have been even more devastating to the national psyche than the incidents in New York.

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort at Troon North, Scottsdale, Arizona, March 13, 2006.

* Former United States Senator, Seattle, Washington; member, National Commission on Terrorist Attacks upon the United States (also known as the "9-11 Commission").

I would like to make one other point before I move into my main presentation: No intelligence information that went to either President Clinton or President Bush before 9-11 was sufficiently specific to have caused a responsible President to have taken dramatic enough action to have frustrated the hijackings. President Clinton went through the entire eight years of his presidency with Louis Freeh at the head of the F.B.I., and Louis Freeh had no personal relationship with the President whatsoever; in fact, they disliked each other intensely. As a consequence, Director Freeh never once met with the President of the United States during the Clinton administration. His record with Bush was very little better. President Bush got all of his intelligence information—his daily briefing—from the C.I.A., and the C.I.A. interpreted what it heard from the F.B.I. in whatever way it wished. For example, just over a month before 9-11, after President Bush asked for a briefing on al Qaeda, the C.I.A. reported that the F.B.I. was engaged in seventy-one separate investigations of al-Qaeda-based terrorism in the United States. We found out that fully half of those were investigations of money laundering, not of terrorism, that six to ten of them had been closed, that four of them involved people already in jail, and one involved a suspect who was dead. That was the quality of information that the President of the United States was receiving about one month before 9-11.

Our report lists on a single page some eleven bits of intelligence information that might possibly, under some circumstances, have alerted those in authority to follow up in a way that could conceivably have frustrated the 9-11 hijackings. What is only implicit in the report is that those were eleven bits of information out of several million intelligence bits picked up by one federal agency or another over a period of several years. None of us could conceivably conclude that they should have been followed up in an effective fashion. We're seeing a bit of that retrospective at the present time in the proceedings on whether Moussaoui will receive the death sentence. The prosecutors are saying that if Moussaoui had just come clean the day he was picked up, 9-11 would have been prevented. That might be true, but the very nature of the people who engage in that kind of activity guaranteed that he wouldn't come clean then (or since then, for that matter). It is highly doubtful that any different treatment of that suspect would have had a different result.

While our two Presidents had not been given the kind of information on which a reasonable person would have acted before 9-11, the country obviously acted decisively thereafter, in destroying the Taliban sanctuary in Afghanistan, in creating the Department of Homeland Security, in passing the PATRIOT Act, and in conducting a rather thorough and now almost totally forgotten year-long congressional investigation of the facts and circumstances leading up to 9-11. That investigation, by a joint committee

made up of members of the intelligence committees of both houses of Congress, was artificially terminated under congressional rules when the 107th Congress ended, and it was not considered adequate by either the press or the victims' families—a group that is the single most effective lobbying organization I've ever come across; it makes the National Rifle Association pale to insignificance. The press and the families demanded an independent investigation of 9-11, and that's why the Commission came into being—reluctantly created by Congress and even more reluctantly approved by the President of the United States.

COMMISSION UNANIMITY

We ultimately succeeded in reaching a unanimous report as a result of hard work, of getting to know one another quite well, of a magnificent staff, and of great good fortune. The first bit of good fortune had to do with who chaired the Commission. At the beginning, President Bush appointed Henry Kissinger to be chair, and the Democratic leader of the Senate picked George Mitchell to be the vice chair. George Mitchell was the Majority Leader when the Democrats had a majority in the Senate, and he was the most successful and highly-partisan-while-seeming-reasonable leader I've ever come across in either party. If Kissinger and Mitchell had kept those positions, all of the air would have been out of the room in the first thirty minutes of our first meeting; but both of them quit because they refused to make the financial disclosures that were required of all of the members of the Commission. Their replacements were Tom Kean, a former governor of New Jersey and at the time the president of a small private university, as chair and Lee Hamilton, who for many years was the chairman of the Foreign Affairs Committee in the House of Representatives and now heads the Woodrow Wilson Center for Scholars in Washington, D.C., as vice chair. You couldn't have found more polar opposites to their predecessors. The two of them reached an agreement before the full Commission ever met that they would never disagree and that there would never be a vote in the 9-11 Commission of five Republicans against five Democrats; and they kept to that pledge. In fact, they kept to it so well that I could count on the fingers of one hand the number of times we voted on anything, and those few votes were not partisan in nature.

The second piece of good fortune had to do with one of the original Democratic members appointed to the Commission—Max Cleland, a one-term senator from Georgia who had just been defeated in 2002, a paraplegic from the Vietnam war, and unfortunately one of the most embittered individuals I've ever known in my life, who only wanted to make speeches about the impeachment of the President. He was given a permanent federal job—iron-

ically, by appointment of the President—and in his place the Commission got Bob Kerrey, a former senator from Nebraska and now president of the New School University in New York City, one of the most intelligent and delightful as well as outspoken people I have ever known and a magnificent contributor to the work of the Commission.

A third factor that helped unite us was the administration's consistent resistance to giving us classified information, most importantly the daily intelligence reports that go to the President. We united in our constant demand for those. I personally think that the President was ill-served on this issue because the White House got a reputation for holding us up but always retreated when we went to the press. We ended up getting everything we wanted, and they ended up with a poor reputation.

A final factor that contributed to our unity was an underhanded (in my view) personal attack on one of the members of the Commission, Jamie Gorelick, by Attorney General Ashcroft. Ashcroft, by the way, was the only witness who appeared before us who refused to give us his written testimony in advance. In sum, the personal qualities of key members as well as the difficulties we faced all tended to bring the members of the Commission together.

At our first meeting we agreed that at the very least we had to be unanimous in writing a history of 9-11. We achieved that; and we did it, at least in part, by writing a history without adjectives—that is to say, without expressing an opinion on whether given officials were inefficient or negligent or otherwise errant. We decided simply to write, in prose that was as spare as possible, a narrative of what happened leading up to 9-11 and left the blame game to be played by others.

I think we all felt, from the beginning, that we would be successful in writing that unanimous history, although we did have a number of debates on specific matters. I don't believe, on the other hand, that any of us thought we were likely to carry out our other two tasks with an equal degree of unanimity. Those tasks were determining the nature of the enemy that the United States faces in its current struggle and developing recommendations as to how the federal government, state governments, and the people should respond to the challenges, an area in which reasonable people obviously can disagree.

In the long run I believe that it will be the history we wrote that will be the longest lasting contribution of the 9-11 Commission. During the course of writing the history, the one detour we made was to deal with as many of the conspiracy theories about 9-11 as we possibly could. For example, in the early days, it was widely believed that many relatives of Osama bin Laden and other Saudi Arabians were allowed to leave the country without security checks and that the skies were open for them before they were open for others, both of which were untrue. However, from my perspective, at least, it

was impossible to deal with all of the conspiracy theories. When we were about halfway through our work, the fortieth anniversary of the John F. Kennedy assassination occurred, and the *Seattle Times* had a long and detailed story on the twelve quite separate and independent conspiracy theories about the assassination that are still outstanding. Two months after that, I read an intriguing book review about a new conspiracy theory regarding the Lincoln assassination. Our ability to deal with all of the conspiracy theories about 9-11 was limited at best. The long-lasting one has been the controversy over a Department of Defense program called "Able Danger"—basically a data-mining exercise—which one Congressman and two of the participants have claimed identified Mohammed Atta long before 9-11, a proposition we found totally untrue, but many still believe it.

THE NATURE OF THE STRUGGLE, AND COMMISSION RECOMMENDATIONS

After dealing with the factual history of 9-11, we moved on to the second of our assignments, which was to make some comments on the nature of the enemy and the nature of the struggle in which we are engaged. The report quotes two speeches by Osama bin Laden that preceded 9-11 in which he responded to questions about what the United States could do to end his attacks on us. He said that it was very simple: We needed to abandon the Middle East, convert to Islam, and end the most corrupt civilization in the history of the world. That set of propositions does not even give us a basis for negotiation. Secondly, and even more profoundly, we found that we are dealing with a religious philosophy that long predates Osama bin Laden, going back at least 600 years; and the difficulty of reconciling that philosophy with tolerance and democracy is simply overwhelming. We also found that much of the current extreme version of that philosophy stems from the fact that Islam, which was a triumphant culture and religion for almost the first millennium of its existence, has been in an uninterrupted decline vis-à-vis the West for the last three hundred years. That creates a natural reaction of resentment and a tendency to look outward rather than inward for the causes of that decline. We concluded, too, that the relative decline is unlikely to be arrested as long as Islam systematically discriminates against the fifty percent of its population that is female and refuses to allow them to contribute significantly to the culture or the society. As a result, our report says, this struggle is likely to be measured in decades or generations rather than in years.

To a certain extent the recommendations, in the final part of our report, result not just from the history of 9-11 but from our conclusions about the nature of the enemy. We made those recommendations in the teeth of a presidential campaign in July of 2004, and then, under the law that created the

Commission, we went out of existence a month later. We believed, though, that it was important to follow up on our recommendations, and with generous private contributions, we continued with our Public Discourse Project, which kept us in business through December of 2005. Our purpose was to follow up on the Commission's recommendations, to try to ensure that public opinion was behind them and that Congress adopted at least significant numbers of them. We had impressive success, when you take into account that presidential campaign and the lame duck session of Congress that followed. Our recommendations were followed in these areas: the consolidation of intelligence functions under a director of national intelligence; the creation of a national counterterrorism center under the director of national intelligence; a thorough debate of the PATRIOT Act renewal; the creation in both houses of Congress of committees to deal with homeland security and the Homeland Security Department; the establishment of a better and quicker system of dealing with security clearances; provision for what is going to amount to a national identification card through the states' reissuance of drivers' licenses that will be more difficult to forge or falsify; the beginning of a biometric screening system for people coming into and leaving the United States; and increased attention to international broadcasting on the part of our communications agencies.

At the same time, there were a number of significant failures, as of December 2005. First and foremost is the lack of incentives to share information and therefore the poor quality of information sharing among federal agencies, and between federal agencies and agencies at the state and local levels. Second was the quality of congressional intelligence oversight. One set of statistics will illuminate the problem: We found that the various intelligence agencies of the United States—and there are fifteen of them—reported to eighty-three separate congressional committees and subcommittees prior to 9-11; because of the "dramatic" reforms of 2004, they now report to seventy-nine committees and subcommittees. Our recommendation was two, one in each house of Congress. In a third important area, the United States has not yet been successful in getting the kind of cooperation we would like from Saudi Arabia, the source of both most of the terrorists and the philosophy that motivates them. Also, funding distributed to the states for dealing with homeland security problems has been distributed on a spectacularly pork-barrel formula under which the states of Wyoming and Alaska received about six times as much per capita as did the state of New York, the location of the Twin Towers.

In addition, we found two failures in the 9-11 response that also subsequently contributed significantly to the Katrina disasters. The first had to do with command structure; we recommended a unified command and control

system to deal not only with terrorists but with emergencies like Katrina. The events of 9-11 dramatically illustrated the necessity for that kind of command structure. Arlington, Virginia, with two dozen responding agencies, responded perfectly and efficiently to the attack on the Pentagon. Not one casualty occurred that was not caused by the immediate crash of the aircraft into the building. The command structure and the response structure there worked as well as could be conceived under any set of circumstances. In New York, where only three agencies responded (the city police department, the fire department, and the Port Authority police department), that was dramatically not the case. There was no incident commander, and the various departments could not communicate with one another. As a consequence, not only was the response much less efficient than it could have been, but the loss of many lives of firefighters was due directly to the lack of command structure and lack of communications ability, one of the tragedies of 9-11. Police communications with the police officers were excellent. After Tower Two collapsed, the police were ordered out of Tower One. The firefighters did not receive such orders, and we heard of a number of incidents in which police officers running down the stairs told the firefighters that they were to get out, only to hear, "We don't take orders from cops." As a consequence, several hundred firefighters lost their lives, while only a relative handful of police officers did so. New York has not completely settled that command structure issue since then, although it has made some improvements.

We all saw similar scenarios in relation to Katrina. Mississippi had a good command structure, and very little in the tragedy there was a result of a failure to respond appropriately. Louisiana had a chaotic response structure—from the federal government, through FEMA, at the very top, down through the state government and the city of New Orleans. We all know about the consequences there. Congress now has given a deadline to the states that they implement a unified command structure by the year 2009, if they want any federal assistance. That's a greatly delayed set of incentives.

The second failure we saw in 9-11 that remained a problem in Katrina has to do with the radio spectrum. Our first responder agencies lack the radio frequencies that are necessary to make even a unified command structure work well. The 9-11 Commission recommended that a significant spectrum be granted to our first responders. Unfortunately, the spectrum they need is the spectrum through which you receive your television signals, unless you have the newest form of digital television. Long ago (even before 9-11), Congress called for broadcasters to give up that spectrum, but only when eighty-five percent of the households in the United States have the digital television equipment. After our criticism last fall, Congress set a 2009 deadline for that transfer as well.

Ultimately, in mid-December of last year, the last act of the members of the former 9-11 Commission (working together on the Public Discourse Project) was to give a report card to the federal government and Congress over its responses to 9-11. We gave them one *A*, twelve *B*s, ten *C*s, twelve *D*s, three *F*s—two of which have now moved up to *C*s with the passage of the spectrum law—and two incompletes. You wouldn't get into much of a college with that kind of high school grade average. The best single response to our issuance of the report card was a CBS editorial expressing regret that we decided to put ourselves out of business; the last line of the commentator was: "The faculty has flunked the students and closed the school."

Putting the criticism aside for the moment, one must say that the ultimate goal of our response to 9-11 is to see to it that such an attack does not take place again here in the United States, and on that we have been successful for more than four years since 9-11. At the same time, however, we obviously have not ended terrorism—this form of Islamic fundamentalist terrorism—in the world. We have merely displaced it and caused the terrorists to focus on easier and softer targets. Elaborate planning is more difficult today than it was when bin Laden had the entire nation of Afghanistan as a sanctuary; but we continue to believe that we are faced with a struggle that is going to last for an extended period of time. We, the members of the 9-11 Commission, don't think the response of the United States has been sufficient to this point, and we hope for more of the kind of bipartisan cooperation that the ten of us were able to achieve and for more concern and participation on the part of all Americans in the face of this very serious challenge.

QUESTIONS AND ANSWERS

Q: You said that Islam is in decline. Can you clarify that? It certainly can't refer to numbers of adherents.

A: It had nothing to do with numbers of adherents to the religion. It had to do with, among other things, political or military power and technology. Just over three hundred years ago the Turks besieged Vienna. The Balkans were entirely controlled by them, as was southern Russia. Since then, they have been pushed back geographically; they have lost all their wars; and they were colonized to a considerable degree. The technology and the prosperity of the rest of the world have vastly exceeded theirs, and they feel persecuted as a result. The development of their society has been infinitely slower than has that of the West. It's that comparison, or the natural reaction to it, that is at the heart of the irrational and violent response.

Q: I have a question about what has come out of the trial of Moussaoui—in particular, the disclosures that the F.B.I. knew, in detail, about the training of some of the pilots and plans of those pilots to destroy buildings with aircraft. Is that new information that your Commission did not have before it?

A: We had that information; it was among the eleven bits of intelligence information that I mentioned. A very resourceful F.B.I. agent, I believe here in Arizona, was very concerned about the number of Saudis and similar people who were taking flight training in flight schools here. Several of his reports noted that they were only interested how planes took off and steered, and not in how they landed. He reported back to the F.B.I. in Washington, D.C., and that information got buried. Moussaoui was picked up because of suspicions about the same kind of activities in Minnesota. He had a computer, but it was the F.B.I.'s view that the court wouldn't give them a warrant to look at the information on his computer, so they didn't seek a warrant. The computer had some valuable information on it, although we don't really know whether it had enough to have caused the F.B.I. to spring into action in a way that would have prevented 9-11. Also, one of the groups that the C.I.A. lost a year or so earlier in Malaysia finally came to the attention of the F.B.I. in New York about a month before 9-11, and it was put on the screen. The people in that group were to be picked up, but the F.B.I. didn't know where they were, and F.B.I. rules gave responders thirty to sixty days to respond. The attacks took place much less than thirty days after that message went out. A key point here is that all of these were scattered bits of information in a field of millions of bits of information. It would have been nearly impossible to connect the right bits of information in time to prevent the 9-11 attacks.

I want to make one other observation about the F.B.I.; my earlier criticism focused only on Louis Freeh. Before 9-11, someone in the F.B.I. got to be an intelligence agent by *failing* as a field agent. Intelligence was the dead-end street of the F.B.I., not a career path that anyone wanted. Bob Mueller, the present director of the F.B.I. who took over just one week before 9-11, has spent the last five years attempting to change that culture and to make intelligence work as important to the F.B.I. as field work; but it is a very difficult cultural change in that agency, and we aren't satisfied that it has been more than half successful, even after five years of history since 9-11.

Q: It is my perception that in many cases the terrorists who are the most violent are people who have lived in this country and who know us reasonably well. I have two questions: First, do you think my perception is correct and that it doesn't necessarily follow that if the Muslims got to know us bet-

ter, they might like us? Secondly, how do we change people's attitudes so that folks in the Islamic world don't want to kill us?

A: That's a very good question. The idea that was expressed often during the Cold War, that the enmity was a matter of poverty and lack of education, is clearly not true here. Many of the people who were involved in 9-11 and many of the terrorists now are quite well educated, and they don't come from the economically poorest parts of the societies in which they live. An education here in the Untied States doesn't necessarily improve their views. The mastermind whom we have in custody now is a graduate of a college here in the United States. The contrast between our way of life and the way in which these people are brought up—their attitudes toward religion, their attitudes toward women and the like—is profound. Many who come here for education do develop a better understanding of us, and probably a majority find the education to be a plus; but some of them react completely negatively to it. And, of course, it is the very nature of terrorism that it doesn't require the support of a majority to be successful.

There is a lot of serious debate about whether we are engaged in a war between civilizations. I don't think it has reached that level, at least so far. I think we are caught up in a war within a civilization, within Islam itself, between those Muslims who would like to be a part of the broader world and who want a more tolerant society and those Muslims who react against such modernization in a way that leads to terrorism. We are not particularly well qualified to participate in that debate; we come from such a different background. The debate about what Islam demands of its adherents is a debate that is going to have to be settled within Islam, not from outside it.

Q: Do you feel that democracy has a chance in the Islamic world?

A: My own view is that if our present President made a mistake—and it was a big one—it was in feeling that it would be as easy to establish democracy in Iraq as it was in Poland when that country came out from under the Iron Curtain. I think it is a great deal more difficult. I do think it's possible; but if we look around the world, we see that the most democratic Muslim state is Turkey, and it was dragooned into the Western world and into democracy by a ruthless dictator, Ataturk. Eventually, it became fairly successful, but even in Turkey, there is a significant movement today to go back to a more theocratic state. So, yes, democracy is possible, and that has to be our goal, but it is an extremely difficult goal to achieve.

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	1. Paid/requested outside-county mail subscriptions	0	0
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C.	Total paid circulation	968	980
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17. I certify that the statements made by me above are correct and complete.

John W. Reed, *Editor*

WOMEN'S HUMAN RIGHTS IN MUSLIM COUNTRIES: CHALLENGES AND STRATEGIES†

Sameena Nazir*

As Marti Robinson mentioned in her generous introduction, Freedom House was founded by Eleanor Roosevelt and others more than sixty years ago, to foster the expansion of freedom in the world. For many years, Freedom House has published surveys and special reports on the state of democracy and human rights around the world; but the book I brought with me today, which grew out of the study Freedom House hired me to direct, is the first publication of its kind, not only by Freedom House but also in the women's rights movement internationally. It scores governments in the Middle East and North Africa on their performance on women's rights issues.[1]

When we started this work, we realized that the Middle East is not the only part of the world where women face discrimination or do not have full rights. As you all know, in Asia, Africa, Latin America, Europe, and even North America, there are several challenges that women continue to face, challenges that range from exclusion to violence to limited professional development. But what makes this region that we have examined unique is the fact that the gap between the rights of men and those of women is most visible and significant.

The Position of Women in the Middle East

Women start in a very marginalized position. If you are born female in the Middle East, you are born without certain rights; you are not an equal citizen. The *constitutions* of most of these countries, with the exception of Saudi Arabia, contain some formulation of equality; but in practice, the *laws* of the countries—particularly in the areas of criminal justice, family law, and citizenship and nationality law—discriminate against women and violate their own constitutions. So even though a constitution might say all that citizens are equal, the laws do not make that a reality, because the laws themselves deny women certain rights. For example, in all the countries except Tunisia, women do not have the same nationality rights. They cannot transfer their nationality to their husbands and children, as their brothers can. So

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort at Troon North, Scottsdale, Arizona, March 17, 2006.

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[1] Freedom House, Women's Rights in the Middle East and North Africa: Citizenship and Justice (Sameena Nazir ed., 2005).

if I am a Muslim woman in, let's say, Jordan, and I marry a Syrian, I cannot give my husband Jordanian nationality rights, and the children born of that marriage will not be Jordanian. The children will be considered Syrian, even though I've spent all my life in Jordan.

Family law also puts women in a vulnerable situation, because the husband is considered the head of the family. There is language in pretty much all of the laws, for example, imposing on the wife a duty of obedience. This might prevent a wife from going to work, from going to a hospital, from going out of the house without permission. It can also include restrictions on daughters and sisters. This predicament makes women's lives much more challenging than on most other continents, although the problems of women in Africa are also significant, as you all know.

Added to that in the Middle East is the politicization of religion and culture. When you look at a map, you see it as a small region , and you might not expect much diversity. But if you look more deeply, you find many subdivisions; and their histories, their politics, who colonized them, and who rules them today make the situations very diverse. I'll give you one small example. [Ms. Nazir then gave a fascinating demonstration of many different ways the women in various specific countries or regions within countries wrap and drape a simple scarf to cover their heads and varying portions of their faces.] In both Afghanistan and Pakistan today, it is not compulsory for women to cover their heads; but although the government doesn't require it by law, tribal customs will force it. In Iran, it is government policy, and women really have to make sure that not a single hair is seen.

The reason I demonstrated this small scarf is that it is loaded with politics. It is loaded with politics about how states want their citizens to behave, how states want the tribes to behave and be controlled, and how state governments negotiate power within their own countries. Most of these areas are tribal areas, and tribes are always negotiating among themselves. There is a lot of oil in that region, as you well know. There is natural gas. There are other resources, minerals, and gold. These resources are claimed by tribes, historically; and as national governments take form and control, they constantly negotiate with the tribes. The one area where the national governments give complete freedom to the tribes, headed by men of course, is the area of family law. (Iran is an exception.) Family matters are left to the religious leaders and the tribal leaders, and the governments do not fulfill their duties toward women citizens.

Family law matters are critical to women in the Middle East because family law includes all the decision making about women: the right of girls to go to school, the right of daughters to take on new educational careers, the right of women to work in different professions, the right to marry a person

of your own choice, the right to divorce, the right to have children and to decide the number of children, custody of children, property, inheritance. All of these issues fall within family law. And in that area the governments give total control first to the tribes and then to the husbands. Language in the family laws says that the wife has the duty to obey the husband and the husband has the right to demand obedience from the wife. If, for example, there is domestic violence, it is considered a domestic matter, and the state will not interfere. The women are excluded from participating in decision making and from the justice system that deals with family law. In a majority of the Gulf countries and the Arabian peninsula, women cannot work as lawyers and judges in the family courts because these courts are based on Sharia law, and the argument is that women are not allowed to work as lawyers and judges in Sharia courts. That is not true, however; the largest part of the Muslim population in the world does not live in the Middle East but in Asia (in Pakistan, India, Indonesia, Malaysia), and in those countries women are able to work as lawyers and judges. But in the Arab Middle East, women (except in Tunisia, Algeria, and Lebanon) are not allowed to work in the family court. That puts women at a great disadvantage because they are not able to participate in a process that is so related to every aspect of their lives. They are not able to make decisions, they are not able to participate in the law-making, and they are not able to influence the legal disputes.

Women's Rights Activism

With these problems that make women's legal status unequal, the struggle for women's rights is extremely challenging, as you can imagine. In all the countries, however, there are women who are working to change discriminatory laws and who are also working to improve not just the legal system but also the social and cultural values. In every country, women's rights advocates are working from within their societies to change the laws. They are working to challenge discrimination and exclusion, and they are also working to propose new laws and policies that will help women advocate their cases.

Let me give you a specific example of the work that needs to be done: In a number of countries if a male family member hurts or murders a female, there is very little sentence in the law; and if the male claims an excuse of "crime of passion," in most cases he will get excused completely. If a man marries his victim—a woman he has raped or injured—he will also get forgiveness. A number of governments—for example, those of Pakistan and Jordan—are trying to change the law but the tribal chiefs, the opposition, are not allowing those laws to be changed.

There are other difficulties for women's rights activists who are pushing for change from within. The right to organize is another right that is limited, and in a number of countries such as Iran and Saudi Arabia, it is very difficult for women to form organizations. Holding a meeting to discuss issues is not something that can be easily done.

I must mention that, in addition to the social and cultural challenges, women also face challenges of global politics. What is happening in Iraq affects not only the women in Iraq but also women in the broader region. As citizens become more insecure about their identities and as there is more violence in Iraq, the extremist forces are becoming stronger and stronger. There are more restrictions on women in Iraq today than there were a few years ago. In Afghanistan everyone was thankful for U.S. support in getting rid of the Taliban, and people are very grateful not only to the U.S. government but also to the American people for the outpouring of support for Afghan women. But as time is passing, the difficulties in Afghanistan are returning, and there is a great need to strengthen the civil society.

I don't want to portray such a dismal picture that you will leave this room very sad. The problems are grave, but we take strength from the fact that there is movement within the societies, movement challenging the existing system. We also take strength from the fact that there are people internationally that support our efforts, that encourage us, that help us learn. I have personally taken examples of civil rights litigation and women's rights litigation in the United States to share with women in the Middle East and Pakistan and Afghanistan, to explain how social change happens and how the process of law has come to include all members of society in the United States. You see, we don't know much about America, especially in Asia. We have a somewhat greater connection with our former colonizers, the British and French, but we did not know much about the United States until ten or twenty years ago. So I think the flow of information from professionals like you, about the development in your laws and about the strategies you have used to advocate human rights and equality for all citizens, strengthens us because we can see it as a global movement of human rights. And although we truly believe that real change in any society can come only from within that society, support from outside, be it in the form of resources or scholarship or exchange of experience and expertise, is invaluable to those participating in the struggles that are taking place in the Middle East today. The Freedom House book is one effort to collect and disseminate useful information. Not only do we explain the obstacles that women face, but we also make recommendations on how some of these obstacles can be overcome, and we describe some of the strategies that women have used.

There *is* progress in the region. For example, two years ago Morocco became the first country in the region to have a very egalitarian family law that removed a lot of the language that discriminated against wives and created a balance between the rights of the husband and the rights of the wife. Specifically, Morocco eliminated language that demanded obedience from the wife. And all of this was done in the name of Islam, and in the name of Sharia. The reformers in Morocco pushed it as something that is acceptable in their society. Similarly, nationality rights have been extended in some countries. And on that positive note, I will stop and take some questions or comments from you.

QUESTIONS AND ANSWERS

Q: A good friend fell in love with a man from Lebanon and moved there with him. Now they are going to Saudi Arabia, and he told her that Saudi law requires her to give her passport to a friend while they are in Saudi Arabia. Is there a law that forces a Canadian woman to give her passport to someone while she is in Saudi Arabia?

A: No, he is wrong. Tell her to keep her passport.

Q: How much danger do women who advocate for women's rights in that part of the world face?

A: It is not without danger. First, you are always accused of being an agent of the West, and the Jews, and the C.I.A. I've had all these labels and more. Doing women's rights work necessarily challenges the existing power structures, and any time you do that, there are all kinds of people who will oppose you. The level of danger depends on the situation within each country. It depends on where the woman is working. It depends on her confidence and her linkages with the civil society. Women have been killed in Iraq, in Pakistan, in Afghanistan. They have been imprisoned in Iran.

That is not to say that they cannot work for their rights. For example, I work in Pakistan and have all the freedom I need, but I have learned to be very careful, and I have also developed relationships within the civil society and the media, *and* I have connections in the West. I am in a privileged position, in my ability to do this work and to inform people in the United States. There are people who are at much greater danger. Women who do this work in Iran, in Saudi Arabia, and in the Gulf States face great risks.

Q: To what extent are women involved in the terrorist movement? Are they *forced* to do any type of suicide bombings?

A: First, suicide bombing fortunately is not something that is common throughout the region. So far it has happened in the Palestinian territories, and we are hearing about it in Afghanistan and in Iraq. I don't think there is a general movement of women who will join terrorists, but I think that it depends on the situation. Just as young Muslim men become vulnerable to extremist ideologies and will commit suicide, women can also become vulnerable to these ideologies, and there have been female suicide bombers. Recently, a woman whose sons were suicide bombers was elected in the Palestinian territories. Historically, however, women have stayed away from such violent acts; and, in fact, in countries where they have faced extreme violence, women generally campaign against it. In Afghanistan, nearly every woman politician opposes violence.

Q: To what degree do you feel that the central issue is secular government versus theocracy? As you said, the constitutions in a number of these countries call for equality and yet the laws often don't reflect those initial gestures toward a secular interest in equality.

A: Religion is involved in politics in the Middle East; most of the political battles there are fought on religious arguments in almost all the countries. Having said that, I need to add that there are movements for secular governments in all the countries, except for those in the Gulf. Religion is much more a part of life in the Middle East, particularly the Arab Middle East; there is no concept of separation of church and state there. But in the Asian Muslim countries, there are civil laws. In fact, before the Cold War, all the laws in Pakistan were civil. We didn't have religious law, and we didn't have any of the restrictions on women in the laws. The family law was Islamic, but it was a very progressive law. Then, when the whole mujahedin war started in Afghanistan and Pakistan became a key player, one of the first things that was done in Pakistan was to Islamize the laws. Any time there is a change in government, religion comes into play full force, as you see now in Iraq.

In sum, then, there is a movement calling for secular governments in these countries, but I don't think that it is practical. I think there should be a movement—there needs to be a voice for secular government—but even the non-Muslims demand religious governments because then they can have control over the practice of their own religion.

Q: Which Middle Eastern countries are moving most rapidly toward equality for women and to what do you attribute that movement in those particular countries?

A: There are a number of factors or elements of equality. For example, our survey looks at five broad areas: We look at nondiscrimination and access to justice; we look at equality and security issues; and we look at economic rights, political rights, and social rights. There are different levels of development in different areas. For example, the rich Gulf states are doing great in women's education and health. They invest a lot in these two sectors, and women have made tremendous progress in these two sectors in the Gulf states, but they don't do so well on equality issues or legal issues. In the Gulf states, for example, if a woman marries a non-Gulf person, she has to give up her own nationality and take the nationality of her husband, and she loses all her property rights in the Gulf. In terms of legal progress, progress in eliminating discriminatory laws, North African countries are way ahead of the Gulf. Algeria, Morocco, and Tunisia all have better laws for women, laws that treat women with more equality. In the Levant, women have more freedom of association; there are more organizations in Egypt and Syria. Also, women have more ability to participate in different professions; they can be lawyers, and they can work in the courts. So there are different levels in different areas. In our book, we rated the countries, and we gave the highest scores to Morocco, Algeria, and Tunisia—and the lowest to Saudi Arabia and Libya.

Q: There are branches in Christianity and certainly Orthodox Judaism that discriminate against women considerably. How do you explain, or have you considered, the difference between Islam and these Christian and Jewish branches where we discriminate against women in the religion and yet don't do so on a secular basis?

A: Progressive Muslims believe that you cannot be a true Muslim if you don't believe in Judaism and Christianity. It's only the extremists who don't want to have peace with these religions, and they are very few in numbers. A majority of Muslims respect both the religions, respect all the prophets and the teachings, and consider Islam to be a progressive development in the series of revealed religions. That means that we have inherited a lot of the rituals and the customs, and I see a lot of similarities between a lot of customs in Islamic countries; but I think that the culture of the area heavily influences the religious outlook. For example, we Asian Muslims, the majority in the world, have very different cultural values than the Arab Muslims; and even within the Arab Muslims, you'll find different cultural values for the Emirates and different ones for the agrarian countries and different ones for the countries that are on the water.

I was very surprised when I met Christians in Egypt and Lebanon who were more strongly opposed than the Muslims to women's right to divorce.

They said they were opposing the Muslim family law in these two countries for granting the right to divorce, and I asked, "Why are you opposing this? It doesn't even apply to you. It only applies to Muslim women." They said, "We are afraid that if Muslim women get it, the next will be our women, and we don't want our Christian women to get this right." I saw similar surprising attitudes toward the tradition of female genital mutilation. That is not a Muslim tradition, but it is practiced in a number of Muslim countries—and the biggest supporters of this custom in Egypt are Christians. They want their daughters to have it, and they also push it as part of Egyptian culture.

I am describing all of this to say that I think that the *culture* of the area and the society has a great influence on the religious outlook. Also, the development of a secular movement or civil law is quite new in the Middle East. The concept of civil society, of nonprofit organizations, of professionals in the community advocating for secular movement is very new. So it does exist, but it is not as successful as in other religions or countries.

Q: You mentioned that women are gaining more rights in some countries, and you also mentioned the danger to female activists. Obviously, changes can't be made without the support of some men in those countries. Do the men suffer the same danger if they support women's rights?

A: They do suffer danger, but they don't suffer the same way because there is a heavier burden on women to uphold the culture or to uphold the religion. I think you are absolutely right: We have to have the support of men in our society to move forward, and the female activists and reformers understand that. Also, the women cannot do this work without some support from their male family members. There are a lot of progressive men who support the movements. But it's different for the men. For example, if my brother and I both come to the United States to study and then go back to do work in our country, my brother is considered "modern," and I am considered "Westernized." So he doesn't have the same social pressure on him. He can wear Western clothing and act Western without being labeled "Western," but women are still expected to go back to their cultural roles.

Those of us who are associated with the West have to very careful because we don't want to set off a negative reaction from supporters. We want to work for global human rights values, but we have to recognize that there are issues of identity. That's why I believe that the best way for those of the West to support these movements is to help the agents of change within the countries instead of going and doing their job directly.

Q: How can people here support the work that you are doing?

A: Thank you for this great question; I was hoping somebody would ask.

I will begin my answer by sharing something I learned here. (I try to learn something new everywhere I go.) When I arrived here yesterday, I was fascinated by the huge cactus plants, and I started asking about them. People told me that some of them are one hundred or two hundred years old, and I couldn't believe it. I mean, I believed that the people were telling me what they thought was true, but I started my independent verification. I learned that it takes seventy years for the saguaro cactus to grow one arm. So if you see a cactus with one arm, you should know that it is at least seventy years old. I'm using this example as a way to say that it takes time for certain things to develop and reach a form where they can hold and grow. That is true, too, of the civil society movement in Pakistan and the rest of that region, and I think there are different ways of helping. One way would be to share your knowledge and information and strategies and techniques. That would be very important and helpful to the advocates in Muslim countries. Also, I think it is important to speak up for the rights of women in Muslim countries and, perhaps, to monitor your own government, with respect to how it works in other countries. Financial support is always good because it allows us to do the work that we want to do not just for today but also for the future. For example, I am trying to build a high school in my mother's native village in Pakistan. It doesn't cost a lot of money compared to what you might spend on a high school in the United States, but it is a huge project for us because we look at that high school not just as a high school but as a step in a movement toward women's emancipation in the coming years. Having you here listening to me is also a great support, and I look forward to staying in touch with you.

THE ART OF ADVOCACY IS NOT A SCIENCE†

Edward L. Greenspan*

Chief Justice McMurtry, Associate Chief Justice Morden, my Lords, my Ladies, your Honors, Mr. Treasurer, and my fellow barristers and friends, I regard this evening as the most significant day in my life after the day I met Suzy, my wedding, the births of my children, the day I got called to the Bar, my first win in a courtroom, my first dinner at a three-star Michelin restaurant in France, the World Series game I saw, and the NBA finals game that I attended. And why I regard it as probably the twentieth or so most significant day in my life is that this is a lecture series that has been dedicated to Chief Justice Charles Dubin.

By his own estimation, Charles Dubin is one of the greatest chief justices in the history of the Province of Ontario and the greatest trial and appellate advocate that ever lived on the face of the earth. I did not have the good fortune to watch Charles Dubin perform in the courtroom, other than while advocating from the bench, so I spoke to some of his articling students. I went to them to try to learn what made Charles Dubin believe he was the very best advocate and, more importantly, what made other people believe it too. And so, I talked to Mr. Justice David Humphrey. I said, "Your Honor, what made you article for Charles Dubin?" He said, "I didn't article for Charles Dubin. I articled for his partner, Kimber." I asked Judge June Bernhardt why she articled for Charles Dubin and she claimed that she didn't remember whom she articled for, and that she is suffering from repressed memory syndrome. When I put the question to Royce Frith, he hung up on me. Mr. Justice Krever said it was the only offer he got.

I knew that Chief Justice Dubin taught at Osgoode Hall Law School so I thought I would get his notes or his casebook to try to discover something about what he may have taught about advocacy, and, to my surprise, I discovered that he taught bankruptcy.

What great cases did he have? Humphrey could remember only one: some case where he argued before the Court of Appeal that they shouldn't kill a

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† The First Dubin Lecture on Advocacy, delivered September 24, 1998, in Toronto, Ontario, Canada, in honor of Charles L. Dubin, former Chief Justice of Ontario. Reprinted here with the kind permission of the Trustees of the Honourable Charles L. Dubin Lecture on Advocacy, who retain the copyright. [The 2002 Dubin Lecture, by Sir Sydney Kentridge, was reprinted in 37 *International Society of Barristers Quarterly* 440 (2002).]

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dog, I mean an actual dog, that was sentenced to die in Thunder Bay. As I understand it, he couldn't even get the dog bail, but he eventually triumphed and the dog was returned to its rightful owner.

He was very fortunate to have practiced at a time when judges thought that gold medalists just might know more law than they. In 1950, at the age of twenty-nine, he became the youngest King's Counsel in the Commonwealth. He got it after six years at the Bar, apparently from winning the case about the dog.

To celebrate our greatest advocate, to be the first Dubin lecturer, is the highlight of my career. So much for my career.

Why did I accept this awesome task when there were so many reasons to flatly refuse this offer? Such as *Ferguson*,[1] *Challice*,[2] *Hilton*,[3] and *Agawa and Mallet*[4]—names that don't mean anything to you. In fact they don't mean anything to Dubin, but all these names were cases I lost in front of him. All were cases I should have won, if he had only known a little law. I should have said "no."

The reason I accepted the offer to do this speech is that I share a characteristic common to all trial lawyers. It's called ego. The fact is, if I am asked to speak to two people, I can't say "no."

As well, I know with absolute certainty that the moment this speech is finished, it will be the very best Dubin lecture in the history of the Dubin Lecture Series. So, compelled by the trial lawyer's tragic flaw, I stupidly undertook to do this speech and I began gathering all of the material that has ever been written on advocacy.

One hundred and forty-two thousand pages later, I find myself no wiser. The fact is that advocacy books will not teach you to be a great advocate. They probably won't even prevent you from being an embarrassment to yourself and your profession. If you are hellbent on boring the jury and appalling your client, you will do it. If you don't know when to shut up or when to persist, no book is going to help you.

Yet advocacy books promise that they will help—a lot. They promise the moon. There is an entire genre called the "How to Win" manuals.[5] These inspiring texts have chapter titles like "Win More Cases and Make More Money"[6] and "You Can Win Before the Closing Arguments."[7] There is one

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1 R. v. Ferguson, [1983] O.J. No. 1870 (QL) (C.A.).
2 R. v. Challice, 45 C.C.C.2d 546 (1979), [1979] O.J. No. 1301 (QL) (C.A.).
3 R. v. Hilton, 34 C.C.C.2d 206 (1977), [1977] O.J. No. 550 (QL) (C.A.).
4 R. v. Agawa and Mallet, 28 C.C.C.2d 379. 11 O.R.2d 176, 31 C.R. (N.S.) 293 (C.A.) (1975).
5 For example, *see* JUDGE RALPH ADAM FINE, THE "HOW-TO-WIN" TRIAL MANUAL: WINNING TRIAL-ADVOCACY IN A NUTSHELL (1998).
6 *Id.*
7 *Id.*

book called *Effective Trial Advocacy*.[8] As if a book called *Trial Advocacy*[9]—and there is such a book—would not deal with effective advocacy. Other titles include, "How to Skillfully Practice Advocacy," "How to Get What You Want by Using Advocacy Skills,"[10] "Think Like a Lawyer,"[11] "Expert Guidance Into the Art of Advocacy,"[12] "The Most Vital Systematic Checklist in Advocacy," "The Complete Advocate,"[13] "The Art of Objecting."[14] There are also videos that make you the complete advocate. They teach you voice inflection, gestures, eye contact, and controlling nervousness. They teach head nods, how to move backwards, how to move sideways, how to touch oneself in a courtroom, and how to smile. They completely reinvent you as a person.

Many of these books are organized by convenient number systems: *100 Hints on Advocacy*,[15] *31 Ways to Winning Advocacy*,[16] *The Three Main Tools of Persuasion in a Courtroom*,[17] *The 7 Mandatory Rules of Advocacy*,[18] and *The Eleven Golden Rules*[19]—I love the 11th rule in that one: Never begin before you are ready, and always finish when you are done,[20]—and *The Ten Commandments of Cross-Examination*[21] by the famous American advocacy teacher Irving Younger. There are also books on *Why Irving Younger Is Right in His 10 Commandments of Cross-examination*[22] and *Why Irving Younger Is Wrong*.[23]

Robert Keeton wrote a book on advocacy that is 429 pages long.[24] It has 203 separate headings. I believe it will take you around twelve years to

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[8] EFFECTIVE TRIAL ADVOCACY: RULES FROM THE BENCH (1983), co-sponsored by the Committee on Continuing Legal Education of the Virginia Law Foundation and Litigation Section, Virginia State Bar et al.
[9] JAMES JEANS, TRIAL ADVOCACY (1975).
[10] ROBERT J. DUDLEY, THINK LIKE A LAWYER: HOW TO GET WHAT YOU WANT BY USING ADVOCACY SKILLS (1980).
[11] *Id*.
[12] EDWARD D. & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENTS (7th ed. 1993).
[13] BRIAN JOHNSON, THE COMPLETE ADVOCATE: COURTROOM SPEAKING SKILLS (video, National Institute for Trial Advocacy, 1993).
[14] ROBERT B. WHITE, Q.C., THE ART OF TRIAL (1993).
[15] RUSTOM KAVASHNA SOONAVALA, ADVOCACY: ITS PRINCIPLES AND PRACTICE 862 (1953).
[16] FRANK D. ROTHSCHILD, 31 WAYS TO WINNING ADVOCACY (video, National Institute for Trial Advocacy, 1996).
[17] FINE, *supra* note 5, ch. 8.
[18] KEITH EVANS, THE COMMON SENSE RULES OF TRIAL ADVOCACY (1994).
[19] SIR FREDERIC JOHN WROTTESLEY, ON THE EXAMINATION OF WITNESSES 40 (1910) (citing David Paul Brown's "eleven golden rules").
[20] *Id*. at 42.
[21] IRVING YOUNGER, THE ART OF CROSS-EXAMINATION 21 (American Bar Association, Section of Litigation, Monograph Series, No. 1, 1975) (he says there are really only six or seven commandments, but ten has a biblical ring) (also a NITA audio tape produced in 1975) (additional NITA videos: "Mastering the Art of Cross-examination"; "The Ten Commandments of Cross-examination").
[22] Lila Weinberg, *In Memoriam: Irving Younger*, 73 MINN. L. REV. 823 (1989); J. R. Waltz, *In Memoriam: Irving Younger*, 73 MINN. L. REV. 819 (1989).
[23] FINE, *supra* note 5, ch. 28.
[24] ROBERT E. KEETON, TRIAL AND METHODS (1954).

memorize and distill it. It contains important headings like "Should You Object?"[25] I think you should. "Should you talk with a witness about how he should be dressed in court?"[26] I say "yes." "When and how should you use an interpreter?"[27] I think when you need one. "Should trick questions be used on cross-examination?"[28] (Pause) Is this being videotaped? No? (Nod "yes.")

My favorite of the *How to Win* manuals is by Gerry Spence, the buckskin advocate. He wrote a book called *How to Argue and Win Every Time.*[29] I thought it might help. So I began reading the book. He says in his introduction that if you read this book, you will never, ever, ever lose a case.[30] As I was reading this, I thought to myself, "What happens if the other side is reading the book?"

In his book, Spence talks about "listening to the soul's ear."[31] He seems to know that souls have ears. He says winning arguments come from the soul, and we all have souls, so we all can produce winning arguments.[32] He uses phrases like "our divine uniqueness,"[33] "the wondrous well of our own personhood,"[34] "our spiritual and emotional selves."[35] I have no idea what he is talking about that is any different from the television motivational speaker Tony Robbins.

Spence also talks about the joy of preparation.[36] Preparation is something that I am didactic about. There can be no disagreement on this subject, and that will be "between you and me."[37] There is a unanimity of expression in all literature on the subject. The most important qualities of an advocate are thorough preparation, hard work, and industry. Every book on advocacy repeats this advice, as if, without books to tell us this, we would all assume it was important to go into a courtroom unprepared. What keeps us up until 4:30 a.m. is our duty to give our clients our all and the absolute fear of screwing up. Nothing is more complicated than that.

Spence's book is self-motivational. He loves to tell you how you can't "B.S." anybody. You must argue out of the heart zone.[38] Yet, listen to Spence:

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[25] *Id*. at 158.
[26] *Id*. at 29.
[27] *Id*. at 65.
[28] *Id*. at 130.
[29] GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME: AT HOME, AT WORK, IN COURT, EVERYWHERE, EVERY DAY (1995).
[30] *Id*. at 7.
[31] *Id*. at 70.
[32] *Id*. at 70-71.
[33] *Id*. at 1.
[34] *Id*.
[35] *Id*. at 13.
[36] *Id*. at 128.
[37] LOUIS NIZER, BETWEEN YOU AND ME 107 (1948).
[38] SPENCE, *supra* note 29, at 118.

> Early in my career I was standing before a jury making my final argument. Stiff with fear, I held tightly to the lectern . . . I was afraid to look up for fear I'd lose my place. I tried to memorize my final speech and all I could do was read it. I was afraid to look at the jury for fear their bored looks would be so disconcerting I would fumble and stammer and then go blank. Suddenly, my papers fell from the lectern and went flying across the courtroom floor. [Like papers fly!] Red with embarrassment, and sweating, I began picking them up. I could hear the snickers of the people in the audience. I caught a glimpse of my client's face frozen in horror. When I had finally retrieved my papers they were in hopeless disarray. I didn't know where I had left off, nor where to begin. I thought I would die. I prayed I would.[39]

Unfortunately for the reader, his prayers were not answered. Spence continues:

> But God did not oblige. I had to go on. I had no choice. In terror I looked at the jurors and they looked back. "Sorry," I mumbled. And then it came blurting out: "I wish I could talk to you without these notes. I wish I could tell you what's in my heart, and how I really feel about this case. If you could only know. Why . . . the facts are clear. Jimmy, here, my client, is innocent. And you know why I know?" And suddenly the *Magical Argument* had begun.[40]

And you the reader want to say: "Hallelujah! Hallelujah! Hallelujah! Let the B.S. roll on." Anyone who spends a minute seriously reading this book is clearly a person who, when he or she cannot sleep at night, watches the great Tony Robbins on television.

In my first trial, like everybody, I too dropped all of my papers on the courtroom floor, but if I had said to the jury, "How I wish I could tell you what's in my heart, and how I really feel about this case," I would have been doing my client a major disservice.

Many advocacy books deal with specific areas like *Appellate Advocacy in a Nutshell*,[41] *The Common Sense Rules of Trial Advocacy*,[42] *Mastering the Art of Cross-examination*,[43] *Theatre Tips and Strategies for Jury Trials*,[44] *Persuasive Expert Testimony*[45] which says that expert testimony has to be credible, understandable, and interesting—what a revelation!—as if some lawyer might think without reading this book that if expert evidence was

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[39] *Id.* at 181.
[40] *Id.*
[41] ALAN D. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL (1984).
[42] EVANS, *supra* note 18.
[43] IRVING YOUNGER, MASTERING THE ART OF CROSS-EXAMINATION (UNL Video Services 1987).
[44] DAVID BALL, THEATRE TIPS AND STRATEGIES FOR JURY TRIALS (2d ed. 1997).
[45] DAVID M. MALONE, PERSUASIVE EXPERT TESTIMONY (video, NITA, 1990).

incredible, totally confusing, and boring as hell, that would be okay, "Controlling the Runaway Witness,"[46] "How To Handle a Turncoat Witness,"[47] "The 12-year-old witness"—I am amazed they do not tell you how to cross-examine the dead. There are books that talk about stubborn witnesses,[48] callous witnesses,[49] truthful witnesses,[50] interested witnesses,[51] uninterested witnesses. These books have chapter titles such as "The Dangers of Cross-examination,"[52] "Cross-examination in murder cases,"[53] cross-examination in arson cases, in poison cases, in fraud cases,[54]—"Some Do's,"[55] "Some Don'ts,"[56] "How to Address a Jury," "You Too Can Talk to Jurors." There is a book entitled *The Common Sense Rules of Trial Advocacy*[57] with headings like, "Entertain Them,"[58] "Think Beginning, Middle and End,"[59] "Keep It Simple,"[60] "Be Very Careful about Raising Your Voice,"[61] "Keep Your Dismay a Secret,"[62] "Don't appear to be manipulative,"[63] and "Don't sound like a lawyer."[64] I found more wisdom about advocacy in a Yogi Berra book where he said, "90% of the game is half mental,"[65] and "You've got to be careful if you don't know where you're going 'cause you might not get there!"[66]

Other titles are more esoteric and academic: for example, "The Psycholinguistic Approach to Persuasion."[67] I read it because it sounded a little dirty. It was not even that! There are many books on the "art" of advocacy.[68] There are books on the "science" of advocacy.[69] There are books on whether

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[46] LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE & TECHNIQUES (1993).
[47] LEE STUESSER, AN ADVOCACY PRIMER (2d ed. 1997).
[48] SOONAVALA, *supra* note 15.
[49] *Id*. at 748.
[50] *Id*. at 750.
[51] *Id*. at 737.
[52] RICHARD HARRIS, K.C., ILLUSTRATIONS IN ADVOCACY (5th ed. 1915).
[53] SOONAVALA, *supra* note 15, at 98.
[54] *Id*.
[55] ERIC CROWTHER, ADVOCACY FOR THE ADVOCATE 82 (1955).
[56] *Id*. at 85.
[57] EVANS, *supra* note 18.
[58] *Id*. at 46.
[59] *Id*. at 48.
[60] *Id*. at 50.
[61] *Id*. at 58.
[62] *Id*. at 139.
[63] *Id*. at 20.
[64] *Id*. (unfortunately, he does not tell us what kind of professional, or nonprofessional, we should sound like).
[65] YOGI BERRA, THE YOGI BOOK: "I REALLY DIDN'T SAY EVERYTHING I SAID" 69 (1998).
[66] *Id*. at 102.
[67] SCOTT BALDWIN, ART OF ADVOCACY—DIRECT EXAMINATION ch. 12 (1994).
[68] LLOYD PAUL STRYKER, THE ART OF ADVOCACY (1979); JOHN A. OLAH, THE ART AND SCIENCE OF ADVOCACY (1990); RICHARD DU CANN, THE ART OF THE ADVOCATE (1964); BALDWIN, *supra* note 67.
[69] OLAH, *supra* note 68; POZNER & DODD, *supra* note 46.

or not advocacy is a science.[70] I have read all of these books. I think it is a bit of both.

Judge Parry's "The Seven Lamps of Advocacy"[71] makes advocacy sound like a mystical craft.

Other books discuss what kinds of personalities are best suited for advocacy. In his book, *To Be a Trial Lawyer*,[72] F. Lee Bailey boldly states that the best trial lawyers are airplane pilots.[73] I hate flying. As well, you have to be an English major according to Bailey.[74] I was a Philosophy major. And you have to be able to play chess.[75] I do not know how to play chess. This means if you think I am a great trial lawyer then Bailey is dead wrong. If you think Bailey is right, then remember this: Dubin is no pilot either.

All advocacy books must be taken with a grain of salt. Most of them are nothing more than advertisements for the author. It seems like everybody who has been called to the Bar and has cross-examined once or more has written a book on the art or the science of advocacy. Everybody with a law degree seems driven to create lists of hints, rules, or dos and don'ts: "*Don't* sound like a lawyer;"[76] "Don't Appear to be Manipulative."[77] This "don't" changed my life. Up until I read it, I thought it was important to *appear* to be manipulative. These writers are genuinely nuts.

If you add up all the rules in all the books, there are 5,213 rules. That is all. Learn them and you cannot go wrong.

Much has been written specifically on cross-examination. Francis Wellman put it best:

> The art of cross-examination requires the greatest ingenuity; a habit of logical thought, clearness of perception, in general; an infinite patience and self- control; power to read men's minds instantly, to judge of their character by their faces, to appreciate their motives; the ability to act with force and precision; a masterful knowledge of the subject matter itself; an extreme caution; and above all, the instinct to discover the weak point in the witness under examination.[78]

"If you count them, you will see that Wigmore has listed 12 requirements, each essential to the mastery of the art. The absence of any one of these

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[70] OLAH, *supra* note 68.
[71] DU CANN, *supra* note 68, at 47.
[72] F. LEE BAILEY, TO BE A TRIAL LAWYER (1982).
[73] *Id*. at 17-18.
[74] *Id*. at 15.
[75] *Id*. at 19. Bailey cautions that one who uses the game of chess to develop skill as a trial lawyer should avoid playing the long game. *Id*. at 20.
[76] EVANS, *supra* note 18, at 20 (emphasis added).
[77] *Id*.
[78] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 28 (1962).

could well prove fatal to the examiner."[79] Even the great Wigmore authored a 12-point approach to advocacy.

The art of cross-examination has traditionally held a prominent position in our profession. It has been revered as the greatest engine designed for the discovery of the truth. Yet books on the art of cross-examination seem to generate the worst clichés and most hollow advice.

For example, "[i]f you don't strike oil in the first five minutes, quit boring."[80] I do not know what this rule means when you begin a cross-examination of an expert accountant on a complex analysis of generally accepted accounting principles relating to a financial statement. The only way I can imagine not being boring in the first five minutes is to suggest to the accountant that it was he who killed Christine Demeter. Other than that, it is probably going to take some time to go down the runway of setting the witness up for extracting the answers you need for an effective cross-examination.

As well, I have had jury trials where I have bored the pants off the jury for two weeks and they've come back and acquitted, and I think they even yawned when they acquitted. I've also had trials where I have excited the hell out of each and every juror for three days in a row, electrified them, and they came back in under two hours and convicted.

Another cliché is: "Cross-examining does not mean examining crossly."[81] "I'm sorry, witness, for having to put this to you and I want to apologize in advance for raising it, and you will have to forgive me, but my client has instructed me to raise this, otherwise I would not even begin to think about suggesting this to you, but it appears to be a fact that you have twenty-three prior convictions for perjury. Again, I want to apologize for raising this, but it is true, isn't it?" The books say "don't" do a lengthy and pointless cross-examination. I cannot imagine any lawyer saying, "I think I'll start the day off with a lengthy and pointless cross-examination."

Patrick Hastings, one of the greatest cross-examiners in the history of England, was rude, offensive, mean-spirited, grossly discourteous, arrogant, pushy[82] and knew only one way to cross-examine, and that was crossly.

Edward Carson cross-examined Oscar Wilde for two days and he did not strike oil until well into the second day. That cross-examination has been reproduced and discussed in many advocacy books.[83] It is regarded as probably the greatest cross-examination that has ever occurred in an English-

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[79] *Id*. at 74.
[80] DU CANN, *supra* note 68, at 109.
[81] CROWTHER, *supra* note 55, at 76.
[82] DU CANN, *supra* note 68, at 97.
[83] WILLIAM H. DAVENPORT, VOICES IN COURT 403-17 (1958); H. MONTGOMERY HYDE, THE TRIALS OF OSCAR WILDE (1962).

speaking courtroom. I read it again very recently and what I can tell you is this: There is not a single judge in this country today who would allow this cross-examination to occur. It took two days. No judge would stand by and let a cross-examiner take the necessary two days to get under Oscar Wilde's skin. It was rude. It was offensive. It was sarcastic—riddled with sarcasm, in fact. Although smart, it was an attack with no holds barred. When Carson embarked on this course, he knew that he had to succeed for if he failed, he would be forever discredited in the eyes of the jury. The old maxim "[d]on't strike a king unless you can kill him"[84] applied.

Verbal bullying should never be equated with cross-examination. But from time to time, the bullying technique cannot be denied. I don't know why judges today think that cross- examinations should be free from any kind of brutality. Brutality is calculated to unnerve, calculated to confuse. I am tired of reading books on cross-examination that applaud the examiner for never raising his voice and scarcely putting the leading question. Cross-examination is a battle between counsel and the witness. I recognize that the jury may get the impression that the witness is being unfairly treated. It is the cross-examiner's right to take that risk, fatal as it may be.

Another common statement about cross-examination is that you should never ask that last question. Sir Norman Birkett made the admonition: "Above all, don't ask that one question too many."[85] I have always wondered, "If you don't ask the last question, how do you know if you are finished?" It is true that you have to learn when to stop.[86] You have to know that when you have scored a direct hit you should probably forget your other points and sit down. Don't try to gild the lily. Don't spoil what you have done by asking that one last unnecessary and dangerous question. Take, for example, the cross-examination of a plaintiff in a personal injury lawsuit. The defendant's lawyer began questioning the plaintiff as follows:

> Question: Did you, at the time of the accident, when you were asked if you were hurt, reply that you weren't hurt?
> Answer: Yes, sir, I did.[87]

The questioning should have ended there. The plaintiff had just admitted that he had said he had not been hurt when the accident happened. But, of course, the lawyer continued:

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[84] STRYKER, *supra* note 68, at 76.
[85] YOUNGER, *supra* note 21 (Commandment #9).
[86] STRYKER, *supra* note 68, at 95, 97.
[87] J. W. EHRLICH, THE LOST ART OF CROSS-EXAMINATION; OR PERJURY ANYONE? 19 (1970).

> Question: Well, sir, why have you been testifying all morning that you were hurt, giving the jury the impression that you were still suffering the effects of the accident?
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> Answer: Well, Mr. Lawyer, it was like this. I was driving my horse and buggy along the road, and along comes this client of yours in his automobile and knocks us in the ditch. You never saw such a mess in your life. I was flat on my back with my legs in the air. The buggy was completely wrecked. Now this client of yours gets out of his car and looks at us. He sees my horse has a broken leg. He goes back to his automobile, gets a gun, and shoots him. Then he comes up to me and says, "Now what about you? Are you hurt?"[88]

But the fact remains that we all want desperately to ask that last question. What gives the advocate that sixth sense which tells him when he has gone as far as he should go? Cases have been lost by bungling, unthinking, unwise, over-confident, and overly bold cross-examinations. Other cases have been won solely because of clever, skillful, and fearless cross-examinations. But it is probably true that cross-examinations do tend to be more suicidal than homicidal,[89] and that cross-examination is as much a game of avoiding mistakes as it is a game of scoring points. I suppose that is why Irving Younger's first commandment is: "Be brief, short, and succinct. Reason number one—chances are, you are screwing up. The shorter the time you spend on your feet, the less you will screw up."[90] I don't agree. I'm living proof that you can screw up a lot, even in a very short period of time.

Most experts say you don't ask a question unless you know what the answer is going to be. For instance, never ask "why." If there is a rule that is inviolate, it is "never ask 'why.'" I decided to look at Sir Edward Carson's destruction of Oscar Wilde to see if he ever broke the rule. Carson was one of the greatest cross-examiners in England. In 1895 the Marquis of Queensberry was very upset about the ugly rumors that his young son, Lord Alfred Douglas, had been on terms of close intimacy with Wilde. Queensberry was so disgusted that on February 28, 1895, he appeared at one of Wilde's clubs, the Albemarle, and handed the porter a card on which he had written, "Oscar Wilde, posing as a Sodomite." Wilde immediately preferred a charge of criminal libel and on April third the trial began.[91]

Carson attacked Wilde with cold fury and unrelenting, sarcastic, repetitive cross-examination, and on the second day of the trial, after mentioning the

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[88] *Id*.
[89] Emily R. Buckner, *Comments on the Uses and Abuses of Cross-Examination*, *in* WELLMAN, *supra* note 78, at 216.
[90] YOUNGER, *supra* note 21, at 21.
[91] STRYKER, *supra* note 68, at 100.

name of a young servant boy at Oxford, asked, "Did you ever kiss him?" Wilde made his fatal answer, "Oh, dear no. He was a peculiarly plain boy. He was unfortunately, extremely ugly. I pitied him for it." Carson asked, "Was that the reason why you did not kiss him?" Wilde: "Oh, Mr. Carson, you are pertinently insolent." Carson: "*Why*, sir, did you mention that this boy was extremely ugly?" Wilde: "For this reason. If I were asked why I did not kiss a door-mat, I should say because I do not like to kiss door-mats. I do not know why I mentioned that he was ugly, except that I was stung by the insolent question you put to me and the way you have insulted me throughout this hearing. Am I to be cross-examined because I do not like it?" Carson: "*Why* did you mention his ugliness?" Wilde: "It is ridiculous to imagine that any such thing could have occurred under any circumstances." Carson: "*Then why* did you mention his ugliness, I ask you?" Wilde: "Perhaps you insulted me by an insulting question." Carson: "Was that the reason why you should say the boy was ugly?" Wilde began several answers inarticulately but couldn't finish any of them. Carson said in staccato tones, "Why, why, why did you add that?" Whether the question, "Did you kiss him?" was a stroke of genius or just a throwaway question, we will never know. But what we do know is that the question was a shattering blow and the brilliant cross-examiner followed that blow with subsequent questions—"*Why* did you say *that*?"—he broke the rule not once, but three times.[92]

Sometimes asking that question you do not know the answer to may not be as successful. This is from an actual transcript:

> Question: O.K. we've talked at length about how the accident happened, what people said as to how the accident happened, is there anything we haven't covered that you can think of, anything in your mind that you're thinking about how the accident happened that I haven't asked you and you're thinking, "He hasn't asked me that" and "I'm not going to tell him because he hasn't asked me." Is there anything?
> Answer: Have you lost your mind?[93]

It is always easier to criticize a cross-examination than to conduct a cross-examination. However, reading about famous cross-examinations is far from useless. From all of my reading, I know this: If I ever get the opportunity to cross-examine Oscar Wilde, I'll kill him. I'm ready for him more than I've ever been ready for anybody. I know what to ask. I know what he's going to say. I know how to trap him. I know how to destroy him. And I have been

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[92] HYDE, *supra* note 83, at 134 (emphasis added).
[93] William T. G. Litant, *And, Were You Present When Your Picture Was Taken?*, MASS. B. ASS'N L.J., May 1996.

waiting for twenty-nine years. I've studied that cross-examination so many times that I know it by heart. And every time I'm retained I always ask whether or not Oscar Wilde will be a witness in the case.

From reading anecdotes I also know that from the Frederick Henry Seddon murder case involving his lodger Eliza Barrow, one of the greatest opening questions to ask a witness is: "Did you like her?" Sir Rufus Isaacs's quiet opening question and Seddon's reply sent him to the gallows.[94] The question put him in a dilemma. Obviously if the accused said he didn't like her, he was in deep trouble, and if he said he did like her, he was in equally deep trouble. I have waited twenty-nine years to use this question. In a case where an expert accountant was testifying, I almost asked, "Did you like her?" In another case where a guy was accused of killing his brother, I was tempted to ask, "Did you like her?" I know my day will come.

Anecdotes about cross-examinations are entertaining but generally offer lousy instruction. With the benefit of hindsight, we naturally think that we could have done better. But cross-examination is not something that can be learned by rote or by poring over old cases. Each cross-examination must differ from the next because it must address different facts, different witnesses, different juries, and different judges. Everything is different. Each cross-examination is a new adventure, a foray into an uncharted sea. Spontaneity, creativity, and quick thinking are necessary, not rules, nor recollections about other cross-examinations.

Some authors tell you that they use yellow-colored pencils to highlight prior inconsistent statements, red-colored pencils for prior consistent statements and blue for important areas of cross-examination on the voluminous set of notes they have in front of them when they get up to cross-examine. Arthur Liman uses a yellow notepad.[95] This is what they teach us. Since you have come to hear me tonight, I think I owe it to you to tell you that I use green for prior inconsistent statements, blue for prior consistent statements, and red pencils for doodling on green, not yellow or white, paper.

There are successful trial lawyers who wear the badge of righteous indignation, attack witnesses, openly argue with opposing counsel and even the trial judge.

There are equally successful trial counsel who are agreeable, friendly, and "who, even when he inserts the knife in cross-examination, does so bloodlessly; who is deferential to his adversary and obeisant to the presiding judge and who, nevertheless, persuades the jury of the justice of his case by the calm, reasoned effort he is making for his client."[96]

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[94] Sir Edward M. H. Marjoribanks, *The Seddon Case*, *in* VOICES IN COURT 418 (William H. Davenport ed., 1958).
[95] EMILY COURIC, THE TRIAL LAWYERS: THE NATION'S TOP LITIGATORS TELL HOW THEY WIN 168 (1988).
[96] NIZER, *supra* note 37, at 107.

Between these two types of counsel is an infinite variety of counsel style. Do not pattern your style as righteously indignant if that is not who you are. The jury will see through you. Likewise, don't be quiet and timid if you are not. The jury will see through that as well. You express your talents in your own way. You have to be natural. The worst thing you can do is ape somebody else.[97] Never try to imitate. Try to see what you like best about yourself. Develop your own style. Your success depends on your voice, your memory, your sense of humor, your own physical strengths, your own techniques suited to your personality.

There are many styles of cross-examination. The fact is that style does not matter. What matters is effect. I suspect if you beat up on a young child in cross-examination, it will do more harm than good. Marshall Hall was passionately involved in his cross-examinations. Others are always detached. The critical point of cross-examination is to remember what Carson always knew and what Wilde, for reasons I still do not understand, did not know, and that is that the cross-examiner has the clear advantage. It is the cross-examiner and not the witness who chooses the parts of the evidence on which to ask the questions and it is the cross-examiner who chooses the words with which to do it and it is only the cross-examiner who knows where he is going.

Everybody who has a law degree believes himself to be an expert in the art of advocacy and wants everybody to know what he thinks.

Irving Younger says there are ten commandments of cross-examination.[98] Somebody else says there are seven commandments. Somebody said there were nine, somebody said there were thirteen. I have now read every single book, every single article on advocacy ever written. I have spent somewhere in the vicinity of 350 non-billable hours on this lecture, and I have reduced all of the books and all of the articles to one single commandment, and if you think I am going to share that discovery with you in some free lecture honoring some former Chief Justice of this province, think again. Besides, if you want the real answer, go to the 1959 Law Society of Upper Canada Lecture Series—"Cross-examination Before Juries," by C. L. Dubin, Q. C.[99] He

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[97] MR. JUSTICE PATRICK T. GALLIGAN, ADVOCACY: A SYMPOSIUM 534 (1982) (the symposium was presented by the Canadian Bar Association-Ontario and the Law Society of Upper Canada, celebrating the 150th anniversary of Osgoode Hall).

[98] YOUNGER, *supra* note 21.

[99] Charles L. Dubin, Q.C., Cross-Examination Before Juries: The techniques of a successful cross examination, Law Society of Upper Canada Lecture Series (1959). *See also* the Right Honorable Sir Norman Birkett, speech delivered to the Lawyers Club of Toronto (Sept. 10, 1947), *in* 25 CAN. B. REV. 1039, 1044 (1947): "I don't come here to try and pretend for one moment to give anybody advice about advocacy . . . I have seen almost every type of advocate in every type of court. And I know at once there are no standards that you can lay down and say, if you want to be a great advocate, there is the pattern. It can't be done." If there is a theme to my lecture, this is the theme.

said, of the techniques of a successful cross-examination, there are indeed no rigid rules that one can or should follow. There is no such thing as *always* do this, or *never* do that. At most it can be said that it is generally best to pursue a certain course. Few rules are inflexible. That is why he was so good at it.

Some authors write that "the high point in the art of advocacy is the summation to a jury, that the summation is the culmination of all of the many elements of a trial, it is the climax of a case, and an opportunity to rescue a cause which appears to be lost. It calls for every skill that the advocate possesses. It summons a lawyer's courage, tests his character. It taxes his logic, reasoning and his memory. It requires his patience and his tact. Every word must convince."[100]

Other lawyers and writers say that if you have not won the case by the time of the closing, no closing will ever pull the case out of the fire. These people say that there is nothing more important than the opening and that "your opening speech must arouse in every juror's mind, the belief that you are not only telling the truth but that you can really prove what you are promising to establish."[101] The opening "is a prelude, an introduction, a preface, a preview of the case about to be presented."[102] The opening is everything.

Some say that the opening part of your opening is the most important part of the opening, which they say is more important than the closing. People who believe in the closing say you have to have a spectacular opening for your closing. Others say that the closing of your opening is all that counts. I have yet to read anybody who thinks that the closing part of your closing is more important than the middle part of your opening. And so, in closing, my experience tells me that I have won cases with good openings and I have lost cases with good openings. Likewise, I have won cases with good closings and I have lost cases with good closings. I even once won a case when I did not make an opening because I didn't know what to say, but I never won a case where I didn't make a closing. And so, it would appear, in my experience, that the closing is more important than the opening.

Some lawyers say that you must address a jury from a podium with notes. The legendary Arthur Maloney says it is helpful to speak from notes and that he always speaks from notes.[103] Other lawyers say do not use a podium and do not use notes. The equally legendary G. Arthur Martin says no notes, no podium.[104] Some other lawyers say never take a jury trial.

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[100] STRYKER, *supra* note 68, at 111.
[101] *Id*. at 54.
[102] *Id*. at 47.
[103] Arthur Maloney, *Addressing the Jury in Criminal Cases*, 35 CAN. B. REV. 372, 379 (1957).
[104] G. ARTHUR MARTIN & JOSEPH IRVING, G. ARTHUR MARTIN: ESSAYS ON ASPECTS OF CRIMINAL PRACTICE 101 (1997).

Some say you have to speak to jurors as if they were friends, that juries have to like you, that you should be someone jurors would invite into their homes. I would have thought it was more important that they would want to invite your client into their homes.

Rufus Choate, the great American lawyer, says the proper length of a jury address is one hour, that you cannot deeply move people, stir them and fix them for more than one hour in any single address.[105] Tell that to Clarence Darrow whose impassioned jury address in his own defense took eight hours over two days that left "his jury spellbound by his virtuoso performance."[106] What if your trial has been three months long and involves complex evidence; if you give that jury a Coles Notebook version of your case, you will inspire them as much as Coles Notebooks do.

We are told that jurors demand stimulation and entertainment, that the lawyer has to be an actor who provides entertainment value.

Is a lawyer an actor? Marshall Hall once declared: "My profession and that of an actor are somewhat akin, except that I have no scenes to help me, and no words are written for me to say. There is no back-cloth to increase the illusion. There is no curtain. But, out of the vivid, living drama of somebody else's life, I have to create an atmosphere—for that is advocacy."[107] To that I would add there are no retakes, no lighting. I say that if there are no scenes to help you, no words written for you, and no back-cloth or curtain to increase the illusion, then what you are is a lawyer, not an actor. Edward Bennett Williams and Arthur Liman say the lawyer is the director, not the leading actor. The leading actor is the defendant.[108] Bob Warren says you are a producer.[109] But a producer only needs ten out of twelve critics on his side to win. *You* must win everybody to get an acquittal. So let's give up on the debate whether an advocate should have an actor's card, a director's card, or a producer's card. We are lawyers.

Nonetheless, the lawyer must at times entertain. There is nothing more important or more difficult than using humor. The Greek orators devoted much attention to the topic of laughter. Quintilian (Book IV, 1, 49) said: "Urbanitas opportuna reficit animos"—"Timely wit refreshes the mind."[110] Diversions are sometimes needed for people who are involved in weighty affairs; they are a valuable part of the advocate's equipment. Wisecracking

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[105] FRANCIS L. WELLMAN, A DAY IN COURT 246 (1910).
[106] B. BYCEL, M. S. LIEF & H. M. CALDWELL, LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW 68 (1998).
[107] STRYKER, *supra* note 68, at 39.
[108] Litant, *supra* note 93, at 336. *See also* DONALD E. VINSON, AMERICA'S TOP TRIAL LAWYERS: WHO THEY ARE & WHY THEY WIN 276 (1994).
[109] VINSON, *supra* note 108.
[110] Lord MacMillan, *Some Observations on the Art of Advocacy*, 13 CAN. B. REV. 22, 27 (1935).

is disastrous, but in the courtroom a sense of humor is invaluable. It not only warms the audience, it keeps you from blowing your top. It is far too easy to see only the shadows and ignore the patches of sunlight that remain. There is a funny side of the street, and a sense of humor is an essential part of the makeup of an advocate.

For instance, in the Helmuth Buxbaum murder case that was held in St. Catharines, involving the alleged murder of his wife, I was in the middle of my jury address when there was an earthquake. Everyone in the courtroom knew there was an earthquake because the chandelier was shaking and the earth was quaking. The trial judge, to my surprise, actually stopped the trial. When the earthquake stopped, he wanted to bring the jury back. I thought we should adjourn for the day. I thought that the trauma of an earthquake was too much of a distraction to get the jury's interest back to the defense. The judge agreed and that is why he brought them back. When the jury came back, it was clear to me, from the looks of horror on their faces, that the last place they wanted to be was in court and the last person they wanted to listen to was me. They were waiting for the next earthquake. And to get their attention back, I said, "And now, for my next trick, I am going to part the waters of Lake Ontario." They loved it and they loved me, and it worked. When the jury came back and said "guilty," they had smiles on their faces.

The Right Honorable Lord Mackay delivered the Fordham University School of Law Sonnet Memorial Lecture in 1991.[111] He went on about written advocacy. Apparently before he came to the United States from England, he had read some routine motion to amend a civil complaint and had counted the words in the reply brief that totaled 41,596 words spread over what he called an agonizing 124 pages. He said rather than impressive, the brief was oppressive. He does not seem to like to read, because he lamented the fact that the story of the "Creation of the World" in the Book of Genesis was 400 words; the "Ten Commandments," he tells us, contain 279 words, Lincoln's Gettysburg Address is only 266 words and the American Declaration of Independence has only 1,321 words. Then, for reasons that I will never understand, he added up all four and they came to a mere 2,266 words. I don't know what he is getting at, other than showing off his math.

I have been involved in many motions that are much more important than the Book of Genesis, the Ten Commandments, Lincoln's Gettysburg Address, and the Declaration of Independence combined!

It is true that briefs do not have to be heavy, lifeless, boring legalese, but Gerry Spence, in his unbelievable book, talks about winning a case with a brief that consisted exclusively of cartoons and was bereft of even one legal

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[111] Lord Mackay, *The Advocate: Should He Speak or Write?*, 60 FORDHAM L. REV. 953 (1991).

citation.[112] So that you have my position on this: I do not recommend it, unless it is an extremely funny cartoon.

Many distinguished and concerned thinkers, participants, and observers in the justice system are calling for major modifications, or even eradication, of the adversary system. As someone engaged in the practice of litigation, my self-interest in the preservation of a system that is my life and my love is apparent. Whether self-interest motivates my fervent belief in the importance of the values the adversary system promotes and protects is a possibility I prefer to deny but cannot determine. I believe that the adversary system is indeed the best way we know to find the truth. I believe that Lon Fuller's theory of adversary justice highlights the superiority of the adversary system as a system for discovering the truth. Like Professor Fuller, I believe that the integrity of the adjudication process depends upon the adversarial presentation of issues before a neutral tribunal and, thus, on the participation of partisan advocates. For Professor Fuller, the "fight" theory is the "truth" theory.[113] The separation of functions is key to "the philosophy of adjudication that is expressed in 'the adversary system.' The decision of the case is for the judge, or for the judge and jury. That decision must be as objective and as free from bias as it possibly can."[114] Fuller explains the function of the advocate:

> The judge and jury must, then, be excluded from any partisan role. At the same time, a fair trial requires that each side of the controversy be carefully considered and be given its full weight and value. But before a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation. This is the function of the advocate. His task is not to decide but to persuade. He is not expected to present the case in a colorless and detached manner, but in such a way that it will appear in that aspect most favorable to his client. He is not like a jeweler who slowly turns a diamond in the light so that each of its facets may in turn be revealed. Instead the advocate holds the jewel steadily, as it were, so as to throw into bold relief a single aspect of it. It is the task of the advocate to help the judge and jury see the case as it appears to interested eyes, in the aspect it assumes when viewed from that corner of life into which fate has cast his client.[115]

Thus is truth arrived at according to adversary philosophy. When truth is pursued through official inquiry, in Fuller's view, "failure generally attends

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[112] SPENCE, *supra* note 29, at 105.
[113] Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW (H. L. Berman ed., 1961).
[114] *Id.* at 30.
[115] *Id.* at 31.

the attempt to dispense with the distinct roles traditionally implied in adjudication."[116] The search for truth is subverted in a non-adversarial, investigatory (or inquisitorial) procedure by what he calls a "natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[117] As he explains:

> What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it . . . [W]hat starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention. An adversary presentation seems the only effective means for combating this natural human tendency . . . The arguments of counsel hold the case, as it were, between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.[118]

It is in keeping with Fuller's explanation of the philosophy of adversary truth-finding that Clarence Darrow is reported to have responded to "a judge who charged that Darrow's opening statement was calculated to prejudice the jury . . . 'What do you think I'm here for? It's my business as a lawyer to prejudice the jury!'" Darrow understood well his function of "hold[ing] the jewel steadily."[119]

In his well-known critique of American trial courts, *Courts on Trial*,[120] Jerome Frank depicts the adversary trial method, which he dubs "the 'fight' theory," as primitive and barbaric, and counterproductive of the truth. He expresses considerable disdain for the lawyer's "art" of cross-examination, so essential to adversarial process. But despite labeling the nonadversary or investigatory method "the 'truth' theory," he falls short of demonstrating its greater capacity for truth-finding. As a substitute for cross-examination to probe for the truth about a witness's testimony, Frank suggests we employ psychologists as "testimonial experts." Having examined the witnesses out of court, they could inform the court of the witnesses' sensory abilities, memory, propensity to lie, and so on. Perhaps if he were writing today rather than almost fifty years ago, Frank's faith in the omniscience of psychologists might

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[116] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).
[117] *Id*.
[118] *Id*. *See also* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).
[119] Arthur & Lila Weinberg, *Darrow: Winning a Biased Jury*, 5 TRIAL DIPLOMACY J. 25, 25 (1982).
[120] JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949, 1973).

have been tempered. In any case, his suggestion seems quite unequal to the task of replacing cross-examination, as indelicate as the experience sometimes is. Frank is persuasive in establishing how complex and elusive it is to determine the facts of a case. But, in the end, I can only agree with Professor Fuller that we know of no better fact-finding method than the adversary presentation of evidence before a neutral tribunal.[121]

And so, in order to preserve the integrity of the adversarial system, we must preserve the art of advocacy. The art of advocacy is multifaceted. It requires intuitive talent and years of practice. Advocacy must be given a chance. It must be instilled in younger counsel. It must be expected of our judges.

Like other art, advocacy requires the use and manipulation of certain tools, among the most important of which are words; their choice and use are vital to the advocate. Language is the advocate's canvas. Spoken and written words are the raw materials, the brush and paint of the lawyer's trade.

Oratory does not require "high faluting" language. All the books talk about the importance of speaking in the language of everyday life. If you go to any pub in Toronto, I doubt that you will hear anyone use the word "purport." The reason is that it is a pompous, stupid, pedantic, dumb word. And some lawyers can use the word "purport" two or three times in a single sentence. I don't purport to be a purported expert on language but to me one who purports is a jerk. You have to use plain language. Everyone says that you have to be sincere to achieve persuasion. A speech cannot leave one cold. It has to be a human speech on the level of its audience. You can't talk down to people. You must not talk down to people. Every submission has to master the rudimentary principles of logic and every advocate has to have the power to reason clearly. I remember speaking to my second jury in Sault Ste. Marie in 1971 and I used the word "surreptitiously." I do not mean I used the word surreptitiously. I actually used the word "surreptitiously." And I saw the look of the wall-eyed pike on the jurors' faces. I have never used the word "surreptitiously" again.

Lord Birkett says that the advocate must have the faculty of using the right words in the right order of he desires to be master of the art of persuasion,[122] and the master knows never to use a polysyllable where a short word would serve better. Cicero once said that the perfect orator must be a perfect man. C. L. Dubin proved Cicero wrong. There are no child prodigies among trial lawyers. Some seasoning and actual experience is a necessary ingredient in

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[121] The analysis of the adversary system comes from an earlier discussion by Edward L. Greenspan, Q.C., *The Future Role of Defence Counsel*, *in* PERSPECTIVES IN CRIMINAL LAW 208-09 (A. N. Doob & E. L. Greenspan eds., 1985).

[122] STRYKER, *supra* note 68, at 179.

the trial advocate. In fact, Irving Younger suggests that you cannot be an advocate—you don't know what you are doing— until you have had twenty-five jury trials. In fact, before you *begin* to know what you are doing, he says, it takes twenty-five jury trials.[123] Not twenty-four, not twenty-three, but twenty-five. I think he is wrong. I think you can be an advocate after nine trials.

Some authors, including the late Francis Wellman, say that you need the requisite voice for the work of an advocate, that a small voice, a womanish voice, will not do.[124] He actually said that. And then two paragraphs later, he said "the hopeless voice is an effeminate voice."[125] In my view, Francis Wellman, in this chapter, showed himself to be genuinely misguided. Whatever voice you have, whether it is a man who has a woman's voice or a woman who has a man's voice or a woman who has a womanish voice or a man who has a mannish voice, that is the voice you work with. It is not necessary to sound like Lawrence Olivier or Orson Welles or Clarence Darrow to be a speaker. I think Sir Norman Birkett, in a speech he delivered to the Lawyers Club of Toronto in 1947, hit the nail on the head when he said that in his thirty-four years at the Bar and on the Bench, he had "seen almost every type of advocate in almost every type of court, and [he knew that] there are no standards that you can lay down and say, if you want to be a great advocate, there is the pattern. It can't be done. There are diversities of gifts but the same spirit."[126] He said that he had known, in his time, advocates who lacked all graces, who could scarcely string a sentence together and yet impressed the court so that the court strained to listen and to catch every word that was said.[127] And he had known the impassioned orator who swept juries off their feet.[128] He also said: "I don't come here to try and pretend for one moment to give anybody advice about advocacy. I expect there are plenty of people who now hear me speak who are quite as competent to talk about the elements of advocacy as I am, but it is a subject on which we are all interested and therefore, perhaps, with humility and deference, you will allow me to make just one or two observations about it."[129] I can only echo his words.

Oratory is simply the art of speaking well. It is one of the greatest human achievements. And oratory and rhetoric face grievous dangers in today's age.

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123 YOUNGER, *supra* note 21, at 17. *See also Impeachment*, *in* JUSTICE GALLIGAN, *supra* note 97, at 231.
124 WELLMAN, *supra* note 105, at 26.
125 *Id.*
126 Birkett, *supra* note 99, at 1044.
127 *Id.*
128 *Id.*
129 *Id.*

These days, our courts are increasingly sacrificing advocacy at the altar of efficiency. It may be a commendable desire to focus attention on the need for speedier, less expensive, and more efficient justice. These may be worthy goals, but surely they must be achieved by constructive action that does not sacrifice any fundamental rights. We must all strive not merely for speed but for justice. The business of our courts is justice, no matter how long it takes.

Effective advocacy involves creating a mood. And we are losing the poetry and the magic. All the romance is being lost. Our Courts of Appeal are now telling us, the moment we stand up, "We've read the material, just get to your best point." We are being limited to one hour and twenty minutes or one hour or, in some cases, three minutes, if the court is particularly unmoved by our arguments. And now, with the appeal courts' reorganization, they are so efficient that appeals are being heard three weeks before the trial has begun.

The constellation of great advocates who have walked the mountain ranges of our profession, like Cicero and Darrow, would be troubled by the apparent need of our present judicial system to completely eliminate backlogs by limiting arguments to a certain length of time that reduces us to a time-serving Bar. Today we measure a successful argument by how long it took to deliver it. "I made my submission in ten minutes," lawyers say with self-satisfaction. "You went an hour? My God, you must have had a terrible case." And we wonder why oratory has now become a word of disparagement.

Another threat to our great tradition of advocacy is the rise of sound bites. We live in an era where it is said people have no patience, no attention span. That rhetoric is gone. That, if you don't have a sound bite, no one seems to care. If it's not gimmicky and quick and punchy, no one is interested. There's no time. And it is said that the long-winded speech, the long cross-examination is no longer valid. People have no patience for anything that takes more than a few seconds. People are fed television programs in which, from the time of the crime until the time of the final appeal to the United States Supreme Court of the Supreme Court of Canada, it has taken under an hour with commercials. And because of this sound bite era that we live in, I am actually, genuinely, seriously considering in an upcoming trial where there is an allegation of rape, where a woman says that in 1954 when she was a youngster she was taken to a gravel pit and raped and where there is, in fact, no evidence at all that the gravel pit that she says she was taken to ever existed, I'm actually contemplating saying to the jury, "If there's no pit, you must acquit." Lawyers are getting sucked into this technological age of television court trials where the sound bite is king or queen. If I have learned

anything in reading all of these books on advocacy, it is that despite the times we live in, which are clearly going to pass, advocacy never changes, not from Cicero to Darrow to Shapiro.

I am painfully aware that I have offered nothing new on the subject of advocacy. I doubt whether I have covered old thoughts as well as others have done. The art of advocacy is as old as the history of human justice. And, quite frankly, the essentials have always been the same and there is nothing new to be said about it.

"'For the lawyer belongs to an order,' says Chancellor D'Aguesseau, 'that is as old as the magistracy, as noble as virtue, as necessary as justice.'"[130] What do you need to win? First, you need a good case, then you need good evidence, then you need good witnesses, then you need a good judge, then you need a good jury, and then you need good luck.[131] And you need a Charles Dubin.

Good luck to you all.

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[130] *See* WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN DAVIS 404 (1973) (cited in a private paper delivered by John Davis—original citation was omitted).

[131] WELLMAN, *supra* note 105, at 73.

SECURITY FOR JUDGES—IN AND OUT OF THE COURTROOM†

John C. Coughenour*

This is the second time I've been asked to speak to your group. I last (and first) addressed you in Hawaii about the breakup of the law firm in which your Peter Byrnes and Jim Smith and I had been partners. I hope I can live up to the implied compliment of being asked back. Having heard and seen the speakers that you bring to these gatherings, I must say I'm humbled. Even more intimidating is the nature of this audience, consisting as it does of accomplished trial lawyers; you are here because you are among the very best orators of our time. I find my courtroom to be a much more comfortable venue.

My assigned topic this time is judicial security. I like to begin my talks with something humorous, but it was hard to think of something funny to say about this topic. I did manage to come up with one anecdote.

Some time ago I presided over a trademark case involving telephone directory ads for escort services. The plaintiff, Rent A Ho, was suing Rent A Pro. I'm not making this up. At the initial hearing I invited the parties to chambers, where we settled the case upon the defendant's agreement to add hyphens between the words in his ad and to change his logo to eliminate some graphics. (Don't ask me to describe the graphics.) A few weeks after the new directory was published, the plaintiff moved to enforce the settlement agreement because the defendant had used dots instead of hyphens in the new ad. The plaintiff wanted me to shut the defendant down. The defendant responded that the mistake was made by the directory printer who thought dots looked better than hyphens. The defendant also insisted that if the case were reopened, he should be permitted to file a third-party complaint against the printer for the damages he would suffer if he were shut down. My mind began wandering to the testimony on damages. What percentage of calls resulted in closed deals? Would the damages be dependent on the services rendered? I'm told (but not by anybody in this audience, of course) that the prices vary. For example, what about traditional vanilla services? Or what about Lewinsky services? You get the picture; the case was becoming quite complex. As I listened to the bickering between counsel, I grew less and less able to maintain my judicial demeanor. Finally, I lost all control and

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* Senior Judge, United States District Court for the Western District of Washington.

yelled, in a voice that could have been heard outside the courthouse, "Get out of my courtroom! I've got better things to do than deal with a couple of pimps!" They stared back at me, apparently in shock. I said, "I mean it; get out of here!" Shortly thereafter, a notice of appeal was filed. I must say I wasn't looking forward to the Ninth Circuit's opinion on my handling of the case. Imagine my surprise when the unpublished opinion said (and I paraphrase), "The District Court did not commit error when it declined to exercise equitable power in this matter."

What does this case have to do with judicial security? Not much, I must admit. A few days later I did receive an anonymous threatening letter, but that might just have been coincidence.

AN INCREASINGLY SERIOUS CONCERN

Judicial security is a serious topic, and it has become increasingly serious with the passage of time. In the two hundred years before 1979, only one federal judge was murdered. In the ten years after 1979, three federal judges were assassinated. Just recently, we saw the assassination of a federal judge's husband and mother in Chicago. That judge, Joan Humphrey Lefkow, testified before the United States Senate and quoted a well-known public figure who said that federal judges pose a threat "probably more serious than a few bearded terrorists who fly into buildings." It takes your breath away, doesn't it? Other provocative comments from some members of Congress followed the Terry Schiavo case. I don't need to repeat them here. Judge Lefkow went on to say in her testimony, "In this age of mass communication, harsh rhetoric is truly dangerous. . . . [E]ven though we cannot prove a cause and effect relationship between rhetorical attacks on judges and violent attacks of vengeance by a particular litigant, fostering disrespect for judges can only encourage those that are on the edge, or the fringe, to exact revenge on a judge who ruled against them."

MYTHS OF JUDICIAL SECURITY

One of the myths of judicial security is that judges can be protected by responding to threats with security details—marshals who guard the judge and the judge's family around the clock. There are about 300 to 350 serious threats to federal judges each year, many of which do result in security details. Some of you may be familiar with the situation of Judge Kevin Duffy of the Southern District of New York, who has had around-the-clock protection for the past twelve years because of his involvement in the first World Trade Center bombing trial. But those who threaten public figures are

not the ones most likely to harm them. Not one successful public-figure assassin in the history of the media age directly threatened his victim first. Let me say that again: Not one successful public-figure assassin in the history of the media age directly threatened his victim first. As the marshal service says, "Hunters hunt and rarely howl; howlers howl and rarely hunt."

Moreover, the marshal service's study of assassinations concluded that so-called profiles of assassins were spurious; of all the factors considered, such as age, education, and nationality, none were reliable indicators, except for gender—almost all assassins are male. Because of this, predicting assassination attempts is virtually impossible. Nor have American judges been victimized by terrorists or organized groups, as have Italian and Columbian judges. History in this country has shown that the most consistent source of threats is our litigants. For example, Judge John Wood of the Western District of Texas was assassinated by a killer (the father of actor Woody Harrelson) who was hired by a family of drug dealers who had been charged in Judge Wood's court. Similarly, Judge Richard Daronco of the Southern District of New York was killed by the father of a woman whose lawsuit had been dismissed by the judge. Judge Robert Vance of the Eleventh Circuit was killed by a mail bomb sent to him by a litigant whose appeal had been rejected by a panel upon which Judge Vance had sat. And of course, most recently, Judge Lefkow's mother and husband were murdered by a disgruntled plaintiff. By the way, Judge Lefkow told me recently she was walking on the street in front of the courthouse in Chicago during the noon hour when a homeless person approached her and said, "You're Judge Lefkow, aren't you?" Joan thought to herself, "Oh, no, what's this going to be?" She said, "Yes, I am." And he said, "God bless you, Judge Lefkow."

INADEQUACY OF FOCUS ON COURTHOUSE SECURITY

Note that all five of these murders took place outside the courthouse, which calls into question the wisdom of the primary approach we have heretofore taken with respect to judicial security: armies of court security officers manning the magnetometers at the entrances to federal courthouses. Magnetometers, x-ray machines, surveillance cameras (we have some 220 surveillance cameras in our courthouse in Seattle), bulletproof shields on the judges benches, and panic alarm buttons—none of them would have prevented any of these assassinations. We are most vulnerable outside the courthouse, in our homes, and driving to and from the courthouse. Only in the past year, after Judge Lefkow's tragedy, has Congress finally funded alarm systems for judges' homes, and they have yet to be installed because of a dispute over who will pay the monthly fees.

In Seattle, we've had recent experiences that touch close to home. Tom Wales, an Assistant United States Attorney, was shot in the head six times through his basement window by an assassin as he worked at his computer. The press reported that his assassin is believed to be a defendant he had prosecuted. I might add that I was under protection for about a month or five weeks as a result of that same incident because I had been involved in the case Wales had prosecuted. More recently, a litigant who was disappointed in decisions by Judge Zilly and me walked into the courthouse displaying a grenade. When he made a threatening move, he was shot and killed in the lobby of our new courthouse. It turned out that the grenade was deactivated, a fact that could not have been known by the S.W.A.T. team officers who shot him. One of our court security officers—who, by the way, is being honored as the court security officer of the year this year—stood about ten feet from this man and for about twenty-five minutes tried to talk him down. As he said to me later, "Throughout that time, I kept thinking to myself that I could be engulfed in a ball of fire at any moment." He's a real hero.

SECURITY DETAILS

My own family has been the subject of around-the-clock security details on numerous occasions. To describe these as intrusive doesn't do the job. You can't go *anywhere* without the marshals. I've even had neighbors complain that their property values might be affected by the presence of armed marshals. My wife pointed out to me that the marshals didn't help matters by walking around in black suits and carrying Uzis; she suggested that in our little beach community, it might be better if they wore khaki slacks and tee shirts.

There have been a few incidents that seem amusing in retrospect. On one occasion during a recent protective detail, my sons and I decided to go to a movie. I invited the marshals to come into the movie with us, but they preferred to wait outside. My sons and I took our seats and then the boys went to the concession stand while I watched the seats. As the boys entered the lobby, an older, balding, white-haired man fell and cut his head, which bled profusely. My oldest boy, who is a professional ski patroller, rushed to the aid of the man. When the marshals noticed the commotion, they saw both of my sons kneeling over a bald, white-headed guy in a pool of blood. Later, one of the marshals told me that he said to himself, "Oh, my God, we lost our judge at a movie. We'll be flipping burgers tomorrow." On another occasion while at home, I heard my then-sixteen-year-old son Jeff answer the phone, pause, and then say, "Oh, yeah, why don't you come over here and try it, or are you too much of a coward to do that?" He hung up and I asked,

"What was *that* about?" Jeff responded, "Oh, some guy said he's going to come over here and kill you."

One of my most extensive security details involved the trial of Ahmed Ressam, the so-called Millennium Bomber. I transferred venue in that case to Los Angeles because of the pervasive media interest in Seattle. You may recall it was believed that Ressam intended to blow up the Space Needle the night of the millennium celebration. As it turned out, I had more to fear from my fellow citizens than from Mr. Ressam. My comments at his sentencing provoked a rather uncomplimentary segment on *The O'Reilly Factor* (which I wear as a badge of honor) and about a foot-high stack of letters containing eleven "inappropriate communications," as the marshal calls them.

Incidentally, after we transferred Ressam to Los Angeles, I got a call from the assistant chief of the L.A.P.D. He asked where I planned to try the case, and I told him the trial would be at the federal courthouse in downtown Los Angeles, which would work well because there is an adjacent federal detention center; that meant we would not have a major problem transferring Ressam to and from detention each day of the trial. (That had been quite a problem in Seattle because the Seattle detention center is located by the airport about fifteen miles from downtown Seattle. Every morning when they brought Ressam into town, they shut down the freeway so that a convoy of about fifteen state patrol cars and marshal cars could escort Ressam downtown. That was at seven in the morning, so you can imagine the resulting traffic problems. Then at about 5:30 in the evening, they shut it down again.—There is only one major freeway going through Seattle.) The L.A.P.D. assistant chief responded by saying that wasn't acceptable; they didn't want to deal with the security problems in downtown L.A., and I would have to try the case in the Santa Ana courthouse. As those of you who have appeared in my courtroom know, I am ordinarily a patient, easygoing sort of guy, but for some reason the police order triggered a hostile response in me. After I suppressed my initial reaction, I calmly said, "That's fine, but you understand that moving Ressam to and from the detention center means that the feds will be shutting down the freeways between downtown L.A. and the Santa Ana courthouse from six to eight in the morning and five to seven in the evening." After a pause, the assistant chief came around to my way of thinking.

My other major security detail surrounded the multi-month trials of the so-called Freemen in Montana. You probably recall that they had been involved in an eighty-seven day standoff with the FBI at a ranch outside of Jordan, Montana. All of the Montana federal judges had recused themselves because one of the charges involved death threats against the judges. I was asked by the chief judge of the circuit to try the case, and I agreed to do so.

I didn't realize it was going to involve nine months of trials and hearings in Billings, Montana. I'm not going to say anything derogatory about Montana, but Billings isn't a place I would choose to spend nine months of my life.

The charges included weapon offenses, armed robbery of an NBC news crew, whose camera and other equipment were taken from them at gunpoint (on film!), bank fraud, and miscellaneous other charges. There were about a dozen defendants, all of whom might be charitably called antigovernment. They believed that they, on their ranch that they called "Justus Township," had seceded from the United States. They issued their own license plates and drivers' licenses, set up their own supreme court, refused to pay taxes because the income tax amendment was never validly adopted, and espoused a number of other not-so-well-thought-out beliefs. (Given today's political discourse, it would seem that they were ahead of their time.) One of their leaders, LeRoy Schweitzer, was the self-proclaimed chief justice of their supreme court, and as he entered my court on the days before I kicked him out, he announced, "All rise. Hear ye, hear ye, hear ye, the Supreme Court of Justus Township is now in session, the honorable LeRoy Schweitzer, Chief Justice, presiding." Then he would turn and look at me and say, "You may now be seated." He and a number of his buddies observed the rest of the trial from their jail cells via closed circuit television.

One of the witnesses called by the defendants was a self-proclaimed expert on filing liens against federal judges. I had placed rather strict limits on his testimony, but he had some speeches he really wanted to make. The first two or three times he started into these speeches, I sent the jury out, admonished him just to answer the question, and reminded him that we didn't want to hear his speeches. About the third or fourth time he began a speech, I sent the jury out and ordered the marshal, a very large African-American former tackle for SMU (I mention his race only because racism was another creed of this group), to remove the witness from the courtroom. The marshal walked up to the witness chair and lifted the witness into the air by his two arms so that his little feet were dangling about a foot off the courtroom floor. My attention was attracted to his swinging feet, and I noticed a growing puddle on the carpet; he had lost control of his bladder.

Security for that case included seventy-five FBI agents and a similar number of U.S. marshals brought in from all over the country, some of whom were assigned to my around-the-clock security detail that, as I said, lasted for about nine months. This led to some very interesting situations. For example, one Sunday during the trial, when I was returning from a weekend visit home, the marshals and I arrived at the hotel in Billings quite late due to a late airplane. I finally dropped off to sleep at about one o'clock in the

morning. Shortly after that, the motion detector that the marshals had installed outside my hotel room door sounded an alarm. I then heard a loud knock on the door and a youthful voice saying, "Domino's Pizza." The marshals had also installed a surveillance camera outside my room, with a monitor in my room and monitors in the two rooms that they occupied on each side of mine, so I looked at my monitor and saw a teenage boy with a Domino's Pizza hat and a pizza box. I yelled through the door, "I didn't order a pizza." The boy, who I'm sure thought I was stiffing him for the pizza, yelled louder, "Domino's Pizza." By then I was annoyed, and I jerked the door open to explain myself more forcefully, but before I could say anything, the boy's eyes darted to the side and he turned ghost white. I followed his gaze and saw a United States marshal in his underwear pointing an HKMP5 machine pistol at this young terrorist. The marshal said (and this is an exact quote), "I don't think he ordered a pizza." The boy said (and this also is an exact quote), "I don't think he did either."

Following the Freemen trial, I was told by the FBI that they had a confirmed witness to a meeting of some antigovernment people where the topic was whether to kill me because of my handling of the Freemen trial or to kill Judge Ed Lodge, of Boise, because of his handling of the Ruby Ridge case. The assigned assassin allegedly chose to kill Lodge (which he didn't accomplish) because if he tried to kill me, he'd probably get caught in Seattle traffic.

A WORTHWHILE JOB, DESPITE SECURITY ISSUES

In conclusion, let me emphasize that the threats facing the federal judiciary today can be as mild as disgruntled pimps and confused pizza delivery boys but too often are serious enough to end in tragedy. I haven't attempted to propose solutions except to note that perhaps my son Jeff's reaction of goading the threatener is not exactly ideal. In fact, I don't think that solutions readily present themselves, given the range of threats and the inherent limitations on security outside the courthouse. Instead, I hope that my war stories have given you some insight into a particular challenge facing the judges before whom you often appear. And let me add—and I know my wife agrees with me—that, despite the security issues, I would do it all over again.