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Kiawah Island, South Carolina

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FOREWORD

This issue lauds John Wesley Reed, who was a fixture for this Society—a regular speaker since 1975, its first Academic Fellow since 1978, the editor of this Quarterly since 1979, and its Administrative Secretary "and general *factotum*" since 1981.[1] All but two of these roles eventually wound down (his speeches) or shifted to others (editing and administrating); John remained an Academic Fellow, of course, and our "general *factotum*." The Latin translates to he who "does all" or "does everything"—like a Jack of all trades. But in John's case, the moniker *magister factotum*—master of everything (who remembered everything)—fit better. Although the task of taking minutes was eventually passed to another, John nonetheless attended board meetings and would look up from time to time and explain, again, the meaning of a bylaw or, with a smile and prompting our own, recall a historical fact: "Since [the Society] didn't accept applications, no one could sue for being turned down; no one then could think of anything for which the board would be sued other than the administrative secretary's running away with the money." Best, though, was his breaking the tedium (all meetings generate some tedium) with a bon mot, such as analogizing the dearth of comments in a nominee's file to "an epitaph reading, 'No ill was remembered but no good could be recalled.'"

John's own epitaph might begin the same way, but end by saying, less wittily, that so much good could be recalled that to account for it all would be impossible.

In this issue, some of that good is recalled, nonetheless—by past presidents Michael Kelly, in a eulogy, and Marti Robinson, in an address delivered at the Society's last meeting. The issue ends with "Fire and Fury in the Courtroom," the John Reed Lecture delivered at that last meeting by Ian Binnie, former Justice of the Supreme Court of Canada. Between the lecture funded and given in John Reed's honor

1. John W. Reed, *For Such a Time as This*, 41 INT'L SOC'Y OF BARRISTERS Q. 392, 392 (2006).

and Mike's and Marti's remembrances are reprints of two of John's own speeches, both of which treat a theme with which this Society is faced, once again.

> *The trumpet shall sound and the dead shall be raised incorruptible and we shall be changed.*[2]

John's addresses to the Barristers were, in effect, homilies—secular sermons that resonated because they taught lessons that enlightened us, whether applied to our professional or our personal lives, and because they rang true. They convinced because they were anchored in fact and frankness; they appealed because they were rich with metaphor and anecdote; they held us loose and receptive because they were generous with humor. And we listened because we knew they were meant kindly. Every word reflected the character and personality of the man who spoke, who lived so fully, who observed so acutely, who read so widely, and who retained, and considered, every phrase and every fact worth remembering.

John's death makes a seismic change for the Barristers, as it will for all those—from his universities, his church, his neighborhood, his family—who knew him, and, inevitably, loved him. The minister of his church, Rev. Paul Simpson of the First Baptist Church of Ann Arbor, who spoke at John's memorial service, reflected on the breadth and depth of the man, and this change, for us all:

> I have been struck by the fact that, to me, John Reed's passing from this earth has had the feel of an ending of an era. That is an overstatement, and he would say so, but there it is. The commitments, values, moral principles, the long memory and style and class that [were] so consistently embodied and expressed in him—where shall we look for that now? This remarkable blend of precision and easy warmth and brilliance

2. 1 Corinthians 15:52 and lyrics in Handel's *Messiah*, played at John's Memorial Service, as he'd requested.

> and humility and eloquence and great humor and devotion and vision and faith and dignity, the heart of a servant, someone very much up to date and yet deep-rooted in the virtues and decorum of the past—who among us possesses these now so classically? All around us, including in this room, are all kinds of wonderful people to admire, learn from, emulate, and be utterly thankful for. But I think we will not see his like again. His departing feels like the closing of an era, and the loss is monumental, as our thankfulness for him is monumental.

The wonderful thing about the written word is that though the voice of the writer is lost, his words live on, and with John's essays, so does John's wisdom. The two essays included here treat a theme John often evoked (and that his death has certainly brought about for us): change and how we might cope with change. Change is itself inevitable: each dawn brings change in small ways. Over time, though, or cataclysmically, it can upend our lives—sometimes for the better, sometimes for the worse. Changes can affect us professionally—as, John notes, with changes to the jury, to trials, and to the adversary system itself—or socially—as with how we perceive and treat one another—or personally, as with promise and disappointment, intention and failure, failure and equanimity, if not success.

John's death is a change for the Barristers in the largest of ways—as his minister said—the end of an era. But even to this uncertain state, John has sound advice. "An optimist is a person who believes that the future is uncertain."[3] The statement, he says, puzzled him at first, but meant more and more to him over the years. At first blush, it is a "chilling statement . . . the hallmark of the pessimist, not the optimist. "But a little reflection," John goes on, "will bring us to an understanding that uncertainty about the future necessarily means that the future is not foreordained and that it remains to be affected

3. John W. Reed, *The Optimism of Uncertainty*, 44 INT'L SOC'Y OF BARRISTERS Q. 362, 364 (2009) (attributed to Edwin Borchard of Yale Law School).

by what you and I do—that we have a role to play in determining the shape of that future."[4]

John would remind us now not only that "[c]hange is a process, not a value"[5]—not, inevitably, good nor bad—but that we are personally, socially, professionally part of that process. Our approach to a future that is necessarily uncertain is like a nighttime car ride, where the headlights show us not our destination but "far enough" of the road ahead "to take the actions we need to take."[6]

The point is, we are at the wheel.

How hopeful. And how true.

Joan Ames Magat

4. *Id*.
5. John W. Reed, *To Change or Not to Change*, 43 INT'L SOC'Y OF BARRISTERS Q. 379, 379 (2008).
6. Reed, *supra* note 3, at 368.

EULOGY: JOHN REED *

Michael Kelly**

I first heard John Reed speak on a Friday morning in March 1998. Having spent the prior four days being far too festive, I arrived at the meeting hall fuzzy headed and wondering why I had gotten out of bed after only four-and-a-half hours sleep. But I had been told by more than one of my new friends that this would be the highlight of my first meeting of the International Society of Barristers. I recall thinking that a lecture from an eighty-year-old law professor was unlikely to cure my hangover—and then John began speaking—and I was spellbound. About fifteen minutes into his remarks, the cynicism that had come with twenty years of courtroom practice was melted. In that time, John had taken everyone in the room back to the reasons we had gone to law school in the first place. We had just had been treated to a half-time pep talk by the Vince Lombardi of trial-lawyer coaches—and we were ready to get back on the field. When he was done, I felt renewed and proud of what my work involved. In those thirty-five minutes, John had reminded each of us that our work was not about short-term gain, but rather the long-term preservation of our justice system.

The International Society of Barristers was begun in 1965, but it really never got going until John Reed appeared. That was in the mid-seventies, when John, a mere boy of fifty-five at that time, became—in addition to everything else he was doing—immersed in the developing field of continuing legal education. And, to no one's surprise, he was in demand in practicing-lawyer circles for his insight, perspective, and eloquence. The trial lawyers who originally formed the Barristers knew John from that lecture circuit. In the beginning, they sought him out as a speaker on legal and procedural

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* Eulogy delivered at the memorial service for John Wesley Reed, Ann Arbor, Michigan, 17 March 2018.

** Past President, International Society of Barristers.

developments for their annual conventions. But almost immediately they realized that they had hit the jackpot: John was not just a law-school professor looking for a free weekend of sun on the beach during the middle of March. He was a much rarer creature: a pillar of academia who connected with the lawyers in the trenches—combining substantive knowledge with personality, wit, and a love affair with the adversary system.

After his speaking at these first few meetings, the Barristers governing board proposed in 1980 that he become the full-time "Administrative Secretary" of the group—a title and position they created specifically for him. The title grossly understated what he would become: the association's public face, treasurer, secretary, chaplain, membership chair, historian, journal editor, social director, and conscience.

And that decision would forever change the organization. A former president of the Barristers once described John in this way:

> There are those who call John Reed the compass of the Barristers—but I call him our gyroscope. A compass is fine if you want to know if you're going East or West—but a gyroscope tells you if you are flying upside down or right side up—and it is John Reed that keeps us flying right side up.[1]

That metaphor, of being right side up, says it all.

The Barristers consists of 685 attorneys from within and without the United States, elected to membership on the basis of their courtroom skill, ethics, and collegiality. Nominations are confidential. One does not apply to the Barristers—one is elected without knowing anything about having been nominated.

From 1979 through 2013, a stretch of more than thirty years, John Reed's Friday-morning address was the crown jewel of the Society's week-long annual meeting.—a thirty- to forty-five-minute discourse which was, for lack of a better word, magical.

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1. Past President Daniel J. Kelly, describing John in a 2010 video tribute.

Whatever enjoyment or comfort John found in being among trial lawyers as an academician was tripled or quadrupled in the hearts and minds of the Barristers who attended those presentations. It is beyond dispute that the trial lawyers felt much more favored by being in his presence than he did in theirs. We were the objects of his encouragement, advice, counsel, and exhortations. Part legal scholarship, part pop-culture, part motivational speech, part tent-revival meeting—year after year John delivered an address that reminded us of our obligation to be compassionate, committed, and devoted to our clients. Year after year, the best lawyers in the country returned to hear him preach the gospel of professionalism—to learn from him, to laugh with him, and to enjoy his presence. No Barrister left an annual meeting early for fear that she or he would miss John's meeting-ending advice and counsel. When a member could not be at a meeting for an entire week, they would routinely attend only the last two days so they would not miss John.

In 2009 John announced that he was going to leave the position of Administrative Secretary . . . at the age of ninety-one. We were shocked. After all, at eighty-five, he had just purchased a thirty-year timeshare in Mexico . . . so we naturally felt he would be able to handle the secretary's post well into his mid-100's! In truth, we were terrified that retirement meant his absence.

Ultimately, John brokered a truce—he would give up the administrative-secretary duties once a suitable replacement was found—and in the interim he would continue to present his annual addresses.

Following that resolution of that crisis, we decided to create a video tribute to John. For an entire day here in Ann Arbor, Barrister's Past President Marti Robinson and I sat in a fourth floor Michigan law-school-library room and interviewed John. (It was the most time I had spent in a library since my first year of law school.) I was determined get John to talk about what it was that made him so positive and optimistic about our profession. After hours of failed attempts to get an answer to that query, John volunteered, without any question pending, "I guess what we are really talking about is philosophy. I don't know that I have a philosophy. But *I do believe that service is the*

important thing. If one approaches what they are doing as service, [they] become addicted to it. And over time, it pans out." No hyperbole, no cymbals crashing, no clouds parting, just the essence of that boy from Missouri who found his way to great things—quietly, consistently, and humbly—through service.

And I would be remiss if I did not speak for just a moment about those speeches and their topics. There were central reoccurring themes of his annual addresses—the importance of hope, the need to confront and accept change, the need to be vigilant in protecting our judicial system, the essential goodness of mankind, and the notion that all of us are in this together.

His 2002 address was entitled "It Never Ends" and came on the heels of the 2001 World Trade Center tragedy. The legislative changes restricting civil liberties after 9/11 were in full force. Likening the post–9/11 legislative contraction of Fourth and Fifth Amendment rights to the myth of Sisyphus, John put it thus: "Finding ourselves back down the hill, we simply start again and work toward pushing the stone higher this time. The valley we are in is not where we are to stay. . . . The Sisyphean struggle for liberty and justice never ends. And you and I have enlisted for the duration."[2]

In his 2010 remarks, given at the time of his not-quite retirement, John reaffirmed his oft-stated hopefulness about our legal system:

> I have an unquenchable optimism that there will be more justice in the future than there was in the past. My reason for that optimism lies with the trial lawyers such as yourselves, driven to make the rule of law and our judicial system serve the ends of justice. You will keep taking one step at a time towards the realization of the high calling which drew each of us into this essential profession… And the role of this beloved society to strengthen our resolve and to reassure us that in this good company we are not alone in our efforts to serve our clients, and our

2. John W. Reed, *It Never Ends*, 37 INT'L SOC'Y OF BARRISTERS Q. 378, 384 (2002).

> profession, and the rule of law, with competence, courage, and honor.[3]

And my personal favorite came at the conclusion of his 2009 address to the Society, entitled "The Optimism of Uncertainty" (a title that reminds me of Yogi Berra's famous quote, "The future ain't what it used to be."). With a full auditorium of Barristers and spouses leaning forward in their folding chairs, he concluded,

> [W]hat steps do we take into that uncertain future? It's like the beginning of a nighttime automobile trip. The headlights never show all the way to the destination, only just far enough to deal with our reaction time. We can't see all the way to the goals we have set for ourselves in our profession. But we can see far enough to take the actions we need to take. As Barristers, we meet here and are met. We get our commitments clarified. And we do so communally, seeking to know and befriend and support each other, *knowing that the world is too dangerous for anything but truth and too small for anything but love."*[4]

That is the quintessential John Reed.

Thank you, John, for lighting our way forward to our destination for as long as you could be with us.

Thank you for your counsel and guidance, for your optimism, your constancy, your friendship, and your love.

By now the Angels have guided you safely to paradise.

Be safe and warm, my friend.

We carry your memory in our hearts, and in our work, every day.

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3. John W. Reed, *Once More, with Feeling*, 45 INT'L SOC'Y OF BARRISTERS Q. 1, 8–9 (2010).

4. John W. Reed, *The Optimism of Uncertainty*, 42 INT'L SOC'Y OF BARRISTERS Q. 362, 368 (2008) (emphasis added).

* * *

JOHN REED*

Marietta Robinson**

We lost the earthly presence of John Wesley Reed on March 6 of this year. His very name makes us sit up straighter, stand up taller, and smile.

He was so many things to so many people and the soul of organizations as varied as the University of Michigan Musical Society, Ministers and Missionaries Fund of the American Baptist Churches and, of course, the International Society of Barristers. In Michigan, where he was a professor at the University of Michigan Law School for decades, he was an absolute icon for the legal profession. It tells you volumes that even though he was ninety-nine, his memorial service was standing-room only with more than 350 attendees.

Personal Loss

My personal loss is profound. John was such an important part of my life for the past thirty-eight years and one of my dearest friends.

John and Dot were like parents to my late husband Jim and me, although John, in his inimitably flirtatious way, informed me in the most serious voice that he had never thought of me as a daughter.

On the occasion of John's retirement from a committee on which he and Jim had served for many years, Jim wrote, "You are not only my friend, but my mentor, my hero, and the best example of everything that is good and noble about the legal profession."

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* Address delivered at the Annual Convention of the International Society of Barristers, London, England, 18 April 2018.

** Past President, International Society of Barristers.

So many here had their own very special relationships with John. And there were so many Barristers who are no longer with us who could also say the same.

ISOB Loss

So, today, I shall not dwell on the personal, but rather on just one of the multiple facets of the best-lived life I can imagine: John's place in the hearts and souls of the Barristers as a group.

You start with the fact that John was a friend and colleague of our founders and so many other Barristers since the ISOB formation in 1965. John was not a trial lawyer, however, but a widely acclaimed academician specializing in evidence and civil procedure. So our board in 1978 created a membership category of Academic Fellow and elected John as the first such Fellow.

In 1979, he took over editing our *Quarterly* and in 1981 he became Executive Secretary of the organization and served in that capacity until 2010.

Over those many years, John was the keystone in our arch, indeed, our North Star.

Through his very example and certainly his words, John became the conscience and very essence of this organization. He was what we hope to be: elegant, erudite, wise. And he always maintained the most marvelous wit.

John, an Example

We become who we are in large part through watching others. And watching John's example taught us so much. He was the most adoring husband, the most loving father, the most willing to serve in any capacity in a cause in which he believed, and the most incredible friend who *always* was interested in you, first.

And he showed us so much of how to wonderfully navigate those years from middle to old age.

Words

In the International Society of Barristers, what we all remember most about John were his speeches. For three decades, the last

speech in what have been spectacular and stimulating programs at our annual meetings was John's. Once you heard one, you never missed another, and it was by far the most anticipated event of our meetings.

Several years ago, the Morgan Library in New York City had a fascinating exhibit entitled "Churchill: The Power of Words." A large part of the exhibit was simply glass cases with the written pages of Churchill's speeches that showed his visible wrestling with finding exactly the right words, as he crossed out and added and crossed out again and added again. It was breathtaking to realize how critical his choice of those words had been. The course of history was changed by this man's mastery of words and ideas.

John Reed knew the power of words. He read extensively and truly listened and paid attention, and then, with his encyclopedic index of others' words and wit and wisdom, he adeptly crafted them into words, wit, and wisdom that were uniquely his own. And, somehow, each year in very different times in both the life of our profession and in our lives, he both taught us essential lessons and reminded us of why we had chosen to be lawyers. He inspired us to greatness, no matter how small the action.

Joan Magat now does our *Quarterly*, and, in recently working on an index of those quarterlies, she was so impressed at how much had been written and spoken by and about John over the years. She wrote to me,

> There have been other voices of conscience, of course, but none so steady and interwoven as his. His words have been personal. How did he cultivate that personal voice, the one that we hear, listen to, attend to in everything we do? That personal warmth is everywhere—in his essays, in his conversation, in his very being.
>
> This man's words have been scholarship; they have been wit, and they have been music. They have been inspiration; they have fired aspiration. John's words have lifted, been helium to our quotidian balloons. His

> are lessons we can live by, hope to live by. And if we do it right, as he has, they will be lessons truly lived.[1]

Anecdotes

One of the reasons we remember the lessons John taught us is that he had an uncanny ability to come up with the perfect anecdote to demonstrate a point. These became known by us Barristers as "John stories," and we each have our favorites.

One of Jim's favorites was about the three little boys who were asked by their teachers what they thought was the most important invention ever made. The first said the telescope, the second the computer, but the third said it was the thermos. The teacher was puzzled and asked, "Why the thermos?" The little boy said, "Well, when it is warm out, my mom always sends me to school with ice cold lemonade in my thermos and when I eat lunch, I pour out the lemonade, and it is still cold. And in the winter, my mom always puts hot soup in my thermos in the morning and when I pour it out at lunch, the soup is still hot!" The teacher said, "And why does that make the thermos the best invention?" And the boy responded, "Well, how do it know?"

And one of my favorite John stories was that of Ken Stabler of the Oakland Raiders and then quarterback for the New Orleans Saints and one of the free spirits of the NFL, being read a passage from Jack London in a television interview: "I would rather be ashes than dust. I would rather that my spark burn out in a brilliant blaze than it should be stifled by dry rot. I would rather be a superb meteor . . . than a sleepy and permanent planet."[2] Then Stabler was

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1. Email to Marietta Robinson (Jan. 31, 2008)(on file with author). *See* Joan Ames Magat, *Appreciating John Reed*, INTERNATIONAL SOC'Y OF BARRISTERS Q. CUMULATIVE INDEX, Vols. 1–50, 1 (2018).

2. IRVING SHEPARD, JACK LONDON'S TALES OF ADVENTURE vii (1956). *See* Clarice Stasz, *Commentary: Jack London's "Credo,"* http://london.sonoma.edu/credo.html.

asked, "What message do you think London was trying to convey?" "Throw deep," said Stabler.[3]

John's Speeches to the ISOB

I recently reread the Barristers' book of a number of the John Reed speeches over many years and was reminded of his many pearls. I thought I would share a few.

Change

John's speeches took place over decades of astonishing change in our society, our politics, and our profession.

In 1987, he observed,

> Change and growing and learning make most people anxious. We talk a lot about personal growth, but this growth is mostly the acquiring of more information to fortify our established positions. All our life becomes a rationalization for remaining as we are, till death do us part from our opinions. . . .
>
> . . . Each of us has the capacity for self-renewal, if only we will regard change as a friend rather than an enemy, as a stimulus to growth rather than a threat to comfort.[4]

John understood how difficult it is for lawyers, particularly, to change. He discussed how lawyers, in particular, have a strong tendency to live in the past and the present and pretend that the future will be more of the same, in part due to our training to look at precedent to tell us what courts will likely do in the future.

> As a consequence, we are more backward-looking than most people. We are like passengers in the railroad

3. This story is apocryphal. *See, e.g.,* Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

4. John W. Reed, *The Best of Times*, 22 INT'L SOC'Y OF BARRISTERS Q. 365, 371 (1987).

> observation car at the back of the train, watching the low hills recede behind us, unaware of the majestic mountains ahead.
>
> . . . The enterprise is moving one way and we are facing another, clinging determinedly to the illusion that nothing is amiss. "[S]ome of us even embrace 'The Principle of the Dangerous Precedent,' put forth by the British academic who said, 'Nothing should ever be done for the first time.'"[5]

Service

One theme that runs through John's speeches is the importance of service. He sincerely believed it was critical for all of us to be mentors and exemplars and to keep in mind Edward Hale's principle:

> I am only one, but I am still one.
> I cannot do everything, but still I can do something.
> And because I cannot do everything,
> I will not refuse to do the something that I can do.[6]

He told the parable of the young child who picked up a starfish to throw it back in the ocean, and "his grandfather said, 'There are millions of stranded starfish. What you are doing won't make any difference.' Said the child: 'It makes a difference to this one.'"[7]

He used examples of ordinary people with few resources changing the course of history:

> [R]ealistically few of us will ever be kings (only a few federal judges); and the temptation is to lose faith that as non-kings—as ordinary men and women—we can

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5. John W. Reed, *. . . and the Invention of the Future Tense*, 34 INT'L SOC'Y OF BARRISTERS Q. 365, 368–69 (1999) (quoting William Sloan Coffin, *Diversity and Inclusion*, MT. HOLYOKE: ALUMNAE QUARTERLY 23, 23 (Winter 1999).

6. John W. Reed, *First Person Singular*, 24 INT'L SOC'Y OF BARRISTERS Q. 322, 329 (1989) (quoting Edward Everett Hale).

7. John W. Reed, *Unto Whom Much Is Given*, 30 INT'L SOC'Y OF BARRISTERS Q. 390, 394 (1995).

> make a difference. But we *can* make a difference, each by responding to the opportunities of the day with whatever talents he has.[8]

He told of his plans as he made the choice that, rather than simply retire from his professorship, he would accept the Deanship of Wayne State University Law School. He decided that he would, as Dean, bring some of his heroes at the bar in to speak to the students hoping that it will give them a higher vision of what it is like to be a true professional. "If I can do that, I will have helped in my small corner of the world to make a useful contribution to our calling. And the pains of the deanship will have been worthwhile."

The Importance of Struggle

His thoughts about struggle, given to us many years ago, seem particularly cogent today. He first discussed how depressing he had always found the story of Sisyphus continually rolling a rock up a hill only to have it roll back down. His view was challenged when he read Camus' take on this story that made the point that "Victory is sweet, but sweeter still is the honest, committed effort toward a worthy goal. "

John's lesson to us in 2002:

> [T]rue victory consists of fidelity to one's code of right and wrong[;] . . . there is no true failure when that fidelity has been maintained, and that victory is transient—without further struggle it withers and dies.
>
> Through the centuries, men and women have struggled to make this a better world. They have toiled up the hill toward new utopias, never quite getting there. The stone of progress seems always to roll back down the hill. Then, as in the myth, we put our shoulders to the stone and push it up the hill again. As tragic and unsettling as the recent events are, they are within the human pattern of up-the-hill-and-down-the-hill-and-up-the-hill-again. Finding ourselves back down the hill, we

8. John W. Reed, *supra* note 4, at 373.

> simply start again and work toward pushing the stone higher this time. The valley we are in is not where we are to stay. In the words of the 19th century cleric Sydney Smith, "Nothing is so stupid as to take the actual for the possible."
>
> The Sisyphian struggle for liberty and justice never ends. And you and I have enlisted for the duration.[9]

Those words seem so much more important for all of us today.

John observed about himself that he is a short-term pessimist and a long-term optimist about our profession. "Hope has an agenda but not a timetable."

Love

There is an important point John made about love:

> Love in the sense of caring is not only relevant, it is central to being a good person and to being a good lawyer. A different world cannot be built by indifferent people. Love animates; it gives purpose and leads to dedication. It is not mere tolerance of others. I think it was Garrison Keillor who said of one of the citizens of Lake Wobegone, "Olaf learned to behave without making people mad at him, which is not the same as being a good person."[10]

Loss

Our conversations with John about losses in our lives were more private, but I have no doubt, knowing the profound losses many of us in this organization suffered over the years, that we each had words of wisdom from John.

John knew darkness intimately. He lost so many he loved. And those losses allowed him both to empathize at a deep level with

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9. John W. Reed, *It Never Ends*, 37 INT'L SOC'Y OF BARRISTERS Q. 378, 383–84 (2002).

10. Reed, *supra* note 5, at 371.

others and to drink even more deeply of the richness of life, with the dark only enhancing the colors.

Shortly after my Jim died, both John and I were invited to a meeting of their Evidence Committee in St. Thomas. At the last dinner, I gave a rather tearful speech about what the group had meant to us and ended by saying that this meeting had been the last thing Jim and I had had on our calendars. As conversation resumed, John leaned in and whispered, "Get a new calendar."

Not long after, John lost the amazing Dot, the love of his life. We met for dinner one night a year or so later and he looked at me with those incredible eyes full of so much emotion and tears started to quietly flow. He simply said, "I miss her now more than ever." And then we went on to have our usual fantastic evening.

At our recent board meeting in Napa, we visited Domaine Carneros, a vineyard that has a very long staircase up to the entrance. I was walking with John holding my arm, and we stopped on one landing to catch our breath. John said softly to me as we restarted our ascent, "My doctor tells me that I have congestive heart failure so I guess that I am failing." I kept walking, squeezing his arm and said, "So, I think that is all the more reason we need to thoroughly enjoy this gorgeous day." He smiled and said, "Amen."

Celebrating the Human Spirit

As he observed in another of his speeches, "There is a magnificent resilience in humankind. Though knocked down, we have a great drive to climb back toward the top. We learn how to celebrate life without papering over the grief and yearning that can lead to wisdom."[11]

Finding the Questions

And, most importantly, he did not give us answers as much as teach us how to find the questions. He once told us about teaching ethics and that he thought it was much more important to teach his

11. Reed, *supra* note 9, at 381–82 (1999).

students to identify when there should be a question and what that question was than to given the answers to some future situation.

Like many of us, I went to see John one last time in his last weeks. Such a delight! During our conversation, I mentioned a great podcast I'd heard recently about the importance of finding the right questions, and the interviewee used a Picasso quote: "Computers are useless. They only give you answers." John then told me about a commencement address he'd given making that point, and the student who spoke after him was quite miffed, because he thought older people should give them answers. Ah, the young . . . And, ah, John . . . .

Sue Unger and Margaret Klocinski went to great lengths to get me a copy of the speech, and it was simply classic John, full of humor and wisdom. My favorite lines were these:

> You and I are not the focus of the universe; rather, we are the moment, the vital link, between past and future. There is more wisdom than that possessed by those of us who happen to be walking around today. There was wisdom before we got here and there is greater wisdom to come if only we do our part to sustain the stream of aspiration and achievement that is our heritage.

I always understood why we people who fought in the courtroom trenches so regularly so adored John Reed, but I never quite got why this brilliant man adored us and this organization. So, I asked his daughter Sue, who has attended so many of these meetings, why he so clearly liked and admired this motley crew of hardscrabble attorneys who were so much less than he was by any measure. This is her response:

> Dad liked to be with smart people!! He and Mom always spoke about how the conversations and experiences of the Barristers were worldly, meaningful, and substantive. He loved the friendships. But there is one theme that runs throughout Dad's life, and that is service to others and social justice. We have found several "documents" looking through Dad's things

> referring to his passion for social justice. At a very young age he decided the law was the avenue he would pursue to achieve his goal of promoting and ensuring social justice. The Barristers was the perfect forum for a man who was an eloquent and ardent advocate for justice and service. From high profile cases to pro bono work Dad was in awe of the work and passion for justice the Barristers displayed. Through the adversarial system of the law, which he loved and believed in, he had found a group of people that shared his passion . . . the perfect marriage.

Eric Kandel, in his marvelous book *In Search of Memory* discussed how he made a discovery that ultimately led to him winning the Nobel. He found that our short-term memories are chemical, but our long-term memories are physical in that we form new synapses with them. And it is through those synapses that we then process new information.

I believe that is a critically important way in which those whom we have loved and are physically gone live on in our minds. Though the conscious memories of the sound of their voices, the feel of their hugs, the warmth of their eyes may fade, those unconscious synapses through which we process our lives are very much there.

We shall never lose John Wesley Reed. He is in the very synapses of our minds.

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THEY'RE PLAYING A TANGO *

John W. Reed

As a law teacher, I have occasion to visit from time to time with a wide variety of lawyers-big town, small town; big firm, small firm; office lawyers, courtroom lawyers, both sides of the table—and no matter whom I meet with, no matter what kind of practice or specialty, the one common theme I encounter is uneasiness about change and the rate of change. Change in the applicable law itself. Change in the way law is practiced. Change in the society to which the law is applied. And, always, a pervasive sense of unease that the rules of the game are being changed in the middle of the game, usually to one's own disadvantage.

This is a different world from the one of your youth. It certainly is vastly different from the world of my youth even longer ago.

Technological changes are perhaps the most obvious. In one lifetime we have gone from the horse and buggy and the kerosene lamp to space stations, heart transplants, and the information superhighway (where, incidentally, many of us are stuck on the entrance ramp). Whether the information superhighway is a good thing depends, I think, on the quality of the information. I was struck by an item in this week's *New York Times* stating that in 1849 (145 years ago) Henry David Thoreau said, "We are in great haste to construct a magnetic telegraph from Maine to Texas, but Maine and Texas, it may be, have nothing important to communicate."

Social and cultural changes have been no less dramatic than the technological ones. I am reminded of the old-timer who said to a friend, "I can remember when it used to be that the air was clean and sex was dirty." One of the social changes that has particular implications for law and the administration of justice is what Kurt

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* Reprint of address delivered at the Annual Convention of the International Society of Barristers, Scottsdale, Arizona, 20 March 2009, *published in* 29 INT'L SOC'TY OF BARRISTERS Q. 371 (1994) .

Luedtke spoke of so thoughtfully a few moments ago: the increasing tendency of people to consider themselves members primarily of cultural and ethnic subgroups, often at odds with one another and at odds with the community as a whole.[1] The common loyalty we once felt to the nation and its ideals is diminished if not destroyed by fierce loyalties to the particular clan, each of which considers itself the victim of another group.

My law school publishes a weekly calendar of events, called The Docket. Its mid-November list of ten so-called "Multicultural Events" on the university campus for that week included the following: Issues Facing Native American Women (held in the Women's Studies Lounge); Puerto Rican Week Dance; Gay and Bisexual Men of Color Meeting; Asian-Pacific Lesbian Gay Bisexual Social Group. The Detroit Free Press publishes the delightful cartoons of Richard Guindon. A recent one portrays a flat, treeless wasteland on which are scattered a dozen or so crudely drawn clumps of people hunkered down behind low barricades of rubble, each displaying a small pennant on a pole. Two expressionless men are walking by, and one says to the other, "As a country, we seem to be breaking up into groups of hurt feelings."

Undeniably, you and I live in an era of enormous technological and cultural change. And because the law affects, and is affected by, all of life, there is concomitant change in our profession, including the trial bar. In particular, those changes threaten two legal institutions the preservation of which are charter objectives of the International Society of Barristers. I speak, of course, of the jury and of the adversary system. The many changes that threaten the jury and the adversary system are, individually, well-meant reforms. Each was intended as a change for the better. But I think most of us feel like the man who opened his fortune cookie and read the message: "A change for the better will be made against you." Let me offer a few observations about these two areas of change affecting trial lawyers and the public they represent.

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1. Kurt Luedtke, *It's Your Mother's Combat Boots: Race, Good Manners and Free Speech,* 29 INT'L SOC'Y OF BARRISTERS Q. 311 (1994).

THREATS TO THE JURY

The first change for the better being made against you is the steady, almost unremitting attack on the jury—in big ways and little ways. Let me count the ways:

First, for practical purposes the civil jury has shrunk from twelve to six. And though further shrinkage seems not imminent, the Supreme Court's endorsement of the reduction to six gives no principled basis for resisting a reduction to, say, three. And the Supreme Court's view to the contrary notwithstanding, there are significant values lost in shrinking the jury's size. There are provable differences between the deliberations of large juries and small juries. There are discernible differences between the verdicts of large juries and small juries. Moreover, nonunanimous verdicts are increasingly permitted, again modifying the jury's historic function.

Second, lawyers all around the country are losing the right to conduct voir dire, especially in federal courts. They are losing it because the judges have run out of patience. The lawyers think selecting a jury is equivalent to making an opening statement, and they start off by making a speech to the panel members, while the judge on the bench is fuming. The response of the courts to these abuses is predictable: the judges take over voir dire. And lawyers have only themselves to blame. But the unfortunate consequence is inadequate probing for possible bias and interest. And so the character of the jury is affected again. Third, in an attempt to eliminate racial prejudice in jury selection, courts are supervising the exercise of peremptory challenges, insisting that counsel establish a nondiscriminatory reason for exercising them. Announced first in a criminal case,[2] then applied to a civil case,[3] the principle has now been extended to gender-based challenges.[4] However laudable the concern, the courts' intrusion into motives for peremptory challenges means they are no longer truly peremptory. The "hunch" basis for exclusion

2. Batson v. Kentucky, 476 U.S. 79 (1986).
3. Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991).
4. J.E.B. v. Alabama *ex rel.* T. B., 114 S. Ct. 1419 (1994).

of jurors has been partially preempted by a desire to minimize prejudice based on group stereotypes. And with peremptory challenges greatly diminished, jury trial is changed again.

Fourth, there are many who would deny a jury trial in complicated cases and in cases involving technology, on the theory that jurors will not be able to understand what is going on. And the right to jury trial is diminished once more. Fifth, jury dockets commonly are allowed to fall relatively farther behind the nonjury dockets, thus forcing those in need of quicker resolution to waive the jury. There is no reason why judicial resources have to be allocated in such a way that jury trials are delayed much longer than nonjury trials. And the right to jury trial is diminished yet again.

Finally, the jury is under attack by those who charge that juries reach irresponsible results, both as to liability and damages, but particularly damages. Neil Vidmar, a professor of social science and law, points out that the statistical studies cited by critics to prove that deep pockets affect jury outcomes are fatally flawed—that, in fact, research yields no support for the existence of a deep pocket effect.[5] Yet the myth of oversympathetic, overgenerous juries thrives. Powerful interest groups exploit and misrepresent findings about jury malfeasance in order to further agendas of tort reform. The jury is used as a symbol of the so-called "litigation crisis." And Professor Vidmar states that "misleading data, and horrific anecdotes of a jury system out of control have been presented at legislative hearings and portrayed in stories and advertisements in the mass media."[6] This propaganda creates and reinforces beliefs about the irresponsibility of juries and the irrationality of the jury system not only in the general public but also in the legal, medical, and legislative communities as well.

In short, the jury is under siege.

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5. Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases,* 43 DUKE L. J. 217 (1993).
6. *Id.* at 265–66.

THREATS TO THE ADVERSARY SYSTEM

The second change for the better being made against you is the diluting of the adversary system of justice.

We use an adversarial process to arrive at truth, based on the Greek concept of "dialectic debate." Over long years philosophers have argued about whether adversaries, arguing vigorously from opposite poles, are more likely to lead us to the truth than are investigators who use something akin to the scientific method of finding "facts" dispassionately. Although it has its flaws, I submit that the adversary system serves us extremely well. To paraphrase the familiar comment about democracy, the adversary system is the worst system of justice except any other. But I do not propose to argue at this moment and in this venue its philosophical merits and demerits. Instead, I want for our purposes to assume its usefulness and to discuss three changes underway that arguably diminish its function.

First is the discovery change effected by what I call "accidental Rule 26(a)."[7] I say accidental because until the very day it became law through congressional inaction, it was universally expected to be rejected on the ground that it is inconsistent with the adversary system. The new Federal Rule 26(a) calls for voluntary disclosure of sources of information "relevant to the disputed facts" and a list of witnesses who will be called at trial and of those who may be called if the need arises. Though the half-century-old federal discovery scheme muted the adversary system, discovery itself has functioned as an adversary proceeding (and, some would say, has replaced trial by ambush with trial by abuse). Under the new rule, however, counsel will have to make early judgments about some aspects of trial strategy and reveal them to the other side. And so the system is rendered less adversary.

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7. F.R.C.P. 26(a), *discussed in* William H. Erickson, *Limited Discovery and the Use of Alternative Procedures for Dispute Resolution,* 29 INT'L SOC'Y BARRISTERS Q. 333 (1994).

Second, the nearly universal pressures for more efficient, business-like management of our courts serve to modify the adversary system. One cannot reasonably complain about attempts to eliminate waste in the judicial machinery. But manipulation of statistical information by efficiency experts, and counting the number of cases disposed of, does not guarantee that justice will be well served. Increasingly, judges are directed to play an assertive role in the planning and control of the pretrial and trial activities of counsel, more like the civil law judges of Europe than the common law judges of the Anglo-American experience. And again, the system is less adversary.

Third, the most severe challenge to the adversary system is the alternative dispute resolution movement. Its rise is, of course, an understandable response to the delay and high cost of traditional litigation and a rational response to the need in some situations for something other than an all-or-nothing outcome. I have some appreciation of how it works, having served on occasion as an arbitrator, and as a mediator to resolve matters that were bogged down in litigation. Nevertheless, I always am uneasy about the outcomes. Neither party seems to get his full say, and the outcomes seldom represent clean-cut victory or loss but rather a measure of compromise, which is often psychologically unsatisfying. I do understand that settlement may produce the same feelings, and the difference may be only a matter of degree, but I still have a feeling of disquiet. I suppose I'm a bit like Coach Bear Bryant, who said, "I'm a win man myself. I don't go for place or show."

Also, the terminology we use is telling. We speak of "the adversary system of justice," but we say "alternative dispute resolution." At the risk of overstating, the emphasis in litigation is on trying to achieve "justice," while the emphasis in the alternative system is on "resolving disputes." I submit that the difference in emphasis is fundamental. The ADR movement continues to grow, and it occupies territory formerly occupied by the adversary system.

LAWYERS AS PROBLEM SOLVERS

These changes, and countless others, represent challenges for us as individual lawyers and for us as a profession. I would pose to you the question whether as lawyers we have the necessary talent, the necessary creativity to solve them.

From the first day of law school, lawyers are trained to think in terms of precedent. On the basis of what *has* been decided, we tell clients what they may do and may not do. We are specialists in the past—professional antiquarians.

Carl Sandburg, in his poem that contains the familiar line, "Why does a hearse horse snicker hauling a lawyer away," writes:

> The lawyers, Bob, know too much.
> They are chums of the books of old John Marshall: They know it all, what a dead hand wrote,
> A stiff dead hand and its knuckles crumbling, The bones of the fingers a thin white ash.
>
> The lawyers know
> A dead man's thoughts too well.

Despite Sandburg, our role as interpreters of the past lends a certain steadiness, a stability, a calmness to our society, that has served us well through expansion and war, prosperity and depression. And it is especially important in individual cases. But I suggest that the rate of change in our world as we approach the end of the millenium is so dizzying that it will no longer suffice to apply the methods of the past when it comes to meeting the larger problems of society, and government, and, yes, the profession. Lawyers defend the status quo long after the quo has lost its status. All too often we fit Mort Sahl's definition of a conservative as one who believes that nothing should be done for the first time. Someone said *stare decisis* is Latin for "we stand by our past mistakes." We have a professional bias somewhat like that of the World War II tail gunner who fainted when he went up

to the cockpit and saw the world rushing toward him at 300 miles an hour.

MEETING THE FUTURE WITH SOLUTIONS FROM THE PAST

All too often we try to meet the future with solutions from the past. A number of years ago when the Fifth Circuit included everything from Florida to Texas, the court was falling farther and farther behind in its docket. The remedy proposed was the traditional one: Add a judge to help shoulder the load. Now, in fact, there were already twenty-five judges on the court. (Imagine, incidentally, what it was like for appellate counsel to appear before the court sitting en banc, facing twenty-five judges sitting in two or three tiers at improvised desks. No wonder they called it the "Fifth Circus.") Experts in organization management studied the court's operations and discovered an interesting fact: The processes of communication within the court required so much of the judges' available time that for each of the twenty-five existing judges to communicate with one more judge would require more judicial time in the aggregate than would be gained by adding a new judge. In short, one more judge would decrease the court's capacity. And so the circuit was split to create two smaller courts—the Fifth and the Eleventh—in place of the larger one. It was a case in which a traditional response would have exacerbated the problem, not solved it.

The critical problems of court congestion require for their solution the invention of new mechanisms, not merely the creation of more courts and the appointment of more judges. If we try to keep up with a burgeoning workload by doing the same things as before, only faster and faster and faster, we fall farther and farther behind and, arguably, produce a less elegant result as well. We are like the woman on the dance floor who knows only the old steps. "Waltz a little faster," says her partner, "they're playing a tango."

I could go on at length, suggesting other areas in which we as lawyers seem content to attack almost intractable problems with tools and habits of thought drawn almost solely from the precedents with which we are so familiar and so comfortable. There isn't time to

discuss them in depth, but let me simply mention a few where new learning and new theories and new approaches are sorely needed but are in short supply.

Take complex litigation, for example. Just mentioning names suggests the magnitude of the problems: Johns-Manville, Agent Orange, Dalkon Shield. Yet many lawyers still think of litigation as involving simply a plaintiff and a defendant—of Helen Palsgraf suing the Long Island Railroad; of Hadley and Baxendale arguing over the measure of damages; of Pennoyer resisting eviction by Neff. The extent to which that simple, two-party, bi-polar model is ingrained in our thinking seems somehow to diminish our ability to fashion new modes of resolving complex disputes.

Neither have we learned well how to resolve disputes arising out of exotic or highly technical subject matters. We still use methods that were developed to decide who struck the first blow or who was on the wrong side of the road. We live in a time when enormous wealth resides in intellectual property—software and electronic data. Vast sums of money are represented by computer impulses and are transferred around the world instantly by satellite. We try to apply to these matters property concepts from the time of Blackstone, and they do not fit very well.

The centuries-old law of the sea permits one to take whatever fish may be netted. But now we have fish "ranching," where fish are conditioned to respond to the sound of the owner's underwater transmitter, and so are kept together and fed by him and harvested by him—unless taken by others claiming free, open-sea fishing rights. Traditional concepts of the law of the sea and personal property are anachronistic in such a setting.

And on and on. You can add your own examples of areas in which the problems are new but the solutions merely traditional and often inadequate, in which lawyers, both individually and as a profession, simply waltz faster when the world in fact is playing a tango.

MANAGING CHANGE

And so I ask, how should you and I, as lawyers, respond to these changes and challenges?

As you would expect, I do not suggest that we rashly adopt a bunch of new procedures, new laws, new institutions, new remedies simply because they are new and, often, touted by enthusiastic "true believers." Malcolm Berko said, "My dad would always say, 'Never buy a gold watch in the parking lot from a guy who's out of breath.'" And there *are* zany solutions to all kinds of problems in this world. I am reminded of a story I told some of you at one of these meetings several years ago. The setting was a graveside service in a Parisian cemetery. A woman had died, and all the mourners had left but two men. One had been her husband and the other her lover. The widower was grief-stricken, but controlled in his grief. The lover, on the other hand, was sobbing and keening and appeared about to collapse, when the husband came over to him, placed his arm about his shoulder reassuringly, and said, "Not to worry, M'sieur; I shall remarry." Not all problems are so easily solved.

I don't know whether you have ever thought about the fact that lawyers, as a class, are not notably creative. Andrew Watson, a professor of psychiatry and law at the University of Michigan, who spoke at our Florida meeting two years ago, describes the brain as a chaotic mass with only a veneer of rationality. He maintains that creativity exists only deep in that disorderly area of the brain, that rationality is the enemy of creativity, and that it is no accident that so many creative, artistic, inventive people are disorderly, iconoclastic, bohemian. The truly creative person delves into the chaos, finds new things, and then brings them to the surface to rationalize them and make them useful. Some creative types plunge deep but never make it back to the surface and end up in a kind of madness, as, for example, the poet Ezra Pound. But creativity requires to some extent that one dig deep beneath the rational. The problem with lawyers, Dr. Watson suggests, is that, by training and practice, we are so steeped in reason that the rational veneer is greatly thickened; and it is very hard for us

to break through that veneer and to move into the creative chaos. Indeed, we are embarrassed even to try. And so we are not very imaginative, not very creative.

Our first task, then, is to try to overcome that barrier, by resolving to think more imaginatively about the problems our profession faces, and by enlisting the interest and efforts of thoughtful experts in other fields, whose creativity hasn't been suppressed by years of insistence on competency, relevancy, and materiality.

In meeting these changes and challenges, it is, paradoxically, more important that we be creative about the questions to be asked rather than the answers to be found. Identifying the question is vastly more important than the answer. The reason a child learns so much so fast is that he is full of questions. Though we think of knowledge as power, Thoreau said most of "our so-called knowledge [is] but a conceit that we know something, which robs us of the advantages of our actual ignorance."[8] In similar vein, Hector Berlioz said of his fellow composer Claude Debussy, "He knows everything, but he lacks inexperience."

As an occasional teacher of the course in professional responsibility, I am often uneasy about my answers to student questions about particular ethical problems, but I believe that I have been of most use by being sure that my students see the existence of the question and understand the competing values involved. If, through the years ahead, those graduates continue to be alert to the existence of ethical questions, I am comfortably sure that on balance they will do the right thing. The problems come when lawyers become inured, little by little, to ethical concerns, to the point where they are scarcely aware that there is even a question.

Although my favorite lay theologian still is the *Peanuts* character Charlie Brown, Calvin, of *Calvin and Hobbes,* runs a close second. In a Sunday strip last fall, Calvin spoke at length to Hobbes, his imaginary tiger friend. He said:

> Today at school, I tried to decide whether to cheat on my test or not.

8. HENRY DAVID THOREAU, 2 JOURNAL 150 (Feb. 1851).

> I wondered, is it better to do the right thing and fail . . . or is it better to do the wrong thing and succeed?
>
> On the one hand, undeserved success gives no satisfaction . . . but on the other hand, well-deserved failure gives no satisfaction either. Of course, most everybody cheats some time or other. People always bend the rules if they think they can get away with it. . . . Then again, that doesn't justify *my* cheating.
>
> Then I thought, look, cheating on one little test isn't such a big deal. It doesn't hurt anyone. . . . But then I wondered if I was just rationalizing my unwillingness to accept the consequence of not studying.
>
> Still, in the real world, people care about success, not principles. . . . Then again, maybe that's why the world is in such a mess. What a dilemma!

Hobbes then interrupted Calvin's monologue to ask:

> So what did you decide?
>
> Nothing [said Calvin]. I ran out of time and I had to turn in a blank paper.

Hobbes again:

> Any[how], simply acknowledging the issue is a moral victory.

Calvin:

> Well, it just seemed wrong to cheat on an ethics test.

Indeed, recognizing the question *is* the beginning of wisdom.

A VISION OF THE FUTURE

I am reminded of another cartoon by Richard Guindon, showing five wispy men and women sitting around a table in what I call a quiche-and-fern cafe, drinking wine and looking bored. One says, "Is evolution still going on, or is this about it?" Well of course, evolution is still going on—in your personal life and in your profession. As I have said, we live in a time of almost overwhelming change. Change makes us uncomfortable, even angry at times. We have a natural tendency to resist those changes. But we cannot opt out. Disconnecting from change does not recapture the past; it loses the future. The question simply is whether we will be agents of change or its victims.

I suggest that, despite our tendency to be limited by the past, we lawyers, with gifts of intellect, training, craft, and station, are obliged, if we are to be faithful stewards of all those advantages, to offer to the republic and to society our most creative ideas for meeting that world that is rushing toward us at 300 miles an hour—or, in today's terms, at Mach 2.

Very late in his career, when his vaunted intellect had begun to slip, Justice Oliver Wendell Holmes was traveling by train. When the conductor came through the car calling for tickets, Holmes couldn't find his. He searched through all his pockets, his briefcase, his wallet. He searched high and low, but he couldn't find his ticket. "That's all right," said the conductor, "you look like an honest man, and I'm sure you have just misplaced it." "Young man," replied Holmes, "you don't understand. The question is not 'Where is my ticket?' The question is 'Where am I going?'" We don't ask that question often enough. You may recall the old conundrum: "Why did Moses wander in the desert for 40 years?" "Because, even then, men wouldn't stop and ask questions." Especially at the personal level, there is the strong possibility that one who neglects to reexamine his goals will come to that condition in late middle age where he's gotten to the top of the ladder only to find that it's against the wrong wall.

I do not suggest for a moment that we can afford to forget where we have been. Not to know history is to be always a child. But lawyers need little help with history. The question we neglect is the one of destination. Unless we keep posing that question, all of our reforms and changes will be nothing but improved means to an unimproved end.

I pray, therefore, that you will address yourselves not only to the immediate problems of your clients and of the bar, but also to Mr. Justice Holmes' larger question: Where are we going? To which I add: And how do we get there? Do not commit the error, common among the young, of assuming that if you cannot save the whole of mankind, you have failed. All that is required is constant inquiry, and creativity, and unselfishness, in addressing the challenges that bear upon us. It may even mean actions that are costly to us personally. But it is essential that we address ourselves thoughtfully and intentionally to

the future. We shall be overwhelmed by events if we do not anticipate them and if we do not invent new ways of coping with them. Like the woman on the dance floor, we'll merely be waltzing faster while the world is playing a tango.

TO CHANGE OR NOT TO CHANGE *

John W. Reed

You surely know what led me to choose this title about change. Most notably injected into the current race for presidential nomination by Barack Obama, the theme of change has been made a campaign centerpiece for virtually all the presidential hopefuls across the full breadth of the political spectrum. The word "change" is spoken again and again in every debate and in every stump speech, and it is printed on placards and painted on the banners that appear behind the candidates as they speak to voters. Every candidate promises to be an agent of change. However much discussion there may be of taxes, Iraq, the economy, immigration, national security, or health insurance, the overriding theme is change. So one has to be deaf and blind not to think about change in this election year. I don't know why the candidates are spending big dollars for campaign consultants. You and I could give the advice for free. All we need to do is tell them to promise change—change to what doesn't matter, just as long as we promise change.

Thinking about change, of course, is not new. Just for fun, I Googled the word "change" and, in seven hundredths of a second, I was referred to 1,770,000,000 sites. Rather unhelpfully, only ten of the 1,770,000,000 sites were displayed on the first page; but, not surprisingly, the second of the ten was a link to a clever You Tube video collage of phrases from campaign speeches by Obama, Clinton, Edwards, Huckabee, McCain, Romney, Giuliani, and Thompson, each claiming to stand for change. The video then captures them in fast sequence saying only the word "change," "change," "change," . . . and finally, in lightning-fast succession, only the initial sound of the word:

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* Reprint of address delivered at the Annual Convention of the International Society of Barristers, Wailea, Maui, Hawaii, 14 March 2008, *published in* 43 INT'L SOC'Y OF BARRISTERS Q. 379 (2008).

"ch, ch, ch, ch . . . ." The video's caption: "They all seem to be singing from the same page."

Change from what to what is seldom clear. The word change doesn't indicate a direction or an intention. Change is a process, not a value. Change may be good, it may be bad. Even when it is good, it may create problems. I'm sure I've told some of you about my favorite fortune cookie saying: "A change for the better will be made against you." I don't know how many of you know a hymn, sometimes sung at Protestant funerals, entitled "Abide With Me." Some years ago I saw on the op-ed page of a newspaper a picture of the Supreme Court Justices—their formal portrait for the year—and the caption was a line from that old hymn: "Change and decay in all around I see." So change is not necessarily a good thing.

We could go on for hours chronicling the myriad ways in which the law and the practice of law have changed. And the work of trial lawyers has changed in our short lifetime. Each one of us knows that change will continue in our lives as trial lawyers, just as it will in the larger world. Some of these changes may be beyond our capacity to influence or control, but not all. To stimulate your thinking about some of these, I want you to suspend disbelief and imagine, now, that I am a candidate for president of the legal profession, or at least our part of the profession. Every candidate is sloganeering with some form of promise of change (just as in the national presidential campaign), and I am challenged to say what that means to me. What are some of the things I would change if elected, and, of equal importance, what things would I not change—indeed, would fight to strengthen?

As I offer my list, I hope you will engage in a similar fantastic exercise. What would you change if you were running for this make-believe office?

THINGS I WOULD CHANGE

First, I will press to make legal services more affordable for the public we are sworn to serve. For the profession's clientele generally, I support the incipient move toward reducing the importance of the

concept of the billable hour and replacing it with so-called value billing, where the charge reflects the value created for the client. Designed originally to make lawyers' fees more rational and transparent, the billable hour has itself become an engine of cost, conferring a premium income on a lawyer who, heedless of the law of diminishing returns, goes the extra mile after extra mile after extra mile. The billable hour certainly provides no incentive for efficiency, and it is quite possibly a major cause of lawyer burnout and broken marriages.

And for our litigation clients, who are less often charged by the billable hour, I will press for a procedural regime that relies more on pleadings than on discovery, thus reducing the enormous pretrial costs that often turn courtroom wins into Pyrrhic victories. The adoption of the Federal Rules of Civil Procedure seventy years ago—indeed just one year before I went to law school—made it possible for litigants to have considerable knowledge about their adversaries' cases, making settlements more likely and, if no settlement is reached, making trial by ambush less likely. Unfortunately, discovery has overwhelmed the process and almost closed the arena to all disputants but big business and the personally rich. I would immediately appoint a broadly representative commission, well staffed and funded, to propose a system of civil procedure that moves us from the extremes of what the Federal Rules call notice pleading to a modified version of the fact pleading that prevailed before the Federal Rules.

I submit that moving away from the billable hour and ending the gigantism of modern discovery will reduce the costs of legal services without diminishing quality, and make those services more broadly available to the public we are to serve. And so, as a candidate, I stand for that change.

Second, I will seek to reverse the decline in the status of judges by increasing their compensation, especially on the federal bench, and by improving the selection process, especially in the states. In the last half century or so, there has been an evolution in the role of the judiciary. We have asked the judicial branch not only to decide controversies but also to manage prisons, supervise school systems,

monitor corporate conduct, define death, and the like; it is no wonder then that the public wants a hand in selecting judges who do those things. But the ways in which those selections are made damage the independence of the judiciary and diminish the public's confidence in the impartiality and fairness of judges.

In my home state of Michigan, for example, our supreme court justices are elected on a so-called nonpartisan ballot; but, weirdly, the nominally nonpartisan nominees are chosen by the political parties at their conventions. And obscene amounts of money are spent in the judicial campaigns, making it clear that various economic and social interests are seeking judges who tilt toward their desired positions. Wherever possible, then, I will press for a change toward some form of the so-called Missouri Plan for electing judges—gubernatorial appointment of judges from a list presented by a judicial selection commission composed of citizens chosen to be broadly representative of the community's interests, followed by periodic retention elections of the appointed judges thereafter. It is by no means a perfect system, but it's clearly superior to the pseudo-democratic process in general use.

Third in the litany of changes that I propose is a major rethinking of our ideas about the penal system. Just two weeks ago, the respected Pew Center on the States reported that more than one in every 100 American adults is in jail or prison, and that figure doesn't include the hundreds of thousands of people on probation or parole. These incarceration rates are the highest in the world. If they increased public safety significantly, they might be tolerated; but in fact the United States crime rates are also among the highest in the world.

Especially troubling are the racial disparities: Almost half of the 2.3 million adults behind bars are African Americans, who constitute only thirteen percent of our population. And here is a more shocking fact: One in nine black males between the ages of twenty and thirty-four is incarcerated.

Our penal policies, in my view, pose issues not only of morality but also of the wisdom of the allocation of the community's resources. A number of states—my Michigan among them—spend more on

corrections than on higher education. You will notice that I used the common governmental term: corrections. Our prisons usually are run by a "department of corrections." But are we correcting anything? Why in fact do we incarcerate wrongdoers?

First, we are trying to prevent future harm in the community. In that view, we are imprisoning people not for what they have done but rather for what we think they might do if they remain at liberty. Our predictions of what a criminal will do the next time are notoriously inaccurate, but at least the desire to protect the community is understandable.

Second, we are satisfying the nearly universal emotional need for punishment—for retribution, to hurt the wrongdoer because he has caused harm to another. It is tit for tat.

Third, we maintain that imprisonment should have a beneficial, rehabilitative effect. Think of the words we use: corrections, reform school, reformatory. Even the word penitentiary connotes penitence. The inmate is penitential and can then be corrected, reformed, or rehabilitated. But this eighteenth and nineteenth century philosophy and hope has largely disappeared. And why should it not disappear? Here's a statement by the Permanent Secretary of Britain's Home Office during a study of the prison system:

> I regard as unfavorable to reformation the status of a prisoner throughout his whole career: the crushing of self-respect, the starving of all moral instinct he may possess, the absence of opportunity to do or receive a kindness, the continual association with none but criminals, . . . and the denial of all liberty. I believe the true mode of reforming a man or restoring him to society is in exactly the opposite direction to all these.[1]

1. IAN DUNBAR & ANTHONY LANGDON, TOUGH JUSTICE: SENTENCING AND PENAL POLICIES IN THE 1990S 13 (1998) (quoting the Permanent Secretary of Britain's Home Office).

As I argue for change, I do not propose change in the concept of prisons. However desirable that might be, it clearly is not feasible in our lifetimes. Rather I will commit my administration to changing the substantive law of crime, especially the laws that are a part of our failed war on drugs, and in tandem I will continue the attack on mandatory minimum sentences and on Draconian measures like the three-strikes laws—not three strikes and you're out but three strikes and you're in, for life, even if the third crime is a relatively minor, nonviolent crime.

You may think that change in the penal system is a task for sociologists and criminologists, but they're not getting it done, at least not by themselves.

It's the lawyers and judges who operate the legal machinery that puts these people in prison, and we must provide the missing leadership to end the scandal and shame of locking up such a high proportion of our people.

The fourth change I promise in my platform will reveal me as a crotchety person, but bear with me. I promise to use my office as a bully pulpit from which to complain about the dismal quality of the use of the English language by both lawyers and judges. I accept the fact that none of us, at this stage in our careers, can significantly improve our own style and elegance of expression, much less that of the profession at large. This is not yet the century of soaring prose. But I have in mind something much simpler and more fundamental—not style and elegance, but clarity and accuracy. Seeking clarity, I would support the move toward understandable English, without using words like "aforesaid" and "hereinafter" and so on—hardly a new idea, but worth reinforcing. More importantly, it calls for more attention to the definition of words so that they convey meaning more accurately and less ambiguously.

For example, meaning is usually expressed in words, either orally or in writing; both modes of expression are verbal. Yet many—perhaps a majority—use the adjective verbal to mean oral. This misuse is probably most common on the sports pages where they report that a particular high school student has made a "verbal" commitment to go to USC. Of course it was verbal—he used words.

But we are not told whether it was oral or written. The ambiguity is harmless on the sports page, but it could have dispositive significance in a legal setting.

Or think of the terms imply and infer. Imply denotes that the speaker's words are intended by him to carry a meaning beyond what is said explicitly. Imply is a function of the speaker. Infer means that the listener finds a meaning beyond the literal message. Infer is something the listener does. I confess that in modern dictionaries, imply is sometimes listed as one of the meanings of infer, though ordinarily listed, fortunately, as "loose usage." In that loose usage, people say, "He inferred that he would return the next day," when, of course, he did nothing of the kind—he implied it. I can infer that he would return, but he can't do the inferring. A crochet? Of course, but carefully used language does tend to reveal a careful thinker.

By the way, I saw a cute illustration of the use of inference. The question was asked, "How can a stranger tell if two people are married?" A little eight-year-old boy said, "You might have to guess, based on whether they seem to be yelling at the same kid."

The other day I heard another common misuse of words, as a friend, not feeling well, said to me, "I'm nauseous." Because I know her to be a pleasant person, I know she didn't mean what she said. "Nauseous" means sickening or disgusting. What she meant was that she was "nauseated," meaning that she felt sick—literally, seasick, which is where the nautical part of nausea comes from. (I feel sure, however, that all of us have encountered instances in which the person saying "I am nauseous" was speaking more truly than he knew.)

There are, of course, scores upon scores of other misuses of words—disinterested for uninterested, reticent for reluctant, enormity for large size, notorious for famous, artful for artistic, and on and on. Lawyers, of all people, ought to use language with precision and insight.

This little rant of mine about language is only a speck on the page of my platform of change. Perhaps, like William Safire, I should write a column about usages that irk me. But I offer these few comments to show you that, as a candidate, I care about the careful

use of language by lawyers—and also, like some more famous candidates for high office, to show my real self, which has this "picky" aspect.

THINGS NOT TO CHANGE

We could go on playing this game of pseudo-candidacy, listing changes I would include in a platform. These have been only the tip of the iceberg of the changes I would work for. Change *will* occur, and the only question is whether you and I will be its agents or its victims. But now let me make a pledge that may be politically incorrect, or at least politically unwise in this change-themed electoral season: I bravely assert that there are aspects of our profession that must *not* change, things that arguably are eternal verities, and that in those areas I will actively oppose change—areas the preservation of which you and I must work for as diligently and strongly as we might work for change in other areas, such as those I have mentioned.

First, we must continue to fight for the preservation of the jury, which is a charter purpose of the Barristers. There is so much to say about the importance of the jury in our system of justice, and the attacks on it, that I need to make it the subject of an entire campaign speech on another occasion. I note, however, that when we speak of the disappearing jury, it is not disappearing everywhere. In fact, Japan, believe it or not, is preparing to adopt a jury trial system in its criminal courts in 2009, the most significant change in its criminal justice system since the postwar American occupation. And here at home, there is gradually emerging a body of research that validates the jury's performance as a fact-finder—preferable indeed to one-person arbiters, namely judges. So all may not be lost. (Speaking of research, it has been discovered that research causes cancer in rats.)

Second, we must continue to fight to maintain our system of separation of powers, resisting incursions by the executive and legislative branches into the judicial branch. An independent judiciary is crucial to the rule of law and to the maintenance of our freedoms.

It is my impression that lawyers individually and the bar corporately are so busy with their everyday concerns—transactional

work, depositions and mediations, mergers, client development, and the like—that they give only occasional and weak attention to large issues like separation of powers, threats to the jury, and threats to the judiciary's independence. We need to speak out. Martin Luther King, Jr., said, "Our lives begin to end the day we become silent about things that matter." We need to speak more of such muscular concepts as habeas corpus, justice, equity, the adversary system, due process—even Magna Carta, although one should be careful to know what Magna Carta is before speaking of it. You may recall the schoolboy's essay. He wrote: "Magna Carta was when, to protest high taxes, Lady Godiva rode naked on a horse through the streets of Coventry. She rode sidesaddle, which is the origin of the phrase 'Hooray for our side.' When she got off, Sir Walter Raleigh gave her his cloak, saying, 'Honi soit qui mal y pense,' which being translated means, 'Your need is greater than mine.' She responded, 'Mon dieu et mon droit,' which means, 'My God, you're right.'" So, be careful about using Magna Carta.

I suspect that one reason why we speak so little of these bulwarks of our freedoms is that they have become too familiar, and we have lost the capacity to be energized, indeed to be surprised and excited as we were when we first were introduced to them. We have "overheard" them—that is, *over* heard them; we have heard them so often that they have lost much of their ability to seize our imaginations and give us the energy to fight for the right. We need to reawaken ourselves to the grandeur and high promise of these mechanisms that secure liberties, and realize anew that laws and lawyers are the infrastructure of freedom.

Yet, when it comes to our obligations to shore up the adversary system, to preserve the jury, to insure the independence of the judiciary, we see the tasks as daunting, and beyond our abilities and meager energies. The forces of society and history often appear irresistible, and the temptation is to give in to what seems to be inevitable, however unappealing it may be. I concede that some quests are impossible and Quixotic, but not as many as we may think. Most problems are solved, most barriers are surmounted, most opportunities are realized not by monumental acts of flashing insight and daring, but by an accumulation of little acts. We achieve our

greatest purposes by attending faithfully to the smallest things. There are times, of course, when this doesn't feel true. We practice law and we live our lives in the shadow of gigantic social and economic and political systems and the endless grinding on of history that takes no notice of us. Isn't it then absurd and pathetically self-important and delusional to think that the little efforts of our little lives make any meaningful difference at all?

The poet Bonaro Overstreet suggested an answer to that question. Originally she titled her poem "To One Who Doubts the Worth of Doing Anything Because You Can't Do Everything," but she ended up calling it "The Stubborn Ounces."

> You say the little efforts that I make
> will do no good: they never will prevail
> to tip the hovering scale
> where justice hangs in balance.
> I don't think
> I ever thought they would.
> But I am prejudiced beyond debate
> in favor of my right to choose which side
> shall feel the stubborn ounces of my weight.[2]

The truth is that the small things we do can make massive differences in the end. Some years ago on a sidewalk in Johannesburg, South Africa, a man did a very small thing. Trevor Huddleston, a white Anglican priest, walked by a black woman and her little boy, and he tipped his hat. That's all. But that simple little courtesy was almost never offered to black South Africans by whites, and the little boy noticed. He and his family started going to Huddleston's church, where they learned more about the love of God for all people equally. The boy was Desmond Tutu, who followed Trevor Huddleston into the priesthood and joined his own witness to the witness of many others, resulting at last in the ending of apartheid and the democratic birth of a new nation. Desmond Tutu has said that one seed of that great

2. BONARO OVERSTREET, HANDS LAID UPON THE WIND 15 (1955).

transformation was the tiniest witness of a tipped hat. We must not, you and I, withhold the stubborn ounces of our weight.

Inherent in all of this is the practice of being true to our best selves. A requirement for being a Fellow of the Barristers is, in the words of the Society's Articles, that you "shall possess excellent character and integrity of the highest order." Integrity, like the word "integer," connotes the concept of wholeness. What we see in you is what we get—consistently high principle through and through, in big things and small. I spoke earlier of things that we ought to change. But the quality that your election as a Fellow certifies that you have excellent character and integrity of the highest order—that quality must not change. You do not change with the winds of expediency or fortune. You are true to your best self in high times and low, good times and bad. That's the very definition of integrity.

The consequence of being a traitor to your true self is suggested by this cautionary tale told by the Danish philosopher Soren Kierkegaard: A peasant walks to town and comes across a satchel of money. Elated, he goes and buys himself an exquisitely beautiful pair of boots. He also buys a big bottle of wine. As he walks in his gorgeous new boots along the road through the forest toward home, he sings and he drinks, and he sings and he drinks, and he drinks some more, until he's roaring drunk and passes out, sprawled across the road. In the morning he is awakened by someone shouting. Hung over, he opens his eyes, sees a horse and a big wagon, and the driver of the wagon is yelling: "Get off the road so my wagon doesn't break your legs!" The peasant raises his head, sees the beautiful boots, then happily waves the driver on. "It's all right," he says, "those are not my legs."

That tale is all too apt a parable for our lives in these times. Living and working in a world that boils and bubbles with change, where the old verities are easily cast aside and where self-interest seems to be the primary value, we are in danger of clothing ourselves in ambitions and attributes that are not true to the person underneath—that are not true to the core of what we really are—until, like the peasant in the Kierkegaard tale, we scarcely recognize ourselves; and the true, the good self underneath gets run over by life

and mangled beyond recognition. As members of the Barristers family, you have well-worn boots of rationality, generosity, compassion, and courage. The world may well offer you exquisitely beautiful new boots of fame and fortune and self-interest. Whatever else you do, don't change your boots.

THE JOHN REED LECTURE
FIRE AND FURY IN THE COURTROOM*

Hon. Ian Binnie, CC, QC **

ABOUT THE SPEAKER:

The Cambridge Union Debating Society at Cambridge University was founded in 1815. It is the oldest debating society in the world. It hosted both Churchill and Roosevelt. Ian Binnie was the first Canadian to be elected as its president. That was while he was studying law at Cambridge, from which he graduated in 1963. In his first fifteen years at the bar in Toronto, he established himself as counsel. In 1982, he became Associate Deputy Minister of Justice in the federal government in Ottawa. Canada's Charter of Rights and Freedoms became law the same year, and Ian Binnie was on the ground floor in courts across Canada and the Supreme Court of Canada, helping define what our Charter was to become. And when Ian returned to private practice in 1986, his choice of firm was at the invitation of John Robinette, then the most celebrated of all Canadian barristers. Ian joined a cluster of barristers at a firm that was at the time the Yankees and the Celtics and the Montreal Canadiens of the bar. In his twelve years there, he rose to national prominence. Constitutional law, administrative law, corporate and commercial law, libel law, patent law—all became his daily fare. He became one of the country's most respected counsel.

In 1998, Mr. Binnie was appointed to the Supreme Court of Canada. In the last fifty years, he is one of only three direct appointments from practice to our highest court. He retired from the court in 2011. As a judge, his writing was lucid and prolific, sometimes humorous, sometimes graphic. In a 2008 decision balancing freedom of expression

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* Address delivered at the Annual Convention of the International Society of Barristers, London, England, 18 April 2018.

** Former Justice, Supreme Court of Canada.

and the protection of private reputation, he wrote, "An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to 'chill' freewheeling debate on matters of public interest."[1]

The Globe and Mail, *Canada's national newspaper, said he was "arguably the nation's premier judge."*[2] *The other leading Toronto newspaper described him as one of the strongest hands on the court, and* Le Devoir *in Montreal expressed thoughts of the same vein. In 2012, Justice Binnie returned to private practice in national and international arbitration.*

I
INTRODUCTION

It's an honor to be here, especially to hear the tribute to John Reed, whose insights into the legal profession were many and profound . I was also interested in the lecture earlier on Marshall Hall.[3] My favorite story of Marshall Hall is this: As he was making some inflammatory submissions to a rather starchy British judge, he was stopped in mid-flight by the judge, who said, "Mr. Hall, all of what you are saying is of no help to me at all; it's going in one ear and out the other." And Marshall Hall said, "Ah, in one ear and out the other. Well, m'lud, what's to stop it?"

John Reed, whose book of essays I had the pleasure of reading, urged lawyers go beyond what he called parochial professional

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1. Simpson v. Mair, 2008 S.C.C. 40 [2008] 2 S.C.R. 420, para. 2.

2. Kirk Makin, *A Rare Look at the Inner Workings of the Supreme Court of Canada*, GLOBE AND MAIL (Sept. 23, 2011), https://www.theglobeandmail.com/news/politics/a-rare-look-at-the-inner-workings-of-the-supreme-court-of-canada/article2178722/page1/.

3. Sally Smith, Sir Edward Marshal Hall KC; Extraordinary Advocate, Extraordinary Life, address delivered at the Annual Convention of the International Society of Barristers, London, England, 18 April 2018 (publication forthcoming).

concerns and play their role on the larger stage of important public issues. And indeed I think a similar message was delivered by Michael Kelly at the opening of this conference in his discourse on the "Conventions of the Convention." And so I want to take up that theme, despite the caution administered yesterday by Lord Igor Judge,[4] who said that judges should know their place—which is a modest one: they should stick to the application of the law and leave politics to the politicians. And, of course, that is fair enough. But barristers are nothing if not cynical. As Chief Justice Hughes famously commented years ago, Yes, we all live under the Constitution, but the Constitution is what the judges say it is. And nowhere is that more apparent than in Canada, where the few originalists have long since given way to those who see the Constitution as a living tree, which evolves with the times, and whose interpretation is shaped by the accumulated experience of the country and its people.

So this morning, with apologies to any originalists in the room, I would like to go boldly where no other retired judge has gone before, at least at this conference. My title, "Fire and Fury in the Courtroom," refers not to Michael Wolff's book about his months in the Trump White House, but to the legal crisis in Canada involving the potential secession of Quebec, one of the most significant courtroom battles in our country's history, where the barristers occupied centre stage.

I am going to draw some analogy between the way the United States came to terms with the attempted secession of the Southern Confederacy, fought out on the battlefields of the Civil War, and the potential secession of Quebec from Canada, argued before the nine wintry judges on our Supreme Court. My thesis harkens back to John Reed's notion that lawyers and judges should not rest silent on the great issues of their era. We have more to offer the country than mortgage remedies and divorce settlements, but as Lord Igor Judge reminded us yesterday, many lawyers and judges, perhaps many at

4. Lord Igor Judge, Legal London and Its Historical Relationship to the Foundations of the United States, address delivered at the Annual Convention of the International Society of Barristers, London, England, 17 April 2018 (publication forthcoming).

this conference, would argue strongly against the involvement of the courts in a subject so political and inflammatory as the secession of a significant part of the country.

In our case, Quebec is about a quarter of the population. So it would be like California and New York jointly seceding from the United States. Worse, secession would leave Canada territorially in a rather odd position, with a great hole in the middle of the country where Quebec used to be, leaving the Atlantic provinces isolated in the east and Ontario on the other side, over a thousand miles away, divided by the newly foreign country of an independent Quebec. Yet that is the scale of the challenge that was faced in Canada.

II
THE IMPULSES TO SECEDE

Now, I am not suggesting any parallel between the underlying causes. Obviously, the preservation of the slave culture of the South has no parallel to the preservation of the French language and culture in Quebec. But in each case, the country was dealing with an existential crisis. Each secessionist movement felt that what was most characteristic of their culture and being, what was at the root of who they were, was at stake and in danger of being swamped by the broader national community. In the United States, the threat was the growth and industrialization of the North; in the case of Quebec, the threat was to the survival of the French culture of about six million French speakers in an ocean of about 400 million English speakers across North America. The feeling that their language and the ability to survive as French-speaking people was becoming more and more problematic eventually gave rise to a very powerful political force in Quebec—to secede. As in the American south in the 1860s, as in Britain now with the Brexit debate, as in the situation playing itself out in Catalonia , so it was in Quebec: a desire to be Masters in their own House. It must be recognized that just as race relations constitute the flash point in the United States, and in Ireland the society is split

along religious lines, in Canada the most explosive issue threatening national unity is and always has been culture and language.

To give you some idea of the power of the secessionist movement, a succession of governments was elected in Quebec on a platform of independence, and a provincial referendum was called in 1995 on the future of Quebec. Instead of a straightforward question, "Do Quebeckers want to be independent of Canada?," the government posed a rather convoluted referendum question in which many people were not quite sure whether they were voting for a renewal of Canada on renegotiated terms or complete independence. There was 93.5 percent participation, and in the end the cause of sovereignty lost by less than one percent—50,000 votes out of almost five million votes cast.

Abraham Lincoln of course famously said, "[M]y opinion is that no state can, in any way lawfully, get out of the Union, without the consent of the others . . . ."[5] That was also the federal position in Canada, whereas the position of Quebec recalled the words of Jefferson Davis, then a Mississippi senator, who said the government of the United States is a compact.[6] When the compact is broken, the participating state has a right to leave. A similar sentiment drives Brexit, in which just over half the British voters voted to "take back control" from the European Community.

Over a hundred years after the American Civil War, the same federal union versus states' rights debate played itself out in Canada. The difference, of course, between 1995 and 1861 is that Ottawa does not have the army of the Potomac at its disposal. And even if it had, the conditions in North America in this day and age do not really contemplate a military solution, even if one were possible. But if not

5. Letter from Abraham Lincoln to Thurlow Weed (Dec. 17, 1861), 4 COLLECTED WORKS OF ABRAHAM LINCOLN 154 (1953).

6. *See* Jefferson Davis' Resolutions on the Relations of States (February 2, 1860) ("the constitutional compact which formed the Union"), https://jeffersondavis.rice.edu/archives/documents/jefferson-davis-resolutions-relations-states.

military, how do you—and how do lawyers—play a role in the resolution of a national existential crisis?

III
THE CRISIS COMES BEFORE THE COURT

So what the federal government did was to initiate a reference to the Supreme Court of Canada seeking an advisory opinion as to the legality of a unilateral declaration of independence of Quebec following a hypothetical referendum where the secessionists won at least fifty percent of the vote plus one. Could the rest of Canada ignore a democratic vote in Quebec?? On the other hand, should one province have the right to split the country into unmanageable pieces?? For the lawyers and judges who took centre stage, the stakes could not have been higher.

There were three questions posed to the Supreme Court: First of all, would it be legal for Quebec to withdraw unilaterally from Canada as the Confederate states withdrew—or attempted to withdraw—from the United States? Second, even if secession were not permitted by Canada's domestic Constitution, the further question arose as to whether, as a matter of international law, Quebec could exercise a right of self-determination—which was essentially the right sought by the southern states in the 1860s—leaving it to the international community to decide whether or not to recognize an independent Quebec. The third question was, if the answers to the first two questions are in conflict, which is to prevail?

Any judicial opinion on these issues would be advisory only. The questions were hypothetical. There was no case-or-controversy in the sense of the U.S. Constitution. However, the Supreme Court of Canada had jurisdiction because, unlike most of the United States, there is no bar against the government's seeking an advisory opinion from the courts.[7] (Although I understand that in the early days of the republic,

7. Alabama and Delaware permit advisory opinions by statute; eight other states provide the same in their constitutions. *See* MEL A. TOPF, A DOUBTFUL AND PERILOUS EXPERIMENT: ADVISORY OPINIONS, STATE CONSTITUTIONS, AND

Chief Justice Marshall would be happy to provide successive Presidents with informal, "heads-up" advisory opinions, perhaps not for attribution—a practice apparently surviving into the FDR era, and perhaps beyond.) An interesting point is that although the government is free to refer a hypothetical question to the Court, the Court is not obliged to answer it if the Court thinks it inappropriate to do so.

In Canada, as would undoubtedly be the case in the United States, there were strong objections to what was essentially a highly political question being referred to unelected judges. However, Canada does not have a U.S.-type "political-questions" doctrine, and less-strict attention is paid to the division of powers. Critics also pointed out that there had never been an affirmative vote in favor of independence from the Quebec electorate, even though the secessionists had come within one percent of success in 1995, and perhaps there never would be. Why stir up trouble, especially when the federal government might not get the answer it wished to hear?

On the political-questions doctrine, the Court agreed that it is not up to judges to make these sorts of political decisions. But there is a role for judges and lawyers in elucidating the legal framework within which political questions get decided, making clear the constitutional ground rules that would permit the voters and politicians to sort out whether Canada would continue as a unified country or not.

As to the prematurity of the question, the view was that if you leave this kind of question open until a full-blown crisis hits, and the country is in the agony of a collision of political forces, there is neither the time nor the calm to reflect on what the ground rules are. ("The time to fix the furnace is in the summer.")

A further complication was that the Quebec government declined to participate in the Supreme Court hearing, saying that the psychodrama apparently playing out in the rest of Canada was none of its concern. The province of Quebec would remain aloof. So the

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JUDICIAL SUPREMACY 17–26 ("Everlasting Disgrace: Advisory Opinions, Constitutions, and the Evils of Plural Office Holding") (2011).

Supreme Court appointed an *amicus curiae* by the name of André Jolicoeur, who was a well-known barrister in private practice in Quebec City. He was a separatist and very respectable—I'm sure so respectable that he would be welcomed as a member of this Society—and he was highly regarded at the bar.

A Hot Political Climate

I do not wish to leave the impression that the secession crisis was a tea party. Pressure had been building in Quebec over the years in some ways similar to that in the southern United States, with the compromise of 1850 and the Missouri compromise and the Kansas-Nebraska Act—the whole series of measures that left the politicians in the South feeling at increasing risk of being swamped by the different social values of the northern states. In Canada, there had been a referendum in 1980 which was won comfortably by those opposed to separation. Reform had been promised, but reform never happened. So there was a sense in parts of Quebec society , especially in some of the universities, that the rest of Canada, the English-speaking establishment—including the lawyers, the constitutionalists, the courts—were too set in their ways, too smug and complacent, too satisfied with the status quo, to engage with Quebeckers in meaningful constitutional reform.

And, inevitably, a small minority of activists at the fringe of the separation movement, preached violence. There were bombs planted. The activists blew up the Montreal Stock Exchange at one point. They blew up a Canadian Army base in Montreal. They kidnapped the British consul, a man called James Cross, and held him to ransom. And they took hostage the deputy prime minister of Quebec, Pierre Laporte, and in the end assassinated him. The vast majority of those in favor of independence were perfectly calm, peaceful people arguing for a reasoned political position, but there were some fanatics who sought their ends through other means.

Unlike Catalonia in Spain, nobody tried to stop the Quebeckers from proselytizing, from preaching the virtues of independence. The police were not called in, as they have been in Catalonia, to put in jail

people advancing a political agenda. At the time of the kidnappings of the British consul and deputy prime minister of Quebec, the federal government briefly invoked the War Measures Act until it could ascertain the scale and potential escalation of violence on the streets. But the violence ceased and political discourse resumed, often dividing families and producing much discord within Quebec society.

I return to the arguments of the barristers. The *amicus curiae* for Quebec was suitably dismissive of the federal position. "Well," he said, in so many words, "we're really not interested in *your* Constitution." Sovereignty is and always has been a question of fact. If we win independence at the ballot box, the outcome will be recognized internationally, and that is what is important. Quebec will have *de facto* independence. And, indeed, after the 1995 referendum was lost, it emerged that the government of France had agreed to recognize Quebec as an independent state if, as, and when Quebec issued its unilateral declaration of independence. So it was a very serious situation, and not one that one would ordinarily expect to be entrusted to lawyers.

The federal position on unilateral secession was simple: if there was no constitutional amendment there could be no lawful secession. Of course, the government knew full well, as did the judges, that such an amendment would never be agreed to by the rest of Canada. A constitutional amendment would require the unanimous consent of the federal Parliament and the provinces. It was not going to happen. Yet many lawyers thought the job of the judges should have been to say that secession requires a constitutional amendment. Period. Full stop.

The unanimous view of the court, however, was that to drop-kick the issue into the political arena without any legal framework to guide the debate would have produced chaos, if indeed Quebec ever did vote to separate. There would have been a legal vacuum. It would have been as if Brexit happened overnight with no time to plan and prepare. Acceptance of the federal argument would have been to create, in Lincoln's words, a house permanently divided against itself.

The Quebec government, while not participating, certainly had a perspective. It agreed with Senator Henry Clay that any population must be free to throw off its fetters and achieve independence simply by the force of the popular vote. To the Quebec government, what the federal government was saying was like Hotel California: you can check in, but you can't check out. Once you're there, you're locked in forever.

Then there was a number of aboriginal organizations who almost uniformly opposed secession and who, although relatively small in numbers, occupy practically two-thirds of the territory of Quebec. These northern communities tend to speak English as a second language, their first language being Cree. From their point of view, their rights would receive better protection in Canada than in an independent Quebec. They considered the government of Quebec to be too enthusiastic about further hydroelectricity development that would necessitate extensive dams across traditional Cree territory.

We had a minority of French-speaking people in Canada, and within Quebec a minority of aboriginal people in the north, and a sub-minority of English-speaking (but increasingly bilingual) people living in Montreal, all with different interests and concerns. And this is the situation that was handed to Supreme Court of Canada.

Constitutional Principles

What is the countervailing answer to unilateralism? One creative argument advanced by one of the attorneys general (from Saskatchewan, as it happened) echoed in some ways the words of Martin Luther King, who preached the "inescapable network of mutuality."[8] Of course, Dr. King was talking in terms of the relationship among the races, but in Canadian terms the web of mutuality meant the interdependence of many different and mutually supportive communities, not unilateralism, not "my way or the highway." Canada has been bound together by a framework of laws,

8. Martin Luther King Jr., Letter from a Birmingham Jail (April 16, 1963).

reflecting economic and social and cultural and business ties, for 150 years. It is simply not consistent with the rule of law to smash that web of mutuality with a unilateral declaration of independence. As the Court put it, "The threads of a thousand acts of accommodation are the fabric of a nation."[9]

Yes, democracy is fundamental, but it is not the only fundamental principle constitutional lawyers and judges should be conscious of. There is also the rule of law, and the avoidance of a legal vacuum. And respect for federalism and the Constitution. And the protection of minorities, including aboriginal peoples.

What would happen in the case of Quebec's separation would look a lot like Brexit without the conveniently located English Channel. Hundreds of thousands of laws, rules, regulations, and treaties bind Britain to Europe. All will have to be undone if Brexit proceeds. What happens to the border in Ireland is, as we know, a huge issue; there are forces in Ireland that say when Britain leaves the Common Market and those customs posts go up, they're going to be blown up fairly quickly by the resurgent forces of the IRA and their Ulster counterparts. Secession is not for sissies. Nobody knows this better than those of you who live with the legacy of the American Civil War.

Now, a referendum seems always to be a bad idea. Brexit was highly controversial, but seems to most outsiders a bad idea. The referendum in Catalonia was a bad idea. And the series of referenda in Quebec have been a bad idea because they have become a neverendum: if the secessionists don't get the answer they want this time 'round, the question will be brought forward again and again. In the Quebec Secession Reference, the Supreme Court was building a constitutional structure that was intended to last for long as the secession question remained, which is likely forever.

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9. Re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) (para 96), *quoting* from the argument by John Whyte, Attorney General of Saskatchwan. The Supreme Court's opinion is available at http://opil.ouplaw.com/view/10.1093/law:ildc/184ca98.case.1/law-ildc-184ca98.

In the absence of a constitutional text providing a mechanism for secession, and at the same time nothing being said in the Constitution about Canada's being a nation one and indivisible, the Supreme Court had to stand back from the text and attempt to formulate principles that are reflected in what is called "the architecture of the Constitution." What this meant, in practical terms, is that the judges undertook to look not only at the letter of the Constitution, not only the original intent of the framers reflected in its general "architecture," but to analyze all of the other potentially relevant factors, including the constitutional practice of Canada as it has developed since confederation in 1867.

In the end the Court declared that a unilateral declaration of independence would be unconstitutional, referendum or no referendum. But that conclusion did not mean that in the face of a successful referendum, the federal government and the other Canadian provinces could sit on their hands and maintain the status quo; there has to be respect for a democratic vote in Quebec. There would arise an obligation to bargain, something that would have been anathema to Lincoln, although frequently urged on him by a number of well-meaning Southerners, who asked, Couldn't we talk our way out of this morass of the Civil War?

The Supreme Court of Canada accepted that while there was a constitutional duty on *all* parties to bargain in good faith about the way forward, including the possibility of constitutional renewal, or the terms of departure, the negotiations would nevertheless be purely political. The courts would have no supervisory or even advisory role. Nothing would be excluded from the agenda, including the territorial boundaries of a new Quebec and including the protection of the rights of the hundreds of thousands of French-speaking Canadians outside Quebec, as well as the rights of aboriginal people, who were very much in the majority in the north.[10]

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10. Aboriginals were over 80% of the Nunavit population in 2001; their population was over 45.6% of the Northwest Territories. Canadian Council on Social Development, A Democratic Profile of Canada 7, http://www.ccsd.

Principles of International Law

So then came the international-law question, which again offers a direct parallel to the United States, where the confederate states had expectations of recognition by France and Britain. The latter, after all, had recognized the Confederacy as belligerent states. The hope was, through King Cotton and so on, that recognition of the South as a political entity would bring about a chain reaction whereby whatever the North said and despite whatever its armies achieved, the southern states would achieve recognition from the international community of nations.

Senator Henry Clay said in 1818 in reference to South America that "an oppressed people are authorized, wherever they can, to rise and break their fetters."[11] The international principle of self-determination, although of more recent origin, is now reflected in the U.N. Charter. But from Quebec's perspective it had an interesting double edge, because in legal terms "the right of self determination" is an *exception* to the more-fundamental principle of territorial integrity. And the principle of self-determination is applied sparingly outside the context of the former colonial empires. We can see there is great fear in Europe over the Catalonia insurgency—that if Catalonia is allowed to break loose from Spain, what about the Basques in Spain? What about the northern Italians who want to rid themselves of their southern countrymen? All over Europe there are communities who would take advantage of a breakaway state like Quebec as a precedent for their own drive to independence. So in order to take advantage of the right of self-determination, the law generally requires evidence that you are an oppressed people.

This was a tough hurdle for Quebec. The prime minister of Canada for forty of the last fifty years has been a French Canadian. At the time the Court heard the Quebec secession reference, the prime minister of Canada, the chief justice of Canada, and the head of the

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ca/factsheets/demographics/demographics.pdf.

11. DAVID ADDISON HARSHA, THE MOST EMINENT ORATORS AND STATESMEN OF ANCIENT AND MODERN TIMES 360 (1854).

military were all French Canadians. The government majority depended on the seats from Quebec. Moreover, Canada is probably the most decentralized country in the world in terms of allowing the various provinces almost complete freedom regarding civil rights and property. So the Court concluded that Quebeckers didn't come within the international definition of an oppressed people.

So Quebec's real argument was the international-law principle of effectiveness: if you *are* sovereign, it really doesn't matter how you *became* sovereign. International law recognizes the reality of a population in control of a territory supported by the popular will. And so it was with the confederate states and so it will be the position of Quebec secessionists if, as they say, they someday achieve "winning conditions."

As to the third question posed to the Supreme Court, that is to say which would prevail if international law reached a conclusion inconsistent with the Canadian Constitution, the Court declared the question moot as, in its opinion, there was no conflict.

IV
CONCLUSION

When John Reed counseled fellows of the International Society of Barristers to stay involved with issues other than those of parochial interest to the profession, he perhaps did not envisage the presumptuousness of taking on such a colossal issue as national disintegration. He might have been inclined more to the view of Lord Igor Judge of the legitimate role of the Courts.

No doubt the role assumed by the Supreme Court of Canada in the Quebec secession reference was highly controversial. What were the judges doing, messing about in a subject that was quintessentially political? Who gave these nine appointed people the authority to set the ground rules from what they conceive to be unwritten principles of the Constitution? Where do the unwritten principles come from? Who's to stop the Supreme Court from adding new unwritten constitutional principles as they go along??

But just as sovereignty is a fact, so was the impact of the Supreme Court's decision in the Quebec Secession Reference. Suprisingly, the outcome was welcomed both by the prime minister of Canada and by the government of Quebec.

The government of Canada welcomed the Court's solution because it said that ultimately Quebec did not have a unilateral right simply to walk out of confederation. And if there was such a walkout, Canada could go to the countries of the world and say the walkout is illegitimate because the ground rules were not respected by the secessionists.

The premier of Quebec thought the judgment was fine because the Court said there would be, in the event of a vote to secede, a constitutional obligation on the part of Canada to sit down and negotiate with Quebec. The rest of Canada could not simply thumb its nose at a democratic vote for independence but had to enter into meaningful negotiations. The content of the negotiations—whether the size of the majority vote in Quebec was sufficient to break up the country, whether the referendum question was sufficiently clear, what the boundaries were—all of those issues were to be decided by the politicians. But for Quebec what was important was the legitimacy of a requirement of a negotiated settlement to their demands which could legitimately lead to separation, which could lead on to international recognition. So, to my way of thinking, the role of the lawyers, the role of the judges in that whole crisis, was entirely appropriate and justified and actually a credit to the profession.

So, I end where I began, with the observations of John Reed, who saw the potential role of lawyers as modest but potentially decisive: he said, quoting Edward Everett Hale, "I am only one, but still I am one. I cannot do everything, but still I can do something. And because I cannot do everything, I will not refuse to do the something that I can do."[12]

And so said the Supreme Court of Canada.

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12. John Reed, *First Person Singular*, 24 INT'L SOC'Y BARRISTERS Q. 322, 329 (1989).

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