

*International Society*  
*of*  
**Barristers**

Volume 38

Number 4

A NEW PERSPECTIVE FOR LAWYERS  
*Lord Slynn of Hadley*

MANDATORY SENTENCES, MINIMUM SENSE  
*Julie Stewart*

PROFESSIONALISM: A LOST ART  
*Richard C. C. Peck*

THE PROPRIETY OF POETRY IN JUDICIAL OPINIONS  
*Mary Kate Kearney*

THE CHALLENGES OF FOREST MANAGEMENT  
*William R. Corbin*

OBSERVATIONS FROM THE POLITICAL FRONT LINES  
*Alan K. Simpson*

THE TRUTH, THE WHOLE TRUTH, AND JUST A COUPLE OF EXAGGERATIONS  
*Will Durst*

INDEX TO VOLUME 38

*Quarterly*

# International Society of Barristers Quarterly

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Volume 38

October 2003

Number 4

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## CONTENTS

A New Perspective for Lawyers . . . Lord Slynn of Hadley . . . . .	451
Mandatory Sentences, Minimum Sense . . . . . Julie Stewart . . . . .	459
Professionalism: A Lost Art . . . . . Richard C. C. Peck . . . . .	466
The Propriety of Poetry in Judicial Opinions . . . . . Mary Kate Kearney . . . . .	475
The Challenges of Forest Management . . . . . William R. Corbin . . . . .	491
Observations from the Political Front Lines . . . . . Alan K. Simpson . . . . .	497
The Truth, the Whole Truth, and Just a Couple of Exaggerations . . Will Durst . . . . .	501
Index to Volume 38 . . . . .	504

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## A NEW PERSPECTIVE FOR LAWYERS<sup>†</sup>

Lord Slynn of Hadley\*

When I sought guidance on choosing a topic for this talk, Gene Mac Winburn suggested that I focus on two words out of the title of the Society and talk about something both international and of concern to barristers. Ever since I first went into the law, I realized the mutual interest that we have in each other's legal systems, so I thought I would say something about the developments in our legal system that have had particular effect and are going to have particular effect on the work of the bar. To some extent they reflect the fact that the United Kingdom is now in the European Union, which entails international involvement. So I have chosen three or four topics—I'm not quite sure if it is three or four because they slide into each other—that have a direct effect on barristers.

You all know that the English courts and the bar have had to get used to interpreting and applying European law alongside English law. This has had enormous effect on our work, on the basic rules of free movement of goods and people and capital, on the principles that we have to apply as judges and as lawyers in England. And it's had an enormous effect on the way in which the bar has to interpret and make submissions about the procedures and the legislation of our various organizations and countries. What, however, is more important and more relevant for my talk today is not what has happened but what is about to happen.

### EUROPEAN CITIZENSHIP AND COOPERATION

In the European Union we are now seeing or considering major changes that will affect the work of the bar. We are creating a citizenship of the European Union. Working out what that means for the individual is going to be very important. There is a new perspective there.

We are working out methods of judicial cooperation in Europe, both in civil and criminal matters. This is going to involve easier and quicker access to justice in the courts of the member states of the Community. As long as we have many different legal systems—at present fifteen and by next year as many as twenty or even twenty-five—it is difficult and costly for a person or

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<sup>†</sup> Address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 10, 2003.

\* House of Lords; Member of the Privy Council; Fellow, International Society of Barristers.

a company in one state to sue and to enforce judgments in another state. The procedures are different and unfamiliar. This has always been so, of course, but now that we are a union, we have to recognize that changes have to be made. We are a long way from being a federation, and the task of drawing a line between becoming a federation on the one hand and making the union work on the other is not at all an easy one. A considerable amount of each country's trade is now with the other states in the European Community, and we have to take this into account.

As I indicated, this change is going to affect not only the civil law. If there is cross-border trade, there is bound to be cross-border crime. The member states are determined to create a Community area of what is called freedom, justice, and security. We already have Europol—cooperation among the police forces of the Community—which has been effective over what can be done and has been done through Interpol. And now lawyers practicing in criminal law, not just prosecutors but defenders equally, will have to adjust to new methods of obtaining evidence, of serving documents, of trying cases.

Perhaps the most important of these changes relates to the process of bringing an accused person before the courts of another member state. You have an extradition treaty with us and with many other states, and so have we. Everyone knows, however, that extradition can be complicated, slow, and expensive—I remember my own participation in the Pinochet case—although it does have the merits of built-in safeguards for an accused person. We have decided in Europe to abolish extradition between member states of the European Union. Instead, a prosecutor in one state will be able to apply to the courts of his own state for what is called an arrest warrant. If the judge issues it, the warrant will be executed through the courts of another state and the individual taken to the requesting state for trial. So, as between ourselves, we shall in the future avoid the extradition procedure of an application by one state to the government of another, with (in England) an investigation by a magistrate, an appeal to the high court, an appeal to the court of appeal, an appeal to the House of Lords, and then a reference back to the minister for him to decide whether the person should be extradited. This is an advantage; the new procedure will be quicker, it will be simpler, it will be effective. The perspective from the bar's point of view is that there will be a greater responsibility to make sure that an accused person's basic human rights in this area are not violated by this new, efficient procedure.

#### HUMAN RIGHTS

It is in this context of human rights that the perspective of lawyers and judges has changed greatly and will have to change more. All the member

states of the Community are parties to the European Convention on Human Rights. That Convention ultimately has to be interpreted by the Court of Human Rights in Strasbourg. It has had an enormous effect on the administration of our countries and even on the operation of their courts. In England we didn't apply the Convention in our own courts until 1998. It was not part of the domestic law. Now it is, and lawyers are astute (I don't mean that in a pejorative sense) to rely on the terms of the Human Rights Act to challenge the legality of what is done by government, by local authorities, by employers, even by the courts. For example, article six of the Convention provides for access to justice. Lawyers, not surprisingly, have raised arguments based on this to challenge procedures of the criminal courts that were adopted long ago and had been regarded as carved in stone. What will enlarge the perspective of lawyers even more, I believe, is the obligation imposed on courts to interpret existing legislation in a way that is compatible with the Human Rights Convention. It is not always possible to challenge legislation as incompatible, but now there is great searching in barristers' chambers, and I know a great deal of midnight oil is being burned, while barristers look for ways in which clients can be advised that words in legislation that appear to be strongly against them are not compatible with the Human Rights Convention. At the bar, ingenuity is the order of the day, and judges have to be a little bit cautious about going too quickly in pursuit of some of these new hares.

Even this position with the Act and the Convention is not the endpoint with respect to human rights. The perspective of lawyers will have to widen further in the light of a new development in Europe: We've just agreed on a new treaty. (Treaties come thick and fast in the European Community.) In that Treaty of Nice, the states have agreed on a charter of human rights. It is said by some politicians to be no more than a statement of existing rights presented in a way that is more transparent to the citizen, but anyone reading it will see quickly that it expresses many ideas not found in the existing Convention, which is fifty years old. Nobody thought fifty years ago of including provisions about DNA, data processing, experiments with body parts, or even intellectual property law. These and many other subjects have crept into this important new charter. It is not yet legally binding, and barristers cannot rely on it as such in the courts, but it is having its effect on the way in which legislation is made and the way in which the European ombudsman works and, more important, the way in which the judges and advocates general at the court are thinking about the content of human rights in the twenty-first century. The perspective of barristers in this area of the law almost certainly will again have to change.

A new question has arisen: Should we have a written European constitution? Should lawyers be able to point to one document as creating rights and

giving obligations? A committee of very distinguished people—called a “convention”—will consider whether Europe should have a written constitution and, if so, what it should contain. It seems likely that the charter of human rights will become a part of the constitution of the European Union and legally binding. If so, this will have a profound effect on the work of barristers and judges in court.

I have been speaking so far about the United Kingdom and Europe, but this is not a parochial subject. In the common law countries ideas have always moved around. There has been considerable cross-fertilization of principles. We certainly look at the decisions of your courts and have been influenced by them; and I doubt if there is any substantial law library in the United States that does not have access to the English law reports, either in print or on the internet. In the European court we have regularly referred to American cases on antitrust law and labor law, and both there and in the English courts, your decisions on equal treatment in employment have been frequent fare.

I can't help reminiscing that on one occasion when I was in Washington, I said to Warren Burger, “We've just had three of your judgments on the Sherman Act cited to us in the European Court of Justice.” Warren thought this was terrific; he was genuinely pleased. Then I added, “It won't be long before some of our judgments are cited to you in the United States Supreme Court.” He didn't think that was funny or attractive at all.

So, although I have been talking about Europe, it is obvious that it's no longer possible even for a continent to be insular in its legal thinking and its perspective. As people seek to enforce rights across the globe, as international commercial contracts increase, and both bilateral and multilateral treaties increasingly deal with many aspects of domestic life, we all need to think globally. Comparative law has become a developed science, and judges and barristers are increasingly aware of parts of public and private international law.

#### MOBILITY OF LAWYERS

How does all of this affect, and how should it affect, the mobility of lawyers? Many of your law firms have offices in capitals and major commercial centers throughout the world, and particularly in Europe, most particularly in London and in Brussels, the center of the administration of the European Court. New York and some other American cities have not a small number of English solicitors and lawyers from other major commercial centers, although it's a frequent comment from lawyers outside the United States that in many of the states here—because it is a state and not a federal matter—there is no foreign

consultants regime, which was adopted initially in New York and which allowed the recognition of foreign lawyers' qualifications, to determine what is permissible.

I admit it's not long since we were very restrictive about the movement of lawyers in England. When I was at the bar, if you were a Queen's Counsel, you couldn't go to a circuit different from the one to which you belonged unless you arranged for the client to pay for a junior from that new circuit to appear with you. The junior who wanted to do a case in a different circuit had to pay a fee to the circuit in order to appear there. A senior lawyer, a Queen's Counsel, couldn't appear in court without a junior, who had to be paid a fee equal to two-thirds of the fee the leader got. (Amongst the most joyous moments of one's life as a junior at the bar were those when you were told that some eminent and very expensive leader had been brought into a case, because you knew that you would get two-thirds of whatever he got as your fee.) Solicitors were restricted in their rights of audience. To some extent they still are, but most of these restrictions have now been swept away in the United Kingdom.

What about our position in the European Union? We set out to create a common market—an internal market without frontiers—where free movement of goods, people, services, and capital was the fundamental principle. We have achieved a great deal. Free movement is not difficult in relation to most workers; for many jobs, location does not matter. Moving to another country is more difficult for most professional workers, although it might be easier for some than for others. An architect designing a modern hotel building in Rome is probably not very different from an architect doing the same thing in Paris. Treatment for appendicitis is probably much the same in Athens as it is in Copenhagen. Architects and physicians probably can move around with reasonable ease. But lawyers cannot. Their legal systems are different, their court procedures are different, and they are trained largely to practice in a single jurisdiction. No less important, since language is the principal tool of lawyers, different languages present difficulties, and misunderstandings can occur easily. Last summer, one of my colleagues was in Greece on holiday with his wife. Just outside of Athens, their Greek driver—being curious but speaking little English—asked my friend to say in Greek what his job was. My friend couldn't remember the Greek word for lawyer, but his wife, who taught theology in a university, remembered that in New Testament Greek the word for a lawyer was "parakletos." So my friend with great pride tapped his chest and said, "I parakletos." The driver swerved off the road, pulled into a field, stopped, leapt out of the car, and ran away. It turned out that although in New Testament Greek "parakletos" meant lawyer, in modern Greek it means the Holy Ghost.

It's clear that the new treaty on human rights supports movement across national boundaries, including such movement by lawyers. Now our task is to reconcile the protection of clients with the right of lawyers to move across frontiers. After all, no one wants to see the innocent client (if there are any such) at the mercy of a lawyer who knows nothing of the language of the country or its law but holds himself out as available to practice there.

It has taken us a long time to work out this problem. I will not go into this at great length, but I will tell you briefly of three changes we have made in the European Community that have a considerable effect on the bar. We first considered the circumstances in which a barrister, or any lawyer, should have the right to go to another state occasionally to practice and to see clients—not the barrister who sets up a permanent establishment in another country but who goes there from time to time to advise clients and perhaps to be involved in litigation there. Here the Community began by adopting a directive called the Services Directive in 1977. A directive is a form of regulation that tells a state what to achieve but leaves it to the state to determine how to do it. The Services Directive defined the lawyers who were to be recognized and said that a lawyer from one state who went to a host state should have the right to advise and even to appear in litigation, but it insisted that the lawyer should continue to use his home title. Thus, a barrister was not to be allowed to go to Paris and put up a plate saying "Avocat;" he had to put up a plate saying "Barrister" so that a potential client would know that he was an Englishman who might not speak much French or know much French law. Although it was small and didn't have as much impact as we expected, that first step of allowing lawyers to go into another country on an occasional basis was very important. It opened the door for lawyers that seek to go to other countries.

In the second step, we considered the lawyer who would wish to become qualified in another state. How far should he or she have to go through the whole process that the student in that country would have to go through in order to become a qualified lawyer? Should any account be taken of the lawyer's experience in England (or any other home country)? What exemptions could reasonably be granted? This again was a contentious and difficult subject, and not until 1988 was a directive adopted stating that (for example) those barristers in London who wanted to become avocats in Paris either would take an exam in subjects chosen by the Paris bar or would go through what was called an adaptation period—a period spent actively practicing—before they could be recognized. Those alternatives might not sound too dreadful; but by the time you are forty, fifty, or perhaps even thirty-five, the thought of starting again with a whole new set of examinations or qualifying tasks is not attractive. The test was not attractive except to very young lawyers. The adaptation period sounded better, but three years of hanging around in

Paris trying to clock up the necessary time did impose a strain and obviously reduced income-earning capacity. Therefore, the two alternatives were not entirely popular. Also, there was a suspicion (sometimes justified I think) that in some countries the test was made so difficult that it was almost impossible.

Thus, we got to the third stage, which is now of the greatest importance to members of the bar in England. The question at the third stage was whether a lawyer using his home title should be permitted to set up not a temporary office but a permanent establishment in another member state without becoming qualified in the host state. This is a more interesting and a more attractive idea. The barrister can go to Paris or Amsterdam or Rome, put up his plate as a barrister, set up a permanent office with a staff, and get on with business.

This, however, raises another difficult question: Should the barrister from London who puts up his plate in Rome be allowed to practice only English law, Community law, and international law, or may he also practice Italian law without having qualified under the Italian system? There has been a great deal of debate over this, for many years. Some people—and the French in particular (French and English don't always agree, as you may have noticed)—thought that it was essential that the lawyer should become qualified in the host jurisdiction or otherwise should not be allowed to stay there permanently. The English, in our more pragmatic way, argued that if we stay in another country long enough, we get the experience and can then practice the host state law.

In 1998, only five years ago, a new directive was adopted, and I want to give you the title of the directive: "To facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which his qualification as a lawyer was obtained." The directive is aimed at making it possible for lawyers to move around the Community and set up offices in other countries on a full-time basis, not for a limited period as the French wanted, but permanently, and to practice not just their own domestic law, not just Community law, not just international law, but also host country law. The practice, of course, will be subject to appropriate rules, but this right to stay permanently and practice fully will, I believe, have a great impact on the vision and on the work of barristers in England and lawyers in other Community countries. This is all very much in keeping, I think, with the decision of the GATT in 1994 to include legal services as being covered by the GATT rules, and I think in time the GATT position will have an effect throughout the world on what lawyers see and what is their perspective.

#### ALTERNATIVE DISPUTE RESOLUTION

There is of course one other topic with which you are more familiar than I and which I will simply mention. We were slower than you to get into alter-

native dispute resolution, but I think we are finding it increasingly attractive. We recognize the need for lawyers who wish to be involved in mediation, whether acting for clients or as mediators, to go through the necessary training by experts in the mediation process, so this will not become a large part of our practice in the immediate future, but there is a great interest in the bar—and not just in England. I spent last weekend chairing a seminar for lawyers in Hungary, and I know that we are going to be asked to do the same thing in Prague and Warsaw and all stations east of Berlin. (They know that the Americans are way ahead of the English in this, but we happen to be nearer to them than you are.) So this is another area in which the perspective of the bar is going to change considerably, as I understand it already has with you.

Well, there it is. We have moved a long way from the common law system as it would have been seen one hundred years ago, or even fifty or sixty years ago. All of these changes do affect enormously the perspective of the bar.

## MANDATORY SENTENCES, MINIMUM SENSE<sup>†</sup>

**Julie Stewart\***

To put it bluntly, I will say right here at the beginning that I don't think legislators should be in the sentencing business. I didn't always think that. Thirteen years ago, I didn't know or care who was in prison. I assumed that the people who were in prison belonged there because they were rapists, child-molesters, and murderers. But then, in 1990, my only brother was arrested for growing marijuana in Washington state. He was growing it in the garage of a house he owned, and he and the two people who actually lived in the house smoked marijuana every day. (I'm not condoning his behavior, believe me.) The two people who were living there went to a neighbor and said, "Hey, come over and see what we're doing." They opened the garage door and showed the neighbor all the little marijuana plants that were about six inches tall. The neighbor called the police. This neighbor had his own felony conviction for a drug offense, but in exchange for turning in the people living in my brother's house, he got a thousand dollars from the local police officers. When the police arrested the two men who were living in the house, they said, "Jeff Stewart is the kingpin here," so the police went and found my brother.

All of this could have been handled at the state level, but instead the case was transferred into the federal system. The two people who lived in the house were given probation even though they both had prior felony convictions for drug offenses. My brother, who had never before been arrested, ended up going into the federal system and pleading guilty. The prosecutors threatened that if he took his case to trial, they would charge him with three different counts, including intent to distribute, and run the sentences consecutively. I now know that probably wouldn't have happened, but we didn't understand anything about the system then. So he pleaded guilty.

As I said, I don't condone my brother's behavior, and I don't even feel bad that he got caught, but what did stun my family and me was what the judge said at sentencing. This judge, who had been on the bench for twenty-five years, said he could not give my brother the sentence he wanted to give: "My hands are tied by these mandatory sentencing laws that Congress passed in 1986, and I must give you five years in prison." Because there is no parole in this system, that meant my brother would serve a full five years in prison.

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<sup>†</sup> Address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 13, 2003.

\* Founder and President, Families Against Mandatory Minimums, Washington, D.C.

I was outraged that the judge didn't have any discretion, and I was naive enough to think that if someone helped members of Congress understand how badly their laws were being applied, they would repeal the mandatory sentencing laws. I thought it might take as long as five years. Well, twelve years later, I am still trying to persuade them that their laws are misguided and need to be repealed.

I have learned a lot and I do feel strongly that legislators should not be in the sentencing business, whether those legislators are in Washington, D.C., or Sacramento, or Albany, or Austin. Legislators cannot know what the appropriate sentence is for each individual who comes before a judge. They don't know the case, they never laid eyes on the defendant, they don't know anything about his or her actions or background or attitude. The judge in each case needs to be able to make the determination about what the appropriate sentence should be.

#### HISTORY OF MANDATORY SENTENCES

Mandatory sentencing laws aren't new, and I guess members of Congress have disagreed with me on this point for two hundred years, because there are a hundred mandatory sentencing statutes on the books, dating as far back as 1790. The list of these statutes reads like the "crime du jour." It reflects the major public safety concerns at different points in time; members of Congress responded by enacting a stiff penalty in order to deter someone from ever committing the crime that was of concern at that time. Thus, in 1790 piracy triggered a sentence of life in prison without parole. In 1934, after Bonnie and Clyde's rampage, homicide or kidnapping during a bank robbery triggered a mandatory federal prison term of at least ten years. In 1965, after Kennedy was assassinated, first-degree murder of a president resulted in a sentence of life in prison. In 1974, skyjacking received a twenty-year minimum prison sentence.<sup>1</sup> So these statutes capture what concerned the public at a given time. Today, new mandatory sentences are being proposed for child pornography and child molestation, for internet theft, identity theft, and, of course, drug offenses.

The drug offenses didn't come into the system until the 1950s. Then Hale Boggs, a congressman from Louisiana (and also Cokie Roberts's dad), introduced legislation to mandate sentences of five years for a first offender and ten years for a second offender. The intent was to deter people from getting involved in drug use. As most of you know, the next decade, the 1960s, was

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<sup>1</sup> See U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

the heyday of illegal drug use; many people tried many different drugs. Clearly, the deterrence theory of those mandatory drug sentences didn't work well—and by 1970 Congress even admitted that and repealed the mandatory minimums for drug offenses that they had adopted in the 1950s.

Between 1971 and 1986, no new federal mandatory minimum sentences were imposed, but during that time members of Congress were trying to create a system of sentencing that would create some degree of uniformity so that a judge in Texas and a judge in California would give more or less the same penalty for more or less the same crime. In other words, Congress was trying to find a balance between unfettered judicial discretion and mandatory sentences that gave judges no discretion. In 1984 Congress passed the Sentencing Reform Act, which established a sentencing commission. This seven-member commission, appointed by the President and confirmed by the Senate, was to establish sentencing *ranges* for all federal crimes—not just for drugs but for robbery, white-collar crimes, any kind of federal crime. Judges would then have a similar starting point for a similar crime but could ratchet the sentence up or down within a given range, depending on the defendant's culpability. In theory, that made good sense, but the sentencing guideline grid that the commission was developing was extremely complicated; and before the commission could complete it, Congress jumped in and enacted new mandatory drug penalties.

There were three events that led to this new congressional action on drug offenses. One involved Len Bias, a basketball star from the University of Maryland who was drafted by the Celtics. The night he was drafted, he went out to celebrate, overdosed on cocaine, and died. This happened in Congress's backyard, in Maryland. Secondly, everyone had become concerned about crack cocaine, a popular but extremely dangerous new drug in the 1980s; Congress didn't know how to address the safety issue so they seized on mandatory sentences for that. Finally, it was an election year, and members of Congress used promises of fixing the drug problem through mandatory sentences as a campaign tool. Those three elements combined to create the mandatory drug sentences we have today, the ones under which my brother was sentenced.

The specific sentences were developed in a very arbitrary way. Representative Bill Hughes from New Jersey, who has since retired, has said that it was like a bidding war: If one person on the floor of the House argued for a two-year sentence for a hundred marijuana plants, the next speaker would propose three years and the next would say four. They just kept upping the ante. There wasn't any research done to determine an *appropriate* sentence for a given quantity of a particular drug, and there was no consideration of how the laws would impact the prison population, either in size or in racial

make-up. Bill Hughes said it got to the point that if someone had proposed the death penalty for one of these quantities of drugs, someone would have tried to top that. That's how out of hand it got.

#### APPLICATION OF AND CHALLENGES TO THE LAWS

We are now dealing with those mandatory drug sentences. One hundred kilos of marijuana, five grams of crack cocaine, and one gram of LSD all trigger five-year sentences. One of the absurd parts of drug sentencing is that the timing of the arrest can make all the difference in the world. One hundred marijuana plants triggers a sentence of five years in prison because Congress provided that one plant, regardless of size, equates with one kilo of marijuana. My brother and his friends had 356 little marijuana plants, so my brother was convicted of having 356 kilos of marijuana, which made him look like a major drug kingpin. If my brother and his friends had been arrested *after* harvesting, they would have had at most twenty pounds (about nine kilos) of marijuana. Keep that in mind when you read newspaper articles about people being arrested and convicted for huge quantities. Sometimes it matters *when* they were arrested, at what point in the process.

Immediately after the enactment of these mandatory sentences and the adoption of the sentencing guidelines, which became effective in 1987, there were challenges, some of which reached the Supreme Court. *Mistretta v. U.S.*<sup>2</sup> was a challenge to whether Congress had the authority to establish the sentencing commission as it did. Was it a separation of powers issue? Were the legislators infringing on the judiciary? Unfortunately, the Supreme Court found that Congress does have the power to act as it did. A 1991 decision involved a challenge to state law. Michigan had one of the harshest mandatory minimum drug sentences in the country. It was life without parole for a first offense involving the quantity of 650 grams of cocaine or heroin, which is between a pound and a quarter and a pound and a half. That would be about the size of a powdered sugar box. In fact, if you had just a teaspoon of cocaine or heroin mixed into 650 grams of sugar, that would still trigger the life without parole sentence. In 1990 when Ronald Harmelin brought his case before the Supreme Court, he argued that this was cruel and unusual punishment in violation of the eighth amendment. In a close decision, the Supreme Court ruled that although life without parole is cruel, it is not unusual; and because the eighth amendment reads "cruel *and* unusual," both prongs have to be met.<sup>3</sup> Therefore, Harmelin did not get out of prison, and

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<sup>2</sup> 488 U.S. 361 (1989).

<sup>3</sup> Harmelin v. Michigan, 501 U.S. 957 (1991).

mandatory minimums—even extreme ones—in that state and elsewhere remained. Most recently, and again in close decisions, the Supreme Court upheld California’s “three strikes” law.<sup>4</sup>

These are the two sentencing systems we are stuck with today—federal and state mandatory sentencing laws, and the federal sentencing guidelines—and they do overlap and work together and against each other. A few numbers will give you a brief overview of their impact on the federal system alone: drug convicts today make up sixty percent of the federal prison population, up from thirty-eight percent in 1986 when the laws were enacted. In 2000 more than half of the people going to prison for federal drug convictions were first offenders, and eighty-eight percent of them were nonviolent. The racial composition of federal drug defendants also merits attention. Twenty-five percent of the people in prison for drugs are white, thirty-one percent are African-American, and forty-two percent are Hispanic. (Two percent are “other.”) Often you’ll hear references to the racial disparity in the application of federal drug sentencing laws, and I have to agree with those concerns.

#### FAMILIES AGAINST MANDATORY MINIMUMS

Let me tell you a little bit about my organization. We are a nonprofit organization based in Washington, D.C. We have about twenty-eight thousand members and about forty chapters in twenty-five states across the country. We have eight full-time staff in D.C. and a couple of others elsewhere around the country. Our focus is on educating policy makers and the public through public speaking, and we also engage in direct lobbying. We have a 501(c)(4) arm, which enables us to lobby, as well as our 501(c)(3) tax-exempt status for our educational work. We also have a lawyer on staff, our general counsel, who does litigation. For example, we were involved in the three strikes cases as an amicus.

We also were involved in the commutations that President Clinton gave in 2001 on the day he left office. We recognized that we had a window of opportunity there; as a lame duck president he might be willing to grant commutations to some of the nonviolent drug offenders with whom we were so familiar. We submitted about twenty-four petitions for commutation and were granted seventeen of them; seventeen prisoners were able to leave prison up to ten years early, although all of them had served at least eight years behind bars.

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<sup>4</sup> *Ewing v. California*, 123 S. Ct. 1179 (2003); *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003). Under “three strikes” laws, a defendant convicted for a third time receives an “enhanced” sentence, regardless of how serious the third offense is.

We also have done a lot of work in the state systems. In particular, in Michigan the 650-lifer law that I described earlier was overturned in 1998 because of our work. Actually, it was amended so that a prisoner is eligible for parole after fifteen years, so at least he or she has a chance of seeing the light of day again.

Overall, I would say that FAMM has accomplished a lot in the last dozen years. By our calculations, we have caused the reduction of the sentences of (made those sentences fairer for) forty-five to fifty thousand people. It feels good to have had that much impact, but there is much more work to be done. I am especially concerned today about what's brewing in Congress regarding judicial discretion.

An article in *The Wall Street Journal* entitled "In Rare Showdown, House Panel to Probe Minnesota U.S. Judge" said that "House Republicans are planning to subpoena records of a federal judge they say broke the law by letting drug offenders off too lightly and then misleading lawmakers about it."<sup>5</sup> I feel both embarrassed and guilty because I am responsible for having brought this judge to Congress's attention. The judge is Judge James Rosenbaum, the chief district judge in Minnesota and a Reagan appointee. He has been on the bench for a long time and has stellar Republican-conservative credentials. Last year in Congress a bill was introduced to prevent the sentencing commission from making some changes in the guidelines that would have limited the penalty for the most minor drug offenders to ten years. Certain key members of Congress wanted to prevent this change in the guidelines and scheduled hearings. I contacted the Democrats on the subcommittee involved and suggested that they have a Republican judge testify in favor of capping the sentence at ten years. They asked me for the name of a good judge to invite, so I did a little probing and was given Judge Rosenbaum's name. I talked to him, and he said he would be happy to appear before the subcommittee. He came to Washington to testify, and he gave six or seven examples of cases that had come before him or before other judges in which he felt that the sentences were way too high under the guidelines. He said that if the ten-year cap were to be passed, it would be good because it would help him deliver more appropriate sentences in the kinds of cases he had described.

After he returned home he started getting letters from the House subcommittee, letters that became increasingly intimidating, asking him for information about the cases that he had cited. He complied, giving them as much as he could, but some of the records were sealed. The House has continued to harass him and is now planning to subpoena all of the records of his cases,

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<sup>5</sup> Bravin, *In Rare Showdown, House Panel to Probe Minnesota U.S. Judge*, Wall St. J., Mar. 13, 2003.

and of all of the federal judges in Minnesota. I read today that now the inquiry has expanded to include a review of sentencing decisions by all federal judges in all district courts throughout the United States.

It is chilling to me that members of Congress intend to look at all the records of all the judges who have departed from the sentences established under the guidelines. Whenever judges do depart, they have to state in writing why they are doing that; it's all very public. But I am very worried about the state of judicial discretion, because if Congress ends up eliminating departures from the guidelines, all of our sentencing systems will allow absolutely no discretion. Whether it's a mandatory minimum or a "guide-line," the judge will be bound. I truly think it's impossible, as I have already said, for legislators sitting in their chambers to know what the appropriate sentence is for an individual defendant coming before an individual judge. The judge needs to have the authority and flexibility to fashion a sentence that appropriately reflects the culpability of the defendant. The people who become federal judges go through such scrutiny in the appointment process that the ones who get onto the bench are high-caliber individuals, and we should give them the discretion to use their judgment.

Are judges always right? No, they're not always right, but at least their decisions are open to public review, and they are appealable. I believe that an open justice system is a healthy justice system, and openness is really a prerequisite to an honest justice system. I know that all of you share my desire to see the American justice system remain of the caliber that we tend to think it is. It's a basic tenet of that system that the punishment fit the crime. I urge you to join me in getting incensed about this and letting your members of Congress and state legislators know that you do not think sentencing judges should have their hands tied.

## PROFESSIONALISM: A LOST ART<sup>†</sup>

Richard C. C. Peck\*

*[T]he age of chivalry has gone. That of sophisters,  
economists, and calculators has succeeded . . .*

Edmund Burke<sup>1</sup>

Over two hundred years ago, Edmund Burke wrote the above words when lamenting the death of Marie Antoinette. While his comments have a superficial attraction for many, they have a much more profound meaning for a few. The word *chivalry* is ancient in our language, and its definitions include gallantry, having a moral and social code, and being of an inclination to defend a weaker party.<sup>2</sup> Burke's eulogy spoke of the decline of the elegance of an earlier age. His reference to *chivalry* can easily be equated with notions of both *civility* and *professionalism*—ideals that seem to have lost their way in the modern era.

This paper is, in a sense, a call to arms, a plea for a return to the values that once—not long ago—separated us from the laity and distinguished us as a profession. It is a plea to reinstate firmly the stature that historically marked the role of the lawyer as something both special and meaningful in the eyes of society. It is what the American lawyer Lloyd Paul Stryker referred to as “a plea for the Renaissance of the trial lawyer.”<sup>3</sup>

Some of us will recall our grandparents saying proudly to a friend, “John's gone for a lawyer” or “Mary's gone for a doctor.” Both expressions, simply understood, meant that their grandchildren had entered either law school or medical school. Our forebears, who often had little opportunity to rise to the professional ranks in society, regarded the achievements of their progeny as being of importance. In this age of common egalitarianism such achievements seem to have little meaning. This must be, in part, due to the fact that the legal profession has lost considerable standing in the eyes of the public. This trend must be reversed, if for no other reason than that an independent bar is critical to democracy.

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<sup>†</sup> Address delivered at the July 2002 Program of the Federation of Law Societies, Ottawa, Ontario, Canada.

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<sup>1</sup> Burke, *Reflections on the Revolution in France* (1790) (in a letter intended to be sent to a gentleman in Paris).

<sup>2</sup> OXFORD ENGLISH DICTIONARY.

<sup>3</sup> L. STRYKER, *THE ART OF ADVOCACY* (1954).

Being a professional means to be a member of a profession. A profession is a vocation, or calling, involving a branch of learning or science traditionally related to divinity, law, or medicine.<sup>4</sup> In the modern era, the notion of professionalism has been “mongrelized” to embrace life insurance salesmen, plumbers, and “sanitary engineers” (formerly called “garbagemen”). None of the latter are *professionals* as that word was used in its historical sense and none embrace the quality of *professionalism* as it is properly to be understood.

Professionals take an oath on being “sworn in” to their respective callings. This is true of the doctor, the lawyer, and members of the clergy. Professionals are bound by a strict code of conduct and are subject to a governing body with immediate supervisory powers of discipline. Professionals are both accounted and accountable. They are expected to adhere to the highest standards of personal conduct in return for privileges not granted to lay members of the body politic. They are expected to exhibit perspicacity, restraint, and the utmost moral worthiness in both their private and public lives. They are required to strive to be “beyond reproach” in the conduct of their affairs.

Ironically, there has been a devolution of the respect in which we have held our institutions over the past several decades. The genesis of this was both healthy and necessary, for, in the progressive development of democracy, criticism is essential.<sup>5</sup> Unfortunately, it would appear that constructive criticism and healthy skepticism have been reduced to what columnist Hunter S. Thompson referred to as “fear and loathing.”

If one picks up a daily newspaper in virtually any part of the country, one is struck by the omnipresent criticism of virtually every institution in our society. Both the news pages and the editorial pages are rife with carping. No one, and no institution, is safe. Politicians, lawyers, doctors, police officers, the courts, the government, the clergy, and even God are assailed. If the media truly represent public sentiment, we are all at risk.

It will not avail us to further examine the fact that various institutions, including the legal profession, are the subject of regular slight. What remains to be examined is why the problem exists and how we can remedy it.

In recent years, the legal profession has demonstrated a self-destructive tendency. It has become a querulous, petulant, and puerile organization that has lost its moral compass. Ad hominem and in terrorem attacks have become commonplace. Civility and logic have been shunted aside and replaced with a “win at any cost” attitude.<sup>6</sup> In short, there has been a woeful erosion of the

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<sup>4</sup> OXFORD ENGLISH DICTIONARY.

<sup>5</sup> ASPECTS OF PRIVACY LAW: ESSAYS IN HONOUR OF J.M. SHARP 15 (D. Gibson ed. 1980).

<sup>6</sup> Sugden, *Civility in the Legal Profession*, in THE SPLENDOR OF THE LAW (J. Giles ed. 2001) (collection of essays in honor of Chief Justice Allan McEachern of British Columbia); see also 36 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 507 (2001).

principles that historically marked our profession. We no longer adhere to the standards that set us apart from the mainstream of everyday life. This has resulted in a diminution of the public's respect for both the legal profession and judiciary.<sup>7</sup>

#### LESSON ONE: KEEP YOUR OWN COUNSEL

This erosion is due, in some measure, to our own attitude toward the work we perform. We have taken the barristers' locker room "chit-chat" into the public hallways of the courthouse. Gone are the days when we confined our excoriation of our opponents, and of the judges we appeared before, to the barristers' gowning room. The modern trend is to decry our opponents, and the judges, to our clients and their supporters and anyone else within reasonable hailing distance who might provide a sympathetic ear. These hallway refrains are all too familiar: "Well, of course we lost, because the judge knows nothing of the criminal law. He was a commercial lawyer before going to the bench. Why they appoint these people is beyond me." "Never mind. We will make it on appeal. The prosecutor was sleazy and underhanded, which is typical of these people nowadays."

When we make such disparaging remarks to our clients, we necessarily diminish the respect that members of the public will have for the institution of the law. If we don't show respect for our own institution, why should they? It is difficult enough for members of the public to have regard for a system where, as a general rule, fifty percent of those engaged in litigation leave the forum unsuccessful. This brings us to the first lesson: Keep your own counsel. In other words, keep your derogatory thoughts to yourself. Do not rationalize your losses by publicly criticizing your opponent or the judge, no matter how justified you feel your comments to be. Such comments will tend to have a hollow ring and reduce your stature as counsel. Such comments lack professionalism.

#### LESSON TWO: AVOID AD HOMINEM ATTACKS

We must comport ourselves in a manner that maintains and supports the values of our profession. Our conduct in the courts requires examination. Nowadays it is commonplace to observe lawyers, during the course of trials, making ad hominem attacks on their opponents. The phrase ad hominem literally means "at the man." Its extended meaning is "an argument which appeals to personal prejudice or emotions rather than reason."<sup>8</sup> There is no

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<sup>7</sup> Address by W.B Smart on Advocacy and Professionalism, University of Calgary Law School (Jan. 2001).

<sup>8</sup> J.R. STONE, *LATIN FOR THE ILLITERATI* (1966).

place for such vitriol in the courtroom. Such attacks indicate a loss of self-control and thus bespeak a loss of objectivity. The lawyer who does not remain in control and objective will lose sight of the goalposts and be less able to handle the contingencies of litigation.<sup>9</sup> The courtroom is a place for cold, clear logic. Emotional utterances are to be disavowed.

#### LESSON THREE: DO NOT OVERACT IN YOUR ROLE AS ADVOCATE

Advocacy is an art form. The skilled advocate will bear some of the qualities of the thespian. However, there is sometimes a tendency to carry acting too far. The overdramatization of the courtroom scene is to be avoided. Spectacles such as lawyers crying during jury addresses or rolling around on the floor while re-enacting a fight detract from the dignity of the setting.<sup>10</sup>

As lawyers we are artisans, if not artists. We are not charlatans. Our skills lie in the art of persuasion using elocution and rhetoric.<sup>11</sup> The aim is to convince rather than confound. Lawyers who resort to emotion will often achieve the latter but seldom the former.

#### LESSON FOUR: OBSERVE COURTROOM ETIQUETTE

Appropriate courtroom etiquette is essential to maintaining the dignity of that most manifest aspect of our system of justice, namely, the trial itself. This is where the public observes us in our day-to-day work. This is where the public will get a sense of the solemnity of the process. This is where the symbolism of the courts and the sanctity of the justice system are best exemplified.

If we are to sustain public respect for the law, we must firstly do so by overtly demonstrating the respect that we, as lawyers and judges, have for the juridical process in the forum of the courtroom. This is our only visible arena.

We must ask ourselves what is occurring in our courtrooms today. It appears that the amenities of yesteryear are rapidly disappearing, only to be replaced by the most commonplace conduct of those who would unthinkingly adhere to the lowest common denominator.

The first complaint relates to tardiness. Tardiness has become a virtual mainstay of the system. It is an example of the laxity that has infected the process. Historically, tardiness was unthinkable to lawyers and unacceptable to the courts. Now, it is a regular occurrence. On occasion, it translates into

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<sup>9</sup> See 5 WIGMORE ON EVIDENCE §1368, at 38 (Chadbourn rev. ed. 1978) (Wigmore's Axiom).

<sup>10</sup> R. v. Sims, 28 C.R. 4th 231, 242, 87 C.C.C. 3rd 402, 414 (1994).

<sup>11</sup> *Rhetoric* is here used in its classical sense, being "the art of using language so as to persuade or influence others; the body of rules to be observed by a speaker or writer in order to achieve effective or eloquent expression." OXFORD ENGLISH DICTIONARY.

non-appearance by counsel, which, not long ago, was viewed as cause for contempt.<sup>12</sup> How have we come to a state of affairs where tardiness and, occasionally, truancy have achieved acceptability in our system? The answer lies, in part, with the tolerance of the modern trial judge. However, this is not a complete answer and, indeed, is a rationalization when advanced by our ranks. As professionals (and by this, again, I mean members of a hallowed and honored profession) we have a duty to ensure that the amenities of practice are maintained. It is a profound discourtesy to fail to appear in court at the appointed hour. Whether the judge is there on time is entirely irrelevant. The hearings are usually scheduled to accommodate our calendars. Court time is precious (both in terms of availability and cost), and it is our duty to ensure that it is not wasted in the least. We are treading on very thin ice if we do not accept this. The tradition of oral advocacy is already at risk, and it is our duty to preserve and foster it rather than to assist in its demise.

The next complaint relates to counsel who do not rise from their seated positions when speaking to the court. Not long ago, it was unthinkable that a lawyer would address a judge from a seated position. Now, this unseemly occurrence is rather commonplace, at all levels of court. There is no rationalization for failing to maintain the dignity of the setting and the role the judge occupies in the system. It is the ideal we respect.

Rising to address the judge is akin to bowing to the judge when the court is brought to order. The lawyers' bow is too often mistaken for a form of obeisance, in the sense of submission. This is not the case. It is rather obeisance in the sense of expressing respect. The judge is simply entering the courtroom after the lawyers. The judge equally bows to the lawyers. This traditional greeting represents nothing more than the acknowledgment of an independent bar to an independent bench, and vice versa. In our system, lawyers are neither subservient nor submissive to judges. The two groups are equal, and equally important, parts of the regime. While the judge has predominant control over the court process (particularly in the context of powers of contempt and administration of the process), the lawyer also has significant control over the procedure and over the unfolding of the trial process. If we look at the European model we see a much different system. There, the judges attend a separate law school from the lawyers. The lawyers have little control over the process, and the judges both investigate cases and examine the witnesses. Under our system the lawyers effectively determine the manner in which the trial will unfold by virtue of their powers in determining how and what evidence will be presented to the court for its consideration.

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<sup>12</sup> See *R. v. Pinx*, 50 C.C.C. 2d 65 (Man. C.A. 1979); *R. v. Hill*, 25 C.C.C. 2d 348 (B.C.A.C. 1975), *aff'd*, 33 C.C.C. 2d 60 (B.C.A.A.).

The fact that lawyers have a stature similar to the bench under our system is perhaps best exemplified by the great Erskine in his brief battle with the intimidating Justice Buller in the Dean of St. Asaph's case.<sup>13</sup> Erskine's dialogue with Justice Buller illustrates the relative equality of the positions occupied by lawyer and judge. In that trial, Erskine was contending for a particular position. Justice Buller was dead against him. The discourse between the two ended as follows:

Mr. Justice Buller: Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner.

Mr. Erskine: Your Lordship may proceed in what manner you see fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct.<sup>14</sup>

This historical example illustrates the point that lawyers and judges are on a relatively equal footing in our justice system. It also illustrates the fact that there must be equal respect between the two bodies. What is required is a mutuality of courtesy. Part of this courtesy has been the acknowledgment, over centuries, that when lawyers choose to speak in the courtroom they rise to their feet. As stated earlier, this is not a matter of submission. It is simply a sign of respect. It is really nothing more than a simple shaking of hands—and no one shakes another's hand while one is seated.

Another indication of respect is not turning your back on the judge. Counsel in a trial (or on appeal) should never turn their back to the court. Yet, this occurs more and more often in our courts today, with counsel turning around to speak to various persons during the court proceedings. This is sloppy practice and a sign, wittingly or unwittingly, of disrespect for the judge. It is the rough equivalent of being at a cocktail party and, while speaking to one person, suddenly swinging about to speak to another. This conduct has no place in our courtrooms. It is to be discouraged.

One recent development is the conduct of counsel in speaking directly to opposing counsel in the presence of the judge. When court is convened, the judge is the arbiter. The judge is the person to whom and through whom one speaks. The proper way to address one's opponent is through the judge: "Your honor, through you I wish to pose this question to my learned friend . . ." It is inappropriate to turn to your opponent and speak to him or her personally, as though the judge were a mere bystander.

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<sup>13</sup> 1 J. RIDGWAY, *THE SPEECHES OF THE HON. THOMAS ERSKINE* 228-29 (1813).

<sup>14</sup> *Id.*

Yet another problem relates to the manner of objection. This applies to both form and substance. If counsel wishes to raise an objection, counsel should rise to state the objection. The manner of objecting is to state the objection and then to state the legal rationale behind the objection. When counsel rises to object, it is appropriate for counsel whose comments are the source of the objection to sit down. Responding counsel will always have an opportunity to reply. It is unseemly for both counsel to be on their feet at the same time.

A further aspect of inappropriate courtroom demeanor occurs when one counsel is making a submission while the other counsel, who is seated, is shaking his or her head, speaking sotto voce, or nodding and turning around to gesticulate to others. Such conduct is distracting for the trial judge (or the appellate judges), demonstrates disrespect for opposing counsel, and is slighting of the process. Such conduct has no place in the courtroom.

The final note here, in the context of appropriate courtroom decorum, is that there is no place for gum-chewing, poor dress code, or slovenly personal habits. Briefcases should not be left on counsel's table. While we are not military academy recruits, we are professionals, maintaining an historic institution.

Our demeanor in this context is of the utmost importance. As lawyers we enjoy privileges not bestowed upon other members of the public. If this tradition is to continue, we must ensure that the public retains respect for the institution of the law.

#### LESSON FIVE: COMPETENCE

The next issue is competence. At its essence the word *competence* means "the ability to perform a task." As lawyers, we are required to perform legal tasks on behalf of clients to a level that is reasonably acceptable to the public. In this country [Canada] our training requires us to achieve both undergraduate and law school degrees as prerequisites, coupled with a period of articling and the taking, and passing, of the bar examinations. In reality these steps are only the start. We must then take our oath of office as barristers and solicitors and continue to improve ourselves in the practice of law. This improvement requires our determination to prepare ourselves fully, as best as each of us can, for each and every case we undertake to defend or prosecute.

Today, in our courtrooms, there are far too many "last-minute Charlies." This phrase bespeaks counsel who are ill-prepared, or not at all prepared, for trial. In such circumstances, both the clients and the courts are let down.

The practice of law requires that we keep current with the developments of the law and that we sufficiently acquaint ourselves with the facts of the case before us so that we can adequately present the case. Being illy prepared is anathema to the proper development of the cases in which we represent the

accused or the state. If we do not competently perform our tasks, we should not be performing them at all.

#### LESSON SIX: DO NOT LIGHTLY ATTACK OPPOSING COUNSEL

There appears to be a trend in a number of different provincial jurisdictions of both Crown and defense counsel inappropriately attacking each other's integrity. Questioning the integrity of opposing counsel should be done only in rare circumstances and must be carried out in a most careful manner when those rare circumstances arise. Counsel should operate from the presumption that opposing counsel has acted honorably. Where circumstances arise that could possibly indicate that opposing counsel has failed in a duty, one must not leap to an assumption of improper conduct and make allegations in open court. Counsel are obliged to conduct a very thorough inquiry to ensure that the perceived problem actually exists, and should further operate on the assumption that any errors of opposing counsel were not made deliberately. In most instances an explanation from opposing counsel will clarify the problem, which is likely to be an innocent mistake or misunderstanding, and the proceedings will be able to continue without a groundless attack having been made against the character of counsel.

In those rare circumstances where, after a careful due diligence assessment, counsel are forced to raise an issue before the court that even indirectly engages the integrity of opposing counsel, this process must be conducted in a most prudent manner. First, thorough materials should be filed that clearly outline the entire history of the matter and provide a strong foundation for a motion. Second, except in the most extreme circumstances, the issue should be approached in a manner that does not presume a finding of bad faith but leaves this issue to be decided by the court on the basis of the record. Third, opposing counsel should be put on notice of any motion that will even indirectly touch on his or her duties to the court; the first that opposing counsel hears of such a motion should not be in court as the allegations are being made to the judge.

It is simply unacceptable, absent a proper foundation, to make comments in open court that question the integrity of opposing counsel. Engaging in such tactics will have numerous detrimental effects. First, a baseless attack will be worn by the counsel making the allegations if they prove to be unfounded. Such counsel will lose the respect of the trial judge, opposing counsel, and the members of the profession in general. Second, baseless attacks often cause similarly baseless counterattacks, and can consequently derail an entire proceeding. Third, a person who is known for making such baseless attacks will find that he or she will not have the ear of the court when a factual foundation does exist for bringing a motion that engages the duties of opposing counsel.

Accordingly, while there certainly are circumstances where counsel must bring motions that reflect on the integrity of their opponents, such circumstances should be rare and motions should be made only when a clear foundation exists.

#### CONCLUSION

In a profession as challenging and difficult as the practice of law, there is not one lawyer who has not occasionally failed to perform to the best of his or her abilities. Lapses will happen, and we learn from those bad experiences to make ourselves better professionals. However, a serious problem develops when those lapses become more the rule than the exception. The problem then develops into an epidemic when the system begins to accept such conduct as the norm. Professionalism is maintained by a group of individuals dedicated to carrying out their duties in the highest possible manner, and by a court system that quickly reacts when conduct routinely falls below an acceptable standard. Given the great history and tradition of the legal profession in our country, these two sides of the balance can work together both to maintain and, more importantly, to help reestablish the professionalism that our clients, ourselves, the courts, and the public are entitled to expect.

## THE PROPRIETY OF POETRY IN JUDICIAL OPINIONS<sup>†</sup>

Mary Kate Kearney\*

Conrad Busch filed a timely appeal,  
Trying to avoid a pre-marital deal  
Which says appellee need not pay him support,  
He brings his case, properly, before this Court.

. . . .

They wanted to marry, their lives to enhance,  
Not for the dollars—it was for romance.  
When they said “I do,” had their wedding day kiss,  
It was not about money—only marital bliss.

. . . .

But a deal is a deal, if fairly undertaken,  
And we find disclosure was fair and unshaken.  
Appellant may shun that made once upon a time,  
But his appeal must fail, lacking reason (if not rhyme).<sup>1</sup>

Judge Michael Eakin, then a member of the Superior Court of Pennsylvania, wrote this verse about a premarital contract gone awry. Since then, he has become an associate justice on the Supreme Court of Pennsylvania and has continued to pen opinions in the form of poems.<sup>2</sup> Justice Eakin has been criticized for the impropriety of using verse in his opinions,<sup>3</sup> but certainly he is in good company with judges from other jurisdictions and other

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<sup>†</sup> Reprinted, with permission, from 12 WIDENER L.J. 597 (2003).

\* Professor, Widener University School of Law, Harrisburg. I would like to thank Randy Lee for his thoughtful critique of this Essay and Dennis Corgill, Michael Cozzillio, John Dermbach, Deryck Henry, Kathy Nelson, Barbara O’Toole, Bob Power, and Julie Stuckey for the insights and sources that they supplied. My colleagues at a Faculty Development Workshop offered helpful comments, and Widener University School of Law provided a Summer Research Grant to fund the writing of this Essay. Thanks also to my research assistants, Scott Lineberry and Darryl Ligouri, and my administrative assistant, Paula Heider, for their hard work on the production of this piece. It was a pleasure to work with the 2002-2003 Board of the *Widener Law Journal*.

<sup>1</sup> Busch v. Busch, 732 A.2d 1274, 1275, 1278 (Pa. Super. Ct. 1999).

<sup>2</sup> Porreco v. Porreco, 811 A.2d 566, 575 (Pa. 2002) (Eaken, J., dissenting).

<sup>3</sup> See *id.* at 572 (Zappala, C.J., concurring) (stating that “an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania”); *id.* at 573 (Cappy, J., concurring) (concerned with “the perception that litigants and the public at large might form when an opinion of [the Supreme Court of Pennsylvania] is reduced to rhyme.”). See also Adam Liptak, *Justices Call on Bench’s Bard to Limit His Lyricism*, N.Y. TIMES, Dec. 15, 2002, at §1 (discussing the controversy surrounding poetry in judicial opinions).

times.<sup>4</sup> In fact, judges' use of rhymed verses in their opinions and the broader issue of judicial humor in opinions has been a source of debate and controversy for a number of years.<sup>5</sup>

The purpose of this Essay is to explore how and why judges use verse in their opinions and to evaluate the advantages and disadvantages of this form.<sup>6</sup> The Essay will draw primarily on the opinions of Justice Eakin to illustrate its points. The Essay concludes that under certain circumstances, rhymed opinions are an appropriate form of judicial expression.

### THE PURPOSE AND AUDIENCE OF JUDICIAL OPINIONS

The effectiveness of a judicial opinion depends on its "purpose and audience."<sup>7</sup> The purposes of a judicial opinion are numerous.<sup>8</sup> Judges write opinions to explain their resolution of a case, to place that case in the context of past decisions, and to offer precedent for future decisions.<sup>9</sup> The act of writing an opinion forces a judge to clarify his thoughts as he reduces them to paper. Often, this process of reducing one's ideas to writing enables the judge to determine whether his reasoning is flawed.<sup>10</sup>

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<sup>4</sup> See, e.g., *United States v. Syufy Enters.*, 903 F.2d 659, 661–63 (9th Cir. 1990) (rhyming the summary of the facts of the case); *United States v. Batson*, 782 F.2d 1307 (5th Cir. 1986); *United States v. Ven-Fuel, Inc.*, 602 F.2d 747 (5th Cir. 1979) (starting the opinion by rhyming "[t]his case presents a vicious duel, [b]etween the U.S. of A. and defendant Ven-Fuel"); *Mackensworth v. Am. Trading Transp. Co.*, 367 F. Supp. 373 (E.D. Pa. 1973); *People v. Sergio* (Crim. Ct., Queens Co.) (Flug, J.), reprinted in *And to all a "Play Ball,"* N.Y. TIMES, Dec. 20, 1986, at 1; *Van Kleeck v. Ramer*, 156 P. 1108, 1121 (Colo. 1916). For example, Judge Irving Goldberg wrote:

Some farmers from Gaines had a plan.  
It amounted to quite a big scam.  
But the payments for cotton began to smell rotten.  
Twas a mugging of poor Uncle Sam.

*Batson*, 782 F.2d at 1309.

<sup>5</sup> Often the debate about the use of verse takes place as part of a discussion about the use of judicial humor. See, e.g., Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869 (1993); Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693 (1987); Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989); Susan K. Rushing, Student Essay, *Is Judicial Humor Judicious?*, 1 SCRIBES J. LEGAL WRITING 125 (2000).

<sup>6</sup> For a compilation of "clever and amusing" law review articles, including the use of poetry, see generally Thomas E. Baker, *A Compendium of Clever and Amusing Law Review Writings*, 51 DRAKE L. REV. 105 (2002).

<sup>7</sup> Rushing, *supra* note 5, at 128.

<sup>8</sup> "A judicial opinion tells many stories and speaks with many voices." John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 447 (2001).

<sup>9</sup> Baker, *supra* note 5, at 872–73. Professor Baker discussed the three essential functions of judicial opinions. These functions are to assure litigants and the public that decisions are the product of reasoned judgment, not whim; to reinforce the decisionmaking process; and to create written precedent. *Id.*

<sup>10</sup> FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57 (1980). Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight. Sometimes the passage of time or a new way of looking at the issue makes us realize that an opinion will simply not do,

The purposes of majority and dissenting opinions differ. A majority opinion carries the weight of authority with it and stands as precedent for future decisions. As one appellate judge noted, the hallmark of a judicial opinion is its objectivity.<sup>11</sup> The elements of a judicial opinion include “facts, law, logic, and policy,” which must be discussed in light of relevant precedent.<sup>12</sup> Authors of majority opinions are likely to follow the conventions of opinion writing.

In contrast, the author of a dissent may set forth rationale which she hopes will be used as the basis for a future majority opinion.<sup>13</sup> Moreover, a dissenting judge may be prompted by a strong conviction that the majority reached the wrong result and want to address the majority’s interpretation of the law.<sup>14</sup> Often, authors of dissenting opinions feel less constrained by the conventions of opinion writing and feel freer to express emotions such as anger or outrage with a decision.<sup>15</sup>

The audience may vary as well.<sup>16</sup> In writing their opinions, judges first address the litigants and attorneys in the case before them. This is so because those parties have the most at stake in the immediate outcome of the decision. In addition, judges write to other members of the legal community: their fellow judges in that court, judges in courts below and above them, lawyers interested in the decision for a variety of reasons, and, sometimes, future members of the profession—law students.<sup>17</sup> Occasionally, the impact of the decision is great or some aspect of the decision invites media attention, and the general public is made aware of it. These instances, however, represent the exception rather than the rule.<sup>18</sup> Nevertheless, while the typical audience for a judicial

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10, continued

and back we go to the drawing board. Or we may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply “won’t write.” The act of writing tells us what was wrong with the act of thinking.

*Id.*

<sup>11</sup> *Id.* at 52.

<sup>12</sup> *Id.* at 57.

<sup>13</sup> Rushing, *supra* note 5, at 139.

<sup>14</sup> COFFIN, *supra* note 10, at 186. Dissents also serve to “reflect the closeness of the issue, to advance reasoned analysis, and . . . to stimulate the Supreme Court [of the United States] to accept the case for review.” *Id.*

<sup>15</sup> Rushing, *supra* note 5, at 139. An example would be Justice Blackmun’s famous dissent in *DeShaney v. Winnebago County Department of Social Services*, in which he takes issue with the majority’s decision not to hold a state agency liable for failing to protect an abused child. The opinion begins, “Poor Joshua! Victim of repeated attacks . . .” and castigates the majority for its deliberate indifference to the child’s plight. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

<sup>16</sup> “[W]hile the major purpose of an opinion in a case dealing with a new issue may be to provide precedent for lawyers and judges, the opinion in a common case may aim only to explain the decision to the litigants.” Rushing, *supra* note 5, at 128.

<sup>17</sup> Walker Gibson, *Literary Minds and Judicial Style*, 6 SCRIBES J. LEGAL WRITING 115, 124 (1998).

<sup>18</sup> Judge Coffin wrote about the end result of the painstaking process of writing an opinion: “Finally, the opinion meets its public—and a deafening silence ensues.” COFFIN, *supra* note 10, at 161.

opinion is primarily other members of the legal community, it has the potential to reach a wide audience.<sup>19</sup>

#### REASONS FOR USING POETRY IN JUDICIAL OPINIONS

Judges write opinions in a variety of styles,<sup>20</sup> and judicial opinions have been criticized for being dull<sup>21</sup> and poorly written.<sup>22</sup> The language is often overblown; the reasoning may be convoluted; and the meaning may be impenetrable. In these instances, readers of such opinions may be left with the justifiable impression that the purpose of the prose was to communicate mystery, inaccessibility, and pretension.

Judges have experimented with different forms of expression in their opinions, including parables<sup>23</sup> and fables.<sup>24</sup> One variation on the format of a traditional opinion is rhymed verse.<sup>25</sup> Judges may write a majority, dissenting, or

<sup>19</sup> “Judges do not have clients; their audience is the legal profession and, in a larger sense, the public.” Jordan, *supra* note 5, at 698.

<sup>20</sup> See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1426–32 (1995) (contrasting the pure and formalist writing style with the pragmatic writing style of judges).

<sup>21</sup> Jordan, *supra* note 5, at 700 (discussing the “lack of color” in opinion writing).

<sup>22</sup> See generally Posner, *supra* note 20. One essay noted that the principles of good writing and good judicial writing are synonymous. Rushing, *supra* note 5, at 134–35 (“There is no reason why almost any piece of legal writing—and certainly judicial writing—may not move us with its sensitive and wise and gracious handling of language.”). See also James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984) (pointing out connections between poetry and judicial opinions); James P. Madigan & Laura Y. Tartakoff, *Doing Justice to the Potential Contribution of Lyric Poems*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 27, 27 (2000) (stating as a thesis that “lawyers can become more compelling advocates by reading poetry”).

<sup>23</sup> See *United States v. Batson*, 782 F.2d 1307 (5th Cir. 1986) (opinion of Judge Goldberg written in parable); Baker, *supra* note 5, at 884.

<sup>24</sup> See *Hatfield v. Bishop Clarkson Mem’l Hosp.*, 701 F.2d 1266 (8th Cir. 1983) (en banc); Jordan, *supra* note 5.

<sup>25</sup> See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 263 n.4, 264 n.5 (1972) (quoting poems by Grantland Rice and Franklin Pierce Adams); *Selig v. United States*, 740 F.2d 572, 580 (7th Cir. 1984) (quoting Ernest L. Thayer’s *Casey at the Bat*); *Makensworth v. Am. Trading Transp.*, 367 F. Supp. 373 (E.D. Pa. 1973) (entire opinion written in verse); *Jenkins v. Comm’r*, 47 T.C.M. (CCH) 238 (1983). In *Jenkins*, the tax court wrote the following poem entitled “Ode to Conway Twitty” at the close of its opinion:

Twitty Burger went belly up  
 But Conway remained true  
 He repaid his investors, one and all  
 It was the moral thing to do.  
 His fans would not have liked it  
 It could have hurt his fame  
 Had any investors sued him  
 Like Merle Haggard or Sonny James.  
 When it was time to file taxes  
 Conway thought what he would do  
 Was deduct those payments as a business expense  
 Under section one-sixty-two.

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25, continued

In order to allow these deductions  
 Goes the argument of the Commissioner  
 The payments must be ordinary and necessary  
 To a business of the petitioner.

Had Conway not repaid the investors  
 His career would have been under cloud,  
 Under the unique facts of this case  
 Held: The deductions are allowed.

*Jenkins*, 47 T.C.M. (CCH) 238 n.14. Attorneys for the tax litigation department of the Internal Revenue service responded with the following poem entitled "Ode to Conway Twitty: A Reprise" and decided not to appeal:

Harold Jenkins and Conway Twitty  
 They are both the same  
 But one was born  
 The other achieved fame.

The man is talented  
 And has many a friend  
 They opened a restaurant  
 His name he did lend.

They are two different things  
 Making burgers and song  
 The business went sour  
 It didn't take long.

He repaid his friends  
 Why did he act  
 Was it business or friendship  
 Which is fact?

Business the court held  
 It's deductible they feel  
 We disagree with the answer  
 But let's not appeal.

*Jenkins v. Comm'r*, 1984 WL 270668 (I.R.S. Action on Decision, Mar. 23, 1984). Another example is *Fisher v. Lowe*, 333 N.W. 2d 67 (Mich. Ct. App. 1983). In *Fisher*; Judge Gillis wrote,

We thought that we would never see  
 A suit to compensate a tree  
 A suit whose claim in tort is prest  
 Upon a mangled tree's behest;  
 A tree whose battered trunk was prest  
 Against a Chevy's crumpled crest;  
 A tree that faces each new day  
 With bark and limb in disarray;  
 A tree that may forever bear  
 A lasting need for tender care.  
 Flora lovers though we three,  
 We must uphold the court's decree.  
 Affirmed.

*Id.* at 67 (footnote omitted).

concurring opinion in verse for a variety of reasons.<sup>26</sup>

One possible reason is to capture the reader's attention. Readers accustomed to a dry recitation of facts, holding, and reasoning will take note and perhaps read an opinion more closely when it is written in a nontraditional format. Furthermore, the subject of the opinion may lend itself to a light touch. For example, Judge Eakin used rhyme in a contract case involving the sale of emus.<sup>27</sup> He began the opinion:

The emu's a bird quite large and stately,  
Whose market potential was valued so greatly  
That a decade ago, it was thought to be  
The boom crop of the 21st century.

Our appellant decided she ought to invest  
In two breeding emus, but their conjugal nest  
Produced no chicks, so she tried to regain  
Her purchase money, but alas in vain.

Appellant then filed a contract suit,  
But the verdict gave her claim the boot;  
Thus she was left with no resort  
But this appeal to the Superior Court.<sup>28</sup>

The reader is drawn into the opinion written in prose that follows these opening lines.

A second and related reason for writing in rhymed verse may be to make the law more accessible to the general public.<sup>29</sup> Assuming that the judge is writing for a wider audience than the legal community, a person without any legal training should easily be able to read and understand a poem as opposed to the analysis contained in a formal legal opinion.<sup>30</sup>

A third reason is that an appellate judge is seeking to break the monotony of opinion writing and write creatively.<sup>31</sup> As "professional writers," judges are attentive to the nuances of language and may want to experiment with different styles of expression.<sup>32</sup> A less flattering perspective on this issue is that

<sup>26</sup> See Rushing, *supra* note 5, at 139 (noting that "[d]issenters may have a freer hand with humor than writers of majority opinions").

<sup>27</sup> Liddle v. Scholze, 768 A.2d 1183 (Pa. Super. Ct. 2001).

<sup>28</sup> *Id.* at 1184.

<sup>29</sup> One commentator cautioned appellate judges against "adopting too lofty a tone, [and thereby] removing themselves from their readers." Rushing, *supra* note 5, at 127.

<sup>30</sup> "Imagery and humor can reshape the dispute into the story that it originally was, help bring the dispute back 'down to earth,' and dispel some of the notions held by those affected by the legal system." Jordan, *supra* note 5, at 700.

<sup>31</sup> *Id.* at 701.

<sup>32</sup> *Id.* at 695. It has been pointed out that a "smile and a chuckle will rejuvenate an audience's desire to read and to listen." Madigan & Tartakoff, *supra* note 22, at 46.

judges who pen opinions in verse are engaging in a form of verbal narcissism: they are writing to show off their cleverness at the expense of the litigants and their case.<sup>33</sup>

A fourth motivation is that a poem requires economy of expression. Instead of a potentially rambling discussion of the legal principles in a case, a poem forces a judge to distill his analysis and make pointed observations.<sup>34</sup> The direct, succinct approach should prompt the judicial author to select his words deliberately and write carefully. These attributes of clarity and succinctness in judicial opinions are the same whether written in verse or prose. It is easier, however, to stray from these goals when the medium is prose rather than poetry. Poetry is less forgiving of digressions.

A judicial opinion in verse enables its author to strip a case down to its essentials and expose the rationale for what it is. A good example of this can be found in Judge Eakin's analysis of the premarital contract in *Busch v. Busch*.<sup>35</sup> In upholding the agreement, he distinguished *Busch* from *Ebersole v. Ebersole*,<sup>36</sup> where the Supreme Court of Pennsylvania struck down a prenuptial agreement:

This contrasts with the *Ebersole* facts  
As our case has something that *Ebersole* lacks.  
There, a catch-all phrase lumped all the many  
"Financial assets" of the marriage, "if any."

This aggregation was too vague to be fair,  
As one couldn't tell what assets were there.  
No matter how much Mr. Busch may implore us  
This isn't the same as the contract before us.<sup>37</sup>

Judge Eakin went to the heart of the difference between *Busch* and *Ebersole*. The issue in both cases was whether the requirements of a prenuptial agreement had been satisfied by full and fair disclosure of both parties' financial assets.<sup>38</sup> In *Ebersole*, the Supreme Court of Pennsylvania determined that the disclosure of premarital assets did not constitute full and fair disclosure because it was too vague.<sup>39</sup> In contrast, the disclosure in *Busch* was comprehensive and specific.<sup>40</sup>

<sup>33</sup> See *infra* notes 43–58 and accompanying text.

<sup>34</sup> Jordan, *supra* note 5, at 700. "Good legal writing is short, as short as possible consistent with clarity and completeness. The same could be said of a lyric poem." Madigan & Tartakoff, *supra* note 22, at 50 (quoting LUCY V. KATZ, WINNING WORDS: A GUIDE TO PERSUASIVE WRITING FOR LAWYERS 3 (1985)).

<sup>35</sup> 732 A.2d 1274 (Pa. Super. Ct. 1999).

<sup>36</sup> 713 A.2d 103 (Pa. Super. Ct. 1998).

<sup>37</sup> *Busch*, *supra* note 35, at 1278 (footnote omitted).

<sup>38</sup> Compare *Ebersole*, 713 A.2d at 104, with *Busch*, 732 A.2d at 1278.

<sup>39</sup> *Ebersole*, 713 A.2d at 104.

<sup>40</sup> *Busch*, 732 A.2d at 1278.

The fiancée of Busch had listed all of her stocks and other assets and estimated their value.<sup>41</sup> Judge Eakin explained that her fiancé could not claim later that those estimates were too low when he had the opportunity to ascertain their worth by looking in the newspaper but had declined to do so.<sup>42</sup> In a few stanzas, Judge Eakin pinpointed his reasons for upholding the prenuptial agreement.

Finally, a poem can humanize the litigants and their predicament. There is less potential of reducing the parties to abstract and sometimes even unnamed participants labeled appellant and appellee than there is in a prose opinion.<sup>43</sup> The parties come alive in the poem, and their situation is more real to the reader because it is described in ordinary language.<sup>44</sup> In very human terms, Justice Eakin described the respective positions of Mr. and Mrs. Busch.<sup>45</sup> The reader understands what they agreed to before they were married and why they disagree about its terms in their divorce.

#### CRITICISMS OF POETRY IN JUDICIAL OPINIONS

Those who object to rhymed verse opinions offer similar criticisms. First, and foremost, they maintain that rhymed verse trivializes the seriousness of the matter before the court and demeans the litigants.<sup>46</sup> Oftentimes, the opinion poems are entertaining, but critics caution that the entertainment comes at the expense of the litigants.<sup>47</sup> The parties who are seeking justice from the court become pawns at the hands of a judge who points out their foibles for the amusement of himself and his reader.

To illustrate this point, these critics often cite *In re Rome*.<sup>48</sup> Rome, a Kansas trial court judge, had written a memorandum opinion in verse to explain his decision to place a prostitute on probation for soliciting an undercover police officer. He wrote:

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<sup>41</sup> *Id.* at 1277.

<sup>42</sup> *Id.* at 1277–78.

<sup>43</sup> This is not to say that the humanity of the parties to the case necessarily is lost in a good prose opinion; however, it is often overlooked.

<sup>44</sup> Jordan, *supra* note 5, at 700. See also Leubsdorf, *supra* note 8, at 450 (“Although judges may hope to issue unanswerable opinions, who today would espouse a stylistic ideal of impassive impersonality, when we all know that opinions are written by human judges about human problems[.]”).

<sup>45</sup> For a discussion of the poem Judge Eakin wrote in *Busch*, see *supra* notes 35–42 and accompanying text.

<sup>46</sup> Rudolph, *supra* note 5, at 192; Jordan, *supra* note 5, at 702–03 (both discussing use of judicial humor in opinions). “The bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.” W. PROSSER, *THE JUDICIAL HUMORIST* vii (1952).

<sup>47</sup> PROSSER, *supra* note 46; Rudolph, *supra* note 5, at 179 (“A judicial humorist may not intend to ridicule litigants, but if humor has that effect, then intent is irrelevant.”).

<sup>48</sup> 542 P.2d 676 (Kan. 1975).

This is the saga of \_\_\_\_\_,  
 Whose ancient profession brings her before us.  
 On January 30th, 1974,  
 This lass agreed to work as a whore.  
 Her great mistake, as was to unfold,  
 Was the enticing of a cop named Harold.  
 . . . .  
 So under advisement \_\_\_\_\_'s freedom was taken,  
 And in the bastille this lady did waken.  
 The judge showed mercy and \_\_\_\_\_ was free,  
 But back to the street she could not flee.  
 The fine she'd pay while out on parole,  
 But not from men she used to cajole.  
 From her ancient profession she'd been busted,  
 And to society's rules she must be adjusted.  
 If from all this a moral doth unfurl,  
 It is that Pimps do not protect the working girl!<sup>49</sup>

The judge faced disciplinary proceedings as a result of this opinion, and the Supreme Court of Kansas determined whether Judge Rome had violated the judicial code of conduct. The court concluded that although the judge had the discretion to write an opinion in verse, he did not have the discretion to “hold[] out a litigant to public ridicule or scorn.”<sup>50</sup> In explaining the purposes of a judicial opinion, the court quoted a justice of the Supreme Court of Arkansas:

Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down.<sup>51</sup>

The state supreme court censured Judge Rome for not displaying the proper judicial courtesy to the litigant.<sup>52</sup> The court reached this conclusion despite the fact that the litigant had not been a party to the complaint filed against the judge.<sup>53</sup>

<sup>49</sup> *Id.* at 680–81.

<sup>50</sup> *Id.* at 684.

<sup>51</sup> *Id.* at 685 (quoting George Rose Smith, *A Primer of Opinion Writing for Four New Judges*, 21 ARK L. REV. 197, 210 (1967)). *But see* George Rose Smith, *A Critique of Judicial Humor*, 43 ARK. L. REV. 1, 25 n.60 (1990) (stating that “that part of the *Primer* disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!”).

<sup>52</sup> *Rome*, 542 P.2d at 686. The commission, however, did not take issue with the judge's writing the memorandum as a poem. They criticized him for the way in which he characterized the defendant. *Id.* at 685–86.

<sup>53</sup> *Id.* at 686.

Next, critics assert that this genre simultaneously produces bad law and bad poetry.<sup>54</sup> They explain that legal analysis is shortchanged in the writer's efforts at cleverness and that he risks failure on both fronts.<sup>55</sup> While the poems may be entertaining, the reasoning and explanation of the law are often deficient.<sup>56</sup> For these critics, the opinions may succeed at a superficial level but fail in their primary purpose.<sup>57</sup> When their primary purpose is to entertain, poems undermine the seriousness of the judicial process.<sup>58</sup> Additionally, they are often poorly written and therefore not creative successes.

Finally, critics single out these endeavors as examples of judges with too much time on their hands who are indulging themselves and wasting taxpayer money.<sup>59</sup> One writer stated that readers of these opinions are likely to conclude that the judicial author was more concerned about his rhymes than reaching the correct result.<sup>60</sup> According to these critics, the appearance of impropriety makes it inappropriate for judges to use verse in their opinions.

#### EVALUATING THE CRITICISMS IN LIGHT OF *PORRECO V. PORRECO*

It is useful to evaluate these criticisms in light of Justice Eakin's most recent foray into rhyme. In *Porreco v. Porreco*,<sup>61</sup> the Supreme Court of Pennsylvania considered the validity of a prenuptial agreement.<sup>62</sup> The ex-husband had supplied the financial information contained in the prenuptial agreement and had listed the value of the engagement ring at \$21,000.00.<sup>63</sup> When the couple divorced, Mrs. Porreco had the ring appraised and learned that the stone was a cubic zirconium worth far less than the stated amount.<sup>64</sup> She sued to have the prenuptial agreement set aside, and the state supreme court considered whether her ex-husband had fraudulently induced her to enter the prenuptial agreement by misrepresenting the ring's value.<sup>65</sup>

<sup>54</sup> Baker, *supra* note 5, at 885 ("Most opinion poems manage to be not terribly clever and, at the same time, terrible poetry.")

<sup>55</sup> Gerald Lebovits, *Poetic Justice: From Bad to Verse*, 74 N.Y. St. B.J. 48, 48 (2002).

<sup>56</sup> *Id.* ("Missing from verse is the key to a reasoned judicial opinion: a clearly articulated holding supported by precedent.")

<sup>57</sup> "[H]umor in the format of doggerel verse . . . can undermine judicial opinions as sources of law." Rushing, *supra* note 5, at 120.

<sup>58</sup> "What about judges who fancy themselves as poets and write opinions in verse? That practice, still alive, should be buried without eulogy." Lebovits, *supra* note 55.

<sup>59</sup> *Id.* See also Rudolph, *supra* note 5, at 186–87.

<sup>60</sup> Lebovits, *supra* note 55.

<sup>61</sup> 811 A.2d 566 (Pa. 2002).

<sup>62</sup> *Id.* at 567.

<sup>63</sup> *Id.* at 568.

<sup>64</sup> *Id.* at 567.

<sup>65</sup> *Id.* at 570.

The court concluded that Mrs. Porreco had not established a fraud claim because her reliance on her ex-husband's statement about the value of the ring was not justifiable.<sup>66</sup> Writing for the majority, Justice Newman explained that a justifiable reliance must be reasonable.<sup>67</sup> In turn, reasonableness depended on "whether the recipient [of that information] knew or should have known that the information supplied was false."<sup>68</sup> Although the relationship between the parties could affect the reasonableness of the reliance, the ability of the person claiming the reliance to determine whether the information was false was dispositive of the issue.<sup>69</sup> Justice Newman determined that the fact that Mrs. Porreco possessed the ring gave her the ability to have it appraised and to know whether it was worth the amount that Mr. Porreco had stated. The court concluded that her failure to do "this simple investigation" was unreasonable.<sup>70</sup>

Justice Eakin, writing in dissent, disagreed with the majority's conclusions about the reasonableness of Mrs. Porreco's reliance on her ex-husband's statement about the ring's value.<sup>71</sup> He placed more emphasis than Justice Newman on the nature of the parties' relationship and its effect on the reasonableness of Mrs. Porreco's reliance. First, he noted the thirty-year disparity in the couple's ages when they entered into the prenuptial agreement:

The realities of the parties control the equation,  
And here they're not comparable in sophistication;  
The reasonableness of her reliance we just cannot gauge  
With a yardstick of equal experience and age.

This must be remembered when applying the test  
By which the "reasonable fiancée" is assessed.  
She was 19, he was nearly 30 years older;  
Was it unreasonable for her to believe what he told her?

Given their history and Pygmalion relation,  
I find her reliance was with justification.<sup>72</sup>

For Justice Eakin, Mrs. Porreco's youth equated with a lack of experience and sophistication.<sup>73</sup> Mr. Porreco's age and experience made it more likely that his teen-age fiancée would rely on his representations.

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<sup>66</sup> *Id.* at 571–72.

<sup>67</sup> *Id.* at 571.

<sup>68</sup> *Id.* (quoting *Scaife Co. v. Rockwell-Standard Corp.*, 285 A.2d 451 (Pa. 1971)) (internal citations omitted).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 572.

<sup>71</sup> *Id.* at 575 (Eakin, J., dissenting).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

In addition to age differences between husband and wife, Justice Eakin asserted that trust should be the hallmark of a marriage.<sup>74</sup> As such, he explained that Mrs. Porreco should have been able to rely on her fiancé's representations:

Or for every prenuptial, is it now a must  
That you treat your betrothed with presumptive mistrust?  
Do we mean reliance on your beloved's representation  
Is not justifiable, absent third party verification?

Love, not suspicion, is the underlying foundation  
Of parties entering the marital relation;  
Mistrust is not required, and should not be made a priority.  
Accordingly, I must depart from the reasoning of the majority.<sup>75</sup>

Unlike the majority, which treated the Porreco's as it would any other parties to a contract, Justice Eakin differentiated between an engaged couple entering into a contract and two people entering into a purely business relationship. Most contracts assume that the parties are dealing at arms' length from each other while nothing could be further from the truth when the parties are engaged to be married. Because marriage is based on closeness and trust, Justice Eakin concluded that Mrs. Porreco's failure to ascertain independently the value of her engagement ring and her reliance on Mr. Porreco's representations were reasonable and amounted to justifiable reliance.<sup>76</sup>

Chief Justice Zappala and Justice Cappy, writing separate concurring opinions, took Justice Eakin to task for his use of rhymed verse in his dissent. Echoing some of the criticisms discussed above, Justice Zappala expressed concern that the use of rhyme "reflect[ed] poorly on the Supreme Court of Pennsylvania."<sup>77</sup> Both he and Justice Cappy cautioned that the use of rhyme could give the public appearance that the judiciary did not take the litigants' concerns seriously.<sup>78</sup> While acknowledging a judge's right to express himself, Justice Cappy agreed with Justice Zappala's observation that "the expression of opinions issued by the highest court in the Commonwealth of Pennsylva-

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 572 (Zappala, J., concurring). Justice Zappala stated:

I believe the integrity of this institution depends in great part upon the understanding that we engage in careful, deliberate and serious analysis of the legal issues that we undertake to examine. The integrity of the Supreme Court of Pennsylvania should never be placed in jeopardy by actions that would alter the perception of those whose lives and interests are affected by the decisions of the Court.

*Id.*

<sup>78</sup> *Id.*

nia should reflect the gravity of our constitutional responsibility to our citizens.”<sup>79</sup> Both justices concluded that Justice Eakin’s opinion did not meet this standard.

#### ANSWERING THE CRITICS

These specific criticisms along with the general criticisms associated with using verse in judicial opinions should be evaluated in light of Justice Eakin’s dissenting opinion.<sup>80</sup> The first objection is that rhymed opinions demean the litigants and make the subject of the litigation frivolous. Certainly, verse which holds either the parties or their dispute up to ridicule constitutes an abuse of judicial discretion. A judge should show respect for the case and people before him as long as they merit it.<sup>81</sup>

Justice Eakin’s dissent in verse undermined neither litigants nor their case. His description of the litigants was appropriate when he referred to them as the bride, groom, and spouse. The one instance in which he referred to Mr. Porreco as “[o]ur deceiver” was consistent with his legal conclusion that Mr. Porreco did commit fraud against Mrs. Porreco.<sup>82</sup> Justice Eakin stated his position clearly and succinctly at the beginning of his dissent: “A groom must expect matrimonial pandemonium when his spouse finds he’s given her a cubic zirconium.”<sup>83</sup> A certain level of judicial disdain for Mr. Porreco’s actions was appropriate in light of Justice Eakin’s conclusions on the issue.

There is a danger, of course, of the verse form trivializing the subject matter of the case.<sup>84</sup> This may be true especially when the case involves a domestic dispute, an area of law which historically has received second-class status.<sup>85</sup> An opinion in verse might perpetuate the stereotype that these issues do not merit the same serious judicial consideration afforded to other matters. The impetus for *Porreco* was the dissolution of a marriage, and the immedi-

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<sup>79</sup> *Id.* at 572–73 (Cappy, C.J., concurring).

<sup>80</sup> See *supra* notes 71–76 and accompanying text.

<sup>81</sup> One law review writer has proposed a test “to cull out those opinions most prone to ridicule litigants.” Rudolph, *supra* note 5, at 195. The purpose of the test is to eliminate the inappropriate use of judicial humor in opinions. The writer has suggested that the test would be included as an amendment to the ABA Code of Judicial Conduct. *Id.* at 194. The test would be added on to Canon 2, which is titled, “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.” Under the test, judicial humor is inappropriate if “(A) a reasonable litigant would feel that he or she had been made the subject of amusement, or (B) opinion utility would be compromised by the humor.” *Id.*

<sup>82</sup> *Porreco*, 811 A.2d at 575 (Eakin, J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> In support of this point, it would appear that certain categories of cases are never appropriate subjects for rhymed verse. For example, the nature of a capital murder case would make it an unlikely subject for a nontraditional opinion.

<sup>85</sup> See, e.g., Susan Frelich Appleton, *From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law*, 6 WASH. U. J. L. & POL’Y 189 (2001).

ate issue before the Court involved the betrayal of marital trust. Both are deeply important matters. The parties to the litigation could have interpreted Justice Eakin's rhymed opinion as not giving proper deference to the seriousness of their case.

One response to this concern is that a rhymed opinion is more likely to capture its audience's attention and thereby increase the importance of the case. Without Justice Eakin's opinion, this case would not have received the public attention that it did.<sup>86</sup> Like many appellate opinions, it would have been consigned to obscurity.<sup>87</sup> Admittedly, the attention that the opinion has received has centered around the controversy over Justice Eakin's use of rhymed verse rather than its substance.<sup>88</sup> However, one of Justice Eakin's purposes in using the form that he did may have been to draw readers into his analysis. Instead of analyzing the issue through a conventional opinion, he may have chosen to use poetry as a hook to secure a broader audience for this issue. The medium may have been his way of calling attention to the message. In so doing, the subject matter was elevated and not trivialized.

The second criticism, rhymed verses make bad law and bad poetry,<sup>89</sup> assumes that in a misguided attempt to be clever or witty, a judge who writes in verse fails at both his primary task of sound legal analysis and his secondary goal of writing poetry.<sup>90</sup> While this may be true in some instances, it is not the case in Justice Eakin's dissent in *Porreco v. Porreco*. The legal analysis is well-developed and well-supported. As discussed above, Justice Eakin offered reasons why Mrs. Porreco's reliance on Mr. Porreco's representations was reasonable.<sup>91</sup> First, the differences in their age, experience, and sophistication explained her reliance on his valuation of the engagement ring. Second, the trust that rightly exists between a husband and wife contributed to her failure to get an independent assessment of the ring's worth. Only when that trust has dissolved in light of the couple's divorce did Mrs. Porreco feel the need to verify her husband's representations.

Furthermore, Justice Eakin supported these reasons in footnotes with extensive quotations from and citations to relevant authority. One case to which he did not refer was his opinion in *Busch v. Busch*. In that case, as a superior court judge, he had upheld a prenuptial agreement in which the man accused

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<sup>86</sup> Justice Eakin's opinion and the surrounding controversy were the subjects of national and local media attention. See Liptak, *supra* note 3, at § 1; John Baer, *Court Sees No Reason for Rhyme*, PHILA. DAILY NEWS, Dec. 9, 2002, at 5.

<sup>87</sup> For a discussion of Justice Eakin's opinions being met with silence, see *supra* note 18 and accompanying text.

<sup>88</sup> Liptak, *supra* note 3; Baer, *supra* note 86.

<sup>89</sup> See *supra* notes 54–58 and accompanying text.

<sup>90</sup> Some critics might argue that even good poetry results in a bad judicial opinion.

<sup>91</sup> See *supra* notes 71–76 and accompanying text.

the woman of not meeting her burden of full and fair disclosure of marital assets because she had estimated the value of her stocks at a lower amount than they were actually worth.<sup>92</sup> Judge Eakin had determined that the full disclosure requirement was met because the man could have checked the newspaper to verify the stocks' worth. Similarly, as the majority posited, full disclosure arguably was met in *Porreco* because the wife could have checked with a jeweler to verify the worth of her engagement ring. However, the age discrepancy between the couple and the husband's intentional misrepresentation of the value of the ring contributed to Justice Eakin's different conclusion in *Porreco*.

Finally, while Justice Eakin's verse might not be on the literary level of Wallace Stevens, he does not claim to be a great poet. The opinion, however, does meet many of the requirements of a good poem. A good poem says something worth knowing in a way that people understand and will remember. No writing can be better than the quality of the ideas that it communicates. In his dissent in *Porreco*, Justice Eakin communicated his position clearly and memorably.<sup>93</sup>

The final criticisms are that writing opinions in verse gives an appearance of judicial impropriety and wastes two resources: judges' time and taxpayers' money. The concern about judicial impropriety, as expressed by Chief Justice Zappala's statement about the integrity of the institution, is particularly striking in light of the Pennsylvania Supreme Court's recent history.<sup>94</sup> Further, Justice Eakin is in good company with other state and federal court judges, and even an occasional Supreme Court justice, in using poetry in his opinions.<sup>95</sup>

Moreover, Justice Eakin uses the form sparingly. Of the almost one hundred opinions that he has written as either a superior court judge or a supreme

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<sup>92</sup> See *supra* notes 35–42 and accompanying text.

<sup>93</sup> In my Torts class, I gave first year students the option to brief a case in rhyme. In that case, *Katko v. Briney*, 183 N.W. 2d 657 (Iowa 1971), the Supreme Court of Iowa determined whether a spring gun trap was reasonable force in the defense of property. The students rose to the occasion with creative and sound discussions of the case. They captured the characters of the litigants as described in the appellate opinion and accurately pinpointed the Court's reasoning about why a spring gun was unreasonable force. In reading the poems, I was struck by how carefully students had read the opinion. Perhaps the novelty of the exercise invigorated them to do some of their best work of the semester, and they had fun in the process. The idea for this exercise came from a professor's essay in *The Law Teacher*. See Andrew J. McClurg, *Poetry in Commotion: Katko v. Briney and the Bards of First-Year Torts*, 74 OR. L. REV. 823, 834–36 (1995). For a collection of poems regarding twenty-nine well-known contracts cases, see Douglass G. Boshkoff, *Selected Poems on the Law of Contracts*, 66 N.Y.U L. REV. 1533 (1991).

<sup>94</sup> For example, one of its members, Justice Rolf Larson, was impeached in the 1990s. Baer, *supra* note 86, at 5.

<sup>95</sup> See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 532 U.S. 204, 222 (2002) (Stevens, J., dissenting). Justice Stevens counters the majority's contention that it is not the Court's job to find reasons for what Congress has done by comparing that statement to Tennyson's poem about the Light Brigade, which reads "Theirs not to reason why, Theirs but to do and die." *Id.* n.3 (Stevens, J., dissenting).

court justice, only five are in rhyme.<sup>96</sup> Judges, particularly appellate judges such as Justice Eakin, are paid to think and write. A well-crafted opinion usually is the product of painstaking research and writing. When Justice Eakin spends the time analyzing the law of reasonable reliance in depth and produces a concise, coherent analysis of why the legal standard is met in a particular case, the rhymed format of that opinion does not detract from the substance. It may in fact have enhanced the analysis by communicating it in an understandable fashion to a wide audience. In that respect, Justice Eakin's time was well spent, and the public was well served.

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<sup>96</sup> The two already discussed, *Porreco* and *Busch*, involved family law issues. *Porreco v. Porreco*, 811 A.2d 566, 575 (Pa. 2002) (Eakin, J., dissenting); *Busch v. Busch*, 732 A.2d 1274 (Pa. Super. Ct. 1999). The third arose when a dog owner sued a driver to recover veterinary fees after the driver hit his dog. *Zangrando v. Sipula*, 756 A.2d 73 (Pa. Super. Ct. 2000). Another arose in the context of a trade name violation when two auto body shops both wanted to use the word Limerick in their name. *Limerick Auto Body, Inc. v. Limerick Collision Center, Inc.*, 769 A.2d 1175 (Pa. Super. Ct. 2001). The fifth was a breach of contract claim involving emus that did not propagate. *Liddle v. Scholze*, 768 A.2d 1183 (Pa. Super. Ct. 2001).

## THE CHALLENGES OF FOREST MANAGEMENT<sup>†</sup>

William R. Corbin\*

Thank you for the opportunity to talk about forestry and about the challenges of my industry. It is a large and complex industry, which makes many positive contributions to society but also engenders many controversial issues. In our time today, I would like to describe a few of those challenges and contributions, and perhaps touch on a few societal inputs, impacts, and issues. My dominant theme, and the one point I want you to carry away, even if you remember nothing else, is that trees are good; in fact, they are essential.

The industry does face many challenges—some based on sound science and some not. Regulations can be good and effective, but they can also be destructive. The burden of regulations falls on the small private landowners as well as the large industrial ones. Balanced, collaborative solutions based on science are essential, and they are possible.

### WEYERHAEUSER

To begin, I'd like to tell you a little bit about Weyerhaeuser Company. We were incorporated in 1900, so we're now 103 years old. We have 60,000 employees and \$18 billion in annual revenue. We are the world's largest integrated forest products company, the world's largest owner of merchantable softwood timber, and the world's largest producer of softwood lumber, hardwood lumber, and engineered lumber products. We're the second largest producer of uncoated free-sheet paper, which is used for computers, and we're the largest producer in the world of market pulp, which is used in paper manufacturing and personal products such as diapers. We are the second largest producer in North America of structural panels and distributor of wood products. We're the second largest producer of corrugated packaging in the United States. We grow and harvest timber; we manufacture and sell and distribute forest products; and we're involved in real estate in four market areas in the United States. We're the fifteenth largest homebuilder.

We manage a lot of timberland. In total, the timberland we manage in North America—under license in Canada and fee-owned in the U.S.—is about the size of Washington state. Our fee-owned seven million acres would

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<sup>†</sup> Address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 10, 2003.

\* Executive Vice President, Wood Products, Weyerhaeuser Company, Federal Way, Washington.

be about the size of the combination of Massachusetts and Connecticut. Of course, those acreages are full of trees, and those acres and trees represent an awesome social and environmental responsibility.

#### THE VALUE OF TREES AND GOOD FOREST MANAGEMENT

I said trees are good, and I doubt that any of you would dispute that, but let me elaborate on my reasons. Trees are a renewable, recyclable, and reusable resource. Wood products have less negative impact on the environment than do other products that serve similar purposes. In a comparison that was run among wood, aluminum, steel, and concrete in building designs in Minneapolis and Atlanta, the bottom line was that wood insulates better than any of the other products and uses less energy. For example, steel studs, which you often see advertised today, require nine times the production energy that wood does. Concrete takes twenty-one times the energy of wood for a similar floor. In one year, a single, vigorous, average-size tree can absorb as much carbon from the atmosphere as is produced by a car driven 26,000 miles. Also, as you probably know, through photosynthesis (the same process that absorbs carbon) plants and trees generate oxygen, making a major contribution to our atmosphere. Forests provide valuable habitats for a wide range of plants and animals, as well as many products that are essential to daily life.

Our industry insures the sustainability of our forests and protects valuable trees through sound forest management. That means we apply both proven and innovative or adaptive science and technology to improve forest growth, productivity, and animal and plant habitat, and to protect the soil and water quality. This allows us to grow three to ten times the volume of wood per acre that we would find in an unmanaged forest. In this way, we offer society a sustainable resource for wood and paper products without placing demands on the world's most ecologically significant natural forests.

Why is that important? Let's take a look at demand. Total global harvest projections show a continuous rise in wood use with population. While much of the wood harvested worldwide is used for building and paper products, sixty percent of all wood consumed annually worldwide is used for fuel—that's a staggering number—and most of this is in underdeveloped countries. This resource must be replaced on a sustainable basis. Much of the supply will come from North America; thanks to consistent attention to good forest management practices and excellent growing conditions, North America produces about half of the wood supply in the world.

There are problems in other parts of the world. Productivity through science and management have led to forest area gains in the developed regions of the world—Europe, North America, Austral-Asia. Deforestation due to less rigor-

ous management, the need for wood as a fuel source, and the need for land for agriculture are depleting the world's forest resources elsewhere—developing Asia, Latin America, and Africa. How do we address this? In large part, we need to disseminate improved forest management practices or the practice of forestry.

If wood harvest came from natural stands only, thirty percent of the world's forest land would need to be in active production. Studies show now that less than five percent of the world's forests would be required to meet world demands for wood today if ninety percent of the timber came from plantation forests that are high-yield, intensively managed. What's needed here is not one or the other but a combination of forest management practices that ensure both sustainability and greater conservation. The result is a smaller footprint.

We use a model that helps us think about a spectrum of management based on the needs of the stake holders. At the left end of the spectrum is very low management, very high conservation, and, at the right, very high management, very high production. On the left would fall owners such as managed parks and preserves, where the objective is preservation and conservation. On the right, the objective is productivity. The methodology on the left is basically protection and management of natural species. The methodology on the right is intensive management using both native and exotic species that can adapt to a particular condition.

#### REGULATIONS

While industrial land owners manage land for intensive timber production, we also have to share the public concern for core environmental values. The challenge comes when regulations drive behavior based on differing objectives or behavior that is not based on sound science or adaptive management. Oftentimes industry and small owners bear the cost of these regulations—for example, regulations removing land from productivity—and the combined costs of regulations are often quite substantial.

I'd like to give you a few examples of what happens when priority is given to the public need for protected forest lands. We often enter into agreements with the government to exchange lands or to sell lands into natural conservancies and reinvest the cash in more productive land. (Our most recent such transaction in Washington state took eighteen years to complete.) One graphic example of the difference between conservation and active management occurred in the wake of the eruption of Mount St. Helens on May 18, 1980. We all know of the devastation of that eruption; Weyerhaeuser alone lost 78,000 acres of forest. The government stepped in after the eruption and put 110,000 acres into a National Volcanic Monument, within which the environment has been left to

recover naturally—a slow process. Weyerhaeuser replanted land within two years of the eruption, and today that is a vibrant, magnificent forest, which contains the largest known herd of Roosevelt elk in the world.

In some situations, we work cooperatively with government agencies or government owners of land. In the Clayoquot Sound in British Columbia, for example, we have a joint venture with the government to manage the land in a way that meets the needs of the public, which ultimately owns that land. This is an area of old growth stands, three-hundred-year-old timber; here we have extracted certain high value trees by helicopter and left essentially no mark on the forest. This area made headlines about ten years ago, and the agreement is still working satisfactorily to all stake holders today.

Now let's move to the private side, where the objective is productivity. In the case of Canada the government owns the land, so we are licensees, and the objective is productivity of the forests and employment for people. This calls for somewhat different techniques. Thus, we have used what we call variable retention logging on Vancouver Island, where we have left trees throughout the stand not only for their esthetic value but also as pathways for birds, while the clearer areas between create migration pathways for animals. What we have found is that we can regenerate the open spaces and then come back later and take those trees, at a cost that is minimal compared to what we might have expected. In the boreal forest in Alberta, the objective is to create open spaces for regeneration, and habitat and migration pathways for caribou.

In areas that are more intensively managed, as in Washington state, we might have a section of old timber, and another section of regenerated stands. In Uruguay, we have created forests out of pastureland; there had been no forests in Uruguay for over three hundred years. We have taken an exotic species—loblolly pine from the southern United States—and planted genetically improved stock. After just three years, these trees have already been thinned and pruned.

In the beginning it was the public and the government that were creating the regulations affecting us (and not doing a very good job, I might add). Before long, non-governmental organizations put a lot of pressure on government and generated more regulations. Today, every stake holder in our business, including our investors and customers, has a say in what happens. Frequently their views are driven by emotion instead of fact, and they lack an understanding of sound forest management. In addition, many environmental groups have grown substantially and become large businesses with significant funding for media and advertising that influence public opinion, whether their views are accurate or not—and oftentimes they are not.

Therefore, regulations, as I already suggested, can be positive or negative, and I'd like to talk briefly about a couple of the negative consequences that

currently are making the news. The first relates to thinning, which removes dead trees and excessive undergrowth. On federal lands, that practice is often discouraged, but appropriately managed thinning actually promotes the health and growth of the forest and reduces fire danger. We saw some devastating results of the lack of thinning in states such as Colorado last summer.

The second example involves watershed management. Just a few years ago, regulations in Washington and Oregon required us to remove from streams all of the debris resulting from logging. Common sense, scientific research, and adaptive management have clearly demonstrated that we need to do just the opposite, that we need the shade and temperature effects of leaving the logs and debris in the streams. On our own land, and under the guidance of full-time fish biologists on our staff, we have returned to leaving the debris in the streams in recent years. Still, attitudes stemming from practices on public lands often spill over into the public expectations of private land owners and therefore create a constraint for our industry.

#### SOLUTIONS

The question we face, then, is how we can arrive at reasonable solutions that meet both public and private objectives and avoid the issues created by emotion, which often drives economic and policy decisions. This is the answer: Solutions come from public awareness, from credible research by third parties (preferably by universities), from adaptive science (which means that you learn and then you adapt to what you learn), and from encouraging the management of federal, state, and county lands in a way that doesn't endanger their future. Public awareness is especially crucial. An informed public can see beyond the clearcuts to our environmental stewardship efforts in both our forests and our manufacturing facilities. An informed public also can see how the industry has changed over the past decades.

School teachers are a pivotal source of information, which can be balanced information or misinformation, opinion, and bias. To help counter misinformation, or simply lack of information, Weyerhaeuser offers programs such as these: Cool Springs Environmental Education Center in North Carolina, which teaches students and teachers how to manage forests; Teachers on Summer Assignment, in Washington, Oregon, Oklahoma and Arkansas, in which the teachers come to work on projects for our company and develop school plans around those projects—not our answers but their own answers, developed from actual experience; and Outdoor Classroom, which has been running in Washington for fifteen years, in which students begin as early as grade school to manage projects involving streamside management or other forestry activities. Some of the students in the Outdoor Classroom program

have continued their participation all the way into graduate school.

Some universities also are becoming enlightened about the interrelationships of the environment and social and economic responsibilities. Unfortunately, there are not many such universities, and there are fewer and fewer forestry schools today in North America. Why? Because the universities are chasing the environmental dollar, which results in environmental schools and environmental studies but doesn't create a balanced view of social, environmental, and economic considerations.

Some of the solutions call for methods of collaboration, such as the land transfers and joint operations that I mentioned earlier. The Joint Solutions Project up in coastal British Columbia is massive, covering fifteen million acres and one hundred watersheds. A similar effort in Washington state is known for the 1999 Forest and Fish Agreement, the adoption of which was a landmark event in Washington. This state-based project involves collaboration among state and federal agencies, several Native American tribes, county governments, and large and small landowners, and it covers eight million acres and 60,000 miles of streams. It deals with slope protection, clearcut sizes, buffers around streams, road upgrades, culverts, and many other aspects of forestry. Both projects have relied on science and technology as well as collaborative efforts among the stake holders in order to develop these innovative practices.

With or without regulation, our industry depends upon the health and productivity of our forests. One of the largest issues we face stems simply from emotion, opinion, and esthetics. Environmentalists and activists have produced graphic depictions of clearcuts, and, because people don't understand forest dynamics, they believe that commercial forestry operations are the primary cause of deforestation. In reality, overpopulation, clearing of forests for agriculture, urban sprawl, and the use of wood for fuel in underdeveloped countries are the primary causes of deforestation. The clearcut, done properly, is full of life, full of diversity, and full of growth potential. Left to Mother Nature, it will come back on its own; and forestry can bring it back better and faster.

Forests are a perpetual, renewable life cycle. Left to Mother Nature, they are managed by fire, avalanche, and similar capricious massive destruction. Forestry is the practice of managing forests in a way that can meet society's needs. Today's clearcut will be a vibrant forest in ten years. This is what the public hasn't seen, but I am confident that the public will learn. To summarize and conclude: Trees are good, regulations can work, all stake holders are affected, and reasonable solutions are possible.<sup>1</sup>

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<sup>1</sup> For those who are interested, I would commend to your reading *Green Spirit: Trees Are the Answer* by Patrick Moore, the founder of Greenpeace.

## OBSERVATIONS FROM THE POLITICAL FRONT LINES<sup>†</sup>

Alan K. Simpson\*

At the outset, I want to offer a realistic, political perspective on an issue raised by one of the earlier speakers. He examined the enormous cost of some arguably unnecessary technology used by the government and wondered why the taxpayers don't say something. The answer is that they do say something; they say, "Bring us more jobs, more defense facilities, more federal money, more, more, more, and we'll reelect you forever." They're not going to say anything else. Try to cut a base or a port; that is political suicide. Why do you think the B-2 does so well even though each one costs between one and two-and-a-half billion? Parts of it are made in forty-eight states; no one in Congress is going to cut the B-2 program and then go home and face their constituents. They would have to say, "I did a real favor for you even though it cut three thousand jobs here." Take a look at Wyoming and North Dakota, two states with minimal population but senior members of the Senate appropriations committee from both parties. They have covered North Dakota and Wyoming with federal facilities and bases of various kinds. That's the way it works. If you bring home the bacon, the taxpayers don't care where you got it, and they love you. They care more about jobs than deficits. It is as simple as that.

In 1987, I went to the Soviet Union with a group that included Al Cranston and Sam Nunn. At one point Gorbachev turned to Cranston and said, "Cranston, I know who you are. You ran for president on a nuclear freeze pledge; you are a pacifist. How can you support the defense budget of the United States? We cannot match it, and we would be destroyed if we tried." Cranston replied, "My state is filled with defense department jobs, and that's my first obligation." This was stunning to Gorbachev, who did not understand American politics.

### IRAQ AND OTHER FOREIGN POLICY ISSUES

Most of the wonderful presenters have talked about Iraq, so I will give you a few of my thoughts on that subject. It's a very disturbing situation; I think

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<sup>†</sup> Excerpts from an address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 14, 2003.

\* Former United States Senator, Wyoming; Former Director, Institute of Politics, J.F. Kennedy School of Government, Harvard University; Cody, Wyoming.

all of us are deeply troubled. What is the best course, when should we go, how long should we stay? (A powerful article on Iraq becoming the fifty-first state, written by James Fallows, recently appeared in *Atlantic Monthly*.) The military outcome is not uncertain. I was in the infantry; that outcome is not uncertain at all. We were trained to kill. We had no other purpose. That's what you do in the Army or the Navy. The real issue is the political outcome—and there are experts on all sides of that one.

Diplomacy, which I know is in tatters, should be pressed as far as possible, but I am not sure how far that can go. Let me tell you why I say that. I probably was one of the last American politicians to visit with Saddam Hussein. Senators Dole, Metzenbaum, McClure, Murkowski, and I went to Iraq in 1990, before the first Gulf war. As we traveled through Iraq, we passed all the great biblical sites that you have read or heard about all your life; they are all in Iraq. We showed Hussein a letter from George Bush that outlined various demands or conditions. Then Hussein went around the room and talked to each of us. When he came to me, he was talking about pesticide factories and baby food. I said, "All right, if that's all you have, let the media in here. They all want to win the Pulitzer Prize; they're waiting just outside your country. Let them in and let them ramble around the country and then tell the world that all you have are baby food factories and pesticide factories." He absolutely scoffed at that and looked at me as if I was an idiot. Then Dole did something that I had never seen him do before (or since): Dole walked up to Hussein, pointed at his own hand, and said, "This is what comes from war, this is what happened to me in war. Nothing good comes from war. I spent 118 days in a hospital, and this is the result." Saddam never blinked an eye or reacted in any way. If there is anybody that is evil, it is Hussein.

Quickly, I want to say something about North Korea. I think the President is making a tremendous mistake by not talking to somebody in North Korea. In my experience in the practice of law, I handled 1500 divorces (which solidified my own marriage). That wasn't my principal practice, but Wyoming was that kind of state, second after Nevada. One of the main lessons I learned was this: You never gain anything in human relations, whether person-to-person or nation-to-nation, by giving each other the ice treatment. That doesn't mean Powell or Bush has to go; they could send some third-level State Department negotiator. Then Kim Jong-il will be able to go back to his people and say, "I told you that they would come over here and talk to me, and somebody did."

There's one thing I wanted to share with you that should be heartening to you. The U.S. Senate is going to become very active in foreign policy because Dick Lugar is the chairman of the Foreign Relations Committee, and his ranking minority member is Joe Biden. Those two men are superb. They will work

together, they will work on nonproliferation, they will pull Sam Nunn back in from retirement, they will talk about bipartisanship, they will do things.

#### DOMESTIC POLICIES

Shifting to domestic political issues, I have to jump to the heart of the matter: We are never going to get much done in the domestic area until we do something about entitlements. The problem here is in the very term “entitlement,” which means that when you get to be a certain age, regardless of your net worth or your income, you’re entitled to money and health care coverage from the federal government. And every time we try to change that, the thirty-eight million Americans who belong to the AARP go to war. (You can now join AARP if you are only fifty.) The “seniors” are brutally organized, and the young people have nobody who truly speaks for them. Many people think that the young are totally out to lunch, but when you visit college campuses, as my wife and I have done, you meet some of the finest people you could ever hope to meet. We have to deal with two stereotypes here—the selfish, rich senior and the out-to-lunch young person—and we need to show the truth about both groups, that most members of both are conscientious people.

Politics is a bizarre business, and very barren if that’s all you are interested in. You have to have music and art and books and theater and laughter and family and friends, and that is part of what I try to teach young people when I talk about politics. Often, the young will say they hate partisanship and politics, so I will suggest that they move to a country that doesn’t have any politics or partisanship and then write me a letter after six months to tell me how much fun they are having—because along with an absence of politics and partisanship, they will find an absence of freedom of speech, loss of freedom of assembly, loss of freedom itself. That catches their attention. I also tell them that you can’t have democracy without politicians. And then I give them a definition of politics: In politics there are no right answers, only a continual flow of compromises among groups, resulting in a changing and ambiguous series of public decisions where appetite and ambition compete openly with knowledge and wisdom. It is not a precise science; it is alchemy.

I also warn students that any time you run out of facts, your opponents will flee to emotion, fear, guilt, or racism. So when you’re dealing with people, try to marshal your facts, and watch out for the arguments based on emotion, fear, guilt, or racism (but with an adept blend of those, you can pass or kill a bill). Then I tell them—and it is exciting—that being politically correct is like wearing duct tape over your mouth, because if you have real bias, real hatred, real prejudice, it will find its way through the human core like lava through a fissure in a volcano. You can’t hide it permanently, so why not get it out in the

sunlight and deal with it? That works with the students. We talk about everything—homophobia, abortion, Armenian genocide, the troubles in Ireland, everything. I recommend that.

I tell the students one other thing, which was said here yesterday—lighten up. People know how you feel when you have succeeded, but when you get hammered, you face the real test. I tell students not to let their faces show how hard they have been hit, and humor will help them get through that. Humor is the universal solvent against the abrasive elements of life.

#### A POSITIVE CONCLUSION

That is enough of the negative. There are problems galore, but I know that people are basically good. That is proven over and over again, each day of our own lives. And our country is truly great. We forget our greatness and our role in the world. We forget our strengths, we forget our blessings, we forget our roots of escaping religious and political tyranny. We must be a pretty good country if everybody in the world is trying to get here—legally or illegally. And I think we should be proud of our heritage and our generosity, of our hospitality and our diversity. As civil war tears at the guts of other countries, we need to remember that we had one, too. (In five days of the struggles around Antietam, we lost more people than we lost in the whole Vietnam war.) So I think we should be slow to judge others, and swift to defend the weak, and steady in our own resolve to combat evil, when we know it is evil. And we should be ready at all times and in all places to speak well of the fine experiment that is called America.

## THE TRUTH, THE WHOLE TRUTH, AND JUST A COUPLE OF EXAGGERATIONS<sup>†</sup>

Will Durst\*

The hardest part about being a political comedian is that the politicians give me material faster than I can write it down, and I feel kind of like a parasite because the worse shape the world is in, the easier my job is. It is a cruise right now. In some ways, though, it seemed so much easier with Clinton. Life was good, the economy was great. Did you see that Monica turned twenty-nine the other day? It seems as if it was just yesterday when she was crawling around the floor of the Oval Office. They grow up so fast, don't they?

Of course, now we have Bush, George W., that is. And now we have to go to war. Why? Because George W. Bush knows something nobody else does. (I guess we can rule out trigonometry.) "Mr. Bush, why do we have to go to war?" "Because Saddam has weapons of mass destruction." "How do you know?" "My dad sold them to him. We've got the receipts right here."

Weapons of mass destruction? Everybody has weapons of mass destruction. That's all McDonald's makes. Did you see that McDonald's got sued by Hindus and vegetarians because McDonald's fries were flavored with beef tallow? And McDonald's defense was that they had not claimed their fries were vegetarian. What do they think potatoes are?

Let's return to weapons of mass destruction in Iraq. What are we going to use to take them out—weapons of mass destruction, right? The difference is that we give our weapons of mass destruction cute names. We have a multiple-nuclear-warhead missile called the Peacekeeper. Daisy cutter—bomb or misunderstood garden tool? We even have an invisible airplane. What good is an invisible airplane? The Iraqis will just look at their radar screens and say, "Well, we don't see any aircraft, but there are two little guys in a sitting position at 40,000 feet."

There is so much I don't understand. The inspectors are over there. They can't find anything, so Bush says, "See, that's proof. I told you he was hiding stuff." And I can't deny that that makes some sense. We all know that Hussein cheats—he uses human shields, *human shields*. And we whine about jury duty. Can you imagine getting a human shield notice in the mail?

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<sup>†</sup> Excerpts from an address delivered at the Annual Convention of the International Society of Barristers, La Quinta Resort and Club, La Quinta, California, March 11, 2003.

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Saddam really is quite mad; even Qaddafi called Saddam crazy. (Getting called crazy by Qaddafi is like getting called a loser by a Democrat. Why do you see no Democrats on Star Trek? Because it's set in the future.) Saddam looks like a police sketch artist's rendering of a child molester. They say he has doubles all over Iraq to foil assassination. Why? All the men in the country—and a lot of the women—look exactly like him. What I really want to know, though, is why Dan Rather didn't take him out. Dan is eighty, and he has had a good life. He could have taken one for the team. We could have shot him up with anthrax or something and had him breathe hard on the Butcher of Baghdad.

Saddam is so crazy that he actually thinks he won the first Gulf war. Well, it looks as if he's destined to go two and zero, in his view. He might be the first coach to retire undefeated and dead. I put it that way because the television reports make it look like a football game. Just consider the terminology: "Showdown in the Gulf," "Desert Storm Two." I can hear it now: "There's the coin toss and Saddam has elected to receive . . . and receive . . . and receive."

Do you know who gets my pity? Poor Korea. They can't get any respect. "Hey, we've got a bomb, too." "Shut up, we're not talking to you." "Hey, we're part of the Axis of Evil." "You're just one of the random hubcaps. Besides, what's your delivery system, a musk ox?" "No, we have a two stage rocket that can hit California." "California . . . really? Maybe we should talk." And doesn't it seem that Bush has turned into President Rainman before our very eyes? "Mr. President, what about Korea? What about the economy? What about stem cell research?" "Iraq, yeah, definitely Iraq. Yeah, it's all about Iraq. Yeah, I'm an excellent warmonger, yeah. Just ask my dad." "Mr. President, how much do you estimate this war is going to cost?" "About a hundred dollars, hundred dollars, yeah."

Some people have gone a little too far, though. The Canadian prime minister's director of communications called Bush a moron. That's a bit harsh, don't you think? I mean, he's no Anna Nicole Smith, but I prefer to think of him as "special"—he's our "special" Commander in Chief. He went to Yale on the *little* bus.

Bush went to the U.N. and called them a bunch of woosies. Who thought that someone would ever be able to unite France and Germany again? He is a uniter, not a divider. France is accusing us of imperialism. South Africa is threatening sanctions. And a German minister said that Bush's tactics were Hitler-like. Our president just got called a Nazi by Germany. That's like having Mike Tyson slap a restraining order on you or having your drug intervention hosted by Robert Downey, Jr.

All of this reminds me of growing up during those baby boomer years. On my first day of school when I was five years old, the teacher showed us the

required film strip about what we should do in case of nuclear attack; we were supposed to crawl under desks. Even though I was only five years old, I realized that that did not make sense. I thought, “Just what I need—one more thing to hit me in the head as the roof caves in.”

It was a great way to grow up. Our parents kept telling us how rough they had it, and now we think we had it rough. We had only three channels, and they all went off the air at midnight. We didn’t have bottled water; we drank out of garden hoses. And seatbelts? No; we had “the arm”; your mom was making sure that you would hit that windshield a millisecond after her. We didn’t have MTV; we had to take drugs and go to concerts. They called us the drug generation, and we still are, but the drugs are different now—Prozac and Zanax and Zoloft and Propecea and Viagra. Propecea is a hair restorer that makes you impotent. What’s wrong with these people? What, then, is the point of having hair? So you have to follow up with Viagra—Propecea, Viagra, Propecea, Viagra. It’s an aging boomer’s speedball.

I do hate being a baby boomer. It’s not just that I feel old, it’s just that this is the oldest I’ve ever been, and I sense a distressing pattern developing. I can tell you how old I am with just one story. I had a gig in Reno on a Thursday night, so I was driving home early on Friday morning. This was the Friday of the British Open, and Tiger was on pace to go for his fifth major in a row, so the sports station was doing play-by-play. (Great Britain is eight hours ahead, so the timing was right.) And then I realized what I was doing: I was listening to golf on the radio. Let me repeat that: I was listening to golf on the radio. That should be one definition of getting old.

I don’t want to overstay my time. I want to thank Ed Matonich, I want to thank the Kelly boys, Mr. Liber, all of you for making this such a good experience for me and my wife. And I want to thank Trent Lott. Poor Bush had to defend Lott for a while: “There’s no room in the Republican Party for racists.” Wow, I knew there were a lot of them, but I didn’t think all of those slots were full. And I do feel sorry for George W. He does have a tough job, especially given the abilities he brings to it. He actually said, “The problem with the French is that they don’t have a word for entrepreneur.” All right, that might be apocryphal—he probably couldn’t have used the word “entrepreneur”—but I want to believe it.

What I really do believe—to be serious for a minute—is that America is sturdy. I am allowed to make these jokes about our leaders because of the first amendment; but I feel free to make these jokes, without worrying about causing any damage, because I know that our system is strong. America will not only survive this war (and everything else) but will continue to thrive.

## VOLUME 38

### AUTHOR INDEX

	<b>page</b>
<b>BECTON, CHARLES L.</b>	
From Mediocrity to Virtuosity: The Theme's the Thing . . . . .	400
<b>BROSNAHAN, JAMES J.</b>	
Law in Time of War . . . . .	351
<b>CORBIN, WILLIAM R.</b>	
(The) Challenges of Forest Management . . . . .	491
<b>COWDROY, DENNIS A.</b>	
(The) Land and Environment Court of New South Wales, Australia—A Court for the United States? . . . . .	359
<b>DURST, WILL</b>	
(The) Truth, the Whole Truth, and Just a Couple of Exaggerations . . . . .	501
<b>FADJO, DONALD E.; MORRISON, FRED K.;</b> and <b>SILVA, JOSEPH, JR.</b>	
(The) Center for Perinatal Medicine and Law . . . . .	420
<b>FOWLER, WYCHE, JR.</b>	
Saudi Arabia: Friend or Foe? . . . . .	435
<b>KEARNEY, MARY KATE</b>	
(The) Propriety of Poetry in Judicial Opinions . . . . .	475
<b>MACINTOSH, GEORGE K.</b>	
Advocacy . . . . .	411
<b>McLEAN, BETHANY</b>	
Enron: Lessons Learned . . . . .	375
<b>MORRISON, FRED K.; SILVA, JOSEPH, JR.;</b> and <b>FADJO, DONALD E.</b>	
(The) Center for Perinatal Medicine and Law . . . . .	420
<b>NORMANN, DAVID R.</b>	
Book Review: <i>Law v. Life: What Lawyers Are         Afraid To Say about the Legal Profession</i> . . . . .	441

<b>PECK, RICHARD C. C.</b>	
(The) Independence of the Bar .....	368
Professionalism: A Lost Art .....	466
<b>REED, JOHN W.</b>	
What Next? .....	382
<b>SILVA, JOSEPH, JR.; FADJO, DONALD E.;</b> <b>and MORRISON, FRED K.</b>	
(The) Center for Perinatal Medicine and Law .....	420
<b>SIMPSON, ALAN K.</b>	
Observations from the Political Front Lines .....	497
<b>SLYNN, LORD, OF HADLEY</b>	
(A) New Perspective for Lawyers .....	451
<b>STEWART, JULIE</b>	
Mandatory Sentences, Minimum Sense .....	459
<b>YOUNG, WILLIAM G.</b>	
(An) Open Letter to U.S. District Judges .....	389

**VOLUME 38****SUBJECT INDEX**

	<b>page</b>
<b>ADVOCACY</b>	
Advocacy, George K. Macintosh . . . . .	411
From Mediocrity to Virtuosity: The Theme's the Thing, Charles L. Becton . . . . .	400
<b>CIVIL RIGHTS</b>	
Law in Time of War, James J. Brosnahan . . . . .	351
(A) New Perspective for Lawyers, Lord Slynn of Hadley . . . . .	451
What Next?, John W. Reed . . . . .	382
<b>CORPORATIONS</b>	
Enron: Lessons Learned, Bethany McLean . . . . .	375
<b>COURT SYSTEMS</b>	
(The) Land and Environment Court of New South Wales, Australia—A Court for the United States?, Dennis A. Cowdroy . . . . .	359
(An) Open Letter to U. S. District Judges, William G. Young . . . . .	389
<b>CRIMINAL LAW</b>	
Mandatory Sentences, Minimum Sense, Julie Stewart . . . . .	459
<b>ENVIRONMENT</b>	
(The) Challenges of Forest Management, William R. Corbin . . . . .	491
(The) Land and Environment Court of New South Wales, Australia—A Court for the United States?, Dennis A. Cowdroy . . . . .	359
<b>ETHICS</b>	
Enron: Lessons Learned, Bethany McLean . . . . .	375
<b>EUROPEAN UNION</b>	
(A) New Perspective for Lawyers, Lord Slynn of Hadley . . . . .	451
<b>HUMOR</b>	
(The) Truth, the Whole Truth, and Just a Couple of Exaggerations, Will Durst . . . . .	501

**INTERNATIONAL LAW**

Law in Time of War, James J. Brosnahan . . . . . 351

**INTERNATIONAL RELATIONS**

Observations from the Political Front Lines,  
 Alan K. Simpson . . . . . 497  
 Saudi Arabia: Friend or Foe?, Wyche Fowler, Jr. . . . . 435

**JUDGES**

Mandatory Sentences, Minimum Sense, Julie Stewart . . . . . 459  
 (An) Open Letter to U.S. District Judges,  
 William G. Young . . . . . 389  
 (The) Propriety of Poetry in Judicial Opinions,  
 Mary Kate Kearney . . . . . 475

**JURY**

(An) Open Letter to U.S. District Judges,  
 William G. Young . . . . . 389  
 What Next?, John W. Reed . . . . . 382

**JUSTICE SYSTEM**

(The) Independence of the Bar, Richard C. C. Peck . . . . . 368  
 Mandatory Sentences, Minimum Sense, Julie Stewart . . . . . 459

**LAW AND MEDICINE**

(The) Center for Perinatal Medicine and Law, Donald E.  
 Fadjo, Fred K. Morrison, and Joseph Silva, Jr. . . . . 420

**LAWYERS**

Advocacy, George K. Macintosh . . . . . 411  
 (A) New Perspective for Lawyers, Lord Slynn of Hadley . . . . . 451

**LEGAL HISTORY**

(The) Independence of the Bar, Richard C. C. Peck . . . . . 368  
 Law in Time of War, James J. Brosnahan . . . . . 351

**LEGAL PROFESSION**

Book Review: *Law v. Life: What Lawyers Are  
 Afraid To Say about the Legal Profession*,  
 David R. Normann . . . . . 441

**LEGAL SYSTEMS**

(A) New Perspective for Lawyers, Lord Slynn of Hadley . . . . . 451

**LEGAL WRITING**

- (The) Propriety of Poetry in Judicial Opinions,  
Mary Kate Kearney . . . . . 475

**POLITICS**

- Observations from the Political Front Lines, Alan K. Simpson . . . . 497

**PROFESSIONALISM**

- Professionalism: A Lost Art, Richard C. C. Peck . . . . . 466  
What Next?, John W. Reed . . . . . 382

**PROFESSIONAL LIFE**

- Book Review: *Law v. Life: What Lawyers Are  
Afraid To Say about the Legal Profession*,  
David R. Normann . . . . . 441

**TERRORISM**

- Saudi Arabia: Friend or Foe?, Wyche Fowler, Jr. . . . . 435

**TORT REFORM**

- What Next?, John W. Reed . . . . . 382

**TRIAL**

- From Mediocrity to Virtuosity: The Theme's the Thing,  
Charles L. Becton . . . . . 400