

International Society
of
Barristers

Volume 40

Number 2

PROSECUTING THE BIRMINGHAM BOMBERS
William J. Baxley and C. Douglas Jones

ON THE IMPORTANCE OF LAWYERS
Dennis W. Archer

HAWAII'S DIVERSITY: A PREVIEW OF AMERICA'S CULTURE
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TO TESTIFY OR NOT TO TESTIFY, THAT IS THE QUESTION
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I DON'T MAKE THIS STUFF UP:
A HUMORIST'S VIEW OF THE CURRENT SCENE
Will Durst

Quarterly

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John W. Reed, *Editor*

PROSECUTING THE BIRMINGHAM BOMBERS†

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

BACKGROUND: *MR. JONES*

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

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

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

† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Hualalai, Kona, Hawaii, March 7, 2005.

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his little 8 mm. camera and caught on film what happened to Fred Shuttlesworth and his wife.

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

We now fast forward to 1963, which was a big year in Birmingham. It was the year that Dr. King brought the movement to Birmingham. He had been to Albany, Georgia, and other places, and in the spring of 1963 he arrived in Birmingham to desegregate the most segregated city in America. Many of the adults in Birmingham's black population worked in the factories or foundries or as domestic help, so the adults couldn't take to the streets to participate in any marches or demonstrations, because they knew they would lose their jobs, and they would not have the money to feed their families. Someone came up with the brilliant idea of having the children march. The Birmingham marches became known as the children's marches because it was teenagers and college students who took to the streets of Birmingham. They would gather at the Sixteenth Street Baptist Church to plan the strategy for the peaceful marches. But as soon as they left the church and crossed into Kelly Ingram Park across the street, Bull Connor and his dogs and fire hoses met the kids. All of those images of Birmingham are ingrained in the memories of many of us to this day, and Birmingham still has a hard time overcoming the impressions the world received then. Bull Connor even had an armored personnel carrier to keep people in their place. At one point in the spring there were 2000 black children in the Birmingham city jails—so many children that they had to set up a makeshift jail at the state fairground. For the first time Dr. King and Reverend Shuttlesworth were not the only focal points and symbols of the movement in Birmingham; the children and the Sixteenth Street Baptist Church also became focal points and symbols in the spring of 1963.

Dr. King, Reverend Shuttlesworth, and Reverend Abernathy announced a modest settlement in April or May. City officials took down the colored and white signs from the restrooms and the water fountains. They inte-

grated the public facilities and allowed black people to sit next to white people at a lunch counter downtown. They repealed laws that made it illegal for a black man and a white man to play checkers together in public. But they wouldn't hire black police officers; they wouldn't go that far.

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

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

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

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

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

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

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

After the bombing there was an incredible effort to solve the case. The F.B.I. often gets a bad rap about this because they never did solve it, but as lawyers you all know that there are unsolved murders all across this country, and they did yeomen's service. But for their work, Bill couldn't have had success and I couldn't have had success in our later efforts.

The F.B.I. had zeroed in on a number of suspects in the case, a group of Klansmen who were members of the Eastview Thirteen klavern but who also met outside the Klan because they thought the Klan was not doing enough to stop civil rights. Robert Chambliss was chief among this splinter group. He was known as “Dynamite Bob,” thought to be responsible for many of the twenty to thirty bombings that had occurred in the black community over a twenty-year period. Birmingham was known as “Bombing-

ham,” and the black community was known as “Dynamite Hill.” These bombings had triggered virtually no investigation and fortunately very little injury (and no deaths)—until 1963. Also in the Chambliss group were Tommy Blanton, the youngest (just in his twenties in 1963) and a Chambliss protege, and Bobby Frank Cherry, the cockiest of the group. Not only did these men meet outside their regular Klan meetings to plan extra actions, but they also went to a place underneath a bridge just outside Birmingham—just like the trolls that we heard about as kids. They became known as the Cahaba River bridge boys. The F.B.I. thought, and I think, that the church bomb plan was hatched under that bridge. The person we believe was the bomb maker, who is long since dead, lived not far from there. (This group also would meet at the Modern Sign Shop, where the owner let them make their George Wallace bumper stickers and all of the signs and Confederate flags they would use in their protests.) These were the F.B.I.’s suspects, but despite the Bureau’s best efforts, they couldn’t develop enough evidence. The case was closed in 1968, and it was thought to be dead.

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

THE CHAMBLISS CASE: *MR. BAXLEY*

Personal Background

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

So you can see that I’m a native Southerner and native Alabamian as far back as you can go. But from the earliest time I can remember, I thought that

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

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

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

Investigation of the Bombing

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

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

After a year and a half or so, we had pulled together enough information to feel confident that Chambliss and his group were the ones who were responsible. (Bear in mind this was not a situation where we could assign a task force to this case. We had other duties, and this was something we did on the side, when I had a little time or could draw in other people. It was not well focused or organized.) The more certain we became that we were on the right track, however, the more we realized that from the very beginning Chambliss and his group had been the F.B.I.'s prime suspects, and we realized we had to have access to the F.B.I.'s files, not only to help us in our investigation but to make sure that people who were talking to us were being consistent with what they had told the F.B.I. I didn't anticipate having any

trouble getting access to the files because I had a good record of cooperating with the F.B.I.—but I was wrong. They kept giving me runaround after runaround and refused to help, both before and after the death of J. Edgar Hoover. I wasted about two years trying to convince the F.B.I. to give us access to their records, and I feared that we would not be able to go any further toward prosecution if we didn't have access to their files.

One day I was in Washington on another matter. A friend of mine, Jack Nelson, who was originally from Alabama, was the chief of the Washington bureau of the *Los Angeles Times*, and we got together that evening. He knew that I had been working on the bombing case and asked if I was still working on it. I told him I was but we might have reached a dead end because we had to have F.B.I.'s help but couldn't seem to get it. He said, "Do you want me to try to help you? I think I can help you." I said, "Sure." By then Gerald Ford had become President and Ed Levi was the Attorney General. Nelson went to Levi and told him that the *L. A. Times* had planned a series of stories (I didn't know whether they had or not) that would run on the front page of the *Times* for a week, saying that the Alabama attorney general had solved the bombing case, and the F.B.I. was blocking the prosecution of the murderers. Nelson said he was going to bring the families of the victims to Washington and take their pictures outside the F.B.I. building, and he said that the *Times* planned to submit the series for a Pulitzer. Levi, or someone at the Justice Department, said, "Would you hold off; can you give me a couple of weeks?" Nelson said, "Well, yeah, I'll do that." They called Nelson back and told him they would cooperate. The F.B.I. called me and said they were willing to give me access to the files.

I was on the road when I got that call. I called Bob Eddy, an investigator in my office, and said, "Bob, we've been running this thing in a haphazard way. You go to Birmingham, get a motel room, plan to stay there for the rest of my term if it takes that long, and make this the only thing you're working on. Close out all your other cases, give them to other people, and let's solve this bombing case." Eddy did that; he took our files and started working with the F.B.I. We learned much later the F.B.I. didn't cooperate fully with us, but whenever we knew what to ask for, they provided it, and had it not been for their help we would not have been able to prosecute anyone.

Eddy spent about a year in Birmingham. He came back and said it was not the strongest case in the world, but he thought it was all we were going to be able to put together. I went to Chris McNair, Denise's father, and said, "Chris, we know who did it, but I'm afraid that we've got much less than a fifty percent chance of a conviction. A lot of people know about this, and one of these days somebody's going to talk. There are people who are telling us things but can't testify. It might be better not to do anything and wait until

other people start to talk and provide a stronger case. If you try them and they get acquitted, you can't ever try them again." Chris replied, "I'd rather you go ahead if you think you've got the right people. I don't have any confidence that when you're out of office, anybody else will come along that will even try." So we proceeded.

The Trial of Chambliss

We chose to indict only Chambliss because our strongest case was against him, and he was the instigator and ringleader. I believe that if Chambliss had not been there, the others would not have been quite as bad. We indicted him in four separate cases and started to prepare for trial.

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

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

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

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

The next morning was when the jury returned with the verdict. Art senior sent Art junior to tell Mrs. Chambliss. What they didn't know was that Mrs. Chambliss had been cooperating with us (and had cooperated with the F.B.I. right after the bombing, although we didn't know about that). She and her sister and many other relatives of Chambliss and of others involved had cooperated with investigators. Chambliss was a bad guy to his family as well

as other people. Art junior didn't know any of this. When he arrived at the Chambliss home, the blinds and curtains were drawn, and it was dark and dusty. He knocked on the door, and a voice said, "Come in." Mrs. Chambliss was lying on the couch with a towel on her head. Art said, "Mrs. Chambliss, I'm sorry to tell you, the jury just came back and convicted Robert. Dad said to come out here and tell you Robert won't be coming home. [He'd been out on bond all this time.] They took him to jail." She said, "What does that mean?" "He can't get bond. We're going to appeal the case, but he won't be able to get out on bond unless it's reversed. We're afraid that it doesn't look good to get it reversed, and at his age he might not ever come home." "You mean he's not going to come home tonight?" "No, Ma'am." "You think he's not going to come home ever?" "Well, it's not likely." "He's not going to come home *again*?" "I don't think so. You'd better pack up some stuff and go see him in the jail." "You mean you're sure, young man, he's not coming home?" "That's what our opinion is." She jumped up, threw that towel across the room, opened the blinds and curtains, started dancing, and sang, "Hallelujah, hallelujah, hallelujah!"

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

THE BLANTON AND CHERRY TRIALS: *MR. JONES*

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

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

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

The Blanton Trial

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

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

Many family members who had avoided the public eye for so long came to our trials. Junie Collins, who was Addie Mae’s sister, and Eunice Davis, who was Cynthia Wesley’s sister, came. Eunice had heard about the bombing on the radio and had to go to the Wesley home to find out that her sister had been killed. Maxine McNair, the mother of Denise, testified. She had

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

One of the new witnesses in the Blanton case, James Lay, was part of a civil defense group that would patrol the black neighborhood and churches. After working their regular jobs in the daytime, they would spend their nights on watch, to try to protect the homes and churches of the black leaders. Two weeks before the bombing, Lay, a postal worker, went by the church at one o'clock in the morning, and he saw a Ford parked there and two white men, one sitting in the car and one standing by the steps holding a satchel. When the men realized someone was watching, they turned the lights off and drove away quickly. Lay then got a friend of his to help him look around, but they didn't see anything. They called the Birmingham police, but the Birmingham police, of course, wrote no report and told Lay to go on home, that he didn't see a damn thing. Two weeks later Lay was three blocks away when the bomb exploded. He went to the church and helped pull out the bodies. He told the F.B.I. what he had reported to the police two weeks before, and the F.B.I. agents showed him pictures of about a hundred Klansmen. Out of all those pictures, he picked out two—Bob Chambliss and Tommy Blanton. Blanton was the one standing by those steps with a satchel in his hand at one o'clock in the morning. Obviously Lay was a critical witness for us.

There also was an informant, Mitch Burns, of whom Bill had never heard because the F.B.I. kept him under wraps. Mitch was an old Klansman, but he was not a violent guy, and when he saw the morgue pictures of the girls, he broke down and cried and said he would do whatever he could to help. For two years he rode around with Tommy Blanton; they would go out drinking and carousing. Even though Blanton drove, they'd always take Mitch's car because Blanton was convinced his car was bugged by the F.B.I., which was funny because it was actually Mitch's car that was

bugged. We had all sorts of tape recordings of Blanton, and one of Cherry because they picked him up one time, and they were vile. Blanton always wanted to drive by the church, and he would laugh about what “they” would do when he bombed his “next church.” And at one point when they were picking up Cherry, Blanton turned into an alley behind Cherry’s house and said, “I almost missed this alley the night we bombed the church.” When it came time for cross-examination, the defense lawyer did a great job and tried to impeach Burns, but he couldn’t impeach the tapes. The tapes spoke for themselves.

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

At the time of the bombing, Blanton had a regular Friday night date with a high school senior named Jean Casey, but he had broken the date on the Friday before the bombing. They went out on Saturday instead. After the bombing, when Blanton was questioned by the F.B.I., he realized that he had to get his alibi straight, but he and Jean couldn’t seem to coordinate the details. Lo and behold, he married Jean in the spring—a move with privilege implications, of course. In 1964 an F.B.I. informant rented the apartment next to the Blantons’ and posed as a truck driver. The F.B.I. tore out a wall and put a little microphone in a hole right into the Blanton’s kitchen. I won’t tell you now exactly how we got that tape into evidence—that’s a story for another day—but this was a crucial piece of evidence that had been buried in a back corner of the F.B.I. This is a conversation between Jean and Tommy in their kitchen:¹ “You never bothered to tell me what you went to the river for, Tommy.” “What did you tell ’em I did?” “They asked me what you went for, and I told them I didn’t know.” “They were interested in the meeting I went to; they knew I was at the meeting.” “What meeting?” “The big one.” “What big one?” “The meeting where we planned the bomb.” “Tommy, what meeting are you talking about?” “You [we?] had to have a meeting to make a bomb.” You can see the significance of the various tapes. Three times Blanton, in his own voice, had referred to being part of the bombing. The jury took only two and a half hours to convict him.

¹ The tape as played during Mr. Jones’s presentation was not entirely clear. Ed.

The Cherry Trial

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

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

Another person who came to us was Willadean Brogdon, Cherry's third wife. She had married him in 1970, but they got divorced in 1973, and she had never been heard from again. Baxley had tried to find her, and we tried to find her but could not. Then a story about Cherry got on the AP wire, and Willadean Brogdon picked it up in a little town in Montana. She drove about two hundred miles to her local F.B.I. office and said, "I know something about this case. I know something about this man; I was married to him. Let me tell you about the time when the car broke down by the church, and he pointed out where they planted the bomb. And he threatened me and said he had killed and would kill again. And he talked about it over and over." She introduced us to her brother, to whom Cherry had also made admissions. I said, "Willadean, where have you been for so long?" She said, "Let me tell you something: this man was mean. I left him once and went to Chicago, and he tracked me down, and like a fool I took him back. We were moving back to Birmingham, and I made up my mind I was going to leave, so I

drove the family station wagon, and I pulled up in front of my sister's house, and he got out and slammed the door, and I slammed the gas, and I never looked back." She drove all the way from Montana to be a witness for us.

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

Justice Nearly Denied

We were fortunate to bring these cases when we did. We nearly missed having the critical testimony of James Lay. Two months before the trial in the Blanton case opened, Lay had a stroke, and then had another. He had been an incredible witness in front of the grand jury—a soft-spoken, lean-over-the-chair kind of witness—but he was in a nursing home by the time of the trial. Although his body was ravaged, his mind was still fine, and he wanted to testify; but I was worried about how weak he was. I made a deal with the defense lawyer: He allowed me to have someone read Mr. Lay's grand jury testimony, and I allowed him to use some hearsay and try to impeach Mr. Lay in ways he couldn't otherwise have done because of the passage of time. Shortly after the Blanton trial ended, Mr. Lay died. If our case had been delayed just sixty days, his vital testimony would have been lost.

Somewhat similarly, we had an F.B.I. agent who was an important witness because he had interviewed Blanton shortly after the bombing and could testify that Blanton lied about his whereabouts on the weekend of the bombing. When this agent (former agent) was in Montgomery on his way to Birmingham to testify in our trial, he suffered heart failure. He survived and was all right but, to enable him to testify, the cardiologist who treated him in Montgomery canceled other appointments and came to sit

with him during his testimony. We also had two paramedics with a full crash cart and defibrillator in the courtroom.

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

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

The Fifth Victim in the Ladies' Lounge

I always like to end any discussions of the bombing and trials with this reminder: Everyone talks about the four little girls, but there were really five in that ladies' lounge that Sunday morning. Sarah Collins (now Sarah Collins Rudolph) was there with her sister Addie Mae. As our last witness, Sarah testified about going to the church that morning with her sisters, without a care in the world. They skipped on the way to church and then she and Addie Mae went down to the ladies' lounge to do all the things that little girls do. I asked, "Sarah, what did you do?" She said, "We were all getting ready, and I went over to that sink. I was going to wash my hands." "What did you do there?" "I turned around." "What did you see when you turned around?" She said, "Well, I saw my sister tying the sash of Denise McNair's new dress." "What happened?" "Well, then there was the explosion, and I got covered with debris. I couldn't move, and I could barely breathe, and I couldn't see." "Sarah, what did you do?" "I just called out to the person I knew to call out to and that was my sister." The courtroom got dead quiet. I said, "What did you say?" She said, "I called out 'Addie, Addie, Addie.'" "Did you ever see her alive again?" "No, sir." And with that, the State of Alabama rested its case.

The defense lawyers did a remarkable job of trying to poke holes in our case, but they couldn't overcome their own clients, neither of whom could take the stand. They couldn't overcome the hate that was revealed that morning in 1963, and we now had black and white jurors who looked at the evidence in a whole new light, a light under the sunshine instead of the old black and white images. And they couldn't get away from a beautiful picture of Denise McNair, taken by her father, in which the brightly smiling Denise was

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

ON THE IMPORTANCE OF LAWYERS†

Dennis W. Archer*

My views on the role and importance of lawyers are deeply rooted in my own personal experiences as a child and as a young man growing up in Michigan. I was born in Detroit but I grew up in the small town of Cassopolis, Michigan, about 187 miles southwest of Detroit. My father had a third-grade education, and he lost his left arm just above the elbow before I was born. My mother had a high school education. I started working at the age of eight. Over the years, I was a caddy on a golf course, set pins in a bowling alley, and did a number of other odd jobs to work my way through high school, college, and, eventually, law school. My parents always stressed the importance of education and were determined that I attend college. After graduating from Cassopolis High School, I began at Wayne State University in Detroit but ultimately graduated from Western Michigan University in Kalamazoo. I became a teacher and taught learning-disabled students in Detroit public schools. I started to work toward a master's degree in order to become a school principal, but I was frustrated to find in the first two classes that I was using the same textbooks I had used as an undergraduate. When I mentioned this to the young lady I was dating at the time, she suggested that I go to law school. I told her that I knew absolutely nothing about the law, but she made me believe that I would come to love the legal profession—so I took the LSAT, entered law school, and fell in love with the law. (Jack Liber mentioned, in his observations at the beginning of the meeting, that our spouses and “significant others” play an important role in our being here. That is especially true for me; the young lady who convinced me to go to law school became my wife, Trudy. She later became a lawyer as well, and has enjoyed a rewarding and distinguished career as a lawyer and as a state district court judge.)

I passed the bar in 1970 and became active in several bar associations. In my first fifteen years of practicing law, I represented both plaintiffs and defendants, and I taught courses at both Wayne State University Law School and Detroit College of Law, from which I had graduated. In 1985 Governor James Blanchard appointed me to fill a vacancy on the Michigan Supreme

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Court, and in 1986 I won an eight-year term on that court. But I kept reading about the problems in the city of Detroit, and I felt a calling to try to make a difference there. I believed that improving Detroit would help my state even more than my service on the court. So I resigned from the Michigan Supreme Court in 1990 and began a trek toward running for the office of Detroit mayor. I announced in 1992, was elected in November of 1993, and took office in January of 1994. And I enjoyed the opportunity and the privilege of being mayor, although the first few days were quite a shock. Imagine going into the office as the new mayor, looking in every drawer, and finding *nothing*. There was not one letter, not one piece of paper, nothing to give me information or help with the transition. It was, to say the least, very interesting.

PUBLIC SERVICE

Throughout my career I have focused on leadership through public service, and I think that is one of the most important aspects, if not *the* most important, of being a lawyer. Yes, we as lawyers vigorously promote the interests of our clients and serve as officers of the court. But it is through public service and the willingness and ability to lead by example that lawyers make their lasting marks on society.

Public service includes not just the traditional definition of literally being a public servant through government service, but also volunteering to lend our special skills as lawyers to a variety of worthy causes and organizations in our communities. As lawyers we make a commitment to serve the poor and the defenseless, whether that work is done pro bono or for a nominal fee. The long list of lawyers who have performed well-known public service stretches from Thomas Jefferson, John Adams, and Abraham Lincoln to Thurgood Marshall, Constance Baker Motley, William Fulbright, and many more whose leadership has changed our world for the better. I believe that my training and experiences as a lawyer and a judge made me a better mayor, and I strongly encourage more lawyers to become involved in elective public service.

Other professions and disciplines bring invaluable skills to public service as well, but we must not allow lawyers to become a rarity in public life. Lawyering in my view is a calling, a calling to serve the public and to be a force for good. And I don't hesitate to use "calling" in the religious sense because I firmly believe that lawyers are ministers of justice. Perhaps no one said it better than Mahatma Gandhi, himself a lawyer, who concluded that "the true function of a lawyer was to unite parties riven asunder." Those of us who have been honored to be called to the bar have a special responsibility to live up to the highest standards of ethics and to assure that all lawyers

do the same. The Fellows of the International Society of Barristers recognize this responsibility and focus tremendous energies on promoting ethics, fair dealing, and professionalism. The American Bar Association devotes substantial resources and energy to defining the lawyer's ethical responsibilities, as in the *Model Rules of Professional Conduct*. It is critical that our profession continue to regulate itself and provide guidance on ethical issues to all members, lest others usurp that role.

Members of the legal profession also have an opportunity to stress the overriding importance of education. As many have noted before, education is a silver bullet that holds out the promise of easing nearly every social ill that confronts us. Education is an issue that is near and dear to my heart. My first professional experience, as I mentioned earlier, was as a public school teacher. I am deeply committed to a quality, free public education for every child in America. Parents, teachers, school administrators, business leaders, government officials, community leaders, faith-based organizations, and yes, lawyers must come together to help promote an educated and diverse American workforce that can compete worldwide. Lawyers and judges have an opportunity to steer more talented young people, particularly students of color, into legal careers.

Serving as the 127th president of the American Bar Association was one of the most rewarding experiences of my career, and I was extremely proud and honored to be the first person of color to lead that organization, which wasn't even open to people like me until 1943. The first person of color joined in 1948. When I assumed the office of president, I stood on the shoulders of legal giants such as William Hastings, Leon Higginbotham, Charles Hamilton Houston, Damon Keith, Wade McCree, Otis Smith, George Crockett, Jr., Thurgood Marshall, Fred Gray, and many others. As young lawyers, they were kept out of the great debates within the Association because of the color of their skin; yet these great leaders of the bar still served as an inspiration to me and to all who strive to promote a profession that is inclusive, committed to excellence, and truly representative of the society it serves.

As president of the ABA, I learned first hand the importance of the influence the Association has in all matters affecting the practice of law and our system of justice. Without taking anything away from the importance and accomplishments of the many fine associations of lawyers in the United States and around the world, including this great Society, the American Bar Association is simply the natural leader of our profession. It leads because it represents all segments and all disciplines within the bar and because of its status as the largest voluntary professional association in the world. It has over 413,000 members. But its strength also lies in its approach to issues of importance to lawyers. Unlike many other professional associations, it does

not have a PAC, and it does not endorse candidates or otherwise become involved in partisan politics. Instead of hiring outside lobbyists to promote our legislative priorities, it relies upon a highly effective team of full-time staff members who provide great expertise and continuity to the Association. Over the last six years it has been on the prevailing side eighty-five percent of the time when it has lobbied on active legislation. That's not a bad batting average.

Recent successes that have benefitted society at large and the profession include the administration's guidelines for military tribunals along the lines urged by the ABA House of Delegates, and the decision of the United States Supreme Court in the *Hamdi* case, which reaffirmed principles voiced in the ABA's amicus brief that United States citizens deprived of liberty are entitled to contest the bases of their detentions in a court of law and must have access to counsel to assist them in their efforts. Many of you are also aware of the latest developments in the case involving U.S. citizen Jose Padilla, who has been held without charges in a military brig in South Carolina since 2002. A federal judge recently ordered the administration to either charge Padilla or release him. The ABA contributed to the passage of the comprehensive Service Members' Civil Relief Act, which updates, modernizes, and expands the range of civil protections for our service members formerly provided under the Soldiers' and Sailors' Civil Relief Act of 1940, so they and their families are not penalized when they accept the call of active duty. We successfully fought to restore funding for the Thurgood Marshall Legal Educational Opportunity Program administered by the ABA's CLEO. Congress had zeroed out that program in fiscal year 2004 after several years of funding, but we obtained three million dollars for fiscal year 2005. Other successes: passage of the Military Family Tax Fairness Act, which allowed service members and their families to qualify for exemption from capital gains tax on the sale of their homes despite extended tours outside of the state or the country; consistent defeat of efforts to impose arbitrary caps on damages in medical malpractice cases; funding of the Legal Services Corporation; cost of living salary adjustments for our federal judges. One tremendous court victory came in a suit filed by the New York State Bar and the ABA, supported by many other bars, challenging the Federal Trade Commission's decision that lawyers are "financial institutions" within the meaning of Gramm-Leach-Bliley. Last week the United States Supreme Court agreed with the ABA position that children under the age of eighteen should not be executed, ending a practice allowed in twenty states.

I could go on, but suffice it to say that no group in this country is having a greater positive impact (depending upon your point of view) on national public policy than is the organized bar. I know that many of you are active

in the American Bar Association, but if you are not, I would urge you to join because the ABA needs your voices, your ideas, and your support to remain a strong advocate for our profession. The ABA is truly a big tent, and nothing demonstrates that better than the debates in the House of Delegates, where the tremendous range of opinions and viewpoints of our members is showcased twice a year. Adlai Stevenson's famous observation, "Freedom rings whenever opinions clash," certainly applies to the debate and formulation of policy within the American Bar Association.

As president-elect and president of the American Bar, I traveled the country and the world speaking on issues of utmost importance to our profession. I spoke to more than sixty-five state, local, and specialty bar associations, delivered commencement speeches, and lectured to some thirty-five law schools, visited nine foreign countries, was interviewed by hundreds of radio, newspaper, and television representatives, and addressed as many ABA entities, law firms, corporations, business groups, service clubs, legal aid societies, and judicial conferences as humanly possible. Throughout my travels, I never failed to be impressed with the work that lawyers do and the generosity with which you offer your time, your knowledge, and your skills. I was especially moved by the contributions of our JAG officers and all service members, who make tremendous sacrifices every day to secure peace and stability so that our country can prevent and defend against terrorist attacks. Our troops in Iraq, Afghanistan, Korea, and elsewhere are giving a selfless service to our country, and we cannot do anything less than extend our greatest support financially, morally, and spiritually for their continuing efforts at home and abroad.

IMPROVING DIVERSITY IN THE PROFESSION

The highlights of my term as president are many, but I'd like to share a few with you. The fiftieth anniversary of the United States Supreme Court decision in *Brown v. Board of Education* occurred in 2004. We were fortunate to have the support of Mrs. Thurgood Marshall and many others in a series of events and activities to celebrate the *Brown* decision and to plan a course to ensure that the spirit of *Brown* continues to guide our ongoing pursuit of justice for all. Professor Charles Ogletree of Harvard University chaired a special commission that sparked a national dialogue on the continuing relevance of *Brown* and the challenges we face. The anniversary of *Brown* was also the theme for Law Day 2004, which brought discussions of the importance of the decision into thousands of classrooms. As we looked back on *Brown*, it was clear to many of us that we could not truly celebrate fifty years of *Brown* because some states and some cities did not implement

the decision for seventeen or twenty years, and did so only when forced by lawsuits. So there's still work to be done.

Two major conferences on diversity issues and women in the profession were held during my term as president. First was a diversity conference in October, 2003, in Washington, D.C. Charles Morgan, executive vice president and general counsel of BellSouth, led this effort as chair of the Council on Racial and Ethnic Justice. The event brought together corporate general counsels with leaders of the ABA sections of litigation, business law, and labor and employment law, to discuss ways to open a pipeline for students of color to attend law school and to enhance the representation of lawyers of color at the highest levels of private practice as managing partners or corporate general counsels. The second was a national women's summit on general counsels and managing partners in May, 2004, led by Diane Yu, who was chair of the Commission on Women. The summit brought together the leaders of business and legal communities to identify strategies for improving the status of women in law firms and corporations and for leveraging the clout of women lawyers. Participants in the summit discussed the best practices to strengthen the advancement and retention efforts in their law firms and companies.

The importance of promoting a more diverse and inclusive legal profession cannot be overstated. Today's world is a world where the majority of people are people of color, from the African continent to Latin America to Asia. In China alone there are over 1.3 billion people, followed closely by India with over one billion. These countries are fast becoming economic forces with which we must contend. People of color are not now in the majority in the United States of America; we have about 294,000,000 people, and just over thirty percent of us are people of color. However, according to United States census forecasts, Hispanic and Asian-American populations are expected to triple by 2050.

Demographers and social scientists began predicting this change back in 1982 and 1983; based on the relaxation of immigration rules and birth rates, they predicted that the majority of people living in the United States would be people of color by the year 2056. That was hard to imagine or accept back then, because African-Americans represented maybe eight to nine percent of America's population, but the business community put their people to work on it—the economists and those in marketing—and found the prediction to be accurate. That's why, in the late 1980s, we began to see print advertising designed to appeal to people of color. And later in the 1990s we increasingly saw, and still see, people of color advertising on television.

In the legal profession, the American Bar Association's Commission on Opportunities for Minorities started a minority counsel demonstration project in Dallas, Texas, in 1988. We hoped that we would be successful enough

to attract six large corporations, six large law firms, and twenty-one minority-owned law firms, to show everyone that you did not have to give up anything in quality if you had minority lawyers. We believed that if we demonstrated that, we could open the doors to large and medium-sized law firms to fully integrate our profession. When I left that chairmanship after three years, we had 139 corporations, 31 large law firms, and 59 minority-owned law firms. The corporations were not limited to the law firms that were in this pilot program, but they spent over \$77,000,000 in legal fees. They helped change the legal environment in America. We still have a lot of work to do, but I'm delighted to say that we are making great strides, not only in law firms and corporations but also in the courts and law school faculties.

American Bar Association members have shown that we mean business when we say the doors must be open to all. Following me as president was Robert Grey, Jr., the ABA's second African-American president. We also elected Stephen Zack, a Cuban-American, as chair of the House of Delegates, and Armando Lasa-Ferrer, a Latino-American from Puerto Rico, as our secretary-elect. Mike Greco is the first immigrant to become president-elect, and he has pledged that he will continue to lead us in diversity.

Another major initiative was undertaken in response to a talk by Justice Anthony Kennedy. He came to our annual meeting in San Francisco and challenged our profession to take a look at the inequities and injustices in our sentencing and incarceration policies. He delivered a stirring address in which he called for a thoughtful examination of mandatory minimum sentencing laws, the application of the sentencing guidelines, conditions of confinement in our prisons and jails, and barriers to successful re-entry of former prisoners into society. In response to his call, the ABA formed the Justice Kennedy Commission, which issued a comprehensive series of recommendations that were adopted by the House of Delegates in August of 2004. The recommendations of the Justice Kennedy Commission have become even more timely in light of the Supreme Court decision in the *Booker* and *Fanfan* cases, which found aspects of the application of the sentencing guidelines to be in conflict with the Sixth Amendment's right to trial by jury.

ESTABLISHING THE RULE OF LAW INTERNATIONALLY

In the international arena the organized bar has helped to establish the rule of law in emerging democracies around the world. Through its international initiatives the ABA has promoted the strong and independent profession and judiciary, the indispensable prerequisites for establishing the rule of law. Most national constitutions, even those found in countries suffering under dictatorial or repressive regimes, contain the *forms* of the rule of law; they

provide for the redress of grievances and an independent judiciary. But those are empty promises without a truly strong and independent legal profession. Lawyers breathe life into the cold, hard forms of written law and give substance to the promise of equal justice for all.

We see the power of the rule of law across the globe, as nations formerly subject to the capricious whims of tyrants and despots take giant steps toward becoming free democratic societies. Lawyers and judges are leading the way in places like the Republic of Georgia, which recently held the first congress of the new Georgian national bar association. We see lawyers and judges leading the way in Ukraine, where the recent peaceful “orange revolution” was made possible by the courageous and correct decision of the Ukrainian Supreme Court to throw out initial election results that were tainted by fraud. This allowed the people to select their new leader in a free and fair election.

I am immensely proud of the role the American Bar Association has played in helping countries across the globe make the transition to government under the rule of law. The international law section and various law initiatives on other continents have worked tirelessly to bring justice, peace, and the rule of law to every corner of the globe, no matter the risk involved. I’ve had the privilege of traveling to Moscow, Cambodia, Nigeria, Kenya, and other places around the world, and have seen the great work done by the lawyers who participate, the judges who participate, the law professors who participate. Consider, for example, going to Cambodia after reading about the “killing fields” and knowing that the Khmer Rouge killed every lawyer and judge except for six. A young female lawyer, Fern Holland, went to Iraq because she wanted to help the women there. Among other activities, she was working on a women’s rights plank in the new constitution. She and two others with her were killed, the first U.S. civilians to be murdered. She was killed because she was there to make a difference. That’s why I don’t laugh at lawyer jokes.

I would like to remind all of you that lawyers play their most important role as healers. You do it every day by giving voice to those who have no resources, who are too young, too ill, or too poor to defend themselves. You help families, business partners, and corporations resolve their differences and find solutions to their problems. You defend the rights of even those who are most reviled in society, and sometimes you do so against your own self-interest. Lawyers across the globe put their livelihoods and their lives on the line to advance the cause of justice. They help build justice systems, train lawyers, write constitutions—often at the cost of great personal hardship and even death. I don’t think that there is a chamber of commerce or a charitable organization or a committee formed to help people that does not have a lawyer serving on it. We do good work.

That's why I'm so delighted to be here. Jack Liber shared with us the original intent of the founders of our Society: We come together to get to know one another, to relax completely, to hear great lectures that enliven and energize us, to recharge ourselves so that we can go back home ready to fight the battles that we fight. It helps to realize and remember the good work that we do, to remember why we went to law school in the first instance—to help people. Lawyers are healers.

A NOTE OF GRATITUDE

In closing, I want to say something to those of you who are not lawyers, who are with someone who is a lawyer. You are here because you are very important to the person who asked you to come, you are part of our lives. I have been married now for almost thirty-eight years, and it has made a difference in my life, especially when I had to get up and go to fight battles that were challenging and sometimes not of my own making. I know that we could not do what we do without you, your support, your help, your guidance, and your listening to us. That you are there holding us up with that hand at our back when we're most tired is what makes us who we are. You are very much our partners. So I thank all of you for being here.

HAWAII'S DIVERSITY: A PREVIEW OF AMERICA'S FUTURE†

Ronald T. Y. Moon*

Whenever my wife and I attend a conference or seminar on the mainland, or in another country, we find great pleasure in learning about some unique aspect of the particular state or country we are visiting that sets it apart from other states or countries. Clearly, what has set and still sets Hawaii apart from the other states—aside from our beautiful weather and beaches—is our rich ethnic diversity. As you look around this week and take in the beauty of the mountains and beaches and bask in the warm, sunny weather, you might observe the positive interactions between members of the various ethnic groups.

From these observations, you might conclude that Hawaii is indeed a paradise, a true melting pot of ethnic and racial groups, but I must acknowledge that such a conclusion would not be completely accurate. Although Hawaii has not experienced the racial and ethnic turmoil found in other states, the reality is that issues of discrimination and unfairness do exist. Sometimes they involve our growing immigrant population. Many immigrant groups report subtle but distinct racial and ethnic discrimination in jobs, schools, and housing. One racial-ethnic controversy a few years ago resulted in the rescission of an award given by the Association of Asian American Studies to a Japanese-American author; the Association rescinded its award in response to outcries from the Filipino-American community that the author's book perpetuated the damaging stereotype of Filipino men as sexual predators. Earlier this year a high school located on Oahu made headlines due to fights among students that started after a weekend basketball game and continued at school the following week. The group that was attacked in the weekend altercation was comprised mostly of black students while the assailants were of various other ethnic backgrounds. When the students returned to school after the weekend episode, some racial epithets were hurled on campus, sparking a series of confrontations that resulted in several students being suspended or expelled. Some parents charged that the problems were

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fueled by racial tension between students born in Hawaii and black students whose families are stationed here with the military.

Clearly, Hawaii is no utopia. However, most of our citizens have learned to and do consider the diversity of the people to be a source of positive strength and not merely a situation we must endure. The relationships among Hawaii's diverse peoples and cultures are generally harmonious.

Other states now are rapidly becoming more racially and ethnically diverse. For example, the latest Census Bureau figures show that whites are no longer the majority in California; its white population now comprises approximately 47% of the state's total population, down from 57% in 1990 and 94% in 1950. Currently, there are only two other states where the white population is not the majority—New Mexico at 45%, and Hawaii at 24%—but demographic experts project that by 2050 no race or ethnic group will claim a majority in the United States.

The reality of the nation's changing demographics dictates that we each take stock of our own attitudes about those whom we may view as different. I realize that I may be preaching to the choir inasmuch as the International Society of Barristers clearly lives up to its name, with members from all over the United States and from Puerto Rico, the Virgin Islands, Australia, Canada, England, Scotland, and Mexico. (And, if I may, I would like to express the hope that you are reaching out to other countries and ethnicities.) Nevertheless, I believe that as leaders in our respective communities we must set the example of promoting mutual understanding of and respect for our fellow men and women by taking the time to learn about the cultures, customs, and traditions of other ethnic groups and also by sharing the uniqueness of our own cultural heritage.

Thinking back to my youth, I don't think I realized then how fortunate I was to be living in such an ethnically diverse community. The students at schools I attended in Hawaii were predominantly Asian and Polynesian Americans. It wasn't until I went to a then-foreign country to go to college in a place called Iowa that I came to appreciate the people, the food, and the traditions of Hawaii. My first year in Iowa was truly a culturally shocking experience. I had never before been in the company of so many haoles—which, as you probably have learned, is a Hawaiian word for foreigners that has come to mean whites. For the first time in my life I experienced discrimination. For example, I remember walking into a restaurant and not being served; after being stared at for a long time, I felt uneasy and left. I remember

hailing a cab: The cab pulled up, the driver looked at me, and the cab pulled away from the curb. I remember not being invited to join a fraternity because of the whites-only policy. An even greater blow to my ego occurred when I asked a Caucasian woman out for a date and she could not accept because of her sorority's white clause. In Iowa, for the first time I experienced how it felt to be stereotyped.

I eventually spent seven years in Iowa, starting at the University of Dubuque, transferring to Coe College in Cedar Rapids, and then going on to law school at the University of Iowa; and I did develop some lifelong friendships. One of your members, Joe Meusey, was my classmate at law school. In hindsight, however, I firmly believe that had I taken the time to learn about Iowa, its community, culture, and people before moving there, I wouldn't have felt so isolated and angry, and my assimilation would have occurred sooner and with a lot less stress. After all, it was 1958 when I arrived. The Korean War, which had ended just five years earlier, and the war with Japan, having ended thirteen years before I arrived, were still fresh in the minds of many students, teachers, and townfolk. It did not occur to me until a few years later that many Iowans had relatives, friends, and acquaintances who had fought against the Japanese in World War II and against the North Koreans and the Chinese in the Korean War. Many had lost loved ones and friends, and many associated Asian-Americans, without distinction, with the enemies of both wars. The Iowans also were probably unaware of the positive contributions made by Asian-Americans to the security and development of the United States. For example, the most decorated United States military unit in the history of this country, the famed 442nd Regiment Combat Team, consisted of Asian-Americans who were predominantly Japanese-Americans with a few Koreans and Chinese-Americans. And the vast majority of soldiers in the 442nd were from Hawaii. (In general, the proportion of Japanese-Americans who volunteered for military service during World War II was the highest of any ethnic group. They were intent on proving their loyalty and allegiance to America and fought courageously in Europe, winning battle after battle against Hitler's army, in spite of the fact that their families back in the United States were rounded up and relocated to concentration camps.) After the war newspapers all over the country carried stories about the 442nd RCT. Upon its return from overseas, it was personally reviewed by the President of the United States, the only military unit to be so honored up to that time.

My personal experience in Iowa many years ago taught me a lesson that many of us must now learn: As the demographics throughout our

country continue to shift, developing mutual understanding among various ethnic groups in our communities is critical. We are seeing more and more emphasis placed on our ability to get along in many forums. Educational institutions across the country are incorporating multicultural studies into their curricula. In the world of business, employers are not only accepting diversity but fostering it through cultural sensitivity training, in an effort to increase the efficiency and effectiveness of their workforce, improve the bottom line, and open the doors for future growth and prosperity.

We see similar trends in the legal profession as well. A good example is the American Bar Association. The first black American to head that organization, Dennis Archer, who is here today, focused during his 2003-04 term on diversity in the legal profession. He supported and promoted the ABA Diversity Center, which facilitates the coordination of resources and efforts among the three ABA entities whose purposes are most directly related to issues of racial and ethnic diversity. The three ABA entities are: the Commission on Racial and Ethnic Diversity in the Profession, which, of course, addresses issues related to racial and ethnic diversity in the legal profession; the Council on Racial and Ethnic Justice, which works to eliminate racial and ethnic bias through education and by involving lawyers and their bar associations in programs designed to eliminate such bias in their communities; and the Advisory Council on Diversity, whose charge is to increase the number of people of color on the track to becoming lawyers and which works diligently to encourage minority students to consider law as a career and then helps them prepare for law school and for passing the bar exams.

In only brief internet research, I was pleased to discover numerous websites of law firms across the country that have incorporated a commitment to diversity in their policies, goals, and mission statements, and have structured recruiting programs to attract minorities and female applicants. Attorneys across the country are also embracing diversity initiatives in order to better serve a multicultural client base. Likewise, judiciaries across the country are working to address diversity issues by promoting programs aimed at improving access to our courts and thereby improving the public's trust and confidence in our system.

On the homefront here in Hawaii, the judiciary, concerned about language barriers, has produced multilingual brochures and videos and established self-help centers in various courthouses to make it easier for our diverse citizenry to navigate through court forms and proceedings. Our multilingual law line offers free recorded telephone

messages on five legal topics—how to get legal services, domestic violence, landlord-tenant, juvenile proceedings, and divorce—in seven languages: Chinese, Filipino, Japanese, Korean, Samoan, Vietnamese, and English. A few years ago the Hawaii judiciary held what might have been the first cultural sensitivity program for judges in the United States. All of our judges were required to attend. The seminar included a self-exploration exercise as well as examined how culture and perceptions affect the decision-making process, and discussed immigrants and the justice system, practice tools for building cultural competency, and language barriers and the proper utilization of interpreters in the courts.

The very composition of Hawaii's supreme court is a demonstration of diversity. We have four associate justices in addition to myself. I am Korean, we have a Jewish male, a Filipino male, an Irish male, and one Japanese-American female—and we all get along pretty well. Indeed, we are a reflection of our community. Because no single ethnic group in Hawaii has claimed the undisputed right to political and cultural control, the various ethnic groups that make up Hawaii's population have learned in large part to tolerate and sincerely respect one another's differences.

I submit that one of the most significant signs of respect and acceptance is for one ethnic group to support and perhaps even adopt or practice the traditions of another group. For example, here in Hawaii we find non-Japanese people celebrating *Yakudoshi*, which is the Japanese traditional good luck birthday party given during the bad luck years of a person's life to dispel danger or weaken the evil spirits that might haunt an individual. For men the years are ages twenty-four, forty-one, and sixty; and for women eighteen and thirty-two. (Evidently as women grow older the evil spirits don't haunt them as much as they do the men.) We also see non-native Hawaiians celebrating their children's first birthdays with birthday luaus, a tradition having its roots in the native Hawaiian culture. And just about everybody in Hawaii celebrates the Chinese New Year with the lighting of fireworks, the eating of *gao* (a traditional Chinese New Year food), and the carving of narcissus bulbs that bloom into intricate arrangements, all for good luck.

Ladies and gentlemen, keeping in mind the prediction by demographic experts that in the not too distant future no race or ethnic group will dominate the United States, I suggest that Hawaii's current racial and ethnic makeup offers a preview of what the future holds for the rest of the country. I am hopeful that as your respective communities

grapple with their growing multicultural workforce and population, all of you as community leaders will look to Hawaii for some insight into the dynamics of an increasingly diverse America and will help your communities implement practices that will foster the highest level of racial and ethnic harmony.

TO TESTIFY OR NOT TO TESTIFY, THAT IS THE QUESTION†

Richard M. Kerger*

An aphorism attributed to Abraham Lincoln declares that it is “[b]etter to remain silent and be thought a fool than to speak out and remove all doubt.” For thirty years, this has been a key issue in almost every criminal case I have handled. I refer, of course, to the decision to put the defendant herself on the witness stand. Initially, it was my view that it was impossible for a defendant to be acquitted unless she testified. In my later years I developed the opinion that it is better not to have your client on the stand if at all possible. Finally, I have reached a firm conclusion and can say with great certitude, “It depends.”

FACTORS TO BE CONSIDERED

Let us begin with the observation that more often than not your client is guilty of something, even if not of the precise offense charged. If he is to testify in a way that will benefit his defense, you run the risk of supporting some level of perjury. Beyond the ethical implications, the fact is that lying generally does not work. There are too many threads to be pulled, too many other witnesses who can refute the fabricated testimony, to make the risk worthwhile. If your client is going to lie, do not call him. It violates the Code of Professional Responsibility, constitutes obstruction of justice, and almost always fails to accomplish your objective.

Another complicating factor that recurs frequently is that this probably is not your client’s first brush with the law. It is one thing to defend against a charge of assault with a deadly weapon and quite another to have the trier of facts aware that your client has two prior convictions for grand theft and one for witness intimidation. You might be able to keep these indiscretions out of the courtroom by establishing that their prejudicial value outweighs their probative worth, but I would not count on that. If your client testifies, you will generally have to disclose these prior convictions—and regardless of the limiting instructions, the jurors will find them persuasive in terms of guilt in the case before them.

† An earlier version of this essay appeared in *The Bulletin* of the American College of Trial Lawyers and *The Ohio Lawyer*.

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To be sure, the existence of prior convictions does not mean you cannot put your client on the stand. It is a common tactic for defense counsel to point out through his questions that on the prior occasions, the defendant admitted his guilt whereas in the case at bar, he is denying his guilt because the charge is not true. If that is the situation, you at least have something to work with in this problem area.

An additional factor you must consider in deciding whether to have your client testify is the court system in which the case is brought. An old friend of mine made a telling observation about the difference between state court and federal court in criminal cases. In state court, he said, the issue is who did it, while in federal court, everyone knows who did what and the issue is whether the “what” is a crime.

In federal court, then, my initial warning about perjury might be alleviated. The client is not going to deny doing what he did but rather will proffer an explanation. This is not perjury. You might lose ground under the sentencing guidelines if there is a conviction, but the goal is to avoid sentencing in the first place, so calling your client as a witness might be an easier decision.

For example, a number of years ago I represented a homebuilder who had a completely clean criminal history. He was charged with grand theft stemming from his practice of “rolling” funds from one house into the next one. Unfortunately, one homeowner became concerned and stopped the final draw on his home, leaving my client without the funds necessary to finish the next home. Since the prospective owner of “the next home” had invested \$40,000 already, he was a bit miffed. He convinced the prosecutor to indict my client.

Our defense was a common one in this sort of white collar crime: My client had no intent to deprive the owner of the funds. He took the stand and convincingly explained that that was the way he had been building houses for years. He had one bank account into which all of the payments from homeowners went and, similarly, from which all homebuilding bills were paid. While the prospective homeowner might have wished that the funds for his house were isolated, that was not the way the builder did business. Although things went sour and the last homeowner lost his money, it was not because the builder intended to steal the money. The jury accepted my client’s version of the story, and he was acquitted. His testimony had not controverted what occurred but instead explained it.

On another occasion I represented the former head of the local chapter of the NAACP. He was charged with stealing from the organization by taking improper expense payments. My client had an exemplary record and the only issue about his taking the stand was whether his testimony would put him in the position of having to tell a lie, one in which he could be snared. It did not. He explained that the method of expense reimbursement was one that had

been in place since before he took over. While the board had not actually reviewed his expense reports, he had nonetheless brought them to every meeting so that they were available to anyone who wanted to see them. He did not intend to take money to which he was not entitled. Again, the jury accepted his explanation of the intent, and he was found not guilty.

Sometimes the evidence in the case may give you a chance to place your client's story in evidence without the risk of cross-examination. If she talked with one of the investigating officers, you might be able to get her version out effectively during cross-examination of the officer. If the prosecutor does not put that officer on the stand, you can call him in your case and then argue whether the government was being fair by not putting him on the stand.

Now let us imagine a client who has a clean criminal history but who is a talker—for example, a man who tells you how the watch was built when you ask him the time. You can try any technique you want—videotape rehearsals of your client's carefully tailored testimony and perhaps even bring in lawyers from other firms to rehearse the cross-examination—but the simple fact is that if your client is over four years old, you are not going to change him. The way he interacts with other human beings has been ingrained, and although you might be able to buff him to a high shine in your office, when he takes the witness stand before the judge and jury, facing the prosecutor and risking a ten-year sentence if things go wrong, he will revert to type regardless of your best efforts. He will talk, and talk, and talk. Get comfortable with him as he is or do not call him.

The problem with the rambling witness is that she appears to be evasive, and juries tend to be very critical of evasive people. Not surprisingly, they think simple, direct questions ought to be answered simply and directly. Your client's habits will convince them she is equivocating in an effort to conceal the truth, and it is more likely that they will convict her. If she must testify, make her appearance brief so that the prosecutor will feel some constraint to limit the cross-examination. Indeed, the trial judge might even limit the scope of cross if your direct is focused, although you cannot be sure of that. And put her on about thirty minutes after lunch!

One of the obvious differences between criminal and civil cases is the availability of depositions. In most jurisdictions, depositions are not available to either side in a criminal case, absent some unusual circumstances. Even if depositions are available, your client is protected from them by her constitutional rights under the Fifth Amendment. That might seem great, but it denies you the opportunity to see how your client will handle herself on the stand. To be sure, there are significant differences between the deposition and trial settings, but even in a deposition your opponent generally will do a better job of revealing your client's testimonial weaknesses

than you will in practice sessions. Your client's constitutional protections sometimes have unintended consequences.

The danger in putting your client on is simple: It will become a one-witness case. If your client is charming, great. Put him on. The jury will love him, and everyone gets to go home early. You probably do not get many clients of that type, however. Most are filled with an admixture of fear, hate, and uncertainty, which can produce testimony that is equivocal at best. And in my experience an equivocal client is a convicted one.

Without a doubt, there are cases in which your client has to testify. In one of my cases, a young man was charged with faking his own kidnapping. After initially telling police the details of his kidnapping, he had a hostile confrontation with an FBI agent that led him to recant his original story and confess to having faked his own kidnapping. Subsequently, he recanted that confession. These various statements could be explained only by him; he had to testify. Unfortunately, the jury did not accept his innocence. I did and still do. I thought he testified well, but the particular group of twelve did not. That is the risk.

POSSIBLE APPROACH IF YOUR CLIENT WILL NOT TESTIFY

Let me give you a couple of suggestions on how to handle the situation if you conclude that your client should not testify. First, never make a final decision about her testifying until the last possible moment. Second, sensitize the jury in voir dire and opening to the possibility that your client will not testify. Consider this for your opening:

Now, Ms. Smith at this point intends to explain to you her actions on December 12th. But we have not yet heard the government's case. As the Judge will tell you, a criminal defendant has the right not to testify and you may not consider that fact. Certainly you know as a matter of your common sense that if Ms. Smith takes the witness stand, she will deny that she committed the crime, but I doubt that many of you would necessarily take her at her word. You would want to see the other evidence. We may choose to bring you only the other evidence. And then again, it may be that I will conclude that the Government has not met its burden, and we will offer no proof. That will be my decision, however, and hold it against me if you wish, but not Ms. Smith.

The explanation is simpler if you decide to introduce no evidence, or at least no testimonial proof. But be under no misapprehension. Despite all of

your arguments and the judge's admonitions, the jurors want the defendant to take the witness stand and explain her conduct. You might be able to overcome this concern on the jury's part, but the desire to hear your client's story is a real speed bump on her route to freedom.

And frankly, there is a temptation to play it safe. If your client wants to testify and you let her, any conviction can be laid at her feet. If she yields to your advice and remains silent, any conviction has your fingerprints all over it.

You may use focus groups, mock juries, or consultants to help make the decision. Videotaping your client is also a good idea. But at the end of the day, the decision is your client's, and the recommendation yours. Generally, a client will accept your recommendation, so once you have made your recommendation, work as hard as you can to make it the right one.

One final word: If your client accepts your advice and does not testify, and the result is a conviction, remember that the same result might have occurred if your recommendation had been the other way. Criminal trials tend to be zero sum games—one side wins, the other loses. All decisions made by the loser look wrong, and all decisions of the winner look right. But that is only how they *look*. It does not mean that they *were* wrong.

I DON'T MAKE THIS STUFF UP: A HUMORIST'S VIEW OF THE CURRENT SCENE†

Will Durst*

I want to thank you for your graciousness in having me back for a fourth time. I especially want to thank all you voters. You have given me the easiest job here. As a political comedian, sometimes I'm in trouble because there's nothing going on—but not now. I come from a blue state, but even in my blue state there are red cities, and there are blue neighborhoods in those red cities, and there are red houses in those blue neighborhoods, and I bet there are even blue bedrooms in those red houses in those blue neighborhoods in those red cities in my blue state which is in a red country. I just want to say that, here, we're all purple people.

But for me, George W. Bush is pure gold because I don't even have to write the material. Bush is like a cross between Reagan and Quayle. These are direct quotes; I wrote them down verbatim: "Our enemies are innovative and resourceful, and so are we. They never stop thinking about new ways to harm our country and our people, and neither do we." "I think we agree, the past is over." "More and more of our imports come from overseas." The latter shows his firm grip on our economic tiller. Here's my personal favorite: "The thing that's wrong with the French is that they don't have a word for entrepreneur." (By the way, I thank you for laughing at that. I often do comedy clubs where the average age of the people in the audience is about twenty-five, and they just stare at me.)

It's hard to pick on the Democrats right now. It's like trying to throttle a shadow—there's nothing there. And it makes you feel bad, like kicking a sick puppy. It just isn't fair. But I have to say that the Kerry campaign was the worst campaign ever. Windsurfing? Are you kidding? Nobody wants to see a future president wearing Spandex. And you've got to admit that Kerry didn't respond effectively to the Republican charges. They accused him of being wishy-washy, and his response was less than inspiring: "My friends, they say I'm wishy-washy. Let me tell you, perhaps I am sometimes, but not always—on occasion, maybe." Also, they tried to use against him the fact that his first wife was worth \$300,000,000, and his second wife was worth well over a billion, and all I could think was, "He's my hero." Then Bush called him an elitist, which I did not understand. You know they both went

† Excerpts from an address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Hualalai, Kona, Hawaii, March 11, 2005.

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to Yale. But John Kerry's people actually tried to claim that "John's the rebel." It was hard to see any rebel in this blue-blooded Boston Brahmin.

Of course, it didn't help that Osama bin Laden released a video tape endorsing Kerry a week before the election. Speaking of Osama, I remember when Bush said, "He can run but he can't hide." Well, apparently he can run, he can hide, and he can manage to build a modern, state-of-the-art television studio in a cave. I think the next video is going to feature product placement: "Death to America, just do it. And remember, nobody doesn't like Sara Lee." We *still* can't find Osama; we can't find a six-foot-nine-inch Arabian guy traipsing around the Khyber Pass and dragging a solar-powered dialysis machine!

In the middle of the campaign, we had the Republican Reaganpalooza. The fortieth President died on Saturday and was buried the next Saturday. We had a week-long orgy, 168 hours, of conservative sentimentality. I actually felt bad for Reagan because I thought they were never going to let the poor guy go to his rest; they kept dragging him back and forth across the country. I honestly thought Karl Rove was going to throw him in the back of a pickup truck and stop at county fairs all summer. I also felt really sorry for the living former presidents because they had to be thinking, "I'm sure I won't get a whole week." Jimmy Carter probably will have to hammer his own casket together, Habitat for Eternity.

Bush, of course, says that he wants to work with the Democrats, and that's true—the same way a five-year-old with a magnifying glass wants to work with ants. It was great to see that at his second inaugural, the Secret Service set up a special section for protesters, that little section on the edge of D.C.—I think it's called Canada. My favorite part of the inauguration was the appearance of Chief Justice Rehnquist. First, I have to admire the determination that it took for him to show up. Second, I always love the four gold lamé stripes that he put on the sleeves of his judicial robe. As you probably know, he got the idea for those from watching a Gilbert and Sullivan production. All I can do is thank heaven that he wasn't exposed to a Carmen Miranda retrospective on AMC; then he might show up with a giant bowl of fruit on his head.

Of course, the second term is when presidents always get in trouble. Nixon had to resign, Reagan had Iran-Contra, and Clinton, well, lost the wrestling match with his libido. I think that George W. has to be very careful not to make a major mistake in his second term, mistakes such as invading a country that had absolutely nothing to do with 9/11, or generating the largest budget deficit in the history of America, or ignoring a briefing entitled "Osama bin Laden Determined to Attack America from Within."

Now Bush is assuring us that the war is going according to plan. Well, then, it's a lousy plan. Of course, it isn't about the weapons of mass destruc-

tion anymore, it's about liberating Iraqis from evil. And we are going to liberate every last barrel of evil out of there.

Everybody talks about how intellectually challenged Bush is, but I don't think that's true; I think he's street-smart. I think he just isn't into book-learning. I do wish he'd learn how to pronounce a couple of words—"nuclear" and "terrorism," in particular. He can't even pronounce the name of our governor in California; but maybe that's fair because the governor can't pronounce the name of his own state.

Actually, I am glad that Schwarzenegger is governor because it makes California's governor the wizard of wackiness again. We have reclaimed the mantle of madcap. We had lost it to Florida and to Minnesota, but once again Schwarzenegger has made us the crackpot of the nation. California has put the "mock" back in democracy.

Schwarzenegger keeps using lines from his movies, and they don't always fit. For example, when he first took office, he said goodbye to the outgoing governor this way: "Hasta la vista, Davis." That was kind of cold. "I'll be back" was cute the first eight thousand times. He has actually said, "You can't handle the truth." That was not even his movie; it was Nicholson's. I am expecting to hear these any day now: "I don't know nuthin' about birthin' no babies." "These are not the droids you are looking for." "You had me at hello."

Now Schwarzenegger wants to get rid of steroids and body building. Arnold—anti-steroids. I love that. In September he signed a bill making it illegal to have sex with corpses. Do we need a law for this? Isn't that just good sense and upbringing? Shouldn't parents or friends be responsible at some point? "Friends don't let friends have sex with corpses."

Now the word from Schwarzenegger's staff is that he might not run for reelection in 2006 because "he's looking so presidential." President Schwarzenegger—I'm sorry, but that's scarier than the Donald Rumsfeld swimsuit calendar. One of the knocks against John Kerry was that he didn't look presidential enough, and I couldn't disagree more. I always thought he looked *too* presidential. Every time I saw him, I worried that the Lincoln animatron had escaped from the Disney Hall of Presidents. His long face made Kerry look dour. That was part of why his choice for running mate surprised me. Edwards looked like a human Smurf, and when they appeared together, it was like the undertaker and the cheerleader. Seeing them was like watching a sitcom or something.

Now that we have returned to the Democratic front, how about those Clinton book deals? Bill got \$12,000,000 for his memoirs. Hilary got \$8,000,000 for hers. Just think of that—\$20,000,000 for the memoirs of two people who for eight years continually testified under oath that they couldn't remember a single thing. Is this a great country or what? I do feel bad for Monica,

though. Nothing she does for the rest of her life will matter. She'll be eighty-four, moving into a nursing home, and people will still smirk and whisper, "Hey, guys, it's Monica Lewinsky."

On a more positive note, I thought the elections in Iraq were pretty inspiring. Think about it: they were defying death to vote. "I'm going out to vote—cover me." In America a hard drizzle can affect turnout. One interesting difference between their election process and ours is that over there the religious fanatics were discouraged from entering the process.

There's something else I found inspiring—seeing our military troops handing out food during the tsunami relief efforts over in Indonesia. That was great to see for two reasons: One, we're good at that sort of thing; and two, we look good doing it. *That* is what we should be doing with the Iraqi insurgents, we should be feeding them. In fact, we should stuff them, super-size them like American sixth graders. That way they will be slower targets, and bigger, too. They won't be able to fit into those suicide belts anymore; they will have to find some suicide suspenders.

Now it turns out that it wasn't Iraq with the weapons of mass destruction, and it wasn't Iraq with the ties to al Qaeda; it was Iran. Darn! We were so close! It was probably a clerical error. They're right next to each other, and it's just one letter. I bet they get each other's mail all the time.

That revelation has to make you wonder whether we're going to do to Iran what we did to Iraq. Well, Condi Rice has assured the world that we have no plans to invade Iran. Frankly, if I were a leader in Iran, I'd start digging a really deep bunker because the last time we said we didn't have plans to invade somebody, we were invading them before the words were out in print. Besides, it's silly to say we have no plans to invade Iran. Of course we have plans; that's what we do. We're America. We make plans.

We also have these amazing weapons. I'm fascinated by the pilotless drones, the robot aircraft that are going over and spying on the rebel enemy. That is so Star Wars. The only problem is that I think it makes us the Evil Empire. Darth Cheney should have been the tipoff. "George, your lack of faith is disturbing."

Soon we will be watching the trial of the century, the trial of Saddam Hussein. Of course, he wants a change of venue. That's one of the less-anticipated by-products of being a tyrannical despot for more than thirty years: It's hard to get a fair trial. He doesn't have any peers left. Where in the world could he get a fair trial? L.A., maybe, but that's it.

Next, we have to rebuild Iraq. The administration estimates that the rebuilding will cost about \$600,000,000,000 over a ten-year period. We're giving them universal health care for life. *I* don't have health care. I'm moving to Baghdad. How are they going to pay for this \$600,000,000,000?

Through a series of tax cuts! “Well, the American people want tax cuts.” Of course they do. The American people are greedy children; they want everything. The American people want to lose weight by eating bacon. The American people require a warning label on their brake fluid so they don’t swallow it. The American people love the Home Shopping Network because it’s commercial-free.

People are already speculating about what’s going to happen in 2008. I don’t think Cheney will run, and I will miss him. To me, he’s the perfect Republican. I’m not really concerned about the Republicans, though. Conservatives can always find common ground. “I think your facts are specious and your argument is out of line.” “There’s more money in it for you.” “You have swayed me with your reasoned arguments.” And when I tell that joke, even conservatives laugh because they don’t care.

For the sake of my job, I hope Hillary runs. She will be pure gold in terms of material for me. This is a woman who made \$100,000 on a \$1,000 investment. Forget the presidency; let’s put her in charge of Social Security. I think she would understand a little more about the economy. We’re in the middle of a recession, but Bush says we’ve turned the corner. Maybe, but we must have turned too fast because we have rolled twelve times, hit a tree, and burst into flames. And what is Bush doing? He’s giving tax cuts to the wealthy. Dude, the rich, by definition, already have money; give some money to the poor, and give the rich a hug. Bush would tell me, “You don’t understand. If you give the money to the rich, they will spend it, and it will trickle down to the poor.” No, they’re not going to spend it; they’re going to hang onto it; that’s how they got rich. And they don’t have to spend it because they don’t need anything. If you give money to the poor, they’re going to spend every penny. Besides, I’m tired of being trickled down on. Did you see his latest budget proposal? He’s keeping all his tax cuts and getting rid of winter heating subsidies to the elderly.

Returning to Hillary, I want her to run because she stirs up the pot. The conservatives hate her so much it’s palpable. It’s chemical. All you have to do is mention her name, and they start making cartoon noises. I also want her to run because if she becomes President, that will make Bill the First Lady. And I will leave you with that image.