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THE LEGAL CHALLENGE TO GUANTANAMO BAY†

Charles Swift*

Because of the work I have done as counsel appointed to represent Salim Ahmed Hamdan, I was asked to speak on the role of the federal courts in the war on terrorism, and I would add to that: "What Is a Military Attorney Doing Filing Suit in the Federal Courts Against the Secretary of Defense?" I am going to attempt to explain that, as well as the very important role I saw for the federal courts from the moment I was assigned to represent Mr. Hamdan. Since this is a legal gathering, I have to start with a disclaimer: Don't let the uniform I am wearing fool you; the opinions that I'm about to express are solely my own, in the role of Mr. Hamdan's counsel, and do not reflect the opinions of the Department of Defense or any other government agency. In fact, if they did, I probably wouldn't be here.

Military tribunals are perhaps the most controversial area in the war on terrorism, and that's saying a lot because the war on terrorism itself is extremely controversial. Interestingly, though, I have discovered that military tribunals actually provide a point of unity for the far left and the far right. Because of their principles of limited government, some conservatives are quite concerned about a military tribunal and what it means. For those on the far left, the mere fact that it involves the military probably condemns it. So this controversial approach to "justice" manages to unite some disparate people.

To talk about military tribunals, we need to talk about the law of war, which is also known as humanitarian law. I will describe humanitarian law in the way that it was described to me by the president of the International Committee of the Red Cross: It is neither humane nor really law, most of the time. The principal documentary basis for it is the Geneva Conventions, but those of you who know something about the field know that it also entails the Hague Conventions, other treaties, and what is referred to as the common practice of militaries or the common international law of war. I can boil it all down to this: the Golden Rule: "Do unto others as you would have them do unto you." Even in time of war, be nice to the other side because you might be in their position someday. This has always been the United States position, subject, of course, to the "Al Davis exception." What is the "Al Davis exception"? "Just win, baby." The rules are great until you are losing; when you are losing, you start wondering why you are following the rules, especially if the other side is not.

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Hualalai, Kona, Hawaii, March 10, 2005.
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THE ROLE OF THE FEDERAL COURTS

Generally speaking, the federal courts, as I am sure most of you are aware, stay out of war. They have robes, not guns, and don't consider war to be in their bailiwick under the Constitution. This idea permeated most of the Vietnam decisions and other wartime decisions throughout the history of the courts. There is, however, an exception to that rule, which was first seen in *Ex parte Milligan*.[1] The case arose during the Civil War but did not reach the Supreme Court until the war ended. Milligan was a Confederate sympathizer who lived in Indiana. He had decided that the war wasn't going well for his boys and allegedly participated in a conspiracy to seize the armory in Indiana and lead a rebellion behind enemy (Union) lines. The Army got wind of the plans and captured Milligan and other alleged conspirators before they could implement any of these plans. Milligan was tried before a military commission and was sentenced to death for conspiracy and other crimes. The Supreme Court of the United States struck down the decision on the grounds that Milligan was a civilian citizen, not a combatant—engaging in criminal conduct did not make him a combatant—and that he therefore had to be prosecuted in the ordinary civilian courts, as long as they were open and functioning. (Note that Milligan was a United States citizen and his actions all took place inside the United States.)

Military authorities weren't happy with the *Milligan* decision, and Congress stepped in after the Civil War, to authorize military commissions to operate in the South. President Taylor vetoed the legislation twice, but eventually Congress overrode his vetoes, and military commissions were held extensively in the South following the end of the Civil War. One of the principal justifications for using them was the need to combat a terrorist organization—the Knights of the Ku Klux Klan. Still, the *Milligan* decision established that criminal conduct did not make the perpetrator a combatant, even if it was directed against the state.

The next major Supreme Court decision in this area, *Ex parte Quirin*,[2] came during World War II. To me, *Quirin* is the *Marbury v. Madison*[3] of this field. The government cites *Quirin* for the proposition that military commissions are permissible. I cite it for the proposition that the courts have an affirmative and important role. *Quirin* differed from *Milligan* in that the seven *Quirin* defendants were enemy belligerents working on behalf of the German military (although one allegedly held U.S. citizen-

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[1] 71 U.S. 2 (1866).
[2] 317 U.S. 1 (1942).
[3] 5 U.S. (1 Cranch) 137 (1803).

ship due to childhood circumstances). The President asserted his right to use military commissions, and at the oral argument Attorney General Bidwell argued that the courts had no role whatsoever. The Supreme Court did exactly what the Court did in *Marbury v. Madison*; the Court said the President might be able to do what he had done, but the Court had the right to review it. In effect, the Court said, "We are the constitutional gatekeepers, and we will decide whether the President has the power." The level of review was not the direct, supervisory review exercised within the federal court system but rather the level of habeas review accorded to U.S. military personnel subject to court-martial. The Court reviewed for three things: First, did the tribunal have subject matter jurisdiction? Second, did the tribunal have personal jurisdiction? Third, was the tribunal properly constituted? The Court did not review whether the proceedings were fair.

My next focus will be on the *Eisentrager* decision, but there were two more decisions before *Eisentrager*, one of them arising here in Hawaii during World War II, *Duncan v. Kahanamoku*.[4] In *Duncan* the Supreme Court overturned the military commission convictions of a stockbroker for embezzling stock and of a civilian shipfitter for getting into a brawl with Marine sentries. Yes, there was a Japanese fleet out there somewhere, but the regular courts were perfectly capable of handling the daily affairs of justice involving civilians not engaged in military activity.

The *Johnson v. Eisentrager*[5] decision was more significant. *Eisentrager* involved twenty-one German nationals who were in China when Germany surrendered, and who decided to provide the Japanese with the benefits of their intelligence efforts instead of surrendering and ceasing hostilities, as all Germans were supposed to do. When the Japanese surrendered, the United States Army found these Germans, took them into custody, and had them tried by a U.S. military commission in China (with the consent of the Chinese government). The Germans were convicted and repatriated to Germany, in the U.S.-occupied sector, to serve their sentences. The convicts filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia, based on alleged violations of the U.S. Constitution and provisions of the Geneva Conventions. The Supreme Court decision was complex, but I boil it down to this: Enemy aliens outside the United States, accused of violating laws of war, effectively are on the battlefield and subject to military justice, not to protection by the U.S. courts.

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[4] 327 U.S. 304 (1946).
[5] 339 U.S. 763 (1950).

Changes After September 11

That was the state of the law before September 11, 2001. We're all told now that it's a new war and that the old rules can't apply—the old rules such as the Constitution. The first question, then, is, "What are the new rules?" Putting aside the war in Afghanistan for analysis purposes, the first of the new rules of the war on terrorism is that war is not confined to a battlefield. This is not a war where there is a front. We cannot pinpoint any particular space and time. Indiana might be as dangerous as anyplace in the Middle East. Next, the opposition does not enjoy combatant immunity. Combatant immunity stems from the status of the combatant as a state actor; I'm wearing the uniform of a particular state, and I fight on behalf of that state. As a state actor, I'm immunized for what I do as long as I act in accordance with the state's direction. This immunity does not apply to members of terrorist organizations, which are not states. Finally, the very existence of war is determined by a presidential finding, not a congressional declaration. That might be the most controversial thing I'll say, because the President cites the Authorization for Use of Military Force, passed by Congress after 9/11.[6] I will talk about this a little more in connection with Mr. Hamdan's case.

The administration initially said that all the new rules would be tested, but the administration then did everything it possibly could to make sure that the federal courts would not have a role. They chose to hold the detainees in military custody outside the United States, at the U.S. Naval Base at Guantanamo Bay. That didn't work, however. On June 28, 2004, the Supreme Court reasserted its role as the constitutional gatekeeper in three decisions. If you take the *Hamdi*,[7] *Padilla*,[8] and *Rasul*[9] decisions as a whole, you find that a majority of justices reasserted that the Court is the constitutional gatekeeper of presidential powers in the arena of justice.

Hamdi limited its analysis to the war in Afghanistan, and it is my opinion that the plurality opinion is well reasoned. Justice O'Connor looked at the facts and said, essentially, that Hamdi, an American citizen, had been with the Taliban and had a gun, or at least was alleged to have had a gun; he was on the wrong side on a battlefield. It certainly looked like international armed conflict. United States troops were fighting there. Certainly, the President had war powers. The difficulty, as Justice O'Connor pointed out, was that the President seemed to be asserting powers beyond those given in the Consti-

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[6] Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).
[7] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[8] Rumsfeld v. Padilla, 542 U.S. 426 (2004).
[9] Rasul v. Bush, 542 U.S. 466 (2004) (together with *Al Odah v. United States*).

tution, so he had to act in accordance with international law. Hamdi was entitled to a hearing to challenge the government's factual assertions. Hamdi never had his hearing, and so Hamdi got to go home. (Actually, Hamdi was deported to Saudi Arabia and agreed to renounce his U.S. citizenship.)

Rasul looked closely at *Eisentrager* as it might apply to aliens held at Guantanamo Bay. The argument was that they were aliens, they were not in the United States, they were alleged to be enemies, and therefore there was no court jurisdiction under *Eisentrager*. Justice Stevens disagreed and said habeas jurisdiction extended to Guantanamo Bay, over which the United States exercises exclusive jurisdiction and control.

So what does that mean? Has due process arrived at Guantanamo Bay? Maybe. This is where Professor Neal Katyal and I came in, when we started with Mr. Hamdan in 2004.

HAMDAN V. RUMSFELD: WHAT IS A MILITARY ATTORNEY DOING . . . ?

We now have military tribunals. This is the area in which the President was most subject to review, and he has decided to use them. *Hamdan v. Rumsfeld* challenges the lawfulness of the President's military order. It is the duty of any military officer, under the oath that we take, to follow first the Constitution. This is what separates us: We take an oath to uphold the Constitution of the United States, not to follow executive orders blindly. Therefore, an order must be constitutional if military officers are to follow it. The facial challenge is first.

An important factor related to constitutionality and presidential power is whether we are at war, and in the *Hamdan* case we have taken the position that there is no declared war. There are pros and cons about that, to be perfectly honest. (Don't you love it when a lawyer says "perfectly honest"?) The analysis has always been of presidential power in declared wars, and the problem today is that there have been no declared wars since 1950. When we joined the United Nations, unilateral war became illegal. We now are allowed only two types of military actions: self-defense, and police actions authorized by the Security Council. So there is no war anymore; war is illegal. The Constitution, however, continues to have provisions on war, allocating powers to declare and conduct war; and the issue came to the fore inside military justice in Vietnam, where the *military* courts determined that jurisdiction did not extend to Vietnamese nationals and to U.S. citizens in Vietnam because we weren't at war, constitutionally speaking.

A key part of our argument is that under the Constitution, Congress has the power to declare war, and the Authorization for Use of Military Force (AUMF) didn't do that. The AUMF carefully avoided declaring war and

referred to and complied with the War Powers Resolution of 1973,[10] through which Congress sought to preclude a repetition of the Vietnam situation, by specifying the circumstances under which the President could send troops into hostilities, and by requiring periodic consultation with Congress while hostilities continued. Every President since 1973 has said the War Powers Resolution is unconstitutional—and every President who has taken a military action has said that he is following it but that he doesn't have to. The principal difference in the current situation is that the state of war, as determined by the presidential finding, is deemed to have existed not only after 9/11 but also before 9/11. In fact, even though I was in the military and did not know this, we apparently have been at war since sometime around 1992. That's interesting—an ex post facto presidential law. The President says that he determined when a state of war existed, even if it wasn't in his administration, and the existence of a state of war gives him extraordinary powers. During time of war, the President is at the zenith of his power under the Constitution; he can do a lot more as Commander in Chief than he can do as chief executive. The President should not be able to give himself such power by finding that war exists, and we contend that AUMF did not go this far. That is perhaps the weakest of the arguments.

Next we argue "no necessity." The basis of this argument is the definition or premise of a military commission. In 1916 General Crowder, who was probably the foremost authority on military commissions, testified before a congressional committee about what a military commission is. He called it our common law war court and said that it was a court of necessity that filled gaps in two places: on the battlefield, where courts could not enforce laws, and in occupied territory, where civilian law and courts had been overthrown. As we have seen in Iraq and other nations, when a government is toppled, you suddenly have a vacuum in the legal profession and in the courts, so there may be a necessity that the military establish some form of due process to enforce criminal and other laws during occupation. Most military commissions in our history have been used during occupations, not to enforce the laws of war on the battlefield. Guantanamo is neither. The Guantanamo Bay detainees have been removed from the battlefield and from occupied land, so there is no necessity that they be tried by military commissions instead of established U.S. courts.

Third, we challenge the presidential order because this is the first time a military commission order has said "only aliens." Historically, citizens have been equally subject to military commissions. That was true in *Quirin*, that was certainly true in *Milligan*, that has been true in all of the other commissions we

[10] Pub. L. No. 93-148, 87 Stat. 555 (1973) (Joint Resolution enacted on November 7, 1973, over President Nixon's veto).

have held. We have always said that the military commission is a lawful proceeding for *anyone* who happens to do something wrong. Not only is the President's "no U.S. citizen" order contrary to precedent, but it also seems somewhat irrational given the nature of this war. We aren't fighting a specific state, and a U.S. citizen could be the *greatest* threat to the United States in this war on terror. So we have pointed to the Fourteenth Amendment and said it cuts both ways. You cannot discriminate in a criminal proceeding; the proceeding should be equal, and everyone should be subject to it—no man above the law.

We have also challenged the commission order as applied to Mr. Hamdan. This part will look very familiar because we follow the *Quirin* analysis. Our first challenge goes to subject matter jurisdiction. Mr. Hamdan is charged with the crime of conspiracy starting in 1996 and continuing until 2001. We say that 1996 is before the war can reasonably be considered to have begun, and military commissions, being war courts, aren't permitted to try prewar conduct. That was an aspect of the Nuremberg trials, by the way. The prosecutors at Nuremberg wanted to look at the atrocities that occurred in Germany prior to the official beginning of the war, and they were not allowed to do that. This also has applied in tribunals for camps the U.S. has had; the starting date has been when the United States entered the war, because a military commission cannot hear charges based on prewar conduct. So the determination of when this war started is extremely important.

Additionally, conspiracy has never been recognized as a war crime. The Blackstone of military law is a fellow named Colonel William Winthrop, who wrote a treatise on military law. He explained that conspiracy was never a violation of the law of war. It might allow you to hold someone for the duration of the conflict, but it was not a war crime per se. And there are very good reasons for excluding conspiracy. First, consider our own leaders. We *want* our military leaders to think through every possible scenario. For example, we held nerve gas through the 1980s—it was destroyed only in the 1990s—even though the use of nerve gas was a war crime under the Hague Conventions. We tested it, and our military leaders made plans for how it might be used, which would be conspiracy to commit a war crime (a meeting of minds on the possibility of using nerve gas and an act in furtherance of the conspiracy in the acquisition of nerve gas). If conspiracy itself were a war crime, they would have been guilty. Second, in terms of reasons for not making conspiracy a crime, think about facing an enemy. Suppose there *had* been weapons of mass destruction just outside of Baghdad, and an Iraqi general had been sitting there with his finger near a detonator when the American tanks came over the horizon. If that Iraqi general had known that he was already a war criminal because he had participated in a conspiracy, what motivation would he have had to refrain from hitting the detonator? So we

have said to the courts that conspiracy should not become a crime under the law of war, and the conspiracy charged against Mr. Hamdan is not within the subject matter jurisdiction of the military commission.

Our second challenge to the application of the commission order to Mr. Hamdan goes to personal jurisdiction. Unlike Mr. Hamdi, Mr. Hamdan didn't have a gun, he wasn't at the front, and he never shot at anyone. He was employed by Osama bin Laden as a driver. He never joined the military; he was a civilian driver. A civilian driver of a military truck may well be the victim of an attack on the truck; the truck is the target. But if that driver is in his tent or house, then, unlike a combatant, he is not a legitimate target. Charging Mr. Hamdan effectively broadens the law of war to Stalin's view: Every man is a soldier, which means everyone is a legitimate target. We have to be careful because the sword cuts both ways in the law.

Next, we contend that the proceeding is not properly composed, in that Mr. Hamdan has not been granted a speedy trial. Here we have not even focused on the entire span of time since he was detained; we have looked only at the time since he was moved into solitary confinement for the sole purpose of trial. The Geneva Conventions and the Uniform Code of Military Justice establish hard-core time limits. The Geneva Conventions require the start of trial within ninety days from the date you start holding somebody for the purpose of a trial. The speedy trial provision under the UCMJ gives you 120 days. Both of those are hard clocks, and both of them were exceeded by more than six months. Mr. Hamdan was placed in solitary confinement in December 2003.

THE DISTRICT COURT'S DECISION[11]

We had begun our suit on behalf of Mr. Hamdan in April, but we suddenly had a race to the courthouse after the *Hamdi* and *Rasul* decisions were announced. Within a week of the Supreme Court's decisions, Mr. Hamdan got charges. The district court heard the case in October, and on November 8 Judge Robertson, a former naval officer, issued his decision. He did not consider the facial challenges to the military commission order but instead went to the issues of the application to Mr. Hamdan, the same approach Justice O'Connor had taken in *Hamdi*. And he found a lack of personal jurisdiction in two areas. Absent a determination of status by a "competent tribunal" under Article 5 of the third Geneva Convention of 1949, the commission does not have personal jurisdiction over the accused; that is, the President cannot determine that the accused is a combatant eligible for trial by military commission. (The Geneva Convention of 1949 changed one of the basic rules and said you

[11] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D. D.C. 2004) (mem.).

have to give the same procedural and substantive protections to the enemy POW as you do to your own soldiers. You can call it a commission but it must look like a court-martial in all ways and forms.) Mr. Hamdan's status has to be determined properly before he can be tried by a military commission, and that has not been done. The Combatant Status Review Tribunal did not comport with Article 5 of the Geneva Convention.

Judge Robertson ruled additionally that the commission's procedure was improper. At the beginning of the commission proceeding, during voir dire, Mr. Hamdan was removed. One of the people proposed to sit on the commission had been one of the chief intelligence analysts in Afghanistan (that would be like having the detective who investigated your case sit on the panel), and another was the person who had moved all of the detainees from Afghanistan to Guantanamo Bay (that would be like having the chief of prisons on your panel), and both of these men had a lot of classified information that they were going to talk about during voir dire; so Mr. Hamdan was removed. Judge Robertson found that commission rules excluding the accused from closed portions of the trial are inconsistent with Article 39 of the Uniform Code of Military Justice, and therefore are invalid and deprive the commission of personal jurisdiction. Alternatively, it could be argued that the commission is not properly constituted. Here, he looked specifically to Article 36 of the UCMJ, which said the President could set rules for military commissions but they could not be inconsistent with the rest of the Uniform Code of Military Justice.

That basically explains why I, as a military lawyer, went to the federal courts against my boss and why I think these courts have an important role in all of this.

QUESTIONS AND ANSWERS

I have five minutes, and I'll use that for questions. First, though, I do want to mention that Mr. Hamdan's case is widely assumed to be on its way to the Supreme Court. It will get there sooner or later because it provides the opportunity to answer many of the questions that were left unanswered by the triumvirate of decisions in the middle of 2004. The Supreme Court doesn't like having to answer follow-up questions, but most observers think the justices really don't have a choice in this case.

Q: Where is Mr. Hamdan now, and have you been able to confer with him?

A: Mr. Hamdan is back among the general population of the detainees at Guantanamo Bay, out of solitary confinement. I've met with him about twenty-five times. Interestingly, I had to find my own translator. In addition

to meeting with him, I met his family in Yemen, even though everybody said I shouldn't go there. (I guess I don't follow orders well.)

Q: In total, how many months elapsed before he saw a lawyer?

A: He was detained in November of 2001, and he didn't see a lawyer until January of 2004, so it was a total of twenty-six months.

Q: Assuming the ruling is in his favor, what will happen to others like him?

A: There are two sets of cases. *Hamdan* addresses military commission procedures for someone who was charged. The other case—actually, a set of cases—challenges the President's power to detain people as "enemy combatants" in this new war, and that set of cases is being led by Joe Margulis and Clive Stafford Smith. They also won a favorable ruling, in January; in *In re Guantanamo Detainee Cases*,[12] Judge Joyce Hens Green determined that the detainees have due process rights under the Fifth Amendment. There is talk of trying to consolidate these cases by the time we get to the Supreme Court, to answer all the questions at one sitting.

Q: Is there any prediction as to when the cases will go to the Supreme Court?

A: They're both on fast track in the D.C. Circuit Court of Appeals, and fast track there means anywhere from six to nine months. We predict that there will be a cert. petition from one side or the other, setting the cases up for another summer decision in 2006.[13]

Q: On a personal level, was there any pressure against you for the kind of advocacy you took on in this case?

A: I think I surprised a lot of people, but I have a wonderful boss, Colonel Will Gunn. When Colonel Gunn interviewed me for the job, I had handled political cases and had pretty set beliefs, so I was very honest with him. Immediately after the interview, I was sure I would never be called. That afternoon Colonel Gunn called and asked when I could be in D.C. I guess I knew what was coming. There may have been tremendous pressure on Colonel Gunn. At the beginning he gave a press conference in which he said, "I'm looking for fighters, and we intend to fight." He has insulated the rest of us. Colonel Gunn is a graduate of Harvard Law School and the Air Force Academy, and he is as great an American hero as there is today.

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[12] 355 F. Supp. 2d 443 (D. D.C. 2005) (mem.).

[13] In July the D.C. Circuit reversed the district court's ruling in *Hamdan*. 415 F. 3d 33 (D.C. Cir. 2005). On November 7, the Supreme Court granted certiorari. No. 05-184. *Ed.*

WHATEVER HAPPENED TO THE COMMON LAW?†

John W. Reed*

For some years now it has been my assignment at these meetings to speak last and to urge all of us to recommit ourselves to the high ideals with which we prepared ourselves to be lawyers, and particularly trial lawyers. Though the speeches have differed from each other, the message has been the same. Musicians would characterize them as "theme and variations." This year, however, it would be impossible for me to add strength to the powerful messages you have heard about what individual lawyers can accomplish with courage and dedication and integrity.

Moreover, my placement as a speaker is different, sandwiched between a political humorist and a singer of humorous songs, and so something different is called for. Unfortunately, my topic is not a humorous one. So instead of hectoring you about being good, I would like to have you join me in some unamusing musings about where our law comes from, about the apparent diminution of the role of court decisions as a source of our governing law, and about the implications of this for you and me. I concede in advance that I will indulge in some overgeneralizations and oversimplifications to make my point, but I believe my main point is valid nonetheless—namely, that the role of the common law in our jurisprudence is diminishing steadily, and that that diminution ill serves the cause of justice. I should warn you also not to expect me to suggest a rosy scenario, only to try to put our times in context.

Former Preponderance of Common Law

The law school I entered sixty-six years ago—which may well make me the senior person in the room—presented a first-year curriculum heavily made up of common law courses such as contracts, torts, and property, in which statutes played virtually no role. It being in New York state, partial exceptions were criminal law (there was the New York Penal Code) and civil procedure (there was the New York Civil Practice Act); but even those two dealt heavily in case law interpretations of the statutes. The story in the second and third years was much the same—perhaps even more pristine. At this late date, I cannot recall any course that was primarily statutory—not even

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taxation, a two-hour course that dealt mostly with such wonderful case law questions as whether the federal government could tax the wages of state employees and whether the state could tax the wages of federal workers. (This was during Franklin Roosevelt's second term, and although the New Deal was well underway, it was not yet recognized that administrative law was occupying many areas that had been the province of both the common law and legislation. There was not even an "administrative law" heading in the digests. It was a non-subject.)

Law students of that day were scarcely exposed to the role of legislation within the fabric of our law. In my first year in a Kansas City firm, another new associate working for the same senior partner was asked for a memorandum on a point of law. A couple of days later, I was in the partner's office, and he said, "John, where's Lyman?" "He's been in the library, sir," I said, "working on that memo you asked for." "What the hell is taking him so long?" "I don't know," I said, "but I think he is just about finished." Sure enough, while I was still in the partner's office, Lyman brought him the completed memorandum. It was many pages long, elegantly written and thoroughly documented in the law review style Lyman (and I) had learned so well in law school; and it was clear that he felt proud of the job he had done. The partner flipped quickly through the pages and in a moment said, "Where's the statute?" Flustered, Lyman said he had checked the digests thoroughly but hadn't thought to look for a statute, and he left the office sheepishly to see if there might be any applicable legislation. Sure enough, he was back in about ten minutes with a statute in hand that cleanly resolved the question and superseded the case law he had so elegantly marshaled in his memorandum.

The point is that he had been so indoctrinated with the primacy of case law that it didn't occur to him that, in dealing with a common law subject, there might be a relevant statute. And had the assignment been mine, I might well have made the same mistake. That's the way we were trained. The common law seemed to reign in solitary splendor.

The common law—the accumulation of judicial precedent—had long been the dominant feature of the Anglo-American landscape. Its philosophical base had survived attacks over the decades and centuries by those who preferred a statute-based law—a code system like that of the Continental civil law. You may remember Jeremy Bentham's acerbic attack on the common law method 200 years ago. Disdainfully, he referred to common law as "dog law." When you train a dog, said he, you don't tell the dog what the rules are; you wait until the dog does something wrong and then you beat him, and that way he knows not to do it again. That is the method, said Bentham, that the common law uses in dealing with citizens. And the Benthamites campaigned to replace

the common law with comprehensive codes, like those governing their neighbors across the Channel. As you well know, they made little immediate progress; and that's why Lyman's law school training, and also mine, paid little attention to statutory schemes of ordering our society.

In much of the twentieth century, there were two primary vehicles for trying to harmonize the varying views of the many judges about the common law rules in a given substantive field. One, of course, consisted of the treatises written by scholars, such as *Corbin on Contracts* and *Prosser on Torts*, with multiple editions trying to keep up with evolving case law. The other was the work of the American Law Institute in issuing "restatements" of the law, prepared by groups of practicing lawyers, judges, and teachers. Both the treatise writers and the "restaters" tried to nudge the law in preferred directions, but essentially they were honest brokers trying to tease out the common law of each area. These published materials were widely consulted by students, practitioners, and judges; and those who mastered them felt that they had a reasonably comprehensive understanding of the law. Although we did not yet have statutory codes in many of these areas, the system had ameliorated what Bentham had called "dog law," because now, much of the time, a lawyer could offer the client reasonable assurance of the law's requirements.

In 2005, all this that I have described sounds quaint—indeed, *is* quaint. All aspects of society have changed (and are continuing to change) at warp speed. Economic and social and political systems are exponentially more complex than during my time in law school, to say nothing of the time of Blackstone and the lord chancellors. Faced with that complexity, our system has become increasingly statutory and decreasingly common law. The Benthamite push for statutory codes of law, rejected through the nineteenth century, began to gain traction in the middle half of the twentieth century as one substantive area after another was organized by statute (and by its first cousin, administrative law). Whole fields were codified, and we learned that the controlling law, again and again, was found not in cases but in codes—probate codes, commercial codes, corporation codes—code after code after code. The courts were called on, of course, to interpret, to resolve ambiguities in statutory language, so there was decisional law; but the guiding law, the source, was unmistakably legislative in origin.

GAINS AND LOSSES

As we move away from the centrality of the common law, what do we gain and what do we lose?

First we gain some efficiency and, one hopes, rationality in organizing the law in a given field, which is a distinct plus when social, scientific, and eco-

nomic development produces great complexity. Arguably, the common law is ill suited to rapid, comprehensive ordering of complex fields. Statutes seem better for that task. Also, statutory law ostensibly responds to the political will of the people and may be thought, therefore, to have greater legitimacy as applied to the general public than a court's decision of a dispute between private parties.

But at the same time, we lose several benign characteristics of the common law process. Let me mention just three.

First, the resolving of real-life controversies, one by one by one, provides a richer, more nuanced set of principles or rules.

Second, the common law is not proactive but rather responds to petitions from parties; that is, it moves into action only when a case is filed and doesn't engage in lawmaking on its own initiative. Thus, it arguably keeps the reach of law to a minimum—which is especially appealing to libertarians.

Third, common law is of course evolutionary and makes adjustments before problems become explosive. It serves as a kind of safety valve. This is especially true when common law juries lead the way. For example, some centuries ago, conviction for homicide—any homicide—resulted in the imposition of the death penalty. But on the ameliorating facts of many cases, jurors felt that capital punishment was too severe and, with no other alternative, they acquitted obviously guilty defendants. This led to the creation of the several degrees of murder and homicide.

This kind of development did not happen only in ancient times. In the last several years, the U.S. Supreme Court has been reshaping our capital justice system. Three years ago, the Court barred the execution of the mentally retarded,[1] and just ten days ago it barred the execution of those who were under the age of eighteen when they committed their crimes.[2]

In reaching the latter result, the Court's five-person majority, speaking through Justice Kennedy, argued that a national consensus has emerged against juvenile executions since the court last visited the issue. He wrote: "[T]oday society views juveniles . . . as 'categorically less culpable than the average criminal.'"[3] (This echoed the Court's earlier ruling against execution of the mentally disabled.)

Justice Kennedy acknowledged the role that even international opinion played in the decision: "[T]he overwhelming weight of international opinion against the juvenile death penalty . . ., while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[4] But

[1] Atkins v. Virginia, 536 U.S. 304 (2002).

[2] Roper v. Simmons, 543 U.S. ___ (2005) (No. 03-633 Mar. 1, 2005).

[3] *Id.* at ___ (slip op. at 13).

[4] *Id.* at ___ (slip op. at 24).

the reliance on world opinion prompted angry dissent, read from the bench by Justice Scalia, who argued that modern foreign law should not be used to interpret the Constitution. He said: "[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."[5] Arguments over the role of foreign law have broken out more and more frequently at the Court, as globalization leads to more cross-border disputes and as justices increasingly look overseas in defending their rulings.

On the issue of whether it is legitimate for the Court to respond to changing social values, however, Justice Scalia did not disagree with the majority; he simply took issue with the timing. He insisted that it was premature to declare a national consensus against the juvenile death penalty and accused the majority of substituting its own moral judgment for true social consensus. But in so saying, he acknowledged that at some point, if not yet in this case, the law moves with social consensus—which is the genius of the common law. The point is that the Court, in true common law fashion, is modifying the law incrementally, case by case, in response to the society in which we all live.

Of course, the common law moves and adapts not only on the criminal side but also on the civil side as well. In my young days as a civil procedure teacher, I used to deal with the burdens of pleading and proving contributory negligence and due care, because a plaintiff's own negligence, no matter how slight, was generally a total bar to his recovery of damages for the harm caused by the defendant's negligence. That result was so harsh that jurors routinely ignored the judges' instructions and awarded damages anyway but reduced them in some amount to take into account the fact that the plaintiffs were victims partly of their own negligence. Sometimes by statute, but usually by court decision, the contributory negligence bar to recovery was replaced by comparative negligence rules, which regularized the result that common-sense jurors had been reaching all along. That process of change was taken over by legislatures, but it began largely in the common law courts.

And one remembers the line of cases that finally held that separate education is inherently unequal.

These are illustrations of the way in which the common law evolves over time to accord with society's better instincts—not perfectly, not always rapidly, but ultimately. Legislation may respond to problems like these, but it often *does* not, sometimes *will* not because of political considerations, and, with the inexperience and short political life of legislators caused by term limits, sometimes *cannot*.

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[5] *Id.* at ___ (slip op., Scalia dissent, at 18).

THE NECESSITY OF TRIALS

The illustrations I have used and countless other kinds of cases were initiated by, defended by, tried by trial lawyers. Court decisions result from tried cases. Without a trial, there may well be no published opinion—unless the court system, like my own system in Michigan these days, seems to believe that most cases should be disposed of by summary judgment.

The common law develops and remains dynamic only if there is a constant flow of opinions responding to varied, evolving issues—and you well know that trials, both jury and nonjury, are diminishing, both in absolute numbers and in percentage of cases filed. About three years ago, the Litigation Section of the American Bar Association launched an ambitious study of the diminishing trial phenomenon. It did this, by the way, under the leadership of Robert A. Clifford, a new Barrister inducted at this meeting. The study's title, "The Vanishing Trial," may be overstatement for dramatic effect, but it nevertheless draws attention to the severity of the decline. I commend to you the reports and published essays that constitute the product of the project. They appear in the third issue (dated November 2004) of the new *Journal of Empirical Legal Studies*—over 500 pages of fascinating information, analysis, and argument. Let me give you just a couple of items from the reports.

In the forty years from 1962 to 2002, the number of civil dispositions in the federal courts *increased* by 400% (from 50,000 to 250,000), while the number of civil trials *decreased* by more than 20% (5,800 to 4,500). In other words, in 1962, 11.6% of civil cases were tried, but four decades later only 1.8% were tried, a proportion less than one-sixth what it was forty years ago.

And of the civil trials, how many were jury trials? In 1962, 5.5%; in 2002, only 1.2%. So not only did civil trials decrease, but the percentage of those few that were tried to a jury also declined, from 5.5% to 1.2%.

I see evidence of the declining trial even from my ivory tower perch. When preparing files of nominees for election as Fellows of the Barristers Society, we seek to assemble a list of trials conducted by the nominee in the last ten years. Twenty years ago, the lists were almost always extensive, with scores of actual trials. Today the trial numbers are vastly smaller. Admittedly some of the trials are marathons—even the average trial is now longer—but the difference in the number of trials is dramatic. With fewer trials, there are fewer trial lawyers, i.e., lawyers who actually try cases in real courtrooms. Arguably, this free fall in the number of cases tried diminishes the vitality and richness and comprehensiveness of the body of case law that is central to the common law system.

Settlements and the many alternative modes of dispute resolution are displacing more and more civil trials. I am aware of the vitality of the ADR sys-

tem—if system it may be called—and I concede its principal benefits of economy, expedition, confidentiality, and sometimes but not always more amicable relations at its conclusion. But as ADR proliferates and trials diminish, the extensive body of decisions that provide guidance to all will serve less and less well. Without a body of published precedents, there can be no bargaining in the shadow of the law. Untethered to precedent, those who determine liability and the amounts of liability are at greater risk of unprincipled decisions in a process that all too readily can value easy resolution over justice.

If we are to arrest, let alone reverse, the slide in trials, we will have to change both the rhetoric and the system.

First, the rhetoric. All my life, and I'm sure well before, lawyers have been the objects of sarcasm and the butt of jokes. But the temperature has gone up in the last few years. People with economic self-interests have succeeded in demonizing trial lawyers. Trial lawyers are characterized as greedy enemies of our nation's prosperity who specialize in so-called frivolous lawsuits. All of us need to rebut the charges—to point out that trial lawyers are essential to the maintenance of our liberties; and, lest the assertion be simply cosmetic public relations, we need wherever possible to emulate the Fred Grays, and the Doug Joneses and the Bill Baxleys and the Dennis Archers and the Lt. Commander Swifts, and the thousands upon thousands of lawyers who again and again serve noble causes unrecognized. And we need to challenge the rhetoric that characterizes trials as systemic failures, especially when that language comes from sitting judges.

But the more important step is to try to ameliorate what I believe is the root cause of diminishing civil trials—and that is the cost. As a young teacher of civil procedure, I taught a course in common law pleading, an arcane subject in the extreme, and then a course in code pleading, a mode of pleading that obtained in many states well into the second half of the last century. In both of these systems, the pleadings were complex and often detailed, but cases went to trial with both sides knowing almost nothing about what evidence the adversary would offer. In 1938, the Federal Rules of Civil Procedure adopted a pleading regime that was just the reverse: The pleading process provided less information about the parties' claims and defenses, but it constructed a system called discovery which authorized the parties to learn a lot about the evidence in the adversary's hands. Trials under the old Field Code were often called trials by ambush because surprise was a major weapon. The Federal Rules were designed to prevent that, and the hope was that with more knowledge of the opponent's case, trials would be fairer and settlements would be facilitated. So far, so good. But implementation of the Federal Rules ran into the law of unintended consequences. As you know

better than I, trial by ambush has been replaced by trial by attrition, in which the costs of extensive discovery—costs in both money and time—threaten to consume any benefits that might be gained in a full trial. No wonder so many cases are settled.

I think most would agree that discovery and the sideshow litigation over discovery are grossly out of hand and that we need to go back to the drawing board. The discovery rules were a healthy development when adopted in 1938, but the system has accumulated so many barnacles that it needs not just tweaking but rethinking. When justice—even civil justice—becomes unaffordable, not only should we be embarrassed, we should be galvanized into action. And surely the decline in trials will be slowed if not reversed by reducing the cost of litigation. Can it be done? I'm not sure, but I hope we are not in the position of the racehorse owner I once told you about. Angrily confronting his losing jockey after the race, he asked, "When that hole opened up in front of you in the backstretch, why didn't you ride through?" "Because," said the jockey, "the hole was going faster than we were."

I know I have said little you didn't already know. I simply wanted you to think with me about what is happening to the civil trial and to consider anew its possible consequences. As a trial lawyer, you are a link in the common law. Every case you try becomes a part of the fabric of our law, our pattern of civil justice; and so you play a vital role in continuing the rich tradition we call the common law. As a trial lawyer, your role in the development of the law is at once a profound responsibility and a magnificent destiny.

REAL LIFE CASE STUDIES IN POLITICAL CORRECTNESS, OR ARE REAL LAWYERS SENSITIVE?†

Alex Sanders*

The subject of this speech—political correctness— is vastly overworked, and I suggested different possibilities, but your program chairman insisted on this one. Do not despair—I have no intention of definitively covering the subject. (I couldn't possibly cover everything.) I hope you will be satisfied with a few glaring examples. But please hear me out and reserve judgment until I am finished. What I am about to say is carefully calculated to offend everyone. The point comes at the end.

Real Life Case Studies in Political Correctness

The most common transgressions involve words used in everyday speech. Perfectly good words have fallen into disrepute, words such as "girl." The politically correct term for a female is "woman." "Lady" is a doubtful substitute. Thus, "girlfriend" is politically incorrect. Until recently the politically correct term for girlfriend was "significant other," and now it is "spousal equivalent." Expect to receive an invitation soon addressed to you and your spousal equivalent. Recently, "lover" has been suggested as an alternative, but that's worse. Can you imagine the introductions? "Mom, this is my lover."

"Boy" is, of course, politically incorrect when applied to any African-American. The politically correct term for a person of that race has evolved from "colored person," as in the National Association for the Advancement of Colored People, to "Negro," to "black," to "African-American," to the designation most recently in vogue, "person of color." Thus, the goal of achieving political correctness is a moving target, and in this area we have come close to full circularity from "colored person" to "person of color," all in one lifetime.

Adjectives have not escaped scrutiny. It is politically incorrect to say that someone is "disabled"; the politically correct term is "challenged." Hence, a person who is blind is "visually challenged" or "phototonically nonreceptive"; short is "vertically challenged"; old is "chronologically challenged." Obesity is such a common challenge that we have numerous euphemisms. It

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is "volumetrically challenged" or "gravitationally challenged" or "person of girth" or "Ample-American." Bald is "follically challenged" or "comb-free." Bisexual is "non-gender-preferential," and so forth.

Job descriptions can be politically correct or incorrect. The practice of exalted job titles started in 1895 when undertakers became "morticians." Others soon followed suit; beauty parlor operators became "beauticians." Not to be outdone, "morticians" became "funeral directors"—and "beauticians" then became "cosmetologists." Garbage men became "sanitary engineers." Store clerks became "retail consultants." Salesmen became "sales associates." Teachers became "educators." Drummers became "percussionists." Corporate presidents became "chief executive officers." Family doctors became "primary health care providers." Hotel desk clerks became "front desk agents," maids became "housekeepers," and bellhops became "luggage assistants." Airline stewardesses became "flight attendants." Elevator operators become "vertical transporters." There's a rule of thumb about jobs: If you make it to age thirty-five and your job still involves wearing a nametag, you're probably not making it. (Look what we are wearing.)

Each building has become some kind of a center. Gymnasiums have become "wellness centers." Hospitals have become "medical centers." Libraries have become "learning resource centers." A similar progression has occurred in other areas. For example, dumps have become "landfills." And in December of last year, in my area of the country, Christmas trees became "community trees."

It is politically incorrect to use any slang term to refer to a person's race, ethnic background, or body part—except that it is acceptable to refer to a person as a "redneck." As former Senator D'Amato learned when he tried to imitate Judge Ito, it is politically incorrect to mimic a person's dialect or accent—except that it is acceptable to mimic a southern accent. Does it sound as if I have a little chip on my shoulder?

Sensitivity abounds in obscure places. More than forty years ago, I traveled with the circus and was a marginal circus performer. My daughter, on the other hand, became a circus superstar. She's a lawyer now, almost forty years old; but when she was only seven years old, she performed in the center ring of the Ringling Brothers circus. (She performed as a midget, so she eventually outgrew the role.) My daughter and I are members of a trade organization of former circus performers. Our organization recently registered a formal protest with the television networks for referring to the Michael Jackson trial as a circus. We found the comparison insulting. Circus performers are disciplined, talented, and honest. They seek to bring surprise and beauty into a world that has too little of both. The enormous difference between circus performance and the Michael Jackson trial was obvious.

Mark Twain said, "Under certain circumstances, urgent circumstances, desperate circumstances, profanity provides a relief denied even to prayer." We once recognized that in this country, but now the word police are everywhere. In my neighboring state of North Carolina, profanity is actually prohibited by statute, except in two counties specifically exempted from the statute. Presumably the North Carolina legislature felt that a refuge should be provided where a person could go when really provoked. One word is being abolished by statute: Idaho has under consideration a statute to change every placename that includes the word "squaw," and Maine has already eliminated the word "squaw" from twenty-four placenames in that state.

It is politically incorrect, of course, to be homophobic. Homophobia is found in odd places. In South Carolina I have friends who are gay and are afraid to come out of the closet because people will think they are Democrats. When President Bush came out in favor of a constitutional amendment prohibiting gay marriage, he spoke in the vernacular of war: "Our core values are under attack." I fully expected Tom Ridge to add a new color to the threat-level scale—pink. In the military, all we formerly had to worry about was "Don't ask, don't tell," Bill Clinton's rule; but that rule is being challenged, and a lot of people don't understand it. As near as I can tell, the rule means this: It's okay for Uncle Sam to want you, but if you want Uncle Sam, keep it to yourself. Now it's time for me to admit that everything I just said about homophobia is itself politically incorrect, and I apologize.

I do not apologize, however, for calling attention to the wretched excesses brought about by political correctness, a good idea run amok. Speech can be offensive, odious, repulsive, and an instrument of domination and oppression, but historically speech has been far more significant as a means of liberation. The Bill of Rights doesn't guarantee freedom *from* speech. Silencing an idea because it might offend a minority doesn't protect the minority; it deprives the minority of the opportunity it needs the most, the chance to talk back and to prove the other side wrong. The idea of bringing harmony to American society through censorship is an evasion of the real problem. Speech reflects social inequities and disparities and injustices; it does not cause them. The answer clearly does not lie in censorship. As George Bernard Shaw said: "All great truths begin as blasphemies." In the marketplace of ideas, where appetite and ambition compete openly with wisdom and knowledge, truth triumphs more often than not.

ARE REAL LAWYERS SENSITIVE?

Having convinced you, I trust, of the transparent absurdity of political correctness (and just to prove that I am still a lawyer), I will now proceed to con-

vince you of just the opposite: That the means by which human beings express themselves is critically important and that decent people, especially lawyers, have the positive obligation to be ever mindful of others and their particular situations in life.

When I was a judge, so long ago I can barely remember it, I wrote an opinion containing a startling concession to pragmatism, entirely remarkable for a court. My opinion adopted the rule that whatever doesn't matter doesn't make any difference. I will demonstrate here that three things matter: Words matter, feelings matter, and the law matters. Because law is the area of endeavor to which I have devoted most of my life and to which you devote your lives, we matter. W.H. Auden said, "Evil is unspectacular and always human, and shares our bed and eats at our own table."

Words Matter

Consider the term "mongoloid idiot." Up until the late 1970s that term wasn't an insult; it was a medical diagnosis. It wasn't uttered by crude, ignorant people; it was pronounced by the best trained medical doctors in the world, who told the families of children with the condition of mongoloid idiocy that their children would never be able to dress themselves, recognize their parents, or lead meaningful lives. Abortion was commonly recommended, if the condition was detected during pregnancy. At the very least, parents were advised to institutionalize the children. Only the most stubborn and inspired parents resisted the advice of their doctors.

Then something momentous happened: The terminology changed. "Mongoloid idiot" became "Down syndrome." Parents began to take their Down syndrome children home in larger numbers, and they learned the doctors were wrong. They learned that children with Down syndrome are here for a special purpose—to teach us patience, humility, compassion, and sheer joy. They learned the profound interdependence of human hearts and minds, and they learned that they were very specially blessed. Of course, terminology did not cause Down syndrome, but did it have an effect on how Down syndrome children were treated? Certainly, it did. The term "mongoloid idiot" may look like just words, but the fragile little babies whose lives were prematurely terminated or wasted in mental institutions surely can testify, in some celestial court, to the power of mere language and the intimate links between words and social purposes.

We possess one crucial characteristic that makes us human, and that is especially vital to those of us who are lawyers, and that is the ability to communicate, to understand, to put ourselves in some mutually reciprocal form of contact with others. Among the many talents we have, communication is the one we could stand to develop more fully. To refer to a woman as a "girl"

or "honey" or "sweetie" is not just demeaning; it is defining and limiting. To refer to a homosexual as a "queer" or "fag" or to call an African-American by that most vile epithet is not just insulting; it's killing. No race is superior, no gender is inferior. All collective judgments are wrong.

Hitler and Roosevelt came to office within months of each other in 1933. Germany was in worse shape, but both America and Germany were in desperate circumstances. The Germans picked a wild-eyed, jack-booted, hate-spewing monster who screeched at them by torchlight, "You are the master race." We chose a man the *Wall Street Journal* called "the gallant cripple." He sat by a homey crackling fire and urged us to have courage, to have patience, to have decency, to have hope. I remember hearing those "Fireside Chats" on the radio as a child, and I also remember hearing Hitler's speeches on the radio. Hitler used poisonous gas to kill the Jews, but first he killed with words. Words matter.

Words are the skins of thoughts. History is filled with too many examples of hateful words followed by hateful deeds—the assassinations of Lincoln, John and Robert Kennedy, Martin Luther King, Yitzhak Rabin, 168 innocent people in Oklahoma City, Columbine High School students, and the most horrendous of all, 3000 innocent people on 9/11. Words matter.

Five years ago the British Royal Navy abolished the prohibition against allowing gays and lesbians to serve. The admirals reacted predictably with alarm. The *New York Times* reported just last week that the British Royal Navy is now actively recruiting gays and lesbians to serve, and everybody wonders why there was such a fuss five years ago.

Feelings Matter

In South Carolina a tiresome debate rages from pulpits to cocktail parties. That's the debate about the Confederate flag, which flies, by state law, on our capitol grounds. The question is whether the flag represents heritage or hate, patriotism or slavery. Everybody has a well-considered opinion on the subject, and everybody is willing to express that opinion without being asked. I try to make it a practice never to enter premises where the matter is being discussed. The Confederate flag is a subject that tends to suck all the oxygen out of a room. To date, nobody has convinced anybody else of anything. The problem with the issue is that it has been played out impersonally on both sides. Everybody is *talking*; nobody is *listening*.

When I was president of the College of Charleston, I was leaving the president's house one morning and saw a coworker of mine standing on the street in front of the fraternity houses. I recognized her immediately as Dorothy, one of our custodial workers who cleaned up the residence halls at night. Dorothy was softly crying. I knew Dorothy, and I knew she had problems.

She lived a life of quiet desperation, as a single mother who worked hard to support herself and her children; but she bore her burdens privately. Her eyes were like the tinted windows of a limousine—she could see out but we couldn't see in. She was always cheerful and uncomplaining. Dorothy, an African-American, neither sought nor expected any help from anybody.

Nevertheless, I thought she might let me help her, or I thought she might at least tell me what was causing her such distress. "What's the matter, Dorothy?" I asked. I fully expected that she would reveal to me some intractable financial crisis or perhaps some serious illness that had befallen one of her children. I was wrong. She pointed at the Confederate flag proudly flying on one of the fraternity houses. "I love these children," she said, "I love cleaning up after them. I don't mind their mess. But when I see that flag, it makes me think they hate me." "Those boys don't hate you, Dorothy. You know how fraternity boys are; they're just playing. You know how they are. They're bad sometimes, and they like to play." I tried desperately to make her understand, but she didn't. Memories of old experiences were too much with her. She sobbed audibly.

I went straight over to the fraternity house. "Men," I said, "I'm sorry, but I've got to ask you to take that flag down." Notice that I didn't order them to take it down; I just asked them—and believe me, they know the difference. They stiffened visibly. I could see it in their eyes: They were ready for me; they were going for their argument like a gunfighter preparing to draw his Colt .45. I was in for the usual diatribe: "It's part of our heritage. It doesn't represent hate. We have a constitutional right to our flag." And so forth.

The president of that fraternity stood about six feet four. He had the ash blond hair and the indomitable spirit of his Nordic ancestors. His eyes were like a Weimaraner's. He stepped up to me. "Exactly why should we take it down?" he asked, as cool as a cucumber. "Because it makes Dorothy cry," I said. Then I told him what had happened. "Oh," said the president, almost in a whisper, his eyes now like those of a deer caught in the headlights, "we didn't mean to make Dorothy cry."

That night the fraternity met and discussed the matter of the Confederate flag, as I'm sure they had many times before, but this time the discussion was different. It centered now not on the lifeless pages of history but on the feelings of a single human being: Dorothy. The next day the flag came down. Perhaps it would go back up the next year or whenever all the fraternity boys then at the college had graduated. But for one brief, shining moment, an idea prevailed that is the best idea any of us ever had—the idea of unselfishness.

I make a lot of people mad when I tell that story at home because I neither condemn the fraternity boys as hatemongers nor defend their heritage. Both sides in the debate about the Confederate flag, it seems to me, have the issue

backward. It is not the intention of the person displaying the symbol that matters. The fraternity boys didn't intend to show hate; they intended to represent what they perceived as their heritage. But their intention didn't really matter. What mattered was the perspective of the person and the feelings evoked in the person to whom the symbol was displayed: Dorothy. Approaching the issues from that perspective—from Dorothy's perspective—immediately invokes the fundamental principle of all human relationships: Do unto others as you would have others do unto you. That "Golden Rule" is common to every religion in the world, major and minor.

Hate is not the opposite of love. Indifference is the opposite of love. In *The Devil's Disciple*, George Bernard Shaw said, "The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them: that is the essence of inhumanity." Indifference to the feelings of others violates the Golden Rule.

The Law Matters

I'll tell you one more story. (As you may have gleaned, I speak in parables.) The story dispassionately describes the career of one Florida lawyer. His name is Virgil D. Hawkins. In this story I use myself and my own career as a sort of yardstick.

I never knew Virgil D. Hawkins. I came upon his story in recorded cases that extended over more than forty years. Ordinarily, opinions provide a pretty dreary literature, but these are the exception. In April 1949, when I was ten years old and in the sixth grade, Virgil D. Hawkins applied for admission to the University of Florida Law School. His application was denied. He appealed, and his case ultimately reached the Florida Supreme Court. The court said he had all the scholastic, moral, and other qualifications for admission, but he was nevertheless not eligible. Virgil D. Hawkins was, after all, black. In May 1954, when I was fifteen years old and a sophomore in high school, South Carolina was ordered by the United States Supreme Court to desegregate all of its public schools with all deliberate speed. In March 1956, when I was seventeen years old and a senior in high school, the United States Supreme Court issued the second of two orders to the Florida Supreme Court regarding the admission of Virgil D. Hawkins to the University of Florida Law School. The Supreme Court said there was no reason to delay; Hawkins was entitled to "prompt" admission. In June 1956 I completed my public school education without ever attending school with a student who was black. By that time Virgil D. Hawkins had been before the Florida Supreme Court three times, and the United States Supreme Court twice, but he still had not been admitted to the University of Florida Law School.

In March 1957, when I was eighteen years old and a freshman at the University of South Carolina, the Florida Supreme Court again denied the application of Virgil D. Hawkins to attend the University of Florida Law School. The court asserted: "He does not in fact have a genuine interest in obtaining a legal education." In January 1963, when I was twenty-four years old, I graduated from the University of South Carolina Law School without ever having attended school with a single student who was black, a common experience of everybody my age in South Carolina. I began my practice in Columbia, the capital of South Carolina. African-Americans were not allowed to use the bathrooms in the courthouses where I practiced; the water fountains were segregated; and even the plaques on the courthouse walls memorializing World War II veterans who had died fighting for their country were divided into separate columns, one labeled "White" and the other "Colored." The anti-lynching law had been defeated in Congress as a result of a filibuster by a South Carolina senator, and Virgil D. Hawkins still had not been admitted to the University of Florida Law School.

In 1976 I was thirty-eight years old and had been practicing law for almost fifteen years. By then, Virgil D. Hawkins had finally graduated from a law school—in Massachusetts—and had appeared before the Florida Board of Bar Examiners, but his application to take the Florida bar examination had been denied because the Massachusetts law school from which he had graduated was not accredited by the American Bar Association (an organization that at one time had itself denied admission to black lawyers). Virgil D. Hawkins finally developed a novel argument: He argued that he should be admitted to the practice of law without being required to take the bar examination because, if he had been admitted to the University of Florida Law School when he should have twenty-seven years earlier, he would have become a member of the bar automatically upon graduation, under the so-called diploma privilege in effect at that time. That sounds like a weak argument, right? But Virgil D. Hawkins was able to come up with something that we all long for: He had a precedent in the state of Florida. After failing the bar examination several times, a relative of a justice on the Florida Supreme Court had been admitted to the practice of law because, according to the court, he had expressed a desire to attend law school before the repeal of the diploma privilege. Virgil D. Hawkins pointed out that he too had expressed such a desire. This time, in a more enlightened day, the Florida Board of Bar Examiners bought his argument; and, at long last, Hawkins became a member of the bar of Florida. He was nearly seventy years old.

Unfortunately, the story of Virgil D. Hawkins doesn't end there. Over the course of time his ability to practice law faded. He'd gotten a late start, of course, and as he grew older, he simply could not keep up, and disciplinary

proceedings were brought against him. He went before the Florida Supreme Court once again, this time tendering his resignation from the bar. In accepting that resignation, the court said: "He seldom turned away an indigent client in need. However, his advanced age and lapse of years since attending law school, the loss of a quality law school education, and the strain of practice as a sole practitioner made the successful practice of law difficult. . . . Worn and weary from the struggles of the last half of his life, . . . Hawkins put down his sword, and attempted to leave the battlefield." On April 18, 1985, when I was forty-six years old and Chief Judge of the South Carolina Court of Appeals, the Florida Supreme Court accepted his resignation from the bar. Three years later he died.

Fortunately, the story of Virgil D. Hawkins does not end there, either. The cases go on. On October 20, 1988, when I was fifty years old and my daughter was making plans to attend law school, the Florida Supreme Court reinstated him as a member of the bar even though he had died several months earlier. The court said (and again, I quote directly from the reported order): "His lifelong struggle for equal justice under the law should be memorialized." The court said that it was also moved by his final plea when he appeared before the court for the last time. "When I get to heaven," he had said, "I want to be a member of the Florida bar."

History teaches that whenever and wherever injustice has been banished, conflict reconciled, and human understanding fostered, the law and lawyers have always played a vital part. The story of Virgil D. Hawkins does serve to remind us that the process is not always quick; however, there have been instances of startling change brought about by the process, the kind of change that people thought would never occur.

There is a better story from the old Fifth Circuit of which Florida was once a part. It's the story of a small group of judges whose courage, integrity, intellect, and wisdom made the Fifth Circuit the institutional equivalent of the civil rights marches that transformed the South and ultimately the United States forever. My old client, Claude Sitton, who was a southern correspondent for the *New York Times* in the 1960s, said this: "Those who think Martin Luther King integrated the South all by himself don't know Elbert Tuttle and the record of the Fifth Circuit Court of Appeals." Robert Kennedy, Jr. said that Judge Frank Johnson was as much an American hero as the leaders of the American Revolution and the Civil War.

Great as Elbert Tuttle and Frank Johnson were, they didn't act alone. Judges, like well-behaved children, do not speak unless spoken to. The first voice must be the voice of the lawyer. The position of the judge is static; the court is like an oyster, anchored in place, unable to take the initiative, digesting only what the currents churned up by lawyers wash their way. If Thurgood

Marshall and the other civil rights lawyers of the 1950s and 1960s had waited for Congress to act, or for state legislatures to act, we'd still have segregated schools. If they had raised only those issues they were paid to raise, we would still have segregated water fountains in southern courthouses.

The role of lawyers in America was captured in poetry more than a hundred years ago. One day a woman named Katharine Lee Bates walked up on top of Pike's Peak. She looked out as far as she could see, and she wrote a poem about what she saw, a love song to America. My mama taught me that song when I was a little boy, and it's familiar to everybody in this room:

O beautiful for spacious skies,
For amber waves of grain;
For purple mountain majesties
Above the fruited plain!
America! America!
God shed His grace on thee,
And crown thy good with brotherhood,
From sea to shining sea.

We've been singing that song lately as a patriotic anthem, but for some reason we haven't been singing the last verse. The last verse carries a suggestion that America the Beautiful isn't perfect. The chorus, which is the one we should be singing today, is in the form of a prayer:

America! America!
God mend thine every flaw,
Confirm thy soul in self-control,
Thy liberty in law!

My mama's been dead for years but I haven't forgotten what she taught me: Our liberty is in law.

Properly practiced, the law tends to be the noblest pursuit of humankind. You and I are part of a rich heritage. No other leaders or professionals—not generals or admirals or preachers or journalists, not legislators or governors or even presidents—have shaped America as profoundly as lawyers. As you and I live out the rest of our professional lives, it will not do to assume that someone else will bear the major burdens, someone else will demonstrate the fundamental convictions, someone else will preserve culture, transmit values, maintain civilization, and defend freedom. What we do not value will not be valued. What we do not change will not be changed. What we do not do probably will not be done.

Real lawyers *are* sensitive. They recognize that justice demands equality, and equality is brought about by the application of the Golden Rule as well as the rule of law. If we are serious about bringing everybody into full membership in our society, we must root out the prejudices in our own souls. Our noble profession demands no less. America demands no less. The world demands no less. Our ethnic and cultural diversity, our differences in language, customs, and beliefs provide the strength, the resiliency, the creativity of our country and of our planet. Think about those fragile Down syndrome babies and remember Virgil D. Hawkins. And whatever you do, don't make Dorothy cry.

TEN "NO-NOS" IN JURY SELECTION†

Myron J. Bromberg*

Voir dire examination of potential jurors is the first opportunity trial counsel have to develop rapport with the jury and to attempt to assure that the trier of fact will be at least neutral, if not favorable, to the client's cause. Numerous articles have been written on how to achieve these goals. Here, however, I will suggest how to avoid shooting yourself in the foot while trying to achieve your purposes.

The following ten errors often committed in jury selection, even by experienced litigators, should be avoided.

1. *Failing to be fully familiar with the rules and statutes governing jury selection*

Each state has its own set of rules and statutes governing jury selection. These may or may not be the same as those governing the federal system. Federal Rule of Civil Procedure 47 gives federal trial judges the option of conducting voir dire on their own or permitting counsel to do so or, at least, to "supplement the examination." It further provides that the number of peremptory challenges is governed by 28 U.S.C. § 1870. That statute provides for three peremptory challenges for each party, but also states: "Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." These matters should, of course, be resolved before commencing jury selection.

Federal Rule of Civil Procedure 48 controls the number of jurors who participate in the verdict. Although federal verdicts must be unanimous, that is not the rule in many states.

Now that you know this, you have only fifty other sets of rules and statutes to research to be comfortable with conducting voir dire in the courts of these United States! We all know the old saw about the word "assume" making an "ass" of "u" and "me." It applies here with great force. Never assume that jury selection rules are the same in any two jurisdictions. If you do, you will be challenging a juror when you have no peremptory challenges left. That juror, who will probably not be kindly disposed toward you, will sit on the case and have an opportunity to return the compliment.

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2. *Failing to know the local method of excusing jurors and the geometry of the jury box*

It is amazing to learn the variety of ways trial judges want challenges exercised. It leaves one in awe of the complexities of the human mind. These variations exist within the federal system, and even within a single state. Consultation with local attorneys, court personnel, and even the judge will permit you to avoid making a fool of yourself in front of the prospective jurors.

Likewise, knowing where juror number one will sit is helpful, lest you excuse the wrong juror. Is number one at the left or the right? Better be sure.

Know how alternate jurors will be seated and where.

3. *Failing to keep track of peremptory challenges*

Losing count of the number of peremptory challenges you have used can result in disaster. You may challenge a juror when you have no challenge left, with the result described above. Or you may fail to challenge when you should do so. If you find that you've lost count, ask the clerk—or the judge.

4. *Addressing a juror by the wrong name*

If you address a juror by name, make sure it's the right name, and pronounce it properly. Trying to pronounce a Slavic name which lacks vowels can be offensive. In a pinch, ask the juror to pronounce it for you.

5. *Failing to know the judge's attitude toward "check-raising"*

Every poker player knows that you cannot pass betting for a round and then raise the bet on the next round. This is known as "check-raising." Many judges have played poker. They will not permit you to challenge after you have passed on the previous round of challenges, unless a new juror has entered the box. Make sure you know the rules in this courtroom. (Oddly enough, New Jersey permits "check-raising" by its Rule 1:8-3(e)(3)—but then, New Jersey is "special" in many ways!)

6. *Offending jurors*

Never ask a woman if she is "just a housewife." Never ask a juror any excessively personal question. Never ask a juror about the juror's religion, or politics. Don't reprimand jurors for failing to understand your questions. Don't refer to a juror by the juror's first name. "Excuse" jurors, don't "challenge" them.

7. *Using your last peremptory challenge*

Peremptory challenges are your protection against the possibility of a disastrous juror sitting on your case. If you use your last peremptory challenge,

you are vulnerable to the fickle finger of fate. It should be done only in the most extreme circumstances. If you represent the defendant, use your last challenge, and the next juror installed is the spouse of a leading plaintiff's attorney, the trial is over. Hang your head in shame!

8. *Exercising a challenge for cause in front of the jury*

Challenges for cause must be based on a claim that the juror should not sit on the case. They are not only offensive to the juror challenged; the friends he or she has made during jury service may also be upset by your claim. Request that all challenges for cause be heard at sidebar, or with the jury withdrawn. Otherwise, an unsuccessful challenge may leave you with at least one very unfriendly juror.

9. *Overreaching or doing anything likely to draw a judicial rebuke*

You want the jury to trust and like you. Any rebuke or admonishment by the court is harmful to your image. You certainly don't want one at the beginning of the trial, before you have even delivered your opening statement!

10. *Failing to object and restrain an overreaching adversary*

Some adversaries will try to use voir dire for improper purposes, such as to obtain "commitments" from a jury on how they will vote on a given scenario. You must call upon the judge to admonish your adversary for doing this and to instruct the jury to disregard the offensive inquiry. If you are in a state where the judge isn't present during voir dire, such as New York, stop the proceedings and insist upon bringing the issue before the judge. Failure to do so may be a waiver of your right to complain afterward.

Once you have mastered this list of what *not* to do in voir dire, you can concentrate on what you should do in this important part of the trial. But that is a subject for another day.

WHERE HAVE ALL THE MENTORS GONE?†

E. C. Deeno Kitchen*

Several years ago when my University of Florida classmate, John DeVault, was running for president-elect of the Florida Bar, he asked me to arrange for him to meet the lawyers in the states attorney's office here in Tallahassee. Our State Attorney, Willie Meggs, was gracious in introducing John to his staff, though he made no endorsement. Later, Willie told me privately that John was fine man but surprised me by saying, "I really don't like lawyers a lot." That evening, I called my oldest friend, John Overchuck in Orlando. John's as good a trial lawyer as I know. After reviewing my discussion with Willie, I surprised myself in saying to John, "Brother, there are a whole lot of lawyers I don't like, either." He agreed.

Some of the finest people I've ever known are lawyers, particularly trial lawyers. They are sincere, talented, conscientious, and generous. But the more I think about it, the more I realize that the public is not totally wrong about its perception of lawyers. An old friend from Taylor County told me many years ago that when two lawyers go to court, one of them must be lying. We know that's not so, but there are reasons why the public ranks lawyers alongside used car dealers in trustworthiness.

In the last few years, the trial bar has grappled with issues relating to topics of ethics and civility. During my thirty-five years at that bar, I've given more and more thought to those things myself. I want to share some of those thoughts, while admitting up front that in both areas I've been a repeat offender—hopefully, not so egregious as some.

Let's start with the premise that a central role of a trial lawyer is simply to tell the client's story better than the client would be able to tell it. Using the old use of the word, we are their champions. As we all know, some tell stories better than others. We have been trained to use courtroom procedures to tell the client's story persuasively. We don't, however, change the story. We don't tell it falsely. We tell it truthfully and we tell it courteously. I believe that we are more persuasive if our audience knows us to be truthful and courteous. How can we persuade others of the justness of our client's cause if we are perceived as untrustworthy jackasses instead of champions? The late Edward R. Murrow of CBS News said it well: "To be persuasive we must be believable; to be believable we must be credible; to be credible we must be truthful."

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My old Webster's dictionary defines "mentor" as "a trusted counselor or guide, a tutor, or coach." Most of us have had mentors in our lives and professional careers. We could all use more. I practiced law for a year and a half with my late father-in-law, William Gautier of Volusia County, who died over thirty years ago. He was really the only father I ever had. Any judge or lawyer who ever knew him would still take his word over most people's checks. For nineteen years I was honored to practice law with Robert Ervin, a former Florida Bar president, and Wilfred Varn, a former U.S. Attorney here in Tallahassee. There was also my partner, Joe Jacobs, whose pastor said at his funeral: "Were there more lawyers like Joe Jacobs, there would be fewer lawyer jokes." For eighteen of those years, Former Governor LeRoy Collins, Florida's greatest governor, was in our firm. If you look up the word "integrity" in the dictionary, you might find Roy's picture. And, of course, there was my mother, Rose Deeb Kitchen, one of Florida's first 150 women lawyers, who exposed me to everything I should know about ethics and civility before I ever went to law school.

I had the opportunity to learn to practice law and try cases the "right" way. My failings are my own and not those of my mentors.

While ethics and civility are interrelated, they are not the same. A lawyer can be ethical and obnoxious, or an absolute fraud and yet a delightful human being. So I'd like to deal with them separately, though realizing that in the final analysis if one lacks ethics *or* civility, the lawyer is flawed.

Let's talk about ethics. With rare exception, this is the easy one. Most of us should have learned these things well before law school. Over the years I've reduced ethics to the following: "If it ain't so, don't say it, and if it ain't right, don't do it"; "You're never right when you're wrong and you're never wrong when you're right"; "If you have to ask whether it's right to do it, don't"; and lastly, "You know when you're right and you know when you're wrong."

There are, of course, ethical issues that evade these simplistic statements. A long time ago, I interviewed a client, in the Leon County jail, accused of a stabbing murder. He handed me a letter opener he said he found in his cell. He told me to get rid of it because it was dangerous. Think about that for a minute. That's why the Florida Bar has a hot line. I may never tell you how I handled that one.

If we abide by the simple colloquialisms listed above, however, we will maintain a good reputation for ethical conduct. A stellar reputation for ethical conduct is just plain good advocacy. If you are trusted, you will be believed. If you are believed, you will persuade. Who will believe—and be persuaded by—someone they don't trust?

The late Bud Robinson of Jacksonville, another classmate of mine and one of Florida's great trial lawyers, was also a mentor to me and to many others.

The last time I saw him before his death, he told me: “Deeno, never ever take a cheap shot. No case is worth it. Win straight up or don’t win. Remember, you’re going to be a trial lawyer the rest of your life.”

There is also this civility thing. To me this is the harder one. The Florida Bar oath of admission includes: “I will abstain from all offensive personalities . . . .” The Bar’s creed of professionalism clearly states: “I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.” Please read these quotations again and look for any exception to the civility requirement. There is none. There is no time when it is acceptable to engage in offensive personalities, or to be rude, disruptive, or disrespectful. There is no time when abusive behavior or lack of courtesy is acceptable—never.

I’ve heard lawyers say, “I’ll treat my opponents as well as they treat me.” Well, that’s just not good enough. If it were justified to act uncivilly because our opponent did, then we could often justify incivility. The Hatfields can justify killing the McCoys and the McCoys can do the same. We see it all over the world, and it’s amazing how often lawyers try to justify their own incivility for just such reasons.

Here are some examples I’ve seen personally in the last year. One of our fine lawyers, in a discovery dispute, told me he said to his opponent: “You were a jerk when I met you and you’re a jerk now.” I asked myself, when is it acceptable to say that to your opposing counsel? The answer is, never.

A good trial lawyer I know was leaving a federal courthouse in the middle of trial with his client when the opposing counsel walked past them and said: “F. . . you.” I asked myself, when is it appropriate to say this to your opposing counsel, whether or not a client is present? The answer is, never.

Finally, in the middle of my own trial I was in disagreement with my opposing counsel over a pretrial understanding concerning the admissibility of certain documents. My referring counsel said to my opponent: “All the rumors about you are true; you can’t be trusted.” I asked myself, when is it appropriate to say this to your opposing counsel? The answer is, simply, never. Aside from being inappropriate, how could any of this conduct benefit your client’s case? How could this conduct ever improve your client’s position? The answer is, never.

It should be clear that ethical conduct is good advocacy, that civil conduct is good advocacy. After all, in most of our cases, criminal and civil, there comes a time when we must try to reason with opposing counsel in an attempt to settle our differences. We all know this is much easier in an atmosphere of mutual trust and respect.

Judge William Hoeveler of the U.S. District Court for the Southern District of Florida once said that when a jury renders a verdict based on the law

and evidence, our system of justice gets a little bit better. But if a jury renders a verdict based on something other than the law and evidence, our system of justice gets a little bit worse.

That concept applies somewhat to trial lawyers' conduct as well. When we handle our clients' affairs before our courts in an ethical and civil manner, our system of justice gets a little bit better, and if we handle those matters in an unethical or uncivil manner, our system of justice gets a little bit worse. It can truly be said as to each of us, when our time at the bar is over, our system of justice will be either a little bit better or a little bit worse because of our efforts—it will not be the same.

Those are my thoughts. I'll leave you with this. If you can't be ethical and civil because it's the right thing to do, then at least do it because it's good advocacy and benefits your client. No, on second thought, do it because it's the right thing to do.