

1996 Law Day Speech
Sacramento County Bar Association
May 1, 1996
7:00 p.m.
Radisson Inn

Thank you. I would like to thank the Law Day Committee for inviting me to be the keynote speaker at this event. And I also want to thank Mr. Loveridge for his kind (and mercifully brief) introduction.

Well, they say . . . "timing is everything." I bet you are all wondering how I could have been so clever as to schedule a major speech the day before my confirmation hearing. A good friend of mine will be testifying in support of my appointment on May 2. When I talked to her yesterday, she said, "Gosh, I'd love to come hear your Law Day speech, but I have to do this thing on Thursday." Now what's wrong with this picture?

Actually, I agreed to this speech many months ago because this year's topic was simply irresistible. "The U.S. Constitution . . . the original American Dream." I hope you have signed up for the seminar. A semester ought to be sufficient for the introduction. Those of you who were promised a 20-minute exegesis on the whole subject of the U.S. Constitution should go immediately and demand your money back. 'Cause in the words of Malcolm X, "you been duped, you been hoodwinked." I am not going to give you the Gilbert's version of the Constitution.

The Constitution does have something to tell us, though, even if taken in very small increments. It provides a window through which we can study ourselves as political creatures. Political institutions do not determine human nature, but as Montesquieu observed, there is a constant interaction between the spirit of a government and the character of the people governed.

The genius of the American Constitution was in its attempt to combine stable government with liberty. Liberty was what the American experiment was all about, but liberty to the founders was not a synonym for license. The political philosophers in Publius's reading list were always careful to modify that word

liberty. They talked of ordered liberty, rational liberty, or moral liberty. But, they always made a connection between civic freedom and civic responsibility.

As De Tocqueville observed when America was still young:

“The Revolution of the United States was the result of a mature and reflecting preference for freedom, and not a vague or ill-defined craving for independence. It contracted no alliance with the turbulent passions of anarchy; but its course was marked on the contrary, by a love of order and law. [¶] It was never assumed in the United States, that the citizen of a free country has the right to do whatever he pleases; on the contrary, more social obligations were there imposed than anywhere else.”

There is a wonderful quote from Edmund Burke which beautifully articulates the task confronting the founders:

“To make a government requires no great prudence. Settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires letting go of the rein. But to form a free government, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful and combining mind.”

For a long period of our history, it seemed the founders had succeeded. As late as 1944, Judge Learned Hand could talk of the Spirit of Liberty in a way that suggested the opposite elements of liberty and restraint had been able to peacefully coexist.

“The spirit of liberty is the spirit which is not too sure it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of

liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.”

The United States Constitution inspired reverence not just because it was a clever experiment in political science, but because it was an attempt to construct a polity consistent with both the baser passions and higher aspirations of its citizens. But there is now a sense that things are more than slightly askew. Despite the founders’ notion that liberty requires law-free spaces, Americans are probably the most law-ridden people on the face of the earth. Every aspect, every corner, every moment of our lives is subject to government regulation and control. And while everybody demands the right to everything without restraint, there is a gnawing sense of impotence. As Aaron Wildavsky has noted:

“[P]rocedures for making public policy—from nominating presidential candidates to holding open meetings—appear to be more and more democratic. Equality, majority rule, due process, representation of practically everyone, all appear to have increased.”

Why then, he asks, are outcomes increasingly unsatisfactory? Despite a constitutional blueprint designed to emphasize deliberation rather than allowing the passion or power of a particular cause to take hold, we have become in recent years what Philip K. Howard calls “A Nation of Enemies.” We seem every day less like a nation and more like a collection of warring tribes.

So after this 30-volume prologue, I want to spend a little time talking about the increasing incivility of American public life. I think it is ominous. It has implications which should trouble us. The language of our public discourse

has become—to put it mildly—shrill. There is a personal animus in our attacks on politicians and representatives of causes we dislike. Our dialogue—if it occurs at all—has only two speeds. World weary and corrosive cynicism or unthrottled rage. Time Magazine recently carried an article on the popularity of talk radio and particularly the attack dog commentator. They quoted Marvin Kalb saying talk radio replaces the town meetings, churches, and community centers of an earlier age. If so, these events must have been blood sports. It is easy to understand why talk show hosts exhibit such a killer instinct. They want to titillate and entertain. The more difficult question is why there is such an avid response. Why are we so angry? So loud? So adamant?

I have heard a surprising number of commentators and political pundits say there is no explanation for the irascibility of the American electorate. In their view, the People are just an immature, unmannerly bunch of surly louts. Employment is up; inflation is holding steady; and the deficit is down. What do we have to be upset about? They attribute the current disaffection to sheer perversity.

I would like to offer a different perspective; to suggest there may be reasons why people are feeling frustrated and fed up. And their disaffection may be real even if they are willing participants in the political dynamic that is at the heart of their difficulties.

My thesis is simple. What has been variously described as excessive rights consciousness, as a culture of victimology, as a dialogue of increasing hostility and incivility may be the most visible symptom of a more fundamental confusion. A confusion about what it means to be free. To the founders, rights were essential to liberty because rights were an antidote to oppressive laws. To us, rights are an antidote to oppressive people. To the founders, a right was a shield to protect us from government; to us a right is a hammer, to be wielded by government, to clobber our enemies.

In 1989, the Yale Journal of Law, Ethics and Public Policy devoted an entire issue to the question—"Whither civic virtue?" The result of a symposium which had the ambitious goal of exploring the normative bases of the United States Constitution, this issue is worth reading. One article in particular, by Walter Berns, argues persuasively that the current emphasis on rights rather than interests will lead inevitably to the destruction of our republican form of government.

"We have become a society ridden with . . . rights. [¶]

This has consequences that ought to concern us. Whereas the framers intended a politics of interests that would be weighed and could be accommodated in the legislative process—a process that, depending as it does on the necessity to find or build majorities, fosters compromise and, therefore, moderation—we now have a politics of rights, a politics that excludes compromise and moderation."

In the June 1991 issue of the New Jersey Law Journal, Terence Moran, Assistant Managing Editor of the Washington, D.C., Legal Times, wrote an article entitled: "The age of incivility: civil rights run amok." Mr. Moran echoes the same theme. He notes:

"Civic discourse, from the mere courtesies people exchange on elevators or in shops to the great political debates citizens conduct on campuses or at workplaces, has degenerated dramatically and undeniably in this country. People seem increasingly unable to address each other in civil tones. There is growing tolerance of personal malice in the pursuit of progressive as well as conservative politics and a growing isolation of people from their neighbors. Whether out of fear or economic insecurity, or moral confusion, we simply aren't talking to each other as much or as well as we

need to in order to keep our communities working peacefully and prosperously.”

In his view, behind the loss of civility and alienation “lies the constant clamoring for more rights to do unto others and to keep them from doing unto you.” In the next few minutes in what—for want of a better description—I call Four Myths and a Parable, I would like to share some thoughts about the ways in which the rights strategy undermines the dream of liberty.

Myth No. 1: Money from the Wall

When my son was young, maybe four or five, we used to have an interesting conversation. He would be convinced by some commercial on his favorite Saturday cartoon show that he had to have some particular wonderful toy. Mom, will you buy me this super duper DX39 great adventure toy? I would say no. He would say, why not? I would explain I had no money to spend on this toy. He would argue: “But if you go to the store, they will give you money.” That was his perception of what happened when we went to the store.

Not too long ago, I heard the modern updated version of this conversation from my five-year-old niece. Except this time, the punch line was: “You can get money from the wall.” Her description of the ubiquitous ATM machine. She was reflecting the perception of children who grow up in a place like America that all such wants are easily, even magically, satisfied.

When a four- or five-year-old says such things, it does not worry us. Usually, we find it amusing. We know that age and experience will change that perception and they will come to understand that you have to put money in the wall before you can take money out. Unfortunately, however, we have come to view government the last 30 years much like little children view ATM machines. Money from the wall. Although our object is not always cold cash—it is more likely to be power, some right to something.

We will agree there is no free lunch. We are not convinced there is no free right. Politicians in their eagerness to please and to provide something of value to

their constituencies that does not have a price tag are handing out new rights like lollipops in the dentist's office. But rights do impose costs—in political and psychic terms as well as economic ones.

In 1949, Lillian Smith, a social historian from the South, wrote a book called *Killers of the Dream*, in which she argued that segregation became entrenched in the South for only one reason—because White supremacy was the one government benefit southern politicians could provide free. In the long run, of course, the cost was incalculable.

I acquit the current political class of the kind of calculated malice which may have motivated the South's curious bargain. Most public officials have good intentions. They mean well. But they have become so comfortable with the language of discrimination and equal protection, the words have lost all real meaning. The concepts are simply empty vessels which can be filled with any content and still elicit a powerful emotional response.

The money from the wall mentality often leads to a kind of creeping paralysis in government. We think rights cost little or nothing and it is only a matter of being fair. But, as Philip Howard points out:

“Making trade-offs . . . is much of what government does: Almost every government act . . . benefits one group more than another, and usually at the expense of everyone else. Most people expect their elected and appointed leaders to balance the pros and cons and make decisions in the public interest.

The problem is, government may lose the ability to do that once it has created “rights” elevating certain interests over other interests. And it doesn't appear that anyone is even keeping track anymore. The rights are so numerous they are beginning to collide. And courts find themselves in the unhappy position of trying to decide what trumps.

And that brings me to the second myth.

Myth No. 2—It Hurts So Good

People entering the rights lotto do not want to baldly assert that they are just after power or that they are motivated by greed or self-interest. Since there is a contest to obtain these rights, it is important to be able to claim the moral high ground. And in this country, because of our peculiar history, our political evolution, being a victim of oppression, creates a certain amount of political capital.

Everyone in America is a victim of one sort or another. If you total up all the groups that various representatives claim are oppressed, political scientist Aaron Wildavsky has calculated their number adds up to 374 percent of the population. *Victim v. Victim* politics increasingly frame our social and political debates.

The object of the exercise is to claim the prize as the most victimized. We have become a nation of whiners. Whining has replaced baseball as the national past time and if talk show lineups are any indication, it's better than sex. You can turn on the TV and watch hours of talk shows featuring guests confessing all manner of moral depravity and crying on cue. And this uplifting entertainment will be interspersed with 20 hours of commercials by lawyers assuring the viewers that nothing that ever happened is their fault. Even if it is, the right lawyer can get them money for it!

Charles Sykes says: "Stripped of its pretensions, victimism is an ideology of the ego, an impulse to deny personal responsibility and to obsess on one's grievances by stressing self-expression over self-control."

Please do not misunderstand me. There has been real oppression and victimization in America. There are real victims. Neither racism nor sexism are a myth. And we cannot ignore the things we must change. But, there is still a cost to this culture of victimization. There is an African proverb: when elephants fight, the grass gets trampled. In this case the grass represents civic discourse in America. Actually, you will find a striking degree of consensus—quite across the

political spectrum—about the implications of constantly extending the boundaries of the society of victims. Observers as diverse as William F. Buckley and Amitai Etzioni agree: “If the only way to solve a problem is to hold a competition to determine whose right is stronger, a disputatious and distrustful citizenry will result.”

Howard states the case more bluntly:

“Seeking balance has become difficult because we have misplaced the language of accommodation. Indeed, we seem to have forgotten why accommodation was ever necessary. The idea of weighing priorities has somehow become un-American.”

There is another negative consequence of this obsession with our wrongs. It keeps us focused on the negative. Worse than that it requires us to create new problems in order to continue deriving power from them. Leaders whose power is grievance-based find their success depends on their constituency’s failure. When power derives from the problem it is impossible to give yourself credit for solving it.

Even more significantly, as John Leo observes:

“If an agenda is presented as a set of rights that the majority refuses to endorse, then it follows that the majority must be bigots bent on domination. Rights talk thus becomes the official tongue of overheated, self-absorbed, no-compromise, fragmented intergroup politics.”

Myth No. 3: Sticks and Stones

When I was a child we had a saying to ward off hurtful things other children said. “Sticks and stones may break my bones but words will never hurt me.” That’s a helpful talisman to teach a child to keep them from being devastated by the careless cruelty of other children. But, like many things we are

taught as children, it is just plain wrong. Words do hurt. Words can lacerate the heart. They can annihilate the spirit.

Words—ideas—have been the most potent force in human history. Zbigniew Brezezinski, in his book *Out of Control*, exhaustively details how the metamyths of the Twentieth Century—Marxism, Nazism, Fascism, and Maoism to name a few—turned what began as the century of promise into the eve of destruction. Attempts to create coercive utopias, perfect societies in which no social, political or social misfits would be tolerated caused the death of perhaps 175,000,000 people. These numbers do not include military casualties. These were civilians whose lives were deliberately extinguished in the name of abstract political ideas. Brezezinski notes:

“This is the approximate equivalent of the total population of France, Italy, and Great Britain; or over two-thirds of the current population of the United States. This is more than the total killed in all previous wars, civil conflicts, and religious persecutions throughout human history.”

He adds: “These horrendous . . . numbers are . . . a reminder of what can happen when humanity’s innate capacity for aggression becomes harnessed by dogmatic self-righteousness and is enhanced by increasingly potent technologies of destruction.”

If the Twentieth Century has taught us anything it should have taught us how appallingly easy it is to convince people that an abstract political idea is worth dying for . . . or more accurately worth killing somebody else to assure.

Madison said it is man’s nature to create enemies and he was correct. He said, moreover, that if human beings cannot find great and weighty matters for which to kill each other, they will go to war over trivial concerns. Madison may have drawn these conclusions from his own experience or from the political philosophers whose work he read. But the modern science of psychology validates them.

Sam Kenn writes in his book, *Faces of the Enemy: Reflections of the Hostile Imagination*, that humans may not only be described as *Homo Sapiens* (thinkers), but *Homo farber* (toolmakers) and, significantly, as *Homo hostilis* (enemy makers). Keen says our “hostility regularly perverts reason into rationalization and propaganda, and makes our creativity serve the forces of destruction by making swords rather than plowshares.” He adds: “Myth, besides telling us who we are, where we come from, and what is our destiny, sanctions the killing of strangers who are considered nonhuman and profane.” He concludes: “Truth is the first sacrifice we make in order to belong to any exclusive group.”

If we have learned anything from our own history, this lesson should be clear. For decades Black men were lynched in the South; their bodies mutilated, and often burned. The murderers were never tried, and if they had been they would not have been convicted. These heinous crimes were rationalized on the basis that Black men were less than human and had no souls. Everyone, including those who most vehemently defended southern mores, knew that what was happening was wrong. Because there is another way we can characterize human beings. We can acknowledge they are also *Homo spiritualis*. Inside each of us there is some small part longing for, striving, struggling toward the light. Some might call it an innate moral sense; others would simply profess a sense of the sacred. And it is this dimension which demands that we justify cruelty and atrocities. Unless we do, we cannot live with ourselves.

And before you decide these ideas have nothing to do with life in America. Consider children being blown up in a daycare center because it happens to be in a federal building. Consider sending anonymous death threats through the mail. Consider the Freemen of Montana in an armed standoff with the FBI, apparently defending the right of free men to commit crimes. Consider too this observation from Eric Hoffer’s book, *The True Believer*: “Hatred is the most accessible and comprehensive of all unifying agents. Mass

movements can rise and spread without belief in God, but not without belief in a devil.”

Myth No. 4: Winning is the Only Thing

This is not exactly a myth. It is a mistaken assumption about the qualities at the core of our humanity. I first came across a clear statement of this idea in a book by Gordon Childe called *What Happened in History*. Childe was talking about the difference between primitive societies and civilized ones. In the former, people relied on shamans and witchdoctors—purveyors of magic. In the latter, they were at the mercy of a hierarchy of priests—often with a king being viewed as a deity at the top of the heap. Accordingly, he concludes: “Magic helps you get what you want; religion helps you want what you get.”

Childe meant this statement to reflect his view that getting what you want is the object of the exercise. And, of course, the corollary is—wanting what you get—with its notions of self-restraint, accommodation, and sacrifice—is a poor second best. I have to take issue with his premise. Always getting what you want may sound like a good deal, but I suspect it does not represent the most fulfilling life for a human being and it would be difficult to maintain any kind of reasonable communal life based on that premise.

If you doubt that, try to imagine a society, a whole nation filled with nothing but two-year-olds. Actually, it doesn’t take as much of a leap of the imagination as you thought, does it?

You could change the word “religion” here to “civic responsibility” or “responsible citizenship” without destroying the sense of the analysis. Brezezinski comments at length on the link between self-restraint and any definition of the good life.

“Two other issues of major importance are pertinent here: the definition of freedom and the definition of the good life. The first pertains to the meaning of citizenship and the second to the essence of the human being. In a society that

emphasizes the maximization of individual satisfactions and the minimization of moral restraints, civic freedoms tend to be elevated into a self-validating absolute. In other words, civic freedom is divorced from any notion of civic responsibility. Traditionally, . . . the notion of freedom was defined in the context of citizenship: That is, a definition of individual rights within a sociopolitical setting which also involved some responsibilities [F]or these responsibilities to be voluntarily shouldered genuine motivation is required, which in turn calls for an inner spirit that prompts the willingness to serve, to sacrifice, and to exercise self-restraint.”

And that thought brings me handily to my parable.

A Parable About Reciprocity

A few of you, like me, may be old enough to remember when Rafer Johnson won the gold medal for the decathlon in the 1960 Olympics. He returned home something of a celebrity. The Olympic Committee hoped to capitalize on his fame and appointed him a sort of goodwill ambassador. They wanted him to visit towns across America, to talk about his experiences, to garner goodwill and hopefully donations for Olympic athletes. In those days, the Olympic Committee did not have the merchandising and money-making machinery it has now.

Rafer agreed to make the trip. It was a definitely low budget affair. He would travel across country by car. Organizations where he made appearances would help defray his expenses. He decided it would be an ideal opportunity to spend some time with his son.

Just before he left, a friend asked if he would make a stop in his hometown. As a child this friend had attended a small church. He said they were still a small congregation with very limited financial resources. But, the friend felt a visit from

Rafer Johnson would do tremendous good for the youngsters in the congregation. He admitted they probably would not be able to offer any compensation.

At some point in his travels, Rafer found himself near the town his friend had mentioned. He called the minister and offered to drop by. His call was enthusiastically received. The kids were enthusiastic, his speech went well, he signed lots of autographs and felt very glad he had made the effort. After everyone left, he and his son remained for a little while, helping the minister straighten up, and the minister apologized repeatedly for not being able to offer even money for gas. Rafer brushed his concern aside. He and his son walked out the back door of the church. Near the door, he saw a little box for benevolence donations. As he went past, he took a \$20 bill out of his pocket and dropped it unobtrusively into the box.

While he was pulling out of the parking lot, he spotted the minister running after him, looking very agitated, trying to flag him down. Thinking he must have forgotten something he stopped the car. The minister ran up, out of breath. "Mr. Johnson, Mr. Johnson, I'm so glad I caught you. I didn't think we had anything to offer you. But you know the Lord always provides. I just want you to have this." And with that he pressed into Rafer's hands, the same \$20 bill Rafer had just left. And as Rafer sat there bemused, trying to figure out how to explain, the minister turned away and went back into the church.

At that moment, he felt a little tug on his sleeve, and his son asked: "Daddy, if you had put more in, would you have gotten more back?"

Conclusion

I do not believe citizens of a democratic republic have to be so self-sacrificing that life is no longer worth living. The founding fathers were quite serious about life, liberty, and the pursuit of happiness. They believed they had created a road map for the good life.

I return to the words of Learned Hand on the Spirit of Liberty.

“Liberty lies in the hearts and minds of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. . . . And what is this liberty which must lie in the hearts and minds of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few. . . .”

To put it another way, freedom cannot stand alone without degenerating into license. License, in turn is the undoing of freedom. In such a case, all personal and social life becomes simply the assertion of power. But in the modern world where liberty, democracy, technology, and mass culture collide, we confuse power with freedom.

Our forefathers understood that governments cannot give people freedom; they can only take it away. In Federalist No. 1, Publius says the People of America may by their conduct and example decide the important question whether societies of men are capable of establishing good government “from reflection and choice” or are forever destined to depend on “accident and force.” The founders gave us a Constitution to preserve our liberty. Martin Luther King, Jr., understood this when he stood on the steps of the Lincoln Memorial and told the assembled throng:

“When the architects of the republic wrote the magnificent words of the Constitution . . . they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the unalienable right to life, liberty, and the pursuit of happiness.”

That was the original American Dream. It is still our birthright. Whether we can maintain it will depend entirely upon what is in our hearts.

Head First Out of Eden
(The Once and Future Legal Profession)
Alameda/Contra Costa Trial Lawyers Association
Annual Judges Night
Claremont Hotel
January 21, 1997
6:00 P.M.

By: Justice Janice R. Brown

Thank you. It is a great pleasure to be here. I would like to thank David McClain for extending the invitation and Beth Summers for her gracious introduction. But I need to show you the real reason I am here. While I was trying to decide whether I should accept the Association's invitation, I did present a short speech for the litigation section of the San Francisco County Bar. That speech was entitled, "Its not Easy Being Green: A Philosophical Perspective From Kermit the Frog." A few days later, I received a rather lumpy package in the mail. I was somewhat concerned, because of course with letter bombs being delivered every day, we have protocols for handling any suspicious-looking package. This was so oddly shaped — having an odd lump right in the middle — that I took a chance on opening it. This was inside. (For those of you who, like me, have begun having trouble distinguishing things from the back row, I will tell you it is a small figure of Kermit in a very debonair, Fred Astaire pose.) With such an emissary how could I say no.

In October I talked a little about my first impressions of the court. Tonight, I want to talk more generally about the legal profession, and its impact (our impact), for good or ill, on the society in which we live.

Recently, while wandering through various bookstores — a thing I am very fond of doing — I have repeatedly noted the title of a book by someone named Brett Butler. I assume it is some sort of celebrity bio. I confess, I have never picked up the book, not even to read the jacket, but the title always catches my

eye. It's called "Kneedeep in Paradise." From this title I assume that Ms. Butler is feeling pretty good about her life. As I began preparing this speech I tried to think how I could capture in a few words the present state of the legal profession in America. I decided this speech should be called "Head First Out of Eden." Because we have been thrown out of paradise. But the point of my message is that may not be all bad.

However, since most of you may think being chucked out of paradise could not possibly be a good thing, I need to pause here to explain my context. You see, I have always been puzzled by the story of the Garden of Eden and a bit chagrined that woman gets blamed for messing everything up. I have found someone who gives a better and, I think, more hopeful and more helpful interpretation of that story. Harold Kushner, a congregational Rabbi, begins his book, "How Good Do We Have to Be," by suggesting that the story of the Garden of Eden is not an account of people being punished for having made one mistake, losing Paradise because they were not perfect. He says:

"It is the story of the first human beings graduating, evolving from the relatively uncomplicated world of animal life to the immensely complicated world of being human and knowing that there are such things as good and evil."

"The story of the Garden of Eden is not a story of the fall of man, but of the Emergence of Humankind."

"The woman is not the villain of the story, enslaved by appetite and bringing sin and death into the world. She can be seen as the heroine of the story, leading her husband into the brave new world of moral demands and moral decisions."

Rabbi Kushner invites us to consider how the story might otherwise have ended. Suppose Eve had not disobeyed? He ends the story this way:

"And God called to the man and the woman and said to them, 'Because you have harkened to my word and not disobeyed my command, I shall reward you greatly.' To the

man, He said, 'You will never have to work again. Spend all your days in idle contentment, with food growing all around you.' To the woman, He said, 'You will bear children without pain and you will raise them without pain. They will need nothing from you. Children will not cry when their parents die, and parents will not cry when their children die.' To both of them, He said, 'For the rest of your lives, you will have full bellies and contented smiles. You will never cry and you will never laugh. You will never long for something you don't have, and you will never receive something you have always wanted.' And the man and the woman grew old together in the garden, eating daily from the Tree of Life and having many children. And the grass grew high around the Tree of Knowledge until it disappeared from view, for there was no one to tend it."

In the Beginning

With the clarity of hindsight, I think I know exactly what the serpent whispered to us. He said: "S-s-s-say, Counselor, law is s-s-s-simply a business like any other business. No different than being a plumber or a retailer." And that was a surprisingly seductive message. So seductive that in a very short period of time, only our elders remembered — and, they, only dimly — that there had ever been any other way of thinking about the legal profession.

I must admit that is what I learned when I was in law school. I was attracted to law as a life work because I had an early glimpse of its nobility. I had a quixotic notion that law, like teaching or medicine or the ministry, was about service to society. But, I came to understand that my view was very naive. And that was not surprising since there were no lawyers or judges in my family. I did not really know any of these exotic creatures, I only read about them.

When I graduated from law school, I had already decided I wanted to be a public lawyer. My reason: I believed only public lawyers had the luxury of doing the right thing for the right reason. For years when I talked to students, I told them one of the tradeoffs for the relatively low pay was the public lawyer's ability to say

“no” to their client, to refuse to defend the indefensible. I made speeches before groups and public lawyers, I reminded them of their unique portfolio: to be aware in every aspect of their professional lives, to be aware of the public interest and their responsibility to consider and honor it.

But always I assumed that the private practice of law was different, that for the private practitioner law was “a business like any other business.” The role of the private attorney was simply to serve the interests of his client. My confusion on this subject is somewhat understandable. I believe there is a powerful discontinuity between older and younger members of the profession in this respect. This is what Richard Abel, who was the professor who taught me ethics at UCLA, has to say about legal professionalism:

“Lawyers are hired guns: they know that they are, their clients demand that they be, and the public sees them that way. As more lawyers are employed by or represent increasingly powerful clients, this identification grows even stronger. Lawyers must stop denying the identification and embrace it. Instead of seeking to justify their actions by reference to process values that allegedly produce truth and justice, lawyers must concede — indeed affirm — that they actively promote the objectives of their clients and justify their own behavior in terms of the substantive justice of their clients’ goals.”

This remains perhaps the prevalent modern view of the role of lawyers. But I can tell you the exact moment of my epiphany on this subject. I had been working for Governor Wilson for about a year. We were in the midst of a dispute with another state official about the interpretation of some recently enacted legislation. We had just received a response from him which, in my view, flatly contradicted the statute, but he backed up his position with a letter from his counsel offering a truly tortured construction of the language. I had to brief the Governor on the outcome of our negotiations. I explained the position and indicated that the official’s chief counsel had validated the approach.

The Governor expressed puzzlement that the department's lawyers would offer such an obvious misreading of the statute. I responded that the lawyers for this particular department simply told the boss what he wanted to hear. At which point, the Governor turned to me, peered solemnly over his reading glasses and said: "Oh, unlike my lawyer." I was so startled by that, I actually started to stutter. You see, it had never occurred to me that it was my job to tell him what he wanted to hear. I was dismayed because I realized I had never asked him about his expectations in this regard. Possibly, that had been his expectation, and if so, I should not have taken the job. As I was struggling to frame a response, the Governor started to laugh. "Unlike my lawyer," he said, "and I wouldn't have it any other way."

From that day, however, I began to look more closely at the question of the role of lawyers, both public and private. I was surprised and chagrined to learn that the view of law as a mere business enterprise and of lawyers as subservient to their clients is quite recent. And that historically the view of the legal profession suggests a nobler role for officers of the court. And that role is the same for both public and private lawyers.

As World War II drew to a close, The ABA's Section of Legal Education and Admissions proposed to conduct a survey of the legal profession which they envisioned as "a broad study of the functioning of lawyers in a free society." In describing the scope, methods, and objectives of the survey, they said:

"Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and an independent bar. [¶] The legal profession is a public profession. Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent upon stewards, if they are to be faithful to their trust, to render an accounting from time to time."

Roscoe Pound, who was then Dean Emeritus of the Harvard School of Law, authored a segment of the survey called "The Lawyer from Antiquity to Modern Times." To hear Pound rhapsodize about the days when law was a profession, not just a business, invokes in me a deep longing for *some* of the verities of the good old days. He says:

"Historically there are three ideas involved in a profession: organization, learning, i.e., pursuit of a learned art, and a spirit of public service.

"In the third idea . . . we have the point of chief importance. It is the essence of a profession that it is practiced in a spirit of public service. 'A trade,' says Professor Palmer, aims primarily at personal gain; a profession at the exercise of powers beneficial to mankind.

"The best service of a professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the law is and ought to be exercised is a prerequisite of sound administration of justice . . . The other two elements of a profession, namely, organization and pursuit of a learned art have their justification in that they secure and maintain that spirit."

In his book, Dean Pound traces the law as a profession in English-speaking countries back to the medieval church. Lawyers got their start as part of a priesthood. As Pound explains: "For a long time the clergy were the only educated element in society and so had a monopoly on the things that called for learning. The judges and counsel were clergyman not only in the courts of the church but in those of the state as well. But a development of lawyers went along with the development of law. In the twelfth century the lawyers became prominent in the courts. In the thirteenth they became dominant. Presently the church forbade the clergy practicing in the courts generally and the lay lawyer got the

monopoly he has held ever since. One became a lawyer by being admitted to a place in the brotherhood.”

I have only one suggestion for improving what Pound has to say. Since there are now so many women lawyers it seems inhospitable to continue to call the profession a brotherhood. However, I can understand that our brethren might feel uncomfortable as part of a sisterhood. So, I propose from now on we just call it the “hood.”

We spent a long time in Eden, and we took it pretty much for granted. Alexis De Tocqueville, in his wonderfully lucid and insightful book, “Democracy in America,” noted that democracy is favorable to the political power of lawyers. When the nobles and the princes are excluded from power, lawyers are likely to be the only people with “information and sagacity” who can be the object of popular choice. He makes another observation about lawyers that is so at odds with current perceptions, it seems shocking. He says: “The people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation.”

Indeed, members of the legal profession played a preeminent role in our history. John Adams, Thomas Jefferson, James Madison, John Jay, and John Marshall — some of the most famous names among the Founding Fathers were lawyers. So was Abraham Lincoln. And in the twentieth century, Franklin Roosevelt.

More than a 100 years after De Tocqueville’s observation, Judge Charles Wyzanski could still talk of the morality inherent in the trial lawyer’s role. And of the larger question of a good and useful life. Lawyers, he said, must try to win the game within the rules. “Nothing else counts The limitations are the conditions of the art. Style is performance within the prescription.”

After the Fall

There seems to be an impossibly long distance between the learned and sagacious counselors of De Tocqueville's observations and Wyzanski's well-defined notions of fair play to the role of roadkill in contemporary lawyer jokes, but it only took a few decades.

Recently, a columnist in one of the legal newspapers took the new bar president to task for making yet another speech on the lack of civility in the practice of law. Since I have made a few speeches on civility myself, the article caught my attention. In the author's view, platitudes about civility are no more than a Band-Aid on a chancre. His point was simply that the incivility and acrimony among lawyers which is causing such consternation is only a symptom of the deeper philosophical problem. Using the transcript of a roundtable discussion of young attorneys, he pointed out that being obnoxious has become the accepted method of practicing law. Abusive and unethical practices are justified on the basis that the lawyer's only ethical obligation is to see that his client wins.

And more to the point, according to these young lawyers, firms tacitly encourage this behavior if it works. Even the words we use to describe these actions — scorched earth, take no prisoners, greenmail — suggest a willingness to destroy the village in order to achieve victory.

Compare this with Dean Jesse Choper's comment that "[w]hen you are a member of a profession, playing hardball is unthinkable." Or with Justice Sandra Day O'Connor's observation: "Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends wealth." That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be.

And this brings me to the point of this discussion. (I know many of you were wondering if I had one.) All too often when we talk about ethical obligations and the public service responsibility of the bar, the conversation narrows down to a single concern. How much pro bono work lawyers do. I do not mean to denigrate pro bono obligations. They are a crucial part of our responsibility. Access for persons of limited resources is critically important and I commend everyone, individuals and firms, who expend their time and resources to provide these needed services.

But I believe that when we talk about lawyers as public servants and when we talk about law as a profession imbued with the public interest, we must consider a much broader context. Concern about the public interest must be part of how lawyers conduct every aspect of their practice. We serve the public interest when we treat litigants and other lawyers fairly; when we resolve to act honorably even if we could bill more hours by being jerks; when we prefer real solutions to Pyrrhic victories.

We might wonder why lawyer jokes do not go the way of dumb blonde jokes or Polish jokes. Bob Eaton argues that lawyer jokes have legs because the stereotypes ring true. He says:

“All you have to do is read the daily paper: Texas lawyers win \$1 for client, collects \$1.5 million in fees . . . Mugger shot by cop, sues cop, collects . . . Girl Scouts sell 87,000 boxes of cookies to pay liability insurance”

Eaton’s theory is that Americans show so little respect for lawyers because they have so much respect for the law, but he sees “a disconnect between what we were taught in civics class and the way the adult world really works. And the word for that disconnect is cynicism.”

I agree with Sol Linowitz’s observation that “the feeling that lawyer’s are not trustworthy is the most debilitating aspect of public attitudes today.” I find

that attitude everywhere I turn. When I told my husband the theme of this speech, I was startled by the vehemence of his response. He said: "You've got to be kidding. Law is a business. That's all it is. Everyone knows lawyers are not honorable and they are not honest. They will do anything they have to do to win." Then, he realized to whom he had made that statement and quickly added, "Oh, I don't mean you. I know you are honorable." I met no one who is indifferent on the subject. Relatives make exceptions for the attorneys they happen to know and like; occasionally a satisfied client offers a spirited defense. In general, though, the response to the word lawyer is one of seething resentment if not virulent hatred. Robert Solomon says "resentment . . . is the class action suit among the emotions." He notes it is "resentment not misery that loves company. And with enough company and a bit of courage, it can even start a revolution."

Honor If Not Glory

Although we may harbor our own resentments about what we consider to be unfair criticisms or circumstances beyond our control, we might fare better as expatriots of Eden if we looked upon our expulsion as challenge and opportunity rather than eternal damnation.

We live in a complicated world. I am sure I could not begin to catalogue let alone comprehend all the reasons for this shift in attitude toward law and lawyers. Perhaps we are the innocent victims of what Bayless Manning characterized as the nation's hyperactive law-making machinery. Living in what Mary Ann Glendon calls the most "law-ridden" society in the history of the world may just make people naturally surly. Maybe the pervasive role of government in defining and promoting the public interest has changed forever the role any profession can play. Maybe the economics of the large law firm make all-out war inevitable.

We change the world and we are changed by it. I realize that we cannot go home again. Indeed, not everything about the good old days was good. Law was an exclusive club that had no place for women or Jews or minorities. It suffered as

much as any other group of powerful and learned folks from bigotry and dogmatic self-righteousness. Nevertheless, it is possible that the view of the legal profession as noble, set apart, a calling and not a trade may have been beneficial in ways we are only now beginning to comprehend.

At least two parts of the old catechism seem worth reviving. First, law is a profession and not a business. It requires independent judgment. A customer is always right, but the client is not. Second, the public interest obligation of the legal profession requiring a personal and collective responsibility for justice includes, at a minimum, a commitment to fairness, playing by the rules, and not abusing the process.

Law is a noble profession and we must restore the primacy of our obligation to act honorably. As Robert Solomon explains in his book "A Passion for Justice":

"Honor involves living up to the expectations of the group — whether these are spelled out as a code of honor or a set of moral rules or simply implicit in the practices and goals of the group. One's honor is never one's own honor alone. It is the honor of the group one represents and stands up for, and defending one's honor necessarily entails defending it as a representative of the group."

My mother has done something for many years and she still does. As a teenager I think it annoyed me. As I grow older, I find I take a certain amount of comfort from it. Whenever I was going through a tough period, facing some dilemma and feeling uncertain about my course, I would talk things over with her. Her final admonition was always the same. She would say: "Remember who you are." Even as a youngster I understood how much was entailed in those few words. Remember who you are. It meant remember what this family stands for . . . don't cheat or lie. Don't take things that don't belong to you. Don't blame other people for your problems. Don't snivel. Treat everyone with respect. Do unto others.

I suppose in the final analysis that is all I am saying to you. We are privileged to be members of a great profession. Remember who you are. The world may not be just but we ourselves can be. If we can remember who we are, we can have what Robert Solomon describes as "a passion for justice that is neither naive nor merely sentimental, but natural and engaged in the world and which alone can justify our good fortune."

Thank you.

A PRAYER FOR CALIFORNIA
36th Annual California Prayer Breakfast
Thunderbird Ballroom, Red Lion Hotel
Thursday, March 6, 1997

By: Justice Janice R. Brown

Please join me in a prayer for California.

Dear God,

We join in prayer to celebrate this great State and surrender its destiny to you. When we find you in the sacred silence of the redwoods; when we contemplate the perfect beauty of Shasta's peak; when you lay fields of golden poppies and purple irises like a gift at our feet; when sunset spreads its colors over the Pacific like a benediction; when we see all the wondrous things your hands have made, we stand in awe of you. And we know you love us. And we thank you.

[We thank you for the cleansing breath of the Santa Ana's and the howling winds of winter's storms. For the night sky teeming with stars and for the burning sun that warms our fertile valleys. We thank you for giving us minds to seek distant universes and hearts filled with the longing to know. We thank you for making us weak enough to love beauty and strong enough to endure whatever comes. When the earth moves beneath our feet and the waters overwhelm our efforts to control the flood, you are yet with us. Do not let us forget that it is the earth and the water that sustain our lives. And it is through the work of rebuilding that we glimpse immortality.]*

We give thanks today for everything that makes California a place of exhilaration and enchantment. We thank you for the good and the bad. We accept

the good with gratitude and the bad knowing we can make it better. What needs to be changed will be changed when we are changed. Help us to change. Heal our cynicism, Father. Cure us of the disease of indifference. Take this plague of violence from our midst.

Forgive us for our many failures, our lapses, our lack of faith. We know you keep *all* your promises and love everything that you have made. We pray today for a new spirit. Grant us, dear God, a total transformation. Send us a miracle. Send us two or three. Whatever it takes to convince us that we can make a world defined by our highest aspirations and not our lowest appetites.

Break our chains so the truth *can* set us free. Remove the walls that separate us. Remove the anger and the rage. Remove from our hearts the illusion that we are separate. Let us all, people of every color and every language and every religion, understand that we are members of a single tribe and through you, our common Father, redeemer of broken dreams, we share one heart and one destiny. Remove from our minds the tendency to blame. Instill in each of us a personal and powerful passion for justice.

We ask your blessings for those who lead us. Make them great enough to be the conduits of your power; humble enough to serve faithfully, diligently seeking the common good; wise enough to see the innocence and the brotherhood of those who oppose them; and brave enough to speak the truth and thus lead us into a new freedom, a new politics, a new hope.

Reanimate in us the spirit of integrity so that the beauty and greatness of this state will flower once again in the hearts of its people. Help us not to be afraid of malice and not to be dismayed by fools. Remind us of the eternal truths and the permanent things so that we will not confuse self-indulgence with self-discipline so that we will know the difference between hype and hope, so that we will stop

* This language was omitted from the prayer presentation on March 6 due to time constraints.

pretending that license and liberty are the same. Help us to realize the dreams of those who came before us, that we might live in honesty and charity and excellence with our neighbors and so that we might pass on a legacy to our children and their children worthy of free people.

Dear God,

Fill our hearts with love.

Our minds with humility.

Our spirits with soaring light.

Reignite the flame in us so we, as living fire, may yet become a beacon of hope and goodness and peace and freedom.

Renew us.

Repair us.

Revive us again.

Dear God, please, bless California.

Amen.

How Open Do We Have To Be?
San Diego Chamber of Commerce
National Business Women's Forum
Thursday, March 27, 1997
7:30 A.M.
Emerald Wyndham Hotel
San Diego, CA

By Justice Janice R. Brown

Thank you. I want to thank Midge Costanza for extending the invitation to join you and all of the people who have gone to so much trouble to make my stay so enjoyable. It is always a pleasure to come to San Diego. I keep trying to convince my colleagues to agree that -- since we are violating our authorizing statute by having the court headquartered in San Francisco, we might as well go all the way and move the court to San Diego. The weather is better; the people are nicer; and you don't have nearly as many bridges. So far I've only gotten one vote for that proposition -- my own.

Recently I had the good fortune to stumble upon a book by Rabbi Harold Kushner called "How Good Do We Have to Be?" It is one of those small delightful books filled with practical wisdom and good sense. Rabbi Kushner points out how much grief and anguish is added to individual human lives by our determination to be perfectly good and by our self-disgust -- the coals of fire we heap upon our own heads when we fail to achieve this mythical perfection. And, of course, we fail over and over again because we are only human. The rabbi's point is not that we should not strive. Striving is what makes us human. But he suggests we should accept the fact that failure is part of the process. That what is required is not perfection, but rather integrity. What he calls wholeness. [Expand this definition]

He illustrates his point with an adult fable by Shel Silverstein. It is the story of a circle that has a piece missing. He goes on a journey rolling through the world

looking for his missing piece. He finds lots of pieces along the way: some are too big; some are too small; some too narrow. None of them fit just right. But because he has a piece missing, he is not able to roll smoothly. He rolls very slowly. And because of his missing piece he has time to notice the colors and the light. He has a chance to appreciate the flowers beside the path. And then one day, he finds his missing piece. It fits perfectly. And once he has it in place, he rolls along at an incredible speed. But he realizes that he is no longer seeing the colors and the seasons and the flowers. So he takes out the missing piece and leaves it by the side of the road and then goes on his way, looking for his missing piece. I think this may be more of a fable for our times than may at first appear. The rabbi's point, of course, is that a person may have integrity (be whole) without being perfect.

It occurred to me that it might be profitable to apply this idea to our consideration of government. In fact, De Tocqueville, who seems to have thought of everything sooner and more clearly than everybody else, says something similar in his book, *Democracy in America*. He says candidly, that compared to the French government of that era, American government is woefully inefficient. But he argues that is one of its strengths. Every project is so thoroughly discussed and debated that everyone feels they have a hand in its solution. Of course, that emphasis on local government and community life has almost disappeared in the modern political realm, but the positive qualities of imperfection might be something we should consider reviving.

This morning, I will attempt to explore (very briefly) the logical limits of a commitment to openness. "How Open Do We Have to Be?" A number of different words could be substituted here. We might ask how pure or how perfect does democratic capitalism have to be? Like Rabbi Kushner, my thesis is a simple one. I believe we can be seduced by this dream of perfection in a way that will ultimately kill the very thing we seek to perfect. My grandmother might approach

this with an affirmation rather than a question. She would say: "It's a fine thing to have an open mind. But your mind shouldn't be so open everything in it falls out."

I realize that even to question openness as the primary virtue of American democracy is to be guilty of heresy. But as Alan Bloom points out openness may be in the eye of the beholder.

"Openness used to be the virtue that permitted us to seek the good by using reason. It now means accepting everything and denying reason's power."

In his book, *The Closing of the American Mind*, Bloom theorizes that our perspective on rational thought and knowledge itself has changed. We have accepted doctrines of openness and relativism to such an extent that we have abandoned reason for fear it may lead to intolerance. The true effect of such blind allegiance to openness is that we now refuse to seek any truth at all. In a word, our minds have become closed to the reality of truth. "The unrestrained and thoughtless pursuit of openness, without recognizing the inherent political, social, or cultural problems of openness as the goal of nature, has rendered openness meaningless." He concludes:

"The United States is one of the highest and most extreme achievements of the rational quest for the good life according to nature. What makes its political structure possible is the use of the rational principles of natural right to found a people Or, to put it otherwise, the regime established here promised untrammelled freedom to reason--not to everything indiscriminately, but to reason, the essential freedom that justifies other freedoms. . . . An openness that denies the special claim of reason bursts the mainspring keeping this regime in motion."

Bloom says in fact that the goals of education have changed from the education of the democratic person to the education of the democratic personality. The old view was that by accepting a notion of universal rights, people found a basis of

unity and sameness in the light of which differences in class, race, religion, and national origin tended to recede. The recent education in openness abandons all that. The only virtue is openness. But, he asks, "when there is no shared goals or vision of the public good, is the social contract any longer possible?"

Francis Fukuyama, in his book, *The End of History and the Last Man*, puts this even more bluntly.

"Democratic societies tend to promote a belief in the equality of all lifestyles and values. They do not tell their citizens how they should live, or what will make them happy, virtuous, or great. Instead, they cultivate the virtue of toleration, which becomes the chief virtue in democratic societies."

Of course, no one is in favor of intolerance. Openness seems to be one of those things like truth, justice, and the American way (motherhood and apple pie); who can be against it. Nevertheless, as in other aspects of our lives, too much of a good thing can have its dark side.

As Fukuyama notes: "It becomes particularly difficult for people in democratic societies to take questions with real moral content seriously in public life. Morality involves a distinction between better and worse, good and bad, which seems to violate the democratic principle of tolerance." It is for this reason, he says, that the last man becomes obsessed with his own personal health and safety. "In America today, we feel entitled to criticize another person's smoking habits but not his or her religious beliefs or moral behavior."

Query whether we could have fought a civil war on the question of slavery in an era of openness in which all views are equally valid? In a society so transformed that we now believe there is no right or wrong, we are left with a single gauge by which to judge all actions and all outcomes: Our feelings. We need no greater justification for any position we care to take. We can say: "This is how I feel. My feelings are valid." End of conversation. On this scale, there is no

difference between the feelings of Mother Teresa and the militiaman who feels he is justified in blowing up a preschool full of toddlers.

It may seem that relying on feeling doesn't matter very much. What's the big deal? There are two ways in which it matters very much. First, we greatly increase the chances of being led into error in our political decisions. In his book, *Democracy Against Itself*, Jean Francois Revel says unself-consciously that the "whole world needs democracy in order to survive or to be reborn." But he notes: "the more democratic societies become, the more complex become the issues and the more difficult the choices among desired but incompatible solutions." In this confusion, conducive to demagoguery, "tricks must not become the ultimate element in the arsenal of campaigns -- a grotesque dance of mutual alienation between the voter and the candidate, wherein the latter grow more manipulative and at the same time enslaved by public opinion, which they themselves deform." It is not enough to say democracy is a good regime because the people cannot be wrong. The people are often wrong and are even more often led into error. It is, Revel says, "despite this sorry reality," that democracy is the least bad regime.

Noting that politicians no longer win elections by telling the truth (indeed they scarcely try to find out what it is), Revel suggests the successful campaign nowadays is "one that severs the link between the voters' common sense and reality."

He concludes that an additional cause of the disappearance of democracy where it should be strongest is "the improvement of the means of persuasion, obsession with public relations, the appeal to feelings instead of critical reflection, the supremacy of affirmative rather than demonstrative statements, all of the tricks of communication which is the art whereby a leader gets himself judged on the basis of the impression he puts across rather than his record or his proposed programs -- lead voters to forget the facts, to lose sight of the real issues and their

contexts. Voters have a growing difficulty in expressing through their ballots a choice based on real results or real reflection on the future.

Secondly, sentiment is simply not a basis for substantive democracy. As James Hunter says: "When the truth claims at the heart of culture are hollowed out, when their substance cannot be defended or criticized, there is little left besides feelings." But sentiment constitutes very shaky ground for sustaining democratic ideals. Shallow democracy is only capable of producing a shallow self-defense.

Thus, a handful of advocates and activists are able to wield enormous power. We literally cede the power of government to the Sony soundbite. Hamlet said, "To be or not to be was the question." He was wrong. "How do you feel?" is the question. A handful of people with picket signs become more powerful than thousands of people peacefully participating. There is little entertainment value in constructive dialogue. The media wants conflict, pathos, ethos, and if possible bathos. The more maudlin the better.

A recent example. A report on NPR about the threatened federal crackdown on Indian gaming. The report began by saying the United States Attorney had asked tribes operating slot machines to sign a voluntary agreement to cease using the machines which violate California law. Although most tribes had agreed, several in Southern California vowed to resist the order. The rest of the report had interviews with tribal leaders talking about what an economic boom the casinos had been to tribes formerly dependent on welfare; the report noted the casinos were major employers in the area and featured an interview with one of the casino workers who was asked -- you guessed it -- "How do you feel." Her response. "Just devastated. It's terrible. I don't feel the casino is doing anything wrong." The segment ended with Steven Seagal, apparently as a spokesman for the Indians, reciting the many broken promises between the Indians and the federal government.

Without expressing any view about the merits of this, I can tell you exactly who won the Sony soundbite contest.

In this, I suppose we must accept being both sinned against and sinning. Our democratic education has taught us to remain in the shallow end of the pool. Even so, we are remarkably ill informed. Legal illiteracy and misinformation are the rule, not the exception. As Hunter describes it: "Americans have strong opinions, but they seem to venture on the seas of various controversies without much ballast of knowledge." They are incapable of articulating much beyond their feelings. They have remarkably few resources on which to draw.

The key institutions which should mediate these controversies are often engaged in the dispute as superficially and tendentiously as the partisans. Professional associations, political parties and religious institutions often become de facto special interest groups themselves and end up carrying out the political agendas of one side or the other. What we end up with is power politics with a vengeance. Brute force. Not only power politics but negative politics in which the object is to delegitimize and discredit the opposition. What one author characterizes as "a soft imperialism" where words are weapons and debates are occasions to intimidate if not verbally bludgeon one's opponent. In the world of power politics there is no percentage in trying to be reasonable.

What information citizens can obtain comes from the media and will be superficial by design. Newspapers, radio, and television are dramatic media. They need the interplay of antagonists and protagonists, heroes and villains, victims and victimizers. The voices that do not fit neatly into the grid of inflamed rhetoric -- the thoughtfully ambivalent and scholarly -- are simply ignored. Public discourse thus becomes much more polarized than the nation is. The other aspect of this -- and perhaps the most significant is the tendency to reduce every controversy to the struggle for power. Every issue is framed in terms of who has power and who does not.

To quote from Barbara Brotman of the Chicago Tribune: "We've gotten bogged down in reporting the political ups and downs of the sides, like we're covering sports and we've gotten away from reporting the issues." To put it another way, "when the cultural, moral, and aesthetic dimensions of a controversy are ignored, public expectations cannot help but be framed by the zero-sum logic of winners and losers."

A recent column by William Raspberry, entitled "Discovered: A New Definition of Ethics," brought this to light for me. Raspberry begins by lamenting that his small class at Duke seemed incapable of working up any more outrage about the latest campaign fundraising scandal. Thinking they simply did not understand what was normal in the buying and selling of political access, Raspberry offered several hypothetical examples of selling his column in the newspaper. To his dismay, the vast majority of his students saw nothing wrong with taking money to advocate some organization's side of a controversy even if he did not believe in the righteousness of their cause. He muses that maybe we are not seeing cynicism or indifference to unethical behavior, but a new definition of "ethics that allows for the buying and selling of virtually anything." He says:

"Maybe they have come to see the media's hot-breadth pursuit of political scandal the way they view professional boxing -- as a game that is sometimes boring, sometimes entertaining but irrelevant to their lives. What are the Lincoln Bedroom story, the Newt Gingrich affair or Whitewater about? One may as well ask what the fight between Evander Holyfield and Mike Tyson was about."

He ends by saying: "It has been remarked of late that the media, driven by their own economic survival, are becoming more tabloid every day." Wouldn't it be something if they also became the last surviving arbiter of public virtue? Now there's a scary thought.

The question, of course, is what then shall we do. We have shifted the paradigm. From our vantage point at the end of history, we exude a world weary cynicism. It is hard for us to believe in anything. The irony is we must believe in something or be destroyed. Democratic capitalism may be the last regime left standing. But its triumph at this stage owes more to the weakness and wickedness of totalitarian regimes than to its own agility.

Fukuyama offers this chilling assessment.

“Relativism--the doctrine that maintains that all values are merely relative and which attacks ‘privileged perspectives--must ultimately end up undermining democratic and tolerant values as well.’ Relativism is not a weapon that can be aimed selectively at the enemies one chooses. It fires indiscriminately shooting out the legs of not only the ‘absolutisms,’ dogmas, and certainties of western tradition, but the tradition’s emphasis on tolerance, diversity, and freedom of thought as well. If nothing can be true absolutely, if all values are culturally determined, then cherished principles like human equality have to go by the wayside as well.”

This is true even though liberal democracy may constitute the best solution to the human problem. As Revel puts it: “Men are able to conceive and build political institutions that are more rational than they are, and to freely place themselves under their rule. However, it is unlikely that we will ever be capable of building a world that is qualitatively better than we ourselves are. There is within us an unchanged impulse which prefers failure to success, misfortune to happiness, might over right, violence over justice.”

There are many ways in which we might begin to recapture the ideal we hold in our minds. There are a few things we could try. First, I think we must give up this idea of the silver bullet, the dream of perfection, the universal solution. Our hopes ought to be altogether more modest. Part of this modesty is

recognizing, as in the parable with which I began this discussion, that we will always be flawed. That's okay. Imperfection is part of the human condition. In fact, Revel says it "is a mistake to fault liberal society for lacking an ideal." On the contrary, "this is what renders it noble." The whole evolution of the West, in his view, has been "to make an individual who is free and even obliged to be the author of his own destiny and capable of doing this."

"The tragedy is that until our own times, so many individuals have shirked before this prospect, fearing mediocrity, anguish, loneliness. So they invented collective madness to avoid their own responsibilities, on the threshold of free and liberal civilization. Totalitarianism is a deadly substitute for man's self-improvement."

Second, I recommend to you a document drafted as part of the bicentennial celebration called the Williamsburg Charter. It offers four guidelines for conducting civil public debate.

"First, *those who claim the right to dissent should assume the responsibility to debate.* This combination implies that 'the characteristic American formula of individual liberty complemented by respect for the opinions of others [will] permit differences to be asserted, yet a broad, active community of understanding to be sustained.'

"Second, *those who claim the right to criticize should assume the responsibility to comprehend.* This suggests a critical difference between a 'genuine tolerance' and a 'debased tolerance.' As the charter puts it, 'Genuine tolerance considers contrary views fairly and judges them on merit. Debased tolerance so refrains from making any judgment that it refuses to listen at all. Genuine tolerance honestly weighs honest differences and promotes both impartiality and pluralism. Debased tolerance results in indifference to the differences that vitalize a pluralistic democracy.'

“Third, those who claim the right to influence should accept the responsibility not to inflame. When ultimate principles are at stake in public life, it is both natural and very easy for each side to incite the other to defensiveness and hostility. After all, what one side of the cultural divide views as a desecralization, the other views as a constitutional right, and vice versa. A commitment to both the social and moral bonds of democratic civility would seem to require a caution and respect (based in common citizenship) in the manner in which ideas and agendas are put forward.

“Fourth, those who claim the right to participate should accept the responsibility to persuade. Among other things, this means that arguments for public policy ‘should be more than private convictions shouted out loud. For persuasion to be principled, private convictions would be translated into publicly accessible claims. Such claims should be made publicly accessible for two reasons: first, because they must engage those who do not share the same private convictions; and second, because they should be directed toward the common good.’ ”

Third, we should redefine the public debate to give it a more human scale. As De Tocqueville noted in his travels through America, democracy flourishes in small scale (decentralized or local) settings. This may be as good a reason as any to argue in favor of smaller government and stronger communities.

Finally, I will close with the final thoughts from Revel’s book:

“Democracy depends, to function well, on citizens being autonomous individuals. This means that culture is understood to provide a capacity to sustain oneself, escaping from the emptiness and the loneliness by the resources of one’s own mind. Education is ever more important as societies grow more democratic. The purpose of education is not to prepare for a job; it is, far more, a preparation for understanding and giving meaning to civilization in which one lives. Only the cultural maturity of the majority will allow democracy to last. Otherwise fanaticism and violence will motivate people. They will be their only way of filling the spiritual void of their existence, by replacing individual liberty with collective exultation.

“Democracy allows free men to be born, but free men enable democracy to last.”

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It's Not That Easy Being Green
(A Philosophical Perspective From Kermit the Frog)
UCLA Law School Alumni Association Luncheon
The City Club
April 30, 1997

By Justice Janice R. Brown

Good afternoon. Thank you. I want to thank Dean Prager for extending the invitation and all of you for such a warm welcome. I am truly happy to be here. This has been the most difficult month I have spent on the court. When Ron George, the new Chief, was appointed, he changed the schedule for the compilation of court statistics from the calendar year to a true court-term calendar which runs from September to September. He did this to avoid what had come to be known as "December Dementia" — three weeks in December when a large portion of the court's yearly workload would have to be completed. The change to a true term means the June calendar represents the last opportunity to get cases completed before September. Thus, December Dementia has now been replaced with "April Angst."

Since I had never experienced this phenomenon, and foolishly thought this would be a slow time for the court, I followed up a packed two-day calendar in Los Angeles with participation in a moot court program at the Southwestern University School of Law; the annual judges dinner in Hanford the following week; a panel discussion at the Appellate Court Institute in Palm Springs the week after that; and finally this luncheon. Those were my spare-time activities. During regular working hours, I had to review, comment upon, or take exception to, no less than 25 circulating calendars and half a dozen opinions being prepared for release. We did not rid ourselves of the bulge in the court's workload, we just shifted it to another season. And tax season at that. Looking on the bright side, I suppose it's better to be feeling evil in April than December.

When I say I am delighted to be here, I am completely sincere. I am thrilled to be still standing. If I can last another two days, I will celebrate (May 2) my first full year as a member of the California Supreme Court. It seems longer doesn't it? June 19 is the 20-year anniversary of my graduation from the UCLA School of Law. And that seems much shorter. Okay, I'm going to talk a little bit about the adventure I am having because this is a family discussion and UCLA played a critical role (even if largely off-screen). I suppose this segment could be called First Impressions.

What is it like being the junior member of a state supreme court in a state so large and populous it seems to be another country? Is it different? Well, I have to tell you the truth. In the words of a froggy philosopher of my acquaintance, "It's not that easy being green." I have always liked Kermit's whimsical signature song because it suggests not only the ordinary ways in which we use the idea of greenness — to be new, fresh, untested — but also acknowledges the special and positive dimensions of being different.

So I will limit myself to sharing a few of the things I think I have learned — some more startling than others. First, I have been forcibly reminded of the wisdom of the ages: There really is no free lunch. In the old days, when someone said they wanted to "honor" me they just meant I should stop by, enjoy a complimentary lunch or dinner, be introduced, and have a good time. These days I'm expected to make a few remarks. The bad news is that this is a speech. The good news is it's a teeny one.

Sudden Revelation No. 1. Supreme Court justices are expected to earn their calories. And this is a good thing. It is how we maintain that lean and hungry look that keeps appellate lawyers awake at night.

Second, one of the things I loved about the Court of Appeal was its air of anonymity. Most people did not know what it was and certainly not where it was or who was part of it. And, except for a handful of appellate specialists, nobody cared. I remember thinking I had finally found my niche and launched myself into complete obscurity.

The Supreme Court has a much higher profile. Many more people know my face. I don't have fans or groupies, but I am recognized — often in unlikely places, like dripping with sweat on the stairmaster at the athletic club or buying shoes in Macy's. Meeting the public has not been so bad. Most of them have actually been quite nice and have offered words of encouragement. What is even more disconcerting, every word written or spoken is likely to be minutely scrutinized. Of course, this has always been true and the dissemination of opinions is a large part of the reason for the court's existence. But information has now become an industry — perhaps the premier industry in America — and the competition for the new angle, the odd spin, the hint of controversy has altered the nature of our interest.

Writing 20 years ago, Bayless Manning diagnosed the United States as having hyperlexis — a malady he described as a pathological condition caused by an overactive lawmaking gland. He paints a graphic word picture of this activity:

“Law has always been one of the garrulous professions, and modern communications gadgetry makes it all too easy to record, reproduce, and distribute legal words. As in the wake of a great ship, mewling seagulls follow so legal commentators pursue the societies law making machines, squabbling over the newly emitted material.”

Whether one agrees with Manning's rather uncharitable characterization or not, the sheer volume of commentary is daunting and the immediacy with which legal pronouncements are turned into political issues seems likely to alter forever the

stately, evolutionary progress of the common law tradition. In the past 20 years, the trends Manning chronicled have only intensified. As more and more new organizations come into being, the news cycles faster and faster. A story that used to last two or three days now lasts two or three hours. Consequently, the media no longer wait for news, they create it.

Newspapers often report what the court will do before it does it. And judges get credit or blame for things they did not do and could not have done. So far, I have seen at least four reports in which I am identified as one of the judges responsible for the *Romero* decision. This kind of haphazard reporting could have a positive side. I have been compiling a list of other things I would like to get credit for which I did not do. Maybe I could take credit for *Marbury v. Madison* or the dissent in *Plessy v. Ferguson* which celebrated its 100th anniversary last year. I certainly would have dissented if I had been there.

Revelation No. 2. In a world dominated by soundbites, perception becomes reality. There is a great irony. Those who are in the business of producing opinions are discouraged from having any of their own.

Third, the differences between this court and the Court of Appeal are obvious, but profound. I did not think so when I was on the Court of Appeal. The work of the Court of Appeal is to write opinions. The task on the Supreme Court is the same. But there the similarity ends. On the Court of Appeal, you spend almost all of your time writing opinions. On this court, you spend a lot of time deciding to decide. This seems like the simplest thing in the world, but it is actually quite complex. H. W. Perry in his book *Deciding to Decide* — a discussion of United States Supreme Court certiorari procedures — begins his discussion of jurisdiction with this gem:

“The State Supreme Court refused to deny a lower court ruling to quash an appeal to rehear an appeal by the Circuit Court to regain jurisdiction in a previous case. In the majority opinion, Justice Memphis Cumbrun wrote, ‘In the opinion of this court . . . we don’t know what the heck is going on here.’ ”

The complaint is often made that the court does not take enough of particular kinds of cases. From the court’s point of view, the perspective is different. We are often desperately looking for the right vehicle. Many cases are rejected simply because they are so procedurally intricate or so factually convoluted we fear we can never fight our way through the thicket to decide the merits. The right case, at the right time, with the right facts, in just the right procedural posture, is a thing of beauty and it is extremely rare.

Moreover, because the court is trying to carefully select cases which present new, novel issues or questions on which reasonable minds and reasonable courts of appeal can differ, a large percentage of the cases selected are quite difficult. In contrast, since litigants have virtually free access to the courts of appeal, a large percentage of the cases are, once examined, easily resolved. Perhaps 80 percent of court of appeal cases fall into this category. So judges can spend a lot of time on the 20 percent of cases that present tough issues. On the supreme court, 70 percent of the cases are difficult. Moreover, the authoring judge needs three votes instead of one. As might be expected, consensus is much harder to achieve. Every judge on the court must consider every case in light of the court’s precedents and their own inclinations.

Revelation No. 3. To achieve unanimity, the authoring judge must overcome the objections of every other judge or get them to come over, AND IT AIN’T EASY.

Which brings me to my final comment and back to Kermit. About the positive dimensions of being different. In 1977, the year I graduated from law

school, the first African American, Wiley Manuel, was appointed to the California Supreme Court. The first woman, Rose Bird, was confirmed a few days later. We have come to accept (and indeed to expect) that the high court will reflect differences of gender, ethnicity, culture, and religious conviction. We did not achieve this easily, but we did achieve it. I think we have come to understand that our similarities as human beings are more important than our differences of gender or skin color or language. And as wide as the divide has been between us on these issues, it has always been easier for us to accommodate our cultural diversity than our differences of opinion.

De Tocqueville, writing in 1835 said: "I know of no country in which there is so little independence of mind and real freedom of discussion as in America." Contrasting the tyranny of the majority with the authority of the king, he noted: "The authority of a king is physical, and controls the actions of men without subduing their will. But the majority possesses a power which is physical and moral at the same time, which acts upon the will as much as upon the actions, and represses not only all contest, but all controversy." As a result, he concluded, "freedom of opinion does not exist in America."

Judge Learned Hand recognized this tendency was amplified by the increasingly homogenized mass society that characterized American society in the Twentieth Century. In many of his speeches, he questioned how democracy might survive amid the pressure toward conformity. Writing in 1920 to his friend Walter Lippmann, he lamented that never before had there been so many people "who felt alike, thought alike, ate alike, slept alike, hated alike . . . loved alike, wore the same clothes, used the same furniture in the same houses, went to the same games, saw the same plays, approved the same sentiments"

If you've been reading the legal newspapers or the advance sheets, the members of this court, however, are in no danger of suffering a crushing conformity. The court represents, as it should, a broad range of life experiences,

perspectives, and philosophies. And though it is our task to produce symphonies and not solos, that does not mean the separate instruments are not heard. But, it is in melding our voices that the work is done. The beauty and utility of the work of a collegial court is this accommodation of differences to create a stronger, richer context for understanding.

I do not mean to suggest that accommodation is easy, painless, or graceful. Usually, it is not. The paradigm of collegiality to which we aspire — fully informed and intelligent participation of every judge in every case — is not for wimps. Disagreements may be sharp; criticisms breathtakingly frank. Revising, restructuring, rethinking is a time-consuming process. In fact, as Chief Justice Traynor once noted, trying to craft a judicial opinion, to see if an analysis “will write” is the hardest kind of thinking. The result, though, is an improved judicial product no single judge could have created.

That is the final insight which has been evolving over the last two years and which comes into clear focus in the work of this court. The tough discipline of the appellate court is not only to capture thoughts and give them structure and coherence within the pattern of the law but to be able to defend both articulation and result.

Like Kermit said, “It’s not that easy being green.” It is difficult to be different. But it has its rewards. It occurs to me that if we imposed the same discipline on politicians, public officials, and bureaucrats, it might have some interesting results. Suppose that before you could run for office, or emcee a talk show, or be an advocate for some interest group, you had to put your opinions in written form, write them persuasively enough to convince three other thoughtful, conscientious people who have different views before you could make any public statement. Undoubtedly, the airwaves would be quieter. Civic discourse would be immeasurably improved. And we might all be the better for it.

Kermit ends his song this way:

BUT IF BEING GREEN IS ALL THERE IS TO BE
IT CAN MAKE YOU WONDER
BUT WHY WONDER WHY WONDER WHY
I'M GREEN. AND IT'S BEAUTIFUL
AND IT'S WHAT I WANT TO BE.

I could end here too because — somewhat to my surprise — I am where I want to be. The California Supreme Court was never my ambition. It was not in my plans. As a youngster and even into my college years, I was a semi-serious poet. In my senior year, I was asked to participate in a poetry reading and told to write my own introduction — what I thought would be important to tell the audience. I said: “The critical question at this time in my life is whether the heart of a Black woman, the mind of an economist, and the soul of a poet can continue to peacefully coexist or will they have to go their separate ways.”

After I was appointed to the Third District Court of Appeal, I remember walking into the Library and Courts Building and seeing the words carved into the pediment: “Into the highlands of the mind.” I realized UCLA was the first giant step on this journey.

The judge exists because of the UCLA School of Law. I know some of my professors are cringing, thinking, “I hope people don’t hold me responsible for this.” I hasten to absolve the faculty of any personal responsibility. But, UCLA, a state institution, was the only sort of professional school I could afford. I was a parent, I could work only part-time, and I had no family resources to finance my education. Moreover, because I was able to manage with a modest amount of loans, after law school I could afford to forego the search for a huge salary and was able to follow my inclination to work in the public sector. And that has a lot to do with my becoming a judge.

I know concern is often expressed about the level of the subsidy provided to students in state-sponsored professional schools. But I hope some consideration will be given in the equation to unexpected returns. The rule of reciprocity. When you put more in; you get more out.

When I arrived at the Third District Court of Appeal, my chambers contained a bare desk, a chair, a telephone. But the work was waiting, briefs and records lined up on my book bench like little soldiers. I picked up the first set of briefs and a pad. I was immediately absorbed. The world went away. I finished my first opinion before I paused to add any personal touches to the office. When I finished it, I had the most poignant, most powerful sense of homecoming I have ever experienced. I knew the answer to that old question, knew the answer was yes. All those different parts of myself survive, indeed they thrive, in the judge.

Thank you.

CJER RESEARCH ATTORNEYS INSTITUTE
September 26, 1997, Noon
Hyatt Alicante Hotel, Anaheim

RESISTANCE IS FUTILE

When I received this invitation, I was faced with the most difficult problem givers of speeches have to confront. I thought it was very nice of you to extend the invitation. I was flattered. I was honored. But I asked myself what can I possibly say. I could talk about the transition from the Court of Appeal to the Supreme Court, but I would have to label that speech "Paradise Lost" and that says about all there is to say on that subject. I could tell you about the glamorous life of an Associate Justice of the Supreme Court, but most of you would know that's a lie. The most exciting thing that has happened to me at Marathon Plaza was a particularly nasty encounter with our state-of-the-art security system which left me (at 9:00 p.m.) locked in an elevator that would not move, would not open, and which after about 90 seconds went completely dark. But, I probably found that a great deal more exciting than you would.

Finally, I hit upon the perfect topic. I could talk about you. Or rather about what you do. Actually, the relationship of judges and research attorneys is a rather mysterious subject — though not as mysterious as it used to be before Professor Barnett started accusing us of selling our judicial soul for the comforts of bureaucracy, the California Lawyer started publishing articles called "The Shadow Court," and newspaper reporters started asking impertinent questions like: "How much of this stuff do you actually write?" Barnett's article is simply taking a page from a much more thoughtful discussion of this subject by Judge Richard Posner. (Judge Posner is focusing on the federal courts.)

I know the mere mention of Barnett gives some folks hives. But, as my grandmother is fond of saying, even the devil tells the truth sometimes. It seems to me that the role of research attorneys and the interaction of judges with them is a largely unexamined aspect of our work. And while I was musing on this subject, I was fortuitously reminded of the perfect analogy for exploring this relationship. I have to confess, I am a science fiction fan. In fact, I am a Trekkie. And, thus, I am well acquainted with all the generations of those who have explored the final frontier and pretty familiar with the etiology of most alien species they have encountered. As luck would have it, while I was struggling with the ideas for this speech, I heard a preview for Star Trek Voyager. The voiceover caught my attention with this phrase. "We are Borg. Resistance is Futile."

For those of you not conversant with the Star Trek cosmology, the Borg is a technological race, half humanoid, half robot, which conquers by assimilating its victims into the collective. In other words, the Borg emulates the organization of the hive: a single consciousness, focused on relentless assimilation of all other life forms. The monolithic consciousness knows all the conquered species knew. The conquered forget all that they were. They are assimilated. They become Borg. Resistance is futile. In applying this analogy to the interaction between research attorneys and judges, the most interesting question, of course, is who is assimilating whom and for what purpose?

I think the assumption would be that attorneys are submerged into the consciousness of judges. In fact, when I have participated in interviews with lawyers seeking work with the court, one of the routine questions is: "How will you feel about having to defer to the judge's wishes even (especially) when you disagree?" What Posner highlights and it may be worth considering is the impact of the attorney presence on the decisionmaking

process itself. In other words, maybe the question is not whether attorneys ultimately defer to the judge's decision, the question may be whether the result is already being shaped in subtle and intangible ways before the judge reaches any decision. Are we talking about judicial alter egos or para-judges?

And Then There Were Law Clerks

The exploration of that question requires us to return to the beginning. Judges have not always had law clerks or attorneys to assist them. I was surprised to find that — in America — a particular judge is credited with creating the judicial clerkship. Judge Horace Gray became Chief Justice of the Massachusetts Supreme Judicial Court of Errors in 1873. In the summer of 1875, the increased workload led Gray to employ a law assistant — a recently graduated and highly ranked law school student. Gray was fortunate to be able to get referrals from half-brother, John Chipman Gray, a Harvard professor. When Chief Justice Gray was appointed to the Supreme Court in 1882, he brought his personal assistant to Washington with him. And the rest is history. Judge Gray apparently paid for his assistants out of his own resources, as there was no budget for them.

By 1886 the Attorney General was recommending that each justice be provided "with a secretary or law clerk, to be a stenographer, to be paid an annual salary to assist in such clerical work as might be assigned to him." On August 4, 1886, Congress provided for a stenographic clerk for each justice of the Supreme Court at the munificent salary of \$1,600 a year. By 1888, all nine justices were using the allotted stenographic clerks. They were never used purely as scribes, however. The law clerk, as invented by Judge Gray, reviewed newly filed cases and the opinions proposed by the judge's colleagues. They were sometimes asked to draft opinions, but the opinions served we are told only as a source of discussion. The real work of the law clerk was to engage in vigorous colloquy with the judge.

That paradigm of the law clerk function has persisted. By the 1930s the institution of law clerking was firmly entrenched and clerks were introduced to the lower federal courts. As caseloads continued to rise so did the number of clerks, reaching a peak with the caseload explosion of the 1960s. Supreme Court justices have four authorized clerks, district courts have two. Circuit court judges also have four if the court's central staff attorneys are included.

The California Supreme Court, as usual a little ahead of the curve, hired its first research attorney in 1925. William I. Sullivan, who graduated from law school in 1924, served the court as a research attorney for 21 years, the last seven as chief research attorney until he was appointed Clerk of the Supreme Court and ex officio Secretary of the Judicial Council in 1946.¹

California created a somewhat unique hybrid, utilizing both a central staff, to handle the courtwide work, like petitions, and permanent attorney staff, instead of temporary law clerks, to assist judges in chambers. The justification for all of these changes was the same: burgeoning caseloads. Courts needed to be more efficient while at the same time keeping the complement of judicial officers relatively small.

¹ Sullivan was joined by a second law clerk (research attorney) in 1930 and the two men had facing desks in a little office of the fourth floor of the old State Building. This second clerk returned to the court in 1959 as an associate justice. In the interim, he served as Presiding Justice of the First District Court of Appeal. His name was Raymond E. Peters. (Not a bad career path.) The two research attorneys performed the functions similar to our current central staff.

Too Much Of A Good Thing?

As the use of law clerks and attorneys has expanded, it has spawned a surprisingly contentious — even if relatively low-key debate. While the complaints vary with the age, experience, and permanency of the staff, the underlying concern is for the quality and legitimacy of the judicial product. Everyone acknowledges that courts may have no alternative, but some question whether there is a darker side to our quest for greater efficiency. Kester, in his article, *"The Law Clerk Explosion,"* laments that these "disquieting changes" are being accepted with "virtually no analysis and no protest."

One concern is consistently voiced. Critics of the over-reliance on staff complain that legal assistants have "become an uncontrollable force that has transformed the judicial process into an essentially bureaucratic arm of government, with judges functioning as staff managers and opinion editors rather than in the traditional judicial role." Whether the courts have increased their reliance on young, inexperienced law school graduates or career attorneys, the complaints are remarkably similar. The critics claim the delegation of judicial tasks has gone too far. As one commentator sees it: "law clerks have usurped the decision-making function in toto from the judges. . . . Once an institution that supplied mentors to instruct bright graduates, the clerkship has grown into a corps of post-adolescent mandarins, Judges for a Year after the fashion of 'Queen for a Day.' " But where a court relies on career attorneys, the attorneys are criticized because their longevity gives them excessive clout. Professor Barnett points to a forum of ex-justices held in 1994, which he claims became "a chorus bemoaning of staff presumption," with Justices Panelli and Kaufman commiserating that "[s]ome people who have been there a long time feel they are the judge" or "tend to lose sight of their role."

Even more surprising was Barnett's repetition of some advice former members of the court had offered after my nomination to "dispel" any doubts about my competence. They, according to a newspaper article, advised me to "first of all hire a good staff . . . and be prepared to delegate work to them and, most important of all, to avoid the mistake of trying to do things my own way." Barnett ends this section with his own editorial comment: "If the power of staff is such that a new justice to survive had better hire some of them, it may follow that the justice had better not offend the ones hired — as by editing their drafts too aggressively."

The Chief Justice has authored a rebuttal to Professor Barnett's specific criticisms of the Supreme Court and we need not rework that ground. What is more interesting is the subtle and coded subtext of these exchanges. Whether people feel alarm or complacency about institutional changes in the courts depends on how they define the essential judicial function. And this definition has proved very elusive.

Critics of the new order, like Judge Posner and Professor Joseph Vining, believe that if there is any essential quality to justice, it is the engaged, personal creative effort of the judge as author. As Posner explains: "The structure, the ideas, even the style of the opinion may be the judge's even though much of the actual drafting is the law clerk's. *But it is generally true that whoever does the basic drafting of a document — a judicial opinion or anything else — will have a big impact on the final product.*" Posner argues that opinions drafted by law clerks will differ in substantial ways from opinions written by judges and these differences include style, length, candor, credibility, and what Posner characterizes as greatness:

"It is a curious feature of the American legal system that a handful of famous judges should have made a contribution to the law so greatly disproportionate to

their number. But it is true; and it would be sad to think that there will never be another great American judge The sense of style that is inseparable from the idea of a great judge in our tradition is unlikely to develop in a judge who does not do his own writing. People are not born great writers; they become great writers by hard work — as writers not editors. And the struggle to compose a coherent opinion provides a more searching test of the soundness of one's ideas than performing an editorial function does. It is all too easy to glide over the smoothly written product of an able assistant without searching out the stresses and weak joints."

To others, the essential judicial function is merely the judge's involvement in the ultimate outcome of the system or process. Thus, Judge Harry Edwards, a spirited defender of the "new" judicial institution, argues vehemently that drafting opinions is not the same thing as deciding appeals.

"[A]ll careful judges will confer at length with their clerks and give them fairly specific instructions concerning the content of opinions. And, more important, careful judges will not allow an opinion to issue in their name until the words constituting the opinion precisely reflect their views on the proper disposition of the case. . . . ¶ ¶ . . . In the opinions of a careful judge, as in other fields, '[s]entences, forms of expression, even ideas that are not originally the author's own become his by adoption because he actually, and I emphasize actually, considers them, sentence by sentence, phrase by phrase, thought by

thought, comma by comma, and makes them his own after deliberation.' "

Judge Mahoney of the Second Circuit strongly seconds this view:

"Personally, I feel that so long as the judge reads all the briefs (and key portions of the record), listens to oral argument and engages in face-to-face dialogue with counsel, participates in the conferences with her colleagues, and controls the formation and expression of ideas . . . that go into her opinion, she has done the job."

Of course, Posner's response is that "adoption is not creation." But, these are issues on which reasonable minds can differ. Indeed, it is not clear that the combatants are fighting about the same thing. Nostalgia tends to add a rosy glow to things when we look back. It is true that opinions were shorter. However, as I have had occasion to note recently, those one-page opinions were often lacking in analysis and some of them were patently wrong.

Moreover, we live in a much more complicated world. The complications are real even if courts themselves have been responsible for their great increase in business and for the difficulties in resolving the ever-expanding universe of questions on which courts now have the final word.

My experience suggests there is some validity to both viewpoints, but this discussion includes elements claimed by neither camp. In one of the first discussions I had with my research attorneys, I explained that I wanted to be able to write. For me, the writing is the most attractive part of the job. I must say my staff has done everything possible to accommodate my idiosyncrasy. In the writing of separate opinions, I have had the opportunity to shape the opinion very precisely.

Crafting majority opinions is a different matter. As you probably know, the Supreme Court's opinion process is somewhat different from the Courts of

Appeal. We begin with a calendar memo (what in other courts is called a proposed opinion). The authoring judge sends out the calendar and all the other chambers prepare formal written comments — a Preliminary Response (PR in the court's shorthand). Usually, the initials of the staff attorney responsible for the calendar appear at the bottom of the calendar. On the summary document which tallies the votes, the initials of the staff attorney who is "tracking the calendar" appears next to the name of each judge. This way, the staff can have detailed discussions about the calendar before the judge even weighs in. Thus, the staff discussion can (and usually does) bypass the judge. The schedule includes time for the circulation of separate opinions. It is up to the individual judges to determine how they will participate in the review process.

When I sent out the first majority calendar drafted entirely by my own hand, there was a great deal of discussion concerning the advisability of circulating the opinion with my own initials or hiding behind the initials of one of my attorneys and letting them take the heat. My staff encouraged me — perhaps in their own self-interest — to circulate the opinion under my own initials. The next morning I encountered a senior attorney from another chambers in the elevator. He asked if those were actually my initials on a calendar he had just seen. When I confirmed it, he asked: "Are you really going to submit yourself to this nest of vipers?" That is a fascinating comment on the way some members of the staff view the process in which they participate. My own experience is consistent.

I have talked to attorneys who have made the transition from the Court of Appeal to the Supreme Court, and they tell me they feel so intimidated by the virulence of the Supreme Court PR process that they are reluctant to send out any work at all. A similar observation was voiced by a former court staffer I encountered at a conference recently. In the course of a casual

discussion, the attorney admitted the decision to leave the court was hastened by continued exposure to a PR process that seemed to thrive on destruction for the sheer joy of destruction. I have no doubt the PR process was intended to be wholly positive, to enhance the quality of the court's work. Sometimes it works that way. But all too often, a process designed to be constructive, to point out mistakes, flaws in reasoning, and inaccuracies degenerates into some sort of demolition derby. My own staff expressed this sentiment a bit more humorously. They awarded me the Chambers Medal of Valor (designed especially for the occasion) for, in the words of the citation, "conspicuous bravery in submitting unflinchingly to the calendar memorandum vetting process." I treasure the medal. I plan to have it framed.

We often make light of the savaging to which majority calendars are subjected and shrug it off as part of the process; and while I am less and less certain such rigorous thought control is necessary, I am more and more convinced that it is inevitable. Indeed, Posner may be right but for the wrong reason. He criticizes current judicial opinions for exhibiting a "standard style" which "draws a veil over reality, making it harder to see exactly what the judge is doing." These opinions, he notes, "do everything they can to conceal novelty and to disguise imagination as deduction." Professor Vining criticizes the bureaucratic writing style for producing opinions which seem "written by no one at all."

"They are too much things of patchwork, things which seem, on their face, to express more the institutional process of their making than the . . . reasoning of the author and those persuaded with him."

In his view, judicial opinions "exert their authority over us and command our respect and serious attention because and to the extent that we hear a person

speaking through them. Their authority rests upon the sense of mind behind them."

If these perceptions are correct, the problem goes beyond the simple complaint of over-delegation. Posner, and others, think the bureaucratic style reflects timidity on the part of staff. It may be instead that the institutional dynamic is more akin to mob rule. Thus, the pressure on judges as well as staff is in the direction of relentless conformity. The desire is to make the target small; to write opinions that are innocuous, uncontroversial, in every way unobjectionable. In other words, the bureaucratic style is not an unintended consequence of the process; it is the purpose for the process.

The sense of style Posner praises, the sense of mind Vining seeks becomes not just unusual, it is deemed inappropriate. Nevertheless, I believe the decline in the quality of judicial writing — if it has declined — cannot be blamed solely on different institutional arrangements.

It is true the tug of institutional arrangements works on us at some subterranean level and it is precisely at that level that the judges best work is done or undone. As Llewellyn says, it is the conscious struggle to take a new look which "may bring something better into focus."

"The queer subconscious may this time be ready to give up an out which has been cooking down in there since the last time the court walked through these legal sandbars. In this effort to take a [fresh] look each time, the appellate court's job, their duty [is to] freshen up consciously It *must not* be what all habit, all routine, all weariness cry out that it is and has to be: just another of the shopworn same."

Of course, not every opinion requires a divine spark. There are subjects which will maintain their pedestrian character even in the hands of

the master jurist. Judges have more to do than ever before. This year our court filed 99 majority opinions, authored 104 separate opinions, reviewed more than 7,000 petitions for review (that works out to about 135 per week); participated in oral arguments and performed countless other tasks, both administrative and judicial. The judicial system ain't what it used to be. I can only look with admiration and envy upon Hand's famous admonition to his law clerks: "I write, you listen." I would like to emulate his singular devotion to his judicial duty. I wonder, though, if we would produce as many "great" judges even if the judges sitting today wrote every word of every opinion. Were those flashes of inspiration and insight so prized by Posner glimpsed in majority opinions or only in separate opinions later adopted by the majority of the court. It occurs to me that greatness is not a goal of the appellate project. The need to woo three other judges to your point of view is a strong incentive to remove all flair, to erase marks of individuality. People often criticize the majority opinions of the Supreme Court as sounding like something written by a committee. But that, of course, is exactly what it is.

It is also true that the weight of institutional arrangements tends to flatten us out, to create a sort of mass culture in which our differences are homogenized. But, again, I suspect that judges come to the bench flatter than they once were. In her book, *Rights Talk*, Mary Ann Glendon theorizes that American political discourse has become thinner and thinner because its leaders have become ever narrower. She notes "[f]ew American statesmen today are — as Abraham Lincoln was — equally at home with the Bible and Blackstone." Our language which has become increasingly legalistic draws on fewer cultural, intellectual, or philosophical resources. Judges are probably no different in this respect. We may find ourselves at century's end much like the last men Nietzsche's Zarathustra speaks of with such contempt

— “without belief or superstition. . . [we stick] out our chests — but alas they are hollow.”

I agree that writing an opinion and editing one can never be the same thing. An act of creation is transforming in a way an act of adoption can never be. You give some part of yourself to that which you create; and you are always changed by the act of creation.

Workload pressures have altered forever the way we work. Must it inevitably cast its shadow over the work itself and cripple the imagination of those whose work it purports to be. The debate may be most notable for what it overlooks. In a scene from *Young Frankenstein*, Gene Wilder who plays the young doctor, says to a horribly and obviously deformed Igor: “Perhaps I could do something about your hump.” Marty Feldman, as Igor, replies, “What hump?”

The current debate focuses on how others will perceive judges and their work product. Maybe we would do better to focus on the mirror we hold up to them. What is it that we prize in judges? Intellect? Experience? Genius? Humanity? Character? Or only the illusion of the emotionless and neutral arbiter. What is it that society thinks it wants judges to be? Is that different from what it will allow them to be. Our fate may be decided by the terms of the debate. Is resistance futile and assimilation inevitable?

Letting The Music Come

My husband is a musician — a bass player. When he and I were still courting (that’s an old fashioned term — you will have to ask your grandparents what it means!) he did something I found rather curious. He would get a far-away, abstracted look on his face and usually the fingers of one hand would be moving, tapping out a rhythm. I would ask: “What are you doing?” His usual answer was “nothing.” But when I persisted, he finally told me “I am letting the music come.” Well, I am tone deaf and have

no musical talent whatsoever, but I do have great curiosity. So I asked: "When you hear this music, is it the sound of a musical instrument — a piano, a saxophone, a flute." He said, "No, no, it's nothing like that. It isn't the sound of any instrument. Sometimes it is the way a flag moves in the breeze, the quality of the light, the way a sign flashes on and off. It has music." And then, having explained it beautifully, he would look at me helplessly and say: "I can't explain." Another time he told me, "There is no music without silence." For a bass player, it's the beat between beats, the beat of silence, that makes the music.

Musically challenged as I am, I did understand in my own way. Sometimes he wakes up in the morning and finds me, propped on my elbow, staring out the window. He says: "What are you doing?" I say: "I am writing." He says, "Oh, sure!" But the answer is accurate. In those quiet moments, the words pour in a torrent through my head — sometimes hot and liquid like molten steel, sometimes cool and supple as clay on a potter's wheel. In these moments I feel free to let the music come.

When I finally write it down, it will never be as clear or pure as that chorus in my head. The melody will never be as right; the bass line never quite as compelling. But, in those quiet, staring-out-the-window and into-my-head moments, I can glimpse what it should be. Words are the way the music comes for me. It is language that I love; writing that is my passion.

CONCLUSION

Lest anyone should misunderstand, I hasten to say that I am devoted to my research attorneys. They are smart, funny, hardworking, intensely loyal. The task of modern day appellate judges would be impossible without them. I am not suggesting that we turn back the clock. Caseloads are not likely to decrease substantially in the foreseeable future. Courts and judges will have to continue to press for productivity gains. My point is a modest one. It is

the hope that judges and staff and institutional demands can be tuned to accommodate the broader reaches of the judicial process so that we can continue to do the work efficiently and well, to be even-handed and to think straight, and still . . . let the music come.

Thank you.

Los Angeles Federalist Society
California Lincoln Club
Libertarian Law Council
California Club — Justice of the Year Award
December 11, 1997, 11:30 a.m.

Thank you. I am honored to accept this award and gratified to know you are cautious enough only to honor one judge this year and discerning enough not to give out an award every year. I am touched and frankly . . . surprised. Since I have been making a career out of being the lone dissenter, I really didn't think anyone reads this stuff. It's nice to know a few people occasionally do. The Reporter of Decisions has a nice tradition. When an appellate judge leaves the bench, the Reporter collects all of the judge's opinions and places them in a bound volume (or volumes) and presents it to the judge as a keepsake. I console myself that these exercises in futility (a.k.a. my dissents) are essays for my bound volume. For reasons which I will explain, however, I think it is probably too soon for me to receive any recognition as a judge. I still don't know what I will be when I grow up.

America is, and always has been, an impatient country. I suppose nothing else could be expected in a place that invented minute rice, instant oatmeal, and quick grits. We delight in jumping to the wrong conclusion and do not hesitate to express our opinions on issues about which we know nothing. As P.J. O'Rourke¹ puts it: "The American electorate isn't willing to learn facts, let alone face them." I recognize that it goes against the grain to say that judges have to be aged to perfection.

Last year when I had been on the Supreme Court a mere five months, I wrote a speech entitled "It's Not Easy Being Green" and talked about my first impressions of the court — about the qualities associated with being green: newness, freshness, being untried and untested. I confessed that I have always liked Kermit's whimsical signature song because it suggests not only these ordinary themes, but also acknowledges the positive dimensions of being different.

I pointed out that the year I graduated from law school, the First African American, Wiley Manuel, was appointed to the California Supreme Court. The first woman, Rose Bird, was confirmed a few days later. We have come to accept (and indeed to expect) that the high court will reflect differences of gender, ethnicity, culture, and religion. We did not achieve this easily, but we did achieve it. I think we have come to understand that our similarities as human beings are more important than our differences of gender or skin color or language. But as wide as the divide has been between us on these issues, it has always been easier to accommodate our cultural diversity than our differences of opinion.

DeTocqueville, writing in 1835, said: "I know of no country in which there is so little independence of mind and real freedom on discussion as in America."² Contrasting the tyranny of majority with the authority of the king, he noted: "The authority of a king is physical, and controls the actions of men without subduing their will. *But the majority possesses a power which is physical and moral at the same time, which acts upon the will as much as upon the actions, and represses not only all contest, but all controversy.*"³ As a result, he concluded, "freedom of opinion does not exist in America."⁴

Judge Learned Hand recognized this tendency was amplified by the increasingly homogenized mass society that characterizes America in the Twentieth Century. In many of his speeches, he questioned how democracy might survive amid the relentless pressure to conformity. (Of course, our court does not suffer this crushing conformity!) Judge Hand believed it was important to the kind of democracy we want to have and the kind of people we want to be to preserve a spirited public dialogue — to make sure the marketplace of ideas remains open.

Today, having passed my third anniversary as a member of the bench and a year and a half on the Supreme Court, I thought I might preview the sequel. I could call it: "It's Not Easy Being Green, but It's Really Tough Being Gray." One of the corollaries to our hostility to different points of view may be the way in which the familiar becomes more and more invisible.

I am reminded of a conversation I had with my son many years ago. He was 10 or 12 years old. I was cleaning house one Saturday afternoon. He was watching one of those mindless, low-budget movies that provided staple early afternoon fare. Usually they featured pretty young girls on the beach. This particular one featured pretty girls in ski sweaters – very original. Anyway, I heard some familiar music and said to him as I was passing by: “That sounds like James Brown.” He looked at me in great surprise and said, “That’s who it is. James Brown and the Famous Flames. How did you know?” “Oh,” I replied airily, “James Brown was the man when I was in my teen’s. He had the most popular group around.” My son looked at me wide-eyed. “Really,” he said. “They were around when you were a kid. Are they dead?”

I remembered that story when I began thinking about this topic because it reminds me how difficult it is to have a true sense of perspective about things — like parents — with which we feel a sense of utter familiarity. I suppose that is why we can all use the same words, we can talk about freedom, justice, and equality, and yet mean something so different we could be speaking a foreign language. Courts have certainly not escaped the contagion. And the whole field of constitutional interpretation is a subject of lively debate with a cast of thousands — originalists, strict constructionists, intentionalists, evolutionists, and even a deconstructive group of neo-intentionalists. In the whorl of abstract and theoretical discussions, the familiar becomes invisible to us and words, chameleon-like, change their meaning with the environment.

In her comment to Justice Scalia’s essay on interpretation, Mary Ann Glendon recalls the scene from *Young Frankenstein* in which Gene Wilder as the doctor looks at the visibly and hideously deformed Igor, played by Marty Feldman, and says, “Perhaps I could do something about your hump” — and Igor replies “What hump?” She ends her comment with this statement:

“Tyranny, as Tocqueville warned, need not announce itself with guns and trumpets. It may come softly — so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects. So

softly that if a well-meaning foreigner should suggest, 'Perhaps you could do something about your oppression,' we might look up, puzzled, and ask, 'What oppression?' " ⁵

The genius of the American Constitution was in its attempt to combine stable government with liberty. Liberty was what the American experiment was all about, but liberty to the founders was not a synonym for license. The political philosophers in Publius's reading list were always careful to modify that word liberty. They talked of ordered liberty, rational liberty, or moral liberty. But, they always made a connection between civic freedom and civic responsibility.

There is a wonderful quote from Edmund Burke which beautifully articulates the task confronting the founders:

"To make a government requires no great prudence. Settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a *free government*, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful, and combining mind." ⁶

For a long period of our history, it seemed the founders had succeeded. As late as 1944, Judge Learned Hand could talk of the spirit of liberty in a way that suggested the opposite elements of liberty and restraint had been able to peacefully coexist.

The United States Constitution inspired reverence not just because it was a clever experiment in political science, but because it was an attempt to construct a polity consistent with both the baser passions and the higher aspirations of its citizens. But there is now a sense that things are more than slightly askew. Despite the founder's notion that liberty requires law-free spaces, Americans are probably the most law-ridden people on the face of the earth. Every aspect, every corner, every moment of our lives is subject to government regulation and control. And while everybody demands the right to everything without restraint, there is a gnawing sense of impotence. As Aaron Wildavsky has noted:

“ . . . [P]rocedures for making public policy — from nominating Presidential candidates to holding open meetings — appear to be more and more democratic. Equality, majority rule, due process, representation of practically everyone, all appear to have increased.”⁷

Why then, he asks, are outcomes increasingly unsatisfactory? Despite a constitutional blueprint designed to emphasize deliberation rather than allowing the passion or power of a particular cause to take hold, we have become in recent years what Philip K. Howard⁸ calls “A Nation of Enemies.” We seem every day less like a nation and more like a collection of warring tribes.

In short, we have more freedom than the founders would ever have imagined possible and less liberty than they would ever have tolerated. We have been described, accurately I think, as the most law-ridden society on the face of the earth. We are heirs to a mind-numbing bureaucracy; subject to a level of legalization that cannot avoid being arbitrary, capricious, and discriminatory. What other outcome is possible in a society in which no adult can wake up, go about their business, and return to their homes without breaking several laws? There are of course many reasons for our present difficulties, but some of our troubles can be laid at the feet of that most innocuous branch — the judiciary.

In Federalist No. 51, Madison tried to explain how we might preserve liberty by constraining government. He said the great security against a gradual concentration of power in one department was to give each the constitutional means and personal motives to resist encroachments of the others:

“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁹

Madison says something else in that passage that is very rarely quoted and that seems to me equally significant. He says:

"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." ¹⁰

In the modern era, we have come to see justice in terms that undermine the notion of liberty. We see justice not as the personal responsibility of each individual, but as an institutional obligation. We talk of social justice and propose redistributive means to achieve those ends. As our view of justice has changed so has the way we view the judiciary and, more fundamentally, the way in which judges view themselves.

Alan Keyes makes a cogent observation about the relationship between justice and liberty. He says this passage summarizes the "challenge our society faces when confronted with questions involving principles of right and justice." Justice has "substantive relevance to any regime," but the real goal of this society's existence is "the preservation of liberty." ¹¹

Concern about the untrammelled power of judges was an issue during the drafting and ratification of the Constitution. As summarized in an article by Raoul Berger, the colonists expressed the fear that judges would " 'undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts;' " they feared the advantages of " 'a known and written [constitution] would be lost if the law's meaning could be twisted by judicial construction,' " ¹² and they opposed the judges' imposition of their personal views.

Hamilton sought to allay the concerns of the ratifiers of the Constitution about possible usurpation by the judicial branch by assuring them that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them." ¹³ As we know, of course, the courts overcame these alleged limitations on their powers with ridiculous ease. How?

By constitutionalizing everything possible, finding constitutional rights which are nowhere mentioned in the Constitution. By taking a few words which are in the Constitution like "due process" and "equal protection" and imbuing them with elaborate and highly implausible etymologies; and by enunciating standards of constitutional review which are not standards at all but rather policy vetoes, i.e., strict scrutiny and the compelling state interest standard. As one commentator candidly admits: The "compelling interest" test imposes such a severe burden of justification on the state as to be "a statement of conclusion rather than a measure of constitutionality."

Hamilton acknowledges that "individual oppression may now and then proceed from the courts of justice," but he says "the general liberty of the people can never be endangered from that quarter."¹⁴ I think Hamilton's faith that the judiciary could never endanger liberty was based on an assumption — not about the nature of the judiciary — but about the nature of judges. And for a long time that classical ideal of how judges behaved was powerfully predictive and accurate. But things have changed.

Most court observers see *Brown v. The Board of Education* as the pivotal decision which ushered in the new era. According to one commentator: What has been changing in the years since *Brown* is the way judges and the legal community in general think about judicial excellence and about the role of the judiciary in American society. Two sets of ideals are vying for the soul of the American judiciary. For most of our history, we admired and venerated what Glendon calls the classical virtues: impartiality, prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole, the ability to preserve principled continuity while adopting the law to changed social and economic conditions — and above all self-restraint. She discerns three distinct concepts of self-control.¹⁵

"[S]tructural restraint (respecting the limits on judicial power imposed by federalism, the separation of powers and a court's position in the judicial hierarchy); interpretive restraint (observing the bounds imposed on judicial discretion by precedent, statute, or

constitutional text, design, and tradition); and personal restraint (avoiding distortion of the decision making process by one's own opinion of the parties or the issues)."¹⁶

In marked contrast, the new paradigm celebrates adventurousness and hubris. From the 1960's onward, we have witnessed the rise of the judge militant. The classical conception of the judicial role was viewed as too confining, boring, and above all insufficiently responsive to social problems. The classical ideal is being rapidly supplanted by the "image of the good judge as bold, creative, compassionate, result-oriented, and liberated from legal technicalities."¹⁷

For judges like John Marshall, Holmes, Hand and Frankfurter, the most important quality was humility. Frankfurter described it this way:

"What is essential. . . is that you get [judges] who bring to their task first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them, disinterestedness, and allegiance to nothing except the effort, amid tangled words and limited insights to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice . . . through reason called law."¹⁸

As is probably apparent these are the judges to whom I can relate. I freely confess that this is the most difficult job I have ever tried to do; the most daunting. There are moments of exhilaration and satisfaction. But, there are also moments (lots of them) of terror and black despair.

And that is why I find it so hard to understand the chronic conceit of judges who claim infallibility, shrug off the Constitution like a shopworn suit, and never let text or tradition stand in the way of a desired result.

Apparently when Learned Hand was asked about his judicial philosophy, he liked to say that it was summed up in Oliver Cromwell's admonition to the Kirk of Scotland: " 'I beseech ye in the bowles of Christ, think that ye may be mistaken.' " ¹⁹ Those words, said Hand, "should be inscribed on the portals of every courthouse in the nation" ²⁰

Justice Brennan, on the other hand, was not given to such doubt and self-questioning. Shortly after his retirement, the justice reminisced with journalist David O. Stewart about his long judicial career. Stewart reminded Brennan of retired Justice Lewis Powell's admission that with hindsight he regretted voting to uphold Georgia's sodomy law. Had Justice Powell's second thoughts prompted Justice Brennan to think of any cases over his 33 years on the Supreme Court where he wished now that he had voted differently?, Stewart asked. "Hell no," Brennan replied, "I never thought I was wrong."²¹

We cannot lay all the blame on the courts. Americans have always turned to the courts for the resolution of difficult problems. As Manning notes, "The special role of the Supreme Court as ultimate arbiter of constitutionality enhances that impulse, but the people's faith and reliance in its judges runs both wider and deeper than that. Whether in matters of civil rights, town planning, the economics of the market place, or labor-management relations, . . . the judiciary will play, a key and often determining, role. . . . The inevitable result is that we are the most litigious people in the world. We go to great lengths to find ways to cast any and every problem into the familiar pattern of a two-party adversary trial and take it to court."²²

If we really want to understand what has gone wrong with the political process, we should look in the mirror. In the immortal words of Pogo, "We have met the enemy and he is us." We the People are We the Government. If we believe nothing really matters, nothing will. If we refuse to look beyond the immediacy of our own desires, politics will never be more than the arithmetical and (paralytic) sum of appetites. And it should be more. Much more.

As Manning recognized way back in 1977, "Our legislatures, courts and agencies must eventually recognize, and the public must come to see, that the legal system simply cannot operate if it tries to provide for every citizen and institution a lawsuit against every other citizen and institution to resolve every difference of view or interest, to redress every perceived invasion of privilege, and to recompense every risk of living. The ultimate result of that approach will be to halt the legal

process and simultaneously frustrate the society's capacity to make policy decisions."²³ However unpopular it may be to say so, America's lawmaking machinery is overheated. We must continue to protect the rights of the individual, but must also consider law's impact on the community and our communal lives. As Keyes puts it: "No matter how much good we may wish to achieve, we do not have the right to achieve that good at the expense of others' freedom."²⁴ Or, to quote Manning: "In a legal system that tries to offer everybody a remedy for everything, no one will have a remedy for anything."²⁵

I started out by saying that you would have to wait to see who I was when I grew up. I know who I would like to be. In 1930, Learned Hand spoke at the presentation to Harvard Law School of a portrait of Holmes. He explained what he and Holmes called "Jobbism." According to Holmes, one of the best ways to find purpose in life "is just to do one's task with one's might." In his speech in 1930, Hand explained what it meant to be a "Jobbist": He asked: "Are you a member of the Society of Jobbist, or do you know the guild? If not let me tell you of it. All may join, though few can qualify. . . . It is an honest craft, which gives good measure for its wages and undertakes only those jobs which the members can do in proper workman-like fashion. Which of course means that they must like them . . . It demands right quality, better than the market will pass, and perhaps it is not quite as insistent as it should be on standards of living, but the working hours are strictly controlled."²⁶ Like Holmes, I believe "every detail has the mystery of the universe behind it" and that the only pride appropriate to a judge is the pride one takes in mastery of one's craft and in the tradition of which one feels a part.

I had the privilege this summer of meeting Raoul Berger in his 96th year. He is a remarkable man and I think he gave me some very good advice. He said he has great sympathy for judges because the task they have to do is so difficult, but he told me to remember that a judge builds her house one brick at a time and I should just concentrate on making good bricks. That is what I will try to do and maybe when I grow up I will be accepted as a member in good standing of that Society of Jobbist to which I aspire.

Thank you.

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- 1 O'Rourke, *Parliament of Whores* (1991).
2 DeTocqueville, *Democracy in America* (1835)
3 Part I, *The Unlimited Power of the Majority*, p. 263.
4 *Ibid.*
5 *Id.* at p. 265
6 Scalia, *A Matter of Interpretation* (1997) pp. 95, 114.
7 The Philosophy of Edmund Burke (Bredvod & Ross edit. 1970) pp. 73-74.
8 Golembiewski & Wildavsky, *Bare Bones: Putting Flesh on the Skeleton of*
9 *American Federalism* (1984) *The Cost of Federalism*, p. 70.
10 Howard,
11 Hamilton, Madison, Jay (Rossider ed. 1961) No. 51: Madison, p. 322.
12 *Op. cit. supra*, No. 51: Madison, p. 324.
13 Keyes, *The Preservation of Liberty* (1992) Cornell L.Rev. 969
14 (hereafter Keyes)
15 Berger, *A Lawyer Lectures A Judge* (1995) 18 Harv. J.L. & Pub. Pol'y, p. 864,
16 quoting H. Jefferson Powell, *The Original Understanding of Original Intent*
17 (1985) 98 Harv. L.Rev. (1985) p. 892
18 Hamilton, Madison, Jay, *op. cit. supra*, No. 78: Hamilton, p. 465
19 Hamilton, Madison, Jay, *op. cit. supra*, No. 78: Hamilton, p. 466
20 Glendon, *A Nation Under Lawyers* (1994) (hereafter Glendon)
21 Glendon, *supra*, at p. 118.
22 Glendon, *supra*, at p. 152.
23 Glendon, *supra*, at pp. 124-126
24 The Spirit of Liberty: Papers and Addresses of Learned Hand
25 (Dilliard ed. 1959) p. xx.
26 *Ibid.*
Stewart, *A Life on the Court*, A.B.A. Journal (Feb. 1993) p. 62
Manning, *Hyperlexis: Our National Disease* (1977)
Northwestern U.L.Rev. 767, 772 (hereafter Manning).
Manning, *op. cit. supra*, at p. 780.
Keyes, *op. cit. supra*, at p. 970.
Manning, *op. cit. supra*, at p. 781.
Glendon, *op. cit. supra*, at p. 93

Hearts Touched With Fire
Upon Receiving Honorary Doctor of Law Degree
Pepperdine University Commencement
May 22, 1998, 2:00 p.m.

I thank the Chief Justice for his kind introduction. To the President, the Dean, Members of the Faculty, Baron Six, Graduates and all our Honored Guests. I greatly value the distinction you confer upon me by awarding me the honorary degree and allowing me to share, if only by reflection, this university's great record of excellence and achievement. I take special pride in receiving a mark of recognition from the Pepperdine University School of Law because of this university's strong affirmation that faith and moral principle are a necessary part of a personal commitment to justice.

A commencement is a ceremony which celebrates both endings and beginnings and invites us to reflect. About the past and about the future. Last summer, my law school class celebrated its 20-year reunion and a classmate reminded me of something I had forgotten. He said that he looked up my picture in the year book and under the heading "future plans" it said: "looking for work as a gardener." He said he was relieved to know at least one other person in the class had not yet achieved their aspiration. I doubt that any of you aspire to be gardeners — but I can now give you some advice from the perspective of a grizzled old veteran. It is more important to think about the kind of person you want to become than to worry about what you will do.

Grant Gilmore ends his book, *The Ages of American Law*, with a passage he identifies as a paraphrase of Holmes. "Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the

lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed."¹

I believe this catechism is correct. But that does not mean law and lawyers are insignificant. In America, there has always been a potent reciprocity between the attitudes of lawyers and the expectations of popular culture. In a country like our own, a society so culturally diverse in which we share neither language nor culture nor history, law has become the carrier of our few common understandings. As Maryann Glendon notes: [It is now] the terrain on which Americans are struggling to define what kind of people they are, and what kind of society they wish to bring into being."²

That will be the challenge for the next generation of lawyers. My generation viewed the task as largely external, and in our arrogance, we believed pure intellect would provide the universal key. We were going to change the world. Through law, our society would be reformed, purified, saved. Our hubris was understandable if not wholly justified. After all, this country was founded by men who believed they were to political science what Sir Isaac Newton was to physics.

We did change the world, but not always for the better. We have overcome cold-eye sheriffs, fire hoses, and cattle prods. We have faced up to discrimination, racism, and bigotry, and struggled to make our dreams and our principles one. We have come close to the mountain top, but we have also descended to the rubble of Oklahoma City. We earnestly celebrate diversity, but we also mourn the loss of common ground. Freedom is the word on all our lips, but every day we drive the stake deeper into the heart of the spirit of liberty. In many ways, civil society now seems shattered. Every attempt to move forward founders on new and greater obstacles. Our

hyphens overtake us. The rights we sow so abundantly spring up overnight, like dragon's teeth, and destroy the bridges to tomorrow. Further investigation revealed that Newton did not get the physics exactly right and neither did we.

The legal profession's task is no longer changing the world. It is the more difficult, useful, and ultimately more rewarding job of changing ourselves.

We must once again seek and respect the "ideal of character." We must restore reverence for the lawyer as peacemaker and healer, the advocate Dean Kronman describes as "devoted to the public good but keenly aware of the limitations of human beings and their political arrangements."³ The desirable traits – integrity, exceptional wisdom, good judgment, extraordinary deliberative power, prudence, sympathy for opposing views, and a keen sense of honor – are a catalogue of virtues. And the pursuit of virtue, like hope, is an activity of the spirit.

De Chardin has said that one day after mastering the physical universe, "We shall finally harness for God the energies of love. And on that day, for the second time in the history of the world, we will have discovered fire." We must restore that spirit of virtue and one more thing: We must once again come to an understanding of what it means to have, in Holmes's words, "hearts touched with fire."

I like that phrase because it distinguishes the "heart" of which I speak from the maudlin sentimentality which pervades the national consciousness, from the flood of easy talk show tears, available on cue.

When I speak of heart, I mean to use the term in what I think is a truer sense. I mean great-hearted. The heart of the warrior, filled with courage and purpose, but not cruelty. The heart that glories in the richness of the human connection. The heart that feels shame. The heart that recognizes

and is humbled by the nuanced, complex, many-patterned reality of the human condition. The heart that perseveres, accepting adversity as the other face of triumph.

Between 1899 and 1902 -- just at the turn of the last century -- Rene Rilke, a young German poet, composed one of his best-known works, "The Book of Hours." In this book, subtitled "Love Poems to God," Rilke pens not only a ravishingly poetic vision but a prophetic one. In one poem, written after a visit to Italy, Rilke admits his envy of his southern brethren whose religious Renaissance art portrayed God as "an ardent flame" and laments: "When I lean over the chasm of myself -- it seems my God is dark and like a web: a hundred roots silently drinking."⁴

Like all good poetry, Rilke's vision works on many levels. He seems to see or foresee exactly what is taking place in his world. He is writing at a time which marks the end of the Age of Enlightenment and the inauguration of this present darkness -- a nonjudgmental, indifferent age, the era of moral relativity. On another level, though, when Rilke talks about leaning over the chasm of himself he also suggests that what we see, all we can see, is what we have made of ourselves. What we have become. If our God is dark, we alone are responsible for reigniting that ardent flame.

So I will close, as I began, with the words of Holmes:

"Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. But, above all, we have

learned that whether [we] accept from Fortune her spade, and will look downward and dig, or from Aspiration her axe and cord, and will scale the ice, the one and only success which it is [ours] to command is to bring to [our] work a mighty heart."⁵

This school has taken seriously its responsibility to engender mighty hearts. The university can only give us the spark. We, ourselves, must nurture the flame. I will work on mine if you will work on yours, and, together, we can bring honor to our calling.

¹ Gilmore, *The Ages of American Law* (1977) pp. 110-111.

² Glendon, *Rights Talk* (1991) p. 3

³ Kronman, *The Lost Lawyer* (1993) p. ____

⁴ Rilke's *Book of Hours, Love Poems to God* (Barrows et al. ed. 1996) p. 49.

⁵ *The Mind and Faith of Justice Holmes* (Max Lerner ed. 1943) p. 33.

Higher Ground
The St. Thomas More Society
of Santa Clara County
Thursday, October 15, 1998
Red Mass — 6:00 P.M.
Dinner — 7:00 P.M.

Thank you. Good Evening. I want to thank Dean Gerald Uelmen; the Society's president, Mary O'Byrne, for extending the invitation; Thomas Hogan for helping me to find my way, not easy with someone as directionally challenged as I am; and all of you for your warm welcome. It is a pleasure for me to participate in this event and to congratulate Cindy Seeley as this year's recipient of the society's public service award. She certainly exemplifies the kind of person, as well as the kind of public servant, we should all aspire to be — and, yes, I emphatically reject the idea that the two sides of life (personal and professional) are hermetically sealed.

I must admit that when I saw the invitation to this evening's festivities and its cost, I felt some trepidation. My speeches are worth exactly what I charge for them. Nothing. Dinner was excellent, though, and so I feel the onus is no longer on me. At least the caterer gave you your money's worth.

The Snake

I want to begin the discussion tonight with a poem. It is really a song and one that may be familiar to you. However, I am married to a musician and whenever I feel moved to burst into song around the house, the response is usually a pained look and the gentle, but firm, admonition that I should "keep my day job." With that in mind, I will not attempt to sing. I will just read these words:

"On her way to work one morning down the path 'longside the lake
A tenderhearted woman saw a poor half frozen snake
His pretty colored skin had been all frosted with the dew
'Poor thing' she cried 'I'll take you in and I'll take care of you.'

Take me in, tender woman
Take me in, for heaven's sake
Take me in, tender woman
Sighed the snake.

She wrapped him up all cozy in a comforter of silk
and she laid him by her fireside with some honey and some milk.
She hurried home from work that night and soon as she arrived,
she found that pretty snake she had taken in had been revived.

She clutched him to her bosom, 'you're so beautiful,' she cried,
'but if I hadn't brought you in, by now you might have died.'
She stroked his pretty skin and kissed and held him tight.
Instead of saying 'Thanks' the snake gave her a vicious bite.

'I saved you!' cried the woman, 'and now you bitten me, but why?
You know your bite is poisonous and now I'm gonna die.'
'Aw shut up silly woman,' said the snake with an evil grin,
'You knew damn well I was a snake before you took me in.' ”¹

I heard Oscar Brown, Jr., sing that song when I was 18. He performed live
at the college I attended. And it made an indelible impression on me. But as 18-
year-olds are won't to do, I saw only its romantic connotation. I thought it was
about unrequited love. It is only in the last few months that I have come to
understand that this is a political parable.

Now I bet at least a few of you think I am talking about President Clinton. I
must admit the parallels are tempting, but I am not going to go there — at least not
today. Like most good poetry, The Snake is a story that works on many levels.
One theme we might draw from it, is that the things we hug to our bosoms do not
change their essential nature simply because we mean well. Ideas have
consequences. So do actions. And the consequences may be fatal.

One of the things we have embraced with fervor is what might be described
as a nonjudgmental culture. Another is the cult of power politics. The
combination of the two has deprived us of even the ability to have a national
conversation about morality. I believe (though I realize this is very much a

minority view) that the marginalization of private morality and public virtue will be fateful to the body politic and the survival of democratic regimes generally.

I want to advance here a novel theory about what is going wrong with our political life. It is simply this. In the evocative words of Bob Kaufman, our tears are “gaining too much weight.”²

Our Tears Are Gaining Too Much Weight

Let me present my usual disclaimers. I think it is fair to say that intellectual and philosophical views are shaped — though not necessarily justified — by our early experiences. Mine certainly were. And by today’s standards my early experiences were circumstances of material deprivation. We were poor, especially my mother’s family. Her father supported a wife and seven children cropping shares in the summer and driving a logging truck over treacherous, mud-slick roads in winter. The family moved every year from one pine-board, tin-roofed shack to another. When I came to visit in the summers, my aunt and I often shared a pallet on the floor, and, through the rust holes in the roof, we could see the dense thicket of stars wheeling above our heads in the Alabama night. Of course, rain was even more entertaining. Then the challenge was to find enough containers to capture all the drips. My mother’s father played the harmonica and a little guitar. And sometimes my uncles played hambone, incorporating the syncopated rhythms of falling water.

My father’s family was comparatively well-off. His parents owned their few acres of land. I am sure their income would have put them well below anybody’s idea of a poverty level. But that was of little consequence. It was a time and place where what you had mattered much less than the kind of person you were. A person’s worth was not measured in BMW’s, Gucci bags, and imported espresso machines. In fact, I did not know what a BMW was. My grandfather owned a battered, turquoise blue, Ford truck. It smelled always of

damp cigars and, to the best of my recollection, he never put more than a \$1.50 worth of gas in it at any one time during his entire life.

There was no moral relativism practiced in the homes where I spent my childhood. It was a stern, Southern Christian sort of upbringing. If you tumbled off the porch and banged your head; if you slipped on the gravel and skinned your knee, you were likely to be told — after the damage had been duly inspected — that you were not really hurt and to dry your eyes and “get over it.” The rules for life were pretty simple too: Don’t lie; don’t cheat; don’t steal. Keep your word. Work hard. Do unto others. Fear God and seek understanding.

I tell you this not to elicit your sympathy, I don’t need it. These are fond memories. I tell you so you can understand that my early experience clearly predisposed me to be skeptical towards the claims of a nonjudgmental culture. So you may comprehend why 40 years later my skepticism has ripened into overt hostility. And so you may judge me a little less harshly when I tell you that I think compassion — at least in the distinctive modern sense in which that term is used — is a much over-rated political virtue.

Now I realize I take my life and fortune in my hands to say such a thing. Especially to this audience. I am aware that it is terribly politically incorrect. Indeed, I am well aware that the media code for conservative is the phrase “lacks compassion.” I will not here argue — nor could I — that we should have no feelings of compassion for people who suffer, that we should be without mercy or pity or kindness. Compassion has only recently become confined to the political sphere of life. As Clifford Orwin notes:

“If by compassion we mean mercy, our account of it would have to begin with the creation of the world, which according to the rabbis was the work of God acting not as *Elohim* (the name which implies his justice) but *Adonai* (that which implies his mercy).”³

The Christian notion of charity — to love one another as God has loved — is related, but both debased and diluted by compassion as personified in our political debates. That view of compassion is both self-centered and self-indulgent while at the same time its invocation is central to notions of redistributive justice. This modern view of compassion traces its provenance to Rousseau, who presents it as “an emanation of that natural human self-love”⁴ and as a repudiation of the rational self-interest posited by Hobbes and Locke. Rousseau has a lot to answer for. In one fell swoop he invented liberal guilt and founded “not only the cult of compassion but also that of sincerity.”⁵ Thus, we show our goodness not only by extending compassion, but also by soliciting it. It is the perfect precursor to the politics of theater where the maudlin sentimentality of talk shows and soap operas substitute for reasoned discourse. And there is an irresistible bonus. To quote Orwin again:

“Precisely to the extent . . . that compassion becomes one’s reigning principle, one is discharged of other grounds of guilt.”⁶ In other words, confession brings absolution without contrition or repentance.

“One of the chief tasks of the morality of compassion, then, is to purge us of being too ‘judgmental’ (that is, too cruel), whether toward others or toward ourselves. Providing we are indulgent toward others, we are permitted to be indulgent toward ourselves.”⁷

For obvious reasons, the morality of compassion is particularly attractive in an era of declining morality. Edmund Burke makes note of this connection in 1791. In a letter to Claude-Francois de Rivarol he observed:

“The [Parisian philosophers] . . . systematically flatter all . . . passions natural and unnatural. They explode or render odious that class of virtues which restrain the appetite. These are at least nine out of ten of the virtues. In the place of all these they substitute a virtue which they call humanity or benevolence. By these means, their morality has no idea in it of restraint, or indeed of a distinct settled principle of any kind. When their disciples are thus left free and guided only by present feeling, they are no longer to be depended on for good or evil.”⁸

The morality of compassion provides a relaxed alternative to the hard choices of the traditional virtues. And its proponents can claim the prize for openness, tolerance, and goodness. If there has been any doubt in your mind that precisely this kind of emotional manipulation is at the heart of our political discourse, recent events should be utterly convincing.

Evicting Rational Passion From the Public Square

Liberals own the franchise when it comes to compassion. They have improved upon it and now invoke what — for want of a better word — I call metacompassion. It works like this. On a recent cable news program, the usual suspects were discussing the Clinton scandal. Catherine Coulter (the obligatory conservative) was arguing that perjury and obstruction of justice are impeachable offenses because such acts when committed by the chief law official of the law subverts the whole notion of justice. Moreover, she argued, a man so lacking in personal probity is not fit to serve precisely because he represents the nation. Governor Roy Roemer (the obligatory liberal) had an immediate response. He said, “I am delighted that people are now interested in having a conversation about morality. I, too, think morality is critically important. But if you want to talk about morality we need to talk about all the people who are suffering; all the people this system has failed.”

Another example. Betty Friedan was interviewed for the perspective of the Women’s Movement. When asked why feminists had not condemned Clinton, she

said “she was proud of the movement. The restraint shown by feminists was proof that the movement had grown up. This was no big deal. We are talking about sexual relations between consenting adults.” “Sex,” she said, “has nothing to do with morality.” She continued: “Poverty is immoral; violence is immoral. If you want to talk about morality, that is what we should be discussing.” Asked why feminists had expressed such outrage over less egregious conduct attributed to Clarence Thomas, Friedan responded candidly: “Well, but you see, I never agreed with his policies.” The bottom line. Morality has no personal component. It is an institutional responsibility.

And it is a trump card. No matter how morally depraved my personal conduct, by invoking the morality of compassion, I can prove that I am a better person than you and the only one with the moral authority to speak. Moreover, degrees of opprobrium are finely calibrated to political agendas. Best of all, the morality of compassion permits the proponents to dismiss traditional morality, to forcibly evict religious conviction from the public square while at the same time imposing their convictions by government fiat. The result is a dichotomy that raises fundamental questions about the principle of liberty that is at the heart of modern liberalism. Gertrude Himmelfarb notes that our current formula of social paternalism and moral individualism amounts, in the economic realm, to social tyranny. She asks: “Why is it proper for the government to prohibit insalubrious foods but not sadistic movies, to control the pollution of the environment but not of the culture, to prevent racial segregation but not moral degradation? Is there not a double standard of values and priorities here?”⁹ Why is it okay “to take [the] view . . . that smog and insecticides are perilous enough to call for restrictions on liberty, but that pornography and obscenity are not; or that the Surgeon General can properly compel cigarette packages to carry a warning declaring them hazardous to health, but that the Attorney General cannot authorize a label on obscene recordings declaring them deleterious to the soul.”¹⁰

In truth, liberalism's vaunted tolerance and openness is a lie. In America, at least, liberalism is tolerant only of those concerns to which it is indifferent. To those trivialized forms of religious observance which amount to no more than a consumer preference, the culture maintains a posture of tolerance. But, as Charles Krauthammer observed in a recent essay in Time magazine, "[I]n our thoroughly secularized culture, there is one form of religious intolerance that does survive. And that is the disdain bordering on contempt of the culture makers for the deeply religious, i.e., those for whom religion is not a preference but a conviction."¹¹

I have news for you. We may celebrate the life of Thomas More and ponder his death, and you can give your organization his name, but he couldn't work here anymore. So ingrained is this disdain for the religious that when Sidney Blumenthal called Whitewater prosecutor Hickman Ewing, a "religious fanatic," nobody blinked. Apparently, Ewing stands accused of daily prayer, membership in a fundamentalist church, and a sincere belief in God. Krauthammer notes that Ewing's associates defended him by saying he left his "open Christian faith"¹² at the prosecutorial door. In other words, he was fit to carry on his duties because "he allows none of his Christian faith to corrupt his working life."¹³ Krauthammer concludes: "We've come a long way in America. After two centuries, it seems we finally do have a religious test for office. True religiosity is disqualifying. Well, not quite. Believers may serve — but only if they check their belief at the office door."¹⁴ He suggests a revision of Chesterton. "[T]olerance is not just the virtue of people who do not believe in anything; tolerance extends only to people who do not believe in anything."¹⁵

Higher Ground

The best line in the movie *City of Angels* is the angel Seth's response to Maggie's quick denial when he tries to convince her he really is a messenger of God. She says I don't believe in "that stuff." He replies: "Some things are true whether you believe them or not." If so, there must be some unspoken corollaries: some things are false even if repeated so often they have become orthodoxy and no one questions them anymore; some things are wrong even if 95 percent of the respondents polled would go along with it; and some things are right even if no one is willing to defend the principle.

I return now to the image with which I began this discussion: The Snake. What is the nature of the serpent whose beauty enthralls us and blinds us to the likely consequence of holding it so tight. Perhaps it is our quest for absolute liberty; our need to challenge every restraint; to go beyond the ultimate questions; to conquer nature, even the natural law.

A serpent is a potent symbol and one that plays a pivotal role in some of our best stories. Like the story of the Garden of Eden and The Fall. You know the one where the woman gets blamed for messing everything up. Rabbi Harold Kushner provides a helpful, and more hopeful, interpretation of that story. He says the story of the Garden of Eden is not an account of people being punished for one mistake, "[i]t is the story of the first human beings graduating, evolving from the relatively uncomplicated world of animal life to the immensely complicated world of being human and knowing . . . that there are such things as Good and Evil."¹⁶ According to Kushner, this is not the story of the fall of man, rather it is the story of the emergence of humankind.

"The woman is not the villain of the story, enslaved by appetite and bringing sin and death into the world. She can be seen as the heroine of the story, leading [us] into the brave new world of moral demands and moral decisions."¹⁷

From that viewpoint, our first encounter with the serpent made us fully human. Perhaps our second encounter is to teach us something equally important: humility. We were right to seek knowledge. A powerful and questing intellect is part of the human design. Physicist Paul Davies offers an interesting perspective in his book, *The Mind of God*. He says: "We have cracked part of the cosmic code. Why this should be, just why *Homo sapiens* should carry the spark of rationality that provides the key to the universe, is a deep enigma. We, who are children of the universe — animated stardust — can nevertheless reflect on the nature of that same universe, even to the extent of glimpsing the rules on which it runs."¹⁸ He concludes from this that our existence cannot be "a mere quirk of fate, an accident of history, an incidental blip in the great cosmic drama."¹⁹ We are truly meant to be here.

As parents we know our children require limits to grow into the best people they can be. Perhaps God knows human beings require reverence to achieve the best of what humanity can be. Perhaps. I do not know. I do know that our efforts to "deconstruct," "demystify," and "debunk" absolutely everything in the quest for absolute freedom has not set human beings free; it has only diminished humanity — made us creatures with small minds and empty chests. Those who have the capacity and the discipline to think about such things long ago foretold the fate of such a project. Nietzsche cautioned us about the dangers of staring into the abyss. "[I]f thou gaze long into an abyss, the abyss will also gaze into thee."²⁰ C.S. Lewis says "[t]he wresting of power from Nature is also the surrendering of things to Nature. As long as this process stops short of the final stage we may well hold that the gain outweighs the loss. But as soon as we take the final step of reducing our own species to the level of mere Nature, the whole process is stultified, for this time the being who stood to gain and the being who has been sacrificed are one and the same."²¹ When men conquer nature, including the law of nature, they step

outside of the *Tao* and into the void and are no longer men. Man's final conquest of nature is thus "the abolition of Man."²²

"[Y]ou cannot go on 'explaining away' forever: you will find that you have explained explanation itself away. You cannot go on 'seeing through' things forever. The whole point of seeing through something is to see something through it. It is good that the window should be transparent, because the street or garden beyond it is opaque. How if you saw through the garden too? It is no use trying to 'see through' first principles. If you see through everything, then everything is transparent. But a wholly transparent world is an invisible world. To 'see through' all things is the same as not to see."²³

My grandmother taught me this wisdom when I was in grammar school. She said: "It's a fine thing to have an open mind, but your mind shouldn't be so open everything in it falls out." Lewis, in his spare and eloquent prose, says much the same thing. "An open mind, in questions that are not ultimate, is useful. But an open mind about the ultimate foundations either of Theoretical or of Practical Reason is idiocy. If a man's mind is open on these things, let his mouth at least be shut."²⁴

There is a powerful symmetry to the idea that man must seek knowledge to be fully human, but he must exercise restraint to remain so. Symmetry is an equally powerful principle in the political realm. Absolute power may corrupt absolutely, but so does absolute freedom. The polity cannot be divorced from the ethos which sustains it. Morality is a prerequisite of liberty.

That is why the politics of compassion can never be an adequate substitute for virtue. Tocqueville warns us that "[d]espotism may govern without faith, but liberty cannot. Religion is much more necessary in [democratic] republic[s] . . . than in any others."²⁵ He asks some interesting questions:

“How is it possible that society should escape destruction if the moral tie is not strengthened in proportion as the political tie is relaxed? And what can be done with a people who are their own masters if they are not submissive to the Deity?”²⁶

But to criticize the morality of compassion is not to say that we are not in need of kindness, benevolence, and genuine empathy for our fellow travelers. We are in desperate need. But we need the reality of compassion not the funhouse-mirror images of it reflected endlessly in our current political debate.

In Micah, chapter 6, verse 8, the writer says that God has shown you what is good and asks: “What does the Lord require of you, but to do justice, love kindness, and walk humbly with God?” This is precisely the kind of life Sir Thomas More modeled for us. It is a good model, though one we may find difficult to fathom in a world where only liberty is deemed absolute, and winning is defined as staying alive.

To do justice, love kindness and walk humbly with the Lord. What more should be required of us? What more would be needed.

I am reminded of a story I heard recently about a father living in a small town who takes his young son out for a walk. They pass a neighbor’s melon field. The area is unfenced and there are luscious-looking melons growing near the sidewalk. The father hesitates a moment, looks to the right and looks to the left, plucks up a melon and tucks it under his jacket. He feels a small tug on his sleeve, and his son says: “Dad. You forgot to look up.”

We have reached an impasse in our political culture. I think it is a time of peril, but the only way out is up. And the only hope for common ground is higher ground.

¹ Oscar Brown Jr.'s Set Free--Vol. 2-- Battle of the Sexes.

² Kaufman, Golden Sardine (1967) Heavy Water Blues, p. 60.

³ Orwin, *Moist Eyes* — *From Rousseau to Clinton*, The Public Interest (Summer 1997) p. 5.

(Endnote cont'd. on next page.)

4 *Id.* at p. 5.
5 *Id.* at p. 8.
6 *Id.* at p. 13.
7 *Ibid.*
8 *Id.* at p. 14, quoting Letter to Claude-Francois de Rivarol (June 1, 1791).
9 Himmelfarb, Looking Into The Abyss (1995) p. 96.
10 *Id.* at p. 98.
11 Krauthammer, Times Magazine (June 15, 1998) p. 92.
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 Kushner, How Good Do We Have To Be (1997) p. 30.
17 *Id.* at p. 31.
18 Davies, The Mind of God (1992) p. 232.
19 *Ibid.*
20 Nietzsche, Beyond Good and Evil (Zimmern edit. Mod. Lib. edit., n.d.) Ch. iv, No. 146, p. 87.
21 Lewis, The Abolition of Man (1975) p. 79.
22 *Id.* at p. 74.
23 *Id.* at pp. 86-87.
24 *Id.* at p. 59.
25 Tocqueville, Democracy in America (Ryan edit. 1994) Causes Which Led to Maintain Democracy
p. 307.
26 *Ibid.*

Remarks
Retirement Dinner of
Justice Robert K. Puglia
February 18, 1999

Close Encounters Of The First Kind

Good evening. I suppose I am on the program because I have a slightly different perspective. I came to know Justice Puglia later in his illustrious career and so represent that generation of lawyers who got to know him from the other side of the bench when he was (in my mind at least) already a great gray eminence and I also had the privilege of serving as a member of the Third District Court of Appeal and working with him.

In 1979 when I joined the Attorney General's office, he was the Presiding Justice of the Third and people were already beginning to speak of him in reverent tones. The first thing I did that caused much wincing and frowning among the assignment assistants at the AG's office was to ask: "Who is this guy . . . PUG-lia? It's Pul-ya, Pul-ya, they chanted in unison. The 'G' is silent!"

I vividly remember my first encounter with Justice Puglia. I had never been in the Third DCA's courtroom before. They sent along another deputy attorney general to make sure I could actually find the courtroom and would know which chair to sit in. It was my companion's job to show me the ropes. And he dutifully pointed out the beautiful features of the courtroom — the marvelously luminous gumwood, the specially designed light fixtures, the frosted glass lightwells, and the magnificent coffered ceiling. He told me how the artisan who created that ceiling had left out one of the gold medallions because he thought only God should create perfection. I peered at the ceiling trying to find that empty space. And the whole time I could hear this annoying tap, tappity, tap, tap. I thought what a shame that this beautiful old

courtroom had problems with the sound system. I wondered if this noise would continue during the argument. And I worried about being totally distracted. I kept leaning this way and that trying to detect the source of that dry, rhythmic clicking.

This was a simple case. What would later be known as a routine disposition appeal. So I had brought along a notebook of carefully outlined arguments, the briefs, and parts of the record just in case. All of this material was resting on my lap. And I happened to notice the movement of the pile of papers resting on my lap was precisely synchronized to that annoying noise — and realized — to my complete horror — that clicking sound was from my knees knocking together. Just at that moment, the gavel banged; the panel of judges strode into the courtroom. I rose shakily to my feet as they marched past those gold-topped Corinthian columns and royal purple draperies. They sat in chairs covered in the same material. But Justice Puglia sat in a chair a foot taller than all the rest with a carved diadem above his head. It looked like a throne.

I represented the respondent. When appellant finished I rose and neatly arranged my pages of prepared argument and launched into it. About 90 seconds into my oration, however, Justice Puglia's chair tilted back almost to the wall, he cast his eyes upward to that magnificent ceiling and kept them there. Somehow, I did not think Justice Puglia was looking for that missing medallion. I stammered: "Uh, unless the court has questions" Before I finished the thought, Puglia's chair came upright with a thump. He nodded regally. I had been dismissed. Lesson No. 1. If you have nothing to say that will enlighten, enliven, or enlarge the dialogue, shut up. I subsided feeling a bit downcast. But, just for a moment, I had the most disconcerting feeling his eyes were twinkling — like a relieved parent with a slow child.

Nah. I thought as I trudged back to the office: "I might be new at this, but one thing I knew for certain: great gray eminencies do not twinkle."

Gamesmanship And All That Jazz

By December 1982, I was an old hand. Puglia, P.J., published *Cronk v. Municipal Court*. The case involved a defendant's attempt to hurriedly enter a plea before the information could be amended to allege more serious charges. The opinion said a magistrate has "the inherent power to prevent injustice." It was short, it was clear, it was correct. And it contained this footnote: "The dubious tactic referred to in the concluding sentence of the trial court's opinion is more colorfully characterized in the Attorney General's brief as "Gamesmanship and All that Jazz." I was that lowly AG. And I was thrilled that something I had written would actually be quoted in the official reports. Great gray eminencies might twinkle . . . occasionally.

Somewhere during this time, the thought may first have come to me that if ever I were a judge — a possibility I deemed extremely remote — I would be a judge like Puglia. I liked his opinions — and not just because he quoted me. They were intelligent, wise, and witty, but most important, they were clear, assessable, understandable. I began to discern that the opinions which resonated, the ones I remembered long after I read them, had at their heart a passionate kernel of truth. They were not the product of "a judicial process"; and even though they sometimes reflected the opinion of a court, the best of them exuded that "sense of style" that Richard Posner tells us is "inseparable from the idea of a great judge in our tradition."

Rules To Live By

Because truth really is stranger than fiction, in time I was actually appointed to the Third and became a colleague of Justice Puglia.

There are many benefits to being a judge on the Third District Court of Appeal. For one thing, you are automatically on the distribution list for

Puglia's Rules to Live By. Unfortunately, I was on the court such a short time, I only received Rules No. 11 and 12. No. 11 warned us not to be guilty of turgid writing lest our readers conclude "we do not know precisely what we are talking about." No. 12 admonished us to be "all [we] could be" but at least be better than the Iowa or Texas appellate courts, and use "pleaded," the correct past tense, and not "pled" — a weak form of the verb when we discussed pleas. I got that part, but since my subscription to the rules was abruptly terminated at that point, I was left in a quandary about other crucial questions. Should I say the victim bled or that he bled. Or should led be leaded.

I learned other important stuff too. Justice Puglia is a walking musical encyclopedia. I am one of the very few appellate judges in the country who knows all the words to the Chiquita Banana Song.

Warrior Virtues

Several years ago, Justice Puglia returned to Korea. He had fought in Korea as a member of the Third Infantry Division — part of the group that finally broke the stranglehold of the North Korean Army in the winter of 1952-53. On his return trip — 40 years later, he had an opportunity to visit a monument commemorating the landing at Inchon. The memorial is set in the midst of a broad, grassy area. Nearby a group of neatly dressed, elderly men sat in the sunshine, laughing and talking. But when the guide explained to them that his guest (Justice Puglia) was one of the soldiers who had fought during the last phase of the Korean War, the men approached him and each in turn bowed and kissed his hand. It was their way of showing respect to someone they regarded as a liberator of their country.

We all thought that was a very touching story until we realized Bob intended to implement a similar ritual in the Third District to show respect for the P.J.

Winning Is The Only Thing

If you know Justice Puglia at all, you know he is a fierce competitor. So it is not surprising that he joined with two of his colleagues — Fred Morrison and Arthur Scotland — to form a triathlon team to compete in the appellate division of regional events. Bob was the biker. The group, aptly named Team Jurisimprudence, first took to the field in the Monterey Bay Triathlon, held in Aptos on July 14 (Bastille Day), 1996, and took first place in the Appellate Judiciary Division. Next was the Sentinel Triathlon in Santa Cruz on October 6, 1996, and another first place! In 1997, the TEAM rested on its laurels. I tried to tell them that if they were resting on their laurels they were probably wearing them in the wrong place. But you know when three appellate judges agree on something, you can't tell them anything.

In 1998 the TEAM was resurrected to defend its honor at the Donner Lake Triathlon, the national championship. Once again, they were victorious, now becoming — unknown to the race directors — national champions in their division. Bob had, by far, the most difficult task in this struggle: he rode up and down the Donner Summit Road. And I certainly don't think the significance of this string of victories should be one whit diminished by the trifling circumstance that they were in each case the *only* team in their division.

With A Song In His Heart

Bob has another little known distinction. You know when entertainers are starting out, they often get their first break as an opening act. That means they go on first, warm up the audience and get them in the mood for the main attraction. When an entertainer has made it to the top in the profession, he or she is the headliner. The part of the show everyone pays to see. But when you get beyond headliner status, you can be the closing act. That's the act that takes over when you want everybody to leave.

Here again, Bob is a standout. At the ABOTA dinner in January 1999, Justice Puglia distinguished himself by taking over the mike from the band's singer and treating the audience to songs from his favorite era — the late 20's — and sure enough, everybody went home. When the last guest left, even Ingrid, Bob was still singing. This is a man who loves his work. Even when its only his avocation.

Not PC

Justice Puglia comes from a time when men could be gentlemen, scholars, and warriors. And these are the virtues he brought to the work at the Third District. Bob Puglia has never been politically correct. He is something much better than that. A decent, honorable man, who never sees people as abstractions or symbols. He takes them as he finds them; expects the best of them; and demands no more from them than he demands of himself. I think it was precisely this leadership by example that over the past quarter century has made the Third such an extraordinary court. With Justice Puglia expressing his absolute faith that we would be all we could be and that we could be much more than we imagined, it would have been downright churlish to let him down.

The Third is a productive, collegial, remarkably lighthearted place where everyone — at every level — works with a will. It reminds me of that mythical Guild of Judges which Learned Hand called the Society of Jobbists — judges for whom exquisite craftsmanship, attention to detail, and principled continuity — is both motivation and reward. If the society existed, Robert K. Puglia would be its California Chairman.

My personal pantheon of admirable judges does not contain a cast of thousands. It is a select company, but I certainly include Justice Puglia among them.

To me he exemplifies the classical judicial virtues: impartiality, prudence, mastery of a craft, persuasiveness, and candor. He has a sense of the legal system as a whole, an awareness of the ebb and flow of history, and of the need for consistent jurisprudence, and above all self-restraint.

I have this framed quotation on my desk. "Angels can fly because they take themselves lightly. I think it was Justice Puglia's seemingly contradictory qualities that gained him the respect and affection of so many people. He was serious about the work of the court; and he took seriously his role as the keeper of its history and traditions — even going so far as to undertake a lightning commando raid on a museum in South Carolina to retrieve some of our lost artwork. He took the job seriously, but he took himself lightly.

His approach to decisionmaking was painfully democratic. I had a great deal of sympathy for lawyers who sought to work at the Third and bopped into the job interview only to be confronted with all 10 judges. Even arguing before the U. S. Supreme Court you only have to deal with nine! It takes 15 minutes just to shake hands with everybody.

Since he retired, Bob and I have shared adjacent workspaces on the fifth floor. He began with his small space crammed with boxes — the accumulation of more than a quarter century at the court. Recently, I stopped to see how the work was progressing. He had only a few boxes left. He said he had calculated that in his time on the court he had authored more than 3,000 opinions. "Are they going to provide you with bound volumes of all your published opinions?," I asked. His response: "Heck, No." I'm pretty sure he said "heck." "I can always find them on the library shelf if I want to read them." And after a little pause, he said: "Any way, all my best stuff is in California Reporter." For the non-lawyers among us, California Reporter is where good opinions go to die when the California Supreme Court depublishes them.

We talked a few minutes more. Reflecting on all the differences the last few years have wrought. We complained about the general fecklessness of American society in its current manifestation and were, frankly, nostalgic for the days when more people had "feck." Finally, he said with a rueful laugh, "I guess I am a dinosaur." I don't think so. Not a dinosaur. More of an ancient artifact. Like the Rosetta Stone. A text from which we can decipher the best of our past and — if we are lucky — find our way back to the future.

I am sure the Third will continue to be a good court. But, a part of it will always belong to Puglia, P.J. The court will go on, but it will never be quite the same without him. And those of us who in our misspent youth wanted to be Puglia when we grew up now know in our heart of hearts that there will only ever be one. That is as it should be.

Justice Puglia, we will miss you. It will be strange to see future pictures of the court without you in that middle chair. We are, all of us, glad to have been part of the California court system on your watch. Thank you for teaching us what it means to be a good judge. For demonstrating that character counts and integrity is personal. For showing us what dreams may come when we believe in ourselves. Thank you.

Vaya con Dios.

Frederick Douglass Moot Court Competition
Introductory Remarks by Justice Janice R. Brown
Hyatt Hotel, Fisherman's Wharf
San Francisco, California
February 25, 1999
6:15 P.M.

Thank you. I would like to thank the Mayor for his gracious introduction. I am especially grateful because I understand the Mayor had an adventure on his way to the hotel this evening that might have unsettled a less self-possessed individual. He was running late when his limousine unaccountably screeched to a halt in the middle of the block. When he asked the driver what was happening, the driver explained that a frog was hopping across the street and the driver, being a compassionate soul, did not want to squash him. Unfortunately, the frog had stopped and showed no signs of moving on. Well, the Mayor had had enough of this nonsense. He got out of the limo, walked up to the front of the car and sure enough a rather large frog was sitting there. He was startled when the frog thanked him for being so courteous and asked for a ride. Mayor Brown obliged. He put the frog on the seat beside him and the limo continued on its way. Before they had traveled two blocks, the frog said: "Kiss me, I will become a beautiful princess and reward you for your kindness." The Mayor said nothing. The entreaty was repeated several times and got no response. Finally, the frog asked plaintively, "Why won't you kiss me?" And the Mayor replied: "I would rather have a talking frog." You see like most lawyers, he loves words. The law is a wordy profession.

Frederick Douglass was also someone who loved words; who believed in the power of words and the ideas they can convey to enlighten, inspire and persuade, as well as chastise and degrade. He made a career of talking.

He was a natural orator. The editor and publisher of a newspaper. And a nonfiction writer of some renown.

It was his role in history to be a beacon and a symbol for black Americans in a time of change and great peril. And it occurs to me that here — on the eve of the millennium — his words may once again help us to see the future more clearly. I apologize for what I am going to say next, but it has become somewhat of a cliché to say black folks in America are imperiled. But sometimes even a cliché may be true.

In the words of Pastor Leonidas Young, former Mayor of Richmond, Virginia: "The crisis now facing Black America is more devastating than the combined impact of slavery, racial discrimination, and drugs. For now, the enemy is within." We are suffering death by a thousand cuts, and many of the wounds are self-inflicted. It is a crisis of the spirit. Robert Woodson laments that "the lifeline has been severed between today's generation and the rich heritage of self-determination and the will to achieve that once provided a foundation for black progress, even against the greatest odds."

I experienced this firsthand when I was still in law school. The Black Law Student's Association at UCLA started a community outreach program. Each law student adopted a neighborhood school and taught a series of classes about issues we thought would be of interest: legal history, famous black jurists, the legal basis of the civil rights struggle, and questions related to juvenile law.

I was assigned to teach at Inglewood High School. Twenty-five years ago, I would not have described Inglewood as a ghetto school. It was located in a neighborhood of single family homes with well-kept lawns. The school itself was the typical, sprawling California construction, with buildings grouped around a landscaped quad. There was a student parking lot filled with decent looking cars.

I thought these discussions were going pretty well. The students were attentive though not talkative. On the last day, a young man raised his hand. He said: "Why are you coming here? Why are you talking about this stuff? Everybody knows if you're black and you're poor, you don't have a chance." I was astonished. In all my life I had never heard this defeatist manifesto. Quite the opposite. I started out poor; I will die black, and all my life I had been offered a world of limitless possibilities. I am a great fan of Condoleza Rice, a black woman, a world-class scholar and now Provost at Stanford University. She is from Birmingham, Alabama; I grew up in the tiny town of Luverne. During one speech I attended, she said her parents had her absolutely convinced that she could grow up to be president — even if she couldn't eat a sandwich at Woolworth's. My experience was much the same. I imagine Mayor Brown could recite much the same story.

I was baffled. A law student in my 20s, I was less than 10 years older than this high school student — much less than a generation — and yet it was as if we stood on opposite sides of a great divide. I could not conceive of anyone having the opportunities this young man had who did not think he could conquer the world.

At that moment, I knew I felt something terribly wrong. My certainty has deepened in every decade since. Simple and silly as it sounds, I began to have an inkling even then that words might be the root of the problem. And when it happened — quite by accident — that I became reacquainted with the writings of Frederick Douglass, I was sure of it.

Like you, I heard part of Frederick Douglass's story when I was in grade school. There are several copies of biographies — by and about him — on my bookshelves. But I feel I really made his acquaintance in November 1994. November 4th to be exact.

[I had been appointed to the Third District Court of Appeal and November 4 was the date set for my confirmation hearing. Ordinarily, the hearing would have been scheduled close to my home, but in order to accommodate the schedule of the members of the Commission on Judicial Appointments, the hearing was scheduled in Los Angeles. I traveled to Los Angeles with my husband and a couple of friends. Not knowing how long the process would take, we scheduled our return flight for late afternoon. As it turned out, the hearing was a breeze and we found ourselves with a whole afternoon of leisure. So, of course, we went shopping. At least, we went looking. On Rodeo Drive. And we happened upon a shop called Profiles in History. They had fascinating memorabilia. Letters and speeches and photographs from past presidents, supreme court justices, movie stars. Autographed pictures and fragments of letters. We had a wonderful time browsing and reading. Finally, the men growing impatient, we headed for the door. As I walked out, I had the sudden sensation of someone looking at me. Turning my head, I encountered a pair of intent eyes. A fierce gaze. From eyes that could stare an eagle blind.

Stopped in my tracks, I did an about face, walked back into the store and into the corner where I could get a better look. It was a photograph of Frederick Douglass — the young Frederick — mounted above his signature, taken from a letter written in his own hand. I was astonished. I had been in the shop more than an hour and had not seen this photo. It was tucked away in the darkest corner behind the door. But, the fact that I did see it; could not leave the shop without my attention being drawn to it; and that I found it (or it found me) on this day — the day I was first sworn in as a judge — must have some special meaning.

They removed Frederick from the wall, wrapped him carefully, and he went with me on the plane back to Sacramento.] His autographed picture

was the first thing I placed on the walls of my chambers at the Third District Court of Appeal. And it went with me when I was appointed to the Supreme Court. If you come into my office right now, you will see Frederick still watching from the wall right in front of my desk. Whenever I look up from my work, he is looking back at me. And that is why when I received your invitation, I knew it was an offer I could not refuse.

Of course, I had heard stories of Frederick Douglass since childhood. The saga of a man born into slavery who managed to win his freedom; to overcome illiteracy and become one of the most powerful advocates of the abolitionist cause. His life has been an inspiration to generations of black people. And Frederick Douglass reentered my life as a story and a symbol at about the time the sense of unease and bafflement I felt that morning in Inglewood blossomed into full-fledged dismay and a sense of impending doom.

It was not that black Americans made no progress in that quarter century. Those decades saw explosive growth in the numbers of black households moving firmly into the middle class. There were more black high school graduates; more college diplomas; and more advanced degrees than ever before. A corps of dedicated black professionals won praise and recognition for their accomplishments in science, medicine, and law. And there are thousands of black-elected officials throughout the country.

It is important to say that this history is part of an unbroken march of progress by black Americans that begins before the Civil War. We have a proud heritage left to us by people who did more than sing "We Shall Overcome." They founded businesses and banks, established flourishing centers of trade and commerce, and supported a host of mutual aid societies. But it is becoming increasingly difficult to feel that legacy is authentic. It seems sometimes like a dream only half remembered.

Day after day, week after week, month after month. We hear, like the incessant thrum of talking drums, this roll call of failure. Drugs, poverty, violence. An illegitimacy rate above 80 percent for black children; a third of young black males enmeshed in the criminal justice system; the highest murder rate in the civilized world. More than 350 young black men are killed each year in our nation's capital. A few years ago the Los Angeles Times ran a week long series on all the child victims of gang warfare in Watts and East Los Angeles. Pages and pages of photographs and tiny biographies. Infants. Toddlers. Ten- and twelve-year-olds. And these scenes are being repeated in cities across America. I sit in my office every day reading of senseless slaughter and young men sentenced to two and three consecutive life terms.

I believe that what is happening on these streets would have been unthinkable 45 years ago when Rosa Parks refused to give up her seat on that Montgomery bus; inconceivable in 1963 when thousands stood before the Washington Monument and heard Martin Luther King speak the truth to power, extolling the dream of freedom.

But sometime between then and now, the dream came undone.

There was a day when we were a community and the things that are now happening to our children would not have been permitted. Now, we

are only a hapless aggregation and we feel powerless to prevent it. The difference is just a word, but the difference is profound.

In the words of Robert Woodson, "[a]ccepting an identity as 'victims' has done more damage than years of outright discrimination could accomplish, because it has caused destruction from within. We have fallen prey to an epidemic of an entitlement mentality." We are not alone. As Tony Brown notes in his book, *Black Lies, White Lies*, "we have become a nation on the dole, a people constantly foraging for government handouts. Americans, rich, poor, and in the middle, have come to feel they are entitled to tap into the public till."

Nor did black people invent the game of grievance-based political action, but — as with everything we put our hearts into — we raised it to a high art form. We did it so well, in fact, that everyone else has learned to play. Julian Bond offers this wry observation: "Today the protected classes extend to a majority of all Americans, including white men over 40, short people, the chemically addicted, the left-handed, the obese, members of all religions. Surely there is a scholar somewhere who can tell us how we came to this state of affairs and how the road to civil rights became so crowded"

By relying on grievance as the basis of political power and our claims to entitlement, we have been twice victimized: first by the oppression which gave rise to our claim, but finally by the unintended consequences of that agenda.

The unintended consequences have been devastating. The sociological equivalent of a reversal of polarity. "[T]he champions of the black community are those who whine the loudest, whose complaints are the most persistent, and whose claims are the most outrageous — those who 'rattle their [beggar's] cups the loudest.' " In order to support this culture of

victimization we have excised from the portrait of black America “the remarkable models of self-help — accomplishments of black entrepreneurs and mutual aid societies” that succeeded even during the eras of the most brutal racial repression and slavery.

“The selective history that is transmitted to our young people is, simply put, that blacks came into this country on slave ships; from there they went to the plantations and slavery, from the plantations to the ghetto, and finally, to welfare.

“A complete black history would reveal that, even in the face of the most bitter oppression and bondage, many courageous blacks persevered and accomplished, undaunted by the obstacles they faced.”

I grew up surrounded by these stories, these images, words of encouragement and support. It was in the air. Like the scent of flowers on the breeze. We breathed it in, absorbed it, internalized, and lived by it. Words like Challenge. Struggle. Self-reliance. Responsibility. Self-improvement. Achievement. Success. Self-respect. They came not just from my parents and grandparents. From in-laws, cousins, teachers, preachers, and passersby on the street. Any adult could and would reprimand me if I behaved badly; but they were just as likely to pat me on the shoulder and say “we’re all so proud of you; keep up the good work!”

These days, it seems just the opposite. Parents struggle in vain to inoculate their children against a culture that celebrates mediocrity and worse; that sees incompetence and academic failure as signs of “true” blackness; that says, without apology, that SAT testing is unfair to black students because they do not have the “genetic hereditary background” to achieve high scores; a culture that proclaims in every way that being black is a handicap, a cross to bear, and a deficit we cannot be expected to

overcome. These words like poison in the air. Defeat. Despair. Failure.
How high I wonder do the bodies of our children have to be piled before we
acknowledge the need for a new vision. Or an old one, retooled for the next
millennium.

The current civil rights agenda apparently assumes history began in the 1960's and ended there too. It is past time to hit the eject button and get out of this time warp.

It's always a revelation to go back to the stories you loved as a child and read them with the eyes of an adult. When I read about Frederick Douglass as a little girl, it was his bondage and his suffering that stayed in my mind. He complained of being hungry, ill-clothed and often cold. I could feel his terrible desolation at being a "slave, a slave for life." His vivid descriptions of the horror and oppression of slavery sparked my compassion.

When I returned to his story as an adult, I still had sympathy for his suffering, but what kindled my admiration was his determination — man and boy — to be free, free on every level. And his willingness to accept the burdens as well as the benefits of his freedom. The Massachusetts Anti-Slavery Society launched Douglass's career by signing him on as a paid lecturer. In later years, when asked where he got his education, Douglass replied: "From Massachusetts Abolition University, Mr. Garrison, president." But as much as he admired the abolitionists and credited them with his success, Douglass chafed at the limits they tried to impose on him. White abolitionists welcomed blacks to recount their suffering, to become prize exhibits of the evils of slavery. They did not invite their input on policy or their vision for the future. When Douglas said he wanted to go beyond a recitation of the wrongs he endured to discuss his hopes for the future, Garrison advised that he just stick to his storytelling. Others told Douglass

that they would take care of the philosophy and that his role should be limited to telling facts.

His determination to go his way and think his own thoughts, eventually becoming publisher and editor of his own newspaper, led to a rift between Douglass and his benefactors that was not healed for decades. Nevertheless, he chose to be free. Even when that was painful. He understood that there were choices to be made and that those choices would have consequences. At the end of his biography he says:

"[I] have written in part for the encouragement of a class whose aspirations need the stimulus of success. I have aimed to assure them that knowledge can be obtained under difficulties; that poverty may give place to competency; that obscurity is not an absolute bar to distinction, and that a way is open to welfare and happiness to all who will resolutely and wisely pursue that way; that neither slavery, stripes, imprisonment or proscription need extinguish self-respect, crush manly ambition, or paralyze effort; that no power outside of himself can prevent a man from sustaining an honorable character and a useful relation to his day and generation."

After the war, on August 1, 1880, speaking at a rally celebrating the abolition of slavery in the West Indies, he gave an update of conditions in America.

"Taking all the circumstances into consideration, the colored people have no reason to despair. We still live, and while there is life there is hope. The fact that we have endured wrongs and hardships, which would have destroyed any other race, and have increased in numbers and public consideration, ought to strengthen our faith in ourselves and the future. . . . I

will not listen, myself, and I would not have you listen to the nonsense, that no people can succeed in a life among people by whom they have been despised and oppressed. [¶] The statement is erroneous and contradicted by the whole history of human progress. A few centuries ago, all Europe was cursed with serfdom or slavery. . . . [¶] Greatness does not come to any people on flowery beds of ease. We must fight to win the prize The hardships and dangers involved in the struggle give strength and toughness to the character, and enable it to stand firm in storm as well as in sunshine. [¶] One thought more before I leave this subject, and it is a thought I wish you all to lay to heart. Practice it yourselves and teach it to your children. It is this. Neither we nor any other people, will ever be respected until we respect ourselves, and we will never respect ourselves till we have the means to live respectably. An exceptionally poor and dependent people will be despised by the opulent and despise themselves."

Like Douglass I do not think freedom is an entitlement. Freedom is a responsibility. Nor do I believe it is the job of government to take care of us. That idea is the antithesis of freedom. Burke got it right 300 years ago and it is still true. "The people maintain the government, and not the government the people." If the government takes care of the people, they will be subjects not citizens, a passive and dependent population, suffering a different, perhaps more comfortable slavery. To quote Alan Keyes: "Empowerment does not mean just the capacity to do for oneself; rather it means the motive and the will to take the responsibility for one's own destiny. This is the essence of self-government."

Frederick Douglass understood something I hope we may soon come to realize. Chains on your body are easier to endure than chains on your mind. When your body is imprisoned, your mind can set you free. But when your mind is imprisoned, there can be no hope. These ideas are not new. They have been echoed by sources as diverse as Frederick Douglass, Booker T. Washington, W.E.B. Du Bois, Marcus Garvey and Malcolm X. Without claiming to be heir apparent to any, we might profitably consider the remarkable convergence of their views on the need for intellectual achievement, economic self-sufficiency, and good character.

There is a song from the soundtrack of Space Jam that I used to hear constantly last year. R. Kelly. I Believe I Can Fly. "I believe I can fly. I believe I can touch the sky. I believe I can soar. See me running through that open door." I hope you believe you can fly. I know you can. But our job on the eve of the new millennium is to create an America in which every child will have that same confidence. For black children, this means retrieving the positive portion of our legacy; creating an ethic of pride, progress, and achievement. A legacy of resilience, courage, morality, responsibility, and collective commitment.

Well, I started with a talking frog. I will end with wild geese. When I was a little girl, living in the country, one of the things that fascinated me was the seasonal migration of flocks of geese. I would see them flying overhead. Always in formation. Sometimes a V; sometimes a W. And I learned there is a reason for this characteristic shape. It is aerodynamic. The biggest and strongest birds are always at the front or nearest to the point of the V. They take the brunt of the headwinds and the shape of the formation forces the winds outward and away from the rest of the flock. The young, the old, the sick and weak fly near the tail end of the formation. That way they are not

only protected from the fiercest winds, the updraft of the leaders' wings lifts them aloft and pulls them along.

You have an obligation to go as far and as high as you can. You cannot change the past, but you have it in your power to invent the future. Have a care for the rest of us who will be swept along and held aloft by the updraft of your wings.

Please. Please. Please. Choose to be free.

California Supreme Court
Sesquicentennial Celebration
B.F. Hastings Building
Old Sacramento
February 8, 2000
9:00 a.m.

By: Justice Janice R. Brown

Thank you Chief.

I am honored to be able to speak on behalf of the court at its 150th birthday party and delighted that all of you are here to share the occasion with us. This has been an extraordinary program.

Shakespeare said, “[The] past is prologue.” H.J. Mueller muses that history is poetry and the poetry of history consists in its truth. “It is the fact about the past that is poetic.” The playwright and the historian are both right.

I want to thank the participants in this morning’s program who have evoked this court’s rich history with passion, poetry, and truth. We have certainly had our share of colorful characters and moments of high drama, and our speakers today have made our story live. And those stories about perseverance, independence and courage — and even eccentricity — are the touchstones from which we shape our visions of the future. Holmes said that knowing our history is not a duty; it is only a necessity.

Sometimes, though, history seems oddly familiar. Or, as the French say, the more things change, the more they remain the same. Consider this brief survey of the press coverage of the court’s first hundred years.

On April 6, 1855, the same year the court moved into the B.F. Hastings Building, the daily *Alta California* published an editorial entitled “Contempt of Court.” The paper gleefully congratulated the Legislature for passing a law overturning the court’s recent decision in *Johnson v. Gordon* (1854) 4 Cal. 368, in which the court held the United States Constitution gave no authority to the Supreme Court of the United States to exercise appellate jurisdiction over the state

courts. According to the Alta's editorial page: "The doctrines laid down in this opinion were so novel and so startling, that in some they caused surprise, in others alarm, in all contempt." The newspaper applauded the Legislature for pulling off "the coolest contempt of court ever committed." Of course, given the way things have turned out, the Legislature might want to reconsider.

Curiously, eight years later the same paper lamented that the \$8,000 annual salary proposed for justices of the Supreme Court was inadequate. Said the paper's editorial writer on March 8, 1863: "This upon reflection must be regarded as very poor economy. First class talent cannot be procured for this stipend. The office of a judge in this state is no sinecure. . . . One of the greatest elements of prosperity is an able, upright, and brilliant judiciary. We can have such only by paying for it." But here we are. Able, upright and brilliant jurists, and still underpaid.

And in a surprisingly sympathetic tone, the Sacramento Union reported, on December 4, 1869, on the first case to be heard in the Supreme Court courtroom at the capitol. The day before, Judge Sanderson had heard the habeas corpus case of Nellie Smith and Anna Keating — a case brought to test the validity of the city ordinance providing that women shall not exhibit themselves in a drinking saloon after midnight. The women argued the ordinance conflicted with the equal protection clause of the Fourteenth Amendment of the United States Constitution. But the city attorney argued that the ordinance, "like all other laws, merely placed restrictions on one for the benefit of many." That was not so uplifting a cause as the one led by Clara Shortridge Foltz, but still a claim for the rights of women.

In 1886, when an unpopular decision concerning riparian rights (*Lux v. Haggin* (1886) 69 Cal. 255) led to vociferous calls for the resignation of the justices, the San Francisco Call came stoutly to the court's defense in an editorial published on June 18 of that year. Chastising the "infamous plan of dragging the Supreme Court into politics," which the Call said was being advocated by papers like the Chronicle, Examiner, and Alta, the Call ridiculed "these journalistic

wiseacres” who with “their usual pretensions to a universality of knowledge, sum up the law of the case in a line and abuse the majority of the Supreme Court in a paragraph” and “stigmatize as ignorant and stupid” the judges who had devoted months “of weary labor to a patient study of the law.”

And then there is the long-running and apparently endless debate about where the Supreme Court should have its headquarters. One editorial, appearing in the *Alta California* on January 20, 1865, takes a somewhat jaundiced view of the reason for the opposition of the City of Sacramento to the court’s removal to San Francisco. According to the *Alta California*, the Sacramento Union opposed the removal of the Supreme Court because it feared “there may be less demand for drinks, and fewer boots to black.” (Parenthetically, I should say I do not think the writer was accusing the justices of being heavy drinkers. He seems to have been referring to the lawyers who would come to town to appear before the court.) On the other hand, the *Marysville Express* had complained that “the removal of the court would necessitate the removal of the State Library,” which the *Express* said was needed as much for the benefit of the Legislature as the court. The *Alta* conceded that point was “good in theory,” but noted: “The Library would be a great assistance to our legislators, provided these gentlemen made a practice of seeking wisdom among its shelves. But when have they done so? [¶] Books in certain cases, it cannot be denied would be of great service in framing of enactments, but the trouble about them is, they can neither buzz nor buttonhole. The ‘lobby’ has an advantage over them which cannot be overcome. Champagne can make more converts to a given opinion, any day, than Blackstone.”

The court did move to San Francisco, but the controversy was still very much alive in 1957 when the *Sacramento Bee* reported Governor Goodwin J. Knight’s favorable reaction to “the growing movement to return the state supreme court from San Francisco to Sacramento.” The article noted that no new law would be needed since the Constitution specifies the court shall be located in Sacramento, and cited in support reports in recent weeks that Chief Justice Phil

Gibson favored returning the court to Sacramento to “do away with the expensive and exhausting practice of holding court periodically in Los Angeles and Sacramento as well as in San Francisco.” (Sacramento Bee (Feb. 22, 1957) p. 1, col. 4.) Apparently, that was only a rumor. Almost 50 years later, the court remains in San Francisco.

After 150 years, we may perhaps be entitled to feel some confidence that — despite our ups and downs — the court’s existence is secure. In 2050, we hope the court will be able to return to the B.F. Hastings Building to celebrate its 200th anniversary. You are all invited. I am reminding you now to save the date. Mark your calendars because Justice Mosk will be very disappointed if you are not here.

Finally, on behalf of all the members of the court and the court’s staff, I want to thank the people of Sacramento for being generous and gracious to the Supreme Court of California during the whole of its 150-year history. And I do not think it was only because you thought we would give a boost to the local economy.

I promise. If I ever get three more votes, we’ll be back!

Thank you.

"Holding Everything Up"
Address to the Black Women Lawyers
Claremont Resort
Berkeley, California
Sunday, May 21, 2000
11:00 A.M.

Thank you. And Good Morning. I want to thank your President, Jill Jasper, for inviting me to join you today at this lovely hotel and for going out of her way to accommodate my schedule. My task this morning is to deliver an address. What that means is that Congresswoman Lee has to do the real work, and I still get to have lunch. That's important because the first thing you learn as a member of the Supreme Court is that there is no free lunch. You are always expected to earn it. But, the more generous groups, like the Black Women Lawyers, sometimes give you a discount: you do an address instead of a speech.

So I thought I would just share with you some personal reflections about life, law and music. I know this may seem to be an oddly disjointed collection of topics, but as I grow older I see fiercer connections between seemingly unrelated ideas and events. This may be the beginning of wisdom. On the other hand, it may signal the onslaught of Alzheimer's. Only time will tell!

In his book, *The Mind of God*, physicist Paul Davies recounts an anecdote about a student who interrupts a lecture on the origins of the universe to proclaim that she knows better. The world she declares is really a flat plate resting on the back of a giant turtle. When asked by the lecturer what the turtle rests on, she replies: "It's turtles all the way down."¹ This story, Davies says, symbolizes the essential problem of those who search for ultimate answers to the mystery of existence. Where he asks can such a

chain of reasoning end? We are either faced with an infinite regress or a superturtle that stands at the base of the tower unsupported. Davies goes on to speculate that the symmetry and precision and intelligibility of the universe weighs strongly in favor of a creative intelligence. That being the case, I propose to offer a new theory about what holds everything up. I am casting a vote for the Left Hand of God. I realize this is an idea which may require a bit more explanation. So, by way of explanation, I offer a biography and some reflections about thinking differently and how a structural conception (or the absence of it) changes everything.

The Biography

You see it occurs to me that the world may not have started with a bang. Maybe it was a jazz riff. An unmistakable boogie-woogie bass line. This is how my theory evolved. Not long ago I heard a program on NPR called Jazz Profiles. They devoted the entire segment to Mary Lou Williams, a jazz pianist and composer, described as the first internationally famous jazz artist who was not a vocalist. I had never heard her name. I doubt if you have either — unless you are a true jazz aficionado. She has become more famous in the 20 years since her death than she was during her lifetime. Yet, Mary Lou Williams began her performing career in 1916 at the age of six, began gigging with early Swing groups as a teenager, and is credited by many with being the bridge from boogie-woogie to be-bop. Her playing influenced performers as diverse as Art Tatum, Count Basie, and Nat “King” Cole. “Indeed, critics have called her the history of Jazz”.² She was “the only major Jazz artist who lived and played through all the eras in the history and development of Jazz: The Spirituals, the Blues, . . . Kansas City Swing, Boogie-Woogie, Bop or Modern, [sacred music], and . . . even . . . Avante Garde.”³

Between 1929 and 1942, she was the musical director and piano player for Andy Kirk and the Clouds of Joy, one of the premier Kansas City bands of Kansas City's golden era. She got her start as an arranger and composer during the great days of the so-called "stride" piano players -- people like James P. Johnson, Fats Waller, and Jelly Roll Morton. In fact, the boogie-woogie player, Jack Howard, was one of her earliest influences. While she was still in kindergarten, Howard taught her the importance of a strong and loud left hand. This was the main characteristic of the stride piano. In those days when many bands did not have a drummer and the bass was unamplified, it was the piano that provided both tempo and bass. Thus, it was said that the piano was "holding everything up." Jazz musicians sometimes refer to this as bottom. It is their way of describing the foundation, the structure or framework on which everything else rests. Without that driving relentless beat, without the fullness supplied by those crashing lefthanded chords, the rest of the band lacks both tempo and contrast.

The front men had fame; the soloist got the glory, but it was the powerful left hand of the stride pianist that made the music happen. And as I was listening to some of the early compositions of Mary Lou Williams, I could feel the strength of her hand. Relentless as a locomotive. Steady as a heartbeat. Providing that steadiness required discipline, self-restraint, self-control and humility.

Listening to the powerful, beautiful, mysterious chords of Mary Lou Williams on a Sunday afternoon, I had this sudden insight: That the structure of music is the structure of everything. It is not, as the modern world seems to think, chaos that is creative. Bringing order out of chaos is the creative act. But only, and this is important, if the order does no more than anchor the soaring solos and make the song intelligible.

Life, Law & The Universe

Does this lesson in musicology have anything to do with life and law? I think it does. The profile of Williams included excerpts of interviews of Williams, commentaries from other musicians about her accomplishments, and many examples of Williams's compositions being played by the lady herself. Thinking about, and hearing and feeling, this music, an odd but satisfying analogy came to mind. Perhaps because we think of new things in terms that are familiar, I found myself thinking this is exactly what good judges do. And, in a sense, it's exactly how they do it.

For much of our history we admired and venerated judges who exhibited what Mary Ann Glendon calls the classical virtues: impartiality, prudence, practical reason, mastery of a craft, and a sense of the legal system as a whole. The ability to preserve principled continuity while adopting the law to changed social and economic conditions was greatly prized; and the highest virtue was self-restraint. These judges of the old school were kindred spirits to the old stride piano players. They could lay down the beat and hold it steady. They could improvise and innovate without ever disconnecting from the solid foundation. Ms. Williams said she "changed her style with each period."⁴ She was "always experimenting."⁵ She changed her emphasis, but she never abandoned her roots. "The left hand gave you strength and a great beat in your head. You didn't have to stride after the [mid-thirties]. You could play rhythmic things on top because the beat was embedded in your head."⁶

For judges of the old school, like John Marshall, Holmes, Hand, and Frankfurter, the most important quality was humility. Frankfurter described it this way:

"What is essential . . . is that you get [judges] who bring to their task first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them, disinterestedness, and allegiance to nothing except the effort, amid tangled words and limited insights to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice . . . through reason called law."⁷

It was all about knowing the limits of the role, the limits of the law, and the limits of human beings. In marked contrast, the new paradigm celebrates adventuresomeness and hubris. The classical conception of the judicial role is viewed as too confining, boring, and above all insufficiently responsive to social problems. The classical ideal is being rapidly supplanted by the "image of the good judge as bold, creative, compassionate, result-oriented, and liberated from legal technicalities."⁸

The ideal of the good judge succumbs more and more to the cult of celebrity. Judges are no longer content with providing the steady and stable foundation. They want acclaim, adulation, stardom. And these may seem innocuous ambitions in a culture where every opportunity for notoriety is eagerly grasped and no indignity is too great if it will guarantee 15 minutes of fame and the paycheck that comes with it. Who wouldn't want to be Learned Hand; but more famous, Harlan Stone, winning every instant poll even if his colleagues won't sign his opinion; Justice Jackson as the guest host on Larry King Live. But judges cast in the role of entertainers or court jesters may not be the best thing for a democratic regime such as ours.

Morton Horwitz⁹ says the early evolution of American law can be explained as a continuing struggle to provide assurance that law transcends politics. To separate law and politics has been a central theme of much of our legal and political thought. In the old world, American jurists sought to

enshrine the rule of law — the conviction that a structure of impartial and self-executing norms existed, untainted by politics. “Law carried an unusual burden in this conception. It was hoped that it could provide a non-political cushion or buffer between state and society. Unless law could be rendered non-political, how could it avoid becoming simply an instrument of democratic politics?”¹⁰

In the new world, the judicial allegiance to principle, prudence, and moderation became the first casualty in the war waged by the theorists and the ideologues. “Safeguards against arbitrary power, resistance to total power, assurance of stable government which is responsive and capable of generating long term consent”¹¹ — these were all anathema to the architects of perfection. Law became not only an instrument of politics, it became the instrument of politically imposed perfection.

America’s Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the founders set out to establish good government “from reflection and choice,”¹² they also acknowledged the “limits of reason as applied to constitutional design,”¹³ and wisely did not seek to invent the world anew on the basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition. They sought to limit government and thus to limit the villainous potential of self-interest amplified by the public sphere.

In the 1930’s things began to change. Traditional morality lost ground to moral relativism. And the ideal of limited government gave way to the ideology of collectivism. Collectivism sought to answer a different question: how to achieve cosmic justice – sometimes referred to as social justice – a world of social and economic equality. Such an ambitious

proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems but new and improved human beings as well. The pursuit of these goals required a new view of government and a new sort of judge — a decisionmaker convinced of the infallibility of human reason and the absolute sovereignty not of the rule of law but of the rule of judges. These judges viewed their paramount obligation as "doing the right thing." It is difficult to think that "doing the right thing" could ever be wrong. But the choice is not between doing right and doing wrong. The choice is between judges imposing their own view of what is right (and waiting for the applause) or judges committed resolutely to the much less glamorous task of holding everything up. What holds everything up can be invisible; unnoticed by the uninitiated; but deeply necessary.

As we cease to remember the music of our youth, the rhythm of our past becomes little more than a fading and erratic echo. If that indeed was what was holding everything up, we are in danger of losing more than the same old song.

I know this sounds impossibly far-fetched. But why should the conception of God as a jazz musician be less compelling than God as a mathematician or God as a computer programmer. Maybe his strong left hand has been sending a rollicking rhythm through the cosmos for eons, and when he lifts his fingers from the keys the song of the universe will collapse. You ought not to reject the idea out of hand. There could be a lot worse things than a God who likes to jam!

Thank you.

1 Davies, *The Mind of God* (1992) p. 223.
2 [http://www.New Jazz Archives](http://www.NewJazzArchives.com) (1997-1999) Eyeneer Music Archives.
3 *Ibid.*
4 O'Neil, *Swinger With A Mission*, Books & Arts (Dec. 7, 1979) pp. 30-
31.
5 Maroon, *Mary Lou Williams Biography* (1931-1942).
6 *Ibid.*
7 *Id.* at pp. 124-126.
8 Glendon, *A Nation Under Lawyers* (1994) p. 152
9 Horwitz, *The Transformation of American Law 1870-1960* (1992).
10 *Ibid.*
11 Bickel, *The Morality of Consent* (1975) p.18.
12 Hamilton, *The Federalist Papers* No. 1 (Rossiter ed. 1961) p. 33.
13 Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (Mar. 1, 1994) 24 American R. of Public Admin. 85 [1994 WL 2806423 at *10].

Fifty Ways to Lose Your Freedom*
The Institute for Justice
Washington, D.C.
August 12, 2000
6:30 P.M.

Thank you. This has been a wonderful evening and I congratulate all of the participants. I would like to thank William ("Chip") Mellor and Clint Bolick for inviting me to join you — even though it is August. Just knowing that such a conference exists is a refreshment to my spirit. It is not often that I am in the company of so many people who speak my language. I appreciate Mr. Bolick's kind introduction and I applaud the Institute for laboring to keep alive an authentic conversation about the core principles of our regime. It is not an easy task in a world where all the words have lost their meaning.

A few preliminaries. First, I should warn you that today's discussion will be a mile wide, but only an inch deep. That's about all you can do in a speech. Second, the title of this meditation is Fifty Ways to Lose Your Freedom, which is a paraphrase of a Paul Simon tune. If you don't know who Paul Simon is, ask an old person. It will be a good way to get acquainted. The song tells the tale of a young man trying — though not too hard — to resist temptation and remain true to his first love while being advised by the source of temptation that . . . there must be 50 ways to leave your lover. When I began writing this speech, that phrase kept revolving in my mind.

In the last 100 years — and particularly in the last 30 — the Constitution, once the fixed chart of our aspirations, has been demoted to the status of a bad chain novel. Government has been transformed from a necessary evil to a nanny — benign, compassionate, and wise. Sometimes transformation is a good thing. Sometimes, though, it heralds not higher ground but rather, to

put a different gloss on Pat Moynihan's memorable phrase, defining democracy down.

My grandparents' generation thought being on the government dole was disgraceful, a blight on the family's honor. Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much "free" stuff as the political system will permit them to extract. What happened to the old time glory of constitutional democracy, which Woodrow Wilson praised for "the emphasis it puts on character; for its tendency to exalt the purposes of the average man to some high level of endeavor; for its just principles of common assent in matters in which all are concerned; for its ideals of duty and its sense of brotherhood"?ⁱ

I have bad news. Not only was the revolution not televised; most of us did not hear the radio broadcast; we missed it entirely.

Writing 50 years ago, F.A. Hayek warned us that a centrally planned economy is "The Road to Serfdom."ⁱⁱ He was right, of course; but the intervening years have shown us that there are many roads to serfdom. In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. If Hayek was writing today he would have to call his book "50 Ways to Lose Your Freedom." Consider these lyrics: "Climb on somebody's back, Jack; just believe every lie, Sly; plan the perfect man, Stan; If you crave slavery, go to the back of the bus, Gus. You don't have to discuss much; tell the powers that be, Lee; they can throw away the key, you don't want to be free!" Well . . . Paul Simon probably has nothing to worry about. I'm just trying to make a point. Most of us no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational

corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens.

The prevalence and permanence of this newly fledged feudal consciousness is a puzzle that led me — by a very circuitous path — to a new understanding of (or at least a new way of thinking about) the judicial role. As a conservative judge, I initially accepted the conventional wisdom that substantive due process was a myth invented by judicial activists who were up to no good. You all know the drill. Substantive due process is an oxymoron and Lochnerism is the strongest pejorative known to American law.

There are at least two problems with dismissing the idea of substance in the due process clause. First, substantive due process is still around, cleverly disguised as fundamental rights jurisprudence. Second, even conservative judges who take the rule of law seriously are appalled by legislative actions which violate the whole spirit, if not quite the letter, of provisions clearly designed to limit government. And most significantly, if we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a Kleptocracy — a license to steal, a warrant for oppression.

Much to my surprise, when I actually began to investigate the question, I found a small but credible body of scholarship suggesting that, in our early history, the due process clause was viewed as a restraint on government, fashioned, in part, to protect the rights of property owners. Apparently, the colonists saw in the due process clause a guarantee which had a wide, varied, and indefinite content. The concept of due process like the words “the law of the land” in the Magna Carta put some liberties and some property interests beyond the power of government. Moreover, the language of the

Constitution suggests the drafters clearly distinguished between the limited framework of that document and the whole law.

This revelation was what's known in the precise, technical language of the judge's trade as an "uh-oh."

It slowly dawned on me that the problem may not be judicial activism. The problem may be the world view — amounting to an altered political and cultural consciousness — out of which judges now fashion their decisions.

At its founding and throughout its early history, this regime revered private property. The American philosophy of the Rights of Man relied heavily on the indissoluble connection between rationality, property, freedom, and justice. The Founders viewed the right of property as "the guardian of every other right" and reasoned that "to deprive a people of this right is in fact to deprive them of their liberty."ⁱⁱⁱ The idea of constitutional government is deceptively simple: the government cannot legitimately infringe upon our rights even if the majority votes to do so.

But, by 1890, attitudes had changed radically enough for Alfred Marshall, the teacher of John Maynard Keynes, to make "the astounding claim that the need for private property 'reaches no deeper than the qualities of human nature.'"^{iv} A hundred years later came Milton Friedman's laconic reply: " 'I would say that goes pretty deep.' "^v Marshall's statement, however, signaled a seachange: a political and cultural shift from the American vision of humans as free and creative beings entitled to enjoy the fruits of individual effort back to the tribal view of man which continues to dominate European political philosophy. "Europe's predominant idea of emancipation consisted of changing the concept of man as a slave to the absolute state embodied by the king, to the concept of man as a slave to the absolute state as embodied by 'the people' — i.e., switching from slavery to a

tribal chieftain into slavery to the tribe."^{vi} America sought to make government subservient to the people; the collectivist impulse which gained preeminence in Europe sought to keep people subservient to the government.

It is, I believe, this shift in world view which causes conservatives to dread judicial activism. In short, we have been fixated on the structure's gingerbread trim when we should have been focusing on its foundations.

Speaking to a conference of Ninth Circuit judges in San Francisco in 1946, Harold McKinnon identified a central problem with the socialist mystique. He understood the threat of the essentially antidemocratic and totalitarian political and legal philosophies gaining ground in American universities. Such teachings, McKinnon believed, denied the essential elements of a regime devoted to the preservation of natural rights.

"[This teaching] denies that there is a moral law which is inherent in human nature and which is therefore immutable and to which all man-made laws to be valid must conform. It denies that by virtue of this law man possesses certain rights which are inherent and inalienable and therefore superior to the authority of the state. It denies that the purpose of government is to secure these inherent inalienable rights."^{vii}

I take issue with one part of McKinnon's catechism. He says the teachings are undemocratic. While it is true that natural law was a necessary precursor to the good constitutional republic; democracy need not be a good regime — as we are proving every day. Freedom and democracy are not synonymous. Indeed, one of the grave errors of American foreign policy is the assumption that merely installing the forms of a regime like ours — without its foundation — will automatically lead to freedom, stability, and prosperity.

McKinnon correctly concluded that adherence to natural law is the essential element of the American birthright.

“For if there is no higher law, there is no basis for saying that any man-made law is unjust . . . and, in such case, the ultimate reason for things, as Justice Holmes himself conceded, is force. If there is no natural law, there are no natural rights; and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses — his life, his liberty and his property — are held by sufferance of government, and in that case it is inevitable that government will some day find it expedient to take away what is held by such a title as that. And if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny.”^{viii}

Today these words sound strange to our ears. McKinnon could make such a forceful statement because he and his audience shared a common understanding. They accepted the necessary connection between natural law and natural rights and the centrality of natural law to any effective scheme of limited government. In short, McKinnon and his audience of judges shared a common devotion to a set of *first principles* — what Clint Bolick describes as that immutable body of law derived from the nature of people as rational human beings — “the law of nature that has from the beginning of human beings nurtured their progress and development.”^{ix}

In the context of law or morality, “natural” means “something which can be apprehended by natural man, by the use of faculties with which he is naturally endowed, including reason and the moral sense, and which does not require for its authentication more than reflection, thought, and the diligent pursuit of truth by practice, self-discipline, and attention to detail.”^x

Let me give you an example from an unlikely source: a comedy routine of Chris Rock's. He is talking about taxes and government services. He says: "The messed up thing about taxes is you don't 'pay' taxes. The government TAKES them. You get your check and money is GONE! It was not an option! That ain't a payment, that's a JACK! I been TAX JACKED! . . . [The] worst part about it, we pay taxes for [stuff] we don't even use Why are black people paying Social Security? I won't get the money till I'm 65 Meanwhile, the average black man dies at 54. Hypertension, high blood pressure, police. . . . I used to work at McDonald's making minimum wage. . . . I would get \$200 a week and they would take out \$50 in taxes. That's a lot of money if you only making \$200. . . . What do you get with that \$50? All the free street light in the world. As far as I am concerned, give everybody a candle. Just give me back my \$50."

As far as I know, Chris Rock is not a lawyer; he is not a legal philosopher; and I doubt that he is a conservative. But he is using his experience, his observations, and his rational faculties to make a judgment about fairness and justice.

Natural law seems to come naturally to human beings. We almost invariably describe events as fair or unfair, sporting or not sporting, just or unjust. If memory serves, "it's not fair" is the first phrase our children learn after they master the word "no." If anything, we may make such value judgments too casually and with too little appreciation of the deep metaphysical implications of our language.

Nevertheless, for thousands of years, the idea of natural law played a dominant role in both philosophy and history. "It was conceived as the ultimate measure of right and wrong, as the pattern of the good life. . . . It

provided a potent incentive to reflection, the touchstone of existing institutions, the justification of conservatism as well as revolution."^{xi}

Cicero's eloquent expression of this idea should be committed to memory by every law student:

"True law is Reason, right and natural, commanding people to fulfill their obligations and prohibiting and deterring them from doing wrong. Its validity is universal; it is immutable and eternal. Its commands and prohibitions apply effectively to good men, and those uninfluenced by them are bad. Any attempt to supersede this law, to repeal any part of it, is sinful; to cancel it entirely is impossible. Neither the Senate nor the Assembly can exempt us from its demands; we need no interpreter or expounder of it but ourselves. There will not be one law at Rome, one at Athens, or one now and one later, but all nations will be subject all the time to this one changeless and everlasting law." (De Re Publica, III, 33.)

I suspect it is the use of words, like unchanging, everlasting, immutable, that was (and is) also natural law's greatest vulnerability. The claim to fame of modern jurisprudence is precisely that it does not purport to have a monopoly on truth. Medieval scholars devoted much energy to demonstrating the demarcation between law and morals because they did not want morals reduced to narrow legal categories. They did not deny the close connection between law and morals (they would have argued that life in society is a moral duty and that there is no aspect of life to which we can be morally indifferent), but argued morality is (and should remain) broader than legal duty. "[T]he laws of men do not primarily aim at promoting virtue, but only at securing peaceful living together; they do not forbid all that is evil, but only that which imperils society; they do not command all that is good, but only that which pertains to the general welfare."^{xii}

"Natural law is the outcome of man's quest for an absolute standard of justice."^{xiii} The breach between law and morals, the assertion that one has nothing to do with the other, is the essential feature of modern jurisprudence. Positivism is perhaps the inevitable result of the rationalist view that exalts the lawgiver. For the positivists, law is defined by the will of the lawmakers and the truth of legal propositions is proven by the fact the provision has been duly enacted by the appropriate authority. Positivism, in turn, paved the way for a slew of other adventures in legal criticism: legal realism, historical, feminist, critical legal studies, and even law and economics.

To the extent the Enlightenment sought to substitute the paradigm of reason for faith, custom or tradition, it failed to provide a rational explanation of the significance of human life. It thus led, in a sort of ultimate irony, to the repudiation of reason.^{xiv} Rationalism pushed to its limits consigns all that is not objectively verifiable, i.e., all that is not mathematical or scientific, to the realm of rhetoric. Thus, it reduces truth to a matter of perspective; and makes all perspectives equal. And since our choices can only be justified rhetorically — that is by reference to compassion or philanthropy or utility — even equality is debased, reduced to the equal right of all desires to be satisfied. In this brave new world, the assertion of a perspective becomes its justification. The claim is that a particular perspective serves the general welfare. What is really served is the will to power. "There can be little room left for old-fashioned discussions about the nature of justice and the essence of law when human will is made the supreme arbiter of all human values."^{xv}

I am glossing over a complicated evolution, but the important point here is that positivism exalts the lawgiver because from the positivist's point of view it is the only rational thing to do. However, "[t]he repudiation of metaphysics, religion, and tradition . . . leads inevitably to the destruction of

all foundations for prudence and practical reason."^{xvi} Thus, "the fatal error" of the Enlightenment is "the emancipation of the will from reason."^{xvii} Similarly, the fatal error of those who repudiated the idea of natural law is the attempt to separate law from morality. "Law is rooted in a series of objective value judgments about morality or 'justice' or it is about nothing."^{xviii}

Lord Hailsham adds: "Law is concerned with the compulsion of human beings by other human beings. To try and divorce such compulsion from conceptions of what is right and wrong is ultimately to justify tyranny in its most naked form."^{xix}

While politics is the art of the possible and law must often be expedient, "the attempt to divorce law or legislation from an objective set of moral or spiritual values connected with right and wrong, just and unjust, good and bad, virtue and vice, however starry-eyed the proponents or advocates of such an attempt may be, is the precise heresy which has led to the major cruelties and disasters of the twentieth century."^{xx}

All political ideologies involve the assertion of values and all values are derived from what we call the Natural Law, Traditional Morality, or the First Principles of Practical Reasoning. "There never has been and never will be, a radically new judgment of value in the history of the world. What purport to be new systems or [as they now call them] new 'ideologies,' all consist of fragments from [the natural law] arbitrarily wrenched from their context in the whole and then swollen to madness in their isolation, yet still owing to [natural law] alone such validity as they possess."^{xxi} To put it another way, these so-called new values resemble natural law "as Satan resembles God. These bloodthirsty idols are proving to be far more exacting than the old gods of truth and justice."^{xxii} The result, I believe, is an America the Constitution never contemplated.

Aaron Wildavsky notes that the Madisonian world has now gone “topsy turvy” as factions, defined as groups “activated by some common interest adverse to the rights of other citizens or to the permanent and aggregate interests of the community,”^{xxiii} have been transformed into sectors of public policy. “Indeed,” says Wildavsky, “government now pays citizens to organize, lawyers to sue, and politicians to run for office. Soon enough, if current trends continue, government will become self-contained, generating (apparently spontaneously) the forces to which it responds.”^{xxiv}

Is this the fulfillment of the Founders’ plan? Not exactly. Clearly, the American Revolution, like the French Revolution, is part of a rationalist tradition. But rationalism is an ambiguous term, subtle in its infinite manifestations. For present purposes it is sufficient to identify the critical differences. The American tradition accepted the limits of reason; the European tradition did not.

America’s Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the Founders set out to establish good government “from reflection and choice,”^{xxv} they also acknowledged the “limits of reason as applied to constitutional design,”^{xxvi} and wisely did not seek to invent the world anew on the basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition.

“The Framers understood that the self-interest which in the private sphere contributes to the welfare of society — both in the sense of material well-being and in the social unity engendered by commerce — makes man a knave in the public sphere, the sphere of politics and group action. It is self-interest that leads individuals to form factions to try to expropriate the wealth of

others through government and that constantly threatens social harmony."^{xxvii}

There is nothing new, of course, in the idea that the Framers did not buy into the notion of human perfectibility. The political theory upon which our Constitution was organized reflected not an antirationalist conception of human capacity — but a narrower and, in my view, more realistic one. It could be characterized as a conception of man *after the fall*.

It was a quite opposite notion of humanity, of its fundamental nature and capacities, that animated the great concurrent event in the West in 1789 — the revolution in France. Out of that revolutionary holocaust — intellectually an improbable melding of Rousseau with Descartes — the powerful notion of abstract human rights was born. At the risk of being skewered by historians of ideas, I want to suggest that the belief in and the impulse toward human perfection, at least in the political life of a nation, is an idea whose arc can be traced from the Enlightenment, through the Terror, to Marx and Engels, to the Revolutions of 1917 and 1937. The latter date marks the triumph of our own socialist revolution.

Collectivism provided the 20th century answer to a question very different from the one our Constitution resolved. The new question was how to achieve cosmic justice — sometimes referred to as social justice — a world of perfect social and economic equality. Such an ambitious proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems, but new and improved human beings as well.

The great innovation of this millennium was equality before the law. The greatest fiasco — the attempt to guarantee equal outcomes for all people. Tom Bethell notes that the security of property — a security our Constitution

sought to ensure — had to be devalued in order for collectivism to come of age. The ambitious project of socialism was nothing less than the “reformation of human nature. Intellectuals visualized a planned life without private property, mediated by the New Man.”^{xxviii} He never arrived. As John McGinnis persuasively argues: “There is simply a mismatch between collectivism on any large and enduring scale and our evolved nature. As Edward O. Wilson, the world’s foremost expert on ants, remarked about Marxism, ‘Wonderful theory. Wrong species.’”^{xxix}

We continue to chip away at the foundations of our success. We dismissed natural law and morality because its unverifiable judgments were deemed inferior to reason. But, then, we drove reason itself from the camp because the most significant of life’s questions defy empiricism. Kant compared a “purely empirical theory of law” to “the wooden head in Phaedrus’ fable, which may be beautiful, but alas! has no brain.”^{xxx} Now we have nothing left but our passion.

This is a dilemma for any judge, but one especially acute for a supreme court judge. A court of last resort is supposed to do more than resolve individual disputes. Such courts ought to be building for the future, providing guidance, structure, stability — instilling confidence in the primacy of the rule of law. But, alas, the decisions of such courts, including my own, seem ever more ad hoc and expedient, perilously adrift on the roiling seas of feckless photo-op compassion and political correctness. And we are, by and large, captives of an intellectual world view that is completely antithetical to the kind of substantive limits an authentic historical interpretation of our constitutional traditions would impose. We are committed to doing the right thing. But with only our feelings to guide us, most of the time we cannot figure out what the right thing is.^{xxxi}

I know the idea that there is an extra constitutional dimension to constitutional law is heresy. And given our recent history, it is a very scary thought. But I am slowly coming to agree with Charles Fried's assessment: it is the hubris, carelessness, and lack of candor of judges that should concern us — not the label active or passive. If judges tell us honestly what they are doing, we do know something about the world view that animated the American Revolution and formed the basis of our constitutional documents. The Founders were committed to individual liberty. Liberty not license. And not openness. Certainly not an openness so extreme it bursts the mainspring of the regime. That mainspring is reason. An idea of reason that is both modest and practical. The Founders did not demand perfection of human beings or civil society. They seemed to understand the essentially totalitarian heart of all dreams of utopia. One man's perfection is another's holocaust. Their ideas — expressed with precision and detail — will allow us to gauge the bona fides of judges audacious enough to invoke higher law.

On those rare occasions, we will have to face the countermajoritarian difficulty squarely. It must be part of the design. Individual liberty cannot be preserved if the majority's will must always triumph.

My view is admittedly a bit skewed. My heritage includes not only the middle passage but the trail of tears; not only the rhythms of midnight trains but the terrors of midnight riders; Jim Crow and Jim Dandy; whited sepulchres and colored fountains.

Anyone with that kind of history will tell you quite emphatically that the positive law is not enough. Never enough. When I was growing up the positive law declared that some people were more equal than others. But that law, judged by a higher law, was wrong.

And the civil rights movement that firmly established that proposition was deeply rooted in the natural law, natural rights tradition. By demanding the natural and political rights which belonged to them as human beings, Black Americans in the early civil rights movement firmly allied themselves with the natural law foundations of the Constitution. Only natural law offers an alternative to might makes right and accounts for man's "unrelenting quest to rise above the 'letter of the law' to the realm of the spirit."^{xxxii}

I know it is fashionable these days to dismiss the Founders as *stale, pale, and male*; to speak harshly and cynically of America's corrupt constitutional tradition. But, this is a cheap shot. One which does not do justice to the principles embodied in our founding documents. These men deserve our admiration and respect. They were human. They were flawed. Gertrude Himmelfarb says hypocrisy is the homage vice pays to virtue. But, whether the result of glorious accident, inspired mistake, Machiavellian machination or well-considered master plan, the Founders built better than perhaps they knew. They built on the right foundation and founded a regime which created the potential for moral freedom, material prosperity, and social generosity. "[W]hat the American revolution instituted was a rule of law, a preference for restraint, a refuge from the rampaging presumptions" of those Sowell refers to derisively as the "morally anointed."^{xxxiii}

Lincoln long ago foresaw that America's achievement might be jeopardized from within by those anxious to "strike a blow" against free government. Men of ambition would continue to seek to gratify their "ruling passion." Such ambition, Lincoln warned, "thirsts and burns for distinction; and, if possible, it will have it, whether at the expense of emancipating slaves, or enslaving free men."^{xxxiv} Both Lincoln and Tocqueville apparently did anticipate that we might cheerfully place the shackles around our own necks.

As Lincoln noted: "If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."^{xxxv}

We have had to decide before: whether to be slaves or free.

Freedom never has been easy. Not to obtain. Not to sustain. In the last 100 years we have let the government buy our birthright with our own tax money. Freedom requires us to have courage; to live with our own convictions; to question and struggle and strive. And to fail. And Fail. Recently, I saw a quote attributed to Samuel Beckett. He asks: "Ever tried? Ever failed?" Well, no matter. He says, "Try again. Fail better." Trying to live as free people is always going to be a struggle. But we should commit ourselves to trying and failing, and trying again. To failing better until we really do become like that city on the hill, which offered the world salvation.

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- * I am, of course, indebted to an old Paul Simon song for this felicitous phrase.
i Woodrow Wilson, *Democracy and Efficiency*, Atlantic Monthly (1901).
ii F. A. Hayek, *The Road to Serfdom* (U. of Chicago Press 1994).
iii Tom Bethell, *Property Rights, Prosperity and 1,000 Years of Lessons*, Wall Street J. (Dec. 27, 1999) p. A19 (Bethell); and see James W. Ely, *The Guardian of Every Other Right* (Oxford U. Press 1992) p. 26.
iv *Ibid.*
v *Ibid.*
vi Ayn Rand, *Capitalism the Unkown Ideal* (New Am. Lib. 1966) pp. 4-5.
vii Harold McKinnon, *The Higher Law*, address to Ninth Circuit judges (1946) p. 1 (McKinnon).
viii *Id.* at p. 16.
ix Clint Bolick, *Unfinished Business* (Pacific Research Inst. 1990) p. 2.
x Lord Hailsham, *Modern Reflections on the Natural Law*, address to the Canon Law Trust Society (1978) (Hailsham).
xi d'Entreves, *Natural Law: An Introduction to Legal Philosophy* (Hutchinson U. Lib. 1951) p. 7 (d'Entreves).
xii *Id.* at p. 86, quoting Thomas Aquinas, *Summa Theologica*
xiii *Id.* at p. 95.
xiv *Id.* at p. 105.
xv *Id.* at p. 75.

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- xvi Stanley Rosen, *Rethinking the Enlightenment*, 7 *Common Knowledge* (Winter 1998) 104, 106.
- xvii *Id.* at p. 114.
- xviii Hailsham, *op cit. supra*, at p. 3.
- xix *Ibid.*
- xx *Ibid.*
- xxi C.S. Lewis, *The Abolition of Man* (First Touchstone ed. 1996) pp. 55-56.
- xxii d'Entreves, *op cit. supra*, at p. 17.
- xxiii Golembiewski & Wildavsky, *The Cost of Federalism, Bare Bones: Putting Flesh on the Skeleton of American Federalism* (1984) 67, 73.
- xxiv *Ibid.*
- xxv Hamilton, *The Federalist Papers No. 1* (Rossiter ed. 1961) p. 33.
- xxvi Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (Mar. 1, 1994) 24 *American R. of Public Admin.* 85 [1994 WL 2806423 at *10].
- xxvii John O. McGinnis, *The Original Constitution and Our Origins* (1996) 19 *Harv. J.L. & Pub. Policy* 251, 253, fn. omitted (McGinnis).
- xxviii Bethell, *supra*, at p. A19.
- xxix McGinnis, *op. cit. supra*, at p. 258, quoting Josh Getlin, *Natural Wonder: At Heart, Edward Wilson's an Ant Man*, *L.A. Times* (Oct. 21, 1994) p. E1.
- xxx d'Entreves, *Natural Law, supra*, at p. 115.
- xxxi See Jean Francois Revel, *The Flight From Truth* (Random House N.Y. 1991) p. xvi.
- xxxii d'Entreves, *Natural Law, supra*, at p. 121.
- xxxiii Tom Sowell, *The Quest for Cosmic Justice* (The Free Press 1999) p. 146.
- xxxiv Abraham Lincoln, address to the Young Men's Lyceum of Springfield, Illinois, January 27, 1838.
- xxxv *Ibid.*