LAWYERS, JUDGES AND RIGHTS

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In his movie, *Jaws*, Stephen Spielberg named the shark "Bruce" after his lawyer. In his later film, *Jurassic Park*, the first victim of the dinosaur's killing rampage was the only lawyer in the movie. When I saw the movie, this scene made the audience go ballistic — with cheers. Clearly, this has not been the best of times for the legal profession from a public relations standpoint. The *Charter* has exposed its potency, the economy has exposed its vulnerability, and the politics of national unity and international disunity have exposed their limits.

So tonight I want to speak in defence of the players in the legal profession and extol the importance of what they do — the lawyers, the judges, and, briefly, the professors. I love being a member of the legal system and feel very lucky to have been able to wander freely in the fields of the law. Tonight then, let me offer an encomium in three parts: to lawyers, or more particularly, to courtroom lawyers since that is where I spend most of my working life; to judges; and to law professors. As for the students here tonight, I am assuming that you will one day be one of the above, or that some of your best friends will be, so really this is a speech about your future.

When I practiced law, I loved being a litigator. Now I love listening to them. I believed then that what goes on in a courtroom really matters and I believe it even more now. Court cases not only reflect their times, they can *make* them, and since lawyers are what breathe life into court cases, *lawyers* can make the times. One has only to mention litigants like Socrates, Galileo or Dreyfus to show that the drama of a trial can not only *attract* the world, it can change it.

Every time a high profile mega-case comes along, we are reminded how intrigued the public is with what happens in a courtroom. Consider, for example, the public's obsession with the "S" word — Simpson.

I personally did not follow the Simpson case. I did not care whether F. Lee Bailey and Robert Shapiro were getting along; and I thought Johnny Cochran's ties were not as interesting as what his ex-wife was saying about him on every talk show in the United States. The only thing I found fascinating about the whole process was how preoccupied the whole continent was with this story of passion's motivating quartet: love, envy, power and revenge. The passions were primordial, the tensions were timeless, and the consequences were cataclysmic.

While that trial was going on, no lawyer I know, even real estate lawyers, could walk into a cocktail party without being swarmed by a few people wanting to know how come, what for, and how much. The answer "I don't know," which usually does the trick at these things, turned out to be the conversation *opener*. Actually, it turned

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out, people did not want your opinion at all. What they wanted was for you to shut up so they could give *their* opinion.

There is a story about the eminent New York intellectual couple Diana and Lionel Trilling. Someone asked a friend of theirs if they had a view of the river in their apartment near Columbia University. "Of course," came the reply, "the Trillings have a view about everything." As did the public about the Simpson trial: about whether he was innocent; about whether he was a good father; about whether the Goldmans should be giving press conferences; about whether Judge Ito was wrong to invite Larry King into his chambers for forty-five minutes during a ten-minute recess; about whether Larry King's coverage was better than Dominick Dunne's coverage; and about whether Marcia Clarke looked better without her perm. And it did not matter what you answered. The public was in a monologue they loved, and there was no stopping or correcting them.

I was discussing this phenomenon about a year ago with a friend of mine who teaches literature at the University of Toronto. She was not a bit surprised by the public fixation. She told me that from her reading, people have *always* been fascinated with how a courtroom divides the spoils after the passions have conquered their victims. By way of example, she suggested I read the Orestes trilogy by Aeschylus, especially *The Eumenides*.

I did, and she was absolutely right. There it was, a trial based on the same motivating quartet as the Simpson case — love, envy, power and greed — written in the fifth-century B.C. The plot is not unfamiliar. A vamp, Helen of Troy, leaves her husband and runs off with her boyfriend, Paris. This starts the Trojan War, which lasts many years. In the first play, the great hero Agamemnon has just won the war and comes home. Unfortunately, he brings home his new young and beautiful girlfriend Cassandra. His wife, Clytemnestra, is not pleased and kills her husband and the girlfriend. In the second play, *Orestes*, the son of the slain Agamemnon and the slayer, Clytemnestra, is very upset about his mother killing his father whom he loved even though his father was away on business for so many years. He consults with his lawyer, Apollo, who tells him he would be justified in avenging his father's death by killing his mother, which he does. This lays the factual foundation for the third play, *The Eumenides*, in which we find the first recorded reference to a murder trial. Because the jury of twelve men were split in their decision, the judge, Pallas Athena, who was also the Goddess of Wisdom, cast her vote for Orestes' acquittal. She gave the following oral reasons: "I am unreservedly for the male in everything," thereby setting back the woman's movement by 2500 years, which is the next time a woman presided over a murder trial.

Just as fish do not know that water is wet, most lawyers do not know how mesmerizing a courtroom is to most people. Lawyers are too busy writing the script, directing the other players, and performing the starring roles to realize that every trial is a movie the public loves to watch. And some of the best trials have in fact been turned into great movies. I watched one the other night to try to get a fix on how the courtroom appears to people and why they cannot get enough of what happens inside

one. The movie I rented, partly because I remembered loving it when it came out in 1960, and partly because today's political landscape has revived the film's relevance, was *Inherit the Wind.*

Inherit the Wind was based on the play written by Jerome Lawrence and Robert Lee, which in turn was based on the true story of the 1925 trial in Dayton, Tennessee of a high school teacher named John Thomas Scopes. Scopes was charged with violating a Tennessee law prohibiting anyone from teaching any theory of creation except that set out in the Bible. When the American Civil Liberties Union in New York heard about the Tennessee law, the executive director, Roger Baldwin, sent a news release to leading Tennessee newspapers offering to defend any teacher who would personally test the constitutionality of the statute. George Rapplyea, a drug store owner in Dayton, called Baldwin and put him in touch with John Scopes. Assured of support, Scopes formally violated the law by teaching Darwin's theory of evolution.

The trial pitted the formidable William Jennings Bryan on behalf of a literal interpretation of the scriptures, against Clarence Darrow on behalf of the modern theory of evolution. The drama of the case and its famous lawyers generated 175,000 words in newspaper coverage each of the eleven days of trial, and was followed daily by millions of readers. Though Scopes was convicted, he was fined only $100 and, on appeal to the state Supreme Court, even though the constitutionality of the law was upheld, Scopes was acquitted on a technicality.

Watching the unfolding of this morality play as a movie, it quickly becomes clear from the screen who the primary magnets are in a courtroom: the civilized samurai we call lawyers. The litigants and witnesses also attract our interest, but by-and-large we see them and hear their stories as the lawyers, through their skilful probing, *want* us to see and hear them. The judges rarely attract our interest unless they, or the people in their courtroom, are very bad.

The lines written for the characters in this movie are classic: "[i]t is the duty of the newspaper to comfort the afflicted and afflict the comfortable"; or "[h]e's the only man I know who can strut sitting down." Spencer Tracy, as the Clarence Darrow character, was given wonderful dialogue. His attack on laws that suppress freedom of thought and expression was pure eloquence:

> The one faculty of man that raises him above the other creatures of the earth is the power of his brain to reason. What other merit have we? The elephant is larger, the horse swifter and stronger, the butterfly is far more beautiful, the mosquito is more prolific, even the simple sponge is more durable. But what does a sponge think?

Clearly, scriptwriters perceive brilliance and insight to be part of the natural arsenal of a courtroom.

What one realizes while watching the film is that the courtroom is viewed by the public as a cathedral to the power of language and reason, a coliseum in which legal

gladiators fight for the right to set the law's boundaries. How many such courtrooms have we come to know through the skill of lawyers?

In the seige lawyers have been under lately, it is too easy to forget how important the lawyer's role is in translating a client's story into what often turns into a timeless message. Oscar Wilde said in 1895 after his calamitous trials for homosexuality in England that "all trials are trials for one's life." This is undoubtedly true for the trial's protagonists. But it is remarkable how often it is true that court cases affect *all* of our lives, either in what they teach us about how other people behave or in what they teach us about how *we* should behave. A brief look at four of them this century shows how profoundly our ideas and way of life can be shaped by what happens in a courtroom.

Just over one hundred years ago, in 1896, the American Supreme Court in *Plessy* v. *Ferguson*[1] upheld the constitutionality of a Louisiana statute requiring railroads to provide "equal but separate accommodations for the white and coloured races" and barring people from occupying railway cars other than those to which their race had been assigned. The majority of the court held that the constitutional guarantee of equality in the Fourteenth Amendment was not violated, and that "separate" did not mean "inferior." The Court thereby delayed for half a century the effective implementation of the Fourteenth Amendment, when the Court said in *Brown* v. *Board of Education of Topeha*[2] in 1954, held that "separate" was *inherently* "inferior," and mandated at last the integration Plessy had hoped for when he refused to move to the "coloureds only" section of the railroad car in 1896.

Seventy-five years ago, ten men, including J.S. Wordsworth, were tried for seditious conspiracy and libel in connection with their leadership in the 1919 Winnipeg General Strike — around the same time that Sacco and Vanzetti were convicted in the United States of distributing anarchist literature and murdering a payroll clerk, and in much the same spirit of prejudice and anti-Red hysteria. The strike was organized by the Winnipeg Trades and Labour Congress to achieve industrial union recognition and wage raises. When 35,000 workers went on a peaceful strike, the economic life of the city stopped. The strike was called off a few days later when armed militia attacked strikers marching in a massive silent parade, killing two of the workers. The strike leaders were charged and convicted for provoking what the Crown called "goals incidental to a socialist revolutionary conspiracy." But the trials of these labour leaders had the effect of politicizing Winnipeg's working class, resulting a few years later in the creation of the CCF and in J.S. Wordsworth's election in 1921 as the first federal M.P. to be elected by a social democratic party in Canada.

Fifty years ago, Nuremberg, the world's first cameras-in-the-courtroom experiment, taught us that language and reason, the courtroom's arsenal, were sometimes inadequate to the task of translating the enormity of an injustice into words the human imagination could digest. And twenty-five years ago, the Canadian Supreme Court said in *Murdoch*

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1 16 S. Ct. 1138.
2 75 S. Ct. 753.

v. *Murdoch*[3] that when a man says "ours" about the family property he bought, he really means "mine," thereby ushering in this generation's women's movement and inspiring a reformation in the family property laws of Canada, including the revolutionary overthrow of the law of separate property in the *Rathwell*[4] decision five years later.

They say that most people only hear the music, not the lyrics of human events. In the courtroom is where we find humanity's lyrics and lawyers are the instruments that give voice to these lyrics.

So what is left for the judges to do? What is in fact really interesting about the judicial role is not what judges actually do, but how the public has changed its perception about what they do. In particular, they are fretting a great deal about whether judges are too busy making law instead of just interpreting it. The catalyst for this revival of historic anxieties appears to be the *Charter of Rights and Freedoms,* which has not only blown the dust off the old conversations, but has blown it with such vigour that the resulting cloud has made it difficult to see the issue clearly. I would like to try to dispel the myths created by the *Charter* and the way judges decide people's rights by examining ten realities of the judicial role.

1. First of all, and generally, judicial interpretation means interpreting language or behaviour. Both are imprecise and loaded with nuance. That means judges almost always have to make a choice from among available conclusions. There is no such thing as a true meaning of a word or action; it is, however, possible to say that a word or action is true to the meaning of a text or true to the person or context. Because no words or human behaviour have absolute meanings, it is up to the judge to decide what they mean based on an understanding of language, law, and human behaviour.

2. The question in almost all judicial decision-making comes down to a question of how you frame the issue, and how you decide which of the available choices should be given more or less weight.

The classic story of Max Brod, Franz Kafka's best friend and lawyer, is a story frequently used by professors of jurisprudence to show how the framing of the issue can affect the outcome. Kafka's last request was that his unpublished manuscripts all be burned unread. Brod not only read them, he published them. That is how we came to have available to us, among other works, Kafka's novel, *The Trial.* Brod wrestled with what he called his "conflict of conscience," and decided that the works were literary treasures worthy of public access and, therefore, worthy of publication in defiance of Kafka's last wishes.

Was Brod right? Whose perspective decides: Kafka's as testator, or Brod's as literary executor? Did it matter that Brod was a lawyer? Was he entitled to decide the literary merit of the work? Did Brod do the public a favour publishing the book? Is the public

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3 [1975] 1 S.C.R. 423.
4 [1978] 2 S.C.R. 436.

interest relevant to this issue? In other words, in interpreting the relevant language, law and human behaviour, can there be any doubt that there is more than one valid, principled judgment available?

3. It is, with respect, unrealistic to say that judges should not make law, they should only interpret it. Almost every time judges interpret, they make law and, implicitly, weigh competing values. Long before we had a *Charter,* we had judges saying they were not making law or trespassing on legislative territory or taking values into account when they interpreted statutes or phrases or legal entitlements. But consider the following examples, and you will see how difficult it is to say that these judges were not reaching legal conclusions based on their understanding of, or sympathy or antipathy for, current social values.

The judge who in 1873 said "the paramount destiny and mission of women are to fulfil the noble and benign office of wife and mother"; the judge who in 1915 thought admitting women to the legal profession would be a "manifest violation of the law of ... public decency"; the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from imminent temptation"; the House of Lords who said in 1959 that privative clauses ousting the jurisdiction of the courts were to be disregarded; the court that said in 1975 that property rights take precedence over peaceful picketing; the courts that said in 1949 that sanctity of the contract and restrictive covenants took precedence over the rights of Jews to purchase property; and the court that said in 1939 that freedom of commerce took precedence over the rights of Blacks to be served beer; not to mention the entire history of common law.

That was all lawmaking, it was all weighing and applying values and policy, and it was all before the *Charter.*

4. Weighing values and taking public policy into account does not impair judicial neutrality or impartiality. Pretending we do *not* take them into account, and refusing to confront our personal views and be open in spite of them, may be the bigger risk to impartiality. Walter Lippmann said in his brilliant 1920 book *Public Opinion* that:

> The image most people have of the world is reflected through the prism of their emotions, habits and prejudices. One person can look in a Venetian canal and see rainbows, another only garbage. People see what they are looking for and what their education and experience have trained them to see.

It is fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. But neutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society's values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. We must be prepared, when the situation warrants, to experience what Herbert Spencer called "The Tragedy of the Murder of a Beautiful Theory by a Gang of Brutal Facts." In other words, there is a critical difference between an open mind and an empty one.

5. Values and social realities change over time. Judges should not be shy about acknowledging this. In 1776, when the American *Declaration of Independence* pronounced that all men were created equal, many of the framers of the Constitution had slaves, and women could not vote. In 1633, Galileo was forced to apologize publicly for spreading news of the evidence revealed by his telescope — that the earth revolved around the sun, not the other way around as the Church had taught for centuries. And, in 1938, the then editor of *Saturday Night* magazine said "The business of women is to keep house and keep quiet." Truths change over time, and judges cannot be hesitant to acknowledge these changes. *Plessy* v. *Ferguson's* transformation into *Brown* v. *Board of Education,* and *Murdoch's* transformation into *Rathwell* are only two of the dramatic jurisprudential reflections of the inevitability of society's evolutionary progress.

6. The use of labels or epithets instead of analysis is not particularly enlightening. Provocative phrases may all too easily become shorthand ways to avoid thinking. The phrase "political correctness" may, for example, replace the need to think about disadvantage; the phrase "special interest groups" may replace the need to entertain valid grievances; the phrase "reverse discrimination" may replace the need to open the competition and to actually try to reverse discrimination; and the phrase "the merit principle" may replace the need to discuss whether we have it. Not every pro-female decision is feminist and not every pro-male one reflects a chauvinist bias. Attributions like "progressive" and "conservative," frequently attributed to what judges do and say, are also meaningless in most judicial contexts.

Lord Denning, for example, who progressively developed the *Mareva* injunction, is the same person who so conservatively interpreted labour legislation as to prevent secondary picketing. The same Privy Council which in 1929 chastised the Canadian Supreme Court for so conservatively interpreting the word "person" that it excluded one of this country's two official genders, in 1902 overruled the more progressive Canadian courts, and declared legal the British Columbia statute denying the franchise to Chinese, Japanese and Indian people.

7. One of the labels which is least helpful and the most inappropriately inhibiting, is that the courts, with the *Charter,* are becoming "politicized." The courts are not becoming politicized. They are becoming nothing they have not always been: reviewers and interpreters of the rules to which society, through the legislature, has proclaimed itself subject. The *Charter* is the klieg light that exposed this judicial reality, it was not the instrument of a new judicial norm. The relationship between courts and legislatures in the interpretation of public values has not changed with the *Charter*, only the public's interest has. In the nineteenth century, for example, the British prime minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury as follows for the House of Lords' routine declawing of social welfare and labour legislation: "the Judicial Salad, requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed."

And in the 1930s, President Roosevelt was so incensed by the U.S. Supreme Court's striking down of his *New Deal* legislation that in 1937, just two weeks after his second

inaugural, he introduced his court-packing Judicial *Reform Bill*, only to withdraw it discreetly six weeks later when Justice Owen Roberts switched sides to help form a pro-*New Deal* majority.

8. But courts *preventing* rights like those in the era of Lord Halsbury, or in the pre-court-packing plan era of the American Supreme Court, were rarely dismissed as being politicized, even though they were no less activist than later courts which *expanded* them. It is clearly appropriate for courts to deal with the interpretation of rights; one wonders why they are deemed to be "politicized" only when they interpret them expansively.

There is no question that lines have to be drawn and care taken, but the sophisticated process of line-drawing does not lend itself to as easy an inquiry as whether a particular issue has a "political" component, since most constitutional issues have one and always have had one. And yet people never called it a politicized judiciary until the advent of the *Charter*.

9. The reason the legislature gave the courts the power to enforce a constitutional charter of rights is that while both courts and legislatures are entitled to enforce rights, only the courts have the institutional characteristic that best offers the possibility of responsiveness to minority concerns in the face of majoritarion pressures, namely, independence. Only courts have the independence from electoral judgment to risk controversy in enforcing rights. Controversy attracts attention. Attention attracts criticism, and the favourite criticism of courts in the enforcement of rights is the suggestion that they have become "politicized," when in fact all they have done is perform, as best they can, the interpretive duty assigned to them by the legislature.

10. And here we come to the role of public opinion. Society is horizontal and it is vertical, and it is practically impossible to know at which point a consensus emerges. Until we know who the public is and how it forms opinions, courts deciding cases are scrupulously entitled to regard public opinion as the responsibility of the legislature and generally as immaterial to judicial determination. In Edith Wharton's *The Age of Innocence,* the van der Luydens and Mrs. Manson Mingott were the custodians and interpreters of social norms in old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Part of the task, in fact, may be to reach a conclusion *despite* the perceived, prevailing public opinions. When we speak of an independent judiciary, we are talking about a judiciary free from precisely this kind of influence. As Lillian Hellman once said: "I will not cut my conscience to fit this year's fashions."

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable. In framing *its* opinions, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said of judges.

But although judges are not accountable to the public in the same way as elected officials, this does not mean that they are not accountable. While they may not be accountable to public *opinion,* they are nonetheless accountable to the public *interest* for independent decision-making based on discernable principles rooted in integrity. Performing the task properly may mean controversy and criticism. But better to court controversy than to court irrelevance, and better to court criticism than to court injustice.

The object of the exercise for all of us in the justice system is the delivery of justice. And so I want to conclude with an acknowledgement of the primacy in this delivery system of our legal academics. Academics are the people who will teach the future lawyers and judges what they need to know and what they need to ask in order to do the justice jobs properly. I want to demonstrate the indispensability of the profession's professors with a story which for me shows the link between knowledge and justice more forcefully — and poetically — than anything I have read in a long time.

The story is taken from a book called *Fragments.* It has just recently been published and was written by a Jewish man, now in his mid-fifties living in Switzerland.

The title of the book comes from the fragments of memories he recovered with the help of a therapist in recent years. The memories relate to the years he spent, from the age of four or five, in Polish concentration camps. After the war, when he was ten or eleven, he was placed in a foster home in Switzerland. The horror and brutality of the only life he had really known left him totally unprepared for the civility of his new surroundings. School in particular was utterly bewildering to this little boy. And hence this story about the day he was totally humiliated by his teacher in front of a giggling classroom when he was asked to identify a coloured poster of the Swiss hero, William Tell, of whom he had, of course, never heard:

> "What do you see here?" [the teacher] asks.
>
> "Tell! William Tell! The arrow!" they're calling from all the benches.
>
> "So — what do you see? Describe the picture," says the teacher, who's still turned toward me.
>
> I stare in horror at the picture, at this man called Tell, who's obviously a hero, and he's holding a strange weapon and aiming it, and he's aiming it at a child, and the child's just standing there, not knowing what's coming.
>
> I turn away, ... Why is she showing me this terrible picture? Here in this country, where everyone keeps saying I'm to forget, and that it never happened, I only dreamed it. But they know all about it!
>
> "You're supposed to be looking at the picture — what do you see?" she asks impatiently, and I make myself look at the picture again.
>
> "I see — I see an SS man," I say hesitantly, "and he's shooting at children," I add quickly.
>
> A gale of laughter in the classroom.
>
> "Quiet," barks the teacher, then turns back to me.
>
> "I'm sorry — what did you say?" and I can see that she's getting angry.
>
> "The hero's shooting the children, but ..."
>
> "But what?" the teacher says fiercely. "What do you mean?" Her face is turning red.
>
> But ... but it's not normal," I say, trying not to cry.

"Who or what isn't normal here?" Now she's beside herself, and shouting. I force down the lump in my throat and try to concentrate. But I can't interpret what's going on. What's this about?

"It's not normal, bec — because..." I'm stuttering again.

"Because why?" she says loudly.

"Because our block warden said, 'Bullets are too good for children,' and bec - bec - because only grown-ups get shot ... or they go into the gas. The children get thrown into the fire, or killed by hand — mostly, that is."

She screeches, losing her composure.

...

"Sit down and stop talking drivel."...

I look over at the teacher, standing there shaking with anger, standing there in front of the big blackboard, her hands still on her hips. My eyes begin to smart, and the big blackboard turns watery, gets bigger and bigger until it surrounds the whole classroom and turns into a black sky.

This is a story about a child who interprets the world based on what he knows, and a teacher who judges his answers based on what she does *not* know.

We are each limited by what we do not know and we are each limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to deliver justice fairly. This in the end is what the public expects from lawyers, judges and law professors, and this, in the end, the public is entitled to get.

This year is the fiftieth anniversary of the *Declaration of Human Rights* and of the *Convention on the Elimination of Genocide.* Those anniversaries are the subtext and motivating passions underlying this speech. I hope that if you take anything away from tonight, it will be the message that each of us has a professional duty to pursue justice with wisdom and without fear, ready to be judged by principle not popularity, and committed to earning history's respect.