

They're Playing a Tango

Address at State Bar of Michigan Annual Meeting Luncheon, September 22, 2005

To be asked to join you at this milestone meeting of the State Bar of Michigan, our 70th, is not only an honor but also a pleasure, which is made even more special for me by the inauguration of my friend Tom Cranmer as our new president and the recognition you have accorded to two of my former students—Leslie Curry and Wallace Riley. Wally, incidentally, was a member of the very first class I taught at the University of Michigan—in 1949.

It's a delight to see again so many of you whom I have been with over the years, although it is sometimes hard to remember in what setting we encountered each other—at Wayne State, or Michigan, or ICLE, or in State Bar committees, or wherever—and I think of the similar circumstance of the late George Kirchwey, who was dean of Columbia Law School early in the last century. When he retired from the deanship, he became, believe it or not, the warden of Sing Sing. Later, after retiring totally, he occasionally encountered on the streets of New York men whom he recognized, but he couldn't remember at which place he had known them. In such instances his greeting was: "Well, my son, how are you and the law getting along?"

The Challenge of Change

This meeting, as I noted, is our 70th. The fourth of these meetings was held the year in which I entered law school, so I have been an eyewitness to our profession for almost all of those 70 years. As a law teacher, I have occasion to visit from time to time with a wide variety of lawyers—big town, small town; big firm, small firm; office lawyers, courtroom lawyers, both sides of the table—and no matter whom I meet with, no matter what kind of practice or specialty, the one common theme I encounter is uneasiness about change and the rate of change—change in the applicable law itself, change in the way law is practiced, change in the society to which the law is applied, and, always, a pervasive sense



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of unease that the rules of the game are being changed in the middle of the game, usually to one's own disadvantage. It reminds me of my favorite fortune cookie message: a change for the better will be made against you.

This is a different world from the one of your youth. It certainly is vastly different from the world of my youth even longer ago.

Technological changes are perhaps the most obvious. In one lifetime we have gone from the horse and buggy and the kerosene lamp to space stations, heart transplants, and the information superhighway (where, incidentally, many of us are stuck on the entrance ramp). Whether, by the way, the information superhighway is a good thing depends, I think, on the quality of the information. I was struck by an item some time ago in the *New York Times* stating that in 1849 Henry David Thoreau said, "We are in great haste to

construct a magnetic telegraph from Maine to Texas, but Maine and Texas, it may be, have nothing important to communicate."

Social and cultural changes in these 70 years have been no less dramatic. The extent of those changes can be seen simply by comparing the contents of a daily newspaper of the 1930s with today's *Detroit Free Press*. You may remember the old-timer who said to a friend, "I can remember when it used to be that the air was clean and sex was dirty." One of the social changes that has particular implications for law and the administration of justice is the increasing tendency of people to consider themselves members primarily of cultural and ethnic subgroups, often at odds with one another and at odds with the community as a whole. The common loyalty we once felt to the nation and its ideals is diminished if not destroyed by fierce loyalties to the particular clan, each of which considers itself the victim of another group. It's as portrayed by a Richard Guindon cartoon in the *Free Press* showing a flat, treeless wasteland on which are scattered a dozen or so crudely drawn clumps of people hunkered down behind low barricades of rubble, each displaying a small pennant on a pole. Two expressionless men are walking by, and one says to the other, "As a country, we seem to be breaking up into groups of hurt feelings."

Change is everywhere. And because the law affects, and is affected by, all of life, there are concomitant changes in the law and in our profession—such changes as:

- the erosion of the role of the civil jury
- the politicization of the judiciary
- the diluting of the adversary system
- the near-disappearance of the general practitioner

Most troubling of all is the widely-lamented decline of professionalism, as the practice of law seems to become more and more a commercial business—which creates great self-doubt in our profession.

- the ascendancy of digital forms of information
- and, of course, most troubling of all to most of us, is the widely-lamented decline of professionalism, as the practice of law seems to become more and more a commercial business—which creates great self-doubt in our profession.

Lawyers as Problem Solvers

These changes, and countless others, challenge us as individual lawyers and as a profession. I would pose to you the question whether as lawyers we have the necessary talent, the necessary creativity to solve them.

From the first day of law school, lawyers are trained to think in terms of precedent. On the basis of what *has* been decided, we tell clients what they may do and may not do. We are specialists in the past; we are professional antiquarians.

Carl Sandburg, in his poem that contains the familiar line “Why does a hearse horse snicker hauling a lawyer away,” writes:

*The lawyers, Bob, know too much.
They are chums of the books of old
John Marshall:
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
A dead man's thoughts too well.*

Despite Sandburg, our role as interpreters of the past lends a certain steadiness, a stability, a calmness to our society, that has served us well through expansion and war, prosperity and depression. And it is especially important in individual cases. But I suggest that the rate of change in our world in this early part of the 21st century is so dizzying that it will no longer suffice to apply the methods of the past when it comes to meeting the larger problems of society, and government, and, yes, our profession. Lawyers defend the status quo long after the quo has lost its status. All too often we fit Mort Sahl's definition of a conservative as one who believes that nothing should be done for the first time. Someone said that *stare decisis* is Latin for “we stand by our past mistakes.” We have a professional bias somewhat like that of the World War II tail gunner who fainted when he went up to

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the cockpit and saw the world rushing toward him at 300 miles an hour.

Meeting the Future with Solutions from the Past

All too often we try to meet the future with solutions from the past. A number of years ago when the Fifth Circuit included everything from Florida to Texas, the court was falling farther and farther behind in its docket. The remedy proposed was the traditional one: add another judge to the existing 25 to help shoulder the load. Experts in organization management studied the court's operations, however, and discovered an interesting fact: the processes of communication within the court required so much of the judges' available time that for each of the 25 existing judges to communicate with yet one more judge would require more judicial time in the aggregate than would be gained by adding a new judge. In short, one more judge would decrease the court's capacity. And so the circuit was split to create two smaller courts—the Fifth and the Eleventh—in place of the larger one. It was a case in which a traditional response would have exacerbated the problem, not solved it. And it illustrated the point that problems of court congestion and delay require for their solution the invention of new mechanisms, not merely the creation of more courts and more judges. If we try to keep up with a burgeoning workload by doing the same things as before, only faster and faster and faster, we fall farther and farther behind and, arguably, produce a less elegant result as well. We are like the woman on the dance floor who knows only the old steps. “Waltz a little faster,” says her partner, “they're playing a tango.”

I could go on at length, suggesting other areas in which we as lawyers seem content to

attack almost intractable problems with tools and habits of thought drawn almost solely from the precedents with which we are so familiar and so comfortable. There isn't time to discuss them in depth, but let me simply mention a few where new learning and new theories and new approaches are sorely needed but are in short supply.

Take complex litigation, for example. Just mentioning names suggests the magnitude of the problems: Johns-Manville, Agent Orange, Dalkon Shield. Yet many lawyers still think of litigation as involving simply a plaintiff and a defendant—of Helen Palsgraf suing the Long Island Railroad; of Hadley and Baxendale arguing over the measure of damages; of Pennoyer resisting eviction by Neff. The extent to which that simple, two-party, bipolar model is ingrained in our thinking seems somehow to diminish our ability to fashion new modes of resolving complex disputes.

Neither have we learned well how to resolve disputes arising out of exotic or highly technical subject matters. We still use methods that were developed to decide who struck the first blow or who was on the wrong side of the road.

We live in a time when enormous wealth resides in intellectual property—software and electronic data. Vast sums of money are represented by computer impulses and are transferred around the world instantly by satellite. We try to apply to these matters property concepts from the time of Blackstone, and they do not fit very well.

And on and on. You can add your own examples of areas in which the problems are new but the solutions merely traditional and often inadequate, in which lawyers, both individually and as a profession, simply waltz faster when the world in fact is playing a tango.

Managing Change

And so I ask, how should you and I, as lawyers respond to these types of changes and challenges? And how should the State Bar of Michigan respond?

As you would expect, I do not suggest that we rashly adopt a bunch of new procedures, new laws, new institutions, new remedies simply because they are new and, often, touted by enthusiastic “true believers.” As someone said, “Never buy a gold watch in the parking lot from a guy who’s out of breath.” And there *are* zany solutions to all kinds of problems in this world. You may remember the story of the graveside service in a Parisian cemetery. A woman had died, and all the mourners had left but two men. One had been her husband and the other her lover. The widower was grief-stricken, but controlled in his grief. The lover, on the other hand, was sobbing and keening, and appeared about to collapse, when the husband came over to him, placed his arm about his shoulder reassuringly, and said, “Not to worry, M’sieur; I shall remarry.” Not all problems are so easily solved.

I don’t know whether you have ever thought about the fact that lawyers, as a class, are not notably creative. My late colleague, Andrew Watson, a professor of law and psychiatry, described the brain as a chaotic mass with only a veneer of rationality. He maintained that creativity exists only deep in that disorderly area of the brain, that rationality is the enemy of creativity, and that it is no accident that so many creative, artistic, inventive people are disorderly, iconoclastic, and bohemian. The truly creative person delves into the chaos, finds new things, and then brings them to the surface to rationalize them and make them useful. The problem with lawyers, Dr. Watson suggests, is that, by training and practice, we are so steeped in reason that the rational veneer is greatly thickened; and it is very hard for us to break through that veneer and to move into the creative chaos. Indeed, we are embarrassed even to try. And so we are not very imaginative, not very creative.

Our first task, then, is to try to overcome that barrier, by resolving to think more imaginatively about the problems our profes-

sion faces, and by enlisting the interest and efforts of thoughtful experts in other fields whose creativity hasn’t been suppressed by years of insistence on competency, relevancy, and materiality.

In meeting these changes and challenges, it is, paradoxically, more important that we be creative about the questions to be asked than the answers to be found. Identifying the question is vastly more important than the answer. One reason a child learns so much so fast is that he is full of questions. Though we think knowledge is power, Thoreau said most of our so-called knowledge is “but a conceit that we know something, which robs us of the advantages of our actual ignorance.” In a similar vein, Hector Berlioz said of his fellow composer Claude Debussy, “He knows everything, but he lacks inexperience.” Indeed, recognizing the question *is* the beginning of wisdom.

A Vision of the Future

And so, even as we celebrate the 70th of our meetings as a family of lawyers, we look ahead. You may have seen another cartoon by Richard Guindon in the *Free Press* that shows five wispy men and women sitting around a table in what I call a quiche-and-hanging-fern restaurant, drinking wine and looking bored. One says, “Is evolution still going on, or is this about it?” Well of course, evolution is still going on—in your personal life and in your profession. As I have said, we live in a time of almost overwhelming change. Change makes us uncomfortable, even angry at times. We have a natural tendency to resist change. But we cannot opt out. Disconnecting from change does not recapture the past; it loses the future. The question simply is whether we will be agents of change or its victims.

I suggest that despite our tendency to be limited by the past, we lawyers, with gifts of intellect, training, craft, and station, are obliged, if we are to be faithful stewards of those advantages, to offer to the republic and to society our most creative ideas for meeting the world that is rushing toward us at 300 miles an hour—or in today’s terms, Mach 2.

Very late in his career, when his vaunted intellect had begun to slip, Justice Oliver Wendell Holmes was traveling by train. When the conductor came through the car

calling for tickets, Holmes couldn’t find his. He searched through all his pockets, his briefcase, his wallet. He searched high and low, but he couldn’t find his ticket. “That’s all right,” said the conductor, “you look like an honest man, and I’m sure you have just misplaced it.” “Young man,” replied Holmes, “you don’t understand. The question is not ‘Where is my ticket?’ The question is, ‘Where am I going?’” As individual lawyers, and as a bar, we don’t ask that question often enough. You may recall the old conundrum: “Why did Moses wander in the desert for 40 years?” “Because even then, men wouldn’t stop and ask directions.” Especially at the personal level, there is the strong possibility that one who neglects to reexamine his goals will come to that condition in late middle age where he’s gotten to the top of the ladder only to find that it’s against the wrong wall.

The question we neglect is the one of destination. Unless we keep posing that question, all of our reforms and changes will be nothing but improved means to an unimproved end. I pray, therefore, that you will address yourselves not only to the immediate problems of your clients and of the bar, but also to Mr. Justice Holmes’s larger question: Where are we going? To which I would add: And how do we get there? Do not commit the error, common among the young, of assuming that if you cannot save the whole of mankind, you have failed. All that is required is constant inquiry, and creativity, and unselfishness, in addressing the challenges that bear upon us. It may even mean actions that are costly to us personally. But it is essential that we address ourselves thoughtfully and intentionally to the future. We shall be overwhelmed by events if we do not anticipate them and if we do not invent new ways of coping with them. Like the woman on the dance floor, we’ll merely be waltzing faster while the world is playing a tango. ♦

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