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For Such a Time as This

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For such a time as this  by John W. Reed

The following essay is based on the talk the author delivered to the annual meeting of the International Society of Barristers at Scottsdale, Arizona, on March 17, 2006.

I want to preface my remarks by expressing my deep appreciation for the long association the Barristers and I have had with each other.

That association began in 1975, when you asked me to speak at your meeting in Puerto Rico. Three years later, I spoke again and was elected as the Society’s first Academic Fellow. But the really rewarding relationship began when I became your editor in 1979, and in 1981 also your administrative secretary and general factotum. No group has been more enjoyable, no relationship has been more rewarding than this one.

I cannot adequately express my pride in having been accepted so warmly as part of this distinguished company. Thank you for all your kindesses to Dot and me over these three decades.

You who have been here before will recall that typically I have commented on changes—usually negative changes—in the nature of trial practice and in the quality of our lives as lawyers. These changes have often centered around a perceived loss of professionalism and the clouding of our ideals. And so we have talked about such matters as law practice as business, or the take-no-prisoners mode of litigation; and if I were to talk about that today, I would be tempted to describe for you the recent practice of holding law firm retreats at firing ranges, where firm members and associates not only practice marksmanship but also learn how to use sub-machine guns; or to tell you about the Florida lawyer whose telephone number advertised on billboards is 1-800-PIT BULL—but not today. We’ve also talked about the bureaucratization of the courts, the steady diminution of the role of the jury, the displacement of trials by alternative modes of dispute resolution, and the like.

But I have always sought to encourage you to reclaim the ideals with which you entered upon your lives as lawyers and to return home with optimism and new dedication to the roles you play in helping to achieve a just and compassionate society, both one on one with your clients and collectively in your communities and nation and world.

I want to do something similar again this year, but this time the problems I want you to consider are not the arguably parochial problems of our professional circumstance but rather problems that arise in the public sphere—hot button issues such as criminal investigations without probable cause, warrantless searches, telephone and Internet surveillance, indefinite detentions, extraordinary renditions, and government infiltration into private groups such as churches, mosques, and political action groups. Although discussion of such issues may have a political cast, there is no denying that these things exist and that they invite legal challenge—which is where you come in.

My knowledge of these issues is neither broad nor deep; but, like you, I have a general, overall awareness which is enough to alarm me, and enough to suggest that, as the cream of trial lawyers, some of you, perhaps many of you, will play a role in the ultimate resolution of these issues. That is because, despite the recent marginalization of the judiciary in major policy areas, it is still the trial lawyers and the courts that stand between the oppressors and the oppressed.

. . . I have always sought to encourage you to reclaim the ideals with which you entered upon your lives as lawyers and to return home with optimism and new dedication to the roles you play in helping to achieve a just and compassionate society . . .
The broad sweep of problems is so daunting that you and I may well doubt that we can affect or change what we see as a betrayal of core principles; and so we are tempted to sit on the sidelines, thinking that our only possible role is to watch television news and mutter increasingly crude epithets. But we must not confuse cynicism with intelligence. The good news—if there is good news—is that these egregious policies that so offend our notions of justice and of the rule of law have meaning only in their application to one case at a time, which generally means one lawyer at a time. And a change in the environment, in the climate of justice, usually comes gradually, like global warming, not like a tsunami. In the words of the familiar adage, “Life by the inch is a cinch; life by the yard is hard.”

There is, of course, a notable tradition of courageous representation of the unpopular client or cause, and you well know many of the more famous instances—instances such as:

• John Adams’ representation of the British Captain Thomas Preston after the Boston Massacre;
• Clarence Darrow’s representation of Leopold and Loeb charged with the murder of Bobby Franks; and Darrow’s defense of John Scopes, the Tennessee high school biology teacher who had committed the crime of teaching the theory of evolution;
• Lloyd Paul Stryker’s defense of Alger Hiss;
• Joe Welch’s confronting of Senator Joseph McCarthy;
• And, almost as real to us as a real person, Atticus Finch’s defense of a black man accused of raping a white girl.

Two who defended unpopular clients at considerable personal risk have met with us in the recent past and recounted their experiences:

• Stephen Jones’ defense of Timothy McVeigh, the Oklahoma City bomber, and
• Lt. Col. Charles Swift’s courageous representation of Salim Ahmed Hamden, Osama Bin Laden’s personal driver, challenging the presidential order that he be tried by a Guantanamo military tribunal.

Among our own members, I would mention two modern examples of lawyers seeking to assure due process in cases where the public thought little process was due. I refer to

• Jim Brosnahan’s defense of John Walker Lindh, who was known in the press as the American Taliban, and
• Bill Gray’s representation of Dan Aravelo, charged with the Boulder, Colorado, murder of a three-year old child—a representation so unpopular that his family had to move out of their home for their safety. Bill’s representation of Aravelo was recognized by the American College of Trial Lawyers Courageous Advocacy Award, one of only 13 such awards in 41 years.

One could go on and on, recounting stories of courage and heroism in doing what trial lawyers do so well—standing with those who face forces far larger than themselves. Each age has had its challenges and its heroes. And it’s satisfying to reflect on them and to congratulate ourselves that we are part of a profession that includes such heroes.

But you and I cannot afford to view this tradition only as in a rear view mirror. The problems of our time are at least as daunting as those of both the recent and distant pasts. We live in the midst of a world on fire with violence and appalling greed and endless insanities of senseless death. Great wrongs are taking place around us, some of them perpetrated by our own government. If we were to seek a musical characterization of our circumstance, surely we would choose Franz Josef Haydn’s famous choral work entitled “Mass for Times of Distress,” for we are indeed distressed.

To be merely spectators in such a time can reduce us to despondent exhaustion. But to understand these wrongs as a call to arms gives you and me a sense of life and purpose that both serves those who need our help and also regenerates our will to preserve the rule of law and to achieve a juster justice.

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During the Montgomery bus boycott inspired by Rosa Parks and led by Martin Luther King, carpools took some people to their jobs, but there weren’t enough cars for them all; in addition, many people simply preferred to walk as a witness to their cause even though they had to walk great distances. Dr. King became concerned about one of these. They called her Mother Pollard, and she was well into her 80s but still needed to work; she was walking miles every day to and from her place of work. Dr. King pleaded with her to ride the bus. She replied that she would walk till it was over. He said, “But Mother Pollard, aren’t your feet tired?” She said, “My feet is tired, but my soul is rested.” Resisting the wrongs around us may be tiring and even dangerous, but I submit that it will rest your soul.

The need for courageous advocacy is undiminished, whether in defense of individuals accused of wrongdoing, or in attacking social issues like those we have heard about from our guests this week: immigration, penal systems, judicial independence, our relationship with Native American peoples, and national security. There is need for your advocacy in countless settings, especially in this time of greater exercise of governmental power. I want, however, to emphasize the opportunity and responsibility that are yours at the level of representing individual clients, especially in those matters where emotions run high.

Just to give flesh to my point, let me describe a single case that highlights the desperate need for courageous representation by lawyers like yourselves and that illustrates, also, what will occur if we somehow allow the system to shut you out. I use this particular episode as an illustration, out of scores of possible examples, because it is recent, having come to my attention only last week, and also because it is to me so shocking. It is the case of a man named Maher Arar.

Maher Arar was born in Syria 35 years ago. He moved to Canada at age 17, apparently to escape the Syrian draft; and he holds both Canadian and Syrian citizenship. He has computer engineering degrees from McGill and the University of Quebec. His wife has a Ph.D. in finance from McGill, and they have two young children. According to all evidence, he has led an exemplary life.

In September of 2002, Arar was returning to Montreal from a family vacation in Tunisia. During a stopover at JFK Airport, he was seized and shackled by U.S. immigration officials, who suspected that he was an al Qaeda member. Despite holding a Canadian passport, Arar was held in solitary confinement in Brooklyn; he was not allowed to contact his family, was not allowed access to consular services, and especially, was not allowed access to a lawyer; and 12 days later he was deported to Syria—a move that is called extraordinary rendition, whereby terrorism suspects are sent to countries where torture is practiced. Held in a dungeon near Damascus, he was abused physically and psychologically.

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According to court papers, “The cell was damp and cold, contained very little light, and was infested with rats which would enter the cell through a small aperture in the ceiling. Cats would urinate on Arar through the aperture, and sanitary facilities were nonexistent.” Reportedly, his captors beat him savagely with an electrical cable. He was allowed to bathe in cold water once a week. He lost 40 pounds while in captivity.

Despite this barbaric treatment, no confession was forth-coming, and after 10 months, he finally was released when no link to any terrorist organization or activity emerged.

The revolting mistreatment of Mr. Arar was, of course, illegal under our Constitution and treaties. Indeed, it would have been illegal even if the suspicions of his al Qaeda connection had proved true. But he was never given access to a lawyer who might have challenged his detention and torture and raised those constitutional and treaty issues.

After his release, Mr. Arar retained a lawyer and sued [then] Attorney General Ashcroft and other members of the administration in federal court in Brooklyn, seeking damages. Now that, at long last, he has a lawyer to stand with him, all should be well, with the government called to account for its oppressive dealings with Arar. But not yet. Two weeks ago, the trial
I know that relatively few of you have a significant criminal practice, but I urge you to seek opportunities to represent those who are persecuted and prosecuted largely because of public emotion, and if not personal representations, then to use your considerable talents to persuade the larger public of the critical importance of due process of law even in times of distress.

And if, because you may have little experience with cases of a politically sensitive nature, you doubt your capacity to make a difference, then I would remind you of an ancient story that some of you know by heart. It is perhaps apocryphal, but instructive nevertheless. In this age-old story, Ahasuerus, better known to Western ears as Xerxes, was king of Persia—today’s Iran—which held the Jews in captivity. One of the king’s many wives—indeed, his favorite—was Hadassah, or, more familiarly, Esther. Esther was a Jew, but the king didn’t know that fact (which should tell you something about the quality of communication in those ancient royal marriages!).

As a result of intrigue in the royal court, Ahasuerus decreed the death of all Jews in the kingdom. Esther’s cousin and guardian, named Mordecai, pleaded with her to ask Ahasuerus to relent, and thus to save her people. She was reluctant to do what Mordecai asked of her, which was understandable since to approach the king unbidden carried the death penalty unless the king chose to extend his golden scepter; and she hadn’t been invited. Mordecai pressed her, however, and concluded his plea to Esther with the familiar words: “Who knows but that you are come to the kingdom for such a time as this.” She then consented to go, saying, “And if I perish, I perish.”

The story ended well, of course, the king not only holding out his scepter to Esther but also authorizing the Jews to arm and defend themselves, which they did with overwhelming success.

No one can guarantee you equal success; but the world’s need is critical, and you have no choice—as Esther had no real choice—but to face that need. Although victory is not assured despite our best efforts, defeat is assured if we do not join the battle. In Winston Churchill’s words, “You will make all kinds of mistakes, but as long as you are generous and true, and also fierce, you cannot hurt the world or even seriously distress her.”

With your talent and dedication, who knows but that you have come to the bar for such a time as this.

In Winston Churchill’s words,

“You will make all kinds of mistakes, but as long as you are generous and true, and also fierce, you cannot hurt the world or even seriously distress her.”