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1987

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Recommended Citation

Reed, John W. "The Best of Times." *Int'l Soc'y Barristers Q* 22 (1987): 365-73.

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THE BEST OF TIMES†

John W. Reed*

As an academic I have occasion to visit from time to time with a wide variety of lawyers, lawyers of many types and interests: with plaintiffs' lawyers, defense counsel, insurance lawyers, house counsel; with lawyers who deal in family law, banking and corporate lawyers, anti-trust lawyers, legal aid lawyers; and on and on. And no matter whom I meet with, no matter what kind of practice or specialty, the one common theme I encounter in those discussions is concern about change, and the rate of change. Change in the applicable law itself. Change in the way that kind of law is practiced. Change in the society to which the law is applied. And, always, a pervasive sense of unease that the rules of the game are being changed in the middle of the game, usually to one's disadvantage.

It is the uneasiness that we all feel about change in the profession, and the pace of that change, that I want to comment on, under the title of "The Best of Times."

CHANGE OUTSIDE THE LAW

Let me remind you of some of the sea-changes that have taken place—that are taking place—in our lifetimes.

No one has to remind you of the immensity of technological change that has occurred in this century. When my father was a boy, he and his family moved from Arkansas to the Territory of New Mexico by covered wagon, yet later he flew from coast to coast in fewer *hours* than the number of *weeks* required for that 600-mile wagon trip. My mother learned to read by the light of a kerosene lamp, but she lived to watch color television images beamed to her from half a world away. I have a 1929 dictionary that defines uranium as "a white lustrous radioactive metallic element having compounds which are used in photography and in coloring glass." Need I say more about the immensity of technological change?

Social and cultural changes have been no less dramatic. I am reminded of 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."

†Address delivered at the Winter Meeting of the American College of Trial Lawyers, Boca Raton, Florida, March 11, 1987.

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CHANGE WITHIN THE LAW

The fact is that you and I live in an era of enormous change, and that is true in the legal profession as well. Let me speak of my own years as a lawyer and law teacher.

General Observations of a Few Decades

I entered law school in 1939. Just the year before, the Supreme Court had done two epochal things. First, it had decided *Erie Railroad v. Tompkins*,¹ which rejected the centuries-long view that law is derived from a body of abiding principles inherent in the natural order—which judges do not create but merely discover and announce—often called natural law. Instead, the Court in *Erie* said that law is only what the sovereign says it is. And so the Court adopted a positivist, pragmatist view of law, which set the stage for activist judges to change doctrine, to announce new rules—in effect to legislate. And much of the law’s development in the nearly half-century since *Erie* is a result of that profound philosophical shift in the way we look at the nature of law.

The second epochal thing that happened in that year before I started law school (of particular importance to trial lawyers) was the Supreme Court’s promulgation of the Federal Rules of Civil Procedure, which significantly changed our system of litigation, in particular diminishing its adversary elements by permitting each side to find out before trial what the other side knows. I needn’t remind you that the discovery process is often abused, and that sometimes the answers given to requests for information are not very useful. My favorite unhelpful discovery answer came in a deposition where the question was: “Are you a Jehovah’s Witness?” And the deponent answered, “No, I didn’t even see the accident.”—But litigation was changed by the Federal Rules, and never will be the same again.

Let me mention two or three other facts about our law and our courts at the time I started law school that illustrate how much change there has been in one short life at the bar:

In that year of 1939, the *Federal Reporter, Second Series*, totaled 100 volumes. Today, the latest volume is number 800, meaning that 700 books of Court of Appeals decisions have been published while I have been a lawyer. The *Federal Supplement* contained twenty-five volumes in 1939; it now totals 640. The volumes of *Federal Rules Decisions* total 110. Thus, in these forty-eight years, the reported opinions of the federal courts—not including the Supreme Court—constitute 1425 volumes, with a total page count of approximately two million. State court reports and statute volumes have grown at nearly comparable rates.

¹304 U.S. 64 (1938).

Meanwhile, there are entire areas of legal activity familiar to us today that were almost unknown in 1939. For example, in that year, the digests contained no heading entitled “Administrative Law,” and there was no such subject in the curricula of American law schools. Now, a significant portion of the bar practices nothing else.

Let me suggest a striking change with an even later reference point. By 1948 I had finished law school, had practiced four years in Kansas City, and had entered law teaching at Oklahoma. A young woman named Ada Lois Sipuel applied for admission to the University of Oklahoma Law School and was turned down on the sole ground that she was black. Pressed by court order to provide her with a legal education, the state of Oklahoma created overnight a law school at its all-black Langston University.

Ms. Sipuel, claiming the new school was not substantially equal to the Oklahoma Law School, renewed her application, was turned down again, and sued again, this time represented by a team of lawyers headed by Thurgood Marshall. Incidentally, I was the Sunday School teacher of a class of high school students, and I took them to the courthouse to watch the trial one afternoon. With the exception of one person, it was the first time any of them had ever sat in a room with a black person!

Ultimately, the Regents were directed to admit Ms. Sipuel, but they decreed that she should sit in the back row, separated from the other rows with a small sign that said “Colored.” (By the second day of class, the other students had moved the sign to the teacher’s desk.)

How unreal, how bitterly quaint all that seems now in 1987—yet it all took place during my teaching years.

I could go on, but I am sure you not only understand my point but can, in your own lives, provide similarly telling examples of the extraordinary degree of change in the law and in the profession of which you and I are a part. And, for the most part we have adjusted to those changes, with more or less grace.

Increasing Pace of Change

But the changes have not ended. They continue—if anything, at an ever-increasing pace. We are in the midst of them, and it seems harder and harder to adjust; and now we adjust with less grace, not more. You may well feel like the man who opened his fortune cookie and read the message: “A change for the better will be made against you.”

What are some of the changes for the better that are being made against you?

The injury compensation system. First, there is tort reform. Though the injury compensation system, like any other institution of our society, has ailments that need attention, major surgery is not indicated. Moreover, there

is considerable evidence that the changes being proposed so hysterically across the nation will have only limited effect on such difficult problems as the availability and affordability of insurance. The tort reform movement illustrates a peculiarly American characteristic: impatience. Jumping to conclusions is bad enough; leaping to solutions is worse.

Not every solution is better than the problem. I have told some of you about the graveside service in a Parisian cemetery. A woman had died, and all the mourners had left the grave 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 weeping and appeared to be 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."

The adversary system. The second change for the better that is being made against you is the accelerating decline of the adversary system. More and more we are turning to alternative modes of dispute resolution: mediation, arbitration, mini-trials, summary jury trials, neighborhood justice centers—even newspaper columns with names like "Action Line." The common theme of all these is the muting of adversariness. How fair those processes are, and how just their results, are open questions.

Also damping adversary zeal is the trend toward managerial judges. The new federal procedures direct the judge to play an assertive role in the planning and control of the pretrial and trial activities of counsel, more like the civil law judges of Europe than the common law judges of the Anglo-American experience. Moreover, the judge now sits in judgment on the degree of zeal with which counsel pursues his or her advocacy of the client's cause. Rule 11, which authorizes the imposition of penalties for bad-faith advocacy, produced only nineteen reported cases in the twenty-five years from 1950 to 1975, less than one a year. In the next eight years, there were forty—still only five a year. But Rule 11 was sharpened in 1983, and in the next thirty months the number of cases zoomed to 335—that isn't one a year, or five a year, but 130 instances a year in which judges are imposing sanctions on attorneys who file what the court believes are meritless claims, defenses, or motions. This poses difficult questions for trial lawyers, who must try to comply with Rule 11's less-than-clear-cut standards while vigorously representing their clients' interests in an adversary proceeding. The problem is compounded by the mixed signals coming from the courts.

The jury. A third change for the better being made against you is the steady, almost unremitting attack on the jury—in big ways and in little ways. Let me count the ways:

First, for practical purposes the civil jury has shrunk from twelve to six.

The Supreme Court's view to the contrary notwithstanding,² there are significant values lost in that shrinkage.

Second, nonunanimous verdicts are increasingly permitted, again modifying the jury's functioning.

Third, in an attempt to eliminate racial prejudice, courts are supervising the exercise of peremptory challenges, insisting that counsel establish non-discriminatory reasons for exercising them. However laudable the concern, the court's intrusion into motives for peremptory challenges means they are no longer truly peremptory. And the jury's character changes ever so slightly again.

Fourth, there are many who would deny a jury trial in complicated cases on the theory that jurors will not be able to understand what is going on. And the right to jury trial is diminished again.

Fifth, jury dockets are allowed to fall relatively farther behind, thus forcing those in need of quicker resolution to waive the jury. There is no reason why judicial resources should be allocated in such a way that jury trials are delayed much longer than nonjury trials. And the right to jury trial is diminished again.

Sixth, there recently appeared a fascinating clue to the value placed on the jury by those who administer and fund the federal courts: When the judicial branch ran short of money last summer, an order went out to all federal judges that there would be no more jury trials until more funds became available, perhaps not until the end of the fiscal year. The costs attributable to the use of juries for the months in question were but a tiny fraction of the costs of running the federal courts. As you may know, the order was contested and set aside by the Ninth Circuit on the ground that it violated the seventh amendment.³ Then Congress enacted a supplemental appropriation bill and the Administrative Office of the United States Courts rescinded its earlier memorandum which had directed the district courts to suspend jury trials. One might have supposed that the matter had been laid to rest, but the Department of Justice asked the Ninth Circuit to vacate its ruling that the order violated the seventh amendment, on the ground that it had become moot. The Ninth Circuit, turning down the Justice Department's request, said that the proceedings fell within the exception to the mootness doctrine for cases involving a voluntary cessation of unlawful conduct that is likely to recur.⁴ Plainly, that court believes that the civil jury is likely to be the economy target yet another time.

In short, the jury is under seige.

The practice of law. A fourth change for the better being made against

²See *Williams v. Florida*, 399 U.S. 78, 99-102 (1970); *Colgrove v. Battin*, 413 U.S. 49, 157-60 (1973).

³*Armster v. United States Dist. Ct.*, 792 F.2d 1423 (9th Cir. 1986).

⁴*Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1357-60 (9th Cir. 1986).

you is the change in the way law is practiced. We all know about the increasing emphasis on making the practice of law more businesslike—which includes advertising, techniques of management-by-objective, efficiency concepts imported from the nation's business schools, computerization of everything from soup to nuts, and even mergers and acquisitions. (I'm waiting for the first insider trading scandal involving law firm mergers!) And the part of law practice that depended on the ability of one lawyer to rely on the word of another seems more and more the relic of an earlier civilization.

The *New York Times* recently carried an article reporting that major law firms are now diversifying into a wide range of consulting services and joint ventures. Arnold & Porter has an interest in a bank consulting partnership and in a fifty-person operation handling everything from lobbying to real estate development. Kaye, Scholer has a wholly owned subsidiary called China Business Consulting Group. Hogan & Hartson is a limited partner in a health care consulting firm. Atlanta's Alston & Bird has joined with an actuary in an employee benefits consulting partnership. All concede that the motive is to increase profits. That is not an unworthy motive, but these enterprises pose serious dangers of conflict of interest. What is undeniable is the fact that tomorrow's law office and law practice will scarcely be recognizable to yesterday's lawyer.

There are scores of other major developments that are changing the practice of law as we know it. But those four are quite enough to ruin your morning: tort reform, the decline of the adversary system, the attack on the jury, and the deprofessionalization of the profession. We can be forgiven if we feel like the captain who said to his troops: "We're surrounded. Attack in any direction!"

There is an old Chinese curse that translates, "May you live in interesting times." These *are* interesting times; but whether that is a curse depends mostly on you, not on the events. I'm no philosopher, but I suppose I express a kind of existentialism when I say that what happens to us is not what makes the difference. What makes the difference is how we respond to what happens.

POSSIBLE RESPONSES

It certainly would be normal to go into a fit of despond after reading the litany of woes I have counted off. Especially would it be normal if you are in midcareer or beyond. The course of your life is well set. You have attained many of your goals and even realized some of your dreams. But you have done so with skills and knowledge tailored to a tort system and a court system that is in transition. You and I are not sure we like the look of the

new day. More to the point, we worry about whether we will be as successful and comfortable in that new era as we have been in the old. The question for each of us is: How will we respond to these interesting times? Will they be a Chinese curse or a blessing? Will this prove to be the worst of times, as it often seems, or the best of times? That depends on you and on me.

One way to respond is to give up, in frustration. Others have done that. Although it may be an apocryphal story, it is said that Colonel Robert Wood, a partner in the firm then called Cravath, DeGersdorf, Swain & Wood, retired in 1940 at the peak of his success, in large part because he felt that he no longer could reliably advise clients when the New Deal Supreme Court considered itself so little bound by old precedents—in short that he could not function well as a lawyer in the new era. To him the yeasty, vital New Deal years proved a curse, not a blessing.

Somehow, the picture of a disillusioned, resigned Robert Wood is not an attractive alternative. Change and growing and learning make most people anxious. We talk a lot about personal growth, but this growth is mostly the acquiring of more information to fortify our established positions. All our life becomes a rationalization for remaining as we are, till death do us part from our opinions.

The other way to respond to these interesting times is to realize that in the nature of things, change and growth are essential to life. That which is not growing is either dying or dead. It's a well-documented fact that much of our aging, in the negative sense of reduced capacities, is arbitrary, a result of conditioning rather than actual limitation. We decide to be old without ever becoming aware of the decision. Yale's former president Giamatti has said that "the wisdom of age is really only fatigue masquerading as philosophy." I suggest that the outstanding human trait is that of remaining in an unending state of development. Life is an unfinished business. The horizon is a definite place when we stand still, but it always recedes as we approach it. That is worth keeping in mind when we think we have the future well in hand.

The most exciting and rewarding thing about being a teacher is the constant renewal that comes from being with young people at the thresholds of their professional careers. But that kind of renewal is not limited to youth. Each of us has the capacity for self-renewal, if only we will regard change as a friend rather than an enemy, as a stimulus to growth rather than a threat to comfort. I hope you have not grown weary in well-doing and that you look to the future with hope and expectation. As the elite of the profession, you have much to offer your community and your profession, not in spite of but because of the myriad changes I have been suggesting. They represent for each of us an enormous challenge: to channel those changes wisely, in directions that will produce a more just society than ever before.

Sometimes challenge is transmuted into opportunity almost in spite of ourselves, and we find in ourselves resources we didn't know we had. Some years ago, a Texas oil well caught fire, and the company called in expert fire fighters, like Red Adair's famous crew. The heat was so great, however, that they could get only within 2000 feet of the rig. In desperation, the management asked the local volunteer fire department for assistance. Several minutes later, a little old fire truck rattled down the road and came to a stop just fifty feet from the fire. The men jumped off the truck, sprayed each other, and then proceeded to put out the flames. The company president was elated and presented the fire chief with a \$5000 check. When asked what he planned to do with the money, the chief muttered, "Well, first we're going to fix the brakes on that damn truck."

COURAGE

But what if you should feel that the problems we face are too big for us to solve, or even cope with? Isn't it reasonable, then, to throw up our hands and let come what may? Let me encourage you to resist that impulse, and to persevere by reminding you of a famous moment in our lifetimes in which ordinary people, most of them with fewer resources than you and I, changed the course of history.

It is the story movingly told in the book *Mrs. Miniver*, which became a motion picture starring Greer Garson. You will recall that the powerful forces of the Third Reich swept through the Lowlands and pinned down 300,000 Allied troops, most of them British, on the beaches at Dunkirk, in French Flanders. Almost surely the British troops would be captured or destroyed, and then there would be no obstacle to the Nazi crossing of the Channel, the invasion of England, and victory for Hitler. The face of Europe and of freedom would be disfigured for our generation, and perhaps generations to come.

But you will recall what happened instead: The able-bodied young men of England were trapped on the beach. Back home there remained only those ineligible for military service—the infirm, the elderly, those who for one reason or another were deemed unfit for front-line duty. From among those rejects were summoned all persons who had access to any kind of boat: fishing dories, small motor launches, outboard pleasure craft, small ferryboats, tugs—in short, whatever boat might conceivably be able to cross the water to Dunkirk and return with a precious payload of soldiers.

If you saw the picture, you will remember the trickle of miscellaneous craft, manned mostly by rag-tag civilian crews, that issued from the harbors and rivers and inlets of England's southeast coast; and the trickle became a stream; and the stream became a flood of little boats moving into the face

of danger off the Flanders coast. With help from the weather and the R.A.F., they shuttled back and forth, back and forth, rescuing the 300,000 men, two or three or twenty or thirty at a time.

Few scenes in history, or fiction, have been as moving as the sight of that flotilla setting out to do what had to be done. Here were hundreds and hundreds of ordinary citizens who gave what they had—not health and strength, so important for soldiers, but courage and boats. No great troopship saved the beleaguered men, but rather little tugs and fishing boats and launches. No daring marines or commandos darted in with a complicated and deceptive rescue mission, but rather fishermen and retired school-teachers.

In short, the cream of the British army was saved to fight another day because the little people, the ordinary people, were courageous, generous, and faithful. And because of their actions, there was no invasion, and the course of the war was changed. And the world was changed.

If there were to be a new canon of scripture, I would earnestly propose that the story of Dunkirk be included as a parable from which one can draw the lesson that the common man *can* make a difference. Each of us, Walter Mitty-like, enjoys daydreaming about the beneficent changes he would make if he were king. “If I were king, the poor would be given jobs.” “If I were king, the arts would flourish.” “If I were king, justice would ‘run down as waters, and righteousness as a mighty stream.’” Or, less grandly, “If I were king, there would be no discovery abuse, no court congestion.” And on and on. But realistically, few of us will ever be kings (only a few federal judges); and the temptation is to lose faith that as non-kings—as ordinary men and women—we can make a difference. But we *can* make a difference, each by responding to the opportunities of the day with whatever talents he has. Not all of those opportunities will be as dramatic, but there *will* be other Dunkirks; they will be called “the attack on the jury,” “the decline of professionalism,” and the like.

I hope that when the call comes, you will offer yourself and your craft (the word *can* mean your boat, as in *Mrs. Miniver*, or, as here, your skills) in the service of your profession and the community. Whether your boat is a yacht or a dory, it is needed in the service of the larger cause. Do not remain tied at the dock, but sail for Dunkirk. In the words of the poet, there is yet much to be “determined, dared, and done.” You and I can help make this “the best of times.”