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An Activist Judge: Mea Maxima Culpa. Apologia Pro Vita Mea

Charles E. Wyzanski Jr.
U.S. District Court for the District of Massachusetts

JOHN A. SIBLEY LECTURE*

AN ACTIVIST JUDGE: MEA MAXIMA CULPA. APOLOGIA PRO VITA MEA.

*Charles E. Wyzanski, Jr.***

INTRODUCTION BY PROFESSOR JOE TOM EASLEY***

OUR guest today is a remarkable man who has been a prominent figure on the American scene for the last four decades.

Judge Charles Wyzanski is a native New Englander. He was born in Boston and received both his undergraduate and law degrees from Harvard. He has worked very hard throughout his life to overcome this early misfortune.

After graduation from law school in 1930 he served as law clerk, then called law secretary, successively to two of the country's greatest judges —first Augustus N. Hand and then Learned Hand—cousins—and both on the Second Circuit Court of Appeals. Following his tour with Learned Hand he was offered the job of clerk to Mr. Justice Brandeis but turned it down. Not many of us would have done that, but I guess he figured two clerkships were enough. It was the kind of independence he would show throughout his career.

He left the court of appeals and returned to Boston to join the law firm now known as Ropes & Gray, Boston's largest. He didn't remain at Ropes & Gray long, for in the winter of 1932 the President-elect, Franklin Roosevelt, was casting about to build what would soon become known as the brain trust, that brilliant group of young activists who were to give form and shape to the New Deal. Harvard law professor Felix Frankfurter, an FDR intimate, recommended young Wyzanski to Roosevelt.

And so, forty years ago next month, March 1933, Charles Wyzanski went to Washington as a Frankfurter protege, one of a handful of men who became known as the Happy Hot Dogs. Out of law school less than three years, he was named Solicitor of the Department of Labor, the top lawyer in the department.

Arthur Schlesinger, Jr., in his three-volume history of the New Deal,

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recalls a story about Franklin Roosevelt and Charles Wyzanski that's worth re-telling. One day the President and several others, including Wyzanski, spent all day discussing various public works proposals. When the meeting broke up late in the afternoon Franklin Roosevelt called Wyzanski aside and told him to draft a bill for Congress that would embody all the matters agreed upon. He was told to have the draft of the bill back to the President the first thing the next morning. Wyzanski worked all night on the bill and had it to Roosevelt on time the next day. That bill, almost exactly as Wyzanski wrote it, became the statutory foundation for the WPA and the PWA. Wyzanski was 26 years old at the time.

Wyzanski was an important figure throughout the first New Deal. After two years as Solicitor of Labor, Roosevelt sent him to Geneva as the U.S. Representative to the International Labor Organization. In the fall of 1935 FDR called Wyzanski to the White House. At that time the New Deal was in danger of expiring at the hands of the U.S. Supreme Court. The upshot of the meeting was FDR's decision to send Wyzanski to the Solicitor General's office to help argue the cases reaching the Court challenging the administration's programs. For the next two years Wyzanski argued the government's position in a score of critical cases, including the case sustaining the Social Security Act.

In 1937, after four years in Washington, he returned to Boston and to Ropes & Gray. Again his tenure there was not long for on December 1, 1941, Franklin Roosevelt named Charles Wyzanski to the federal bench. He took his seat a month after Pearl Harbor. At 35 he was one of the youngest ever appointed to the federal bench. For the next thirty years Judge Wyzanski sat in regular service on the U.S. District Court for Massachusetts.

During his years on the bench, Judge Wyzanski has taken on two major outside assignments. In the forties and early fifties he was a member and President of the Board of Overseers of Harvard University, the university governing body. In 1952 he became a member of the Board of Trustees of the Ford Foundation, and for the last two decades has played a major role in the operation of that foundation.

He has also found time to serve on the Council of the American Law Institute, and is a member of several other learned societies. He has written one book, numerous law review articles, as well as articles for the *Atlantic Monthly* and other popular magazines. He has given several endowed lectures such as the one he gives today.

All of this he has worked around his first love: being a trial judge.

On at least one occasion he has turned down an offered appointment to the court of appeals. Until he passed the 60-year-old mark he was rumored to be up for appointment to the Supreme Court each time there was a vacancy. Perhaps the presidents were afraid he would turn that down too. Perhaps he did.

On September 1, 1971, Judge Wyzanski assumed senior status. He still sits on the district bench in Boston, and has frequently by invitation sat on trial and appellate courts across the nation. He comes to Athens today after a month sitting on the federal district court in San Francisco.

Some years ago Judge Wyzanski wrote, in a eulogy to Learned Hand, that Hand was the heir to Holmes' triple crown of jurist, philosopher and poet of liberty. If Hand was Holmes' heir, then Wyzanski is Hand's. A wise and sensitive man of enormous intellect, Judge Wyzanski's conduct on the bench over the years has made him this country's most famous and most respected trial judge.

The fact that Judge Wyzanski is so well known is in itself a testament to his performance. Unlike Supreme Court justices—who have a built-in claim to fame because almost all of their cases have national impact—a lower court judge operates on a much smaller stage with a less attentive audience.

Ask a lawyer to name ten outstanding lower federal court judges from recent history and he would be hard-pressed. Several come immediately to mind—both of the Hands, Swan, Clark, Frank, Tuttle. Of that group only the Hands sat as trial judges, and their reputation rests not on that, but on their service on the court of appeals. Some trial judges, such as Julian Mack or Edward Weinfeld, are greatly respected by those who carefully follow the courts, but even these men are virtually unknown to the profession at large.

This cannot be said of our speaker today. Every lawyer and law student knows at least one and often several remarkable Wyzanski opinions.

No anti-trust lawyer can begin to understand equitable remedies without knowing the Wyzanski opinion in *United States v. United Shoe Manufacturing Corporation*. Today, twenty years after it was written, that opinion stands as an outstanding display of insight, imagination and sheer brilliance. Equally ground-breaking was the innovative and unprecedented way Judge Wyzanski ran the trial and the presentation of evidence. It is fair to say that judges over the country have been enor-

mously affected by Judge Wyzanski's conduct of this incredibly complex litigation.

In labor law Judge Wyzanski's opinion in *Textile Workers Union v. American Thread* was relied upon by the Supreme Court for its decision in the *Lincoln Mills* case. This decision has profoundly affected the development of the law of collective bargaining. The entire growth of arbitration is directly traceable to Judge Wyzanski's broad statutory interpretation.

In criminal law he has scrupulously guarded the rights of the accused and has been sensitive to the need for protecting the individual against the overreaching of the state.

He has consistently supported the first amendment, even when it has proved highly unpopular to do so.

The list of examples could go on.

It's not that these were major cases to be remembered no matter what the Judge did or didn't do. They weren't. They are important because Charles Wyzanski *made* them important by what he said and did.

And it's not that Judge Wyzanski's results were righter than others—goodness knows he had enough clinkers in there too. It's just that Wyzanski's opinions are always models of scholarship and erudition and, most importantly, full of penetrating analysis. You might not always agree with the result, but you knew that he had cut to the heart of the case, fairly and meticulously, so that your quarrel might be with his interpretation of the facts, but rarely with his analysis.

I could go on talking about the Judge's good qualities, but I would much prefer to talk about his bad ones.

I don't want to mislead you into thinking that Judge Wyzanski is universally loved. Boston is full of lawyers who have been reduced to rubble in his courtroom. Some call him Ivan the Terrible. Those are his friends. Those who don't know him off-the-bench call him much worse. Among lawyers around the Boston courthouse there's a waggish question asked—"Would you rather be staked to an ant-hill, flogged by a wet rope, or subjected to a Wyzanski tongue-lashing?" I never heard anyone pick the latter.

Now the Judge will probably get up here and, in his winsome manner, try to deny that he is anything but a mild-mannered father figure on the bench. Don't believe it.

If Wyzanski is impatient with the unprepared or inept lawyer, he also has a compulsion to fill the breach and ask those questions he feels

should be asked. That doesn't fit too well with the idea of the judge as umpire, and Judge Wyzanski has observed several times that perhaps he talks too much from the bench. The pages of Federal Reporter Second are sprinkled with cases that show that the court of appeals thinks he talks too much also.

I must say that my first impression of the Judge was enough to make me think seriously about the rope or the ant-hill. I haven't told the Judge this story before, and I'm sure he doesn't remember this, but shortly before I graduated from law school I applied to Judge Wyzanski to be his law clerk. By return mail—indecent haste—I had a one-sentence rejection.

I did manage to hook on with another judge in Boston and shortly after I arrived there I met Judge Wyzanski. Of all the seven federal judges he turned out to be the kindest and most considerate. He may have just felt sorry for the Texas boy lost in a sea of Boston accents, but I rather suspect he was that way with everyone.

Kind and considerate, impatient and irritable, brilliant and incisive, expansive and creative—our guest is an American original. If only we had twenty more like him, or even one. He honors us all by being our Sibley lecturer today.

Ladies and gentlemen, one of the truly great judges of our time, the Honorable Charles Wyzanski.

An Activist Judge

Dean Beaird, ladies and gentlemen, and Joe Tom. The only proper way for me to respond would be in the words that are attributed to Pershing, but probably were the words of Stanton, when he was at LaFayette's Tomb in the World War, having led the American Expeditionary Forces. Bereft of proper response, he said: "*Nous voici.*" Beyond being here, I hope I would be able (well, I know I won't) to be equal to your expectations after that really unnerving introduction.

I'm going to first comment on some parts of it, but may I suggest that ample space is here on the steps and some of you may want to sit down and I shan't mind if you move out. I'm quite used to people leaving while I'm talking.

It is true that I was born in Boston, but I've had some opportunities to get away from there and think of this area previously. It may surprise you to know that although I have turned down some extraordinary law clerks, (Kingman Brewster is the only rival I want to suggest as another turn-down which I made of a person who became of great distinction)

I took from this area a law clerk whom all of you know by reputation, (and some of you will be surprised to know he was my law clerk) Howard Moore, who represented Angela Davis. I have other connections with this area. My son, believe it or not, was educated in this area. He was in the Peace Corps, and went to Nigeria after training in Atlanta. On the Council of the American Law Institute, as many of you will know, Francis Bird is a very important member, and chairman of our membership committee. Smythe Gambrell served with me on the Harvard Overseers Committee To Visit the Harvard Law School. Even here I find persons who were in my own class in law school, and in the Scott Law Club with me. So I do have some basis for the claim that I am not as exclusively Yankee as you may have been led to believe.

With respect to the problem of what I have declined and not declined, I cannot refrain from telling you a story that I am sure Joe Tom knows. A Senator whom I shall leave nameless in order to protect him from his indiscretion, on behalf of himself and some other Senators, asked me whether I objected to having my name proposed to a President for the Supreme Court because he knew that I had a disinclination for appellate jobs; and I replied to him in language which I hope you will not regard as too frivolous. I said, "If I were asked it would be like being asked into bed by Cleopatra. I couldn't say 'no'; I would wonder if I could perform; it wouldn't be half as much fun as it is cracked up to be; I would be bitten by the academic asp; and I would yearn for my home hearth."

In introducing me, Joe Tom did not refer to the title that I had given him, "An Activist Judge: *Mea maxima culpa. Apologia pro vita mea.*" Now if I had been more sensitive to the proprieties, I would have realized that coming from the Athens of America to the Athens of Georgia, I should have put my title in Greek. And I am aware from having had lunch with Mr. Dean Rusk as well as others, that I would have found in the audience people who would have understood me, had it been in Greek. But my limited Greek goes hardly beyond the Yale cheer, "brekekekex, ko-ax, ko-ax," which I know comes from the chorus of *The Frogs* of Aristophanes.

In selecting my topic, I intend to address myself to a phase of judicial work which, as Joe Tom suggested in his introduction, is probably less well known, because fewer trial judges get remembered than the judges of appellate courts. It is quite a striking thing, is it not, that when Judge Cardozo delivered the Storrs lectures on *The Nature of the Judicial Process* he assumed that the judicial process was the appellate process.

What litigant would ever have assumed that? Or what lawyer in regular daily practice would have thought that? The truth is that we don't talk about the trial judge because we don't have available, or at least easily accessible, the material as to trial judges. To be sure, there are records on appeal which preserve the errors of the trial judge. But, relatively speaking, what the trial judge does in an affirmative way, what he represents in terms of personality and character and ideals, is very difficult to find. And yet think how important that is. I will give you a rather (to me) painful illustration.

I had a case only about four months ago, *United States v. Perkins*,[1] involving a black man under these circumstances. He was indicted on the grounds that he had willfully resisted a federal officer in the course of his official duties. The evidence in the case, and I think I summarize it fairly—I am trying my best not to allow my own ultimate view to color what I am saying with the facts—the evidence in the case indicated that there were federal officials, FBI and like persons, in disguise, who went to the door of the house and didn't ring the bell, but knocked and demanded entrance. The occupant of the house, Perkins, a black man, had previously been the subject of a very recent burglary attempt. He told them to go away. They did not identify themselves. They did not go away. He took down a gun and he shot over their heads, and they fled. They believed, and maybe they were right about this, that he was in the drug business. I'm not saying whether they were right. But he was indicted for a willful assault. And the case was tried before me and a jury. In my charge to the jury, I made it perfectly plain that in my view the wrong persons had been indicted. The jury was unable to agree on a verdict.

The case has recently come before another judge of the trial court; and Perkins was convicted. Now I am not saying, don't misunderstand me, that I was right and the other judge was wrong. I am merely pointing out the terrific significance of what Judge Shientag, a very able judge of New York (who delivered the Cardozo lecture) called *The Personality of the Judge*. There is a terrific importance in the trial court, never equaled in any appellate court, of knowing who is the judge.

One of the things that I am certain of is that it will turn out to be in your interest, and in the interest of your clients, if you avoid as often as you can reasonably do so, the trial of a case. Judge Learned Hand used to refer to the trial lawyer as engaged in a black art. My three and more decades of experience lead me to believe that you cannot, no matter what your experience, safely predict the outcome of a case in a trial

[1] Docket No. 72-73-F (D. Mass., Feb. 26, 1973).

court with a jury. Two weeks ago, sitting in San Francisco, I was trying a jury case.[2] A black, crippled, blind man was a defendant. He was charged with having forged the endorsement on two federal welfare checks, and having uttered, i.e., passed, those checks. The testimony against him was given by the Chinese-born woman who was operating the store where he allegedly passed the checks. She was for two days on the stand, and was rigorously examined and cross-examined. I am absolutely certain that 90 percent of you, and hopefully 100 percent of you, if you had been jurors, would have voted that that man was guilty. There was absolutely not a shadow of a doubt in my mind. It was easy to identify him. There could be no question that the checks were forged, and there was no doubt he was a customer.

He was acquitted. And I will tell you why, as I reflect about it, because I do try to re-examine what goes on in my court so that I may in the future not guess so incorrectly, and not make so many errors. I do not believe the acquittal was chiefly due to sympathy for a poor, black, blind cripple. He was represented by John Keker, who is, I suppose, 27 years of age, and who last year or the year before was Chief Justice Warren's law clerk. He is a handsome man; he is a very intelligent man; he is a very hardworking man who had prepared himself thoroughly. He was a dedicated professional with a strong sense of purpose. He proved a theorem that I've often uttered, but didn't think of in time: David can always beat Goliath. A young person armed with nothing more than the five smooth stones from the brook who comes into a courtroom as a lawyer manages to persuade the jury that it is he and not the defendant who is on trial. And the result in that case was one I should have foreseen, but didn't foresee.

Let me consider other reasons to stay out of court. I have already referred, as Professor Easley referred, to the fact that I was sitting in California last month. In four weeks, I disposed of 35 cases. That's not because of my impatience—impatient as I am. That was because the bar fears more the devil it does not know than the devil it does. Any visiting judge of any competence can get a calendar cleared much more quickly than a resident judge. He doesn't do it necessarily in the way Judge Hand said Judge Buffington acted. Judge Buffington, the widely known, but not widely admired, Senior Judge of the Third Circuit, once announced that he had cleaned up the docket. And Judge Hand remarked to me, "What with,—the vacuum in his head?"

It is not only that you can't predict what a judge and jury will do

2 United States v. Harshaw, Docket No. 72-416 SC (N.D. Cal., Jan. 30, 1973).

with any substantial accuracy, at the trial level, but the probabilities are that if you are sufficiently expert, you can negotiate a better result than a judge can give you if he sticks to the law.

Moreover, unless lawyers and their clients are prepared to settle most cases, the judicial business of the nation cannot be done. When I was first a judge, and, as has already been pointed out, I was nominated before Pearl Harbor—a very long time ago—before almost any of you were born, more than 90 percent of the federal criminal cases resulted in pleas of guilty. And it was easily possible to handle the federal criminal business. I am not engaged in a criticism of a court that I much admire, the Warren Court. But the doctrines of the Warren Court in the hands particularly of young lawyers appointed as voluntary defenders, have reduced to, in some places 50 percent, certainly almost everywhere to less than 75 percent, the pleas of guilty from the previous 90 percent.

In one of my more caustic moods I have referred to these young persons as Don Quixotes. I easily understand why a young person retained in a criminal case as a voluntary defender wants to try the case. After all, his compensation is in the form of experience, not in the form of cash. What he gets by way of payment in dollars is generally insignificant. He wants to try the case not because he thinks his client will be, or deserves to be, acquitted, but because he would like to practice in the moot court called the United States District Court. But his duty, while primarily to his client, is not exclusively to his client. And unless it is entirely clear that his client has really a plausible chance of gaining an acquittal, it is not in the public interest, nor may I say in his long run interest, to go through the exercise of a trial so that he may get experience. On the contrary, it would be far better to develop in him a sense of the reality of justice, looked at in the broad.

Now, I am going to turn from this preliminary skirmish to say something about the judge's relationship to his docket. And I am again, of course, talking about the trial judge. There are people, including Governor Rockefeller, and, I fear, including Chief Justice Burger, who think that the cure for the problems that we face with the increase of disorder is more judges. The notion is that the problem is quantitative.

I am not unmindful that we are now a population of over 200 million. I am not unaware that we have far more legislative and administrative action than half a century ago. I have heard of Brossard's Law; and I know that social contacts increase geometrically as population increases arithmetically. Therefore, I am quite sensitive to the likelihood that there will be an increase in litigation. But though I know this, I do not

subscribe to the view that the cure is primarily quantitative by increasing the number of judges. In the nineteenth century in England, according to Maitland who has made the count, there were at any one time no more than 23 judges of the High Court.[3] When I was a youngster, there were in the Southern District of New York, four district judges. Their names happened to be Hough, Hand, Hand and Mayer. In both Victorian England and in the first quarter of the century in New York, the reason that so few judges did the business is that they did it so superbly that the bar as a whole, and through the bar, the community as a whole, recognized that excellent examples were sufficient and that most business could be adjusted or settled or handled on the basis of the excellent models.

Now I do not say that I know of the equivalents of Judge Learned Hand or Judge A.N. Hand or Judge Hough or Judge Mayer. I don't. But I am certain that the search should be for such people, and that if we increase immensely the number of judges, the willingness of a Learned Hand or an A.N. Hand to accept a trial judge's position will be reduced. The honor of being a selected, excellent judge is the chief attraction. After all, judges of the District Court do not get paid as much, as I see from today's paper, as a professor in this law school gets paid. Mind you, I think the professor is worth it. And I'm going to drop a footnote that he doesn't know about. The Ford Foundation very much wanted to give Mr. Dean Rusk a professorship, or equivalent, without any portfolio beyond himself. But the Ford Foundation trustees, embarrassed by their previous action in connection with persons on the staff of Robert Kennedy, and the congressional criticism directed at the Ford Foundation, felt impeded. And I am very glad that this university found its way to add to its faculty such a distinguished member.

I will turn to the question of the way to deal with the overcrowded docket. And mind you, I do not suggest that by themselves, judges, no matter how excellent, would be able to accomplish what I have in mind. Much depends on the response of the lawyers and the citizens. Has it ever occurred to you, as it did to Gunnar Myrdal, that the greatest social accomplishment of this country is the federal income tax? We collect, in this country, billions of dollars from tens of millions of people, with a relatively small staff of investigators, and a handful of criminal and civil cases in the courts. We have learned as a people, (through lawyers to be sure) from the decisions made by the Tax Court and by the courts of appeal, and to a much lesser extent by the district courts which rarely

[3] F. MAITLAND, JUSTICE AND POLICE 43 (1885).

get tax cases. We have learned that those tribunals, on the whole, are consistent and clear and rational. And the body of law which they lay down we apply without litigation. Most people are quite satisfied to look in the CCH Tax Service to see what has been the ruling.

Now I didn't say you'll accomplish quite so much in the field of personal injuries. You won't. But it isn't beyond imagination that by a more careful and discriminating analysis of what are the actual recoveries of injured persons, we could do a great deal to reduce accident litigation and produce settlements. If we had the same careful analysis of how much juries and judges allow for particular types of injuries, what proportion went to the injured person and what proportion to the lawyer and to the expense of the case, and we were willing to tell the client, it might very well be that there would be a substantial diminution of litigation. Now, of course, I don't think that's going to happen at once. The nearest approach is the no-fault kind of law, which is a step that I commend as being in the direction of the intelligent handling of a problem which otherwise would engulf, if it has not already engulfed, a great many tribunals.

I'm going to turn now more particularly to a rather personal view of how the trial job looks. Perhaps the most important thing a trial judge does, and according to Judge Shirley Hufstedler, the only important thing a trial judge does, is to find the facts. Those of you who have never engaged in the job of trying to find the facts do not know what this requires in the way of art, as well as of science. This is not running a lot of material through a computer, and finding what the weights of the testimony are by page or witness.

One thing I shall claim for myself, and it is perhaps my greatest virtue: I have never consciously fudged the facts. I have always written the facts before I wrote the conclusion, and I have never rewritten the facts when I didn't like the conclusion. Often, I have thought after I had finished the facts that I was going to reach conclusion A, and then I've written conclusion A and found out in the words of Mr. Justice Holmes that the conclusion didn't wash. You may be surprised but one example of that is *United Shoe.*[4] I don't think I've ever said this publicly before. I was aided, more than that, I was taught, by my clerk, Carl Kaysen, now Director of the Institute of Advanced Study at Princeton, who is the most gifted economist of his age known to me. He prepared a memorandum and the memorandum has been published, and you can verify,

[4] United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.* 347 U.S. 521 (1954).

if you doubt what I'm saying, what his recommendation was. His recommendation was, that having found, as I did, that the leases of United Shoe had been used as a tactic to maintain monopolistic power, I should reach a conclusion, and apply a remedy, to the effect that there should be no leasing but only sales. And United Shoe should thereafter be prohibited from leasing its machines in any way. Aside from my law clerk, there is only one person to whom I ever talk about a pending case, and that is my wife. I read the draft opinion of *United Shoe* to my wife. It was rather a suffering evening, I suppose, for her—you may remember that there were 100 and something pages of the final draft of the opinion. My wife said to me: "I don't understand why you are prohibiting United Shoe from leasing. I would understand if you require them to offer machine types for sale. But why, if the terms are economically equivalent, shouldn't a customer, if he wants to lease, be able to lease?" I said: "Carl Kaysen said I shouldn't allow them." Then that answer didn't quite stick. And as we talked about it, I was sure my wife was right and Carl Kaysen and I were wrong. And, as you know if you've looked at the opinion, the final form of the opinion and decree gives to customers the option to lease if they want to lease, provided that the terms are economically equivalent; and in case of doubt as to equivalency, there is a right to a court review.

What I was saying is that I do not fudge the facts. I may have difficulty with the conclusions and may write them one or two different ways. But in the drafting of the facts, sometimes the problem is one of organization. Perhaps in world terms the most important case I ever had was *Standard Oil of New Jersey v. Markham.*[5] This case goes back to 1945 and was in every aspect a dramatic performance. Judge Learned Hand asked me to accept assignment to sit in the Southern District of New York. And he assigned to me, as a district judge, this case which arose out of the hearings before a Senate committee presided over by Harry S. Truman as chairman—the most celebrated single incident in the investigatory career of Senator Truman. Standard Oil of New Jersey, represented by John W. Davis and by Theodore Kenyon, a lawyer at the patent bar who was a worthy associate of Mr. Davis, had brought this proceeding against the Alien Property Custodian who was represented by Professor Philip Amram, then of the University of Pennsylvania Law Faculty, and Professor Max Isenbergh, now of the University of George Washington faculty.

[5] 64 F. Supp. 656 (S.D.N.Y. 1945), *aff'd sub nom.* Standard Oil Co. v. Clark, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948).

Standard Oil of New Jersey and I. G. Farben Industries had formed, jointly, four corporations, and shared jointly some 500 patents, all of which were related either to buna rubber or high octane gasoline. The importance of buna rubber can hardly be overstated as of the 1940's when Malaysia had fallen to the Japanese, and artificial rubber was essential for military purposes. High octane gasoline obviously had a direct relationship to the problems of new types of airplanes and other transportation.

When World War II began, with the consent of the British Foreign Office, Howard, who was President of Standard Oil Development Company, a subsidiary of Standard Oil of New Jeresey, went from England to The Hague to meet Dr. Ringer and Dr. Braun, delegates of Dr. von Knierem, who was the general counsel of I. G. Farben, and who later was one of the principal defendants at Nuremberg. At that meeting, in The Hague, in the winter of 1939-40, ostensibly Standard Oil and I. G. Farben agreed on a territorial division with respect to high octane gas and buna rubber, Standard Oil of New Jersey getting as its territory all the countries in which the Western Powers had interests, and I. G. Farben getting all the territories in which the Axis powers had interests. This agreement was reduced to writing. The government of the United States, when we entered the war after Pearl Harbor, and after a preliminary investigation by Senator Truman, thought that this was not a bona fide agreement, and that it was a mere cover, and so the Alien Property Custodian proceeded to seize the shares of stock and patents of Standard Oil of New Jersey with reference to high octane gasoline and buna rubber. The Standard Oil Company brought suit in the Southern District of New York against the Alien Property Custodian to regain what had been taken by the Alien Property Custodian. It was a fascinating trial. You can imagine the glory and joy of having John W. Davis and those other persons every day for weeks on end. The Supreme Court never gets such a treat.

Mr. Howard, of Standard Oil of New Jersey, took the stand, and recited the circumstances in more detail than I have told, and he said: "It was a perfectly good-faith agreement. In fact, as evidence to our good faith, we made a mistake about Iraq; we made a mistake about which side Iraq was on, and we had to redraft the agreement."

The case had been going for six weeks and we were in the first week of June, 1945. Suddenly, I saw enter the courtroom, a United States Army sergeant, and, in his custody, a layman. Philip Amram, representing the Alien Property Custodian, called to the stand Dr. von

Knierem. The man left the custody of the sergeant, came up, and clicked his heels and bowed to me. He had just been apprehended by the advancing United States troops in Germany. And he had been captured with the files of I. G. Farben. On his counterpart duplicate copy of the agreement made at The Hague were the words, *"Nach Krieg Kamoflage."* Postwar camouflage. I don't have to tell you how the case came out. But the job of stating the facts in the case was a work of considerable difficulty. I had no law clerk; and I am quite content to be judged as a craftsman by the opinion as you'll find it in the Federal Supplement, 64 F. Supp. 656.

I must now tell you an amusing sequel. The case went to the court of appeals, where Judge Clark, already referred to by Professor Easley, wrote the opinion, and 98 percent of what I said was accepted; there was one very minor change. Mr. Davis petitioned for certiorari. The Court denied certiorari. Robert Jackson and I, who were associated as partners in the Social Security cases, to which Professor Easley referred in the introduction, met each other shortly afterwards, and I said, "Bob, why didn't the Supreme Court grant a writ in that case? It involves hundreds of millions of dollars; it has great international ramifications; and it is a question in many respects of first impression." Bob looked at me and said, "There are some of us who prefer the errors of a lower court to the errors of our brethren."

A problem other than the arrangement of facts, and the marshalling of them, is the problem of sensitivity to the kinds of issues which require some appreciation not merely of documents but of the qualities of human beings. And I'm now going to tell you another case[6] which, strangely enough, by mere coincidence, also involves the Alien Property Custodian. Professor Reinhold Rudenberg was employed by Siemens and Halske, the German firm, in Germany before Hitler, and was the head of their patent office or patent work and a director of the company. In the days of the Weimar Republic, when a new invention was made by an employee of a firm, the common practice was to have the invention classified in one of three ways: either as a shop invention, that is, something to be expected in the normal course of the work of that factory, in which event the invention belonged unqualifiedly to the employer; or, at the other extreme, a wholly dissociated invention, where an employee invented something having absolutely nothing to do with the employer's business, in which event the employee had total ownership;

[6] Rudenberg v. Clark, 72 F. Supp. 381 (D. Mass. 1947), *modified*, 81 F. Supp. 42 (D. Mass. 1948).

and the middle class where the invention, if it fell in that class, was to be regarded as joint property with a royalty to be paid by the employer to the employee, but the employer was to have the right to exploit the invention. When a question came up in Siemens and Halske as to how a new invention would be treated, which category it would be put in, the inventor had a right to make a suggestion as to which class the invention fell within, and Mr. Rudenberg as head of the patent department also had a right. And in the event of a dispute Mr. von Siemens, who was a patriarch of great quality, had the final say.

Siemens and Halske is a manufacturer, as many of you will know, of electrical equipment of various kinds but chiefly equipment used by power companies and other rather heavy electrical equipment.

Professor Rudenberg's son, two years of age, contracted infantile paralysis. The father—this was before Jonas Salk—was deeply concerned. He wondered what he could do to bring his talents to bear upon learning something about his son's ailment and helping the doctor. It occurred to him that maybe the virus carried a different electrical beat. And stimulated by that thought he invented the electron microscope.

He went to his office and he faced the blank that I have described to you with the three slots in it. As the inventor, he marked it as belonging entirely to the inventor in the free class. As the head of the patent department he put it in the middle class, as an invention in which both the employer and employee had rights—the title to be, however, in the employer, and the employee to have the right to royalties. And he took the form to Mr. von Siemens. Mr. von Siemens said:

> Come now; in your case this doesn't matter at all. You surely want us to exploit this and you're director and head of the patent department and you know there won't be any problem whatsoever about your compensation. Just leave the form where it is, we don't have to finish that form at all. Go ahead and see if you can make the invention.

So it was manufactured.

Hitler came to power. Rudenberg was a Jew. The Deputy Fuhrer, Hess, got in touch with von Siemens, the old man, and said: "Don't you let that Rudenberg out of the country, he's much too valuable. I don't care what the general policy is with respect to Jews, we'd better keep him at work."

Rudenberg remained, for a while. But he became more and more uncomfortable. He went and told Mr. von Siemens how uncomfortable he

was. Mr. von Siemens was more or less uncommunicative and used no words which were treasonable. The result of the talk, however, was that Rudenberg's wife and children went on a visit to England, and shortly afterwards, Mr. von Siemens told Professor Rudenberg he ought to talk with some of the business people in England about developments in England. And Professor Rudenberg went to England. All the Rudenbergs then being in England, Mr. von Siemens sent over a representative to negotiate with Rudenberg what would be a fair settlement with respect to the electron microscope. Before the negotiations could be completed World War II broke out. At that stage, Rudenberg came to the United States. He taught, I think, for a while at Rutgers, and then he became a professor at Harvard University.

We entered the war. The Alien Property Custodian seized the United States patents which had been procured in connection with this invention, by agreement, in the name of Siemens and Halske. That is, when Mr. von Siemens had had this conversation at the first stage of the business with Professor Rudenberg, the agreement was that the patent should be formally in the name of Siemens and Halske, but that didn't preclude the ultimate determination. It was just easier, since Siemens and Halske had all kinds of representatives all over the world, to take out the patent in the name of Siemens and Halske. And the Alien Property Custodian in the United States at the outbreak of the war seized the patents as being the property of a German national.

Professor Rudenberg brought suit to recover the patents on the grounds that he in fact was the real owner, that this was a wholly novel invention, and that it did not relate to the business of Siemens and Halske and was in fact in the free area.

Remember, he was in a situation where in his capacity as head of the patent department he had said the opposite. He had said as head of the patent department that it was in the middle category, and if it was in the middle category his right would have been wiped out by the Alien Property Custodian's taking of the title which was superior to the royalty claim. If, on the other hand, the situation was one in which he was truly the inventor, and the property never belonged to Siemens and Halske, but was just there as a matter of convenience for easy registration and exploitation, then he was entitled to the return of it.

I don't have to say to you that this is exactly the sort of delicate issue which a district judge, appraising the quality of the witness, determines, at least in those circuits where the findings of the district judge are respected, finally. And the questions were, how did Professor Rudenberg

impress me, and was I able, if persuaded of his sincerity, to convey to an appellate court the reason why I thought he was sincere.

I will assure you, I was deeply impressed. In fact, I could not help but feel that the very way that he filled out the form was one of the best evidences of the character of Professor Rudenberg. It was quite a victory for him. Electron microscopes then were selling at $75,000 each. And it was quite an item for a Harvard professor, who doesn't get paid at the rate of $75,000 a year, to have a right to royalties from RCA and others for the sale of electron microscopes which had a market price of $75,000 each.

Another aspect of the trial judge's work that is of the greatest significance, is what he does in connection with sentencing in criminal cases. Now let me make it quite plain that I know I don't know anything about the subject. I mean that. But I have the company of every other judge. We are exercising a power which is literally suitable only for someone with divine insight. Even if we know all about the past of somebody, and who does know that, what can we really tell about future stresses and strains? How can we have any certainty? We can only have, in Holmes' phrase, "certitude," which is, of course, the most dangerous of deceptions. What would be desirable, undoubtedly, is to have every sentence imposed subject to revision upwards or downwards by a review panel preferably of trial judges. That is the system in the state courts of Massachusetts and Connecticut, and, as far as I know, it is quite successful. But we are faced at the present time with a situation in which, as you know, the district judge is reviewable on questions of law which are of relatively minor importance, but he is not subject to review on questions of sentence unless he exceeds the statutory limit. It is a strange kind of appellate process, which the man from Mars and hopefully the man from Athens, Georgia, doesn't understand. It makes no sense.

Moreover, the judge is required on the most minor procedural matter, at least by custom, to write an opinion. And if he doesn't, he's likely to hear from the appellate court that he owes them an opinion, if he doesn't owe anybody else one. But he's not required to write an opinion with respect to a criminal sentence. Is it because there is no reason or logic for what he does? Perhaps so. That isn't absurd. Do you think any parent can properly and accurately describe how he treats his child? Much lies in a kind of reason which is not logical, but is not on that ground irrational. Santayana, in *The Life of Reason*,[7] talked about five different kinds of reason. I won't go through them all, but they do in-

[7] G. SANTAYANA, THE LIFE OF REASON (4 vol. 1905-06).

clude religion, and they do include art; and it is easy to understand that in human relations those who suppose that logic is the answer will get a wholly Procrustean result. It may therefore not be so absurd that judges don't write opinions on sentencing.

But I am going to confess to you that on more than one occasion I have written for myself an opinion before I have imposed a sentence of difficulty, and yet I rarely even indirectly quoted from it in sentencing. But I tried to weigh the considerations in the same way I would if I were dealing with a problem of substantive law.

I've had another purpose and that is to see whether I really believe that judges should be required to write opinions, when they sentence. My response is a *"non-liquet.* — I don't know!" Sometimes I find myself as baffled in writing as I am in imposing the sentence. That doesn't comfort me, and I suppose it would never comfort the defendant. But I know that sometimes by thinking I've done better than I would if I had acted without reflection.

You've all heard of the singer, Ray Charles and maybe many of you have heard him. I do not claim credit for the wisdom of this sentence. It is the wisdom of my predecessor as Chief Judge, George C. Sweeney, whose path I have followed. Ray Charles was a heavy user of drugs. And he was charged with a violation of a federal drug statute, in connection with possession and transportation, not sale.[8] And he pled guilty. He was represented by a lawyer of whom I wish there were more of the same type. The lawyer said,

> Now, this is a very serious matter, but I suggest that the real problem is to cure this fellow. And if he can get cured, then to see what you ought to do with a man who has been cured. We are quite prepared to pay the full bill for confinement for one year to any institution you suggest, but we have in mind McLean Hospital which is a branch of Massachusetts General Hospital. We are prepared to have the defendant stipulate that he will not leave the hospital and you can fix the bond then as you see fit.

That is the course I followed. Ray Charles was, and I hope and believe is, wholly cured of his drug addiction. I don't have to tell you, do I, that after that he was placed on probation, and not sent to jail.

I take a second case, in which I rather suspect I will get more applause from the young than from the old. Two weeks or so ago in San Francisco I had before me a defendant charged with willful evasion of a draft

8 United States v. Charles, Docket No. 65-40-S (D. Mass., Nov. 22, 1966).

order to report for Selective Service duty.[9] He was, and is, there's very little doubt about it, a conscientious objector. However, he did not consult counsel. And he failed to make on Form 150 the claim, which he had a right to make, that he was a conscientious objector. The period for making the claim elapsed, and the local board ordered him to report for service. He failed to report. He had very able counsel *after* the failure to report. His counsel said, "I don't see any choice except to have this fellow plead guilty. He's plainly guilty. There's no doubt he didn't report; and there's no doubt he did not seasonably make the claim of conscientious objection, and he's lost it under the statute."

The defendant was not the kind of figure who initially is appealing to a man of my age because it was hard to tell whether he was a boy or a girl, his hair was so long and his costume was so ambiguous.

His counsel suggested that I should place him on probation on condition that he be a senior adviser in a boys' home. I said to the counsel, "I don't make any comment on whether a man is or is not as doubtfully virile as the defendant appears to be, but I do not really think that it would be a wholly desirable thing in this ambiguous situation to send him in with young boys." To the defendant himself I said, "What is your interest?" And he said, "I'm a guitar player." I said, "Do you do that professionally?" and he said, "Yes, I play a good deal, and I get a lot of money, but I'm not as good as I should be because I didn't have enough musical education." "Do you need more musical education?" He said, "Yes, I need more." I finally fixed the terms of the sentence as follows. I placed him on probation on condition that he should enroll and remain as a student in a particular musical school for the next two years and that every week during the next three years he should, at a place designated in advance by the probation officer, preferably a veterans' hospital or a paraplegic hospital or like institution, give a free guitar concert.

Well, I am sure of only one principle in connection with sentencing. And that is what was said by Sir James Fitzjames Stephen: "the dominant note should be frugality." The least you can do is the best. I mean after a real consideration; not just to let a fellow off without anything. For example, it's quite clear that we do not sufficiently recognize the sexual problems inherent in confinement in prison. In the ordinary case, say of a tax evader or the like, let us assume that his sentence is going to be six months or two months or any other period of time, is

[9] United States v. Craig, Docket No. 73-073 SC (N.D. Cal., Jan. 29, 1973).

there any reason why he should not be allowed to serve five days a week in prison and allowed to go home two days? He's still being punished. There are some other considerations beyond punishment which go toward rehabilitation and toward a readjusted family life when he returns. Why don't we split sentences that way? Just lack of imagination, isn't it? If we applied to the penal processes not the ordinary brains of the bureaucracy but the brains of the academic world, we might get better results.

Now don't for a moment think I believe for all kinds of callings academic people are best. Not even for judges. I happen to represent a very dangerous kind of judge. Judges are magistrates rather than intellectual leaders. And it may be that Learned Hand should have been in a university and not in a court. And the same may be true of C. E. W., Jr. Don't think for a moment that "the best and the brightest" are really the best. We operate in a society, like every other society, in which much is due to the habits of the country, and the feeling that those who are in authority are truly stable. It's all right but only occasionally, to depart from conventional men of stability.

There's a very famous story of Augustus Hand going to President Woodrow Wilson to thank President Wilson for having named him a judge to the United States District Court. He went to the White House in 1916 and in the course of the conversation, he said to President Wilson, "I'm very glad you appointed Mr. Brandeis to the court. It was a very good idea to have one man like that on the court." Wilson replied, "What about another?"

When you have nine you can afford to have a man of the imaginative grasp of Brandeis, or a man of the poetic insight of Holmes. But it wouldn't do to have nine Holmeses. Some of you have read the biography of Chief Justice Fuller by a lawyer named King.[10] In that biography there is a reference to the reaction of Senator Hoar of Massachusetts when Theodore Roosevelt withdrew President McKinley's invitation to Hemenway to be Justice of the Supreme Court in succession to Horace Gray, and instead tendered the post to Oliver Wendell Holmes in 1902. Senator Hoar thought it was a bad mistake. He favored, as did Secretary Long who was the Secretary of the Navy, who came from Massachusetts and had been Hemenway's partner, the naming of Hemenway, who was a leader of the Boston bar. And Hoar wrote a letter to Chief Justice

10 W. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES (1888-1910) (1950).

Fuller in which he said, "You will find Judge Holmes a delightful companion. We in Massachusetts think his work excellent ivory work, but we like our law out of hewn timber."

Now there is a kind of subtlety and delicacy which there's room for in every university. And there's room for it in every multi-judge court. But it is dangerous stuff if it's the only kind of quality which a judge has.

I think that it is undoubtedly the fact that a trial judge who is constantly innovative is unsettling. In general, he would do better to follow what his superiors have said, and to call to their attention his doubts rather than to reach a conclusion different from theirs. Sometimes, and often in a rather mischievous way, I have done that. There was the case of a stewardess who brought suit against the New York, New Haven and Hartford Railroad because she was injured as the train came into the Providence station. The train was brought to a halt by quick braking which caused her to fall against a table.[11] The reason that the engineer brought the train to a quick halt was that a crazy man wishing to commit suicide had just laid himself down on the track. With more than a mischievous glance at Mr. Justice Black and company, I said that a railroad is always liable for injuries to its employees. Of course, ultimately, I got reversed[12] and the Supreme Court found it necessary to qualify some of the things it had said about the FELA; and that was my intention.

I have wholly failed sometimes in trying to get the Supreme Court to do things which I thought they should do. And the most notable example of that, familiar to all of you, and one which I briefly referred to earlier today was the *Sisson*[13] case. I knew perfectly well that I was creating havoc. I intended to. The problem is at what stage will the Court do what it should do. There's no doubt if anyone will read *Ex parte Milligan*[14] that the Supreme Court of the United States in the Civil War stayed away from deciding issues until after the hostilities were over. There's no doubt, as anyone who will read *Ex parte Endo*[15] may see, that the Supreme Court stayed away from determining the validity of the removal of the Japanese and Nisei from the west coast until after

11 New York, New Haven & Hartford R.R. v. Henagan, 272 F.2d 153 (1st Cir. 1959), *rev'd per curiam*, 364 U.S. 441 (1960).

12 364 U.S. 441, 442.

13 United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968).

14 71 U.S. (4 Wall.) 2 (1866).

15 323 U.S. 283 (1944).

the battle of Midway. The Justices weren't necessarily cowards or fools. They knew what I hope everyone in authority knows that statement of John Selden, the 17th century lawyer involved in *The Ship-Money Case*[16] and the author of famous books including *Table Talk*. He said, "You cannot govern without juggling, but not too much juggling."[17] The point is at some stage you can face up to the question, but don't think you can necessarily face up to it *in medias res*. You have to govern, not debate.

Now I've made lots of mistakes of other kinds. One that worries me most and about which I thought I had achieved peace of mind only to have Judge Sirica upset it, was the *Worcester* case.[18] Thomas Worcester was a man of decency. He ran a business of constructing roads. His father had done it before him, and they had a large staff of people. Worcester had plenty of money. I don't mean to say he was Rockefeller, but he was well off. He continued in business primarily to preserve his father's original enterprise and to keep people employed. You could not get business in Massachusetts building roads, unless you bribed the officials of the Commonwealth. He bribed the officials to the tune of $275,000; and, knowing better, he took a deduction from his federal income tax. He was indicted for having filed a willfully false return. He was convicted. I placed him on probation on condition that he should inform the grand jury as to who were the persons to whom he paid the bribe. Elliot Richardson was the United States District Attorney, and he filed an information before me that in his opinion Worcester had failed to comply with the conditions of probation because he had not indeed told all the names. I held a public hearing. In connection with that hearing it appeared that Mr. Callahan, who later swung the necessary votes for John Fitzgerald Kennedy to become President of the United States, had been bribed. It appeared that the Speaker of the House of Representatives of Massachusetts had been bribed. It appeared that a Congressman had been bribed. And many others.

There was a general feeling of outrage that Robespierre and the first Senator McCarthy had been surpassed by Wyzanski, Judge. What was the idea of not giving these people the protection of the grand jury and

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16 3 St. Tr. 825 (Exch. 1637).

17 *Cf.* TABLE TALK OF JOHN SELDON 60 (F. Pollock ed. 1927). The actual quote is as follows: " 'Tis not Jugling that is to bee blam'd, but much Jugling, for the world cannott bee govern'd without it."

18 United States v. Worcester, 190 F. Supp. 548 (D. Mass.), *application for prerogative writs denied sub nom. In Re* Callahan, 285 F.2d 757 (1st Cir. 1960).

its secrecy and the fifth amendment and all the other things? The *Columbia Law Review*,[19] the *Yale Law Journal*[20] and Professor Moore in his book on Rules of Criminal Procedure[21] all denounced me; and I long since concluded they were right. If I had any doubt about it, Judge Aldrich in *Worcester v. Commissioner*,[22] in a tax case from the tax court, added his Ichabod Crane view.

But Judge Sirica has made me doubt. I'm not involved in the Watergate trial. And I am delighted with what Judge Sirica is doing. He's heading right down the *Worcester* path. So I'm not so sure I was wrong. I didn't say I was right; I merely tell you I am again in doubt. It's a terribly difficult problem.

The hour is late and I'm now going to conclude with a quite different problem, though it's basic to everything I've said. When I was young and when I as much respected the views, as I still respect the character and quality, of Justice Holmes and Judge Hand—both Judges Hand—I thought that it was quite plain that a judge ought not to be a knight errant on a white charger. Even when I went off on these frolics I thought I was a rather wayward fellow. I was not wholly comfortable with my own departure from the canons I had been taught. I'm much less certain now.

I know that I live in one of the greatest revolutions in history, far greater than the French Revolution, or the Russian Revolution. I know that people in front of me differ more from my classmates than my classmates differed from the people who lived in Elizabethan England.

Your attitude, and now I'm speaking to the young, is far more revolutionary than I think you perceive. I am not talking about sex; though let me tell you that is a rather significant line because historically sexual change is indicative of something very deep. It is indicative in the same way that poetry and the arts are indicative. Most of you no longer really believe in Max Weber's Protestant ethic. You don't really believe in work toward the end of material advantage in the way in which my generation believed.

Most of you, if you reflect at all, are probably not believers in a meritocracy. You are much more prepared as a group, and certainly the disadvantaged of you are far more prepared, for a society in which the basic emphasis is neither on liberty nor on equality, but on fraternity.

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19 61 COLUM. L. REV. 1175 (1961).

20 71 YALE L.J. 551 (1962).

21 J. MOORE, FEDERAL PRACTICE ¶¶ 32.04(5), 32.08, at 32-116, n.11 (2d ed. 1972).

22 370 F.2d 713 (1st Cir. 1966).

You are persons who, on the whole, suppose that the danger of my generation was, in E. M. Forster's words, "the underdeveloped heart." You are much more prepared for an affirmative kind of tolerance, in which instead of being indifferent to your neighbor, you think each person and group has an important contribution to make to the common pot; and that the object of society is to realize, for all, a degree of participation and recognition, rather than to engage in some kind of sorting out which assures that the excellent come out on top and that the excellent make their full possible contribution so that the society will make gains which will percolate through to the whole body.

I do not know that I belong in your camp, but I do know that nobody is fit to be a judge in these times who does not realize the deep revolution in which we are caught.

We are living in a revolution comparable only to that of the Renaissance. Lord Acton said that the generation which faced the greatest change at any time in history was that which was born in or lived in the period 1490 to 1520, the period of the discovery of America, of the Protestant Reformation, of the beginning of printing in Venice based upon the Gutenberg precedent, of the Sack of Rome, of the union of Portugal and Spain, of the Inquisition, and of the recognition of syphilis. Mind you, as I said before, it's a very strange thing that sexual problems seem to be indicative of more basic problems, if there are more basic problems.

The district judge or the other person in authority must, if he is to do his job, recognize, as Heraclitus told us long ago, that we never step twice into the same stream. We must know how fast the stream is running. And, hopefully, like the greatest man I ever met, Alfred North Whitehead, put it, "We must love change."[23]

23 Conversations of Alfred N. Whitehead with Charles E. Wyzanski, about 1950.