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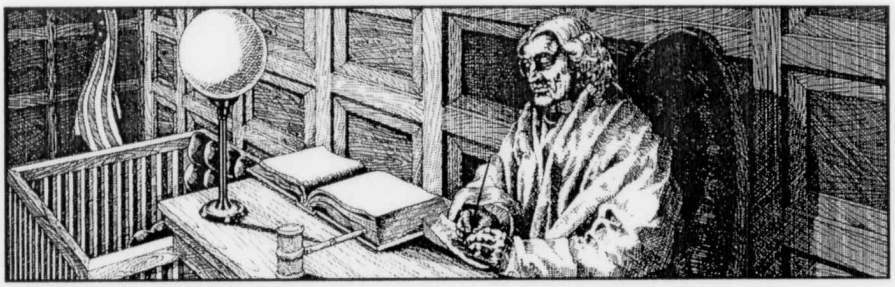
Back to Basics



From the Bench

A Salutation

by Noel Fidel

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At the close of the last century, Mark Twain had lost his sense of humor. Writing on December 31, 1900, in what he called "A Salutation Speech from the Nineteenth Century to the Twentieth," Twain described Western civilization as:

> [a] stately matron . . . returning bedraggled, besmirched and dishonored from pirate-raids in Kiao-Chow, Manchuria, South Africa and the Philippines, with her soul full of meanness, her pocket full of boodle, and her mouth full of pious hypocrisies.

Samuel L. Clemens, "A Salutation-Speech from the Nineteenth Century to the Twentieth, Taken Down in Short-Hand by Mark Twain," in *Mark Twain: Collected Tales, Sketches, Speeches, & Essays 1891-1910*, 456 (The Library of America 1992). "Give her soap and a towel," Twain concluded, "but hide the looking glass."

In the waning days of the twentieth century, can we summarize our era in more salutary terms?

We have mastered mass production and supersonic transport, but cannot stop famine around the world, and will not stop hunger in our own back yard. Our communications tools exceed Twain's, or even Jules Verne's, imagining: we can dial up parties from Jiaoxian, Manchuria, South Africa, and the Philippines for a conference call, or link up with them in cyberspace for a bridge game or an exchange of photographs or a chat. But with all our fabulous tools for communicating with each other, with all our proud advances in the anthropological and archaeological and sociological and psychological and biological and even genetic understanding of other cultures, we watch the same old murderous tribal and religious antagonisms rage with genocidal fury around the globe. And as for mean-spirited, hypocritical, boodle-driven public policy and discourse, must we take a back seat to Twain's, or any other, century? Call me a twentieth-century chauvinist, but I think we can take seats right in the front row.

You may be asking yourselves, "Did we wander into the wrong ceremony? We are a gathering of lawyers. We are here to celebrate admission to the bar. What has this to do with us?"

What it has to do with is the social compact, and that has everything to do with us.

We are lawyers. We study law. We practice law. We shape the law. And what is the law but an elaboration—a shifting and evolving elaboration—of the social compact? If you could take a snapshot of the law at any moment in time, you would find what practical thinkers of that time have devised as guides for men and women to live in tolerable contiguity with each other. Those guides are the social compact. And we lawyers are its caretakers, its tenders, its menders. To practice law is, consciously or unconsciously, to shape society's management of the social conflicts of one's time.

How does our recent shaping shape up? What will future legal historians write about our contributions as twentieth-century American lawyers to the management of human conflict? We cannot tell, of course. We woodchoppers, down among the timber, never see the forest whole. But we do see patterns in the woods. We can spot some preoccupying themes.

One theme is our struggle in the law to accommodate the clashing libertarian and communitarian impulses that are ingrained—or, more accurately, cross-grained—in the timber of our history and culture. We want to be left alone, but we know that no one is an island. We have fought to keep *Ulysses* and *Huckleberry Finn* and *Das Kapital* in our libraries and bookstores, and we detest the hypocrisy and self-righteousness of those who would appoint themselves to be our censors. But when push comes to shove, we do not know how to run an open market for intellectual or political or artistic self-expression without exposing our children and our culture and ourselves to a numbing and demeaning profusion of sexual and violent imagery. We cherish the right of privacy—cherish it so intensely that we torpedoed a Supreme Court candidate for the heresy of questioning its constitutional validity. But when push comes to shove—and push always comes to

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This article is based on Judge Fidel's "Welcoming Address to Newly Admitted Attorneys to State Bar of Arizona," May 16, 1998.

shove—we do not know how to protect our privacy from investigatory incursions by the government or the press.

We have struggled with the promise of equality—and how we have struggled. Our country was founded on that promise, and my generation was galvanized into public service by the insistence of Martin Luther King that we make good on a promise that was two centuries overdue. But when push comes to shove—and push always comes to shove—we have yet to find the way to open opportunities for some without inhibiting opportunities for others.

Uneasy with the substance of such controversies—and the list of controversies runs on and on—we have concentrated on spawning and refining rules of procedure. We cannot guarantee you justice or even guarantee you truth, we tell our customers (at least we tell them so when we are not kidding ourselves); we have no meter that flashes in our courtrooms when we land upon those great intangibles. But, we promise, we will offer you the fairest and most refined system of procedures the mind can devise to maximize our chance to find the justice and truth of your case.

We also turn to process to domesticate discretion. In this skeptical—or cynical—age, we so distrust our decision-makers that we confine their discretion within ever-elaborating boundaries of standards and procedures.

We lawyers are skillful at these efforts. We are procedural virtuosos. And in America, we boast that we have created the finest system of due process in the history of time.

Well, maybe. But Mark Twain comes back to mind. He wrote:

> We think we are wonderful creatures. Part of the time we think that, at any rate. And during that interval we consider with pride our mental equipment, with its penetration, its power of analysis, its ability to reason with clear conclusions from confused facts, and all the lordly rest of it; and then comes a rational interval and disenchants us. Disenchants us and lays us bare to ourselves, and we see that intellectually we are really no great things; that we seldom really know the thing we think we know; that our best-built certainties are but sand-houses and subject to damage from any wind of doubt that blows.

Samuel L. Clemens, "The Great Dark," in *Mark Twain: Collected Tales, Sketches, Speeches, & Essays 1891-1910*, 319 (The Library of America 1992).

Look for a moment at the sand-house of our current certainties. To see due process in action, stop in a criminal courtroom of the superior court on any weekday and watch the judge as she takes the morning guilty pleas. Reading from a script to assure that nothing is left out, her honor scrupulously recites all of the procedural safeguards that the prisoner is about to waive. The prisoner waives them; the prisoner *must* waive them in order to take his deal; another prisoner is unchained and steps forward; her honor recites her script once again.

Today's Due Process

And on it goes, prisoner after prisoner, morning after morning, due process as it is seen on the front lines. It is, by and large, a process for the extraction of guilty pleas. We are dependent on guilty pleas. If much more than 5 percent of the criminally accused insisted on exercising their right to go to trial, the system would break down. Not that we need worry, as we have made the penal consequences of refusing a plea bargain so onerous that few can afford to risk a trial. Our precious criminal due process, the pride of some of our finest lawyers and jurists of this century, is an edifice too costly to occupy.

Cross the corridor to the civil side and watch a motion to compel disclosure. In mid-century, we devised discovery rules to outlaw trial by ambush, systematize trial preparation, and streamline the conduct of civil trials. That noble effort to economize the trial process mired our civil litigation in a marsh of interrogatories and depositions and motions from which we never have emerged.

In the 1990s, to eradicate the virus of discovery abuse, we have begun to adopt rules of mandatory disclosure. But the virus is a resistant strain, and our new disclosure rules have generated new motions to compel, new motions to sanction, new motions to preclude. All of these cost money. All of these take time. On the civil side, as on the criminal side, we have invented a process few litigants can afford.

In *The Ages of American Law*, Grant Gilmore wrote, "In heaven, there will be no law, and the lion will lay down with the lamb. . . . In hell, there will be nothing but law, and due process will be meticulously observed." Grant Gilmore, *The Ages of American Law* 111 (Yale Univ. Press 1979).

Is there some way out of our fixation with procedure? Our instinct is to adjust our process, to refine it, to add standards to make clearer what we want. But each time we do so, we elaborate a new cycle of excess and abuse. And then the refinements start again.

I do not pretend to see the path out of this bog. But I do not doubt that we will find one. One of my law school professors compared the law to art. "[T]he mission of each," he wrote, "is to impose a measure of order upon the disorder of experience without stifling the underlying diversity, spontaneity, and disarray." *See* Paul Freund, *On Law and Justice* 22 (Belknap Press of Harvard Univ. Press 1968). And the great lawyer, like the great artist—and like the great scientist, I might add—shows us new patterns, new paradigms, that we could not see before. I feel a paradigm shift coming on.

We will never resolve some of our great conundrums. We will never find a perfect blend of individual liberty and public order. We will never find an enduring balance of liberty and equality. We will never settle the perfect proportions of discretion and constraint for our decision-makers. On these and other great questions, we will achieve no better than an uneasy, shifting equilibrium. What satisfies us at one time will not satisfy us the next.

We live in times of conflict and uncertainty. But what times have not been so? And such times are great times for lawyers, because conflict and uncertainty are the great subjects of the law. We will not reach an end of them, just as doctors will not reach an end of disease. In every century, in every millennium, we will face the unresolved disease and suffering and conflict that are the human condition on this side of paradise.

But let us be cheerful about it. That means lawyers will never lack for work. And whether it is paying work or volunteer work, whether it is trial work or transactional work, whether it occurs in the courtroom or on the picket lines or in the board room or the committee room or at the legislature, the work will immerse us in the human condition, in the human story. We know by our training and experience as lawyers—and by

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other attorneys think you know about being part of the work force. NEWSFLASH: many first-year associates have never worked in a formal business setting, have never had a secretary or an office, have never even seen hanging files, and have never used a photocopier that requires numbers to be punched in before the blessed thing will work. Most first-year associates are young, right out of school, eager, and probably a little wet behind the ears.

Firms generally try to acclimate first-year associates to the work environment through a half-day orientation on their first day of work. Good idea; poor execution. Rather than try to tell first-years everything they need to know in the first four hours of their careers as practicing attorneys, firms should hold all-day retreats prior to the first day of work.

First-years would arrive at their new firm mid-morning on Saturday or Sunday. (Tell them that dress is casual or they may arrive wearing a tie or high heels.) Give them the usual orientation information. And then let these new, eager attorneys spend the day practicing—and thus learning—everything from how to work fax machines and photocopiers to how to get reimbursed for late-night cab fares home from work.

Every form an associate may need should be put in a binder for future reference; every function the phones can perform should be put on a sheet of paper attached to the phone itself; and every important phone number (car services, restaurants that deliver, security) should be placed on a list somewhere in the associate's office. Someone should be on hand to explain how to fill out the tax forms and medical insurance applications, give advice about whether to participate in the firm's 401K and life insurance plans, and provide general information about compensation, bonuses, and vacation time.

But the firm's support should not stop at the purely professional. As these young lawyers struggle to acclimate to their new jobs, they are also trying to settle into their new lives. Some are decorating the apartments they will rarely see during their first year of practice. Some are trying to learn a new city—from how to get to work every morning, to where to buy groceries, to how to find a decent (cheap) place to eat dinner. Some are dealing with relationships, children, and a host of other personal issues in a new environment.

Remember that these are people who have spent the past three years in school—that wonderful place where all you do is go to class occasionally, hang out with friends, do a little reading around exam time, and watch television. The whole getting-up-early, putting-on-a-suit, and working-all-day thing is new to many. And it is quite hard for some.

Finding a Home

There is much that a firm can do to help ease the first-year associate's transition into her new life. First, big-city firms should help out-of-town associates find apartments. I mean REALLY help. Hire licensed real estate brokers, clip real estate sections, get on the Internet, look in the obituaries for recently vacated apartments. In some cities (New York comes to mind) finding an apartment is such a daunting, difficult task that many associates never really recover from the experience.

One associate, born and raised in the Midwest, told me the story of arriving in the Big Apple a few days after taking the bar exam. She stayed at a hotel while she looked for an apartment with a broker whose name she found in the newspaper. Knowing nothing about New York City apartments, this associate told her broker that she wanted to spend about two to three hundred dollars a month. Not surprisingly, the broker took her to a relatively dangerous area on the upper, upper westside of Manhattan, where she was shown a series of dilapidated, roach-infested, noisy apartments in buildings surrounded by crack dens.

This associate was not naive, but she also realized that she had never seen the apartments of other associates at the firm. Maybe they all lived like this at first? At least until their student loans were paid off?

(You can sleep easy tonight; the story has a happy ending. The associate was fortunate enough to call a friend who told her to keep her head down to avoid stray bullets and to get out of there. Two weeks later, she was comfortably ensconced in a studio apartment—more expensive, of course—six blocks from the firm.)

There are too many stories like this one to recount them all here. The point is that some associates need all kinds of help—from finding apartments, to buying a bed, to figuring out how the public transportation system works. Firms should provide this help through the recruitment coordinator or some other accessible person. Out-of-town associates will arrive in a new city—often alone and knowing no one—before they start their jobs; they need immediate help finding shelter, clothing, and other necessities of life. How much easier it would be if the firm had someone available to help these needy associates before their start dates.

In the end, it is in the best interests of law firms, partners, senior associates, and administrators to do as much as they can to help the fresh recruits who arrive each fall. Though I have no statistics to prove this, common sense tells me that associates who have positive first-year experiences remain at the law firm longer than those who do not. If this intuition is true, then law firms that train first-year associates to become better lawyers and support first-year associates so they may live better lives will keep these young attorneys, who will someday become partners and leaders in the firm. Law, after all, is the study and practice of the rules that regulate society. It makes perfect sense, then, that those new to the law should be given a full understanding of their immediate society and its workings.

From the Bench

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the disposition that led us into law—that everyone has a story and that every case has many stories. We listen, we find patterns, we compare one story with another, we improvise, we shape our law to fit the real-life stories of our time.

We are problem solvers. Our job is to study the conflicts of our time, to place them in the context of the conflicts of other times, and to improvise sensible solutions. That is good work. It is sometimes even noble work. It will always be there for us.

And that is why, to switch from Twain to Dickens, every time will be the worst of times and the best of times for those who practice law.