



1-1-1992

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Recommended Citation

17 Nova L. Rev. 825

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The Care and Feeding of TV Court Critics

Gerald F. Uelmen*

There was a time in America when courtrooms were one of the chief sources of entertainment and amusement. Watching a trial was like going to the theater, and part of the fun was picking up the next day's newspaper to see if the critic sized up the performances the same way you did. This era produced some of the greatest court critics ever. Let me offer some examples:

First, an article that appeared in the *San Francisco Call* on September 29, 1864. It appeared under the headline, "Advice to Witnesses."

Witnesses in the Police Court, who expect to be questioned on the part of the prosecution, should always come prepared to answer the following questions: "Was you there, at the time?" "Did you see it done, and if you did, how do you know?" "City and County of San Francisco?" "You say the defendant struck the plaintiff with a stick? Please state to the Court what kind of a stick it was." "Did it have the bark on, and if so, what kind of bark did it have on?" "Do you consider that such a stick would be just as good with the bark on, as with it off, or vicy versy?" "Why?" "I think you said it occurred in the City and County of San Francisco?" "You don't know anything about this assault and battery, do you?" "You have seen this defendant before, haven't you?" "Well—that's all." "Say: did this occur in the City and County of San Francisco?" The Prosecuting Attorney may mean well enough, but meaning well and doing well are two very different things. His abilities are of the mildest description, and do not fit him for a position like the one he holds, where energy, industry, tact, shrewdness, and some little smattering of law, are indispensable to the proper

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fulfillment of its duties. Criminals leak through his fingers every day like water through a sieve. He affords a great deal less than no assistance to the Judge, who could convict sometimes if the District Attorney would remain silent, or if the law had not hired him at a salary of two hundred and fifty dollars a month to unearth the dark and ominous fact that the "offence was committed in the City and County of San Francisco." The man means well enough, but he don't know how; he makes of the proceedings in behalf of a sacred right and justice in the Police Court, a drivelling farce, and he ought to show his regard for the public welfare by resigning.¹

The young reporter assigned to the Police Court who wrote this article went on to a distinguished literary career. His name was Mark Twain.² One thing that hasn't changed at all since Mark Twain's article was written is the pathological fear of prosecutors that they will forget to ask if the offense occurred in the City and County of San Francisco. In their defense, I must offer the 1872 opinion of the California Supreme Court in *People v. Parks*³ reversing a conviction for robbery on the grounds that, although the prosecution proved the defendant robbed Stroback's saloon, they forgot to prove Stroback's saloon was in Yolo County. Apparently, Stroback's saloon was not notorious enough to apply the doctrine of judicial notice.⁴

Mark Twain and his contemporary court critics recognized no sacred cows. They were just as frank, and just as funny, in reporting proceedings in the Supreme Court as they were in chronicling Police Court cases. Consider, for example, this tribute to Justice Crocker of the California Supreme Court. It also appeared in 1864. It sounds suspiciously like Twain, but there was no by-line attached. After announcing Justice

1. Mark Twain, *Advice to Witnesses*, in CLEMENS OF THE CALL: MARK TWAIN IN SAN FRANCISCO 219 (Edgar M. Branch ed., 1969).

2. Samuel Clemens, better known as Mark Twain, was *the* reporter for the *San Francisco Call* for five months in 1864. As he put it, "[T]here was enough work for one and a little over, but not enough for two . . ." Forty-five years later, he wrote: "It was the only time in my life that I have ever been discharged, and it hurts yet . . ." MARK TWAIN IN ERUPTION 254 (Bernard De Voto ed., 1940).

3. 44 Cal. 105 (1872).

4. Cf. *Swartzwald v. Cooley*, 103 P.2d 580, 588 (Cal. Dist. Ct. App. 1940) (taking judicial notice of where the tide comes in at Laguna Beach).

Crocker's retirement to become chief counsel of the Central Pacific Railroad, the critic continued,

His name will continue to be uttered, if only in derision. When his opinions are cited, counsel will reply apologetically, "That's not the Supreme Court, that's only Crocker." Judges will smile with melancholy good humor, as they whisper to each other on the bench, "That's not law; that must be Crocker." And posterity will point to this sad period in the judicial history of our State, as a convincing illustration of the propositions: that weakness is more pernicious than corruption, that blunders are often worse than crimes; and that speedy injustice is not better than slow justice.⁵

Justice Crocker, incidentally, still holds the California record for judicial productivity. In seven months, he produced 237 opinions, an average of two a day. That's a record no subsequent justice has ever matched, thank God. Only one of those opinions is memorable. In *Donner v. Palmer*,⁶ Justice Crocker struck down a verdict in which the jurors agreed to abide by the flip of a coin, and returned a verdict for the plaintiff when the flip came up "heads." Believe it or not, the juror who flipped the coin was a man named Fortune.⁷ Ever since, *Donner v. Palmer* has been known as the case that struck Fortune off of California juries.

Certainly one of the all-time greats among American critics was H.L. Mencken, who covered the Scopes "monkey trial" for the *Baltimore Sun*. He frequently aimed his acid pen at the courts, as he did in this memorable passage:

The average American judge, as everyone knows, is a mere rabbinical automaton, with no more give and take in his mind than you will find in the mind of a terrier watching a rathole. He converts the law into a series of rubber stamps, and brings them down upon the scalped skulls of the just and unjust alike. The alternative to him, as commonly conceived, is

5. (Alta California), Jan. 6, 1864, at 1.

6. 23 Cal. 40 (1863).

7. *Id.* at 47.

quite as bad—an uplifter in a black robe, eagerly gulping every new brand of Peruna that comes out, and converting his pulpit into a sort of soap box.⁸

Compared to the biting satire of Twain and Mencken, today's lawyers and judges get off easy. But that may soon change, as Court TV and its play-by-play commentators invade the courtrooms of America. The "instant playback" will permit intense scrutiny of courtroom ploys. It's fun to speculate on what this new era may mean to prosecutors, defense lawyers, trial judges and appellate judges.

For prosecutors, the new byword has to be originality. For many years now, prosecutors have been stealing lines from each other, and reusing the same material in their closing arguments until it's threadbare. Veteran defense lawyers and judges, who have to listen to the same routines over and over, have started putting labels on them, and we can expect the voiceover of the court commentators to do the same. As the prosecutor starts into a peroration about why his witnesses were all sleaze-balls, an off-screen voice will say, "Oh, oh. Here comes the 'we can't find racketeering witnesses at Sunday School' shtick. This is the same routine that Tom Dewey used in the prosecution of Waxey Gordon in 1933."⁹ Perhaps trial judges should start sustaining a new type of legal objection. "Objection, Your Honor. This is hackneyed." Or, "Your Honor, I move that be stricken from the record as rank plagiarism."

One court critic collected and published all the derisive names that prosecutors have successfully affixed to criminal defendants in closing arguments.¹⁰ The list is a disappointing one. Most prosecutors seem to favor animal allusions, calling defendants dogs, hogs, hyenas, rats, rattlesnakes, skunks, vultures, wolves and worms. That gets old fast. Televised trials will demand more colorful heights of oratorical splendor. I found an especially good role model in an old Missouri case, where the

8. H.L. Mencken, *American Mercury*, in *THE VINTAGE MENCKEN* 195 (Alistair Cooke ed., 1955).

9. Thomas E. Dewey's closing argument in *United States v. Waxey Gordon* (1933): "I cannot prosecute a case against a crime racketeer with bishops, social leaders, and Sunday School teachers . . . My witnesses were the men with whom Waxey Gordon associated. He knew only scoundrels and jailbait." RICHARD NORTON SMITH, *THOMAS E. DEWEY AND HIS TIMES* 139 (1982).

10. Arthur N. Bishop, *Name-Calling: Defendant Nomenclature in Criminal Trials*, 4 OHIO N.U. L. REV. 38 (1977).

prosecutor told the jury the defendant "ought to be shot through the mouth of a red hot cannon, through a barb wire fence into the jaws of hell," but only after he was "kicked in the pants by a Missouri mule and thrown into a manure pile to rot."¹¹

Prosecutors should also explore greater use of expert witnesses to dramatize what are otherwise tedious and routine trials. Well-trained experts can add considerable drama and suspense to a trial, and are frequently a great way to get around the rules precluding evidence of the defendant's bad character.

A prosecutor cannot call relatives and neighbors who have known the defendant for twenty-five years, and can testify based on personal experience that he is a liar, a cheat and a lazy good-for-nothing who would steal from his own mother. That would be impermissible evidence of bad character.¹² But an expert can be called to testify that the defendant matches all the criteria of the S & L Swindler Syndrome: that is, he lies, he cheats and he steals from his mother.¹³ They might emulate the tactics of a Texas civil lawyer who represented a defendant accused of libeling a neighbor by calling him a son of a bitch. The defense was truth. As his final witness, the lawyer called a tall, lean, sun-tanned gentleman to the stand. In answer to the question, "What is your business or profession?" he testified, "I am an expert judge of sons of bitches. Here in Texas we got a lot of 'em, and my business is knowing how to spot 'em. I can spot one a mile away on a clear day." He was then asked to carefully observe the plaintiff. He looked, turned to the jury, and said, "Gentlemen, he's a son of a bitch if I ever saw one."¹⁴

The creative use of experts will also allow an alternative when the explicitness of criminal trials threatens to drive the ratings of Court TV to X or below. Consider the deft handling of very tricky evidentiary issues in a recent trial:

The Court: Yes, well, this does add some humor to this case, but I'm concerned with the best way to determine whether this photograph can be admitted into evidence. Although it is clearly a photograph of a penis, it could be one that belongs to someone else. I suppose what I can do is order an

11. *State v. Richter*, 36 S.W.2d 954 (Mo. Ct. App. 1931).

12. *E.g.*, FED. R. EVID. 404.

13. *E.g.*, *State v. Lafferty*, 472 A.2d 1275, 1278 n.3 (Conn. 1984) (commenting on admissibility of evidence of compulsive gambler syndrome).

14. Saul Cohen, *A Study in Epithetical Jurisprudence*, 41 L.A. BAR BULL. 374 (1966).

independent examination to compare the defendant's penis to the one shown in the photograph to make sure that we are concerned with the same penis. I realize that such an examination will be somewhat embarrassing, but I have no other choice. Is Court Officer H. here?

Officer H.: Yes, here.

The Court: Mr. H., we have a difficult situation here. It involves the genuineness of this photograph. We are going to have to make a comparison between this photograph and the defendant's penis to make sure we are talking about the same penis. Would you be able to carry that out?

Officer H.: I guess so.

The Court: All right. Please carry out your duty and be prepared to testify before the jury as to whether the penis you observe in the men's room is the same one shown in this photograph, keeping in mind size, texture, quality, and so on. We'll take a brief recess and await word from Mr. H . . .¹⁵

Fortunately, the issue was resolved by stipulation before the deputy had to carry out his assignment. In another case, however, the defendant was not so lucky. On appeal, he offered the following argument:

The Trial Court Erred in Ordering a Medical Examination of Appellant's Penis in his Absence.¹⁶

For defense lawyers, the advent of Court TV will put a premium on careful rehearsal of the defendant. As every defense lawyer knows, your client would be much easier to defend if he weren't sitting next to you in the courtroom looking so damn guilty. Consider the defendant called before the court for arraignment. The judge says, "The charge here is theft of frozen chickens. Are you the defendant, sir?" The defendant answers, "No, sir. I'm the guy who stole the chickens."¹⁷ Or another defendant, asked if he wanted the court to appoint a lawyer to defend him. He responded,

15. RODNEY R. JONES & GERALD F. UELMEN, SUPREME FOLLY 17 (1990).

16. RODNEY R. JONES ET AL., DISORDERLY CONDUCT 128 (1987).

17. *Id.* at 79.

"You don't have to appoint a very good lawyer; I'm going to plead guilty."¹⁸

Careful rehearsal can avoid the embarrassment experienced by the defense lawyer who came to the dramatic climax of the direct examination of his client by asking, "Are you sure you did not enter the 7-11 on 40th and Broadway and hold up the cashier on June 17 of this year?"

His client responded, "I'm pretty sure."¹⁹

As more and more trials include a videotape of the defendant committing the crime, we can expect a new genre of weekly TV series—the best home crime videos. It's been reported that former LAPD Police Chief Darryl Gates has become chief advocate of a new law that would require full identification, registration, and a fifteen day waiting period for all purchasers of video cameras.

The most important procedural move in the defense lawyer's arsenal may be a motion to suppress the videotape. It can be argued that a Miranda-type warning should precede the activation of any video camera. Actually, a similar argument was made in a Canadian case.²⁰ The defendant was arrested by the Royal Canadian Mounted Police and charged with arson in setting forest fires. He agreed to take a lie detector test. He was brought into the room where the polygraph machine was located, but he was not told the room was fitted with a concealed video camera and microphone. While alone, waiting for the test to begin, he looked around the empty room, slid out of his chair, got down on his knees, raised his arms in the air, and said, "Oh God, let me get away with it just this once."

At his trial, the defense lawyer moved to suppress the videotape of his client's prayer on the ground that it violated the Canadian wiretap law, which prohibits the interception of communications by someone other than the person intended to receive them. The prosecutor argued that the law only protected communications to other persons, and God is not a "person" within the meaning of the law. The Court agreed, and the videotape was admitted in evidence.

The trial judge has an easy out as we enter the era of TV Court critics. The trial judge can assume the role of the silent sphinx. Trial judges should carefully practice, in front of a mirror, how to look pensive and judicious, while announcing, "This will require thoughtful consideration. The Court will take the matter under submission. Proceed, Counsel." This strategy can present its own difficulties, however. What to do, for example, when

18. *Id.* at 83.

19. *Id.* at 84.

20. *Regina v. Davie*, 17 C.R.3d 72 (1980).

the lawyers performing for the TV camera have become so obnoxious that they need to be deflated. Ordinarily, a stern announcement that "the court has ruled" will move proceedings along, but if judges are to become masters in the art of never ruling, a new ploy must be found.

Consider the ingenuity of an Arizona justice of the peace in 1908.²¹ This was long before TV cameras were invented, but he was presented with a lawyer who couldn't resist great flights of oratory for even the smallest courtroom audience. The lawyer was U.S. Senator Henry Ashurst, and he was appearing to contest a \$22 plumbing bill on behalf of his client.

Mr. Ashurst: Your Honor, as I approached the trial of this case today, my heart was burdened with crushing and gloomy forebodings. The immense responsibility of my client's welfare bowed me down with apprehensions. A cold fear gripped my heart as I dwelt upon the possibility that, through some oversight or shortcoming of mine, there might ensue dreadful consequences to my client, and I shrank within myself as the ordeal became more imminent. Yet the nearer my uncertain steps brought me to this tribunal of justice, distinguished as it has been for years as the one court of the rugged West where fame attended the wisdom and justice of the decisions of Your Honor, a serene confidence came to my troubled emotions, and the raging waters of tumultuous floods that had surged hotly but a moment before were stilled. Your Honor, I was no longer appalled. I no longer feared the issue in this case. Aye, I reflected that throughout the long years of your administration as a judge, there had grown up here a halo as it were of honor and glory illumining Your Honor's record, eloquent of a fame that will augment with the flight of years and with increasing luster light the pathway of humanity down the ages so long as the heaving billows of the stormy Mediterranean shall beat vainly upon the cliffs of Gibraltar.

Justice Waltron: Sit down, Mr. Ashurst. You can't blow any smoke up this court's ass.

21. JONES & UELMEN, *supra* note 15, at 13-14.

Obviously, Justice Waltron's tactic could not be employed in a televised trial. He would be lambasted by the critics as churlish and lacking in judicial temperament. Judicial temperament was once defined by the great Justice John Marshall as "the ability to look a lawyer straight in the eyes for two hours and not hear a damn word he says."²² Salvation, however, can be found in technology. Television viewers are now completely acclimated to seeing judges, lawyers, witnesses and even presidential candidates with funny wires coming out of their ears and neckties. If equipped with an earpiece, a judge who grows weary of counsel's argument will be able to simply switch channels, and tune in to a baseball game, or some soothing music—whatever is needed to maintain a decorous and dignified smile. The trial judge should remember to occasionally nod and look pensive.

The tuned-out judge who is caught unaware by an objection can simply call for an instant replay, thus avoiding the embarrassment experienced by a public defender whose client sought his replacement:

Defendant: Judge, I want you to appoint me another lawyer.

The Court: And why is that?

Defendant: Because the PD isn't interested in my case.

The Court (to Public

Defender): Do you have any comments on defendant's motion?

Public Defender: I'm sorry, Your Honor, I wasn't listening.²³

But even if a judge is caught with his or her ears tuned to another channel, we can cite the precedent of the Texas case of *Jackson v. State*.²⁴ The Court held that even though the trial judge fell sound asleep during the prosecutor's cross examination of a defense witness, he didn't miss much anyway, so his nap was harmless error.

The avoidance of rulings by trial judges has its limits, though. At some point, of course, a judge will have to announce a ruling. But taking it under submission will permit careful planning of the most dramatic television impact when the ruling is announced. Some judges, however, will forget to ever announce a ruling. That puts counsel in a very awkward position. While you want to coax a ruling from the court, you are consumed by a pathological fear that your reminder will tick off the judge, and the ruling

22. ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 83 (1919).

23. JONES ET AL., *supra* note 16, at 61.

24. 634 S.W.2d 727 (Tex. Ct. Crim. App. 1982); *see also Conviction is Upheld Despite Nap by Judge*, N.Y. TIMES, May 20, 1982, at A22.

that comes will not be the one you were hoping for. A couple lawyers came up with a very creative solution to this dilemma. They hired someone to deliver an anonymous singing telegram to the judge. The message was sung to the tune of "Let it Snow, Let it Snow, Let it Snow":

Oh the age of this case is gallful,
 Your procrastination awful,
 Our impatience we must show,
 Let us know,
 Let us know,
 Let us know.
 Would you finally give the word
 Now we're down on our knees, pretty please?
 And we heard from a little bird
 You'll even add an attorney's fees.
 Oh we've spoken as long as we dare to,
 One final question have we for you,
 Are we shafted, yes or no?
 Let us know,
 Let us know,
 Let us know.²⁵

The problem that Court TV and its critics present for appellate judges is especially difficult. Let's face it. What they do is excruciatingly boring. How can you make the intonation of an appellate opinion into an exciting media event? One answer might be to write appellate opinions in verse that can be set to music. While lacking a musical accompaniment, a number of appellate courts have been experimenting in flights of poetic justice. In *Fisher v. Lowe*,²⁶ for example, the appellant sought to overturn a verdict in favor of a landowner whose tree was grievously damaged when it collided with the defendant's automobile. Here is how the court rendered its decision:

We thought that we would never see
 A suit to compensate a tree.
 A suit whose claim in tort is prest
 Upon a mangled tree's behest;

25. Shafer v. A.A.F.E.S., 667 F. Supp. 414 (N.D. Tex. 1985).

26. 333 N.W.2d 67 (Mich. Ct. App. 1983).

A tree whose battered trunk was prest
 Against a Chevy's crumpled crest;
 A tree that faces each new day
 With bark and limb in disarray;
 A tree that may forever bear
 A lasting need for loving care.
 Flora lovers true we three,
 We must uphold the court's decree.

Another example of judicial versifying comes from a Florida bankruptcy case:

Once upon a midnight dreary, while I pondered weak and weary
 Over many quaint and curious files of chapter seven lore,
 While I nodded nearly napping, suddenly there came a tapping
 As of someone gently rapping, rapping at my chamber door.
 "Tis some debtor," I muttered, "tapping at my chamber door—
 only this and nothing more."
 Ah distinctly I recall, it was in the early fall
 And the file still was small.
 The Code provided I could use it
 If someone tried to substantially abuse it.
 No party asked that it be heard.
 "Sua sponte" whispered a small black bird.
 The bird himself, my only maven, strongly looked to be a raven.
 Upon the words the bird had uttered
 I gazed at all the files cluttered.
 "Sua sponte," I recall, had no meaning, none at all.
 And the cluttered files' sprawl, drove a thought into my brain.
 Eagerly I wished the morrow—vainly I had sought to borrow
 From BAFJA, surcease of sorrow—and an order quick and plain
 That this case would not remain as a source of further pain.
 The procedure, it seemed plain.
 As the case grew older, I perceived I must be bolder
 And must sua sponte act, to determine every fact,
 If primarily consumer debts, are faced,
 Perhaps this case is wrongly placed.
 This is a thought that I must face: Perhaps I should
 dismiss this case.
 I moved sua sponte to dismiss it for I knew I would not miss it.
 The Code said I could, I knew it,

But not exactly how to do it, or perhaps someday I'd rue it.
 I leaped up and struck my gavel
 For the mystery to unravel.
 Could I? Should I? Sua sponte, grant my motion to dismiss?
 While it seemed the thing to do, suddenly I thought of this:
 Looking, looking towards the future and to what there was to see,
 If my motion, it was granted and an appeal came to be,
 Who would be the appellee?
 Surely, it would not be me.
 Who would file, but pray tell me, a learned brief for the appellee?
 The District Judge would not do so,
 At least this much I do know.
 Tell me raven, how to go.
 As I with the ruling wrestled
 In the statute I saw nestled
 A presumption with a flavor clearly in the debtor's favor.
 No evidence had I taken,
 Sua sponte appeared forsaken.
 Now my motions caused me terror,
 A dismissal would be error.
 Upon consideration of §707(b), in anguish, loud I cried
 "The court's sua sponte motion to dismiss under
 § 707(b) is denied."²⁷

To sum up the challenge of Court TV and its critics, prosecutors must become more original, defense lawyers must make more creative objections, trial judges must learn the importance of timing in making their rulings, and appellate judges must offer more entertaining opinions.

Ultimately, we can form an Academy of Televised Trials and present Academy Awards for the best performances. I have my nominations already. For the award for the most original closing argument by a prosecutor, I nominate the following, which was the complete closing argument for the prosecution in a drunk driving case:

Roses are red
 Violets are blue

27. *In re Love*, 61 B.R. 558 (S.D. Fla. 1986).

Point one five
Means drunk to you.²⁸

For the most creative evidentiary objection by a defense lawyer, I nominate this Fresno attorney:

A: Did you observe anything?

B: Yes, we did. When we found the vehicle, we saw several unusual items in the right front floorboard of the vehicle. There was what appeared to be a Molotov cocktail

Counsel: Objection. I'm going to object to that word Molotov cocktail.

Court: What is your legal objection, Counsel?

Counsel: It's inflammatory, Your Honor.²⁹

For the best timing in a ruling by a trial judge, I nominate the judge who conducted a sentencing in a murder case as follows:

Judge: You stand convicted of murder. Do you have anything to say before this court pronounces sentence?

Defendant: As God is my judge, I didn't do it. I'm not guilty.

Judge: He isn't. I am. You did. You are.³⁰

And finally, for the most entertaining farewell address by a retiring appellate judge, I nominate the words of Judge Thurman Arnold, as he left the U.S. Court of Appeals to return to the private practice of law:

I'd rather have to talk to a bunch of damn fools than listen to them.³¹

You may be getting the idea that playing to the TV audience and accommodating the court critics will transform the way we do justice in American courtrooms. You're right. But there is an alternative. It was expressed in rhyme by a poet who had little use for critics. Lord Byron was his name.

28. JONES ET AL., *supra* note 16, at 145.

29. CHARLES M. SEVILLA, *DISORDER IN THE COURT* 44 (1992).

30. JONES & UELMEN, *supra* note 15, at 162-63.

31. *Id.* at 158.

As soon seek roses in December—
Ice in June
Hope constancy in wind,
Or corn in chaff
Believe . . . an epitaph
Or any other thing that's false,
Before you trust in critics.³²

32. GEORGE NOEL GORDON, *ENGLISH BARDS AND SCOTCH REVIEWERS* 75 (1809).