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# FOREWORD

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BY F. LEE BAILEY

Several years ago I was asked by my most important client at the time to find him a fearless, highly skilled lawyer in Connecticut to take the lead in a monstrous case which was then degenerating rapidly. After questioning a number of colleagues to get recommendations, I set an interview with Norman Pattis of New Haven. We met at dinner. At first glance, as he entered the room, I noted a generous pony-tail, patches on the elbows of his sport coat, a shirt suitable for fly-fishing, and a pair of shoes that must have come from L. L. Bean. This was how he dressed for court. In my mind I imposed on him an indictment for “hippiness”, and envisioned great problems in getting my client - who had many of the attributes of a tiger - to even agree to an introduction. Thirty minutes later, the indictment dissolved, I stepped out of the room and called the client: “I have our guy,” I said. “Good,” said the client. “Sign him up!” Thus began an always intriguing and consistently pleasant relationship which has lasted since that day and has, I hope, a long future; I have invited Norm to my 100th birthday party.

We worked together on the monster litigation, and got what I consider to be a good result. Not long after it was concluded, I asked him to handle a tragic case for a friend, wherein a young mother was charged with vehicular manslaughter and driving under the influence

of alcohol resulting from a crash which killed two of her children, and nearly killed her. He took the case to trial (as described in the book) and turned in a masterful job.

Norman has an exquisite command of the written word, and his prose in this book soars and swoops consistently. For those whose English skills are less than extraordinary, the book is worth reading regardless of its content, just to get the benefit of writing at its best. I have written several million words myself, and always felt that I had a pretty good handle on the King's English. Pattis sent me to the dictionary six times in less than 200 pages, read carefully in just over five hours on a Sunday. Most of these trips were worthwhile, although Pattis flirts with the pedantic when he uses "quotidian", when "mundane" will work just as well or better.

It is said that a lawyer who will represent the poor, the downtrodden, the hated and the ugly, against the juggernaut of the state, must have balls of a lion. Having tried my first case in 1954, and having tracked the very best trial lawyers since that time so I could learn from them, I must endorse the description above. But such a lawyer must also have the unflagging stamina of a marathon runner, the calm under fire of a David who has but one chance to bring down Goliath, and a simmering rage against the law and its minions that often lumber along almost mindlessly, crushing the good with the evil. Such a warrior must also have the most rare among the skills of an advocate: a consummate command of the spoken word. Pattis stands very, very tall in this respect. He is one of the best speakers I have ever encountered.

He has the arsenal which best befits a gunslinger: a Colt .44, a 30-30 deer rifle and a Bowie knife. These are all in the form of whiplash phrases and sentences so necessary to the destruction of a lying witness, with which our courtrooms are well-populated.

This is not to say that Norman Pattis is perfect. His massive indictment of all judges and prosecutors as ranging from lazy and meek to the devil incarnate is overdone. As one who has had a handle in some form in court cases in every state of the United States but Montana, I have found most of our judges to be pretty good; they would be better if we paid them a realistic wage. True, several of them were ugly and cruel people inside and out, and should be publicly defrocked and thrown bodily off the bench. And while too many prosecutors take unto themselves a license to massage the truth in order to win the case, I have met a goodly number who had some sense of “doing the right thing”.

Pattis is seriously wrong-headed with nearly all of what he has to say about the Simpson case - but I will fix that. He makes good inroads into some of the things that are wrongfully done to minimal sex-offenders, but doesn't complete the circle. True pedophiles need some sorts of controls, because their lust can and often does degenerate into murder and rape (in that order). On the other hand, awarding the next slot on the U. S. Supreme Court to a trial lawyer who has lived in the pit and on the street is a very good idea: President Obama and Attorney General Holder, please take note.

This is an important book. For all who contemplate or are engaged in the study of law, it should be required reading. Even those students who plan to hide out in the comfort of the nooks and garrets of some behemoth law firm, insulated from the hurly-burly of our courts, need a solid glimpse of what really goes on before they write their briefs whose purpose is to crush some “little guy” opponent. It is essential for these “quiet ones” to realize that the Pattis type is a vanishing breed, slowly being crushed by courts at the behest of prosecutors who have been given way too much power by lawmakers. There are no other real hotshots,

to my knowledge, coming down the pike. Not for many, many years has a top-ranked trial lawyer, possessed of a superb vocabulary, ripped open the innards of a system which has multitudinous shortcomings and a goodly number of sins festering in its underbelly. Judges who are offended, and prosecutors and police who are outraged, may seek revenge. They should be careful. This horse can kick and bite.

Among those of us who have sallied forth into the breach of the well of the court, broadsword and scimitar firmly in hand, the litmus test for the really top-shelf lawyers who occupy these halls is simply this: If I were in some sort of serious trouble, who would I choose? Who would I trust to give me the very best representation, shrewdly and fearlessly. This is where the rubber meets the road.

I have long maintained such a list. It is rather short now, since a number of my esteemed colleagues who did *not* resolve to live to be 100 have passed along in recent years. But the list, however brief, remains. The youngest, but by no means the least, of the names on that list is Norman Pattis.

F. Lee Bailey

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# INTRODUCTION

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BY GERRY SPENCE

To understand the nefarious carryings-on of the justice system you must ignore as irrelevant the professors who peddle to unwary law students and to the lobotomized bar ideas that are as archaic as the medical profession's leaches of old. You must uniformly disbelieve as naked fraud the promises of politicians who holler and rot as they swim in their own political excrement. You must irreverently question the pronouncements of judges who pound their judicial breasts like drummers on soggy drums and demand the nation to dance to their doleful tunes, and finally you must read this book written by a man who knows the justice system, because he has not only lived in it for many years but examined it, absorbed it, tested it, peered at it like a pathologist examining a diseased spleen, confronted it, challenged it to be real and honest, a man who has refused to accept its mythology, who has been disappointed by the system, amazed at its deficiencies, disgusted by its lack of human compassion, confounded at its hypocrisy, amused by its folly and disappointed by its failure to respond to live people instead of dead money.

Pattis is one of the best, a genuine trial lawyer, who has labored and wept and hoped and skillfully fought just battles in these temples where justice is said to reside, and who, over these pages, reports his findings on certain questions: Is this system even marginally adequate to protect

the revered rights of a free people? Is it sufficient to admit it has faults, but with a shrug, acknowledge it is a human institution and, as such, it will suffer its own pathology? At last, is it permissible to offer one's lips to that worn out aphorism holding that, despite its faults, it is the best system in the world, and thereby, having made our confession of its deficiencies, to bounce blithely and blindly along, decade after decade, with a judiciary that has betrayed the people's trust? So is the justice system in this country broken?

Well, yes.

Do we care?

We are lied to so thoroughly and skillfully that we don't appreciate how sick the system is until we must face it ourselves, until we look for the few lawyers and judges who understand it and who, if they understand it, care enough or are brave enough to expose it. We must not undress it, for if we do we may be approaching heresy considering the system's demand that we be ever reverential in its face – sort of like the maxim that forbids publically condemning at his funeral the villainous dead lying in his open coffin. Lawyers are taught they must respect judges some of whom are not entitled to respect, even as members of the species. Lawyers are charged with the duty to bow courteously to an opponent no matter that he is a retched cur and a blight on the profession. Lawyers are required to respect the institution of the court despite that in the hands of unfettered and ignorant power it produces pain and injustice that would occasion any honest person to rise up in loathing and horror.

I am reasonably fond of the polemic I have just written. But I like the facts and the examples, the elegant prose, the tough and intelligent insights and stories of Mr. Pattis better. We yearn for someone to tell

us the truth. Please do not lie to me any more. Please do not defraud me again. Please do not promise me justice when, in most cases, it is available only for those with money. Please do not turn untrained lawyers loose in the courtrooms to fight for the accused, public defenders, who have a hundred cases and who are given neither the time nor the facilities to prepare for even one, and who are forced to join in the nauseating games being played in every jurisdiction in America where clients are pled guilty to crimes they did not commit or who possess valid defenses against the charges—all of which is performed in the name of due process but proves to be little more than the nation's barefaced lie proclaiming, without embarrassment, that there is liberty and justice for all.

Mr. Pattis does not write with such dripping vehemence. He is far too able and gracious to do so. But what he writes in well-balanced, well nourished prose is true. The courts belong to us. They are not the property of judges many of whom sit on high because they suffer a latent and virulent lust for judging others. The courts are not the property of mediocre lawyers, now judges, who could not otherwise make a go of the devilish demands of a private practice. The courts do not belong to the politicians who infect our hoped-for wholesomeness of the judiciary with the pernicious political agendas of those who appoint them to these scared posts. The courts belong to the people. The function of our courts is to keep presidents and congressmen and corporations contaminated with greed for money and power from destroying our dreams of a more fulfilling life and from denying justice over the broken rights and bodies of the people. The courts are diseased. Justice has become an empty word. The people see themselves as helpless. Pattis tells us we must take the courts back. He proves his case herein.

And, now what? Well, let me say it: It got this way because of you. It will remain in this devilish condition as long as you are willing to endure it. When you finish this book you will have been put on what the law calls “inquiry notice.” You will have been fully advised, enough so that you must inquire further. The condition Pattis describes will become terminal if you do nothing, and all the while we will hear the same blaring rhetoric about the beauty of our court system. But you ought not care. The system only fails those who do not have the means. At least it fails only those who come before it seeking the promise of justice or who are dragged before it in cuffs and chains. That will not be you, of course. Not ever. That will not be your child or loved one.

No. Not ever.

Gerry Spence



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# PREFACE

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Government amazes me; the state terrifies. Try as I might, the sense of it all eludes me. We might not have been born free, but the chains we routinely accept are heavy weights. I rage against them blindly and without real hope of lasting victory. I rage against them because I am not prepared to die a servant of strangers. I rage against them and am therefore a trial lawyer. I defend people against the monsters we create.

The German philosopher Immanuel Kant once wrote that two things filled him with awe: the starry heavens above, and the moral law within. Let me add a third source of wonder: the fact that perfect strangers acquire not just power, but the right, to tell others how to live. This third miracle is government. It is a miracle that can be used for good or ill.

How good is American government? Oh, I know the platitudes. We are the land of the free. We are a city on a hill. We are a beacon to the world. Why, everything is just fine and dandy. God Bless America, we sing. And we mean it, too, at least most of the time.

But I wonder how many of us really enjoy the liberty we proclaim on the Fourth of July? When I read about a man and his family being evicted from their home because they can't pay their mortgage, freedom rings a little hollow. When I hear about high unemployment, lack of health care, schools that fail, and then I read about corporate bail-

outs and the lifestyles of the rich and famous, I can't help but wonder whether there are at least two Americas. There is the daylight dream realized by the elite, and then there is the waking nightmare of the great mass of folks struggling in quiet desperation. Where, I wonder, do these two worlds even meet? Do they ever meet?

The polling place is one place where Americans have a voice. But it is not much of a voice. Although Barack Obama mobilized a lot of new voters and promised change, the landscape doesn't look much different a couple of years after his election. The rich are getting richer; the poor remain poor; and the same old elites are in charge of the courts, our corporations and our public institutions. Plenty of folks are looking for more radical change. They are looking for hope. They are looking for justice, whether that be social justice, criminal justice, civil justice, or economic justice.

We are a court-watching people. Turn the television on in the evening and the screen glows with images of police officers solving crimes. Courtroom dramas are the stuff of daily news. Tongues wag about the doings in our courts. Why are we so preoccupied with the courts?

We are transfixed because we believe that it is in a courtroom that we can be heard. We expect juries to be composed of people just like us. It is in a jury trial that we expect the miracle of government to be made plain and transparent to all Americans. If each of us can serve on a jury, if each of us truly has access to a courtroom, then each of us can redeem the promise of American life by seeking justice. The courts are the engine of democracy, the ancient Athenian forum brought to life in twenty-first century form. At least that is my vision of what the courts should be.

The sad reality is that what goes on in a courtroom is a long way from fulfilling the dream of civic participation in the broadest and most significant issues of the day. The courts are drifting out of control. Lawyers and judges, armed with an arcane vocabulary and near magical powers, can summon us into a courtroom and then make a mockery of our dreams for autonomy and civic responsibility. The courts are out of control, and unless we take them back, this most accessible form of self-government and regulation of government conduct will become a closed and cloistered world, as far removed from the lives of ordinary Americans as the doings in a corporate boardroom or the shenanigans in a Senator's suite on Capitol Hill.

There's time to take back the courts, but just barely. If we want to regain control of how justice is administered and of the shape of our day to day lives, whether it be whom we love, how we live, where we work, and to whom we are accountable, we must act now. Things are far worse than the rhetoric we use to describe our lives acknowledges. If you want to provoke change, you must demand answers and insist on transparency.

I am a trial lawyer. I go to court almost every day and fight for people. Most of my cases involve a fight with the government. Either a client has been charged with a crime and has hired me to fight for his life and liberty, or, in some cases, I pick the fight with a government employee, filing a civil suit on behalf of an ordinary man or woman who believes that the government has abused them. I have issues with authority. Sometimes I represent individuals in private disputes; these affairs are usually tense and difficult. A man may be fighting to see his children, or someone might sue the woman who falsely accused him of exposing himself to her child.

I am a warrior and I am bold enough to assert here that I fight as well as any lawyer alive. When I pick up a newspaper in the morning and learn of a new conflict or controversy, some part of me always wishes that I had the case in question. Why would someone go elsewhere, I wonder? It says a lot about my ego, I suppose, that I genuinely believe this. As I worked on this book, Julian Assange, identified as the founder of WikiLeaks, was taken into custody in Great Britain. All at once, I was filled with longing to represent him. I suppose I am lucky; I have found my place in the world. I am on David's side in every fight; there are Goliaths everywhere in need of slaying. I have a pocket full of stones and a sharp aim. I love the feeling when the giant stumbles and falls. The blood of tyrants nurtures liberty.

I make no apologies for my role or attitude. I've made my share of friends, and more than my share of enemies. But that is as it should be with a life well lived. A group of people marching lockstep is quickly hypnotized by the cadence of uniformity. A government unchallenged by those it governs becomes arrogant and haughty. Whether we are the product of creation or evolution, I am inspired by the thought that we are all equal and that no person is the sum of his worst moments. I am the last friend of the friendless, a warrior for the despised, a thorn in the side of the popular and powerful. I am hated until I am needed, and then I am the last hope of the hopeless. I am, I repeat again, a trial lawyer, and I intend to die one, hopefully in a courtroom, breathing my last bits of fire into the cold face of an autocrat.

This book is a series of snapshots of things I have seen in court. These sketches of cases, controversies and events won't find their way onto a scholar's shelf. Don't expect a design for a better world. Power often justifies itself by saying to the critic: "I am necessary. Design a

better system or forfeit the right to speak.” Says who? Sometimes it is enough to speak. I don’t recall Jesus of Nazareth penning any great manifestos about a better government before he was nailed to a cross. It was enough for him to proclaim that the Kingdom of God was at hand: this both got him killed and kept us scratching our heads now for two thousand years. It is enough, I tell you, to look the Devil in the eye and demand simply that he blink.

Some of the material in this book first appeared in the form of columns printed in the Connecticut Law Tribune, for which I have written a weekly column for the past decade. I’ve changed some of these columns somewhat, trying to eliminate what are now anachronisms, and from time to time correcting errors of fact or omission that I made in the mad scramble to write a weekly column. A special thanks to the good folks at American Lawyers Media for permission to use the material here. Other portions of this book have appeared on various blog pages I have written for the past five years. I try to write something daily at [www.pattisblog.com](http://www.pattisblog.com), but some days I am simply too swamped to opine. A busy law practice can do that do to even the most opinionated man. I’ve changed most of the names of former clients in this book, unless their case has already received so much attention as to cross the threshold from routine to notorious. And I’ve disclosed no confidences here. I may from time to time engage in poetic license to reflect a client’s position or how the client was perceived. Those looking to find fault with this technique can have the satisfaction of doing so. I learned long ago that peck sniffs are a constant in this life. Sniff away.

“More light, less heat,” a judge once told me as I argued heart and soul in favor of just what I can’t recall. The judge won’t like this book: it is heat; the fire that burns my clients more often than not in places

where light should shine. Consider this book a quick diagnostic tour of our palaces of justice. Most of you don't visit courtrooms daily. I do. This is what I see and, I am telling you, the courts are failing. Read this, look for yourself, then together let's find a better way to do justice.

The book is intended to comfort the afflicted and to afflict the comfortable. It is an invitation to walk in the shadow of darkness and death, only to find the courage that comes of honest despair. I invite you to travel along, and to look for your own pebble or stone to throw against the glass towers of the high and mighty. Come walk with me down a rebel's lane. The journey, however short or long it may be, begins not with a single step, but with the turning of this page ...

# WHERE ARE WE?

Perhaps you've lost your job, or maybe your home is in foreclosure. Maybe you're one of the lucky few who made it through tough economic times more or less in one piece. You might even be a banker who mortgaged the nation's future in a fraud, failed, and then got a government-backed bailout. Whoever you are, odds are you sit up from time to time and wonder whether the rhetoric of the American dream really and truly matches the reality of your life. Did "we the people" really bargain for what amounts to chaos? Many, if not most, Americans feel as though the American dream has been betrayed. Some seek to reclaim it through religion, others through political firestorms, and others still have opted out entirely, content to find what stability and comfort they can in the security of private associations.

But there is still one place where we the people can speak loudly and clearly. That is in a courtroom. Criminal cases and many civil cases are decided daily in the courts by ordinary Americans sitting on juries. The jury system is at risk, however. We are emasculating the jury system with lies, legal doctrines and biases that are making trials less a chance for the people to decide cases and controversies than a privileged arena for judges and the well-heeled to decide what justice requires in ever broader areas of American life. I say it's time to take back the courtrooms, one jury at a time. Doing so requires a little planning and insight into what goes on in a courtroom, so I am offering

this small book, based largely on my own experiences in the past couple of decades, as a tool you can use to reclaim a sense of power.

Consider the following: what would you do if you were standing at a street corner waiting for the light to change, and two young men walked up to you, pulled a gun and ordered you to produce your wallet? I suspect most of us would comply. We would give up our wallet, although not our sense of outrage, out of a sense of self-preservation. The armed men have the power to compel us to do their will. We may not know the men at all, but force speaks.

But suppose these two young men were wearing the uniforms of our local police department? We see on their shoulder a patch naming the department. They have a nameplate above their breast pocket announcing their last name. They appear to be clean cut and reasonably well-spoken.

Although we would still be alarmed and unhappy to be looking down the barrel of their guns, we would comply with the command to produce our wallet. At some level, we would accept that these men had not just the power to compel us to do their will, but also that the police officers had the right to compel us to act.

In the case of the two young men at the street corner, we comply with their show of force because they have the apparent power to cause us harm. We comply with the police for similar reasons, but there is more to their show of force: we acknowledge their authority to use force. The difference between mere power and authority is a sense of legitimacy. We say of the state that it has a monopoly on the legitimate use of force.

But we say far more than that in the United States. We say that authority is exercised in our name, in the name of We the People. The Preamble to the federal Constitution begins with those words. Our Bill



of Rights guarantees us rights that the government is not supposed to be able to trample upon. These rights are not self-enforcing, however. If they are to mean anything at all, we the people must have a place where we can go to make government listen, and to hold government accountable. It's not enough to vote every couple of years, especially if all the men and women running for office start to look and sound the same. We the people need a place to turn to be heard in the day-to-day matters of importance to us in our communities. I say that the courts can be and should be such a place.

In a healthy republic, we would say that the police officer acted in our name when he pulled a gun to stop and question someone. We have authorized his action in a way we never would the drug lords. But my sense is that we are a long way from healthy as a society. We have permitted police officers to become as unaccountable as the giant corporations they protect. When a banker comes to take our home on behalf of an investor betting against our success, the banker is often accompanied by a police officer. Who authorized this turning of our guns against ourselves? I did not. Did you?

Ordinary Americans should be able to turn to the courts for relief. We should be able to make our case for justice in front of an ordinary jury of our peers. We ought to be able to say to the corporation that fouling our waters creates an obligation to clean them, that being too big to fail means that you must ensure we succeed. We ought to be able to say to a police officer that using high voltage to prod us like cattle from one spot to another is wrong. Juries should be able to say to judge, prosecutor and lawmaker that some laws don't make sense.

But the courts are out of control and adrift just now. Judges have assumed powers in the name of the people that we have never given

them. Jurors are lied to and misled. Lawmakers refuse to be accountable for the consequences of what they do in the courts. Lawyers grow fat, sassy and increasingly disengaged from the pursuit of justice. Whether in civil or criminal court, the pursuit of justice looks more and more like a game played by hidden rules. All this and more is done in the name of you the people. What do you say we do something about it, you and I?

The first step in reclaiming the courts is understanding that a courtroom is a place of public terror. It is where strangers face one another in contests that often determine what becomes of them and their fortunes. The courtroom is the place in our society where we try to transform naked power into authority. Force is applied in a courtroom, and that force is supposed to be the people's force, force applied in your name. If you are unhappy with what you see taking place in the courtrooms of this nation, you should be as outraged as you would be if you saw your church desecrated or your home invaded by strangers.

Most of our ideas about justice and public life come from Greece and Rome. The Roman orator Cicero once wrote that a republic is not just any collection of human beings united together; a republic is a group of people bound together by common interests and a shared conception of right, or justice. In the United States, we claim the Constitution is the document reflecting our shared sense of right. The Constitution is not a mere contract binding strangers together in a common enterprise. Rather, the Constitution is a shared commitment creating a community.

But who decides what the Constitution says or what it means? What role do the people have in defining and redefining common visions uniting strangers under law? Did we the people really rebel against a distant overlord, declare our independence, create a new Constitution

and then decide to walk away from that creation, leaving it in the hands of others to interpret?

We certainly behave that way. Would anyone today really protest over a tax on tea or coffee? I'm not talking about the polite sort of water cooler protesting that takes place at work. I'm talking about the sort of protest that inspired men to dump tea into Boston Harbor in defiance of British power.

I am not suggesting that a social revolution will solve the problems confronting us. The twentieth century was among the most violent centuries in history because one utopian vision after another was set loose on ordinary people in the name of the good. In each case, the utopia became a living hell. It did so because of what I call the Rule of the Eleventh Man. It works something like this.

Put a group of ten people together in a room for a while. Leave them alone. Soon enough, a group will form, with a common sense of identity and some sense of pecking order. In no time at all, they will come to think of themselves as sharing something, even if they cannot name what it is that is shared.

Now, let an eleventh man walk in after this group has taken shape. Try as he might, the eleventh man will not quite fit in. The group has now become large enough, complex enough, that there are insiders and outsiders. To protect what they have in common, the group will turn on the eleventh man. He is the outcast, the heretic. He'll be ostracized, perhaps locked away or even killed, depending on the stakes. Every utopia becomes a living hell to the outsider. The last thing we need is another utopia.

The courts can serve as a means of leveling the playing field between insider and outsider in all spheres of life. But to do that, jurors

and citizens appearing in the courtrooms of this nation need to do less bowing and scraping before a judge. Every time I see a court open session and hear a marshal command all to rise as the judge enters the room, some part of me dies. How has it come to pass that in a republic we treat judges like kings? What sorts of pompous asses require we the people to refer to them as “your honor”? Judges ought to stand as we the people enter the room; they serve the community.

So here is the first thing you can do to recapture the courts: stop pretending that judges are divine or semi-divine oracles dispensing wisdom from the bench. They put their shoes on the same way you do; they only choose to dress funny to create a sense of distance between themselves and all others in the courtroom. A judge is entitled to decent respect, to be sure; but no more respect than is due the man or woman accused of a crime, or seeking compensation for an injury. We have no priestly caste from which judges are drawn. Anyone can become a judge in this country. You can become a judge. In fact, you are a judge of what goes on in our courtrooms. I wonder what would happen if you went to a courtroom just to watch the proceedings, to let the judge know that the people are present. Instead of standing as the judge enters, remain seated. When the marshal orders you to stand, ask him, “Why? What law requires this?” He will not be able to recite such a law because there is none. But odds are he will ask you to leave the court. Indeed, the judge may order you to do so. Why, again? You have a First Amendment right to attend court proceedings; no legal duty requires you to stand when the judge enters. I predict that if this small symbolic step were to take place in courtrooms throughout the country day by day, it would be as symbolic a gesture as dumping tea in Boston Harbor. Do you care enough about your liberty to take this small step?

What good does all this do? Aren't there bigger issues, such as racial justice, insane drug laws, corporations that avoid accountability, the rape of the Earth? How will these little steps change anything? In and of themselves, these steps change nothing. But what they signify is a change in attitude, and that is where revolutionary change begins.

There's no use pretending that when the colonists arrived on the shores of North America, they arrived on an empty continent with divine blessing to build a city on a hill for all the world to admire. There were native Americans here. Many of them died when exposed to diseases brought to these shores from Europe. Others were killed fighting to protect a way of life threatened by an invading people. There was no state of nature extant on our shores, no blank slate on which men and women could confront one another without the restraining influence of law and then decide what rules would best govern their affairs. Yet theories about the state of nature and the formation of civil society are powerful means of explaining how authority is distributed and what justice requires. So let's pretend, shall we, that we live in a state of nature; there is no government to protect us from one another. It's a jungle out there. The strong consume the weak. That doesn't sound like a fantasy? It sounds real? That's all the more reason to press on.

I want to end this chapter where I began it. What makes a cop different than a gangbanger when you are looking down the barrel of a stranger's gun? The difference is that the police officer's show of force is legitimate because he is said to be acting with authority, he is said to be acting in our name. The gangbanger, by contrast, demonstrates mere power; his use of force reflects a private purpose we do not share.

Social contract theory explains how a government acquires legitimacy. In the absence of any government, people are said to live in

a state of nature. To acquire security and the means to accomplish other common purposes, people in the state of nature give up natural liberty in exchange for the security provided by the state. The social contract they form authorizes the state to act on behalf of all of them to establish common norms and to enforce these norms with force if necessary. What is important about this contract is that it makes legitimacy flow from consent of the governed. Consent is the basis of authority in a democratic society.

Tell me, did you consent to the decision to bail out Wall Street tycoons while ordinary Americans lost their homes to foreclosure? I sure as hell did not. My congresswoman voted in favor of doing this, but she didn't ask me. I'm supposed to sit tight and bide my time until the next election to signify my approval or disapproval of this Welfare for Wall Street scam. From where I sit, however, the bailouts look a lot like behavior in the state of nature. Rich bankers get their powerful friends to screw little people without either power or wealth. It is enough to make me want to holler.

I propose the following test to evaluate a policy measure or law. If I were on the short end of the law's stick, would I think the law fair? If so, then the law is just; if not, the law is not fair. I'm not the person who first conceived this theory. John Rawls, a Harvard professor, did so almost fifty years ago in an essay called "Justice as Fairness." He devoted a long academic career to defending the idea, eventually defending it in his longer book, *A Theory of Justice*.

Let's use this notion of justice as fairness as the touchstone for the following analysis of our courts and legal system. I encourage you to adopt the standpoint of a person in the state of nature. You know only the general shape and structure of our society: you know there

are people of color, bankers, athletes, judges, single mothers. But in the state of nature you just don't know what role you will be assigned in society. Will you be lucky, and be an athlete of incredible skill and grace? Or will you be unlucky, and find yourself mentally ill, without family and friends to support you? How fair is life when seen from the bottom of the heap?

I've been going to court almost every day for almost 20 years, representing people on the short end of the stick. I once represented a prisoner beaten by guards in a failed escape attempt. I once represented a frail old woman who was roughed up by police officers as she watched them arrest her son in her own home. I have represented men merely present when bad acts occurred but charged now as coconspirators in crimes that require they be locked away for a lifetime. I've learned up close and personal the extent to which power will go to protect its own. I've learned that for little people, justice isn't fairness. Clarence Darrow perhaps got it right: there is no such thing as justice inside or out of court.

But I cannot give up longing for justice. Neither, I suspect, can you. You want a way to fight back against what sickens you. It's not enough to sit back and wait for the next election cycle when you will be given the meaningless choice between Tweedledee and Tweddledum as candidates for high office. We live our lives in the here and now. We want ways to affect the world around us today, not two years from today, assuming the next candidate for whom we vote has the courage of whatever convictions our politics make it safe for him to utter.

My hunch is that increasing numbers of Americans look at what goes on in a courtroom the way strangers might view gangbanging men with guns: strangers, making up rules as they go along, extracting

things from others with power and fear. We are becoming strangers in our own courts. I say it's time we take them back.

I want to tell you what I see in the courts. I want to tell you what I see and ask for your help making it better. I believe the courts belong to the people but that judges, prosecutors and defense lawyers are taking the courts away, bit by bit. What follows are observations in no particular order. These are things that I have seen; things that happened and continue to happen in your name. Do you care enough to demand change?