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SPEECH

**EVERYTHING YOU ALWAYS WANTED TO KNOW
ABOUT JUDGES BUT WERE AFRAID TO ASK***

ALEXANDER M. SANDERS, JR.**

In memory of the late Julius B. "Bubba" Ness, our esteemed former Chief Justice, I think I will begin with a poem. (Bubba used to severely chastise me for including poems in my opinions.)

When I was young and bold and strong,
Oh, right was right, and wrong was wrong!
My plume on high, my flag unfurled,
I rode away to right the world.
"Come out, you dogs, and fight!" said I,
And wept there was but once to die.

But I am old; and good and bad
Are woven in a crazy plaid.
I sit and say, "The world is so;
And he is wise who lets it go."¹

* Patti Goff, my secretary, and Deborah Neese, my former law clerk, are largely responsible for my being able to write this article. They are, of course, exclusively responsible for any errors it may contain. Versions of this article in the form of speeches have been delivered to a number of different audiences, ranging from the Fourth Circuit Judicial Conference to the Past Presidents of the American Bar Association to the Alaska Bar. For earlier versions of this speech, see Alex Sanders, *A Judge's Swan Song*, S.C. LAW., Nov.-Dec. 1992, at 37 and Alex Sanders, *A Judge's Swan Song*, A.B.A. JUDGES J., Summer 1994, at 23.

Despite the fact I was a judge, sworn to uphold the law, I have shamelessly adopted as my own the thoughts and, to some extent, the words of Martin Luther King, Jr., Truman Capote, Justice Benjamin Cardozo, Justice Felix Frankfurter, Justice Antonin Scalia, Louis Nizer, Gloria Steinham, Pope Brock, Jared Carter, Lawrence Grey, Karl Llewellyn, James Harvey Robinson, James Hay, Garrison Keillor, *The New Yorker Magazine*, *The New York Times*, the *Battle Hymn of the Republic*, John Mortimer, James Joyce, Clifford Irving, Tom Robbins, Kurt Vonnegut, Tom Bergin, Cal Woodard, George Steadman, Lefty Gomez, Ulysses, and my daddy.

In the preface to his book, *Six Great Ideas*, Mortimer Adler said: "It is with the kind of piety that Confucius thought should be accorded our ancestors for their contribution to our being that I look upon the sources of this book." MORTIMER J. ADLER, *SIX GREAT IDEAS* ix (1981). This is precisely how I look upon legal philosophers, legal historians, lawyers, and judges—the sources of this paper.

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1. DOROTHY PARKER, *The Veteran*, in *THE PORTABLE DOROTHY PARKER* 101, 101 (1976).

A lot has happened to me since I became a lawyer thirty-five years ago. As Truman Capote said, "That's all blood under the bridge."² I was a trial lawyer for more than twenty years before I ascended to the lofty office in which, until 1992, I was so safely ensconced. Having abandoned that office and left the bench, I feel a certain latitude in being completely candid—in the words of Martin Luther King, Jr., "Free at last! Free at last!"³

The name of this speech is *Everything You Always Wanted to Know about Judges but Were Afraid to Ask*. My format will be a simple question-and-answer period. Because I was an appellate judge, I will supply both the questions and the answers. Old habits die hard. I am sure you have had the experience.

I was, of course, a state judge. The first question is in honor of the federal judiciary, before whom we all have practiced, with whom we are all intimately familiar, and whom we all know and love.

Question One: What is the difference between a federal judge and a state court judge?

A state court judge has to work twice as hard and be twice as smart to get half the respect of a federal judge. Fortunately, this task is not difficult.

How many federal judges does it take to change a light bulb? One, he holds the bulb and the universe revolves around him. But, the opinion the typical federal judge has of himself may not be an altogether bad thing. It is, I suppose, better than believing in no God at all.

The prayer of a federal judge reads: "Lord, deliver me from the sin of intellectual arrogance—which, for your information, means"

Question Two: What is the difference between a trial judge and an appellate judge?

Tom Bergin, a professor at the University of Virginia, explains the difference between appellate and trial judges this way: "Judges are like dogs. They are okay one-on-one," he says, "but they are dangerous in a pack."⁴ The animal analogy that I like best is about judges being like monkeys swinging on a vine. The vine is attached at the top, but the monkeys are free to swing right and left, even around and around, at their choice. However, the vine is always attached so the monkeys

2. Although I have been quoting these words from Truman Capote for years, I have never been able to find a source for the quote.

3. MARTIN LUTHER KING, JR., AN ADDRESS AT MARCH ON WASHINGTON (Aug. 28, 1963), reprinted in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 536 (William Safire ed., 1997).

4. Tom Bergin, Lecture at the University of Virginia Graduate Program for Judges (summer 1988).

do not jump around randomly.⁵

To extend this analogy, trial court judges, not appellate judges, are at the top of the vine, closer to the point of attachment and closer to the source of law. Depending on your point of view, the source may be the common law, the Constitution, Congress, the Legislature, or even God. Nevertheless, trial judges, not appellate judges, are closer to the source of law, whatever that source may be. However, because trial judges are at the top of the vine, they are less able to influence the vine's swing. Judges on courts of last resort are at the bottom of the vine, doing most of the free swinging.

I, myself, have always been an intermediate monkey. This position has been my place in the greater scheme of things, and I have become fairly reconciled to it. I have taken comfort in something they say in the Caribbean. "The higher the monkey climbs, the more he exposes himself." But, do not think appellate judges are utterly ignorant of what goes on in the trial courts—up there at the top of the vine. After all, we read the transcripts (or rather, we sometimes read some parts of some of the transcripts). Listen to this actual transcript which came across my desk just before I left the bench:

Trial Judge: "Do you want to say anything before I sentence you?"

Defendant: "Yeah. I want you to appoint me another lawyer."

Trial Judge: "What's wrong with the lawyer you have?"

Defendant: "He doesn't listen to anything I say."

Trial Judge: "What about that, counselor?"

Public Defender: "I'm sorry, Judge. I wasn't listening."⁶

Question Three: What does a judge do, anyway?

The United States Supreme Court has seriously misled the public as to the function of a judge. Despite the textbook model of a democracy, democratic institutions strive not for majorities but for consensus and, if possible, for unanimity. If you do not believe that, watch Congress on C-SPAN. Almost everything is worked out by those delicate compromises so vital to the legislative process. Nothing is ever decided by a one-vote majority. The same is true of legislatures. Why? Because politicians, from Henry Clay to Bill Clinton, understand that to decide an important question by a close vote portends instability, if not chaos. After all, a few votes, one way or the other, can usually be changed. At the very least, that possibility is always the hope which springs eternal.

Some courts also understand this potential for instability. The United States Supreme Court, on the other hand, regularly decides cases by votes of five to four

5. Calvin Woodard, Lecture at the University of Virginia Graduate Program for Judges (summer 1988).

6. See RODNEY R. JONES ET AL., *DISORDERLY CONDUCT* 61 (1987).
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and, worse, three to two to four. Instability in the law, and even chaos in the streets, is often the result. I refer, of course, to those chaotic, sometimes even violent, confrontations which are occurring across America in connection with the abortion issue.

A more mundane example is the recent decision of the United States Supreme Court in *Barnes v. Glen Theater, Inc.*,⁷ also known as *Barnes v. Kitty Kat Lounge*. After great agonizing, the Court finally decided that the statute banning nude dancing in South Bend, Indiana, does not violate the First Amendment.⁸ The decision was rendered by a three to two to four plurality. As a result, in terms of the application of the decision to any other factual situation, it is impossible to know exactly what the Court decided. I respectfully suggest that America can get along fine, with or without a Kitty Kat Lounge. However, the American people should not be required to do so without knowing what their Constitution means.

The ordinary judge, by way of contrast, is seldom, if ever, called upon, or even allowed to apply his or her own moral philosophy. Like Sir Thomas Moore and unlike Saint Thomas Aquinas and Associate Justice Clarence Thomas, in the lower courts, we do not practice "natural law." At the same time, it is true that the judge cannot always find the law by looking it up in a book. Sometimes the judge must look it up in himself or herself.

In his book, *Palm Sunday*, Kurt Vonnegut poses the question, "What is it an artist does? . . ." The artist says, "I can do very little about the chaos around me, but at least I can reduce to perfect order this square of canvas, this piece of paper, this chunk of stone."⁹ The judge says pretty much the same thing. Everyone, including every judge, is a conglomerate enterprise whose values and judgments derive from a mysterious jumble of experiences since childhood. Like Ulysses, the judge is a part of all he or she has met.¹⁰ Thus, to the judge, the law is, in words similar to those of Ulysses, an arch through which gleams the untraveled world whose margins fail forever when we move.¹¹ Wow! What a phrase: an arch through which gleams the untraveled world whose margins fail forever when we move. Is that an apt description of the law, or what?

My daddy was a watchmaker by trade and I, myself, have experienced the rare pleasure of examining the hidden recesses of a timepiece. Judges borrow from the craft of the watchmaker the assumption that, by getting below the level of appearances and by looking at the components of a thing, they might be able to find out "what makes it tick."¹² With luck, we come across some special significance

7. 501 U.S. 560 (1991).

8. *Id.* at 565.

9. KURT VONNEGUT, *PALM SUNDAY* 321 (1981) (quoting his mentor).

10. See John M. Woolsey, *United States v. One Book Called Ulysses* (1933), in *LAW: A TREASURY OF ART AND LITERATURE* 300 (Sara Robbins ed., 1990).

11. Although these words are the author's, they are Joycean in nature and akin to something that Ulysses might have said.

12. See Jared Carter, *Poetry Chapbooks: Back to the Basics*, 1986 GA. REV. 532 (book review) <https://scholarcommons.sc.edu/sclr/vol49/iss2/9>

hidden beneath the cover, some mainspring of myth or metaphor providing the movement of the rule of law. Or, we may encounter some intricate and interlocking mechanism and realize the meaning of the rule is to be found, not in any of the jeweled points, but in the sum of their interaction.¹³ I should add, however, that my experience with watchmaking was in the pre-Timex, pre-Seiko era. Nobody takes apart a watch anymore. Similarly, most of my experience with the law has been in the pre-Westlaw, pre-Lexis era. Outside of academia, does anybody brief a case anymore? I doubt it. So, I may be wrong in my analogy to the watchmaker.

It is very difficult to explain exactly what a judge does. I ought to know. For one year short of a decade, I was a judge. Did I make the law, or did I merely apply it? Did I invent the law, or did I discover it? The short answer, of course, is sometimes I did one, and sometimes I did the other. In some cases, I deferred to other authority; in some cases, I did not. Who decided what I did and when? I did, and that is the scary part. Some days nothing seemed constitutional.

There is no Nobel Prize for law because law is the only human endeavor which does not reward original thought. Think about that for a minute. It is barely possible for lawyers to persuade most judges of the validity of anything they have to say unless they can first persuade those judges that some other judge has already said it. We embrace, therefore, a sort of institutionalized nostalgia. We call it, quaintly enough, *stare decisis*. The contradiction of following precedent is apparent: how can we progress while fixed to the past; on the other hand, how can we avoid anarchy without being affixed to something?

So, what do judges do? A man named James Harvey Robinson has said a rude thing about judges.

We are constantly misled by our extraordinary faculty of "rationalizing"—that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong. We are abjectly credulous by nature, and instinctively accept the verdicts of the group. We are suggestible not merely when under the spell of an excited mob or a fervant revival, but we are ever and always listening to the still small voice of the herd, and are ever ready to defend and justify its instructions and warnings, and accept them as the mature results of our own reasoning.¹⁴

I would add to Robinson's statement that judges are like soldiers—they are regularly required to do things they know are wrong. Sometimes they are able to justify their actions on the ground they are serving some higher purpose. But quite often, they convince themselves what they do is right simply because they are required to do

(analogizing the watchmaker to poems rather than to rules of law).

13. *Id.*

14. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 175-76 (1949).

it.

Do judges really decide anything? Professors Bergin and Haskell say, "[Judges] are like the thrown stone which, coming to life while descending, announces, 'I have decided to come down.'"¹⁵

How can anything coherent come from this? Cardozo has ventured a theory.

"History, like mathematics, is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last." The like is true of the work of courts. The eccentricities of judges balance one another. . . . [O]ut of the attrition of diverse minds there is beaten something which has a constancy and uniformity and an average value greater than its component elements.¹⁶

I have personally observed this phenomenon. I have seen it "in the watch-fires of a hundred circling camps."¹⁷ I have watched it happen, over and over again, in the South Carolina Court of Appeals. So, I know it happens everywhere. And it is just stunning to see—watch for it yourselves.

Question Four: How have I felt about getting reversed?

In the first place, let us recognize that it is fairly easy for a judge to manipulate the system to avoid being reversed. For example, the trial judge can adopt the practice of never granting summary judgment. Of course, a decision denying summary judgment is almost never appealable. Similarly, the trial judge can rule in response to every objection: "Rephrase the question." In the entire history of Anglo-Saxon jurisprudence, no judge has ever been reversed for ruling in such a manner. The appellate judge can almost always find some procedural basis on which to avoid a difficult issue. Failing that, he or she can manipulate the facts or simply fall back on the always available "summary dismissal." In short, judges who are determined not to be reversed can follow what I call the "Gomez Corollary." The great Yankee pitcher, Lefty Gomez, once said, "If you don't throw it, they can't hit it."¹⁸

My all-time favorite quote comes from the Civil War general, George Steadman. He was on their side, not ours.¹⁹ He was addressing his troops right up the road a piece just before the battle of Second Manassas. The Yankees call it, I

15. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO *ESTATES IN LAND AND FUTURE INTERESTS* v (1966).

16. CARDOZO, *supra* note 14, at 716-77.

17. JULIA WARD HOWE, *Battle Hymn of the Republic* (visited Jan. 24, 1997) <<http://kuhttp.cc.ukans.edu/carrie/docs/usdocs.txt/battle.htm>>.

18. The quote from Lefty Gomez is apocryphal.

19. Editor's Note: "Their" side undoubtedly refers to the invaders, not the defenders. Consequently, "ours" was the side fighting to be left alone.

think, "Bull Run." Apparently, General Steadman had a premonition about how that battle was going to turn out. "Gentlemen," he said, "I want you to fight vigorously and then run away. As I am a bit lame, I am going to begin running now."²⁰ As a judge, I have never encountered a problem so big that I could not run away from it. But is it ever worth running?

Shortly after I became a judge, I wrote a monumental opinion, an opinion which most people regard as the high point of an otherwise mediocre career.²¹ In writing the opinion, I traced the history of tort law from the law of ancient Rome to the law of Wyoming. I read more than five hundred cases. The opinion itself cites and discusses more than a hundred cases from all fifty states, three territories, and seven foreign countries. I read more than 3000 pages of text materials. I quoted legal scholars including, among others, Campbell, Fleming, Green, Harper and James, Dreton, Leflar, Malone, Pound, Prosser, and Richard Nixon.²² Amazingly enough, more than 50 years ago, President Nixon, as a young law student, wrote a law review article in which he prophesied the result I reached.²³

Regardless of what anyone may think of the result, the opinion is, at the very least, a marvelous new literary form. It combines the raw power of a "major novel with the bone-rattling immediacy of front-line journalism . . ."²⁴ It intertwines the "flashy enthusiasms of musical theater, the lethal left jab of the short story, the [intimacy] of personal letters, [and] the oompah of [world] history . . ."²⁵ In the end, it reduces and distills two thousand years of accumulated legal wisdom to twenty-four single-spaced pages. The South Carolina Supreme Court, in a little lump of an opinion as plain as a potato, reversed my opinion in one paragraph.²⁶ Ever since then, I have been "a bit lame."²⁷

How do I feel about this? How do I feel about this? I am glad you asked. I feel fine about it; I really do, and I will tell you why at no extra charge. Will this have any therapeutic value? Of course it will. If I could not help you, I would not be here. In any event, here it is: no one appraises a judge or a lawyer, for that matter, by results produced. Does anyone remember how many times Cardozo was reversed? Does anyone remember how many cases Darrow lost? Of course not—no

20. The quote from General George Steadman is apocryphal, as is General Steadman.

21. *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561, (Ct. App. 1984) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."), *quashed per curiam*, 286 S.C. 85, 332 S.E.2d 100 (1985); *see also* *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991) (citing with approval *Langley*, 284 S.C. 162, 325 S.E.2d 550).

22. *See Langley*, 284 S.C. at 162, 325 S.E.2d at 550.

23. *See* Richard M. Nixon, Note, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 483 (1936).

24. VONNEGUT, *supra* note 9, at xv (describing Vonnegut's novel rather than the *Langley* opinion).

25. *Id.* at xv-xvi.

26. *Langley v. Boyter*, 286 S.C. 85, 87, 332 S.E.2d 100, 101 (1985) (*per curiam*).

27. *See supra* text accompanying note 20.

more than anyone will remember my reversal rate or the win/loss ratio of any lawyer now practicing.

Like a lover or a matador, the key to the success of a judge is style. The finished product means little: a dead bull, an exhausted mate, a case affirmed or reversed. Instead, the judge and the lawyer, like the lover and the matador, are appraised, not by results, but by their moves, by their flow, and by the field of rhythms they set up in the orchestrated hatching of results. Maybe even more importantly, judges and lawyers, like lovers, matadors, and even presidents, are appraised by whether they cheat along the way.²⁸

So I feel fine. I really do. Richard Nixon, on the other hand, was very disappointed, to say the least. I, therefore, respectfully suggest that judges, both trial and appellate, should not be judged based on their reversal rates but, instead, on whether they fairly and squarely confront the issues presented to them for a decision. After all, judges are the principal cartographers—the map makers—of that untraveled world whose margins fail forever when we move.

Question Five: How did I like being a judge?

I liked it fine. All in all, I found a good deal of harmless fun in what the English barrister, John Mortimer, calls a "crude and brutal business."²⁹ So, I liked judging. The hours were good, the pay was regular, and the work involved no heavy lifting. For almost nine years, I did not know the heartbreak of regular employment.

But after a while, I found myself more and more listening to cases being argued like a dog listens to something. From time to time, I gave a little bark. I did so more or less randomly. My bark used to invoke at least a little fear, like the bark of, say, a German shepherd or maybe a Rottweiler. At the end, even the most timid lawyers looked up in a benignly tolerant manner. "Good judge, smart judge," they seemed to say, "Down boy."

A lot happened while I was a judge. Even the language changed: toilet paper became bathroom tissue, false teeth became dentures, and dumps became landfills. A lot happened recently. Following the verdicts in the Rodney King case, Blacks in Los Angeles looted everything in sight—everything, that is, but Savings and Loans because Whites had already looted those. The looting by Blacks has cost millions of dollars, while the looting by Whites has cost a half trillion dollars. For some reason, people are more upset about the former than the latter. However, everyone is unanimous in blaming it all on the legal system. Is it any wonder I decided to run away?

28. See TOM ROBBINS, *JITTERBUG PERFUME* (1994) (analogizing bartenders, not judges).

29. JOHN MORTIMER, *CLINGING TO THE WRECKAGE: A PART OF LIFE* 159 (1982); see also JOHN G. WHITTIER, *Maud Muller*, in *THE PANORAMA, AND OTHER POEMS* 127, 133 (1856) (describing the life of a judge as "No doubtful balance of rights and wrongs, Nor weary lawyers with endless tongues . . .").

Did I learn any law, even if I did not make any? I don't know. Sometimes, I think I understand the law about as well as Sir Isaac Newton understood gravity: I know how it behaves, if not how it works. Constitutional historian Charles A. Miller said: "The three sources of decisions—values, rules, and fact—combine to focus on the mysterious "act of deciding." While the sources of decisions are rationally comprehensible, the act of deciding is not."³⁰ As I leave my life in the law, the lyrics of Joni Mitchell, only slightly paraphrased, leap to mind:

I've looked at law from both sides now,
From up and down, and still somehow,
It's law's illusions I recall.
I really don't know law at all.³¹

Or do I? It may very well be that the illusions are enough. Stonewall Jackson said, "It is images, not ideas, upon which men base their decisions."³² Bill Moyers followed up with a compelling observation: "For the law to hold authority beyond mere coercion, the power of the judge must be ritualized, mythologized."³³ Perhaps, in the final analysis, General Jackson and Mr. Moyers are right.

Question Six: Was it worth it?

The answer is an unqualified "yes." There is nothing to compare to the satisfaction of doing justice in even the smallest case. Justice, like lasting love, often depends on the diligence and courage of one enlightened individual. A judge chases justice like an old man wheezing after a bus: the process is awkward, but the objective is almost always realized.³⁴ That is why being a judge is the best job in the world. Dean Roscoe Pound quoted the great legal historian Pollock as saying "so venerable, so majestic is this living temple of justice, this immemorial yet ever freshly growing fabric of our common law, that the least of us is proud who may point to so much as one stone thereof and say the work of my hands is there."³⁵ Each of you, whether you are a judge or a lawyer, can say that, provided only that

30. See ROBERT SATTER, *DOING JUSTICE: A TRIAL JUDGE AT WORK* 76 (1990) (quoting Charles A. Miller).

31. See JONI MITCHELL, *BOTH SIDES NOW* (1992).

32. See *Stonewall Country* (Lime Kiln Theater, Lexington, Va. 1988) (purporting to quote Stonewall Jackson).

33. JOSEPH CAMPBELL & BILL MOYERS, *THE POWER OF MYTH* xiv (Betty Sue Flowers ed., 1988).

34. See Pope Brock, *Lost at Sea - and on Land*, LIFE, Feb. 1990, at 78 ("Like an old man chasing a bus, American justice will be wheezing after the answers for years . . .").

35. Dean Roscoe Pound, Address at the American Bar Association Medal for Conspicuous Service Annual Banquet, in 26 A.B.A. J. 800, 801 (1940).

you do not follow the Gomez Corollary,³⁶ and unlike General Steadman, his troops, and myself, you do not choose to run away.³⁷ You should be happy.

And, if you live a long, long time,
 If you keep the faith in all you do,
 Day by day and hour by hour,
 Remembering the colonnade of the Courthouse,
 The purple shadows of the Courtroom,
 And the dreams of your life at the Bar,
 You can always look upon this magnificent
 temple of justice we call the law,
 And continue to say, with appreciation and with pride:³⁸
 "The work of my hand is there."³⁹

What better accolade could anyone have? Indeed, what better epitaph? Now if you will excuse me. As I told you, I am a bit lame, so I think I will start running now.

36. See *supra* text accompanying note 18.

37. See *supra* text accompanying note 20.

38. James Hay, Jr., *The Honor Men* (visited Oct. 3, 1997) <<http://www.astro.princeton.edu/~wes/random/honor.htm1>>. This passage is paraphrased from a reflection on the University of Virginia made by Mr. Hays in 1903, which today is printed on T-shirts and sold by Mincer's in Charlottesville, Virginia.

39. See Pound, *supra* note 35.