

LASCHER AT LARGE  
By Edward L. Lascher  
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As we get older – which, you'd better believe, is a thing some of us are doing only too effectively – it is predictable, and may even be permissible, that we tend to particularize things of great moment into our own little trove of experience. (We also tend to write awfully pretentious, complex and obscure sentences.)

#### Enemies' List

Thus, I got a kick out of finding one of my cases on Duke's list of communist infiltrators – oops, anti-business court decisions. (Of course, it turns out the guy didn't have a list at all. I loved his "explanation": He didn't have any specific cases in mind when he told the California Plutocracy Association that the Supremes had rendered 31 business-wrecking opinions lately; he just spun out the number and let his audience come up with the cases he would have been talking about if he had known what he was talking about. A quantum improvement on the methodology of the late Junior Senator from Wisconsin, who was unimaginative enough to brandish his own lists. But I digress.)

Turned out the list that was finally put into our Duke's mouth, nunc pro tunc, had some other odd characteristics. Like the fact he described these cases as hot off the presses, whereas they actually went back more than ten years, and three chief justiceships. And that some of them were written by flaming left-wingers like Frank Richardson. You know I can't hear your silly facts when I'm ranting about Rose, sonny!

Anyway, there was my case, right up there in the money, third of thirty-one. We nosed out such high seeds as American Motorcycle and Royal Globe, I'll have you know. Of course, the two that beat us are utterly unknown outside the conflict of laws department of the Katmandu College of Law but, what the hell, maybe our infant business industry is in more vulnerable straits than we'd realized.

All this reminded me of the time, back in the wonderful Watergate days, when the Ventura newspaper ran a headline: "FORMER COUNTY MAN ON NIXON ENEMIES LIST". This time they didn't pick up my initiation to glory. Nevertheless, at risk of being guilty of biting the hand that slaps me, I can't help puzzlement over being named. You see, we represented one business and another law firm represented another

business, and we both lost. Come to think of it, maybe Duke's right – what could be a clearer case of anti-businessism?

### Nobody's Doing it

In any event, it's good to know that nobody's campaigning against the Supreme Court. The Republicans certainly aren't; they just hold monthly tent shows for exhibitors peddling lists of evil deeds, hangable effigies of one to five justices, and printer ready copies of letters to the editor. The governor is keeping studiously out of the fray, confining himself to not more than one speech per day declaring how far off he is standing and describing how much dirt he could dish if he weren't so pure.

The Los Angeles Times, too, is displaying its newfound level of journalistic statesmanship by staying far above seamy partisanship. Okay, so they run at least a full page per day about the goings on of the court haters. What's wrong with that? News is news. And on a day there isn't any, they do a think piece on what they deem the latest Bird devised atrocities. Like selective publication of opinions, even though that was inaugurated under Phil Gibson and Roger Traynor, or depublishing of Court of Appeal opinions, the brainchild of Donald Wright. (Don't get me wrong; I think I just named three of the great men of my lifetime, but I didn't always agree with everything they did. Like selective publication and depublishing. But how come the Times just discovered it? Where were they when Gideon Kanner, Mike Berger and I needed them – we being the dissenters in a universally forgotten commission report. But I sorta digress.)

Most especially, the state's prosecutors aren't running against the courts. As they keep saying, at their Chautauquas, it would be improper for them to comment. That, at least, is a great comfort to me.

### Framing the Issue

The aforesaid Ventura paper recently covered a debate between our new Public Defender and DA Mike Bradbury, an event that gained notable significance from the fact Mike's the anointed leader of all the state's peerless prosecutors. The substance of their remarks was unremarkable, to put it mildly, but my eye got caught by one exchange.

It seemed the reporter had acted in very uncontemporary fashion – he did some homework – pointing out that the Supreme Court only heard 9% of the petitions for hearing addressed to it, and that the court system as a whole affirmed 92% of criminal appeals. (I thought it was even higher.) That seemed like pretty potent answer to the party line about pro-crime judges reversing every conviction.

But Mike came up with a response that I think is worth quoting. "Bradbury discounts the statistical record, saying most of the cases that are rejected by the courts are cut and dried. 'So that's not a surprising figure at all. People are guilty, the evidence is straightforward, there is no issue. In those cases where there is an issue, however, and it can go either way, I think you'll find that Rose Bird votes for the defendant in 90 percent of the cases.'"

Am I confused, or does that put the whole thing right on the line? Reread that. What it says is that the courts practically always convict and affirm when guilt is clear and the trial is fair. It also pooh-poohs that fact. Why? Isn't that exactly what the propaganda is saying doesn't happen? Once more, class: When a good prosecution is made, and a good trial is conducted involving a guilty person, the courts convict. That's bad, Mike? When a case can go either way, the courts tend to come down on the defendant's side. If there is a serious issue as to fairness, and guilt is in doubt, an acquittal or reversal can occur. Forgive me, but isn't that the way it's supposed to be? Don't the ties go to the defendant?

Put the two together, and see what our prosecutors – those who used to tell us they win a victory every bit as much when the innocent are acquitted as when the guilty are convicted – are espousing. What they want the courts to do is convict and affirm more often when there is doubt, when there has been error which creates "issues [of] far-reaching impact". Where there is no basis for regarding guilt as clear. They're mad at the courts for those cases.

I am aware that the vast majority of persons proceeded against as felons are, in fact, guilty. The statistics say they are also convicted and their convictions affirmed. If they aren't, Mike and the DAs and the Duke and the Times ought to be telling us about that. But, what they're complaining about is that it's too hard to convict people who may be innocent. That argues too much for their own position.

### Reasonable Doubters

As I said at the outset, I am reminded of instances. It was November 26, 1963, the first day the courts were open after the Kennedy assassination. I had a misdemeanor child molest case on the Muni Court calendar. It was absolute bedlam that day, with one court day totally disrupted and another cancelled without advance warning. Calendar judges were dangling bribes to get us to ask for continuances, and it was a nasty chore to evaluate the public mood in light of Friday's shock and television's first live action murder. I bet on a sense of dedication and insisted on going to trial.

Those cases weren't any easier to defend than they are today – just not as chic. I had to send Hilda out to buy me a couple of shirts so I could change at the recesses; I was wringing wet. My client, who seemed unlikely to have done it, insisted on taking the stand and then tried showing the prosecutor what a quick-on-his-feet, barb-witted debater he could be (in effect railroading himself).

It also transpired that the kid could relate the "events" in one order and one form of words, only, and no other. Ask a specific question on cross, and she went right back to the beginning and reeled off the entire story. She couldn't say another thing.

The jury deliberations took longer than the trial, one day each, until 7:30 on the evening before Thanksgiving. They acquitted, the judge dismissed in the interest of justice, and eventually my client skipped town without paying his bill – real "Anatomy of a Murder" stuff.

Oh, yes, the message. Considering the hour and all, I escorted a bunch of the women jurors over to the dark, under-construction parking area. On the way, one of them said to me: "Mr. Lascher, I still don't know if I did right or not, I just was in so much doubt." I responded: "Didn't you do exactly what you should have, then? Reasonable doubt?"

"Oh, yes, that's right. We never thought of that." They did, whether they realized it or not.

That was one of my most moving experiences in the practice of law, in a dirty parking lot outside a muni court. I still believe in it. I am glad courts do.

### Sanctionitis Epidemic

Colleagues amused by the federal judiciary, and/or concerned by the fad of lawyer-sanctioning, especially on appeal, which is sweeping the Wild West (California levied more dollars last year than the aggregate imposed from statehood through 1983, while the Ninth Circuit imposed sanctions in more different cases than in all previous years combined) will not reap much comfort from two recent cases: Lewis v. Brown & Root, Inc. (5th Cir. 1983) 711 F.2d 1287 and Lewis v. Brown & Root, Inc. (5th Cir. 1984) 722 F.2d 209, cert. den. The point is not the substance of that litigation, but rather its colorful history.

In the first case, the plaintiff appealed from a trial judge's dismissal of an action. He failed, abundantly. The majority affirmed and also granted ancillary relief against him which required further proceedings. The third judge dissented from the affirmance. On the second appeal, the

majority decided they had been wrong about parts of their earlier decision, necessitating still another reversal in part, but zonked the plaintiff for sanctions for taking both appeals.

The judge who had dissented in the first one did it again, terming that action "unconscionably wrong" and pointing out – ruefully if not without some justification – that his colleagues were therefore adjudicating his dissent on the first appeal to have been "frivolous, unreasonable and without foundation".

However, there is a happy ending: The majority, after imposing sanctions, reduced them by one-third, I suppose in proportion to their own division. Partial pregnancy is alive and well in the Fifth Circuit.

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