

## Becoming a Player: a Credo for Young Lawyers in the 1990s

Patricia M. Wald

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Legal Profession Commons](#)

---

### Recommended Citation

Patricia M. Wald, *Becoming a Player: a Credo for Young Lawyers in the 1990s*, 51 Md. L. Rev. 422 (1992)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol51/iss2/5>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Essay

## BECOMING A PLAYER: A CREDO FOR YOUNG LAWYERS IN THE 1990s

PATRICIA M. WALD\*

Thank you for inviting me to address the first post-Gulf War graduating class of the University of Maryland School of Law. Forty years ago, I was a member of another post-war class. In the interim I have made many graduation speeches. Thinking back over them, I realize that although they were built around a variety of themes, there was a common message, summed up best by the author John Casey in his fine novel, *Spartina*. In the novel, a Cape Cod fisherman wants his own boat, but his high ideals and contempt for weaker souls keep getting in the way. His more pragmatic friend Parker tells him:

You spend a lot of time dividing up the world into . . .  
the unworthy and the worthy. . . .

There are times I divide the world the way you do, the bad guys and good guys. And other times other ways, depending . . . . But one way, one important way is this—players and nonplayers.

What gets me is you could be a player. What you end up doing is what nonplayers do. They drudge, and . . . [m]oan about it, how bad it is, how unfair it is, and they drudge some more to make it even badder and even more unfair.<sup>1</sup>

That's my message to you graduates. Be a player. Life is awfully short—it may not seem so to you now, but believe me, it is. You will not always be able to play the game by your rules; but, for your own sake, don't sit the game out. In the end, it will not be the win-loss record as much as the innings you missed that will hurt. That old trio of despair—anger, envy, and regret—haunts the nonplayers.

---

\* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. B.A., Connecticut College, 1948; LL.B., Yale University, 1961. Judge Wald served as Chief Judge for the United States Court of Appeals for the District of Columbia Circuit from July 1986 to January 1991. This Essay is adapted from remarks delivered to the 1991 graduating class of the University of Maryland School of Law.

1. JOHN CASEY, *SPARTINA* 75 (1989).

You are the beginning of the nineties generation. Too many of your counterparts in the eighties sat out some important games—important for the legal profession, important for the law, important for the nation. In a controversial and provocative article a few months back, Robert Reich, the Harvard political economist, wrote about the “Secession of the Successful,”<sup>2</sup> dropouts from the biggest game of all—the construction of a healthy and nourishing community life for all citizens. Last year, Reich said, Americans in the top one-fifth income bracket (presumably, that is where all of you will be) took home more money than the other four-fifths combined. But, accused Reich, that top tier has for a decade been quietly seceding from the rest of the nation—picking up their stakes and going home to comfortable suburban retreats—defaulting from the game our forefathers began 200 years ago: to build “one nation, . . . indivisible, with liberty and justice for all.”

The secession Reich talked about takes many forms: For example, withdrawing support from public facilities and institutions in favor of “privatization”; establishing or joining private health clubs and recreational associations, rather than public swimming pools and public parks; investing in private security for homes and neighborhoods, while denying money for municipal police. (Nationwide, we are told, “the number of private security guards . . . now exceeds the number of public police officers.”<sup>3</sup>)

Even the private charitable acts of this elite go overwhelmingly to the arts, universities, and private hospitals that they themselves patronize; little goes to the public institutions or health facilities that the other four-fifths of the nation use. Business donations to education tapered off markedly in the eighties; only 1.5% went to public schools, far less than the tax breaks those same corporations ask for and receive from local and state governments for just “being there.” The federal share of local government expenses also has shifted downward from 25% to 17%; federal contributions to local transit have been cut by 50%; payments for low-income housing, job training, garbage disposal, and sewage treatment have been cut by \$50 million; the federal government now contributes only 6% of public school costs.<sup>4</sup> This means, of course, that the poorer communities, where public services are most needed, have the least money to pay for them, and that economic segregation has reinforced the seem-

---

2. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 42.

3. *Id.*

4. *See id.* at 43.

ingly intractable problems of de facto racial segregation in housing and education. Reich concluded that the secession of the young elite

raises fundamental questions about the future of American society. . . . [T]he most skilled and insightful Americans, who are already positioned to thrive in the world market, are now able to slip the bonds of national allegiance, and by so doing disengage themselves from their less favored fellows. The stark political challenge in the decades ahead will be to reaffirm that, even though America is no longer a separate and distinct economy, it is still a society whose members have abiding obligations to one another.<sup>5</sup>

I suggest that this national dilemma—how to reintegrate into our economic and social community life the lower four-fifths of the nation—is a competition in which you must be a player, or risk your own and your children's futures. A great nation built upon tenets of equality and community, that can wage war so brilliantly against foreign tyranny, must be able to defeat a new threat at home—the tyranny of the cerebral and sophisticated over the unskilled and socially impoverished, a threat that is not so different from the ancient tyranny of the social and economic caste that the Founding Fathers fled Europe to avoid. Nonplayers, John Casey said, “[m]oan about . . . how bad it is, how unfair it is, and . . . make it even badder and even more unfair.”<sup>6</sup> You must break that cycle. You have the know-how, the skills, the tenacity to play in that game—and the stakes are incredibly high.

There are, right now, twenty million of your contemporaries with only a high school degree or less, growing up in financially deprived, single-parent families, with bleak job prospects, frustrated in their attempts to find a satisfying place in their communities, and able to give little back to their families, schools, or communities. Their plight is masked in unemployment statistics that are disturbing in the aggregate and startling in the disaggregate: 21% black, 11% Hispanic, 7% white unemployed in the twenty to twenty-four-year-old range. Those who do work have experienced a decline of almost 30% in real income since 1980; almost 40% fewer now own their own home than did two decades ago; more than one-half of those who have been married are now separated or divorced. These counterparts of yours drift in ever-increasing numbers to-

---

5. *Id.* at 45.

6. CASEY, *supra* note 1, at 75.

ward impoverishment, so that now one-third of all families headed by a man or woman in your age bracket are below the poverty line. And behind them trail 840,000 "discarded" children in jails, foster care, and detention homes.<sup>7</sup>

Yet these are the people who will be your fellow citizens in the decades ahead, who will influence where you choose to live and work, who will provide the services or products you grumble about, who will contribute to the crime and drug scourges that will affect you in ways you dare not think of. If we, or you, cannot create initial job opportunities and career possibilities that allow them to rise above the poverty level, to participate meaningfully in the community, the nation's game will not be worth the candle. If we, or you, cannot reform our schools so that they provide the mass of students who do not reach college with the training and attitudes that permit them to work gainfully and to rear their children with dignity and respect, then we, and especially you, will spend too much of your generous salaries on the often-futile, last resort defensive measures of police, jails, hospitals, and courts.

By the year 2000, the workplace will have room only for those with finely-honed skills in marketing, computer sciences, and personnel training. What will happen to other young people then? Already we find "a startling mismatch between the product of the high schools . . . and corporate America's needs."<sup>8</sup> The country's "haphazard approach to child care" will also vitally affect the workforce of tomorrow. The links between early child care and the rest of one's life have so far gone untended; fifty-one percent of mothers with children under the age of one now work. Corporate CEOs tell us "the bottom line again and again comes down to the development of human capital."<sup>9</sup> The nineties must be the decade when America changes its rigid views about the forty-hour work week and the traditional roles of men and women.<sup>10</sup> That is a big agenda—to rebuild a nation so that it can compete in a global economy.

You newly-minted lawyers must be key players. You cannot avoid the game. Lawyers are the dealmakers, the negotiators, the media spokespersons, the intellectual property advisers, the pro-

---

7. WILLIAM T. GRANT FOUND. COMM'N ON WORK, FAMILY AND CITIZENSHIP, *THE FORGOTTEN HALF: PATHWAYS TO SUCCESS FOR AMERICA'S YOUTH AND YOUNG FAMILIES 1-2* (final report 1988).

8. Cindy Skrzycki, *Workers of the '90s: Promise or Problems?*, WASH. POST, Jan. 21, 1990, at H19.

9. *Id.*

10. *See id.*

spectus writers. For lawyers, however, the danger is in thinking of themselves solely as proxies for someone else, assuming the identity of the principal players. The rules of legal gamesmanship, as we have seen that game played in recent years, are too easily condensed into single-minded advocacy; let the chips fall where they may. Too many lawyers of the past decade laid aside their own values, their own ideas, their own visions, and their own integrity when they sat down at the table to play. Profit supplanted professionalism, strategies trumped goals, stakes won out over rules. Greed gobbled up small law firms, and created mega-firms. Young lawyers were seduced by recruiters for the big firms, who, as P.D. James said, "pay too generously and . . . ask too much,"<sup>11</sup> only to be abandoned to the streets a few years later when the partners' spoils began to shrink.

I offer a modest plea to you: Young lawyers, do not sell your professional souls to the devil. Your work in the law over the next several decades will be the most important part of your life; two-thirds of your waking hours will be spent at it. Don't cede its governance, its rules, or its goals to others—put your own chips on the line. It can be done. You may not be able to work full-time for a cause you fervently believe in, though for those of you who can, it has great rewards. But you can commit time during a forty-year career to stints in government, or to the special cause you believe in; you can add hours to your regular schedule for volunteer efforts in the community; and you can speak up inside your own law firms or corporations about where legitimate advocacy ends and civic responsibility begins.

Idealistic—yes; unrealistic—I don't think so. Some of our finest lawyer-statesmen have been advisers and counselors to industry and government, not captives of them. Just recently, a small group of enlightened business leaders sat down with civil rights leaders to try to craft a workable civil rights bill. Their efforts were at first widely applauded, later bitterly opposed by the administration and other business groups. Finally, because their efforts were frustrated by White House protests against political interference, they withdrew.

So it is a risky business taking principled stands. I know of young men and women who voiced sincere ethical concerns about the course of advocacy on which they had been set by superiors; they were thereafter considered suspect by the more zealous members of their team, and ultimately they moved on to other jobs. Yet

---

11. P.D. JAMES, AN UNSUITABLE JOB FOR A WOMAN 75 (1972).

I also know of veteran government lawyers who would not sign briefs taking certain positions they found antithetical to the public good, and were all the more respected for it. Their talents were such that even shorter-sighted political officials could not afford to let them go. Similarly, we are beginning to find that at least in some firms it is acceptable to say, "I won't work on that case because my conscience or beliefs won't let me."

To be a player is to take risks. Everyone draws his or her line in the sand somewhere; don't go beyond yours. But play to the hilt up to that point. The law is always evolving in its capacity to grasp and resolve the human dilemmas that come within its reach. It is, as a generality, the product of the lawyers, not the judges. The lawyers decide what cases to bring to court or to settle, what issues to test or avoid, what arguments to make or bypass, which cases to appeal or accept, what relief to request. Often we judges wonder why they choose as they do, but for the most part we are also bound by the issues they do not raise, the arguments they do not make, as by the ones they do. Like the parable of the grains of sand that, added one by one, become dunes holding back the tide, wise and courageous lawyers contribute to making the law not just a game of "winner take all," but a forum for resolving disputes fairly and in the interests of all. They do so not just by pro bono activities—important as they are—but by their responsibility in representing the powerful interests in society, including the government, and by their influence as taxpayers and local officials, as respected voices on governance and public policy.

It has been said that self-indulgence was the benchmark for the eighties; if so, we must change that in the nineties. For one of the untidiest legacies of our legal system in the eighties was the not-so-benign neglect that characterized delivery of legal services to the poor. In what has been described as a world of lopsided budgets, gargantuan debt, scanty savings, holes in the ozone layer, global warming, massive oil spills, and crack babies, the dearth of lawyers for the poor may seem to merit only a footnote; but in terms of our professional self-respect it is a scandalous headnote.

Tocqueville wrote that "[l]awyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society."<sup>12</sup> If so, the gap yawns ever wider. Legal services today is

---

12. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 286 (Phillips Bradley ed., Vintage Books 1945) (1835).

an undernourished adolescent with a questionable capacity for ever reaching maturity. Twenty years ago, when I was a legal services lawyer, legal services was a healthy, scrappy kid with an avaricious appetite for legal problems and reform. In the interim it has been abused and neglected.

During the eighties when the lowest fifth of the population (those most in need of legal services) received less than four percent of the national income, the cost of legal services skyrocketed. Yet we remain the only major Western nation that does not provide a right to counsel in civil matters. In a recent ABA study, forty percent of low-income households surveyed had civil legal problems in the last twelve months but could not obtain counsel.<sup>13</sup> In the last three years, two of five Americans surveyed could not afford legal help with everyday legal problems like contracts, housing, or domestic relations.<sup>14</sup>

Twenty years ago, the best and the brightest law school graduates flocked to the ranks of legal service projects; the ideal was intact, the company was good, the support from the profession and from the government itself, while never indulgent, was adequate, the issues were great, the courts were hospitable. In twenty years, the government has become hostile, the level of financial support has plummeted, the courts are less welcoming, and only the most dogged and idealistic young law graduates volunteer to fight evictions for a paycheck many thousands less than they could earn elsewhere.

If the nineties are truly to be a decade of concern, one of your tasks must be to restore legal services to the underprivileged as a respected national priority. The law schools must view it as an honor rather than a compensation prize, and law firms must subsidize nonpenalty sabbaticals for young associates and partners to do their bit. Maybe that sounds radical, but we won't make a dent in the problems otherwise. Our best public defender offices have shown that with sufficient financial backing and leadership they can still attract stellar legal talent; public service need not be a career dead end. We must do the same for legal services.

I would like now to shift the focus of these remarks. Another great problem facing this new world of yours will be the question of

---

13. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 18 (1989).

14. See Talbot D'Alemberte, *Alexis de Tocqueville, Atticus Finch, and Legal Service for the Poor in the Nineties*, 7 GA. ST. U. L. REV. 397, 399 n.9 (1991).



how to integrate disparate groups—races, religions, social and ethnic groups—into a workable society. We are a pluralistic society. Yet the one thing we have not learned to do well is to find the commonalities among us and make them work. Diversity has always been what America is about. We have a national motto, *E Pluribus Unum*—one out of many, united in diversity—but we are being pushed more and more by our differences and less by our sense of unity.

Last year in the District of Columbia we were shocked by a series of revelations about interracial juries in which black jurors allegedly asserted that they would not send another young black to jail—even for murder.<sup>15</sup> A justice system is at risk if any group sincerely believes that the game is stacked. And how tragic it is that we must debate the free speech rights of hate groups to poison campuses with loathsome invective against others. We still have not found a way for separate groups in our society to exist and flourish, to retain their identities, and yet to remain committed to national values. How can we lead the world if we ourselves are divided and polarized?

I believe the answer to this awful problem lies less in constitutional guarantees or political activity than in a fundamental rededication to our own natures. I offer a fervent prayer that your generation can begin to unify our nation—to make it a nation in which individuals understand and care about each other. Sentimental as it may seem, that process must begin within each of us.

As big a question in your lives as whether to get into the game, is how to play it. This is the mark you will leave behind. In the immensely popular novel *Straight*, by the English author Dick Francis, there is a jockey detective whose credo is “deal with honor and sleep at night.”<sup>16</sup> Not a bad philosophy for a player.

We have just come through what our leaders have called a moral war. Television interviews with the soldiers, marines, and sailors who actually fought that war echoed with rare unanimity a belief in the rectitude of what they did. How grand it would be if our country could be so motivated in peace; if our leaders and our citizens believed that we have embarked on a moral enterprise. As the *New York Times* book review of George Walden’s *The Shoeblick and the Sovereign* put it: “[P]ublic and private morality are not distinct

---

15. See Daniel Klaidman, *Racial Politics in the Jury Room*, LEGAL TIMES, Apr. 23, 1990, at 1.

16. DICK FRANCIS, *STRAIGHT* 77 (1989).

realms with their own separate rules, but rather a continuum stretching without seam from the ruled to the ruler; the citizen . . . cannot evade responsibility for the decisions of government."<sup>17</sup> No one can be expected to be an enthusiastic player in a game he or she does not care about. But nations and people must not only care about winning, but believe that they can win. Our leaders—in the near future they will be you—must themselves believe, and convince the people, that we should and can achieve something better in peace than in war; that it is not only critical, but feasible, to improve the plight of the homeless, to halt the carnage in our inner cities, to convert young predators into constructive members of society, and to stop the bitter polarization of races. I read frequently that most *entering* law students want to go into public interest work when they graduate, to be “do-gooders.” Three years later those same students are queuing up for the downtown, big-name firms. What happens midcourse? I think it is not so much a switch to “it doesn’t matter” as a growing sense of “I can’t do anything about it that counts.” But you can—in your corporate firm as well as in the storefront clinic, and in your business as well as in academia.

An insightful article in the business section of the *New York Times* recently asked: “Why don’t we find our heroes in the world of business?”<sup>18</sup> No businessperson polled by the *Times* named a business leader as a national hero; the group also failed to list any scientists, authors, or inventors. Everyone named was in the area of public policy, politics, and social reform. Those polled did agree upon what made a visionary—courage, determination, willingness to take risks—qualities that should be associated with entrepreneurial enterprise in America. Visionaries must look beyond the next quarter, gamble on the future, put their careers on the line in the pursuit of concepts and change, and include in their visions the kind of nation and world in which they will live and sell their goods. The notion prevalent today—that we can’t do what must be done to make this country work—is a prescription for failure. You are too good to sign on to that philosophy.

Admittedly, whatever you do, your greatest enemy will be the pressures of work. It will often seem that there is just no time to do anything but the immediate job at the office or the endless family

---

17. Peter Grose, *No One Shall 'Scape Whipping*, N.Y. TIMES, Feb. 26, 1989, § 7 (Book Review), at 27 (reviewing GEORGE WALDEN, *THE SHOEBLACK AND THE SOVEREIGN* (1989)).

18. Karl D. Loos, . . . *And the Recognition of Visionaries*, N.Y. TIMES, Mar. 17, 1991, § 3, at 11.

jobs at home. But you must make the time to be a player. The saddest words of all—especially for gifted and privileged young people like yourselves—are “I never had the chance to do anything important in my life.”

Playing the game also means playing by the rules. Every game, including the law, has a structure that serves to let people with vastly different views and styles play together. Civility and a decent regard for the sensitivities of others carry us through much of the game; they allow us not only to win and lose, but often to play to a draw, with grace and self-respect. Judith Martin, “Miss Manners” of the *Washington Post*, has written in a serious vein that:

Law can be said to exist to compensate for the failure of etiquette, . . . just as it is in other professions that must deal with strongly felt conflicts—parliament, the military, diplomacy, the Church, athletics . . . . The more orderly . . . the form of a social structure, the more conflict it can support. . . . [A]dherence to [some] etiquette is [thus] a prerequisite for any aspect of civilized life.<sup>19</sup>

And being a player also means, in a very special sense, going with the flow. For twenty years, a University of Chicago professor, Mihaly Csikszentmihalyi, has studied the optimal human state he calls “flow,” which he describes as being “mentally involved in the challenge and intrinsic pleasure of the activity,” yet lacking apprehension or anxiety about one’s personal performance.<sup>20</sup> Usually, he says, people experience this kind of flow while pursuing a goal in the context of a set of rules. It is, I venture to say, as far as most of us will come in our pursuit of happiness. Without flow, Professor Csikszentmihalyi warns, most people spend their lives alternating between work they dislike but are obliged to do, and leisure in which, he says, “life passes in a sequence of boring and anxious experiences over which a person has little control.”<sup>21</sup> So flow means setting goals and reaching for them.

But sometimes even a good player is cast out of the flow and runs aground. Learn to accept loss and move on; be ready to be disparaged or displaced but not to despair; to “play it as it lays,” even when someone else has the better hand—all this is part of be-

19. Judith Martin & Gunther S. Stent, *I Think; Therefore I Think: A Philosophy of Etiquette*, 59 AM. SCHOLAR 237, 247-48 (1990).

20. Carol Tavris, *Contentment is Hard Work*, N.Y. TIMES, Mar. 18, 1990, § 7 (Book Review), at 7 (reviewing MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* (1990)).

21. *Id.*

ing a player. In the law, particularly, the race is for the long-distance runner, not the sprinter. For example, *Brown v. Board of Education*<sup>22</sup> came sixty years after the Supreme Court in *Plessy v. Ferguson*<sup>23</sup> had rejected a challenge to racial segregation, and the fight for equality is nowhere near over yet. For women, the seventies brought a wave of victory over gender stereotypes and blatant discrimination; but it remains for the nineties to remedy the more subtle problems of "glass ceilings," shared job assignments, daycare facilities, business networks and flexible working hours. Gay and lesbian Americans are still at square one in their struggle for legal equality, dignity, and respect. Constitutional cognoscenti watch apprehensively as the Fourth Amendment's guarantee against unreasonable search and seizure ebbs and flows in the currents of the drug war: random encounters in buses and trains, where law enforcement officers seek "consent" to comprehensive and even intimate body searches; tests to detect drugs for all federal workers, not just those involved in safety or security-oriented tasks; virtually unlimited discretion for the agencies that control so many aspects of our lives; and increased barriers against public participation in governmental decisionmaking through heightened thresholds for standing and judicial review.

For many, the eighties was a decade in which high ground was lost. But the nature of the legal process is one that never ends. Doctrines change—albeit slowly—and they change in response to public demands and movements, spawned by bright and committed lawyers. Justice Cardozo has said, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."<sup>24</sup> I urge you to play hard to win, but stay in the game even when you are losing. Walter Wriston, head of Citibank, once said: "If you miss seven balls out of ten, you're batting three hundred, and that's good enough for the Hall of Fame. You can't score if you keep the bat on your shoulder."<sup>25</sup>

Even the losing player makes a difference: she affects the winner's course; she often tempers her opponent's position; she frequently entices a compromise or exacts a concession; she leaves the door open for a future success; she occasionally engages the conscience of her opponent to join her on a plane higher than the outcome of the immediate dispute.

---

22. 347 U.S. 483 (1954).

23. 163 U.S. 537 (1896).

24. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

25. WILLIAM SAFIRE & LEONARD SAFIR, *LEADERSHIP* 206 (1990).

The important thing is to remain part of the dialogue. "Know when to cut your losses" is a good maxim in life; the bigger the loss, the harder it is and the longer it takes to recoup. But knowing when to push forward and when to back away is a skill to be cultivated and sharpened. If it is your judgment call—though a probable loser—have the courage to press on, to risk not being loved or hailed by one's peers—this defines you as a player.

Finally, play your best cards. Do not leave behind the perceptions, the questions, the concerns that four years of a liberal arts college and three years at this great law school have laid upon you. The insights of history, psychology, philosophy, even chemistry and biology, and most of all, literature, are not closed chapters in your life now; they are the grist for planning your life strategies—they will identify your goals.

When they left the Garden of Eden, Eve reportedly turned to her companion and said, "Adam, we live in a time of transition." Martin Buber, the great philosopher, asked his pupils, "Are you ready—for each other, for history, for the world? . . . that is the great question."<sup>26</sup>

So I too will close by asking, "Are you ready?" If so, get started. The game is just beginning out there. Good luck and good fortune to all of you, and Godspeed.

---

26. Thomas Hughes, Remarks of the President, Carnegie Endowment for International Peace, at the Carnegie Endowment Trustee Dinner (Nov. 18, 1990) (relating personal conversation between Mr. Hughes and Dr. Buber).