

## **CHARLES R. GARRY MEMORIAL LECTURE**

### **What's Good About Being a Criminal Defense Lawyer**

**by John W. Keker**

I am very proud to have been asked to give the Charles Garry Memorial Lecture, proud because my predecessors, including Jim Brosnahan, Tony Serra, Mike Millman, and Ephraim Margolin, are people I admire greatly, proud because I was there when Ephraim, Charley Garry and others started this great organization in 1973, and proud because Charles Garry was the first great criminal lawyer I knew, and an inspiration to me.

One of the grand things about being asked to do this speech is that it made me think about the last 30 years, which was fun, and it gave me a chance to talk to friends about our work, friends like Doron Weinberg, Penny Cooper, Bill Osterhoudt, Mark Topel, Barry Portman, David Fechheimer, Ephraim Margolin. If you don't like what you hear, blame them. It's wonderful to talk openly, without having to persuade anyone of anything, to other defense lawyers. As we all know, talking to civilians about criminal defense work is like pushing an oyster into the coin slot of a parking meter—it can't be done and it makes a mess. So it is nice to be among friends.

Since I am going to talk about what's good about being a criminal defense lawyer, I think you need to know a little about Charles Garry. I first heard of Charles Garry in New Haven, where I was in law school and where Black Panther leader Bobby Seale was charged with murdering a BPP member turned police informant named Alex Rackley. Seale was insisting that a

San Francisco lawyer named Charles Garry represent him; Charley was recovering from a gall bladder operation and needed a delay. Bobby Seale was already famous for throwing such a fit when Chicago District Judge Julius Hoffmann would not delay the Chicago Seven trial so Garry could represent him that Seale spent the trial in front of the jury lashed to his chair, gagged, and shackled to the floor. Now here is an attorney/client relationship, I thought.

Those were exciting times in New Haven. My blond two-year-old son Adam learned to speak by running around with clenched fist in the air, shouting "Free the Seals." To show support for Bobby and his co-defendant, Ericka Huggins, someone, probably the Panthers, organized a huge rally for May Day 1970 on the New Haven Green. Everybody who was anybody was there—the entire Chicago Seven, including Abbie Hoffman and Jerry Rubin, movie stars Warren Beatty and Julie Christie, all the Yale students, the Panthers and their hangers-on, and thousands of others. It was a political Woodstock. The *New York Times* predicted a riot, a prediction which turned out true when Nixon announced the bombing of Cambodia, our country erupted, and National Guard troops killed students at Kent State and Jackson State. I always associated this high excitement with the fact that Charley Garry needed a continuance. Needless to say, he got one and later won an acquittal for Bobby Seale.

I first laid eyes on Charley that summer, when I worked at Heller, Erhman while taking the bar. KQED outtakes had been subpoenaed to the big political trial of the summer, called *Los Siete*. The seven were Latino young men charged with killing a police officer with his own gun. The defense was self-defense, and/or that the cop's partner, who I remember as a brute with a bad Internal Affairs record, had shot

him by mistake. The KQED lawyer asked me if I wanted to come along to the trial, where Charley Garry, Michael Kennedy, Dick Hodge and R.J. Engle were defending the Seven. Charley had the dead cop's partner on the stand, and was pounding away savagely. I learned more about cross-examination and dealing with objections right there than I had in all of law school. Charley's typical question began, "When my parents brought me here from Armenia seeking freedom ...?" His response to objections was, "Judge, this man is lying through his teeth, that's why I have to ask it that way." I also learned another great lesson, when one of the other defense lawyers, much younger, more dapper, and far less burly than Charley, tried to cross-examine using Charley's style. It didn't work.

Later, I got to know Charley, listened raptly as his jury addresses overflowed the banks of grammatical structure (I must have learned from him because mine still do), watched in awe as he stretched the voir dire in the San Quentin Six case to six months, an event which was great for his client, who was acquitted, but became the poster child for why lawyer voir dire should be restricted. Charley was a great man and a great lawyer, and as we go along tonight I will look to him for inspiration.

When I thought about what I would talk about, my first thoughts were mostly gloom and doom. Too much of the work we do feels a lot like facilitating the prosecution, explaining to hapless clients why they have to take the deal offered, or standing by to provide due process while one's client goes down the tubes on wheels you helped to grease. That is not much fun.

Bill Brockett, my great friend, law partner for 20 years, and one of the finest civil and criminal trial lawyers in California,

had a recurring dream when we were in the federal public defender's office. At an open gravesite stands a judge, a prosecutor, a cop, a probation officer, a prison official, and Bill, in his public defender suit, throwing dirt on the accused as he is lowered into the earth, still alive and screaming.

As I said, my first thoughts were somewhat lugubrious. I thought about the awesome power of prosecutors, whose almost limitless discretion to decide who to charge for what is supported by the vast majority of Americans. I thought about the fact that the charging decision is 90% of the game, when only 1 out of 10 felonies goes to trial in California, when prosecutors use cooperation agreements, forced waiver of rights, and plea bargains to solve their problems without a trial. I thought about judges, the best of them hamstrung by charging decisions and sentencing guidelines, the worst of them scared and intimidated by prosecutors. I thought about a trial process abbreviated by narrow discovery rules, the destruction of voir dire, the lack of sanctions against prosecutors who cheat. I thought about the dismantling of the great writ, about closing of centers for training lawyers to defend capital cases, about attacks on the unanimous jury. I thought the body politic whose appetite for more criminal laws and stiffer punishment, including more executions, keeps mainstream politicians in an anti-crime frenzy, increasing penalties, making state crimes federal, and building prisons.

The current scene looks particularly bleak to my generation of lawyers who began practicing in the late 60's and early 70's. We started in the "good old days" when the Warren Court tried to put teeth into the Bill of Rights. As young lawyers, our job was to catch slow-moving bureaucrats—be they cops, FBI agents, U.S. Attorneys, DAs, judges—and nail them with

new law, new motions, new challenges. We even won motions to suppress. Mark Topel and I won a suppression motion for Eldridge Cleaver in the trial court and eventually in the California Supreme Court, based on our argument that the cops needed a search warrant to look through the rubble left after they burned down a house Cleaver and little Bobby Hutton had broken into and were shooting from as they were escaping from a Black Panther ambush of cops. Imagine that ruling today.

We challenged jury selection procedures, brought creative motions—my favorite was “Notice of Intent to Disobey Court’s Order” in connection with discovery—appealed every loss with high hopes, and asked the Supreme Court to look at every case we lost on appeal, always believing someone would listen.

Everyone was fair game. After Steve Kipperman and I were jacked around at Folsom one day while visiting a prisoner, we had a complaint dictated by the time we passed the Nut Tree on the way home, suing the Director of the California Prison System, the warden at Folsom, the Lieutenant on duty, and Goons One through Eight since we didn’t know their names. The judge made us change Goon to Doe, but eventually ruled for us. [*Keker v. Proconier* 398 F.Supp. 756 (E.D. Ca. 1975)]

That procedural revolution in criminal law and the optimism it brought us has been deeply eroded. Although there are some bright spots now that didn’t exist then—judges are not all white males, as they were then, and the right to an attorney still holds for most parts of the process—much of the Bill of Rights withered away. Loss of liberty is a wasting disease. At first, it is hard to diagnose but easy to cure; later, it is easy to diagnose but impossible to cure.

Even jurors are worse now. It used to be that we could count on young people to be idealistic, to apply the reasonable doubt standard, to hold the government to its proof. Young people had an anti-authoritarian streak in them. Today they seem more skeptical than ever, but apathetic. They no longer can be relied upon to be good jurors. In the 1970’s, if you were careful about race issues, you could pick jurors according to Racehorse Haynes’ famous line—take jurors who, when asked length of residence, say 45 feet. Today those folks follow the Commandant in Kafka’s *The Penal Colony*, who said, “My guiding principle is this: guilt is never to be doubted.”

But it is too easy to focus on the bleak side of our jobs. You must be wondering why I called this talk “What’s Good About Being a Criminal Defense Lawyer.” After my first gloom-and-doom thoughts, I looked for wisdom to two people I have mentioned already, Charley Garry and Bill Brockett. First, Charley. Charley practiced in the 40’s, 50’s and early 60’s, when things were worse than they are now: no right to counsel if you were poor, the police could do whatever they wanted, no exclusionary rule, little discovery, no *Brady* or *Giglio*. Those were the times of Charley Garry, Vincent Hallinan, James Martin McGinnis, Jake Ehrlich, Edward Bennett Williams. Clarence Darrow practiced even earlier, in the days of lynching, all-male juries and corrupt judges. These were great criminal defense lawyers, people who still inspire us. They did it in times far tougher than ours. They never succumbed to the Sisyphean myth, because they always believed they would get the rock over the hill, and sometimes they did.

That brings me to Bill Brockett. When we were in the federal public defender’s office in the early 70’s, some Ph.D. student

sent a questionnaire asking for a list of five things good about being a public defender. I imagine she had trouble fitting Bill's answer into her database, but here it is:

- One** Returning dangerous criminals to the street.
- Two** Returning harmless criminals to the street.
- Three** Acting like a big-shot in front of the jury.
- Four** Fucking the U.S. Attorney.

I have forgotten number 5.

Between inspiring ancestors and Brockett's wisdom, I knew I was onto something, and will now try to figure it out for you. I will start with some of the good we do, but these first ones don't really inspire me.

Is providing due process what's good about our job? Of course it is important—policing the police, keeping the government at bay, limiting abuses of power, enforcing Constitutional rules no one else will enforce—these are all important, but they don't do it for me. The trouble is that due process deals with the system, not the result, and I care deeply about the result. Machiavelli described the Roman emperor Alexander as a kind, gentle, even soft man, because in the 14 years of his reign, he never executed anyone without a trial.

What about protecting our sacred Constitution as what's good about being a criminal lawyer? Again, I believe protecting the Constitution is important, but that doesn't do it for me, either. The Constitution, when written, protected the institution of slavery. It had to be amended to allow women to vote. It still protects the

rights of every nut case to bear arms and every rich egomaniac to spend \$40 million to get elected to something. Like the *Bible*, the *Qu'ran*, and the *Torah*, it stands for almost anything good or venal people want to find in it. I am not a man of the book, and cannot find my satisfaction there.

So what about Justice, with a capital J? Is that what's good about being a criminal lawyer? I remember standing in a holding cell outside Judge Zipoli's courtroom with Gangsta Bob and Papa Thomas, as they were known to everyone, in the midst of a trial for eight bank robberies and one Post Office robbery, all armed. The Thomas brothers were so famous that when a bank was robbed by black men with guns anywhere in San Francisco, FBI agents headed for the Double Rock housing project to find the Thomas boys, Papa, Poochie and Gangsta Bob. The FBI finally got fed up, and offered "Get Out of Jail" cards to the actual robbers—all junkies—to describe how the Thomas brothers would wake them up, give them guns and a stolen car, sit outside the bank while they robbed it, follow them to a pre-arranged site where they would leave the car, take the guns, and take most of the money. We had been listening to the umpteenth cooperating witness, who was lying through his teeth, and Gangsta Bob was mad. In the holding cell, he shouted, "I want justice!" I looked at him, there was a long silence, and then he said, "Well, I want a fair trial."

The trouble is that justice is in the eye of the beholder. Edward Bennett Williams said that a client who wants swift justice, often gets it. Clarence Darrow insisted that there was no such thing as justice, in or out of court, and I think he was right. In the Marine Corps, they assured us that military justice is to justice what military music is to music. Justice for the ancient Germanic tribes was too important to be left to men.

Juries were okay for civil disputes, but criminal cases needed an opportunity for the hand of God to operate. If you were charged with a crime, you were lashed to a chair and thrown into the river. If you floated, you were guilty, and were hauled out and stoned. If you sank, you were innocent, and if they pulled you out in time, you could enjoy your acquittal.

No one believed in justice more deeply than the Inquisitors who used informants and torture to save men's souls. Justice, like religion, is too personal to be common to all. And I certainly do not believe that the only real injustice is when an innocent man is convicted.

Part of the justice problem these days is that we are all guilty of something in our highly-regulated state. Balzac said, "Behind every great fortune there is a great crime." The prosecutor, and only the prosecutor, decides which of our crimes we must answer for, if any.

The arbitrariness of punishment is even worse. The best—or the worst—example is the death penalty, where the arbitrariness of its imposition cannot be denied. Take short descriptions of 100 murders, where half of the murderers are serving life and the other half have been given death, mix them up, and ask experienced prosecutors and judges to say which case is life and which is death. They can't do it.

Due process, the Constitution, Justice—all good but not enough. So, what is it that is good about being a criminal defense lawyer? Let's go back to Charley Garry—what did I see that I liked?

He was a hero, pure and simple.

He fought against a strong enemy—the beast is always overreaching, only the hero

stands in his way.

He fought for others, not himself. He fought for those in distress, even if that distress was self-inflicted—it was still distress.

He fought with courage and independence—against great odds—that's what heroes do.

He fought, not for glory or public approval or acclaim, but with great clarity of purpose, with a clear, totally unambiguous goal, to protect his clients from the power of the state which wanted to hurt them.

He fought alone, or nearly so. He was not a bureaucrat. This is not committee work. The responsibility is personal, not collective.

So that's my answer—that's what's good about being a criminal defense lawyer—you and I get a chance to be a hero. Every case is a huge boulder blocking your client's path to freedom. If you can't get under it, around it, or over it, you start hitting it, hoping it breaks. The fact that it is very unlikely ever to break does not deter you.

I love having that chance again and again. Not many people ever get a chance to be a hero, and certainly not over and over again. And I love what goes with the chance to be a hero.

You have to do your work with creativity and imagination. You cannot afford conformity of thought—the job is too difficult. Cross-examination is the greatest of all performing arts; like playing jazz, you prepare for 50%, the rest is pure riff. In a trial, you are a novelist, attuned to the fine detail of human life; you are a playwright, setting the stage carefully, letting the

characters develop; you are a movie director, setting up the scenery and the music, then zeroing in for an emotional close-up.

How many jobs are that creative? Not many.

In what we do there are no certainties, well, maybe one: never waive a jury.

The only time I ever tried a criminal case to the bench was for Alonzo X, a follower of the late Elijah Mohammed. Alonzo had been justly accused of financing his ministry by printing and passing \$20 bills. It took a long time for me, a white devil, to gain his trust, but finally Alonzo and I stood before Judge Weigel awaiting jury selection. When the panel came in, Alonzo looked at the back of the courtroom, saw one of those federal panels with 60 people, none of whom was African-American, and said to me, “Who are those people?” I explained that those were his peers from whom the jury would be selected. Alonzo stood up, looked straight at Judge Weigel, and shouted, “I’d rather be tried by one honest Jew than 12 of those honkies.” Judge Weigel, viewing this as a compliment, accepted his jury waiver, tried the case, and convicted him. Alonzo went to prison with the satisfaction that he had been proved right about white people once again.

Never forget how lucky we are to have to be creative and imaginative. Just after World War II, the great film director Sergei Eisenstein, who had just been reprimanded by Stalin for the second part of *Ivan the Terrible*, was asked, “When were you happiest?” Eisenstein replied, “In my 20s, when experimentation was still allowed. We let grease-smearing pigs loose in the audience.” So it is with us—we are happiest when we do something unusual, unexpected, creative. One of my most cheerful moments

in a courtroom was getting to Judge Schwarzer’s courtroom before the prosecutor for the first day of Judge Schwarzer’s first criminal jury trial—he had been a civil litigator—and plopping myself and my client down at the table next to the jury. The prosecutor asked me to move, I refused, we argued before the Judge about whose table it was, the prosecutor had no case authority saying where he should sit, and we tried the case with my client and I sitting next to the jury, which voted 10-to-2 for acquittal. At the retrial, the Judge made us sit at the far table, and we lost.

Another thing required of heroes is controlling fear. Many people spend their lives hiding from fear, avoiding what scares them. Others seek it out, in skiing or kick-boxing or chess. But we face fear relentlessly. And we are all afraid, at least I am, every time we go to trial, afraid:

that our judgment is not the best;

that our skills are not the best;

that our preparation is not the best;

that the responsibility may be too much;

that we will fail, and our client will go to prison or die.

I think learning to live with fear and to perform well in spite of it is one of the great things about being a criminal defense lawyer. It is the measure of a grown-up. I remember attending a seminar in San Diego after practicing 4 or 5 years. I had tried quite a few cases, knew how to ask a question, when to submit jury instructions, how to object, and so on. But I felt at the time, and still feel now, that that seminar took me to a new level. Gerry Spence, who few had heard of at the time—this was before Karen Silkwood or Imelda Marcos,

or his evolution into a media person—talked about fear in the courtroom. The judge is afraid of losing control and losing dignity; the prosecutor is afraid of losing and of the agent's disapproval; the jurors are terrified of doing the wrong thing; your client is trembling inside and maybe outside over what is going to happen to him; you are terrified about looking bad, about forgetting something, about not thinking fast enough, about losing.

To understand fear, to use the fears of others, to control your own, is what heroes have to do. Mastering fear leads to exhilaration, our genetic reward for performing heroically in spite of fear. It requires intensity, another benefit of being a heroic criminal lawyer.

Mike Metzger used to compare criminal trials with going over the rapids. By that I think he meant that you are scared, exhilarated, living in the moment, and glad when it's over. Criminal defense lawyers have fun when they try cases, and it shows. Prosecutors don't. What Nietzsche said about Christians, I say about prosecutors: you can tell by the look on their faces they don't enjoy what they are doing. Living intensely makes every effort and every sacrifice worth while. It is the opposite of what Tallyrand, the great survivor of both the French Revolution and Napoleon, said he wanted from life: "Above all, no zeal."

We all know what he meant, because we all know the dangers of living so intensely. For criminal defense lawyers, those include cynicism or arrogance or condescension, as protection against caring too much; too much stress, leading to wrecked families, too much drinking or drugs. I try to manage the intensity by being aware of it, taking time to feel satisfaction and pride when things go well, and finding ways to indulge the worst moments, as soon as I can, with a

trip or a treat. After a painful loss, I went with my co-counsel to Death Valley, to visit the lowest spot in the United States, where we felt we belonged at the time. Another great antidote is a one-day trip to Yosemite, by yourself so that you won't kill anyone if you crash the car. I have made it there in 2 and a quarter hours.

Living intensely is being truly alive. If it weren't dangerous, it wouldn't be intense. Sometimes what we do is literally dangerous—a friend of mine used to represent Hell's Angels, and one client was so incensed at motion papers he thought were inadequate that when my friend came back from lunch one day, he found the motion stuck in his desk with a hatchet. Another well-known example is Pat Hallinan, who did a great job for his client *Ciro Mancuso*, only to find himself the subject of unjust arrest, search, and indictment when *Ciro* realized the worth of a prominent lawyer as a prosecutor's trophy.

Another good thing about seeking heroic status is that it keeps you separate from the crowd. We are always in the posture of opposition, with the minority. It is our unyielding skepticism that kept us from being priests or political leaders, and protects us from becoming smug or complacent. A lawyer whose client is accused can have no interest in political influence, no interest in policy, no interest in appointments. The goal is specific—protect the client, whom all others despise. As citizens, we may support government as an alternative to anarchy or even worse government; as criminal defense lawyers, though, we know it is not based on reason, but on custom, inertia and force.

We work for humans in distress, we deal with greed, fear, weakness, regret, sex—human things. We have too much empathy to sustain any ideology for long. One of the

things I always admired about Judge Spencer Williams, who came to the bench as a Governor Ronald Reagan acolyte, with firm views that all draft resisters should spend years in jail, was the way empathy overcame ideology. With a big family himself, he would look down at the draft resisters awaiting sentencing, see them as their mothers' and fathers' sons, as people, and give them probation. So it is with us: we know our clients from the inside, understand how they got where they are, and love them in spite of their faults. At the same time, we remember what our job is—to win if we can. Mike Tigar tells of trying to get Edward Bennett Williams to represent Dr. Benjamin Spock, William Sloan Coffin and others against conspiracy charges relating to the war in Vietnam. Williams said, "I guess they will want to get on the stand and talk about that war." "Probably," Tigar replied. "They need a toastmaster, not a defense lawyer," said Williams.

Jim Brosnahan talks about the great feeling when the judge scowls down at the accused, and reads the charging document as though it were gospel, and says, "Who stands for this defendant," and you say, "I do." If you still feel, at that moment, some exhilaration, some thrill at a new chance to be a hero, keep doing what you are doing. If you don't, go sell stocks and bonds.

Little, if anything, we do will survive the dreaded test of time. And no one is a hero all the time—Joan of Arc spent most of her life as an obscure milkmaid, and even Ulysses took a year off on Circe's island. No one is a hero to everyone—ask Oliver North about that. We probably will never persuade a majority of Americans that defending criminal defendants is heroic, and I don't even want to try. I know it is, you know it is, our clients and their families know it is. For us, that is enough.