

Advocacy Lecture in Memory of the Honourable Justice John Sopinka

by Clayton C. Ruby, C.M.



I do not want you to think that I am without experience in these matters. Some years ago my youngest daughter graduated from high school, and I was thrilled that the school asked me to deliver the commencement address to the graduating students and their families. I thought to urge the students to emulate two distinguished Canadian oceanographers, who had, for the first time, mapped world fish populations and disclosed that the largest fish were in universal decline — a decline that could only be caused in so many places at once by over fishing. These scientists were perfect examples of Canadians who had used their education, I thought, to make the world a better place. . .and so I talked about fish.

If you are ever asked, do not give any speech about fish! I do not blame the dismal reception my fish address received on the faulty P.A. system,

which ensured that only the first four rows heard my speech. Those in the first four rows were no less bewildered than those who could not hear at all, as I soldiered on about the importance of the dwindling large fish population. Unfortunately, my daughter was in the first four rows, and has ever since reserved her greatest contempt for “that fish speech”, a phrase which is daughter-code for fathers who misread their audiences.

It is the courage that counts. I want to tell you how pleased I am to be able to talk about courageous advocacy in a room filled with people who understand it. Who get up every morning, and whose job requires them to find the courage to speak for unpopular ideas and people accused of crime. And we do this not as an exception, but on a daily basis.

We find, somehow, the ability to do what is right in a criminal court despite

all the pressures to “go along,” to make the system look better than it really deserves to look, to make justice efficient. Many of us have had to do advocacy despite public disdain. We are almost never on the side of someone who the wider public approves of or accepts. Popular sentiment is only rarely our friend. Advocacy for the underdog is just more difficult than making submission on behalf of a large corporation. Today, the top 1% of the population owns fully one-half of the world’s wealth. They do not need more help.

We do not accept the values that pervade our law schools, and the corporate side of our profession, that the best lawyers get jobs on Wall Street or

We are almost never on the side of someone who the wider public approves of or accepts.

on Bay Street. That if you are any good at all, you will find your way to the big downtown firms. It is that understanding that takes many of the best minds of our generation and teaches them that the best that they can expect from law is a life dedicated to making large corporations even richer than they are. That is simply not true. They can do better. And the inevitable happens — those young lawyers become disenchanted with a life in the law because they have come to believe that nothing exciting can come of lawyering, that big firm law is the best that law offers. That too is simply not true.

Where does that courage come from? It comes from just that commitment to make the world a better place by making certain that the small piece of it that we work in — the justice system — does what it promises to do. We know that when power and authority

always win, the system is unjust. Many of your arguments are going to fail. The fact is that the system tends to produce convictions and not acquittals. It over-imprisons, especially black and Native Canadian people. Many judges have difficulty envisioning the Crown or the police being wrong. Courage speaks with that small voice inside yourself that says “I know what justice requires and I am not going to settle for less. I may lose, but I am going to lose asking for justice, and not for something less.”

It is important to respect those who have the courage to struggle against adversity in their advocacy. The lawyer who raised racial profiling as the foundation for an unconstitutional arbitrary police stop — Steven Skurka — was told by his trial judge to apologize to the police officer for raising that issue. The trial judge’s decision was later reversed by the Court of Appeal and it is now regarded as perfectly appropriate advocacy to raise unconstitutional discrimination by the police as a defence in a criminal court. The lawyer who raised the eligibility of Justice Marc Nadon to sit in the Supreme Court of Canada, after appointment by the Prime Minister — Rocco Galati — was ridiculed and scorned for making that argument. It turns out he was right. Russell Silverstein dared to suggest that convicted terrorist Chiheb Esseghaier was not merely a very religious person but also so crazy as to be unfit to be sentenced. He was chastised and had his arguments repeatedly interrupted by the trial judge. Marlys Edwardh and her client Owen Swain brought changes to the law that made it impossible for the Crown to call gratuitous evidence of insanity until guilt or innocence had been decided, making sure that such evidence could no longer prejudice a jury deciding on guilt or innocence. After that decision, Parliament had to rewrite much of the law on mental illness in the criminal context. In 2001, David Tanovich moved, despite a long history of toleration of police strip searches as very

convenient, to expose what the Supreme Court of Canada ultimately held: “Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out. . .they cannot be a routine policy.”

There is neither money nor public appreciation for any of this.

It would be so much easier just to get along and go along. But criminal advocacy demands that you do not go along. It demands that you be strong enough to make the unpopular, even despised arguments, despite the absence of money, despite the absence of public praise and despite the loneliness in doing that.

Underlying all our advocacy is a love of liberty and a yearning for justice.

Underlying all our advocacy is a love of liberty and a yearning for justice.

When did we as a society lose the idea that justice was important? When did we decide that it was more important to build a few miles of highway than to provide first rate justice for the poor? Criminal lawyers know the difference between advocacy that is about which litigant gets what money, and advocacy about justice itself. It is the life’s work of every generation of criminal lawyer to keep this tradition of advocacy for justice, rather than for power or for money, alive.

Now, let me return to my commencement address and ... misreading one’s audience. At the risk of blowing yet another opportunity, I am going to tell you about a lawyer you have never heard of, in another country, in another time. The story may not even be true: some distinguished colleagues in our Bar, following Ronald Radosh, a conservative U.S. historian, doubt it.

It is a story about loss. Like Arthur

Kinoy, we learn to live with loss: advocacy, when we lose, as we often do, can be heart-breaking. We must not become cynical.

Arthur Kinoy was a distinguished American lawyer of the last half of the last century, one of the founders of the famous Center for Constitutional Rights in New York City. He was a white Jewish lawyer from the north who worked with the Montgomery bus boycott that emerged from Rosa Parks's refusal to sit in the back of the bus. I knew him slightly. And I liked him. Eventually he combined his practice with a professorship at Rutgers University Law School.

In the summer of 1953, late at night, a very young Arthur Kinoy took a phone call from Manny Bloch, who

If I were as young as you are, I would be sitting where you are now and saying and arguing what you are arguing.

was the lawyer for Julius and Ethel Rosenberg. He had been selected by the Communist Party of the U.S.A. He was a very good communist, but he was not a very good lawyer. Julius and Ethel Rosenberg, both Jews, had been convicted as communists of spying for the Soviet Union and passing on to them then secret information about how to make an atomic bomb. At the time, only the United States had that information and the bomb had ended World War II. These were public enemies numbers 1 and 2 and President Eisenhower had refused to commute their death sentences. All normal appeals had been exhausted. Every newspaper and radio station clamoured for their execution. Their lawyers had been vilified. McCarthyism

and anti-Semitism made Jews fearful of their place in American society. It was an age when communists were feared and an earlier version of our present "war on terror" had been fashioned.

A last minute appeal to the United States Supreme Court for a stay had been granted by William O. Douglas but, in an unprecedented move, then Chief Justice Fred Vinson had called the entire court back from their summer vacations to overrule the stay. The execution was rescheduled for 8 p.m. the next day. By next morning Kinoy was in the Chambers of Chief Justice Swan of the Second Circuit Court of Appeal in New Haven, Connecticut seeking another stay on different grounds. Bloch had neglected to raise on appeal an arguable point that could have resulted in a new trial. A conservative judge, Swan listened. And he said: "Okay. You've got a point. I can't grant a stay on my own after the entire Supreme Court vacated Justice Douglas's stay, but I'll convene an emergency panel of three to rule on these arguments if you can convince one other judge of my court that this has merit." But who was in New Haven in dead of summer? Where to find a judge at noon on the day of execution?

"Ah", said Swan. "Jerome Frank is in New Haven." Kinoy's heart leaped with joy.

Jerome Frank was the leading liberal judge in the northeast, the architect of Franklin Roosevelt's new deal. Author of its most humane legislation. He was a truly great professor of law who, when he had taught at Yale, practically invented clinical education in law schools.

Chief Justice Swan lent Kinoy his car, and chauffeur, and off they went to see Jerome Frank who greeted them at the door and told them that a phone line had been opened up between Chief Justice Swan's office and Sing Sing, the prison where the electrocution was to take place.

Kinoy argued as he had never argued before. When he tried to cut any point short, worrying about the time, Justice

Frank would interrupt, saying, "No, develop that point." Then he would say "Fine. Develop the next point." They argued for more than an hour. Then there was silence. Then he said words that Kinoy would never forget: "If I were as young as you are, I would be sitting where you are now and saying and arguing what you are arguing. You are right to do so, but when you are as old as I am you will understand why I" — and he repeated 'why I' — "cannot do what you ask. I cannot do it."

Kinoy concluded that Justice Jerome Frank, deep in his heart, had decided that it would jeopardize his acceptance as a liberal and as a Jew, in an increasingly conservative society, to rule in favour of the Rosenbergs, who were also Jews.

that need for acceptance makes it impossible to base advocacy decisions purely on the need for justice. ...

... we are each Arthur Kinoy

As he drove back to New York City, Kinoy heard the radio announcement that the execution had taken place. The Rosenbergs were dead.

Kinoy was unable to speak of this incident for many years. It marked him deeply. It illustrates for me the difference between criminal lawyers — who are extraordinary — and lawyers whose work does not demand such daily courage: many lawyers have an overriding commitment to their particular place in the system, and that need for acceptance makes it impossible to base advocacy decisions purely on the need for justice.

I tell you this story because we are each Arthur Kinoy. And because crimi-

nal advocacy can truly be heartbreaking! But you knew that.

We are often criticized for who we defend. Ronald Radosh, the U.S. historian, said of Kinoy: "He had never met a communist who was not worth defending." We have heard similar comments about ourselves and those we defend. I want us to renew our

There is a marked parallel between the "war on communism" ... and the "war on terror" presently on offer at much the same price by much the same kind of people.

commitment to act without fear, determined to make this world a better place through our advocacy skills, whatever kind of criminal law we practice, and whether that effort turns out to be hugely significant, or as was Kinoy's effort here, utterly futile.

Know what is right, and do that. We each struggle for the courage to take

difficult and unpopular positions. We struggle whether we are just beginning criminal lawyers, or, like me, a small part of the legal establishment. There is no shortage of excuses for lost courage. Silence is easy. But quiet acceptance of injustice quickly becomes a way of life. As Albert Camus said: "People get used to anything, even shame and stupidity."

There is a marked parallel between the "war on communism" that warped the economic, military, political and emotional life of the last half of the last century, and the "war on terror" presently on offer at much the same price by much the same kind of people. There *were* dangerous communists, but not very many, and certainly they were not dangerous enough to justify the suppression of debate in so many areas of public life. Today, we are learning to fear Muslims, and those of Arab descent. This is a time when once again it takes courage in every criminal case to speak up and act for the values of liberty and for justice. There is a danger when a tiny few seek by violence to create a religious dictatorship, but it is even more dangerous when a majority takes advantage of our fear to pass laws that are inconsistent with the right to counsel, the right to silence, the presumption of innocence, freedom of speech and

expression, laws inconsistent with the rule of law itself.

I have burdened you with Camus before. Indulge me. I love Camus. He understood that we can as criminal lawyers and citizens do better than this, better than the constant sacrifice of human rights for security, of freedom for safety. Albert Camus said: "Between freedom and justice there seems to exist a state of contradiction. How could there not be? Freedom for each also means freedom for the rich and ambitious; that invites injustice. Justice for all means the submission of the individual to the collective good. The question for all of us is how to reconcile justice with freedom. The goal we must pursue is to make life free for the individual but just for all."

That is the tradition of advocacy in our profession.

The courage to do that is what makes our profession great — and the Kinoy story has enabled me to avoid the difficult subject of fish, for which my daughter Kate is very grateful.

Clayton C. Ruby, C.M. practises criminal, constitutional, administrative and civil rights law at Ruby & Shiller. He is a Member of the Order of Canada and has been awarded a Doctor of Laws degree (honoris causa) by the Law Society of Upper Canada.