PRESIDENT'S MESSAGE

by Scott A. Hagen
Salt Lake County Bar President

It is an understatement to say that the terrorist attacks on the World Trade Center and the Pentagon have profoundly affected all of us and will continue to have a great impact on our lives. It was perhaps the worst crime in American history and the most deadly terrorist attack ever. Hundreds died in the attack on the Pentagon, and as I write this message, Mayor Giuliani has announced that the death toll in New York may rise above 6,000. It is amazing that anyone could intentionally perpetrate such an unspeakable horror on so many innocent people.

By contrast, it has been heartening to witness the heroic acts of the fire fighters and police officers in New York, and to see the response to this tragedy from across the nation and the world. Ordinary citizens have contributed blood, money, and their time to help the rescue effort and to assist those who have lost loved ones. Sporting events were cancelled or postponed, and after the schedule was resumed, one hockey game was interrupted and then cancelled after the second period so that the crowd could watch the president's speech on the Jumbotron. I think we have all been moved by this response.

One of the particularly unsettling aspects of the tragedy is that these terrorists apparently lived among us even as they were preparing for the attack. In fact, they actually took advantage of the freedoms we enjoy to assist in their preparations. They were able to move about freely. They traveled into the United States itself with apparently little difficulty. They obtained training in how to pilot a large commercial aircraft without scrutiny from government officials. And

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most importantly, they lived freely, despite the fact that they were from a different country, spoke a different language and practiced a minority religion. America is far from perfect, especially in its treatment of minorities, but I think we can all agree that these terrorists could not have lived and prepared as they did except in the United States or in other western countries.

While we may have to sacrifice some of our openness to gain a greater measure of security, I hope and believe that we will succeed in maintaining our civil freedoms even as we carry on a war against terrorism. And I believe that we lawyers have a part to play in this effort. While we should help as countless others have, by giving blood, or by donating our time and money, we should also make sure that our voices are heard in support of policies that aim to preserve our freedom as well as protect our security. Lawyers have played an important role in establishing and maintaining our great freedoms throughout our nation's history. Let us not hesitate to once again play an important role as our country undertakes this great challenge of defeating terrorism.

Of course, ordinary law practice in Salt Lake County is also important, even though it may seem less so at a time like this. For many years, the Salt Lake County Bar Association has contributed to the improvement of the practice of law in three important ways.

First, we believe it is important that we have opportunities to meet other lawyers and develop friendships. After all, this is a competitive, adversarial profession. We need to be with each other in more collegial settings. To that end, we will again sponsor several social events during the next year. This year we will plan to repeat our social evening for new admittees to the Bar, as well as our traditional Holiday dinner and dance at the Salt Lake Country Club. In addition, we plan to repeat our spring dinner and casino night at Tuscany next May. We are also planning a family day at Lagoon next summer.

Second, the continuing legal education luncheons, which we think are the best deal in town. The food is good and the speakers include judges from both federal and state courts, as well as some of the best lawyers in Salt Lake City. These luncheons will be held each month at the Marriott.

Third, we also support and promote pro bono work for those persons and causes who cannot afford the high price

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Factoring Mental Illness into the Criminal Justice Equation

By B. Kent Morgan

Fewer insanity pleas are entered in our courts than you might think. Yet, mental illness continues to be an important legal issue in both trial courts and appellate opinions. Just last term, in *Penry v. Johnson*, 121 S.Ct. 1910 (2001) (*Penry II*), the Supreme Court revisited the issue of circumstances where society may be justified in executing a mentally retarded defendant. This case started a firestorm of legislative activity seeking to outlaw this practice despite the fact that most jurists assumed that the issue had been put to rest in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) where the Supreme Court approved of executing a mentally retarded defendant.

The reason that mental illness continues to pop up in the criminal justice process is not only because it can break the link between accountability and criminal conduct, but because it tests our civility when we seek to punish those who are too incompetent to defend themselves or appreciate the consequences of breaking society's rules. Even in the most drastic proceeding, a death penalty hearing where guilt beyond a reasonable doubt has already been established, the jury is still allowed to consider mental illness as a mitigating factor against imposing the most severe of sentences.

In order to understand why the issue of mental illness is often raised only indirectly in Utah criminal cases, the present law must be placed in its chronological context. Historically, the defense of insanity arose because society believed that it was immoral to hold someone criminally responsible who had faculties equivalent to that of a beast. I would presume that since the penalty for most serious offenses at common law was death, the insanity defense was a result of the medieval judiciary becoming equally troubled by resigning a deranged individual to the gallows as when they were faced with the prospect of putting down one of their fine hunting dogs for eating sheep. In any case, the task of summoning pity for an accused suffering from mental illness was left to the jury, who applied a test that asked whether the deranged had the ability to tell right from wrong. This test arose from questions posed by the House of Lords to justices of the Queen's Bench in outrage over the acquittal that occurred in *M'Naghten's Case*. While this case is considered to be the foundation for all modern insanity tests and is credited with inventing the "right-wrong" test, it is probable that had it been decided under modern law it would have been disposed of in favor of the state under principles of transferred intent. It may well be a defense to be delusional as to whether a justification exists for killing. However, in *M'Naghten*, it appears that the defendant's delusions merely caused him to mistakenly shoot the wrong fellow.

Even a well-educated jury may be taxed when it is asked to determine if a defendant, as a result of mental illness, understood the nature and quality of the act he committed or failed to understand that it was wrong. The *M'Naghten* test presumes that a jury can adequately identify and diagnose a mental illness. Certainly, the jury needs assistance in this task, and a mental health professional is frequently asked to present expert testimony to aid the jury in this regard. Unfortunately, the mental health professional's definition of mental illness can vary considerably from the legal definition of mental illness. Being treatment-oriented, a mental health professional begins its definition only from the viewpoint of the defendant.

A mental disorder is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress or disability or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom. Engaging in behavior such as punching another individual in a rage or pointing a gun at a convenience store clerk to compel them to turn over cash is an incredibly risky endeavor and, if everyone does their job appropriately in the criminal justice system, the consequence of those actions should be the loss of that person's freedom. Under the mental health professional's definition, all individuals engaged in criminal activity could conceivably be diagnosed as having a mental disorder. In fairness to the American Psychiatric Association, mental health professionals exclude conflicts that are primarily between the individual and society that are not symptoms of a dysfunction of the individual from the definition of mental disorders.

At one time, some jurisdictions adopted the test set forth in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) and briefly engaged in an experiment that left the decision as to whether the accused should be excused from criminal consequences to the mental health professionals. This test excused a defendant from criminal responsibility if the criminal act was a "product" of a mental illness when the behavior occurred. Not only did the "product" test offend conservative communities who found the liberal mental health professionals incompetent to declare criminals off limits from punishment, but it occurred to many legal organizations that all criminals would have to be excused as insane since no one in their right mind would commit a criminal offense if they truly understood the consequences that could be imposed.

Alternatively, if they did not understand the consequences of complying with rudimentary rules of society, then they must be insane and, therefore, beyond the reach of punishment.

Accordingly, the legal community carved out a more narrow description from the mental health professional's definition of mental illness. While this definition also focuses on the defendant, it attempts to separate those who merely commit criminal offenses as a result of mental impairments from those who commit crimes as a result of having rotten personalities. The Utah Criminal Code defines mental illness as a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of injury, or a residual effect of a physical or mental disease and includes, but is not limited to, mental retardation. This definition expressly excludes personality or character disorders or abnormalities manifested only by repeated criminal conduct.

Both mental health and legal definitions of mental illness focus on the defendant's subjective state of mind and fail to directly address a victim's perception of the behavior. Victims are just as certainly outraged by having to suffer injury and property damage from those who are mentally disturbed as from those who know perfectly well what they are doing. As a practical matter, and notwithstanding carefully crafted instructions, jurors frequently assess mental illness according to how horrific they perceive the act complained of, and not how clinically deranged the accused might appear.

Legal scholars have done their best to require a finding of something more than just the mere existence of a mental illness to justify an acquittal. In the Twentieth Century, efforts began to invent a more meaningful test to guide the jury's determination of insanity. Early definitions and tests for insanity failed to guide the jury as to how much of a connection between the mental illness and the criminal act had to be shown. Accordingly, like many jurisdictions Utah adopted the ALI/Model Penal Code test for insanity in 1973. This test states that a person is not responsible for criminal conduct if at the time of such conduct, as a result of a mental disease or defect, that person lacks the *substantial* capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Adding "substantial capacity" as an element to the insanity defense forced the jury to look at the realities of the claimed mental illness in the context of the behavior of the defendant. A jury was asked to determine how a defendant could be so disabled by mental illness so as to lack the intent to commit an offense, yet retain the ability to carry out the intricacies required to successfully complete a criminal act?

This paradox sparked the debate over versions of the insanity defense that could be asserted at common law known as "temporary insanity" and "diminished capacity." Temporary insanity is a convenient state of mind that allows the defendant to allege that at the time of the offense, he suffered from a mental disability but that institutionalization is no longer necessary because he "feels much better now." The defense of diminished capacity would not fully exonerate a defendant but had the effect of reducing the degree of the crime charged. If, as a result of a mental disorder, a defendant could not form the specific intent for a charged crime, but could formulate the general intent necessary to convict him of a lesser-included offense, the defense of diminished capacity would reduce the degree of conviction. The Utah Supreme Court initially decided that the diminished capacity defense survived the changes in the test for insanity.

Utah's carefully crafted law of insanity would completely unravel under the notorious case published under *State v. Bishop,* 753 P.2d 439 (Utah 1988). Arthur Gary Bishop was convicted and sentenced to death in 1984 after confessing to sexually molesting and killing five young boys, and then burying their bodies in Big Cottonwood Canyon and Cedar Fort, Utah. During the trial, the defense made every effort to indirectly interject mental illness as a defense or as a mitigating factor. Had the defendant directly claimed that he was not guilty by reason of insanity, the state would clearly have been permitted to have its psychiatrist examine, evaluate and testify regarding the defendant's mental state at the time the crime was committed. Upon hearing both competing psychiatric points of view, it is doubtful that the jury would have acquitted the defendant of such a horrendous series of offenses on the basis that he was insane.

The defendant's perspective regarding his motivation for killing the children was that he was helpless in suppressing his pedophilia and feared that by permitting victims to live, his sexual crimes against the children would be exposed. He therefore killed the children to avoid being caught. Based on these facts, the defense theory was that the defendant's homosexual pedophilia with narcissistic overtones constituted an extreme mental or emotional disturbance for which there was a reasonable explanation or excuse. Phrasing the mental disorder defense in this manner bypassed the ordinary rules for determining whether a defendant should be acquitted under the insanity laws. If only the defendant's subjective beliefs were examined, the mental disorder could raise issues of diminished capacity and reduce the offense to an unintentional homicide, thereby avoiding the death penalty. The prosecution convinced the trial court to allow their psychiatrist to examine the defendant in any event and prevented the defense from arguing diminished mental capacity, and qualified the proposed manslaughter instruction by precluding the jury from considering the defendant's crime as an event that could trigger mental or emotional distress for which there is a reasonable explanation or excuse.

On appeal, the Utah Supreme Court affirmed the trial court's decision to appoint psychiatrists to examine the defendant while observing that the state's psy-

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chiatrists were prevented from giving substantive testimony unless the defendant raised issues of insanity or diminished capacity. The Court further held that an amendment to the manslaughter statute in 1975 essentially did away with Utah's previous recognition of diminished capacity as a separate defense. Finally, the Utah Supreme Court upheld the trial judge's instructions requiring the mental or emotional disturbance be triggered by something external to the defendant's actions in committing an underlying offense. Manslaughter could not be found where the defendant committed further criminal acts to cover up an underlying crime, no matter how much this "need to avoid detection" arose from an underlying mental illness.

The sophistry argued in the *Bishop* case led to a number of legislative revisions in Utah's insanity law. First, whenever a defendant raises a defense of any kind that will involve the testimony of mental health experts, notice must be given to the prosecution, and the prosecution is entitled to have its own mental health experts examine the defendant. And, in 1986, the manslaughter statute was amended to remove any reference to a "mental disturbance" leaving mitigation to be established only when the defendant committed the offense under the influence of an extreme *emotional* disturbance for which there was a reasonable explanation or excuse. Any defense involving a mental disorder had to be determined under Utah's insanity defense.

In 1983, before the ink would have a chance to dry on Arthur Gary Bishop's death warrant, Utah again amended its insanity defense statute. The present defense classified under the characterization "Mental Illness," includes the defenses known as "insanity" and "diminished mental capacity." Utah has virtually eliminated the moral and emotional features from the historical insanity tests and now simply declares, "it is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense." In *State v. Herrera*, 895 P.2d 359 (Utah 1995), the Utah Supreme Court declared the present statute free of constitutional defects. The rules of evidence were changed to prohibit a psychiatrist from rendering an opinion on a defendant's past mental state. Finally, the rules of procedure were changed to permit a finding of guilty and mentally ill that impacted sentencing but did not exonerate a mentally ill defendant.

The intent of all of these changes was to restore to the jury the function of making an informed and guided decision as to whether to exonerate an individual from his criminal conduct alleged to have resulted from a mental disorder. For every offender who raises sympathy in the minds of the public, there is an offender who will be viewed as sinister, lacking compassion and meriting only frost from society. The victim and her survivors justifiably have little regard for needs of the defendant. The state cannot escape the responsibility of fairly administering the law. No doubt, the debate will continue on the direct and indirect treatment of the mentally ill in the criminal justice system.

The author of this article, B. Kent Morgan, is an Assistant Justice Division Administrator for the Salt Lake County District Attorney's Office. He is a member of the California and Utah State Bars, and has been a prosecuting attorney for the past twenty years. He has appeared in a number of high profile trials and has recently authored the Fourth Edition of the Utah Prosecution Manual.

Judicial Profile
Judge Bruce C. Lubeck

By Robert O. Rice

To describe newly-appointed Third District Court Judge Bruce C. Lubeck's professional career, one might rely heavily on words like "endurance" and "stamina." First, there were the thirty years of legal practice, starting out as a legal defender, followed by a stint in private practice and next, twenty years of service at the U.S. Attorney's Office. There were the hundreds of trials – too many to precisely count. Then there was the running – twenty marathons, a grueling fifty mile race, the hundreds of miles logged at lunch or before breakfast. After all that, many lawyers would be forgiven for slowing the pace a bit, maybe even retiring. Judge Lubeck, however, has hardly broken stride.

"I've been a litigant for many years and I just wanted to stay with the law," Judge Lubeck explained about his decision to begin a fourth decade of legal practice as a Third District Court Judge.

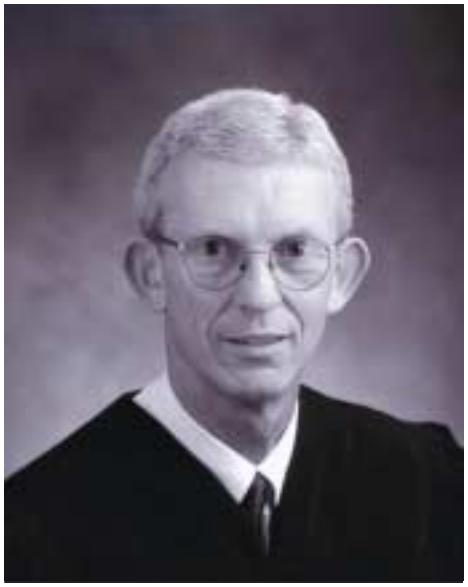
Governor Mike Leavitt appointed Judge Lubeck to the bench in March, 2001, filling a vacancy left by retiring Judge Homer F. Wilkinson. After briefly touching down at the Third District's downtown location this summer, Judge Lubeck recently relocated to the Third District's Murray courthouse. While Judge Lubeck by now has unpacked the moving crates, he might consider keeping his running shoes laced up. The Third District's newest judge describes a hectic schedule in Murray with a calendar brimming with criminal matters and a full complement of civil cases inherited from Judge Michael K. Burton, who has moved to the Salt Lake City courthouse.

Judge Lubeck graduated from the University of Utah in College of Law in 1971. "I was five," he joked, "so I'm only thirty-five now." He was sworn into the Bar in October of that same year and began his legal career as a public defender "as a way to do good for people." In 1981, he became an Assistant United States Attorney for the District of Utah. He spent twenty years there, most recently heading the Narcotics Section and leading the Organized Crime Drug Enforcement Task Force for the U.S. Attorney's Office before donning a black robe.

Not surprisingly, three decades of trial practice has prepared Judge Lubeck well for his new position. "I certainly don't think I'm here to change anything or fix anything, but what I did for thirty years was try a lot of cases. I hope I know how to run a court room," he said. Translation: Come to Judge Lubeck's court with a good sense of procedure, a firm grip on the rules of evidence and a strategy for quickly getting to the point because looking down from the bench Judge Lubeck sees familiar territory.

The transition from lawyer to judge, however, has not been without its adjustments. Chiefly, Judge Lubeck is surprised by the magnitude of it all. "I went to court a lot through the years and I sometimes took the judges for granted," he said, "but I have found, to my surprise, this is much more difficult than I thought it would be." Take sentencing, for example. On the one hand, dealing with an "extraordinarily serious crime" is a relatively easy judicial task. At other times, however, Judge Lubeck admits to "struggling harder than I thought I would with what to do in any given situation." Moreover, in the wide array of litigation matters that come before him, Judge Lubeck is struck by how seriously the parties take their respective positions. "I'm nothing special, but it's a frightening feeling to realize you are making decisions that have such a direct impact on people's lives," he said.

There are other, less profound, issues that Judge Lubeck has confronted, issues that perhaps grow out of his thirty years of maintaining a tightly-scheduled and hectic trial practice. For example, "no one seems to be overly concerned with really staying on time," Judge Lubeck lamented. Now presiding over calendar calls that sometimes contain scores of matters in a single morning, Judge Lubeck confesses, albeit politely, to some degree of consternation when counsel do not keep to a schedule. "I know they're not out golfing at 8:00, but you know, 9:00 means 9:00," he said. Let it be known, then, that a 9:00 a.m. hearing in Judge Lubeck's courtroom means "you're ready to go at 9:00," not that you're at the courthouse or talking to opposing counsel at that hour.



Judge Bruce C. Lubeck

Judge Lubeck also encourages litigants to plow more ground before bringing matters to the Court's attention. Not every dispute should end up on the Court's docket, and those that do should at least be the product of the parties' attempts to whittle disputed issues down to the bare minimum. "What I would hope and expect is that they do a little more work before Court in order to resolve things. It's astounding how many times the lawyers tell me they haven't talked until today, until it's time for the court," he said. Instead, the Judge advises counsel to "talk sooner. When you come to Court, be prepared for what is really important and highlight the issues."

Away from the bench, Judge Lubeck spends time with his five children, four grandchildren and wife, Karen, of 32 years. None of his progeny are currently pursuing legal careers, though one son has made a few inquiries about his father's profession. In addition to his family life,

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Judge Lubeck tends his yard and flips the pages of an occasional history novel. Finally, his trim figure belies the fact that his court calendar has infringed substantially on his running schedule. Nonetheless, Judge Lubeck still finds time to pound the pavement in his favorite running shoes.

During his days as a lawyer, Judge Lubeck also shared his vast experience as a U.S. Attorney with others. He taught short courses in seminars dealing with law enforcement topics to federal investigative agencies, including the Federal Bureau of Investigation, Secret Service and Drug Enforcement Administration. He also taught various law courses at the University of Utah, Westminister College, and Salt Lake Community College. In addition to his law degree, he received his Bachelor of Arts in Psychology from the University of Utah.

Presidents Message
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of legal representation. To that end, we will continue to promote the pro bono initiative at the University of Utah College of Law, and will also promote other worthy pro bono causes throughout the year. We will also hold our annual charity golf tournament in late May or early June 2002.

Joining the existing members of the Executive Committee will be several new members. They include Ken Black (Stoel Rives), Diana Hagen (U.S. Attorney's Office), Trina Higgins (Salt Lake District Attorney's Office), David Reymann (Parr Waddoups Brown Gee & Loveless), Rob Rice (Ray, Quinney & Nebeker), and Laura Scott (Parsons, Behle & Latimer). This is a great team, which we hope will join with existing committee members to accomplish great things during the coming year.

We are always looking for new ideas and additional help. Please feel free to call me or any other member of the Executive Committee if you have a comment or suggestion.

Announcements

The Salt Lake County Bar Association Executive Committee has held and is planning a variety of interesting social events for the upcoming months. On October 25th, the Salt Lake County Bar Association hosted a "Just Passed the Bar" social at the Alta Club from 5:30 p.m. to 7:00 p.m. This social is a way of congratulating those who passed the July, 2001 Utah State Bar Exam. Many members of the Salt Lake County Bar attended this year and it was a big success — great food and great conversation.

This year's Holiday Dinner and Dance is Friday, December 7th, at the Salt Lake Country Club. For those of you who have never been to our Holiday Dinner and Dance, just ask someone who has attended how fun this function is. B. Murphy and his band, who entertained at the 1999 Holiday Dinner and Dance, will be performing again due to popular demand.

The Salt Lake County Bar has extra revenue this year, and the Executive Committee voted to pass this surplus along to members by discounting the price of the Holiday Dinner and Dance this year. Last year, members paid $50 per ticket, but this year, tickets will be only $40 each for members and their guests. Additionally, non-members and their guests paid $65 per ticket last year but can attend the event this year for $55 each. Every non-member who attends this event will receive a free Salt Lake County Bar membership for the rest of the 2001-2002 year. If you want to attend, please respond by the RSVP date on the invitation, which you should receive in mid-November. There is limited space for this event. Unfortunately, last year we could not squeeze in some people who called after the RSVP date.

Other social events in the works include a new judge's reception in the Spring of 2002 at the Grand America Hotel and a Lagoon Day in the Summer of 2002 for Salt Lake County Bar Association members and their families. We will have our Spring Dinner and Casino Night at Tuscany again in May of 2002. We held this event at Tuscany for the first time last year, and the feedback was extremely positive on this new location. More details will follow on dates and times.

Each of these events presents a wonderful opportunity to mingle with other members of the County Bar in a relaxed, informal setting. We are very fortunate to belong to a collegial Bar, and these social events are intended to maintain this collegiality.

Justice Tongue

Dear Faithful Reader:

Tragedy and grief inevitably bring along their unwelcome buddy, guilt, when they show up, unbidden at our doorsteps. Guilt's specialty is a sleeper hold on our impulse for pleasure and mindless indulgence. He's starting to loosen his hold now. It's time for me to revive the pleasure, dormant long before September 11, that I experience by responding to your queries about the law and its practice. And, it's time for you to do your part for the cause of mindless indulgence and continue reading all the way to the end.

This column will not include a reply to one of your letters, though your reliable trickle of inquiries nourished my vanity during my exile. They included in their number a bounteous crop of topics which warrant the cheeky, cheesy, distasteful and no-tasteful commentary to which I am by intellect and temperament suited. That commentary will come later. This is not the time for cheeky and cheesy. Instead, I'm going to tell you about baseball and my niece's wedding.

The terrorists have much to answer for. Near the bottom of the list, but on the list nevertheless, is the fact that the terrorists wrenched our attention away from a terrific baseball season. As I have learned from reading the brief biographies of the Trade Tower victims, many were passionate about the Yankees. This is no reason to mourn their loss less, but there was a time when I probably would have said that this might not apply to my brother, Patrick.

Like the rest of us, Patrick was a Detroit Tiger fan and part of the first experimental group of offspring from what we have only recently come to know as the greatest generation. Of course, Patrick didn't choose his baseball allegiance any more than he chose his pedigree as a baby boom prototype. Our expectations about choice in general have come a long way since the analog era before Sputnik. Back then, war came in only one temperature—cold. The bad guys were one color—reds. And, your baseball team was the one that provided the strongest radio signal. In that age when the menu of choices was shorter, our depth of commitment was greater. Much about America in the second half of the twentieth century can be explained in part by the theory that there is an inverse relationship between scope of our choices and the strength of our allegiances.

This theory fails to explain our sister, Anne. Anne is a Yankee fan. Furthermore, from the time she contracted this inexplicable disease, she took on all of the characteristics that most of us raised in the provinces who care about such matters find so loathsome about Yankees fans. Anne was vocal and provocative in her adoration of Mickey Mantle, Roger Maris, Whitey Ford and the rest of the Yankee behemoth which had its way with the American League during the Eisenhower administration. Maybe she couldn't help herself. Maybe it was a cry for help. Whatever, Anne became too much for Patrick. As the two navigated their way into adulthood, the rough and tumble of their childhood differences hardened into an estrangement that endured after Anne packed up and followed her baseball loyalty to live in New York City. Manhattan suited her. Anne thrived, prospered and bought season tickets.

Like many of the baby boom generation, my siblings and I look back over the decades from the vantage point of endstage, middle-age and see in ourselves a surplus of narcissism, a flaccid morality, and paralysis in the face of great wrongs. This unpleasant self-appraisal has driven otherwise sensible people to fabricate Vietnam war records and resulted in an astonishing inflation in attendance at anti-war rallies. The "greatest generation" earned its title because of who our mothers and fathers were and what they did, but the deeds of the greatest generation owe much of their hold on our awe and respect for what we were not and what we failed to do.

In August, Anne received an invitation to the October wedding of Patrick's daughter. Anne enclosed a Yankees cap, a barbed note on the Tiger's nagging futility, and her regrets that she would not be able to attend. The cap had the desired effect. "She's sick," Patrick said in a call after the package arrived, "It's her niece's wedding, but for her it 's just another chance to torture her brother." Then September 11 arrived.

The wedding was last week. The bride and groom are both law students. They authored their own ceremony. It was in the style of Kahlil Gibran giving the Miranda warning. Anne was there. Patrick wore the Yankees cap. "It's not about baseball," he explained. Small miracles like this appear to be sprouting like daisies from the rubble of the World Trade Center and Pentagon. They hold the promise that there may yet be hope for the baby boom generation to get it right and stake its own claim to "greatest generation." Since September 11, I have seldom heard mutterings about pummeled 401(k) plans from acquaintances who before spoke of little else. It's probably a good thing that we boomers can't retire yet. There's work to be done on our legacy. If we can purge the planet of terrorists while preserving our liberties we've got a lock on "greatest generation."

At the wedding reception, the groom struck up a serious conversation with me as part of a badly disguised effort to distract me from his bad dancing. "Did the proposed anti-terrorist legislation really pose a threat to our civil liberties?" he asked, trying to flatter me by suggesting that I might have something to say on the subject while making it clear that the expiration date stamped on my knowledge on any topic had long since come and gone. I mentioned the challenges that faced judges in times of national crisis to keep a grip on the Bill of Rights, pointing to the California Supreme Court approval of warrantless searches in aid of solving crimes of "enormous gravity" in People v. Sirhan, 497 P.2d 1121 (Cal. 1972). By the time the song ended I had discovered that my young dance partner, "Generation Y" I believe, had no idea who Sirhan Sirhan was. Old folks, let's get busy.

Your servant in finite justice,
Tongue, J.