

HOW I NARROWLY ESCAPED INSANITY

Alex Kozinski^{*}

I know what you're thinking: You've invited a United States circuit judge to lunch. It seemed like a good idea at the time. But now you have to sit there trying to digest your meal and look interested as he lectures you about all those silly things that annoy judges—overlong briefs, incomplete excerpts of record, attorneys who leave the no's and not's out of quotations, things like that.

Wrong. I'm tired of talking about that stuff. What I'm going to talk to you about instead is my idea for a screenplay. Ah, a captive audience is a wonderful thing!

I got the idea for my screenplay a few years ago when I took my three young boys to see *Batman*.¹ Not the recent, Johnny-come-lately sequels, but the original one—with Jack Nicholson. The first time Batman came on screen wearing that black, flowing cape, one of my boys gasped, "Hey, Dad, Batman dresses like you!" And, you know, that cape does look a bit like my robe. And that gave me a great idea for a movie: *Bench-man*.

Our hero is a judge—let's say, I don't know, how about a United States circuit judge—who was born somewhere in eastern Europe—let's say Romania. By day, he does whatever it is that judges normally do. But by night he roams the law firms of Los Angeles, looking for attorneys who have cases on the trailing calendar and forcing them to submit to impromptu settlement conferences and minitrials. Kind of a vigilante Oliver Wendell Holmes; Learned Hand with brass knuckles.

I picture him as imposing, but not necessarily physically large. Maybe someone, ah, about my height, but with that body armor that Michael Keaton wore in the movie. He speaks with a thick accent, but no one recognizes him because he wears a small mask over his eyes.

Of course, given these qualifications—being a circuit judge, the accent, the imposing demeanor—there's really only one person in the world who could play the role convincingly: Arnold Schwarzenegger.

^{*} Judge, United States Court of Appeals for the Ninth Circuit. When Judge Kozinski delivered this address on February 23, 2001, as part of *UCLA Law Review's* Law and Popular Culture Symposium, he had them rolling in the aisles. Arguably, it lacks something without Judge Kozinski's knee-slapping delivery.

1. *BATMAN* (PolyGram Filmed Entertainment & Warner Bros. 1989).

I see that you are all starting to compose your letters to Mike Asimow asking who had the dumb idea of letting me speak on a subject of my own choosing, so enough about my screenplay. What I'm really going to discuss is one of my favorite law-related movies. *Witness for the Prosecution*?² *To Kill a Mockingbird*?³ No, as you've probably guessed I'm talking about *Mad Max Beyond Thunderdome*⁴—which stars Mel Gibson as a kind of Dirty Harry in postapocalypse Australia. Max takes a trip to Bartertown, a commercial center where one can trade for all manner of goods, including drinking water with a healthy, radioactive glow. There he meets Auntie Entity, a benevolent despot maniac queen played by Tina Turner in leather—and not much of that. Max makes a bargain with Auntie to kill one of her political rivals, and to that end he deliberately provokes a dispute with the man. And that's where the fun begins.

You see, controversies in Bartertown are settled through trial by combat in the Thunderdome—a huge metal cage in which the contestants struggle as they swing from the ceiling by giant bungee cords. The entire population of Bartertown hangs eagerly on the outside of the cage, chanting the only rule of the contest: TWO MEN ENTER, ONE MAN LEAVES.

Max defeats his opponent, but proving that he's a real mensch, he refuses to kill him. The problem is, this violates Max's bargain with Auntie, who, after all, paid Max to get rid of the scoundrel, not just humiliate him. In Bartertown breach of contract is a serious offense and there's just one law of contracts: BUST A DEAL, FACE THE WHEEL.

Anyone who defaults on a contract must spin a huge wheel of fortune in one of Bartertown's public squares; the punishment indicated when the wheel stops spinning is the final judgment—there is no appeal. The available punishments include death, exile, forfeiture, amputation, and the dreaded "Spin Again."

Now, as a student of judicial administration, what caught my eye here was that the denizens of Bartertown had devised a novel and efficient method of adjudicating disputes. As you might imagine, the part I found most attractive was that there were no appeals. But other aspects of the system also were of interest: It was swift, it embodied the ethos of the community and, best of all, it did not require any lawyers or judges. Think about what the litigants saved in photocopying fees alone. True, the results tended to be a bit arbitrary and losing your case often meant losing your life, but hey—no system is perfect. And I betcha they didn't have a lot of vexatious litigants.

2. WITNESS FOR THE PROSECUTION (United Artists 1957).

3. TO KILL A MOCKINGBIRD (Universal International Pictures 1962).

4. MAD MAX BEYOND THUNDERDOME (Kennedy Miller Productions 1985).

Now, compare the way we do things. I'll use as my example a real case that started a few years ago in Charlottesville, Virginia, with University of Virginia student Dennis O'Brien.

Dennis went to a local restaurant called the Mousetrap to meet some friends. At the Mousetrap, when you walked in you were given a tab, and whenever you ordered something the waiter would put it on your tab. When you left, the cashier added up your tab and you paid it. To discourage deadbeats who would run up a tab and then pretend to have lost it, the Mousetrap charged five dollars for a lost tab.

Well, Dennis met his friends but—allegedly—ordered nothing. When he was stopped at the door he couldn't find his tab, and the cashier asked him for five dollars. Dennis refused.

Now, had this been Bartertown, everyone in the restaurant would have stopped eating and drinking and would have started banging their cups and silverware on the tables and chanting BUST A DEAL, FACE THE WHEEL. But this was Virginia so they did the civilized thing instead: They had Dennis arrested and hauled off to jail in handcuffs. Once he got out of jail, Dennis sued the restaurant for false imprisonment. The lawsuit generated a lot of bad publicity that eventually drove the restaurant out of business, so it counterclaimed against Dennis for the damage to its reputation. When the smoke cleared, the owner of the Mousetrap had obtained a judgment of \$60,000—it has since grown to \$165,000—against Dennis. But Dennis had left the country and was living in New Zealand—which is not too far from Bartertown, by the way.

Was this the end of the matter? No way. One fine day Dennis was walking out of his apartment Down Under and got hit with a summons notifying him that the Mousetrap was seeking to collect its judgment against him. It's many years later, the restaurant has gone out of business, Dennis is a world away, but the litigation machinery grinds on. Now is this civilized, I ask you?

The truth is that as a society we have invested a great deal of faith—and substantial resources—in the belief that you can solve almost any dispute if only each party gets a lawyer to present their differences to a judge. Where does this litigious spirit come from? I believe in large part it comes from our popular culture, which glorifies the role of lawyers and judges, and fosters the belief that going to court is not merely right and appropriate, but almost your patriotic duty. Not so long ago, I was watching Alan Dershowitz on the *Oprah Winfrey Show*⁵ and heard him proclaim: "Americans . . . don't sue enough. When you don't sue you know who

5. *Oprah Winfrey Show* (ABC television broadcast, 1986–current).

benefits—the big corporations, the governments, the power establishments. Suing is good for America.”⁶

As far back as I can remember, TV shows and movies have carried the drumbeat of this message. I started watching TV when I came to the United States in the early 1960s, and I am quite certain that my decision to become a lawyer—and eventually a judge—was formed right there in front of the black-and-white television tube. I was particularly influenced by *12 Angry Men*,⁷ which I caught on television during a rainy afternoon, and by *Inherit the Wind*.⁸ Both movies portray a legal system that works rationally to reach a just result, and a system in which reasoned argument and effective advocacy is always employed by the good guys to advance a just cause. Watching countless episodes of *Perry Mason*⁹ convinced me that criminal defendants are all innocent, and that you can always count on the guilty party to sit in the back of the courtroom during the trial and, at the key moment, jump up like a jack-in-the-box and cry out: “I confess, I did it, I did it!”

There was also a very strong message that lawyers could be involved in promoting social change through the mechanisms of the law. I wonder how many people remember a great old TV show by the name of *The Defenders*,¹⁰ starring E.G. Marshall (who, incidentally played one of the jurors on *12 Angry Men*). Week after week the show confronted the most difficult and controversial subjects of the time. I can still remember the episode that dealt with what was then a highly controversial and somewhat taboo subject, namely abortion. You have to cast your mind back to 1963 or 1964, a time when abortion was illegal in every state in the Union, often punishable with heavy prison terms for both the mother and the doctor. Abortion, moreover, was well understood to be morally reprehensible and was not readily discussed in polite company. I know it must be hard to imagine these days, but this was a time when certain words were not used and certain subjects were not discussed on television. Which is why *The Defenders*' abortion show was such an eye-opener, as it portrayed the story of a young girl who had an unwanted pregnancy and submitted to the tragedy of a back-alley abortion. I have always suspected that this one TV show shattered the public silence on this topic and helped put the idea of abortion rights on the national agenda.

6. *Oprah Winfrey Show: Too Many Lawsuits in America* (ABC television broadcast, July 8, 1991).

7. *12 ANGRY MEN* (Orion-Nova Productions & United Artists 1957).

8. *INHERIT THE WIND* (Lomitas Productions, Inc. 1960).

9. *Perry Mason* (CBS television broadcast, 1957–1966).

10. *The Defenders* (CBS television broadcast, 1961–1965).

Two other TV shows influenced my decision to go to law school. The first was *Divorce Court*¹¹—an hour-long show about contested divorce proceedings, starring Voltaire Perkins as the stately, sage, and always patient judge, who conducted the often acrimonious proceedings with calm and decorum. The grounds for divorce were always either “adultery” or “mental cruelty,” and I remember anguished wives and husbands getting on the stand, pointing an accusatory finger at each other and crying out: “And then the private investigator I hired followed them to Zuma Beach, where they spent the day together!”

You see, it was well-understood that no one ever went to Zuma Beach unless they were going to engage in some heavy-duty hanky panky there, so proof that the husband or wife took someone of the opposite sex to Zuma Beach was conclusive proof of adultery. I was living in Baltimore at the time and had an image of Zuma as a beach covered with couples writhing and moaning under their blankets; I was very disappointed when I finally moved out here, drove out to Zuma, and found it to be just an ordinary beach with no special attractions.

Finally, there was the precursor to Judge Judy¹² and Judge Wapner, and all those other TV judges who adjudicate disputes between individuals appearing before them without a lawyer. I don’t know how many people remember *Day in Court*¹³—a very non-flashy predecessor of *People’s Court*.¹⁴ The presiding judge was a man with a crewcut and a natty bowtie by the name of Edgar “Ted” Jones. He would stride to the bench and hear two cases during a half-hour show. Like the real Zuma Beach, it was a rather staid affair; he did not lecture the parties, he did not berate them, he did not give them advice for improving their lives. He listened to their cases and gave them a decision.

Imagine my surprise when I got to law school about ten or twelve years later and walked into my first class. Standing in the front of the room was a man with a crewcut and a natty bowtie. He looked up at us and said: “So, this is the first day of law school for all of you. Welcome. My name is Ted Jones.” I later learned that not only was Professor Jones the judge in *Day in Court*, but the show itself was researched by UCLA law students, who would comb through the records of the Small Claims Court in Los Angeles, looking for likely cases to put on the show.

We have come a long way from those early days. Shows and movies about lawyers and judges have proliferated. There are at least half a dozen

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11. *Divorce Court* (NBC television broadcast, 1957–1969).
 12. Featured in *Judge Judy* (ABC television broadcast, 1996–current).
 13. *Day in Court* (ABC television broadcast, 1958–1965).
 14. *People’s Court* (nationally syndicated television broadcast, 1981–1993).

shows running right now involving law, lawyers, and judges—perhaps many more. And there is a constant stream of movies glorifying the litigation process. While lawyers are not always portrayed as the good guys, and judges are sometimes portrayed as venal, stupid, or corrupt, the overall message continues to be that suing people is the preferred way to resolve any grievance you may have. Whereas, in an earlier day, people might have hesitated about taking a private dispute and handing it over to lawyers and judges to decide, today people often have no hesitation about bringing a lawsuit if they have what they think is a legitimate claim. Just think of those immortal lines repeated for years every weekday afternoon: “The next time you’re involved in a dispute with someone, don’t take the law into your own hands; take ’em to court.” This credo of the *People’s Court*, which has somehow become our national motto, teaches that no dispute is too trivial, too one-sided, or too ridiculous for a visit to the courthouse.

No one is immune from the pull of litigation; certainly not me. I assume you all remember the landmark case of *Kozinski v. Gates*? Surely it’s reported in your criminal procedure casebook. No? Well, let me tell you about it.

Just after I graduated from UCLA School of Law, I was pulled over and given a speeding ticket (I don’t think the two events were related). As is customary, the ticket stated that I could either pay the fine or go to court and fight it. I chose the latter; I figured I would plead temporary insanity and throw myself at the mercy of the court. The ticket listed Thursday as the evening when night court was available, so the following Thursday evening I put on my best polyester double-knit suit and headed off to court.

When I got there, things were not at all as I had expected. There were no judges and the courtrooms were all locked. A long line of people was waiting at a lone clerk’s office window. I joined the line and, when it was my turn, the clerk informed me that night court had been moved from Thursdays to Mondays, but the police had a lot of old tickets with Thursday printed on them and so they kept handing them out. “So,” he said with a sigh, “every Thursday night we get a line like this. You can come back Monday night, or just pay the ticket and be done with it.”

I was astonished. I looked around me and saw that I was practically the only one wearing a business suit; many didn’t speak English. Most didn’t understand why they couldn’t see a judge. “This can’t be right,” I told the clerk. “Maybe I’ll see *you* in court, and I don’t mean night court.”

When I called the city attorney’s office about a week later to tell them I was suing Chief of Police Darryl Gates, the city, the county, and the chief

judge of the traffic court, they laughed. "You can't make a federal case out of a traffic ticket," they chortled. "There is no constitutional right to night court."

They were still laughing in the courtroom when Judge Matt Byrne stormed to the bench and glared down at us. He looked like God gazing upon Sodom and Gomorrah. "This is an outrage," he said in a voice like thunder, "and it stops now!"

"Shazam!" I said to myself, "when I grow up I want to be a federal judge too."

I'll spare you the remaining details of my war story. Suffice it to say, after Judge Byrne worked them over for about twenty minutes, opposing counsel became very cooperative and we managed to settle the dispute in a jiffy. And no doubt, I was right in bringing my lawsuit. Or was I? That's just the problem: Everyone thinks they have a good reason.

Fast forward now about twenty years and it's the year 2000. Another Kozinski gets an alleged traffic ticket. This is young master Yale Kozinski, my son, who was maliciously accused of jaywalking by a deputy sheriff who had a ticket quota to fill. At least that was Yale's story. "I wasn't jaywalking," Yale told me indignantly, "and I'll go to court and prove it." So that is what he did—early one morning he heads down to Torrance Superior Court and . . . finds that the courtrooms are locked and there's nobody there. No, I'm just kidding, there were plenty of courtrooms and a long line to see the clerk. When his turn comes, he tells the clerk he wants to plead not guilty and ask for a trial. So the clerk asks him for seventy-six dollars. "What for?" Yale asks.

"Bail," the clerk says, without blinking.

"Bail?" Yale asks. "Why?"

"To make sure you show up for trial," the clerk says.

"You must be kidding," Yale responds. "If I was going to flee to Zanzibar to avoid prosecution for jaywalking, I would have done it by now, don't you think?"

The clerk, however, is the ultimate bureaucrat—he has absolutely no discretion, so Yale asks to see a judge. When he gets before the judge, they have pretty much the same conversation: If Yale wants a trial date, he has to pay the bail (which conveniently happens to equal the amount of the fine), and the judge has absolutely no discretion in the matter. "Say what," the judge tells him, "if you can't pay the bail right now, I'll give you two weeks."

"And what happens if I don't pay in two weeks?" Yale asks.

"Then I'll send the sheriff out to arrest you."

“Let me get this straight,” Yale says, “you think it’s safe to let me out on the street for the next two weeks, but after that I have to be arrested to make sure I show up for trial on my jaywalking ticket?”

“That’s right,” says the judge.

Which is what led to the landmark federal case of *Kozinski v. Baca & Chavez*. You already know who the Kozinski is. Lee Baca, of course, is our sheriff, and Victor Chavez is the Chief Judge of the Superior Court. And the case wound up before Judge Margaret Morrow of the District Court for the Central District of California, who promptly recused herself because she is married to Judge Paul Boland, who is not only a beloved former professor at UCLA School of Law, but also a very fine Superior Court judge. So the case got transferred and, by random assignment, got reassigned to God—I mean Judge Byrne, of course—who had the pleasure of presiding over the second Kozinski traffic case.

This is beginning to sound like the makings of a TV miniseries, no? Anyway, Judge Byrne yelled at the defendants just like he had twenty years earlier, and they came to heel. Today, if you should get a traffic ticket in L.A. County, you will not be subject to the requirement of automatic bail. You will have the option of appearing before a judge who must then determine whether you are a flight risk or a danger to the community. If that should happen to you, feel free to send a thank-you note to my son Yale for making L.A. County safe for all wrongfully accused speeders and jaywalkers.

But not all litigation has a happy ending. In my job, I often see people who spend years of their lives in what is ultimately the fruitless pursuit of their version of justice. Often, the litigants get consumed by the cause they are pursuing, and it eats up their lives. The money, or whatever they are actually suing for, winds up being a secondary consideration. What people look for is vindication—a judicial pronouncement that they are right and their opponent is Satan incarnate. And often, the cases that raise the greatest acrimony involve the very industry that most shapes our popular culture, namely the entertainment industry.

There is an interesting story about a case that did *not* go that way, but could have. As many of you may know, one of my colleagues, Steve Trott, was a member of a band called The Highwaymen. They were very popular in the '60s; their biggest hit was “Michael Row the Boat Ashore.” But after rock 'n roll came into vogue, The Highwaymen took a deep plunge into near oblivion.

The group was brought back together, however, by an affront to their dignity: A bunch of upstarts by the names of Willie Nelson, Waylon Jennings, Johnny Cash, and Kris Kristofferson started touring the country

calling *themselves* The Highwaymen. Well, you don't tug on Superman's cape, you don't spit in the wind, you don't pull the mask off the old Lone Ranger, and you don't mess around with Trott.

Pretty soon we had a lawsuit going: *The Highwaymen v. The Interlopers*. And a doozy of a fight it might have been—except that it settled in a most unusual way when Steve Trott got on the phone with Waylon Jennings. They agreed that The Highwaymen owned the name and that they would give the interlopers a nonexclusive license to use it. This, as Steve explained to me, soothed The Highwaymen's bruised egos, which was mostly what they wanted anyway. Then, to cement the relationship—and to make some money—they all agreed to do a concert together and split the proceeds. And so it happened, a while back in the Universal Amphitheater, there was the one and only performance of The Highwaymen, featuring The Highwaymen.

Steve and his band managed to find an out-of-court solution to their litigation problem, but most people don't. What they find, instead, is a long, slow, undramatic process, quite unlike what they see on television and in the movies. Often the process drains their pocket books and saps their sanity. They begin to see life itself through the lens of litigation, and other interests such as job and family become secondary. I've seen it happen many times. In fact, it almost happened to me. You see, it is a little known fact that, in addition to my numerous judicial opinions and scholarly articles on the joys of Nintendo, I single-handedly wrote the motion picture blockbuster *Total Recall*.¹⁵ Well, to be honest, there's a reason it's a little known fact; you see, it's not exactly true. But I came close.

I'm sure everyone here has seen *Total Recall*. For those of you who missed it, it's a warm, romantic comedy about a guy, played by Arnold Schwarzenegger, who quite literally has a personality transplant, which gives him an excuse for killing about six thousand people with his bare hands. It turns out, *Total Recall*, is based on MY NOVEL. It's absolutely true. I am *not* making this up. About twenty years ago I got the idea of a science fiction novel about a technique for extracting people's minds and implanting them into other people's heads. "How would you know," I asked, "if someone had stolen your mind?"

Well, the similarities between the movie—hereinafter referred to as "the pirated work"—and my novel are uncanny. Sure, they had changed a few details: The characters are different, the dialogue is different, the plot

15. TOTAL RECALL (TriStar Pictures et al. 1990).

is different. Other than that, the stories are identical. Still, I thought to myself, they were clever about it; they managed to cover their tracks.

And then came the smoking gun. Near the end of the movie there's a scene where Cohagan, the bad guy, kicks over a fish tank and the camera shows the fish squirming on the ground amidst the shattered glass. Well, I had them cold: The identical scene appears in my novel. How could they possibly deny their perfidy? What jury would believe they independently came up with a story about mind-swapping that contained a scene about a shattered aquarium and squirming fish? I started imagining what I would do with the extra cash: a yacht, a plane, a villa in Capri. Perhaps I'd become the first federal judge with his own gag writer.

And then it dawned on me. I had never finished the novel and I had never sent it to anyone for consideration. In fact, no one even knew I was working on it. Despite the similarities, despite the smoking gun, it was all just a big coincidence.

But imagine, just for a minute, that I *had* completed my novel and sent it out for consideration. Do you think there is any power on earth that could have persuaded me that the producers of *Total Recall* had not somehow gotten ahold of my manuscript and pirated my ideas? Whatever explanation they might have offered, whatever protestations of innocence, I would have had one response: Remember the fish scene! You read my novel and decided to steal the story, but you were betrayed—unwittingly—by a small but important detail. The argument is so plausible, so seductive, even now I am almost ready to believe it; I am sure it would have driven me mad and I would have spent the rest of my natural life looking for the one good lawyer who would vindicate me.

Fortunately, however, after a little digging through old boxes, I found my tattered, half-completed manuscript where I had left it; there it was, covered with dust and cobwebs, an anchor by which to tether my mind to the world of the sane Unless, of course You don't suppose they have mind-reading machines in Hollywood Naw, forget it.

So what's the lesson in all this? Laws and lawyering, judges and courtrooms are the natural subject of novels, plays, movies, and TV shows. Distilled to its essentials—as it must be in order to make an entertaining story—litigation can be very exciting and rewarding. Alas, the reality is much more mundane and painful. So, as a good lawyer, seeking to promote your clients' best interests, try to keep them out of court at all reasonable costs. But if you can't, try to have a little fun with it.

Let's say, for example, your client is suing some of his suppliers, claiming that they colluded to fix prices. You could bring a regular, boring old complaint, using a lot of "whereases" and "hereinafters." Or you could

try something a little more exciting. Maybe, something like this (sung to Frank Sinatra's *Strangers in the Night*¹⁶):

Strangers in the night, exchanging
prices
Wondering in the night, were
there devices
To form a cartel, before the night
was through?
Increased revenues, were so inviting
Oligopoly, was so exciting
Money to be made, the method tried
and true

Strangers in the night, they were
competing
They were strangers in the night,
until the meeting
Where they set restraints on trade
They nearly had it made
'cause DOJ was far away and the FTC
was closed that day

Ever since that night, they've
priced together
Colluders at first sight, their
nests they feather
Few schemes work so well,
as conscious par-al-lel

16. FRANK SINATRA, *Strangers in the Night*, on STRANGERS IN THE NIGHT (Reprise 1966).
