PRAISE FOR *WAY OF THE TRIAL LAWYER*

"For forty-five years as a trial lawyer, teacher of trial advocacy, and federal district judge, I have read every book on being a trial lawyer I could get my hands on. This book stands heads and shoulders above all of them. Unlike the others, Rick Friedman reveals the key to unlocking the psychological barriers that prevent 99.9 percent of trial lawyers from reaching their full potential. He explores the ethos, the moral values imperative to becoming a great trial lawyer. Rick Friedman also explores how to overcome the many types of fears all trial lawyers encounter. I have thought deeply about fear my entire legal career but have never read anything written about it that is so incredibly refreshing and insightful. Like a master safe cracker, Rick Friedman unlocks the secret combination to overcoming fear. This chapter alone is worth its weight in platinum. Rick Friedman has stood on the shoulders of trial giants and indeed has seen further than any. In my view, it is akin to legal malpractice to go to a civil or criminal jury trial without mastering the concepts in this book, no matter how much or little trial experience you have."

—Hon. Mark W. Bennett, retired US district judge and director of the Institute for Justice Reform & Innovation at Drake University Law School

WAY OF THE TRIAL LAWYER

Beyond Technique

By Rick Friedman

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To Jim McComas, who had my back when I needed it most; and
Dr. Ann Stockman, my therapist of twenty years, whose presence is on every one of these pages.

—Rick Friedman

"The sincerity of a true heart is the only requirement of effective advocacy. No one wants to know that, because a true heart is so much harder to acquire than a few advocacy techniques."

—Jim McComas

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PUBLISHER'S NOTE

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FOREWORD

Barnardo: Who's there?
Francisco: Nay, answer me. Stand and unfold yourself.

—Opening of Hamlet

You are what you do.

—Will Durant

More importantly, you do what you are.

—Anonymous

There's a lot to be said for being very smart and very sensible. Rick Friedman is among the veriest. His smart often rises to the domain of wisdom. Each Friedman book makes us all better lawyers or consultants. Rick often does this with the simplest of strokes, such as rules (with Pat Malone) and polarization, which both opened new advocacy vistas for us.

That's why I've long told lawyers and consultants to read every book with Rick's name on the cover. Those who have not come on the Friedman journey are the poorer for it. In today's outpouring of good and great advocacy books and approaches, Rick's stand out.

And practicing what he preaches, he's also among our best plaintiffs' attorneys.

So when I learned he'd used COVID-19's hiatus to finish a new book he called "unusual," I awaited it as eagerly as Ralphie in *A Christmas Story* awaited his secret decoder pin.

As for eager Ralphie, the big day finally arrived for me: Rick's book got here. I settle into my reading chair (yes, people still have them), set my coffee alongside, open to page one, and dive in.

Yeah, well. Remember when eager Ralphie decoded his secret message? The best-laid plans of mice and men. The secret coded message?

A self-help message! "Drink your Ovaltine." Poor Ralphie. Crushed. Welcome to the world, kid.

And eager David, by page four of Rick's new book? Crushed. It's about looking personally inward, a direction I'd never been even slightly interested in looking. And ethos, for Gods' sake? This book is about ethos. I'm a 1950s kid. We were warned away from navel-gazing mush like ethos, or thinking inwardly, or wondering who we are or why we are the way we are. Looking inward was weakness: "*Don't be a punk!* Don't be a Commie! Don't be gay! Be macho! Above all, *don't look inward*, because nothing inward is worth seeing. You can look up, look down, look back and forth, but don't look inward."

Yet here it is again in the form of Friedman's new book. Apparently, a book of *self-help* and *inward-looking*. So, no! I'm not reading it, even if you put twelve-eyed snakes with legs in my bed. And unless you view most lawyers through sentimental rose-colored glasses, you wouldn't believe they were going to read it either. To my 1950s/60s-framed mind, this damn stuff comes from the condemned fraudsters in Hell's Eighth Circle.

So I refused to read this book.

Until a horrifying thought: I *had* to read it because I'd promised Rick.

No CliffsNotes. No one to cheat off of on the test. Stuck. Screwed. It's from a friend I admire almost to heroic proportions, a paragon of decency whose techniques sustain me and everyone else in our field who's any good. I gotta read it. Oy. I told myself, "Shut up, Ball, and do your wretched duty." So I've done my wretched duty. I read it. I totally read it.

Here's what could be my entire forward to this book: *THANK GOD WE GOT THIS BOOK!*

It's the first of its kind. If law schools care what they're sending into the world, they'll make it their first required book, at least for advocacy classes.

The title accurately includes *Beyond* Technique. Not *Instead of* Technique. Rick assumes you already have techniques and will come to have more. But with all those techniques in your toolbox, what kind of builder are you? Because the kind of builder determines—concretely and in practical ways—what gets built. That's the *Beyond* part.

I have watched and worked with lawyers whose knowledge and application of technique are very good. But the nature of the person they are—mainly their ethos—enlists the trust and attachment of the jury so well that their track records are far better than most of their colleagues who may have far greater technical mastery. The opposite is just as true: many who are the most technically knowledgeable and proficient still struggle because the self they bring to trial undermines how the jury perceives them and thus their cases. Rick's book will show them how to change this.

Why did I love reading this book despite my repulsed disposition to what I thought it'd be? Because it's the first usable guide I've ever seen about one of our oldest and best tested principles of persuasion. The great observer Aristotle named what even then was an ancient principle; he called it ethos, meaning the nature of something or someone. Trial strategy books and teachers refer to ethos here and there. But beyond telling you it's important, they don't help you with it. And that's not enough for a trial lawyer. You can't settle for, "I am what I am and dat's what I am," though that was enough for Popeye. This is because ethos is hard to talk about; we barely have had the vocabulary for it without falling into la-la-Kumbaya-land. So we've heard little about questions like these:

- How can you tell whether you're one of the vast majority whose self is full of some things you hope will not surface in trial—that is, when your whole self is someone you should not bring to court?

- What exactly are you supposed to *do* when that self is someone you should not bring to court—as is the case with most of us? What if your truth, your "whole self," includes, say, greed, or fear of not being able to pay overhead, for two of many examples?

Because trial lawyers need practical, not theoretical, answers, you need this book. It will guide you away from the fakery and masking that undermines verdicts, and into gaining some control over your component traits. The former is easy and ineffective. The latter—gaining

control over yourself—is, as Rick's title says, *the way of the trial lawyer*: You learn to understand and exercise some control over your nature, the aggregate of your traits. Because what you are, not what you pretend, is what jurors perceive you are.

So yes, this book is about ethos in a comprehensive way that gives you the kind of persuasion resource that its centuries of adherents—and, now, modern scientific research—shows ethos to be. That makes this book a first, as far as I know, for trial lawyers.

I have two pieces of important advice for every attorney I know:

1. Read this book. I know you, so I know it will bring you close to the way of the trial lawyer as Rick describes it—if you follow my second piece of advice.

2. Try not to read this the way we normally read strategy or technique books. Instead, work slowly and thoughtfully through it. A piece at a time. Reflectively *in relation to yourself*, honestly and privately, and as egolessly as you can manage. Yes, that means to introspect. It won't hurt, and no one but you need know about it.

So don't read just to see what Rick has to say. Read to let the book help you show to yourself the whole "who" that you are. It's hard to believe it does that, but it does. As you read, ask yourself the hard questions, come to the hard conclusions. Fear of doing that is a crippling load of baggage.

The longstanding advice to "be yourself" and "be yourself fully present in the moment" is only the first half of the advocate's gold standard. The second half—the half Rick deals with—is to shape what "yourself" actually is. Your *nature* or, per Aristotle, your ethos, and thus the ethos, the nature, of your case as jurors see it. Your current ethos is immutable only if you let it be. So you have work to do.

Doing it is the way of the trial lawyer.

—David Ball

INTRODUCTION

The Way of the Trial Lawyer? Yes, I know, a truly pretentious title. But the fact that it caused you to pick up the book and read this far speaks to a widespread longing among those who do the work we do.

How to describe that longing? Maybe by talking about what is missing.

There was a time, I've been told, I've read about, I've imagined, when trial law was a profession. A commonly held and acknowledged set of values, beliefs, and understandings guided the trial lawyer through his career (they were almost all men). These values established the trial lawyer's place in his community and gave him a wholesome sense of self. They articulated a sense of purpose that went beyond ego and self-interest.

Certainly, there were shortcomings and appalling gaps in these values and beliefs, but for those with the integrity and discipline to follow them, they provided a path toward true satisfaction and fulfillment.

As the values in our country evolved, law stopped being a profession and became a business. At present, we lack a commonly held set of values, a common understanding of the trial lawyer's place in the community, and any direct guidance for the trial lawyer trying to live a life of purpose and integrity.[1]

That is not to say we lack trial lawyers living lives of purpose and integrity—there are plenty. They are men and women of courage and open hearts, battling for things they believe in. Often, they are so engaged in the battle, that the true meaning of the battle is not well understood or expressed—even by them. This creates an advocacy problem, an advocacy weakness.

1. The term *trial lawyer* is meant to mean lawyers representing individuals in criminal and civil courts. It is meant to exclude civil defense lawyers (including insurance defense lawyers) and prosecutors. There may be "a way" for them, but I know little about it.

You see, there is something beyond technique. Anyone who pays close attention to what goes on at trials begins to notice rather quickly that the most technically skilled lawyer does not always win. In fact, it is awfully common for the most technically skilled lawyer to lose. Lots of factors can account for this: biased jurors, unfair rulings from the judge, and, of course, difficult facts. But frequently, there is something else going on as well. Spend enough time in a courtroom and you begin to feel it. Some kind of invisible force or energy is moving through the room, affecting the actions and decisions of everyone there. This energy can make the difference between winning or losing. If lawyers seem in command of this energy, we might say they have *charisma*. But this energy is much deeper and more powerful than charisma, a trait usually associated with special personal charm or appeal.

Aristotle is reported to have said that there are three main types of persuasion: logos, pathos, and ethos.

Logos is logic. The rational, logical argument we spent so much time on in law school. A lawyer unable to employ logic is not going to be much of a lawyer.

Pathos comes from the Greek word *pathea*, meaning "suffering" or "experience." The members of your audience have had experiences; they have suffered. Maybe one of your jurors hates tractor-trailers because a family member was killed in a crash with a tractor-trailer. If so, that feeling is available to help the lawyer suing the driver of a tractor-trailer before the first fact is presented. Pathos is an appeal to thoughts and emotions that already reside in your audience. In the last few decades, social scientists have tried to help lawyers figure out what feelings and emotions reside in the jury audience. The Reptile model of advocacy is largely based on identifying and then appealing to thoughts and emotions that already reside in the jurors. Focus groups are also used to discover thoughts and feelings that are likely to reside in the jurors.

Ethos forms the root of *ethikos*, meaning "moral," or "showing moral character." It has come to refer to the character or fundamental values

of a person or culture. Aristotle is reputed to have said that ethos is the most powerful form of persuasion.[2]

These are cursory, simplistic definitions, but sufficient for our purposes.

Every lawyer has been exposed to at least three years of logos training. As for pathos, there are innumerable articles, books, and classes discussing how to identify and appeal to the emotions, thoughts, and beliefs that already reside in the jurors. But what of ethos?

In trial advocacy writings we are told, "don't do anything to hurt your credibility." We read that we should not say anything that isn't true; we should be prepared, polite, and confident—and then we will be credible. And that is pretty much the end of it. I know of no writing or CLE that attempts to teach ethos.[3] Can ethos even be taught? I think so. Although the better way to phrase it is: ethos can be *cultivated*. It is in all of us, waiting to emerge and manifest itself. It can also wither and die of neglect. With attention, care, and patience, it can grow into a diamond-hard supportive presence within the advocate, and a powerful force in the courtroom.

One can be a successful trial lawyer without ethos. Some people are so intelligent, so clever, or have so much charisma that they are successful without paying much attention to ethos. Others are successful by working hard and simply having the courage to repeatedly go into court. Still, cultivating ethos would make all of them even more successful. Ultimately, an advocate without strong ethos has weakness and vulnerability.

In over fifty years of public speaking and writing, Gerry Spence has repeatedly said—and I am paraphrasing here—"Anyone can beat me. The youngest, most inexperienced lawyers in the country can beat me. If they can be more real or authentic than me." In these statements, Spence recognizes the power of ethos, but leaves out an important part.

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2. I say "reputed," because I have not read a word of Aristotle.

3. The only exception to this of which I am aware is a series of workshops I have been teaching with a group of friends, helping trial lawyers cultivate their own ethos.

If you are a callow, superficial person (or worse), "being real" in the courtroom will not help you. And most callow, superficial people do not see themselves that way. More relevant to the rest of us: we all have blind spots, neglected parts of ourselves, and self-defeating behaviors. Those things can hurt us in the courtroom—whether we consciously or unconsciously reveal them or try to hide them.

The best criminal defense lawyer I have ever met or heard about is Jim McComas. In an email he once wrote me, he said, "The sincerity of a true heart is the only requirement of effective advocacy. No one wants to know that, because a true heart is so much harder to acquire than a few advocacy techniques."

What the heck is a "true heart"? It is ethos.

Spence and McComas are talking about the same thing. Something difficult to put into words, but which we all recognize when we see it in others or feel it in ourselves.

For now, we can call it a rock-solid sense of personal purpose and integrity that informs all of our actions, in and out of the courtroom. It is bigger than that, but that is a good start. When you have that, others can feel it—and it is powerfully persuasive. When you have that, you can feel it, and in the heat of battle, it provides a sense of calm and safety that nothing else can give you.

You can think of your potential advocacy power like a six-cylinder engine. You have two cylinders of logos, which are likely well developed and maintained. You have another two cylinders of pathos, which may or may not be well developed or maintained. If they are not, there are plenty of resources to help you get those two cylinders running smoothly. But only a relatively small number of trial lawyers are running on all six cylinders. This book is designed to help you be one of them—a trial lawyer who can bring ethos to the courtroom and run on all six cylinders.

A further intention of this book is to explicitly express the best that is in our existing trial culture and describe the elements needed to develop that culture in a healthy way.

It is my hope that this book will provide guidance, direction, and nourishment for those who feel a calling to participate in the brutal process that is the American trial. There is a way to effectively participate in this process while claiming our human birthright of compassion, courage, and love; while living with purpose and integrity; while growing health and strength in ourselves and those around us. But it isn't easy. It is the way of the trial lawyer.

Externally and internally, there are powerful forces arrayed against us. There is much in our environment and within ourselves conspiring to have us accept a version of ourselves that is less than the person we could be, less than the trial lawyer we could be. One way to think of this book is as a manual on how to fight those forces, on how to develop neglected aspects of yourself and become a more powerful and more satisfied trial lawyer.

The Way of the Trial Lawyer is a misleading title in two ways: (1) it suggests there is only one way, and (2) it suggests I know that one way. In fact, there are many ways, and I think I may know some of them. But I could be wrong. I have no doubt there will be much in this book that some of my friends in the trial bar will find insulting, offensive, or just plain wrong. I have no desire to make people feel bad about the life they are leading. What follows in this book are my personal thoughts, observations, and ideas. One or all of them could be totally off the mark—dead wrong. But this is all I have to offer. It makes no sense to offer up someone else's ideas. And it would be cowardly to withhold my own because others will strongly disagree.

Right or wrong, I hope this book provokes thought and discussion about how we live our lives as trial lawyers. If it does that, I will consider it a success. But I hope it does more; I hope it helps you become a better trial lawyer.

In a sense, this book is an attempt to describe the ideal trial lawyer or, perhaps, the ideal way to live the life of a trial lawyer. It is aspirational. I have made every mistake of action or intention alluded to in this book—and I will probably make them again. But we all need to

know and understand the ideals we are trying to manifest, even if at times we fall short.

What to call a lawyer who attempts to follow this path, to live up to these ideals? I needed a noun to help the book flow smoothly. I chose Teiwaz (pronounced "Tee-waz."), the name given to a symbol on a Rune stone.

The Viking and Celtic Warriors who would paint this symbol on their shields recognized that the real battle is always with the self. How to stay out of one's own way "and let the Will of Heaven flow through you?"[4]

> Here, you are asked to look within, to delve down to the foundations of life itself. Only in so doing can you hope to meet the deepest needs of your nature and tap into your most profound resources. The molding of character is at issue when you draw Teiwaz. Associated with this Rune are the sun, masculine energy, the active principle. The urge for conquest is powerful here, especially self-conquest, which is a lifelong pursuit and calls for awareness, single-mindedness, and the willingness to undergo your passage with compassion and in total trust.[5]

4. Ralph H. Blum, *The Book of Runes* (St. Martin's Press, 1987), 113.

5. *Id.*

This passage has much to teach the trial lawyer; the best advocates are truly spiritual warriors.[6]

I would hope two things would go without saying, but I will say them anyway. First, the reference to masculine energy does not exclude women. We all have both masculine and feminine energy. The best trial lawyers use both, regardless of their gender. Second, runes are associated with Nordic culture, but the use of a word associated with that culture does not exclude those (like me) of other backgrounds. The ability to draw on ideas from diverse sources makes an individual or culture stronger. For too long the term *trial lawyer* has been synonymous with white males. It is time for that to change—and it is changing.

Whatever your race, religion, political affiliation, age, gender, or sexual orientation, I hope this book helps you increase your sense of purpose and satisfaction while traveling the way of the trial lawyer.

Rick Friedman
September, 2020
Bremerton, Washington

6. Some white supremacists have tried to adopt this rune for their own purposes. As they proceed from a place of insecurity, fear, and hate—all inconsistent with the origins of this symbol—it can never belong to them.

PART ONE

THE WORLD AND OUR PLACE IN IT

1

SETTING THE STAGE

Everything depends on the individual human being, regardless of how small a number of like-minded people there is, and everything depends on each person, through action and not mere words, creatively making the meaning of life a reality in his or her own being.

—Viktor Frankl

As best I remember, the story goes something like this . . .

Centuries ago, there was a large tree on the edge of a small village in India. Five children went to the tree one day to gather the delicious nuts that had fallen to the ground beneath the tree. They shared a bucket, and when all the nuts were picked off the ground and placed in the bucket, it was time to divide the nuts between the children. There were eighty-three nuts. How to divide them fairly?

After extended discussion, the children decided to ask the wisest man in the village how best to divide the nuts. They went to his house and explained their problem to him.

"Do you want them divided according to God's law or Man's law?" asked the wise man.

The children were young, but had already heard of mistakes and corruption in the local legal system. On this they were of one mind: "God's law," they told the wise man.

"Very well," said the man and handed
the first child, forty nuts,
the second child, twenty nuts,
the third child, fifteen nuts,
the fourth child, seven nuts,
and gave the fifth child nothing.

Like many great parables, a variety of meanings can be taken from this story. Those of a religious bent might say it illustrates the mysterious, unknowable workings of God. Those of a cynical or atheistic bent might say it illustrates the arbitrary, even cruel ways in which the impersonal forces of the universe work upon humankind.

But the story can also speak to what draws many people to the stressful, contentious, risky world of the American courtroom. The Teiwaz trial lawyer knows the world is unfair. If it were fair, there would be no need for courts of law. There would be no need for trial lawyers.

Fair and unfair, right and wrong, strong and weak, care and harm; how exciting to think we might make the world a better place. But to optimize our success in fighting moral battles, we need moral sophistication. The more the better.

A fish in the ocean cannot move without affecting the surrounding water. And movement of the ocean will always affect the fish.

Like fish suspended in water, Teiwaz lawyers—like all lawyers—are suspended in a moral environment. They understand that any choice, any action or inaction, has moral implications. The difference between Teiwaz lawyers and other lawyers is that the Teiwaz know this reality and do not pretend otherwise. In fact, they embrace and draw strength from the moral environment that is their world—the world of the courtroom.

Teiwaz understand that we live in a society controlled by and for the benefit of corporations. This is so obvious that most of us lose sight of it. Corporations control or have enormous influence on our

government, politics, health care, scientific research, educational system, and prison system, to name just a few. It is difficult to think of any aspect of our lives or our society that is immune from corporate influence. Others have made this argument quite well, and there is no need to dwell on it here. We are here concerned with the implications of this state of affairs for the Teiwaz lawyer.

When corporations act, they act consistent with their values. Corporate values are informed by a single goal or imperative—to make money. Whenever a corporate decision must be made, the sole criteria of decision is "what will result in the greatest monetary profit, or least monetary loss?" This is without exception, even when it seems not to be the case. Take charitable donations, for example. Has a corporation ever made an anonymous donation? Charitable donations are made to increase goodwill and the value of the corporate brand, items that frequently show up on corporate balance sheets.

To make money, corporations have advocated and advanced a particular type of capitalism. Our capitalism has become not just an efficient way of organizing our economy but a set of moral precepts, embraced with the faith, fervor, and fanaticism of a religious cult.

Of course, corporations have been an engine of economic growth in this country, raising our standard of living to heights unimaginable when they first appeared on the economic scene. But along with raising our material quality of life, they have eroded the moral core of this country. In order to sell us products and services, corporations have bombarded us with messages designed to make us feel insecure and inadequate.

We are not tall enough, not skinny enough, not smart enough, not rich enough, not healthy enough, not cool enough, not relaxed enough, not sexy enough—the list is endless. And all of our problems can be solved simply by buying something. Even those things that are "priceless" can be obtained if we use the right credit card.

Corporations have been astonishingly successful in changing the way we think, the way we view the world, and the way we experience our lives. They have created a competitive, materialistic culture

whose citizens—whether homeless people, billionaires, or anyone in between—have only one thing in common: not one of them has "enough." In short, corporations have gone a long way toward turning us into replicas of themselves—entities whose main goal is to amass wealth.

The effect on the plaintiffs' bar has been devastating. Many of us now see ourselves as not much more than individual economic units, fighting for our place in the laissez-faire sun. Looked at in this way, the plaintiffs' bar mirrors American society as a whole:

The people at the top are doing great.
Those at the bottom are struggling to avoid going under.
Those in the middle hope to rise and are terrified of falling.

That we have come to view ourselves this way shows the phenomenal success of our opponents. To a large extent, they have succeeded in getting us to change the way we see ourselves—from protectors of people and critical human values, to businesspeople—just like themselves. They have transformed our self-image from Clarence Darrow and Atticus Finch to . . . Gordon Gekko.[1]

And, of course, they have changed the way others see us as well.

It is the Teiwaz's task to be in the world created by corporate values, but not of it; to bring something different to that world. Teiwaz lawyers understand it is their job to appeal to a different set of values than those that most jurors and judges have unconsciously adopted. They understand that every trial—whether criminal or civil—involves a clash of values. This insight gives the Teiwaz moral clarity and the courtroom power that comes from that.

1. Gordon Gekko is a fictional character in the movie *Wall Street*, who celebrated and embraced materialistic greed.

2

THE CLASH IN THE COURTROOM

Tenderness is what love looks like in private, just like justice is what love looks like in public.

—Cornel West

Every trial involves a clash of values. Sometimes the clash is obvious, as when the defense says the plaintiff is failing to take responsibility for misusing a product, and the plaintiff is saying the corporation failed to act responsibly to ensure the product was safe. More often, there are numerous values conflicts going on beneath the surface, not articulated by any of the advocates or witnesses.

Teiwaz work to understand the values at play in trial; that is where the energy is; that is where the opportunities are.

THE CIVIL CASE

For the corporation, economic efficiency is the highest value. Corporations will readily set aside any other value or belief to further their single and only goal: to maximize profit.

With economic efficiency as the highest value and profit as the highest goal, corporate actions are necessarily amoral. That is, they are not driven by any moral code, as that term is generally understood. They are simply not concerned with issues of right or wrong. A *right* decision for a corporation is one that increases profit in the short or long term; a *wrong* decision is one that decreases profit.

The experience of human life, the mystery, the joy, the suffering of human existence is meaningless—literally meaningless—in the corporate worldview, except as a tool to get us to buy and consume.

This then is the real culture war taking place in America today. Will we sell our collective souls to corporate capitalism, or will we identify and advocate for human values that transcend material values? This war is being fought in every venue in America, including legislatures, churches, newspapers, schools, and even within marital relationships. It is impossible to think of an arena of American life where this conflict between corporate and human values is not playing out. Some places it is simmering; in others it is raging.

In this book we are concerned with the courts, where it is fair to say this conflict is ever-present. We see it in tort reform, where the thesis is that economic efficiency is more important than individualized justice. And we see it most acutely in the types of cases that are brought to court for resolution.

In the name of efficiency and profit, corporations commit atrocities. Corporations don't just rob with a fountain pen (or the click of a keyboard), they maim and kill as well. They do this quietly, for the most part, via emails and obscure policy manuals, in conference rooms, and in legislative halls.

Corporations put defective products on the market, without adequate testing—or despite testing that shows they are defective. They fund fraudulent scientific studies and publicize them to promote or defend dangerous products. They ignore sexual harassment in the workplace. They bribe doctors to provide unnecessary treatment. The list is familiar and almost endless. But at the root of almost every corporate transgression is the desire to maximize profits.

When issues such as these are presented in the courtroom, the clash of values is apparent. "This corporation put profits over people," the plaintiff's lawyer will declare. But the same clash of values occurs in virtually every personal injury case (and many other civil cases) even when it is not so obvious.

Take a typical personal injury case. The Teiwaz's task is to help the jury appreciate the impact of the injury on those things we humans value:

- family
- pleasure
- joy
- human dignity
- integrity
- beauty
- human connection
- courage
- compassion
- love

In response, the civil defense lawyers come into court with the objective of diminishing the importance of these values—although they would never say so explicitly. Thus, in personal injury cases, the two sides are fighting a below-the-surface battle, between corporate values on one hand and human values on the other.

The plaintiff's lawyer talks about the plaintiff's back pain that simply won't go away and keeps her from getting a good night's sleep (human value).

The defense lawyer emphasizes that the plaintiff can still work, so there are no lost wages (corporate value).

The plaintiff's side presents evidence that the constant pain is preventing the plaintiff from taking her son fishing on weekends as she used to do (human value).

The defense side questions the plaintiff's credibility and points to preexisting problems in the lives of the plaintiff and her son to diminish the value of their relationship.

The plaintiff's husband testifies that his wife has been distant, preoccupied with her pain, and ill-tempered, and that this has negatively affected their relationship (human value).

The defense points out that there was only $2,000 damage to the car and $5,000 in medical expenses . . . And so it goes.

Because, to a corporation, to be important, something must be material and measurable.

The paradox is that all of the human values the plaintiff's lawyer is fighting for must be translated into corporate language—the language of money. If a relationship has been harmed, the amount of money awarded is the measure of the plaintiff's lawyer's success in getting the jury to accept the value and magnitude of the loss. The defense lawyer capitalizes on this, arguing (usually implicitly) that the human value at issue is insignificant, while simultaneously arguing that it is so *priceless* that it is dirty and shameful to even consider putting a dollar value on it. As a result, damages often get lost in translation.

The extent to which corporate values hold sway in this country can be seen in the well-documented resistance of many jurors to award money for pain and suffering or mental and emotional distress. Jurors who have no problem awarding $15,000 for damage to a car, or $35,000 for medical treatment, balk at the idea of awarding anything for pain and suffering that is likely permanent. The rationales differ, but we usually hear things like, "What good will it do? Money can't make the pain go away." Or, "Pain is just part of life; no one gets through life without it." Or, "I have a bad back too—and no one is paying me. No point in whining about it; just get on with your life." People can also be

suspicious of such intangible losses because they cannot be measured—at least not in the easy, mechanistic ways that lost wages or property damage can be measured.

These types of attitudes reflect an unconscious adoption of corporate values: things that can't be measured in direct monetary terms are inconsequential—or maybe are not even real. The plaintiffs' lawyer's job is to overcome these attitudes. These attitudes don't exist in jurors only; they exist in most judges—and in plaintiffs' lawyers as well. Corporate values have thrived and triumphed over human values because we have done a poor job exposing and clarifying the conflict between them—inside and outside of the courtroom.

THE CRIMINAL CASE

The conflict of values in criminal cases is just as real, but more complex. Rather than the clear duality of corporate vs. human values that exists in almost all personal injury cases, criminal cases can present a multitude of conflicting values. It is initially worth noting, however, that corporate values have infected the criminal justice system in significant ways.

First, the privatization of prisons, prison medical care, prison rehab programs, and various other prison functions have created huge economic incentives to produce more prisoners. Corporations now routinely lobby for more extreme criminal legislation, in order to produce more prisoners and more profit. They also lobby for legislation that produces other economic opportunities.

Second, the criminal defense lawyer has to deal with a jury pool that has largely adopted a corporate value system. In that system, all people, but especially those accused of crimes, are regarded as fungible, with no inherent worth or value. At a minimum, Teiwaz criminal defense lawyers must insist that the humanity of their clients be recognized and respected.

Jurors' fears and insecurities have been magnified by corporate messages designed to profit from those fears and insecurities. Many jurors' capacities for empathy, subtlety, and compassion have been flattened. Their abilities to think critically and objectively have been impaired. They identify with authority (the prosecutor, the government, the police) in order to feel safe.

While there is no typical criminal case, it is fair to say that one set of values or motivations at play in all criminal cases is the desire of the jurors to support the authorities and ensure that the rules are enforced—and therefore followed by others. Who would want to live in a society where the criminal laws were not enforced and followed? The question for the criminal defense lawyer is this: What values will the defense promote in opposition to the natural human tendency to support the law enforcement authorities?

As important as offering up opposing values to overcome the tendency to support the authorities, Teiwaz lawyers must wrestle with their own values at play in a criminal case. To have conviction, gravitas, and persuasive power, they must come to an understanding of what personal values they are expressing in the individual criminal case. This can be a difficult, frustrating process, but necessary for those who want to be the best trial lawyers they can be.

Recognizing the moral conflicts that often go unnoticed in the courtroom is an important step in the path toward developing ethos. It is easier than the next step, turning attention to the conflicts within.