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It Takes a Team: A Tribute to the Honorable Walter Herbert Rice

Cover Page Footnote

With apologies, for borrowing from her title, to Hillary Rodham Clinton, *It Takes a Village: And Other Lessons Children Teach Us* (Simon & Schuster 1996), and, as appropriate, to the Pittsburgh Pirates. I am convinced that all could only be flattered by any comparisons to Judge Rice or his work.

IT TAKES A TEAM¹: A TRIBUTE TO THE HONORABLE WALTER HERBERT RICE

*Susan Newhart Elliott*²

I. *Introduction*

The general business of law schools is to “raise” young lawyers. The first step in the process at most law schools, including the University of Dayton School of Law (UDSL), is a formal orientation program for entering first year students. I remember very little of my own first year orientation program: a sea of forms, assignments, anxious fellow students, books of mind-boggling cost, various staff welcome speeches that soon blurred into each other, and other welcome speeches of my academic career. Only one clear memory remains. The keynote speaker for the orientation was the Honorable Walter Herbert Rice, United States District Court Judge for the Southern District of Ohio.

Judge Rice spoke to entering students of the enormous significance of the role we were seeking to assume as future lawyers. If eyes are the window of the soul,³ he suggested, then law is the window of society. Law reflects our ideals, how we put those ideals into practice, and how we work out tensions between competing ideals. Freedom and justice are readily agreed to be the great American ideals, but they are not easily achievable. The educational path on which we were embarking would prepare us to participate in the realization of those ideals. Our work would help to define American society. Legal education is an endeavor to be taken seriously. It is worthy of, and would require from us, great individual effort, but we would find many professors, staff, and practitioners to help and guide us. Judge Rice was right, and for three decades, some of the greatest help and guidance for generations of University of Dayton law students has come from Judge Rice.

¹ With apologies, for borrowing from her title, to Hillary Rodham Clinton, *It Takes a Village: And Other Lessons Children Teach Us* (Simon & Schuster 1996), and, as appropriate, to the Pittsburgh Pirates. I am convinced that all could only be flattered by any comparisons to Judge Rice or his work.

² Assistant Professor and Head of Public Services for Zimmerman Law Library, University of Dayton School of Law; Law Clerk to the Honorable Walter H. Rice, 1987-89; J.D., *summa cum laude*, University of Dayton School of Law; M.L.S. Kent State University; M.Ed. Miami University.

³ “L’occhio, che si dice finestra dell’anima.” Leonardo da Vinci, *Paragone*, in *The Literary Works of Leonardo da Vinci Compiled and Edited from the Original Manuscripts* vol. 1, 56 (Jean Paul Richter ed., 3d ed., Phaidon 1970). Judge Rice is a man of remarkable intellect and cultivation. He would never be so pedantic or affected in his own footnotes as to cite da Vinci in the original Italian, but old law clerks never completely lose their zeal for running down obscure references. The Judge will, I think, appreciate the effort.

I am privileged to have been one of the beneficiaries of Judge Rice's help and guidance, as a law student, as one of his law clerks for two years following my graduation from law school, as a practicing lawyer at a Dayton law firm, and now as part of UDSL. I have seen, first hand, his dedication to and passion for the law.

I have also come to see another of his great passions: baseball and, particularly, the Pittsburgh Pirates. The Judge's love for the Pirates has been cultivated over a lifetime – he was born and raised in Pittsburgh. His love for the sport of baseball may be somewhat less self-evident, for Pittsburgh also has a strong football tradition. There are those who would suggest that the Judge's university years made him leery of strong emotional commitment to football teams. He received a Bachelor of Arts degree from Northwestern in 1958, and Master of Business Administration and Juris Doctor degrees from Columbia in 1962. These superb academic institutions provided him with an excellent education but, perhaps, not entirely fulfilling football experiences. During the time I clerked for the Judge, both football teams were working on record losing streaks. Nonetheless, I can attest to his continuing loyalty for the football teams of Northwestern and Columbia and his faith that better days would come. His passion for baseball is simply in a different category altogether.

I have always believed that a large part of Judge Rice's love for baseball is the extent to which it is truly a team sport. In baseball, the strongest hitter cannot take the bat on every offensive play; each team member must take his turn. Most defensive plays require a coordinated effort by team members with different roles and gifts. Teamwork is the foundation of successful baseball. Teamwork is also the foundation for successful legal education, and Judge Rice has been and continues to be a vital part of the UDSL team.

II. *On the Mound*

Judge Rice has pitched his commitment to excellence in legal education to the state, to the bar, to the Dayton community, and to the students and faculty of the Law School. He helped to get and keep the ball rolling for the reopened Law School⁴ by serving on the Board of Advisors since its inception in 1976. His advice is founded on a wealth of experience. He spent several years in private practice in Dayton and

⁴ The original University of Dayton Law School closed in the 1930s, a victim of the Great Depression. The Law School reopened in 1974, following significant efforts and support by many "old" Law School alumni and individuals in the University and legal community, including Judge Rice.

served as First Assistant Prosecutor for Montgomery County from 1964 to 1966. He was elected as a Municipal Court Judge for the City of Dayton in 1969. He was a judge for the Montgomery County Court of Common Pleas from 1971 to 1980. During his tenure as a common pleas court judge, he received numerous awards for judicial service from the Supreme Court of Ohio. In 1980, he was named United States District Court Judge for the Southern District of Ohio, nominated by President Jimmy Carter. In 1996, he became Chief Judge for the District.

The advice he has offered to the Law School is particularly valuable for the “big picture” vision that he is able to communicate.⁵ He is equally effective speaking to aspiring law students about the significance of the work of lawyers and to Law School faculty about evolving changes in the practice of law that have generated the need for a new approach to the Law School curriculum. For his efforts, in 1983, Judge Rice became the third individual to receive the UDSL Distinguished and Honorary Alumni of the Year Award.

III. *Behind the Plate*

Judge Rice has shown no reluctance to get down in the dirt – teaching regular classes to UDSL students as an adjunct professor since 1976, so that every graduating class of the reopened Law School has had the opportunity to benefit from his instruction. Judge Rice has willingly assumed the tremendous time commitments involved in preparing for and teaching law students, principally in Trial Practice. It has been a hallmark of Judge Rice’s teaching that students come to understand not only the law and its technical points, but also the policies the law is intended to serve and the human beings whose interests are at stake. Sometimes, he has engaged in team teaching, offering the combined benefit of his own perspective with that of another judge or an experienced trial lawyer. UDSL students have earned a reputation for excellence in trial practice – a credit to Judge Rice’s teaching. His students now serve as respected lawyers and judges themselves.

The Walter H. Rice Moot Court Competition, part of the second-year UDSL curriculum, brings students a rigorous experience in appellate advocacy, including both brief writing and oral argument. Competition finalists have the incomparable opportunity to argue in front of a panel that includes Judge Rice. Many students who never thought that they could or would want to be litigators – I among them – have

⁵ His communication is also noteworthy for his quick wit. His dry, self-deprecating humor is so rooted in the context of the situation and in his inimitable deadpan delivery, that it is beyond my powers of description to convey, but it makes avid listeners of his audiences.

found the experience so exhilarating that it changes the direction of their future careers.

IV. *The Infield*

A. *First Base*

As a great first baseman stretches to pull in the ball, with a foot still on the base, Judge Rice has stretched to bring real-world trial court experiences into the Law School. Keller Hall, the new building into which the Law School moved in 1997, has provided the opportunity, and Judge Rice's supreme generosity has provided the rest, as Judge Rice has conducted federal district court trials in the Law School's Mathias Heck Courtroom.

Judge Rice has instituted special procedures for conducting trial at the Law School so that students could come and go, in between classes. Thus, the students who wish to see a trial have not been forced to go downtown, either giving up a day of classes or seeing only an isolated portion of the whole. With trial conducted at the Law School, students have been given an opportunity to see the entire process, in all the great untidiness that never occurs in simulations: potential jurors who are concerned about the time commitment involved in sitting on the jury, motions that cause delays, unexpected testimony for which a lawyer is unprepared, and the strange limbo period of jury deliberations. Not only have UDSL students been able to follow the trial court process, but, with the cooperation of the judge, participating lawyers, and court personnel, they have been given special opportunities to ask questions about confusing aspects. No simulated experience can completely duplicate the jury trial, which is the foundation of the American judicial system, and yet few students have schedules that permit them to attend the trials held in downtown courtrooms. Judge Rice's efforts have made it possible for all UDSL students.

B. *Second Base*

The great Pirates player Bill Mazerowski was a quiet and unassuming individual with remarkable understanding of the second baseman's role in handling unpredictable, dual-direction comings and goings. Judge Rice (also a quiet and unassuming individual) exhibits similar understanding of the often unpredictable trial process, and the value to law students of not only watching, but participating in the process. He has provided unparalleled educational opportunities for a continuing stream of UDSL students by accepting them into his

chambers as interns and externs and by employing a number of UDSL graduates as law clerks.

Judge Rice's interns, externs, and clerks quickly appreciate the staggering amounts of work that go into each case. They learn that all parties' submissions (including documents written in pencil on notebook paper) are carefully read; issues are exhaustively researched and discussed; and opinions are drafted, painstakingly edited, and rewritten. No decision is rendered without the utmost consideration. As they read through mountains of paper to help prepare a case for decision by the Judge, these aspiring lawyers learn the significance of clarity in writing. They see that while the Judge may not be quite as concerned as their legal writing professors about fine points of citation style, he cares deeply about proper use of authority in legal memoranda. They also see that superficial analysis in a legal memorandum frustrates the Judge, intentional misstatement of law or facts enrages him, and flaming rhetoric has little effect. They learn that, for effective advocacy, substance truly means more than style.

Active participation in the judicial process often brings the sobering and invaluable realization that all legal work has human consequences. On one occasion, in a criminal tax case hearing conducted by Judge Rice, a defendant reneged on a plea agreement that had involved months of delicate negotiations. This defendant was a sincere, and sincerely misguided, tax protester who could not accept that the law obligated him to pay taxes. Judge Rice asked the defendant if he would reaffirm his plea agreement if the Judge could show him the law that obligated him to pay taxes. The defendant thought for a moment and agreed that he would. The Judge called a five minute recess. He then turned to his new law clerk and directed: "Find me the law that says you have to pay income taxes!"

After a few minutes of terrified and desperate searching, I did manage to find the code sections.⁶ Whether I felt triumph or only relief I can barely recall, but I will never forget the looks on the faces of the defendant, his distraught family, and the anguished United States Attorney, as I headed from the courtroom to the library to find The

⁶ 26 U.S.C. §§ 1 (tax imposed), 63 (taxable income defined), 6012 (persons required to make returns of income), 6151 (time and place for paying tax shown on returns) (2000). Unfortunately, the organization that had persuaded the defendant he was not obligated to pay taxes had also provided him with a litany of arguments challenging the effect of these code provisions. He was similarly unconvinced by the myriad cases that had addressed and dismissed these arguments. *See e.g. Cheek v. U.S.*, 498 U.S. 192, 201-205 (1991) (holding that the argument that tax laws were unconstitutional could not be made in good faith); *Perkins v. Commr.*, 746 F.2d 1187, 1188 (6th Cir. 1984) (holding that typical tax protester arguments had been established as frivolous).

Solution. For this clerk, legal research was never again just a pleasant little mind game.

C. *Third Base*

If third base is the “hot spot” in baseball, the first few years of active practice are the hot spot in legal experience, when there are real clients, real consequences in real lives – and no more law school classes structured to provide answers. One national organization that is intended to help bridge the gap, to continue the educational process and facilitate the exchange of ideas between new and experienced lawyers, is the American Inns of Court.⁷ The American Inns of Court promotes excellence, civility, professionalism, and ethical awareness in the legal profession. Judge Rice is a perfect exemplar of these ideals, through his conduct inside and outside of court. It is typical of Judge Rice that he is not content merely to stand as a model for lawyers in the “hot spot.” The Judge also elects to take a more direct role, through the Inns of Court, in promoting these ideals, for the benefit of the profession generally and for young lawyers specifically.

At Inns of Court meetings, “pupilage teams” of members take turns presenting programs for the rest of the membership. Both individual teams and the membership as a whole are expressly structured to include a well integrated mix of backgrounds and experience. The organization is not intended to benefit only newer lawyers. The exchange of ideas, the social and intellectual interaction in a non-adversarial context, and the focus on ethical issues are of value to lawyers at all stages of their careers. Nonetheless, the success of an Inn, and its value for new lawyers, depends largely on the willingness of judges and experienced lawyers to participate. Judge Rice has not only participated in this organization – he was a founding board member and the first president of the Carl D. Kessler (Dayton) Inn of Court.

D. *Shortstop*

As the legendary Honus Wagner captained the Pirates’ infield, so Judge Rice captains his courtroom through the trial process, seeing that all components function effectively for the good of the “game.” Judge Rice’s courtroom has become a principal playing field for many UDSL-trained lawyers and their clients. For Judge Rice, the trial process must comply with the law, must be thorough, must ensure that all participants understand the process and their roles, and must be fair. This is not always convenient. The tax protestor who reneged on his plea agreement

⁷ See *American Inns of Court*, <http://www.innsforcourt.org> (accessed Sept. 13, 2004).

did so in response to a long series of questions which the Judge poses to a defendant before accepting a guilty plea.⁸ The defendant would not, could not, accept criminal responsibility for his conduct, although that was a condition of his plea agreement,⁹ because he did not believe his refusal to pay taxes was in violation of the law. This may have resulted in a few moments of terror for a new law clerk, but it also resulted in months of additional evaluation and negotiations before the case could finally be resolved. Nonetheless, the same body of law that did in fact require the defendant to pay income taxes¹⁰ also guaranteed him the right to put the government to its proof if he did not believe that he was guilty of a crime.

Examination of potential jurors for a trial is also thorough. Judge Rice conducts voir dire personally, with his own questions and with questions suggested by the parties' attorneys, to reduce as much as possible any risk that jurors may prejudge a case, either as a result of outside influences or the manner in which questions might be posed and explanations made during voir dire. The Judge impresses upon all potential jurors the critical importance of their role in the trial process, the seriousness of the duty imposed upon them, and the great service they perform for society in fulfilling that duty.

Trials are conducted with all due decorum. (Lawyers very quickly learn never, *ever*, to whisper to a client or colleague during a proceeding.) All participants are treated with respect and dignity and given an opportunity to make their presentations. Rules of procedure and evidence are carefully observed, and if necessary, the trial is temporarily delayed while legal questions are resolved (occasionally generating more moments of research terror for law clerks). The instructions given to a jury before it begins deliberation are thoroughly researched and drafted to be clear as well as legally correct. I have seen many jury trials, civil and criminal, in Judge Rice's courtroom. As a law clerk I had the opportunity to talk to jurors after the trial was completed. There were verdicts with which I did not completely agree, but if I ever had doubts about the jury system, fed by too many television shows or sensational new stories, those doubts were resolved. A carefully selected and well-instructed jury invariably makes a dedicated and sincere effort to fulfill

⁸ The Federal Rules of Criminal Procedure require judges to satisfy themselves, by addressing defendants personally in open court, that guilty pleas are made knowingly and voluntarily, with full appreciation of the consequences. Fed. R. Crim. P. 11(b) (2004).

⁹ The United States Supreme Court has held that "a guilty plea is an admission of all the elements of a formal criminal charge." *McCarthy v. U.S.*, 394 U.S. 459, 466 (1969) (reversing a conviction for tax evasion, when the trial court judge accepted the guilty plea without personally addressing the defendant, who consistently disavowed the requisite intent for the crime).

¹⁰ See *supra* n. 6.

its duty fairly and reasonably. I can think of no higher compliment to a judge than to say that, in observing his conduct of trials, I have seen that the system works.

V. *The Outfield*

Judge Rice has made significant contributions to American law through his handling of a variety of cases, including some so far out in left field that Roberto Clemente could not reach them. Federal court staff members still talk about a complaint I viewed as a law clerk – filed by a man who was suing himself. That is to say, his “good” self was suing his “bad” self, whose tendencies had been strengthened by some sort of electronic device that the State of Ohio had allegedly implanted in his brain while he was in State custody. He sought an injunction requiring the bad self to have the device removed.¹¹

Many cases, including some of Judge Rice’s most noteworthy, have been resolved by agreement of the parties. In February 1984, parties in the decade-old Cincinnati school desegregation case settled on the eve of trial, at Judge Rice’s urging, with a plan structured to reduce segregation and increase quality and choice in public schools, avoiding a lengthy and divisive trial.¹² Settlement is not always possible, and when called upon to produce an opinion on legal issues, the Judge responds with decisions that are scholarly, thorough, and well crafted. Each issue is addressed individually so that there is no question about how a decision has been reached, even in the most complex cases.

Judge Rice has faced cases of an extremely sensitive nature, including a challenge to 1995 Ohio legislation restricting abortions.¹³ The issues involved the authority of the State to make its own laws according to the perceived interests of its residents, competing individual rights guaranteed by the United States Constitution, and strongly held

¹¹ Attached to the complaint were highly detailed, hand-drawn diagrams of the complainant’s head, with various parts of his brain and their functions carefully labeled, including the location of the implanted device. No complaint filed in federal court is ever ignored (and, when the bad self did not respond, the possibility loomed that the good self might seek to enforce a default judgment). The State of Ohio, which had been sent a copy of the complaint, responded with an affidavit attesting that the State did not engage in the practice of implanting electronic devices in the brains of individuals in State custody and had not done so in this case. The case was dismissed.

¹² E.R. Shipp, *Cincinnati School Pact is Embraced as a Model*, N.Y. Times A16 (Feb 17, 1984). Details in the settlement and settlement process are set forth in Judge Rice’s order approving the settlement. *Bronson v. Bd. of Educ.*, 604 F. Supp. 68 (S.D. Ohio 1984).

¹³ *Women’s Med. Prof. Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995) (addressing the constitutionality of Ohio Substitute House Bill 135, 146 Ohio Laws 2123 (1995)). Judge Rice’s decision concluding that the legislation must be found unconstitutional was upheld by the Court of Appeals for the Sixth Circuit. *Women’s Med. Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

religious and moral views. The Judge's appreciation both for the tensions generated by the conflicting ideals and perspectives, and for the duty of the court to decide the issues objectively, is best illustrated by the opening words of his opinion:

Never, since the final shot of the Civil War, over a century and a quarter ago, has American society been faced with an issue so polarizing and, at the same time, so totally incapable of either rational discussion or compromise, as is the ongoing controversy, of which this case is but the latest chapter, over the legality of attempts by the State to regulate abortion – the act of voluntarily terminating a pregnancy prior to full term.

Over the course of six days of hearing, this Court has heard testimony from a number of medical practitioners, each expert in the field in which he or she testified. The Court believes that, regardless of the personal opinions of these professionals, whether pro-choice or pro-life, each testified not in accordance with those personal opinions, but rather on the basis of his or her medical opinion. So, too, has this Court endeavored to put aside its personal opinion on the issues herein, in order to render an opinion which it believes is mandated by the present state of the law.¹⁴

Difficult legal issues may arise even where there is little dispute that conduct violates the law. In one of the classic civil insider-trading cases of the 1990s, Judge Rice found that Robert Brethen, an executive at a publicly held manufacturing company, sold stock based on material information that was not available to the public, knowing that it was improper for him to do so and providing misleading information to those whom he consulted about the trading.¹⁵ The Judge ultimately ordered Brethen to pay damages and interest amounting to well over a million dollars.¹⁶ The Judge denied, however, the SEC's request for its favored remedy – a permanent injunction specifically prohibiting future insider trading. The Judge noted that in the absence of evidence of a continuing course of conduct, the likelihood of future violations was too speculative to meet requirements for the issuance of an injunction.¹⁷ He emphasized

¹⁴ *Id.* at 1056-57 (notes omitted).

¹⁵ *SEC v. Brethen*, [1992-93 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,210, 94,870 (S.D. Ohio Oct. 15, 1992).

¹⁶ *Id.* at 94, 894.

¹⁷ *Id.* at 94,892.

that the American system of justice guarantees defendants the right to contest litigation and that Brethen's exercise of that right could not be used to support an inference that he was likely to commit further violations of the law.¹⁸

Judge Rice's decisions have created an enduring legacy through their contribution to substantive American law – for those who study law, for those who practice, and for those who are governed by it.

VI. *At Bat*

I have compared Judge Rice to Bill Mazerowski, Honus Wagner, and Roberto Clemente, all of whom performed as brilliantly in their positions as does Judge Rice in his. These legendary Pirates owe their fame not only to their performances in appointed positions, but their batting ability as well – the ability to get on base, to advance team mates, and, on occasion, to hit balls out of the park. Judge Rice also looks beyond the “playing field” out to the greater community, where he does his utmost to become a participant, to support other community leaders, and, on occasion, to score important points for Dayton and the surrounding area.

In 1987 through 1989, the period during which I was a law clerk for Judge Rice, he was already engaged in efforts with local and state politicians, aviation buffs, Air Force personnel, and community leaders to find a way to recognize the 100th anniversary of the first powered flight by Wilbur and Orville Wright that would celebrate and benefit the Dayton community. The result was Aviation National Park, the 2003 Inventing Flight celebration, and revitalization of the Wright-Dunbar neighborhood.¹⁹

Many of Judge Rice's efforts – so many it would be impossible to catalogue them all – have been directed at increasing harmony among various components of the community. Some of the programs in which the Judge has participated have focused on religious understanding and tolerance, such as *Judaism, Christianity & Islam: Can We Build a Road to Peace?* (February 2004), for example. Other efforts, such as the Race and Reconciliation Collaborative (inaugurated in December 1999) and *Durban to Dayton: Community Summit on Eliminating Racism* (October 2003), have focused on furthering the community dialogue on racial and educational issues. The Judge has often partnered with UDSL in his efforts, including a program intended to explore ideas to prevent

¹⁸ *Id.*

¹⁹ See Lester A. Reingold, *Dayton, Ohio: This Year's Great American Place*, 54 *American Heritage* 54 (Oct. 2003).

resegregation of the Dayton Schools following the termination of the lawsuit that had led to busing in the district (September 2002) and a 2004 bicentennial retrospect focusing on issues of race, equality, and justice, *Yesterday to Tomorrow: The Changing Role of the Federal Court in Ohio's Southern District*. Judge Rice's efforts to work with the Law School have had the dual effect of making the programs accessible to UDSL students and helping the Law School to be a good citizen. Dayton is the home of the Law School, and the basis of much of its support. It is the home of a number of UDSL students; it is where most will find their first legal work, in local firms, courts, and agencies; and it is where many UDSL alumni will remain to raise their own families and practice their profession. The Law School and all who are associated with it owe Judge Rice a debt of gratitude for his contributions toward making Dayton a better community.

VII. *Conclusion*

It takes a team to raise a lawyer. The Honorable Walter Herbert Rice has been a vital part of the team at the University of Dayton School of Law throughout the thirty years that have passed since its reopening in 1974. Judge Rice has proved himself the ultimate utility player – advisor, professor, exemplary judge, scholar, community leader – and in every position he has assumed, Judge Rice has been an All Star.