Memorial for the Honorable Terence T. Evans, Circuit Judge
United States Court of Appeals for the Seventh Circuit

Special Session of the United States Court of Appeals for the Seventh Circuit
and the United States District Court for the Eastern District of Wisconsin

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On the last Sunday of October 1983—the first semester of my 3L year at Marquette Law School—Judge Evans called to offer me a clerkship in his chambers after my graduation the following spring. It was Halloween Sunday, and rather than studying the law that afternoon, I had been out taking my stepdaughter trick-or-treating. When his call came, I was standing at the front door of my house handing out candy to neighborhood kids in costumes. Of course, there was no caller ID back then, so I was surprised to learn who was on the other end of the line. I had interviewed with the Judge the week before but was caught a bit off guard hearing from him over the weekend. Because it was late on a Sunday afternoon in the fall, he was no doubt calling between football games—or maybe it was halftime—but anyway, there we were, both in the midst of our normal weekend routines. For him, it was the seventh of 47 law-clerk job-offer calls he would make. For me, it was the first of the three most important phone calls of my professional life; the other two came from the Governor's office and the White House. I was absolutely thrilled to get that clerkship with the Judge, but back

then I could not fully appreciate the significance of the opportunity he was giving me. What I learned from Judge Evans during my clerkship year made those other two important phone calls possible. For that and much more I am greatly in his debt.

Terry was everyone's ideal trial judge. For starters, he had that rare combination of a sharp legal mind, abundant common sense, and broad legal and cultural experience that made him perfectly suited to the work of the trial court. He was steeped in everything that is Milwaukee—its people, its traditions, and its institutions. Add to that his legendary sense of humor and his considerable powers of perspective and intuition and you've got a truly masterful trial judge. He could read the courtroom, size up each case really quickly, cut through the clutter, pull the story line from mountains of evidence, identify the real clash of interests, and articulate a concise and well-reasoned decision that everyone could grasp. He did all this with a clarity of expression and wit rarely found in the world that we lawyers and judges inhabit.

One opinion he issued during my clerkship year particularly illustrates these talents. The case had come in the year before, so I was not in the courtroom when the evidentiary hearing was held. That didn't matter, so vivid was the opinion he wrote. Most of us in this room have lived in Milwaukee all our lives. Those of us over 40—okay, those of us over 50—may remember Count Fuller, a colorful local oddity and erstwhile door-to-door salesman who used to roam the east side peddling household

wares. His given name was Jeffrey Pergoli, and for a short time, he worked as a door-to-door Fuller Brush salesman until the company terminated him for writing a bad check. Company officials reported the matter to law-enforcement authorities, and Pergoli was charged with a couple of misdemeanors. The charges were eventually dropped, and Pergoli sued the Fuller Brush Company for malicious prosecution. The company's lawyers responded to this minor litigation annoyance with the legal equivalent of a bazooka: They counterclaimed for trademark infringement, unfair competition, interference with business relations, and unfair trade practices. Their theory was that Pergoli was misrepresenting himself as a Fuller Brush salesman even though he had been terminated two years earlier. But here's the thing. In the meantime, Pergoli had legally changed his name to "Count Copy-Fuller," known to everyone as simply "Count Fuller." He went about town in crazy outfits—tights and capes and such—and carried on his door-to-door marketing in an unconventional way, all the while disclaiming any relationship with the Fuller Brush Company.

The Judge's decision became an instant classic.[1] He dismissed Count Fuller's malicious-prosecution claim in a couple of sentences, then turned his attention to the bevy of counterclaims filed by the Fuller Brush Company. He first noted the crucial fact that Count Fuller's sales materials contained the disclaimer. He then gave this

[1] *Count Fuller v. Fuller Brush Co.*, 595 F. Supp. 1088 (E.D. Wis. 1984).

description of the plaintiff:

> The Count wears wild costumes. At the court hearing on [the company's] motions he wore one of them, a bright green sportscoat and large dark glasses in the shape of butterflies. He had numerous small stuffed animals perched on his shoulders. . . . [T]he outfit borders on the outrageous. . . . [And here the Judge inserted a sketch made by his law clerk Rick Sankovitz.]

Next, the Judge framed the issue: "[T]he company claims that Count Fuller[] . . . must be stopped. The issue presented is to what extent Count Fuller's activities are legally impermissible either as unfair competition or because they infringe on the Fuller Brush trademark."[2] He continued:

> The 'Fuller Brush Man' is a part of American lore. It is as if he exists in a Norman Rockwell painting, carrying samples of mops and bottles of cleaning solutions to the housewife, who answers the door while wiping her hands on her apron. Today, he is probably less folksy but no less respectable. To understate, Count Fuller does not fit the bill. In fact, the Count is so atypical that it is difficult to imagine why the Fuller Brush Company seems so threatened by his activities. I do not believe that any, or at least very many, could be deceived.[3]

Judge Evans concluded:

> Count Fuller states outright . . . that he is not a Fuller Brush Man. Why would a reasonable person think that he was? Dom DeLuise can squirm into bikini Jockey underwear and say he's Jim Palmer without causing Palmer or Jockey any anxiety. Exaggeration, hyperbole and parody have a

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[2] *Id.* at 1091.

[3] *Id.* at 1092.

place. It should not be the mission of the federal court to stomp them out.[4]

During his 16 years in the district court, Judge Evans presided in many important trials, notably the organized-crime prosecution of Frank Balistrieri, the bribery prosecution of a powerful Milwaukee alderman, and a long-running legislative redistricting battle after the 1980 census.[5] He was ahead of his time in an early case about gays in the military.[6] He was a strong believer in individualized justice and chafed under the sentencing guidelines after they were implemented in 1987. He wrote several important opinions objecting to the grid system of sentencing for reasons of principle, efficiency, and the proper allocation of sentencing responsibility.[7] He ran a superb trial court. His pragmatic sound judgment, general good cheer, and incisive wit made him a favorite of lawyers, law enforcement, and others in the justice system who regularly appeared in his courtroom.

Even so, when he saw litigation foolishness, he would call it out. In a decision denying a routine motion for leave to amend a complaint, he dropped the following footnote [and I will omit the name of the offending law firm to protect the innocent]:

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[4] *Id.*

[5] *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

[6] *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980).

[7] *United States v. Scott*, 757 F. Supp. 972 (E.D. Wis. 1991); *United States v. Anderson*, 782 F. Supp. 80 (E.D. Wis. 1992).

> (1) The story of the creation of the world is told in the book [of] Genesis in 400 words; (2) The world's greatest moral code, the Ten Commandments, contains only 279 words; (3) Lincoln's immortal Gettysburg address is but 266 words in length; (4) The Declaration of Independence required only 1,321 words to establish for the world a new concept of freedom. Together, the four contain a mere 2,266 words. On this routine motion to amend a civil complaint, [the law firm which shall remain nameless] has filed a brief . . . that contains approximately 41,596 words spread over an agonizing 124 pages. In this case, the term . . . 'brief' is obviously a misnomer.[8]

The point was made.

This kind of good-natured ribbing endeared Terry to our legal community, but it had a broader purpose. He was teaching us that the law is serious business, but we're all in it together so let's be reasonable.

Once Terry arrived at the court of appeals, his pragmatism, his humor, his knack for getting right to the point, and his capacity for writing lucid, compelling opinions were on display in every case. On the bench, he did not pepper the lawyers with questions, but when he did jump in, it was to bring a meandering argument back to legal or factual essentials—and sometimes to bring his theoretically minded colleagues back down to earth. In the conference room, as elsewhere, he was quick with an interesting story that shed new insight on the discussion.

When we circulated draft opinions among our panel colleagues, he would often send amusing little editorial comments along with his vote. A few examples will

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[8] *Marson v. Jones & Laughlin Steel Corp.*, 87 F.R.D. 151, 152 n.✻ (E.D. Wis. 1980).

illustrate the spice he brought to our judicial life:

In the summer of 2007, I circulated a draft opinion in a case concerning the surprisingly difficult question of what it means for an illegal immigrant to be "found in" the United States in violation of the illegal-reentry statute.[9] The opinion went on for several pages about the meaning of the statutory term "found in." Terry sent this response: "I approve Judge Sykes' proposed opinion in this case. And if you are looking for me at 9 a.m. tomorrow, I could probably be 'found in' the rough off the 5th green at the Western Lakes Golf Club in Waukesha County."

And this, in response to an opinion Mike Kanne sent to us in a case raising a question about liability for the improper use of tools rented from Home Depot.[10] In his draft, Mike had observed as an aside that "[w]e would all like to use tools perfectly."[11] Terry responded: "I approve this proposed opinion. P.S. May I suggest, on page 17, after the statement 'We would all like to use tools perfectly' that you add this: 'Judge Evans is the only member of this panel who always does so.'"

And this, in response to a draft opinion Dick Posner circulated resolving a particularly contentious appeal.[12] Dick had closed his opinion with this observation:

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[9] *United States v. Are*, 498 F.3d 460 (7th Cir. 2007).

[10] *Rickher v. Home Depot, Inc.*, 535 F.3d 661 (7th Cir. 2008).

[11] *Id.* at 669.

[12] *Allan Block Corp. v. County Materials Corp.*, 512 F.3d 912 (7th Cir. 2008).

"[I]t is time the war between these pertinacious antagonists was brought to a peaceful end."[13] Now, you know Terry was not going to let language like that go by without comment. He responded: "I approve Dick's proposed opinion in this case. Actually, I just read the opinion while watching, with one eye, CNN's coverage of the Iowa Caucuses. [This was in early 2008.] And Dick's last line, '[I]t is time the war between these pertinacious antagonists was brought to a peaceful end,' would be good advice for Mitt Romney and Mike Huckabee." He offered a couple of additional observations about the candidates, which I am not going to share with you because this presentation is being recorded. He concluded: "I suppose you two Republicans wish you had someone like Herbert Hoover to rally around." Then he corrected himself: "Actually Dick always strikes me as a bit of a Bolshevik."

Then there's this comment from Terry, responding to an email from Judge Phil Simon of the Northern District of Indiana, who was sitting with us by designation. Phil had apologized for being a "pain in the backside" but asked Terry to make a couple of modest changes in the draft opinion he had circulated.[14] Terry wrote back, saying, "Rest assured, I do not consider you a 'pain in the backside,' [although that] might well be true if you had me down by seven after nine on some fancy-schmancy golf course in

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[13] *Id.* at 921.

[14] *United States v. Stotler*, 591 F.3d 935 (7th Cir. 2010).

Valparaiso." I chimed in (electronically speaking) and noted that Terry was in a particularly good mood notwithstanding the Packers' loss to the Vikings the day before because "for the first time in 20 years, he came in first in his own football pool." Terry replied: "It's true. I shocked the experts by rolling to a win in our pool yesterday despite going with Green Bay over the Vikes. It's the first time all year I haven't been bested by at least one of the Sykes law clerks or her hot-shot secretary, Chris Petrie."

Now, a few words about that football pool. Everybody in the building looked forward to it every fall—and to Terry's March Madness basketball pool in the spring. Terry called himself "The Commissioner" and he had lots of rules, which my law clerks regularly challenged. Before the football season opener and every Tuesday during the season, Terry distributed a "Commissioner's Memo." In addition to the weekly standings, the memo contained hilarious little nuggets about that week's winners and losers. The Commissioner frequently had a few choice words for Bill Callahan, one of our wonderful magistrate judges who has the misfortune of being a Chicago Bears fan. We anxiously awaited the arrival of the Commissioner's Memo on Tuesday mornings throughout the fall. As the Commissioner, Terry was the final authority—the court of last resort, as it were. At the beginning of last year's season, he explained the rules for the pool and how the championship round would work:

> All weekly winners, plus 6 "discretionary picks" by the **Commissioner**, will qualify to compete for the league championship. As usual, the 6

> discretionary picks will be based on the subjective judgment of the **Commissioner**—but things like good manners, nice penmanship, and a willingness to suck up to him will be given strong consideration.

As an appellate judge, Terry's opinions stood out for their clarity, brevity, attention to factual detail, and straightforward reasoning. They were always interesting, which is saying a lot when it comes to judicial opinions. As is well-known, he liked to liven up his opinions with sports and pop-culture references.[15] Criminal cases, in particular, drew on his storytelling strengths.[16] Last weekend, I tried to come up with a "Top Ten List" of Terry's opinions (we all know how much he loved lists), but I had to give up. There are just too many great ones. So I'm going to mention just a few that would have to be included among his "Greatest Hits":

Olinger v. United States Golf Association is a Terry Evans classic that opens with one of his preferred newspaper-style introductions: "This case presents a clash between big-time sports and the Americans With Disabilities Act. It pits the venerable United States Golf Association against a professional golfer who wants to compete in America's greatest—and most democratic—golf tournament, the United States Open."[17] The

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[15] *See, e.g.*, *Brennan v. Connors*, 644 F.3d 559 (7th Cir. 2011); *Murphy v. Eddie Murphy Prods., Inc.*, 611 F.3d 322 (7th Cir. 2010); *Vought v. Wis. Teamsters Joint Council No. 39*, 558 F.3d 617 (7th Cir. 2009); *United States v. Murphy*, 406 F.3d 857 (7th Cir. 2005).

[16] *See, e.g.*, *United States v. Moore*, 563 F.3d 583 (7th Cir. 2009); *Calloway v. Montgomery*, 512 F.3d 940 (7th Cir. 2008).

[17] 205 F.3d 1001, 1001 (7th Cir. 2000).

opinion goes on to explain that pro golfer Ford Olinger, who suffered from a degenerative condition that impaired his ability to walk, had asked the USGA for an accommodation in order to compete to qualify for the Open. More specifically, he wanted to use a golf cart. The USGA said "no" and he sued. Terry's opinion takes the reader through a brief history of the USGA and the U.S. Open, sprinkled with interesting and obscure statistics.

After canvassing the law and the evidence in the style of a Sports Illustrated column, Terry came down on the side of the USGA and rejected the golfer's claim for a cart accommodation. He concluded:

> The focus of our opinion has been on one question: *Must* the USGA allow Ford Olinger to compete while riding in a golf cart instead of walking? The answer is 'no.' The question we have not addressed is whether the USGA *should* give seriously disabled, but otherwise well-qualified, golfers a chance to compte. Compared to most people who play golf, Olinger's skill level is beyond comprehension. And without question, most players would prefer to walk while playing competitive, championship-caliber golf. Surely a player like Olinger would gladly trade in his cart if he could walk a golf course without pain. But the decision on whether the rules of the game should be adjusted to accommodate him is best left to those who hold the future of golf in trust.[18]

The Supreme Court would later disagree in the more famous *Casey Martin* case, affirming a decision of the Ninth Circuit that was issued at about the same time as

[18] *Id.* at 1007.

Terry's but had come out the other way.[19] Before the Supreme Court granted cert in the *Martin* case to resolve the conflict, a friend of Terry's wrote to him suggesting that the conflict between the circuits could be worked out in a game of golf, 36 holes, one circuit's judges riding and the other circuit's judges walking. Terry wrote back and nixed the idea:

> I think your idea of a match between the Ninth and the Seventh Circuits would be a disaster. We have 11 judges on the Seventh Circuit . . . . Of the 11, only 2 play golf and I'm better than the other guy, so you can see our team would sink. So I'm afraid, without even knowing anything about the abilities of the judges on the Ninth Circuit, they would wax us in a tournament.

Crue v. Aiken[20] involved a First Amendment claim by a group of students and professors at the University of Illinois whose pressure campaign to change the school's Native American mascot was squelched by the university's administrators. Terry's opinion opens with a colorful description of college mascots, from the prosaic to the fanciful. After listing a number of nicknames he thought were "pretty cool" and others he said were "pretty boring," Terry paused to make a very important legal observation: It was "quite obvious," he wrote, "that, when considering college nicknames, one must kiss a lot of frogs to get a prince. But there are a few princes."[21] Then he listed some

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[19] *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), *aff'g* 204 F.3d 994 (9th Cir. 2000).

[20] 370 F.3d 668 (7th Cir. 2004).

[21] *Id.* at 671.

familiar and venerable nicknames followed by some that were not so familiar:

> Can anyone top the Anteaters of the University of California—Irvine; the Hardrockers of the South Dakota School of Mines . . . ; the Humpback Whales of the University of Alaska—Southeast; the Judges (we are particularly partial to this one) of Brandeis University; the Poets of Whittier College; the Stormy Petrels of Oglethorpe University in Atlanta; the Zips of the University of Akron; or the Vixens (will this nickname be changed if the school goes coed?) of Sweet Briar College . . . .[22]

"As wonderful as all these are," he said, "we give the best college nickname nod to the University of California—Santa Cruz. Imagine the fear in the hearts of opponents who travel there to face the . . . 'Banana Slugs'?"[23] I recall that Frank Gimbel once introduced Terry at a bar association event as "one of the comedy writers down at the Seventh Circuit." This opinion suggests that Frank may have been onto something. Still, after this entertaining detour, Terry comprehensively analyzed the plaintiffs' claim and found a First Amendment violation.

Terry wrote some important opinions in copyright and trademark cases—difficult areas of law that benefitted from his clear-eyed analysis and clean writing. One was *Central Manufacturing, Inc. v. Brett*,[24] a trademark dispute involving the "Stealth" line of baseball bats developed by a company affiliated with former

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[22] *Id.*

[23] *Id.*

[24] 492 F.3d 876 (7th Cir. 2007).

Kansas City Royals star George Brett. The opinion begins with a summary of Brett's notable batting records and a riveting account of the famous "Pine Tar Incident." But it goes on to clarify how trademark registration can be overcome. There are many other examples of how Terry made complex legal doctrine interesting and understandable.[25]

Terry didn't disagree with his colleagues very often, and when he did it was always in good faith and good humor. In one case early on in my tenure, Dick Posner, Terry, and I divided three ways. It was a criminal case—*United States v. O'Neill*[26]—and Terry thought the district judge had probably committed an error and the case should go back for a do-over—but just on the sentence. Dick thought the judge had definitely made a mistake but the proper remedy was to unwind the plea, not just the sentence. I thought there was no error at all. So Dick assigned the case to Terry to try to bring consensus. Terry circulated a draft opinion, but Dick couldn't agree and sent a dissent. I replied that I didn't agree with either opinion. This is what Terry emailed back: "Very interesting. We have two extremes (and I use the term only in a loving way, of course). My approach [is] somewhat in the middle [and] rather pragmatic. So where do we go from here?" Dick replied that he would amend his opinion to join Terry's disposition,

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[25] *See, e.g.*, *Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356 (7th Cir. 2009); *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007 (7th Cir. 2005); *Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586 (7th Cir. 2003).

[26] 437 F.3d 654 (7th Cir. 2006).

but explain why he preferred his own. So Dick revised his separate opinion, described the three-way split and said he was "join[ing] Judge Evans's proposed disposition," but "at the risk of seeming a fusspot" would explain why he disagreed with the analysis. I emailed back to say I would circulate my dissent soon. I added this: "For the record, in my humble opinion, Dick Posner is not a fusspot. I think we can be unanimous on that." Terry shot back: "I dissent—Posner *is* a fusspot."

This trip through some of Terry's cases illustrates his great gift to our court and to the law. He always looked for the story and central legal insights in each case, and he explained them in clear, compelling, often entertaining prose. He placed the law in the context of what he knew about human experience—and that was a lot—and he made it more understandable and accessible to everyone.

One of the great joys for me in joining this court was the opportunity to work with Terry again. He boosted my judicial career and was present at every important step along the way. He administered the judicial oath of office to me three times: In 1992 as a newly elected state trial judge; in 1999 as a newly appointed state supreme court justice; and in 2004 as a newly confirmed circuit judge on this court. Here is what he told the assembled dignitaries and guests at my supreme court investiture in the Assembly chamber at the State Capitol in 1999:

> Some of you know that Diane was my law clerk back in the early 1980s. At that time, she was in a minority; some of you may not know that she

> was an affirmative action appointee. She was a member of a group that had been discriminated against, certainly in my court and in some other courts in our building. And I thought it was high time that the discrimination should come to an end. So I bit the bullet and hired a conservative Republican.

As much as he loved his work on the bench, Terry's family was always primary: His beloved Joan; his daughter Kelly and her husband, Erich; his daughter Christine and her husband, Randy; his son David; and his grandchildren Olivia, Henry, and Stella. Oh, how he loved his family. He had many good friends—some to whom he was extremely close; they, too, were very important to him. Those of us who were blessed to be in the concentric circles around him were immeasurably enriched by his friendship.

Terry Evans filled the lives of his family and friends with joy. He filled this courthouse and our legal community with a sense of shared purpose. He filled our court with his practical wisdom and wit. And he filled the casebooks with lucid opinions, memorably written. Terry's buoyant approach to life and his humane approach to the law inspired countless others in our community. His legal and human legacies will endure. We—everyone in this room and many more in our community—loved him very much. He left us too soon and is very deeply missed.