JUDGE NEIL M. GORSUCH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 12(d)

Speeches
If you were looking for a talk tonight about the maddening maze of our civil justice system—its exuberant procedures that price so many out of court and force those in it to wade wearily through years and fortunes to win a judgment—you came to the right place. Almost.

When Professor Adler kindly asked me to share a few words with you tonight, that was my intended topic. I’d just finished penning opinions in two cases. One was older than my law clerks and had outlived many of the plaintiffs. The other had bounced up and down the federal court system for so long it was nearly as ancient as Cleveland’s championship drought. You know you’re in trouble when the Roman numeral you use to distinguish your opinion from all the others of the same name draws closer to X than I. Needless to say, I was eager to talk about civil justice reform.

But that was then and this is now. Since Professor Adler extended his invitation, the legal world suffered a shock with the loss of Justice Scalia. A few weeks ago, I was taking a breather in the middle of a ski run with little on my mind but the next mogul field when my phone rang with the news. I immediately lost what breath I had left, and I am not embarrassed to admit that I couldn’t see the rest of the way down the mountain for the tears. From that moment it seemed clear to me there was no way I could give a speech about the law at this time without reference to that news.

So tonight I want to say something about Justice Scalia’s legacy. Sometimes people are described as lions of their profession and I have difficulty understanding exactly what that’s supposed to mean. Not so with Justice Scalia. He really was a lion of the law: docile in private life but a ferocious fighter when at work, with a roar that could echo for miles. Volumes rightly will be written about his contributions to American law, on the bench and off. Indeed, I have a hard time thinking of another Justice who has penned so many influential articles and books about the law even while busy deciding cases. Books like A Matter of
Interpretation and Reading Law that are sure to find wide audiences for years to come.

But tonight I want to touch on a more thematic point and suggest that perhaps the great project of Justice Scalia’s career was to remind us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best. As Justice Scalia put it, “[i]f you’re going to be a good and faithful judge, you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.”

It seems to me there can be little doubt about the success of this great project. We live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret texts—whether constitutional, statutory, regulatory, or contractual. And as Justice Kagan acknowledged in her Scalia Lecture at Harvard Law School last year, “we’re all textualists now.” Capturing the spirit of law school back when she and I attended, Justice Kagan went on to relate how professors and students often used to approach reading a statute with the question “[G]osh, what should this statute be,” rather than “[W]hat do the words on the paper say?”—in the process wholly conflating the role of the judge with the role of the legislator. Happily, that much has changed, giving way to a return to a much more traditional view of the judicial function, one in which judges seek to interpret texts as reasonable affected parties might have done rather than rewrite texts to suit their own policy preferences. And, as Justice Kagan said, “Justice Scalia had more to do with this [change] than anybody”

6. Id.
because he “taught” (or really reminded) “everybody how to do statutory interpretation differently.” And one might add: correctly.

I don’t think there is any better illustration of Justice Kagan’s point than the very first opinion the Supreme Court issued after Justice Scalia’s passing. That case—Lockhart v. United States—involved the question how best to interpret a statute imposing heightened penalties for three types of offenses—“[1] aggravated sexual abuse, [2] sexual abuse,” and “[3] abusive sexual conduct involving a minor or ward.”

The majority opinion by Justice Sotomayor relied on the rule of the last antecedent and held that the phrase at the end of the sentence—“involving a minor or ward”—modifies only the last offense listed. So that the statute’s penalties apply whenever there is aggravated sexual abuse, or sexual abuse, or whenever there is abusive sexual conduct involving a minor or ward. In dissent, Justice Kagan noted that, in “ordinary” English usage, the rule of the last antecedent bears exceptions and that sometimes a modifying phrase at the end of a sentence reaches further back to earlier antecedents too. And, in Justice Kagan’s estimation, an ordinary and average reader of the language at issue here would have thought the phrase “involving a minor or ward” does just that, modifying not just its immediate but all three of its antecedents. So for the statutory penalties to apply, Justice Kagan argued, the government must always prove some kind of sexual abuse involving a minor. In support of her suggestion that an exception rather than the rule should apply to this particular statutory language, Justice Kagan offered this gem of an analogy: “Imagine a friend told you that she hoped to meet ‘an actor, director, or producer involved with the new Star Wars movie.’ You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander.” So too here, the Justice reasoned.

As you can see, the two sides in Lockhart disagreed pretty avidly and even colorfully. But notice, too, neither appealed to its views of optimal social policy or what the statute “should be.” Their dispute focused instead on grammar, language, and statutory structure and on what a reasonable reader in the past would have taken the statute to

7. Id.
9. Id. at 961 (quoting 18 U.S.C. § 2252(b)(2)).
10. Id. at 963.
11. Id. at 969 (Kagan, J., dissenting). For another example of what I thought was an interesting encounter with the rule of last antecedent, its exceptions, and a misplaced modifier, see Payless ShoeSource, Inc. v. Travelers Cos., 585 F.3d 1366, 1369–73 (10th Cir. 2009).
13. Id.
mean—on what “the words on the paper say.” In fact, I have no doubt several Justices found themselves voting for an outcome they would have rejected as legislators. Now, one thing we know about Justice Scalia is that he loved a good fight—and it might be that he loved best of all a fight like this one, over the grammatical effect of a participial phrase. If the Justices were in the business of offering homages instead of judgments, it would be hard to imagine a more fitting tribute to their colleague than this. Surely when the Court handed down its dueling textualist opinions the Justice sat smiling from some happy place.

But of course every worthwhile endeavor attracts its critics. And Justice Scalia’s project is no exception. The critics come from different directions and with different agendas. Professor Ronald Dworkin, for example, once called the idea that judges should faithfully apply the law as written an “empty statement” because many legal documents like the Constitution cannot be applied “without making controversial judgments of political morality in the light of [the judge’s] own political principles.”14 My admirable colleague, Judge Richard Posner, has also proven a skeptic. He has said it’s “naive” to think judges actually believe everything they say in their own opinions; for they often deny the legislative dimension of their work, yet the truth is judges must and should consult their own moral convictions or consequentialist assessments when resolving hard cases.15 Immediately after Justice Scalia’s death, too, it seemed so many more added their voices to the choir. Professor Laurence Tribe, for one, wrote admiringly of the Justice’s contributions to the law.16 But he tempered his admiration by seemingly chastising the Justice for having focused too much on the means by which judicial decisions should be made and not enough on results, writing that “interpretive methods” don’t “determine, much less eclipse, outcome[s].”17

Well, I’m afraid you’ll have to mark me down as naive, a believer that empty statements can bear content, and an adherent to the view that outcomes (ends) do not justify methods (means). Respectfully, it

17. Id.
seems to me an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function. That, yes, judges should be in the business of declaring what the law is using the traditional tools of interpretation, rather than pronouncing the law as they might wish it to be in light of their own political views, always with an eye on the outcome, and engaged perhaps in some Benthamite calculation of pleasures and pains along the way. Though the critics are loud and the temptations to join them may be many, mark me down too as a believer that the traditional account of the judicial role Justice Scalia defended will endure. Let me offer you tonight three reasons for my faith on this score.

*  
First, consider the Constitution. Judges, after all, must do more than merely consider it. They take an oath to uphold it. So any theory of judging (in this country at least) must be measured against that foundational duty. Yet it seems to me those who would have judges behave like legislators, imposing their moral convictions and utility calculi on others, face an uphill battle when it comes to reconciling their judicial philosophy with our founding document.

Consider what happened at the constitutional convention. There the framers expressly debated a proposal that would have incorporated the judiciary into a “council of revision” with sweeping powers to review and veto congressional legislation. A proposal that would have afforded judges the very sorts of legislative powers that some of Justice Scalia’s critics would have them assume now. But that proposal went down to defeat at the hands of those who took the traditional view that judges should expound upon the law only as it comes before them, free from the bias of having participated in its creation and from the burden of having to decide “the policy of public measures.”18 In place of a system that mixed legislative and judicial powers, the framers quite deliberately chose one that carefully separated them.

The Constitution itself reflects this choice in its very design, devoting distinct articles to the “legislative Power[19]” and the “judicial Power,”20 creating separate institutions for each, and treating those powers in contradistinction. Neither were these separate categories empty ones to the founding generation. Informed by a hard earned intellectual inheritance—one perhaps equal parts English common law experience and Enlightenment philosophy—the founders understood the legislative power as the power to prescribe new rules of general applicability for the future. A power properly guided by the will of the

19. See U.S. Const. art. I.
20. See id. art. III.
people acting through their representatives, a task avowedly political in nature, and one unbound by the past except to the extent that any piece of legislation must of course conform to the higher law of the Constitution itself.²¹

Meanwhile, the founders understood the judicial power as a very different kind of power. Not a forward-looking but a backward-looking authority. Not a way for making new rules of general applicability but a means for resolving disputes about what existing law is and how it applies to discrete cases and controversies. A necessary incident to civil society to be sure but a distinct one.²² One that calls for neutral arbiters, not elected representatives. One that employs not utility calculi but analogies to past precedents to resolve current disputes.²³ And a power constrained by its dependence on the adversarial system to identify the issues and arguments for decision—a feature of the judicial power that generally means the scope of any rule of decision will be informed and bounded by the parties’ presentations rather than only by the outer limits of the judicial imagination.²⁴ As the founders understood it, the task of the judge is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have done when engaged in the activity underlying the case or controversy—not to amend or revise the law in some novel way.²⁵ As Blackstone explained, the job of the judge in a government of separated powers is not to “make” or “new-model” the law.²⁶ Or as Hamilton later echoed, it is for the judiciary to exercise

²¹ See generally THE FEDERALIST No. 44 (James Madison); THE FEDERALIST Nos. 78, 81 (Alexander Hamilton).


²³ Cf. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (“When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles . . . .”); THE FEDERALIST No. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . .”).

²⁴ See THE FEDERALIST No. 10 (James Madison); THE FEDERALIST No. 78 (Alexander Hamilton).


²⁶ 3 WILLIAM BLACKSTONE, COMMENTARIES *327.
“neither FORCE nor WILL, but merely judgment.”\textsuperscript{27} Or again, as Marshall put it, it is for the judiciary to say (only) “what the law is.”\textsuperscript{28}

So many specific features of the Constitution confirm what its larger structure suggests. For example, if the founders really thought legislators free to judge and judges free to legislate, why would they have gone to such trouble to limit the sweep of legislative authority—to insist that it pass through the arduous process of bicameralism and presentment—only to entrust judges to perform the same essential function without similar safeguards? And why would they have insisted on legislators responsive to the people but then allowed judges to act as legislators without similar accountability? Why, too, would they have devised a system that permits equally unrepresentative litigants to define the scope of debate over new legislation based on their narrow self-interest? And if judges were free to legislate new rules of general applicability for the future, why would the founders have considered precedent as among the primary tools of the judicial trade rather than more forward-looking instruments like empirical data? And why would they have entrusted such decisions to a single judge, or even a few judges, aided only by the latest crop of evanescent law clerks, rather than to a larger body with more collective expertise?

In response to observations like these, Judge Posner has replied that “American appellate courts are councils of wise elders and it is not completely insane to entrust them with responsibility for deciding cases in a way that will produce the best results” for society.\textsuperscript{29} But, respectfully, even that’s not exactly a ringing endorsement of judges as social utility optimizers, is it? I can think of a lot of things that aren’t completely insane but still distinctly ill-advised (or so I try to convince my teenage daughters). And, respectfully too, wouldn’t we have to be at least a little crazy to recognize the Constitution’s separation of judicial and legislative powers, and the duty of judges to uphold it, but then applaud when judges ignore all that to pursue what they have divined to be the best policy outcomes? And crazy not to worry that if judges consider themselves free to disregard the Constitution’s separation of powers they might soon find other bothersome parts of the Constitution equally unworthy of their fidelity?

This first point leads to a second. It seems to me that the separation of legislative and judicial powers isn’t just a formality dictated by the Constitution. Neither is it just about ensuring that two institutions with basically identical functions are balanced one against the other.

\textsuperscript{27} THE FEDERALIST NO. 78 (Alexander Hamilton).

\textsuperscript{28} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights later enumerated in the Constitution and its amendments.\textsuperscript{30} Though much could be said on this subject, tonight permit me to suggest a few reasons why recognizing, defending, and yes policing, the legislative-judicial divide is critical to preserving other constitutional values like due process, equal protection, and the guarantee of a republican form of government.

Consider if we allowed the legislator to judge. If legislatures were free to act as courts and impose their decisions retroactively, they would be free to punish individuals for completed conduct they’re unable to alter. And to do so without affording affected individuals any of the procedural protections that normally attend the judicial process. Raising along the way serious due process questions: after all, how would a citizen ever have fair notice of the law or be able to order his or her affairs around it if the lawmaker could go back in time and outlaw retroactively what was reasonably thought lawful at the time?\textsuperscript{31} With due process concerns like these would come equal protection problems, too. If legislators could routinely act retroactively, what would happen to disfavored groups and individuals? With their past actions known and unalterable, they would seem easy targets for discrimination. No doubt worries like these are exactly why the founders were so emphatic that legislation should generally bear only prospective effect—proscribing bills of attainder and ex post facto laws criminalizing completed conduct\textsuperscript{32}—and why baked into the “legislative Power” there’s a presumption as old as the common law that all legislation, whether criminal or civil, touches only future, not past, conduct.\textsuperscript{33}

\textsuperscript{30.} See \textit{The Federalist No. 47} (James Madison); \textit{The Federalist Nos. 79, 81} (Alexander Hamilton); Rachel E. Barkow, \textit{Separation of Powers and the Criminal Law}, 58 \textit{Stan. L. Rev.} 989, 990–91, 1031–34 (2006); Kevin Mooney, \textit{Supreme Court Justice Scalia: Constitution, Not Bill of Rights, Makes Us Free}, \textit{The Daily Signal} (May 11, 2015), http://dailysignal.com/2015/05/11/supreme-court-justice-scalia-constitution-not-bill-of-rights-makes-us-free/[https://perma.cc/UN6Q-LNVS] (“'Every tin horn dictator in the world today, every president for life, has a Bill of Rights,' said Scalia . . . . 'That's not what makes us free: if it did, you would rather live in Zimbabwe. But you wouldn’t want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word ‘constitution;’ it means structure.’ . . . ‘The genius of the American constitutional system is the dispersal of power,’ he said. ‘Once power is centralized in one person, or one part [of government], a Bill of Rights is just words on paper.’”).

\textsuperscript{31.} See Barkow, supra note 30, at 1033.

\textsuperscript{32.} U.S. Const. art. I, § 9, cl. 3; id. § 10, cl. 1; \textit{see also} Barkow, supra note 30, at 1012–14; \textit{The Federalist No. 84} (Alexander Hamilton).

\textsuperscript{33.} See \textit{Landgraf v. USI Film Prods.}, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and
Now consider the converse situation, if we allowed the judge to act like a legislator. Unconstrained by the bicameralism and presentment hurdles of Article I, the judge would need only his own vote, or those of just a few colleagues, to revise the law willy-nilly in accordance with his preferences and the task of legislating would become a relatively simple thing. Notice, too, how hard it would be to revise this so-easily-made judicial legislation to account for changes in the world or to fix mistakes. Unable to throw judges out of office in regular elections, you’d have to wait for them to die before you’d have any chance of change. And even then you’d find change difficult, for courts cannot so easily undo their errors given the weight they afford precedent. Notice finally how little voice the people would be left in a government where life-appointed judges are free to legislate alongside elected representatives. The very idea of self-government would seem to wither to the point of pointlessness. Indeed, it seems that for reasons just like these Hamilton explained that “liberty can have nothing to fear from the judiciary alone,” but that it “has every thing to fear from [the] union” of the judicial and legislative powers. Blackstone painted an even grimmer

embodies a legal doctrine centuries older than our Republic.”); De Niz Robles v. Lynch, 803 F.3d 1165, 1169–70 (10th Cir. 2015); see also 3 HENRY DE BRACTON, DE LEGIBUS ET CONSUELTUDINIBUS ANGLIAE 530–31 (Travers Twiss ed. & trans., 1880) (1257); 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (“All laws should be therefore made to commence in futuro, and be notified before their commencement.”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (Melville M. Bigelow ed., 1994) (1833) (“[R]etrospective laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact.”); Adrian Vermeule, Essay, Veil of Ignorance Rules in Constitutional Law, 111 YALE L.J. 399, 408 (2001).

34. See generally John F. Manning, Lawmaking Made Easy, 10 GREEN BAG 2D 191 (2007).


36. THE FEDERALIST NO. 78 (Alexander Hamilton); see also id. (“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.”).
picture of a world in which judges were free to legislate, suggesting that there “men would be[come] slaves to their magistrates.”37

In case you think the founders’ faith in the liberty-protecting qualities of the separation of powers is too ancient to be taken seriously, let me share with you the story of Alfonzo De Niz Robles.38 Mr. De Niz Robles is a Mexican citizen, married to a U.S. citizen, and the father of four U.S. citizens. In 1999, he agreed to depart the country after being apprehended by immigration authorities. For two years his wife tried without luck to secure him a spousal visa. At that point, Mr. De Niz Robles decided to return to the United States and try his own luck at applying for lawful residency. In doing so, though, he faced two competing statutory provisions that confused his path. One appeared to require him to stay outside the country for at least a decade before applying for admission because of his previous unlawful entry.39 Another seemed to suggest the Attorney General could overlook this past transgression and adjust his residency status immediately.40 In 2005, my colleagues took up the question how to reconcile these two apparently competing directions. In the end, the Tenth Circuit held that the latter provision controlled and the Attorney General’s adjustment authority remained intact.41 And it was precisely in reliance on this favorable judicial interpretation that Mr. De Niz Robles filed his application for relief.

But then a curious thing happened. The Board of Immigration Appeals (BIA) issued a ruling that purported to disagree with and maybe even overrule our 2005 decision, one holding that immigrants like Mr. De Niz Robles cannot apply for an immediate adjustment of status and must instead always satisfy the ten-year waiting period.42 In support of its view on this score, the BIA argued that the statutory scheme was ambiguous, that under Chevron step 2 it enjoyed the right to

37. 4 WILLIAM BLACKSTONE, COMMENTARIES *371; see also 1 CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 174 (Thomas Nugent trans., M. D’Alembert rev. ed. 1873) (1748) (“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.”).

38. See generally De Niz Robles, 803 F.3d 1165. For another encounter with similar issues but along the executive-legislative rather than the legislative-judicial divide, see United States v. Nichols, 784 F.3d 666, 667–77 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).


40. Id. § 1255(i)(2)(A).

41. Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1300–01 (10th Cir. 2005), amended and superseded on reh’g, 453 F.3d 1237, 1244 (10th Cir. 2005), disapproved by Padilla-Caldera v. Holder, 637 F.3d 1140, 1153 (10th Cir. 2011).

exercise its own “delegated legislative judgment,” that as a matter of policy it preferred a different approach, and that it could enforce its new policy retroactively to individuals like Mr. De Niz Robles.43 So that, quite literally, an executive agency acting in a faux-judicial proceeding and exercising delegated legislative authority purported to overrule an existing judicial declaration about the meaning of existing law and apply its new legislative rule retroactively to already completed conduct. Just describing what happened here might be enough to make James Madison’s head spin.

What did all this mixing of what should be separated powers mean for due process and equal protection values? After our decision in 2005, Mr. De Niz Robles thought the law gave him a choice: begin a ten-year waiting period outside the country or apply for relief immediately. In reliance on a judicial declaration of the law as it was, he unsurprisingly chose the latter option. Then when it turned to his case in 2014, the BIA ruled that that option was no option at all.44 Telling him, in essence, that he’d have to start the decade-long clock now—even though if he’d known back in 2005 that this was his only option, his wait would be almost over. So it is that, after a man relied on a judicial declaration of what the law was, an agency in an adjudicatory proceeding sought to make a legislative policy decision with retroactive effect, in full view of and able to single out winners and losers, penalizing an individual for conduct he couldn’t alter, and denying him any chance to conform his conduct to a legal rule knowable in advance.

What does this story suggest? That combining what are by design supposed to be separate and distinct legislative and judicial powers poses a grave threat to our values of personal liberty, fair notice, and equal protection. And that the problem isn’t just one of King George’s time but one that persists even today, during the reign of King James (Lebron, that is).45

*  

At this point I can imagine the critic replying this way. Sure, judges should look to the traditional tools of text, structure, history, and precedent. But in hard cases those materials will prove indeterminate. So some tiebreaker is needed, and that’s where the judge’s political convictions, a consequentialist calculus, or something else must and should come into play.

Respectfully, though, I’d suggest to you the critics’ conclusion doesn’t follow from their premise. If anything, replies along these lines

43. See Padilla-Caldera v. Holder, 637 F.3d at 1147–52.


seem to me to wind up supplying a third and independent reason for embracing the traditional view of judging: it compares favorably to the offered alternatives.

Now, I do not mean to suggest that traditional legal tools will yield a single definitive right answer in every case. Of course Ronald Dworkin famously thought otherwise, contending that a Herculean judge could always land on the right answer. But at least in my experience most of us judges don’t much resemble Hercules—there’s a reason we wear loose-fitting robes—and I accept the possibility that some hard cases won’t lend themselves to a clear right answer.

At the same time, though, I’d suggest to you that the amount of indeterminacy in the law is often (wildly) exaggerated. Law students are fed a steady diet of hard cases in overlarge and overcostly casebooks stuffed with the most vexing and difficult appellate opinions ever issued. Hard cases are, as well, the daily bread of the professoriate and a source of riches for the more perfumed advocates in our profession. But I wonder: somewhere along the way did anyone ever share with you the fact that only 5.6% of federal lawsuits make it all the way to decision in an appellate court? Or that, even among the small sliver of cases that make it so far, over 95% are resolved unanimously by the courts of appeals? Or that, even when it comes to the very hardest cases that remain, the cases where circuit judges do disagree and the Supreme Court grants certiorari, all nine Justices are able to resolve them unanimously about 40% of the time? The fact is, over 360,000 cases are filed every year in our federal courts. Yet in the Supreme Court,

46. See generally Ronald Dworkin, Law’s Empire (1986); Ronald Dworkin, Taking Rights Seriously (1978).


a Justice voices dissent in only about 50 cases per year. My law clerks reliably inform me that’s about 0.014% of all cases. Focusing on the hard cases may be fun, but doesn’t it risk missing the forest for the trees?

And doesn’t it also risk missing the reason why such a remarkable percentage of cases are determined by existing legal rules? The truth is that the traditional tools of legal analysis do a remarkable job of eliminating or reducing indeterminacy. Yes, lawyers and judges may sometimes disagree about which canons of construction are most helpful in the art of ascertaining Congress’s meaning in a complicated statute. We may sometimes disagree over the order of priority we should assign to competing canons. And sometimes we may even disagree over the results they yield in particular cases. But when judges pull from the same toolbox and look to the same materials to answer the same narrow question—what might a reasonable person have thought the law was at the time—we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow.

And even when a hard case does arise, once it’s decided it takes on the force of precedent, becomes an easy case in the future, and contributes further to the determinacy of our law. Truly the system is a wonder and it is little wonder so many throughout the world seek to emulate it.

Besides, it seems to me that even accepting some hard cases remain—maybe something like that 0.014%—it just doesn’t follow that we must or should resort to our own political convictions, consequentialist calculi, or any other extra-legal rule of decision to resolve them. Just as Justices Sotomayor and Kagan did in Lockhart, we can make our decisions based on a comparative assessment of the various legal clues—choosing whether the rule of the last antecedent or one of its exceptions best fits the case in light of the particular language at hand. At the end of the day, we may not be able to claim confidence that there’s a certain and single right answer to every case, but there’s no reason why we cannot make our best judgment depending on (and only on) conventional legal materials, relying on a sort of closed record if you will, without peering to outside evidence. No reason, too, why we cannot conclude for ourselves that one side has the better of it, even if by a nose, and even while admitting that a disagreeing colleague could see it the other way. As Justice Scalia once explained, “[e]very canon is

52. Ryan J. Owens & David A. Simon, Explaining the Court’s Shrinking Docket, 53 Wm. & Mary L. Rev. 1219, 1225 (2012) (noting the Court now decides an average of 80 cases per Term); Sunstein, supra note 50, at 780 (noting dissents now appear in approximately 60.5% of the Court’s decisions).

simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud—not, at least, unless the judge wishes to make it so."

Neither do I see the critics as offering a better alternative. Consider a story Justice Scalia loved to tell. Imagine two men walking in the woods who happen upon an angry bear. They start running for their lives. But the bear is quickly gaining on them. One man yells to the other, “We’ll never be able to outrun this bear!” The other replies calmly, “I don’t have to outrun the bear, I just have to outrun you.” As Justice Scalia explained, just because the traditional view of judging may not yield a single right answer in all hard cases doesn’t mean we should or must abandon it. The real question is whether the critics can offer anything better.

About that, I have my doubts. Take the model of the judge as pragmatic social-welfare maximizer. In that model, judges purport to weigh the costs and benefits associated with the various possible outcomes of the case at hand and pick the outcome best calculated to maximize our collective social welfare. But in hard cases don’t **both** sides usually have a pretty persuasive story about how deciding in their favor would advance the social good? In criminal cases, for example, we often hear arguments from the government that its view would promote public security or finality. Meanwhile, the defense often tells us that its view would promote personal liberty or procedural fairness. How is a judge supposed to weigh or rank these radically different social goods? The fact is the pragmatic model of judging offers us no **value** or **rule** for determining which costs and benefits are to be preferred and we are left only with a radically underdetermined choice to make. It’s sort of like being asked to decide which is better, the arrival of Hue Jackson or the return of LeBron James? Both may seem like pretty good things to the Cleveland sports fan, but they are incommensurate goods, and unless you introduce some special rule or metric there’s no way to say for certain which is to be preferred. In just this way, it seems to me that

---

54. *Scalia*, supra note 1, at 27; see also *Interview with James Boyd White*, 105 Mich. L. Rev. 1403, 1418 (2007) ("[A]s every law student learns, one finds in a very wide range of cases indeed, that arguments—rational, persuasive, decent arguments—can be made on both sides of the question. The law thus requires real choices from both judges and lawyers, but it informs those choices, which should not be merely a matter of preference or calculation, but should rather express the result of the mind’s engagement with the materials of the law . . . ").


at the end of the day the critics who would have us trade in the traditional account of judging for one that focuses on social utility optimization would only have us trade in one sort of indeterminacy problem for another. And the indeterminacy problem invited by the critics may well be a good deal more problematic given the challenges of trying to square their model of judging with our constitutional design and its underlying values. So before we throw overboard our traditional views about the separation of the judicial and legislative roles, it seems to me we might all do well to remember The Bear.57

* 

With the three points I’ve briefly sketched here tonight, I hope I’ve given you some sense why I believe Justice Scalia’s vision of the “good and faithful judge” is a worthy one. But so far I’ve discussed mostly principle, not experience. And I run the risk of an objection from those who might suggest that there’s more in heaven and earth than is dreamt of in my philosophy.58 So, as I close, I want to make plain that the traditional account of law and judging not only makes the most sense to me as an intellectual matter, it also makes the most sense of my own lived experience in the law.

My days and years in our shared professional trenches have taught me that the law bears its own distinctive structure, language, coherence, and integrity. When I was a lawyer and my young daughter asked me what lawyers do, the best I could come up with was to say that lawyers help people solve their problems. As simple as it is, I still think that’s about right. Lawyers take on their clients’ problems as their own; they worry and lose sleep over them; they struggle mightily to solve them. They do so with a respect for and in light of the law as it is, seeking to make judgments about the future based on a set of reasonably stable existing rules. That is not politics by another name: that is the ancient and honorable practice of law.

Now as I judge I see too that donning a black robe means something—and not just that I can hide the coffee stains on my shirts. We wear robes—honest, unadorned, black polyester robes that we (yes) are expected to buy for ourselves at the local uniform supply store—as a reminder of what’s expected of us when we go about our business: what

57. And isn’t it easier, too, to assess whether a judge does or doesn’t offer a persuasive textualist analysis—whether Justice Kagan or Justice Sotomayor have the better account of the statutory language in Lockhart—than to assess a judge’s success using some ends-based or efficiency-based methodology, when those methods often rest on contested political or moral convictions or disputed social science data?

58. William Shakespeare, Hamlet act 1, sc. 5.
Burke called the “cold neutrality of an impartial judge.” Throughout my decade on the bench, I have watched my colleagues strive day in and day out to do just as Socrates said we should—to hear courteously, answer wisely, consider soberly, and decide impartially. Men and women who do not thrust themselves into the limelight but who tend patiently and usually quite obscurely to the great promise of our legal system—the promise that all litigants, rich or poor, mighty or meek, will receive equal protection under the law and due process for their grievances. Judges who assiduously seek to avoid the temptation to secure results they prefer. And who do, in fact, regularly issue judgments with which they disagree as a matter of policy—all because they think that’s what the law fairly demands.

Justice Scalia’s defense of this traditional understanding of our professional calling is a legacy every person in this room has now inherited. And it is one you students will be asked to carry on and pass down soon enough. I remember as if it were yesterday sitting in a law school audience like this one. Listening to a newly-minted Justice Scalia offer his Oliver Wendell Holmes lecture titled “The Rule of Law as a Law of Rules.” He offered that particular salvo in his defense of the traditional view of judging and the law almost thirty years ago now. It all comes so quickly. But it was and remains, I think, a most worthy way to spend a life.

May he rest in peace.


60. See 28 U.S.C. § 453 (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I, __________, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ________ under the Constitution and laws of the United States. So help me God.’”).

ACCESS TO affordable JUSTICE

A CHALLENGE TO THE BENCH, BAR, and ACADEMY

BY NEIL M. GORSUCH
Most everyone agrees that in the American civil justice system many important legal rights go unvindicated, serious losses remain uncompensated, and those called on to defend their conduct are often forced to spend altogether too much. Eighty percent of the members of the American College of Trial Lawyers report that pretrial costs and delays keep injured parties from bringing valid claims to court.¹ Seventy percent also say attorneys use the threat of discovery and other pretrial costs as a means to force settlements that aren’t based on the merits.²

The upshot? Legal services in this country are so expensive that the United States ranks near the bottom of developed nations when it comes to access to counsel in civil cases.³

The real question is what to do about it.
This paper explores three possible avenues for reform. All three lie within the power of the legal profession to effect. They include revisions to our ethical codes, civil justice rules, and legal education accreditation requirements — possibilities that in turn challenge each of the main elements of our profession: bar, bench, and academy. Each of these avenues of reform holds the promise of either reducing the cost or increasing the output of legal services — in that way making access to justice more affordable. And for that reason, you might think of them as (sort of) market-based solutions.

Now, you might wonder why this paper doesn’t address some other angles at change — perhaps most obviously the possibility of increased public financing for legal aid. One reason is that, whatever challenges may be associated with asking a self-regulating profession to reconsider its self-imposed barriers to entry and output restrictions, entering that political and fiscal thicket appears likely to pose even more. Maybe even more importantly, though, on the road to change perhaps we should begin by asking first what we can do on our own and without expense to the public fisc, and whether and to what degree our own self-imposed rules increase the cost of legal services and decrease access to justice in unwarranted ways?

THE REGULATION OF LAWYERS

We lawyers enjoy a rare privilege. We are largely left to regulate our own market, often through rules of our own creation and sometimes through statutes effectively of our own devise. Of course and no matter the industry, even the most well-intentioned regulations can bear negative unintended consequences. Sometimes even the intended consequences of regulations can only be described as rent-seeking. And it seems hard to think our profession might be immune from these risks. Surely many of our self-imposed regulations represent well-intentioned efforts to prevent and police misconduct that risks harm to clients. But you might also wonder if a profession entrusted with the privilege of self-regulation is at least as (or maybe more) susceptible than other lines of commerce to regulations that impose too many social costs compared to their attendant benefits. Consider two examples.

Unauthorized Practice of Law. Marcus Arnold presented himself as a legal expert on AskMe.com, a website that allows anyone to volunteer answers to posted questions. Users of the site rate those who offer advice, and in time they came to rank Arnold as the third most helpful volunteer of legal answers out of about 150 self-identified legal experts. When Arnold later revealed that he was but a high school student, howls emerged from many quarters and his ranking dropped precipitously. Still, his answers apparently continued to satisfy the website’s users because soon enough he went on to attain the number one ranking for legal advice, ahead of scores of lawyers. Like a Rorschach test, both supporters and opponents of unauthorized practice of law (UPL) regulations see in this case support for their positions.

When approaching questions about the unauthorized practice of law, you might think it’s a natural place to begin by asking what exactly constitutes the practice of law. But that turns out to be a pretty vexing little question. While the ABA offers a set of model rules of professional conduct governing those who engage in the practice of law, it is surely a curiosity that those rules don’t attempt to define what constitutes the practice of law in the first place. After all, it’s no easy thing to regulate an activity without first defining what that activity is.

The fact is the job of defining what does and doesn’t constitute the practice of law has largely been left to state statutes. And history reveals that the definitions states have adopted, usually at the behest of local bar associations, are often breathtakingly broad and opaque — describing the practice of law as, and prohibiting nonlawyers from participating in, the “represent[ation]” of others, or (even more circularly) any “activity which has traditionally been performed exclusively by persons authorized to practice law.” More than a few thoughtful people have wondered if these sorts of sweeping and opaque restrictions may be subject to constitutional challenge on vagueness, First Amendment, or due process grounds. But however that may be, about one thing there can be little doubt. In recent years, lawyers have used the expansive UPL rules they’ve sought and won to combat competition from outsiders seeking to provide routine but arguably “legal” services at low or no cost to consumers. Indeed, by far and away most UPL complaints come from lawyers rather than clients and involve no specific claims of injury. Take recent cases involving Quicken Family Lawyer and LegalZoom. Those firms sell software with forms for wills, leases, premarital agreements, and dozens of other common situations. When Quicken entered the Texas market, an “unauthorized practice of law committee” appointed by the Texas Supreme Court quickly brought suit, a fight that eventually yielded a federal court decision holding that Quicken...
had violated Texas UPL regulations (though, happily, a result the legislature later effectively undid). Similarly, when LegalZoom entered the market in North Carolina, the state bar declared its operations illegal, a declaration that eventually induced the company to settle and promise to revise some of its business practices. Neither are challenges of this sort aimed only at for-profit firms. The federal Individuals with Disabilities Education Act (IDEA) affords parents the right to be “accompanied and advised” in agency proceedings by nonlawyers who have special training or knowledge “with respect to the problems of children with disabilities.” Yet even here, where (supreme?) federal law seems clear, state authorities have sought (sometimes successfully) to use UPL laws to forbid lay advocacy by nonprofit firms with expertise in IDEA procedures. To be sure, efforts like these to thwart competition from commercial and nonprofit advocates have proven only partially successful — LegalZoom and companies like it continue to expand. But surely, too, the threat and costs of litigation deter entry by others and raise costs for those who do enter, costs the consumer must ultimately bear.

It seems well past time to reconsider our sweeping UPL prohibitions. The fact is nonlawyers already perform — and have long performed — many kinds of work traditionally and simultaneously performed by lawyers. Nonlawyers prepare tax returns and give tax advice. They regularly negotiate with and argue cases before the Internal Revenue Service. They prepare patent applications and otherwise advocate on behalf of inventors before the Patent & Trademark Office. And it is entirely unclear why exceptions should exist to help these sort of niche (and some might say, financially capable) populations but not be expanded in ways more consciously aimed at serving larger and perhaps most especially the most underserved, are not well equipped to judge legal expertise. But do these entirely valid concerns justify the absolute UPL bans found today in so many states? That seems an increasingly hard case to make in light of an increasing amount of evidence suggesting that, at least in specified practice areas, a more nuanced approach might adequately preserve (or even enhance) quality while simultaneously increasing access to competent and affordable legal services.

Consistent with the law of supply and demand, increasing the supply of legal services can be expected to lower prices, drive efficiency, and improve consumer satisfaction. And, in fact, studies suggest that lay specialists who provide representation in bankruptcy and administrative proceedings often perform as well as or even better than attorneys and generate greater consumer satisfaction. The American Law Institute has noted, too, that “experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers.” And the Federal Trade Commission has observed that it is “not aware of any evidence of consumer harm arising from [the provision of legal services by nonlawyers] that would justify foreclosing competition.”

In the United Kingdom, where nonlawyers can win government contracts to provide legal advice and appear before some administrative tribunals, nonlawyers significantly outperform lawyers in terms of results and satisfaction when dealing with low-income clients. Indeed, studies there show that the best predictor of quality appears to be “specialization, not professional status.”

Of course, the potential for abuse cannot be disregarded. Many thoughtful commentators suggest that UPL restrictions are necessary to protect the public from fraudulent or unqualified practitioners. And surely many lay persons, perhaps most especially the most underserved, are not well equipped to judge legal expertise. But do these entirely valid concerns justify the absolute UPL bans found today in so many states? That seems an increasingly hard case to make in light of an increasing amount of evidence suggesting that, at least in specified practice areas, a more nuanced approach might adequately preserve (or even enhance) quality while simultaneously increasing access to competent and affordable legal services.

Capital Investment. All else equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local “superstores.” Yet Rule 5.4 of the ABA’s Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining “any interest” in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can’t secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels, for as Prof. Stephen Gillers has put it, “lay
IN RECENT YEARS, AT LEAST 30 STATES AND FEDERAL DISTRICT COURTS HAVE IMPLEMENTED PILOT PROJECTS TESTING VARIOUS AMENDMENTS TO OUR LONG-IN-THE-TOOTH RULES, ALL WITH AN EYE ON INCREASING THE EFFICIENCY AND FAIRNESS OF CIVIL JUSTICE ADMINISTRATION.

To engage only in the practice of law, (2) prohibited nonlawyers from owning more than a certain percentage (e.g., 25 percent) of a firm, and (3) demanded that nonlawyer owners pass a “fit to own” test. Another approach would have allowed lawyers to engage in partnerships of this sort without the cap on nonlawyer ownership or the fit to own test. And the third and final option would have done away with all three requirements and permitted firms to offer both legal and nonlegal services.

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007. In the first two years of the program, 386 so-called “alternative business structures” (ABSs) were established. Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it’s no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.

Of course, supporters of the current ABA ban contend that allowing nonlawyers to participate in legal practice might influence lawyers’ professional judgment. But it is again worth asking whether these entirely legitimate concerns justify a total ban on the practice. After all, we routinely address similar independence concerns in the model rules without resort to total bans. So, for example, we permit third parties (e.g., insurance companies) to pay for an insured’s legal services but restrict their ability to interfere with the attorney-client relationship. We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals. And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client. Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden. But surely it shouldn’t be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when we stand to gain.

CIVIL PROCEDURE REFORMS

The Federal Rules of Civil Procedure aim to shepherd parties toward “the just, speedy, and inexpensive determination of every action and proceeding.” But as the American College of Trial Lawyers’ survey suggests, it seems the rules sometimes yield more nearly the opposite of their intended result: expensive and painfully slow litigation that is itself a form of injustice. After years of study, the federal rules committees recently advanced a package of amendments (the “Duke Package”) seeking to address the problem. The Duke Package made three important changes. It emphasized proportionality as the governing principle for discovery. It tightened discovery deadlines and so shortened the opportunities for delay. And it sought to reduce costs by increasing certainty about parties’ obligations to preserve electronically stored information.

While these changes are no doubt a start, it’s hard to imagine they’ll finish the job of realizing the promise of Rule 1 in the 21st century. After all, our so-called “modern” rules of civil procedure are now almost 80 years old, written for an age in which discovery involved the exchange of mimeographs, not metadata. Neither do you have to look far to see promising models of change. In recent years, at least 30 states and federal district courts have implemented pilot projects testing various amendments to our long-in-the-tooth rules, all with an eye on increasing the efficiency and fairness of civil justice administration. Not every project has proven a resounding success, but the results suggest at least two other possible avenues for reform, and the federal rules commit-
Early and Firm Trial Dates. A RAND study of the federal judicial system in the 1990s found (perhaps to no litigating surprise) that setting a firm and early trial date is the single “most important” thing a court can do to reduce time to disposition. 

A more recent IAALS study found the same thing: a strong positive correlation between time to resolution and the elapsed time between the filing of a case and the court’s setting of a trial date. Studies of recent experiments in Oregon, Colorado, and other states have shown, as well, that firm and early trial dates contribute to reducing litigation costs and increasing client and lawyer satisfaction. And in light of so much data like this, IAALS, the College, and the National Conference of Chief Justices have all recently endorsed the setting of an early and firm trial date as a best practice in civil litigation. Yet, despite this mounting evidence, and while some federal districts today adhere to the practice of setting a firm and early trial date in every case (e.g., the Eastern District of Virginia), system-wide in our federal courts over 92 percent of motions to continue trial dates are granted and fewer than 45 percent of cases that go to trial do so on the date originally set by the court.

Naturally, the possibility of mandating the practice of setting early and firm trial dates will raise some legitimate concerns. Like the worry that reducing time for trial preparation may not afford complicated cases the time and attention they require. Or the worry that deadlines set early in a case may prove too rigid to account for developments that arise only later. No doubt concerns like these suggest the importance of accounting for a case’s complexity when setting a trial date (perhaps examining empirical data regarding how long certain classes of cases take to prepare would be helpful here, data the federal courts now collect and share with judges routinely). Concerns like these may suggest as well the need to preserve a measure of flexibility to respond to new developments — perhaps by permitting continuances in “extraordinary circumstances.” But just as important is what concerns like these don’t suggest:

reason to ignore the proven empirical benefits of setting an (appropriately) early and (normally quite) firm trial date in every single case.

Mandatory Disclosures. In 1993, the federal rules committees experimented with a rule requiring parties to disclose evidence and documents both helpful and harmful to their respective causes at the outset of discovery. As the committees reasoned, lawyers and parties are rightly expected to fight over the merits but that doesn’t necessarily mean they should be permitted to fight (sometimes seemingly endless) collateral battles over what facts they must share with the other side. Just as a prosecutor must reveal exculpatory Brady material before proceeding to a vigorous fight on the merits, so too civil parties should have to disclose the good and the bad of their evidence before proceeding to litigate its significance.

The proposal met with swift criticism. Some argued that requiring lawyers to produce discovery harmful to their clients asks them to violate their clients’ trust. Others questioned whether a lawyer for one side is well positioned to know what might be helpful to the other. In response to criticisms like these, the rules committees permitted districts to opt out of the initial disclosure requirement, and a number did so, resulting in a patchwork of practices nationwide. And then, responding to complaints about this development, the committees in 2000 narrowed the mandatory-disclosure rule to require only the production of helpful evidence.

That might have seemed the end of it. Except that since 2000 a number of states have returned to the idea of mandating early and broad disclosures. And in that time a good deal of evidence has emerged suggesting these disclosures allow parties to focus more quickly and cheaply on the merits of their litigation. For example, Arizona requires parties to disclose all documents they believe to be “relevant to the subject matter of the action” within 40 days after a responsive pleading is filed. In 2009, an IAALS survey found Arizona litigators preferred state to federal court practice on this score by a 2-to-1 margin. Respondents confirmed that Arizona’s rule “reveal[s] the pertinent facts early in the case” (76 percent), “help[s] narrow the issues early” on (70 percent), and facilitates agreement on the scope and timing of discovery (54 percent). Similarly, respondents disagreed with the notion that the disclosure rule either adds to the cost of litigation (58 percent) or unduly front-loads investment in a case (71 percent). Importantly, too, counsel for plaintiffs and defendants responded in largely the same way on all these issues.

Other states and even a recent experiment in the federal system have reported similar results. A pilot project in Colorado requiring robust early disclosures in business disputes appears to have resulted in cases with fewer discovery motions and costs more proportionate to case type and the amount in controversy. Meanwhile in Utah, broad initial disclosure rules have seemingly led to quicker case dispositions, fewer discovery disputes in most types of cases, and, according to most attorneys, lower costs. Now years removed from the backlash against the 1993 amendments, many federal district courts have begun experimenting with requiring parties in certain employment disputes to provide certain disclosures automatically and early. And a study by the Federal Judicial Center shows that motions practice in these cases has fallen by over 40 percent.

Given all this evidence, it’s hard not to wonder if the real problem with the 1993 experiment was simply that it was ahead of its time. Maybe we just needed to wallow a little longer in collateral discovery disputes and watch them become ever more complicated and exasperating with the exponential growth of electronically stored information before we could appreciate this potential lifeline out. At the least, it would seem churlish to ignore all that’s happened since 1993 and not bother with a pilot project to test in the federal system more broadly what seems to be working so well in so many states and in a discrete set of cases in federal court.

LEGAL EDUCATION

The skyrocketing costs of legal education are no secret. Since the 1980s, private law school tuition in the United States has increased by 155.8 percent and public law school tuition by 428.2 percent (yes,
IS IT TRULY THE CASE THAT THE LEGAL TRAINING OF A MAIN STREET FAMILY LAWYER NEEDS TO FOLLOW THE SAME BASIC TRAJECTORY AS A WALL STREET SECURITIES LAWYER, ESPECIALLY WHEN DEMAND FOR THE FORMER’S SERVICES IS OFTEN ACUTE AND ROUTINELY UNMET?

in real, inflation-adjusted terms). Today, many students pay over $200,000 for a legal education — that on top of an equally swollen sum for an undergraduate degree. And with rising tuition costs come other costs too. Increased debt loads reduce students’ incentives and ability to take on lower-paying public service or “main street” legal jobs. No doubt, as well, some of these increased costs are ultimately borne by consumers, as lawyers pass along as much of their “overhead” expenses (student loans) as they can. Which raises the question: Why is a legal education so expensive?

It’s hard to ignore the possibility that our legal education accreditation requirements are at least partly to blame. Take California’s suggestive experience. In deference to the ABA, most states require anyone sitting for the bar to graduate first from an ABA-accredited law school. But in California it’s possible for graduates of state-accredited or unaccredited law schools to take the bar exam. And the cost differential is notable: average tuition runs $7,230 at unaccredited schools, $19,779 at California-accredited schools, and $44,170 at ABA-accredited schools in the state.

No doubt the increased marketability of an ABA-accredited degree is responsible for some of the difference here. But isn’t it worth asking whether at least some of our often well-intended accreditation requirements are actually worth the costs they impose?

Consider first and perhaps most ambitiously the mandate that most everyone must attend three years of law school after the completion of a college degree. We’ve come a long way from Abraham Lincoln’s insistence that “[i]f you wish to be a lawyer, attach no consequence to the place you are in, or the person you are with; but get books, sit down anywhere, and go to reading for yourself. That will make a lawyer of you quicker than any other way.” For much of our nation’s history, President Lincoln’s advice held true: The only requirement to become a lawyer in most states was to pass the bar exam. Even some of the law’s luminaries as late as the mid-20th century didn’t attend three years of law school, greats like Justices Robert Jackson and Benjamin Cardozo and Harvard Law School Dean Roscoe Pound.

Where did the idea of three years of graduate education come from? It appears most states adopted the requirement at the behest of the ABA. In pushing states to adopt this requirement, the ABA emphasized that legal education must develop in students a mind attuned to the common law — an argument arguably not specific to three years as opposed, say, to two or four. The ABA also invoked the fact the American Medical Association had proposed a four-year standard for physicians and reasoned that, because law, like medicine, is a complex field, legal studies should last for a comparable period — an argument that seems to have stemmed more from professional pride than empirical proof.

Even if these doubtful rationales once seemed sufficient to persuade states to mandate a monolithic three-year graduate course of study, do they really remain persuasive today? Competitive and consumer-friendly markets are usually characterized by a diversity of goods, specialized to fit consumer needs and preferences — and markets with just one good of uniform character are often the product of a producer-friendly monopoly or some similar competitive failure. And while it would be wrong to suggest that all law school educations are identical, it might be worth asking whether three years (with a largely prescribed first year) is necessary for each and every law student. Is it truly the case that the legal training of a Main Street family lawyer needs to follow the same basic trajectory as a Wall Street securities lawyer, especially when demand for the former’s services is often acute and routinely unmet? Recently, the ABA acknowledged the need for greater heterogeneity in legal education. And one starting place might be to permit students to sit for the bar after only two years of study, allowing students and employers alike to determine the value of an optional third year of law school. President Obama, himself a Harvard-trained lawyer, has promoted this concept.

Consider that in the United Kingdom the legal education market is a good deal more heterogeneous than ours. To qualify for practice, a student may either take a three-year undergraduate course or a one-year graduate conversion course. Meanwhile, further graduate educational options are available in a variety of fields (e.g., criminal justice, intellectual property, and human rights) for those seeking specialized skills. But none of this is essential. After the basic academic instruction, a student may decide to become a barrister or solicitor. Depending on his or her choice, the student will then have to undertake additional training, often a one-year specialized educational course followed by a hands-on apprenticeship during which he or she will usually receive only modest compensation. But even the minimum wage presents a substantial swing from expending $50,000 or more on a year of formal legal education in the United States. This diversity of legal education options does not appear to be a threat to the rule of law in the United Kingdom — and it is difficult to see how it might be here.

Beyond that, we might also ask about
the value of some of the more discrete accreditation requirements we impose on law schools today. In our zeal for high educational standards, we have developed a long and dreary bill of particulars every law school must satisfy to win ABA accreditation and it’s often unclear whether these many and various requirements can be justified on the basis of evidence of improved outcomes.81

Here are just a few illustrations. Law schools must employ a full-time library director (dare not a part-timer) with the job security of a faculty position.82 And maybe that’s necessary after all because of some of the many other requirements that the ABA imposes on law school libraries — like the requirement they furnish a device to print microform documents.83 (Does anyone still use those? Or is there just one microfiche printer left, passed between law schools one step ahead of the accreditation committee?) Schools must extend extensive tenure guarantees to faculty,84 and full-time faculty must teach “substantially all” of a student’s first-year courses, even if adjuncts would prove just as good.85 Schools must also generally maintain student-faculty ratios of 30:1 or less (about the same ratio found in many public schools), though adjuncts (full disclosure: like me) count as only one-fifth of a professor for this purpose.86 Meanwhile, if professors have any sort of ongoing relationship with a law firm or business, a presumption arises that they are not full-time.87 And if an American law school wants to offer something other than a traditional JD program, like the sort of diverse degree programs found in English universities, it must receive a special dispensation from the ABA council responsible for legal education.88 Then, too, there are the restrictions on the number of credits a student may take at any given time,89 and the rule that no more than a third of credit hours can be earned for study or activity outside the United States.90 And beyond even that don’t forget that while students usually may receive credit for unpaid internships, they generally may not earn credit for the very same internship if it offers pay and helps reduce their debt load.91

Of course, any revisions to our rules governing law schools would raise complicated cost-quality tradeoffs. Some believe that the current American legal education regime is necessary to permit future lawyers to develop sufficient knowledge of legal doctrine and capacity for legal analysis.92 Justice Antonin Scalia, for example, once argued that “the law-school-in-two-years proposal rests on the premise that law school is — or ought to be — a trade school,” a premise he believed erroneous.93 Others defend the current system by citing familiar consumer-protection concerns.94 And others still point out that the third year offers opportunities to take elective courses in specialty areas of the law.95

Admittedly, these seem good enough arguments to persuade a reasonable mind that at least some lawyers should undertake three years of graduate education. These also may be good enough arguments to justify imposing some significant restrictions on those who opt out of a third year (e.g., requiring on-the-job training for a period of years under the tutelage of a supervisor as in the English system). But it’s far less clear whether these are sufficient grounds for concluding that everyone needs three years of graduate legal training, or legal training shaped by so many and such detailed accreditation requirements. Comendably, a 2014 ABA whitepaper explored some of these questions and concluded that many current accreditation requirements do indeed increase cost without conferring commensurate educational benefits. As a result, the paper encouraged a shift from a regulatory scheme controlling so many detailed aspects of the educational process to a scheme focused more on outcomes and empirical cost-benefit analyses.96 And true to its word, the ABA’s section on legal education has begun relaxing at least some of its more extraordinary accreditation requirements.97 First steps, maybe, but steps in the right direction.

CONCLUSION

Lowering barriers to entry, ensuring judicial resolutions come more quickly and at less cost, and making legal education more affordable share the common aim of increasing the supply and lowering the price of legal services. All of these potential changes, too, are uniquely within our profession’s power to effect. Of course, meaningful change rarely comes easily, let alone when it requires a self-regulating profession to undertake self-sacrifice. But estimates suggest that inefficient policies and our professional regulations result in a roughly $10 billion annual “self-subsidy,” in the form of higher prices lawyers may charge their clients compared to what they could charge in a more competitive marketplace.98 Might not our willingness to confront candidly just how much of that self-subsidy is warranted prove a good test of our commitment to civil justice reform — and whether we as a profession wish to do good or merely do well?

NEIL M. GORSUCH is a judge on the U.S. Court of Appeals for the Tenth Circuit. He serves on the Committee on Practice and Procedure for the U.S. Courts and is the Thomson Visiting Professor at the University of Colorado Law School. He thanks his Legal Exchange colleagues, Justice Ruth Bader Ginsburg, Joe R. Caldwell, Jr., and Catherine M. Recker, for their comments on prior drafts, and Merritt E. McAlister, David J. Feder, Alex J. Harris, Stefan J. O. Hasselblad, Jordan L. Moran, and Allison K. Turville for their editorial assistance.

2 Id.
3 Luz E. Herrera, Educating Main Street Lawyers, 63 J. Legal Educ. 189, 193 (2013) (listing the United States as the fiftieth out of 66 nations in an individual’s ability to obtain legal counsel).
ing in an activity which has traditionally been performed exclusively by persons authorized to practice law.


9 Ky. State Bar Ass’n v. Tanny, 476 S.W.2d 177, 180–81 (Ky. 1972).


12 Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999) (per curiam).


16 See In re Arons, 756 A.2d 867, 873 (Del. 2000).


19 Indeed, the practice is so well recognized that Congress has codified an accountant-client evidentiary privilege. See 26 U.S.C. § 7525(a).


21 37 C.F.R. §§ 11.5–6 (governing patent agent registration and practice).


23 Unauthorized Practice of Law Comm. v. Emp’s Unity, Inc., 716 P.2d 460 (Colo. 1986); Rhode, supra note 10, at 1244.


27 Rhode, supra note 10, at 1255.

28 RHODE, supra note 5, at 89.


31 Id. at 795.


36 Id.


39 Id.

40 Id. at 17–18.

41 Id. at 18.


43 Laura Snyder, Does the U.K. Know Something We Don’t About Alternative Business Structures?, ABA J. (Jan. 1, 2015, 5:51 AM), http://www.abajournal.com/mobile/mag_article/does_the_uk_know_something_we_dont_about_alternative_business_structures.


46 See, e.g., Daniel J. McAluf, Decoding the Core Values of the Profession, ARIZ. ATT’Y, Oct. 2011, at 32, 33.

47 See ABA Model Rules of Professional Conduct, Rule 1.8(f); James W. Jones & Bayless Manning, Getting at the Root of Core Values: A “Radical” Proposal to Extend the Model Rules to Changing Forms of Legal Practice, 84 MINN. L. Rev. 1159, 1196–97 (2000).


50 FED. R. CIV. P. 1.

51 Gotsch, supra note 1, at 745.


55 James S. Kakalik et al., INST. FOR CIVIL


Id. at 510–12 (Scalia, J., dissenting).


Momentum for Change, supra note 57, at 4, 16, 29.


James E. Moliterno, And Now a Crisis in Legal Education, 44 Seton Hall L. Rev. 1069, 1074–76 (2014).

Id.


See Tamanaha, supra note 73, at 25.


Id.


Rhode, supra note 73, at 456.


ABA Standards for Law Schools 2015-2016, supra note 81, at 40.

Id. at 136.

Id. at 29–30.

Id. at 121.

Id. at 119–21.

Id. at 121.
THE LEGALITY OF THE NATIONAL SECURITY AGENCY'S BULK DATA SURVEILLANCE PROGRAMS

John Yoo.................................................................901

THE NEW PRIVATE-REGULATION SKEPTICISM: DUE PROCESS, NON-DELEGATION, AND ANTITRUST CHALLENGES

Alexander Volokh.....................................................731

THE EMPTY PROMISE OF BEHAVIORAL ANTITRUST

Alan Devlin & Michael Jacobs..........................................1009

STRICT LIABILITY OFFENSES, INCARCERATION, AND THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

Paul J. Larkin, Jr..........................................................1065

WHAT'S THE POINT OF ORIGINALISM?

Donald L. Drakeman......................................................1123

NOTES

NEITHER "MINISTERIAL" NOR AN "EXCEPTION": THE MINISTERIAL EXCEPTION IN LIGHT OF HOSANNA-TABOR..................................................1151

DUTY OR DIGNITY? COMPETING APPROACHES TO THE FREE EXERCISE RIGHTS OF FOR-PROFIT CORPORATIONS.....1171
BOARD OF ADVISORS

E. Spencer Abraham, Founder

Steven G. Calabresi
Douglas R. Cox
Jennifer W. Elrod
Charles Fried
Douglas H. Ginsburg
Orrin Hatch
Jonathan R. Macey
Michael W. McConnell
Diarmuid F. O'Scannlain
Jeremy A. Rabkin
Hal S. Scott
David B. Sentelle
Bradley Smith
Jerry E. Smith

THE HARVARD JOURNAL OF LAW & PUBLIC POLICY RECEIVES NO FINANCIAL SUPPORT FROM HARVARD LAW SCHOOL OR HARVARD UNIVERSITY. IT IS FUNDED EXCLUSIVELY BY SUBSCRIPTION REVENUES AND PRIVATE CHARITABLE CONTRIBUTIONS.
LAW'S IRONY

NEIL M. GORSUCH*

Thank you for the kind introduction. It is an honor to be with you and a pleasure to be part of a lecture series dedicated to the memory of Barbara Olson and to some of the causes she held dear—the rule of law, limited government, and human liberty.

Let me begin by asking if you’ve ever suffered through a case that sounds like this one:

[1]n [the] course of time, [this suit has] become so complicated, that no man alive knows what it means.... [A] long procession of [judges] has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality ... [but still it] drags its dreary length before the Court, perennially hopeless.¹

How familiar does that sound? Could it be a line lifted from a speaker at an electronic discovery conference? From a brief in your last case? Or maybe from a recent judicial performance complaint?

Of course, the line comes from Dickens, Bleak House, published 1853. It still resonates today, though, because the law’s promise of deliberation and due process sometimes—ironically—invites the injustices of delay and irresolution. Like any human enterprise, the law’s crooked timber occasionally produces the opposite of its intended effect. We turn to the law earnestly to promote a worthy idea and sometimes wind up with a host of unwelcome side effects and find ourselves ultimately doing more harm than good. In fact, the whole business is something of an irony: we depend on the rule of law to guar-

* Judge, United States Court of Appeals for the Tenth Circuit. What follows is a speech—originally given as the annual Barbara Olson Memorial Lecture—and more than that it does not pretend to be. Just because what follows lacks a footnote after every dependent clause, do not assume anything here is original: nearly everything is borrowed, and from too many sources, some too long ingrained and too dimly remembered, to capture faithfully—but borrowed gratefully all the same. What citations exist here are thanks to the work of my excellent law clerk, Michael Kenneally.

antee freedom but we have to give up freedom to live under the law's rules.2

In a roundabout way, that leads me to the topic I'd like to discuss with you tonight: law's irony. Dickens had a keen eye for it. But even he was only reworking long familiar themes. Hamlet rued "the law's delay."3 Goethe left the practice of law in disgust after witnessing thousands of aging cases waiting vainly for resolution in the courts of his time.4 Demosthenes plied similar complaints 2000 years ago.5 Truth is, I fully expect lawyers and judges to carry on similar conversations about the law's ironies 2000 years from now.

But just because unwelcome ironies may be as endemic to law as they are to life, Dickens would remind us that's hardly reason to let them go unremarked and unaddressed. So it is I would like to begin by discussing a few of the law's ironies that I imagine he would consider worthy of attention in our time.

*

Consider first today's version of the Bleak House irony. Yes, I am referring to civil discovery.

The adoption of the "modern" rules of civil procedure in 1938 marked the start of a self-proclaimed "experiment" with expansive pre-trial discovery—something previously unknown to the federal courts.6 More than seventy years later, we still call them the "new" and the "modern" rules of civil procedure.

2. See CICERO, The Speech of M.T. Cicero in Defence of Aulus Cluentius Avitus § 53, in 2 THE ORATIONS OF MARCUS TULLIUS CICERO 104, 164 (C.D. Yonge trans., 2008) ("[W]e are all servants of the laws, for the very purpose of being able to be free-men."). Timothy Endicott has recently made the point eloquently, and I am indebted to him for the title of this talk. See Timothy Endicott, The Irony of Law, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 327, 327 (John Keown & Robert P. George eds., 2013).

3. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

4. 2 JOHANN WOLFGANG VON GOETHE, THE AUTOBIOGRAPHY OF GOETHE 119 (John Oxenford trans., Boston, S.E. Cassino 1882) ("Twenty thousand cases had been heaped up: sixty could be settled every year, and double that number was brought forward.").


Now, that's a pretty odd thing, when you think about it. Maybe the only thing that really sounds new or modern after seventy years is Keith Richards of the Rolling Stones. Some might say he looks like he's done some experimenting too.

In any event, our 1938 forefathers expressly rested their "modern" discovery "experiment" on the assumption that with ready access to an opponent's information parties to civil disputes would achieve fairer and cheaper merits-based resolutions.7

Now, how is that working out for you?

Does modern discovery practice really lead to fairer and more efficient resolutions based on the merits? I don't doubt it does in many cases. Probably even most. But should we be concerned when eighty percent of the American College of Trial Lawyers say that discovery costs and delays keep injured parties from bringing valid claims to court?8 Or concerned when seventy percent also say attorneys use discovery costs as a threat to force settlements that aren't based on the merits?9 Have we maybe gone so far down the road of civil discovery that—ironically enough—we've begun undermining the purposes that animated our journey in the first place?

What we have today isn't your father's discovery. Producing discovery anymore doesn't mean rolling a stack of bankers' boxes across the street. We live in an age when every bit and byte of information is stored seemingly forever and is always retrievable—if sometimes only at a steep price. Today, the world sends fifty trillion emails a year.10 An average employee sends or receives over one hundred every day.11 That doesn't begin to account for the billions of instant messages shooting

---

9. Id. at A-4.
around the globe.\textsuperscript{12} This isn’t a world the writers of the discovery rules could have imagined in 1938—no matter how “modern” they were.\textsuperscript{13}

No surprise, then, that many people now simply opt out of the civil justice system. Private alternative dispute resolution (ADR) abounds. Even the federal government has begun avoiding its own courts. Recently, for example, it opted to employ ADR to handle claims arising from the BP oil spill.\textsuperscript{14} These may be understandable developments given the costs and delays inherent in modern civil practice. But they raise questions, too, about the transparency and independence of decisionmaking, the lack of development of precedent, and the future role of courts in our civic life. For a society aspiring to live under the rule of law, does this represent an advance or perhaps something else?

We might even ask what part the rise of discovery has played in the demise of the trial.\textsuperscript{15} Surely other factors are at play here, given the disappearance of criminal trials as well. But we’ve now trained generations of attorneys as discovery artists rather than trial lawyers. They are skilled in the game of imposing and evading costs and delays, they are poets of the

\begin{itemize}
\item \textsuperscript{12} CTIA-The \textsc{Wireless} \textsc{Assoc.}, \textsc{CTIA}'s \textsc{Wireless} \textsc{Industry} \textsc{Indices}: \textsc{Semi-Annual} \textsc{Data} \textsc{Survey} \textsc{Results}, \textsc{A} \textsc{Comprehensive} \textsc{Report} \textsc{from} \textsc{CTIA} \textsc{Analyzing} \textsc{the} \textsc{U.S.} \textsc{Wireless} \textsc{Industry}, \textsc{Year-End} 2012 \textsc{Results} (2013), http://www.ctia.org/resource-library/facts-and-infographics/archive/us-text-messages-sms, [http://perma.cc/5V6F-GRNM].
\item \textsuperscript{13} To be fair to the drafters of the 1938 rules, they’re not entirely responsible for the current state of affairs. While providing new and more liberal access to depositions, the 1938 rules didn’t make document discovery a matter of right. In fact, at that time, and for a good while after, documents could be discovered only by agreement among the parties or on a showing of good cause before the district court. \textsc{SB Charles Alan Wright, Arthur R. Miller} \& \textsc{Richard L. Marcus}, \textsc{Federal Practice and Procedure § 2205} (3d ed. 2010). The federal rules took the question of document discovery away from the district courts and codified its expansive view of document discovery only in 1970. \textit{See id.}; \textsc{Fed. R. Civ. P. 34 Advisory Committee’s Note} (1970). About the same time photocopies became relatively inexpensive. \textit{See David Owen, Copies in Seconds} 9–10 (2004). One can’t help but wonder if the timing was merely coincidental.
\item \textsuperscript{15} \textit{See, e.g.}, Marc Galanter, \textit{The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts}, \textsc{1 J. Empirical Legal Stud.} 459, 459 (2004) ("The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline.").
\end{itemize}
nasty gram, able to write interrogatories in iambic pentameter. Yet terrified of trial.

The founders thought trials were a bulwark of the rule of law. As Hamilton saw it, the only room for debate was over whether jury trials were (in his words) "a valuable safeguard to liberty" or "the very palladium of free government."16 But is that still common ground today? No doubt, our modern discovery experiment is well-intentioned. Yet one of its effects has been to contribute to the death of an institution once thought essential to the rule of law.

* What about our criminal justice system, you might ask? It surely bears its share of ironies too. Consider just this one.

Without question, the discipline of writing the law down, codifying it, advances the rule of law's interest in fair notice. But today we have about 5000 federal criminal statutes on the books,17 most added in the last few decades.18 And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years.19 Neither does that begin to count the thousands of additional regulatory crimes buried in the federal register. There are so many crimes cowled in the numbing fine print of those pages that scholars actually debate their number.20

When he led the Senate Judiciary Committee, Joe Biden worried that we have assumed a tendency to "federalize everything that walks, talks, and moves."21 Maybe we should say hoots, too, because it's now a federal crime to misuse the likeness of Woodsy the Owl or his immortal words, "Give a Hoot, Don't Pollute."22 Businessmen who import lobster tails in plas-

19. See Baker, supra note 17, at 1.
20. See id. at 2, 4.
tic bags rather than cardboard boxes can be brought up on charges. Mattress sellers who remove that little tag: yes, they're probably federal criminals too. Whether because of public choice problems or otherwise, there appears to be a ratchet clicking away relentlessly, always in the direction of more—never fewer—federal criminal laws.

Some reply that the growing number of federal crimes isn't out of proportion to our growing population. Others suggest the recent proliferation of federal criminal laws might be mitigated by allowing the mistake of law defense to be more widely asserted. Others still suggest prosecutorial discretion can help with the problem.

But however that may be, isn't there still a troubling irony lurking here? Without written laws, we lack fair notice of the rules we must obey. But with too many written laws, don't we invite a new kind of fair notice problem? And what happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?

The sort of excesses of executive authority invited by too few written laws helped lead to the rebellion against King John and the sealing of the Magna Carta—one of the great advances in the rule of law. But history bears warnings that too much and too much inaccessible law can lead to executive excess as well. Caligula sought to protect his authority by publishing the law in a hand so small and posted so high no one could be sure what was and wasn't forbidden. (No doubt, all the better to keep everyone on their toes. Sorry . . . .) In Federalist 62, Madison warned that when laws become just a paper blizzard citizens are left unable to know what the law is and cannot con-

23. See United States v. McNab, 331 F.3d 1228, 1232 (11th Cir. 2003); see also Alex Kozinski & Misha Tseytlin, You're (Probably) a Federal Criminal, in IN THE NAME OF JUSTICE 43, 48 (Timothy Lynch ed., 2009).
form their conduct to it. It is an irony of the law that either too much or too little can impair liberty. Our aim here has to be for a golden mean. And it may be worth asking how far we might have strayed from it.

* 

Beyond the law itself, there are the ironies emanating from our law schools. A target rich environment, you say? Well, let’s be kind and consider but one example.

In our zeal for high standards, we have developed a dreary bill of particulars every law school must satisfy to win ABA accreditation. Law schools must employ a full time librarian (dare not a part timer). Their libraries must include microform printing equipment. They must provide extensive tenure guarantees. They invite trouble if their student-faculty ratio reaches about the same ratio found in many public schools. Keep in mind, too, under ABA standards adjunct professors with practice experience (like me) count as only one-fifth of an instructor (maybe they’re onto something here after all).

Might it be worth pausing to ask whether commands like these contribute enough to learning to justify the barriers to entry—and the limits on access to justice—they impose? A legal education can cost students $200,000 today. That’s on top of an equally swollen sum for an undergraduate degree—yet another ABA requirement. In England, students are allowed to earn a law degree in three years as undergraduates or in one year of study after college, all of which must be followed by

28. THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) ("It will be of little avail to the people, that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.").


30. See id. at 48.

31. See id. at 34–35.

32. See id. at 33.

33. See id. at 32.

34. See id. at 38.
extensive on-the-job training.\textsuperscript{35} None of this is thought a threat to the rule of law there. One might wonder whether the sort of expensive and extensive homogeneity we demand is essential to the rule of law here.\textsuperscript{36}

* 

So far, we’ve briefly visited ironies where the law aims at one virtue and risks a corresponding vice. But it seems to me that maybe the law’s most remarkable irony today comes from the opposite direction—a vice that hints at virtues in the rule of law.

These days our culture buzzes with cynicism about the law. So many see law as the work of robed hacks and shiny suited shills. Judges who rule by personal policy preferences. Lawyers who seek to razzle dazzle them. On this view, the only rule of law is the will to power. Maybe in a dark moment you’ve fallen prey to doubts along these lines.

But I wonder whether the law’s greatest irony might just be the hope obscured by the cynic’s shadow. I wonder whether cynicism about the law flourishes so freely only because—for all its blemishes—the rule of law in our society is so successful that sometimes it’s hard to see.

I wonder if we’re like David Foster Wallace’s fish: surrounded by water, yet somehow unable to appreciate its existence.\textsuperscript{37} Or like Chesterton’s man on the street who is asked out of the blue why he prefers civilization to barbarism and has a hard time stammering out a reply because the “very multiplicity of proof which [should] make reply overwhelming makes [it] impossible.”\textsuperscript{38}

Now the cynicism surrounding law is easy enough to see. When Supreme Court Justices try to defend law as a professional discipline, when they explain their jobs as interpreting


\textsuperscript{36} As the American Bar Association has recently started to do, at least to some degree. See \textit{Task Force on the Future of Legal Education}, AM. BAR ASS’N, DRAFT REPORT AND RECOMMENDATIONS 22–23 (2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf, [http://perma.cc/HE9X-S574].

\textsuperscript{37} See DAVID FOSTER WALLACE, THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION, ABOUT LIVING A COMPASSIONATE LIFE 3–8 (2009).

\textsuperscript{38} GILBERT K. CHESTERTON, ORTHODOXY 152–53 (1908).
legal texts, when they echo the traditional *Federalist* 78 conception of judging, they are mocked, often viciously. Leading media voices call them “deceiving.” Warn that behind their “benign beige facade[s]” lurk “crimson partisan[s].” Even law professors venture to the microphones to express “complete[ly] disgust[ing]” and accuse them of “perjur[y]” and “intellectual vacuity.” Actual quotes all.

If this bleak picture I’ve sketched were an accurate one, if I believed judges and lawyers regularly acted as shills and hacks, I’d hang up the robe and hand in my license. But even accounting for my native optimism, I just don’t think that’s what a life in the law is about. At heart, I doubt you do either.

As a working lawyer, I saw time and again that creativity, intelligence, and hard work applied to a legal problem could make a profound difference in a client’s life. I saw judges and juries that, while human and imperfect, strove to hear earnestly and decide impartially. I never felt my arguments to courts were political ones, but ones based on rules of procedure and evidence, precedent, and standard interpretive techniques. The prosaic but vital stuff of a life in the law.

As a judge now, I see colleagues striving every day to enforce the Constitution, the statutes passed by Congress, the precedents that bind us, the contracts adopted by the parties. Sometimes with quiet misgivings about the wisdom of the regulation at issue. Sometimes with concern about their complicity in enforcing a doubtful statute. But enforcing the law all the same, believers that ours is an essentially just legal order.

This is not to suggest that we lawyers and judges bear no blame for our age’s cynicism about the law. Take our self-adopted model rules of professional conduct. They explain that the duty of diligence we lawyers owe our clients doesn’t “require the use of offensive tactics or preclude . . . treating [people] with courtesy and respect.” Now, how’s that for a profession-
al promise? A sort of ethical commandment that, as a lawyer, you should do unto others before they can do unto you. No doubt we have reason to look hard in the mirror when our profession's reflected image in popular culture is no longer Atticus Finch but Saul Goodman.

Of course, too, we make our share of mistakes. As my daughters remind me, donning a robe doesn't make me any smarter. But the robe does mean something—and not just that I can hide coffee stains on my shirt. It serves as a reminder of what's expected of us—what Burke called the "cold neutrality of an impartial judge." It serves, too, as a reminder of the relatively modest station we're meant to occupy in a democratic society. In other places, judges wear scarlet and ermine. Here, we're told to buy our own plain black robes—and I can attest the standard choir outfit at the local uniform supply store is a good deal. Ours is a judiciary of honest black polyester.

In defending law as a coherent discipline, I don't mean to suggest that every hard legal question has a single right answer. That some Platonic form or Absolute Truth exists for every knotty statute or roiled regulation—if only you possess the superhuman power to discern it. I don't know about you, but I haven't met many judges who resemble Hercules. Well, maybe my old boss Byron White. But how many of us will lead the NFL in rushing? When a lawyer claims Absolute Metaphysical Certainty about the meaning of some chain of ungrammatical prepositional phrases tacked onto the end of a run-on sentence buried in some sprawling statutory subsection, I start worrying. For questions like these, my gospel is skepticism—though I try not to make a dogma out of it.

But to admit that disagreements do and will always exist over hard and fine questions of law doesn't mean those disagreements are the products of personal will or politics rather


44. EDWARD J. RIELLY, Byron Raymond White (Whizzer) (1917-2002), in FOOTBALL: AN ENCYCLOPEDIA OF POPULAR CULTURE 389, 390 (2009) (Byron White was the NFL's rushing leader twice—as a Pittsburgh Pirate in 1938 and then as a Detroit Lion in 1940—though his football career was interrupted by Rhodes Scholarship studies at Oxford and cut short for Navy service during World War II).

than the products of diligent and honest efforts by all involved to make sense of the legal materials at hand.

The first case I wrote for the Tenth Circuit to reach the Supreme Court involved a close question of statutory interpretation, and the Court split 5-4. Justice Breyer wrote to affirm. He was joined by Justices Thomas, Ginsburg, Alito, and Sotomayor. Chief Justice Roberts dissented, with Justices Stevens, Scalia, and Kennedy. Now that's a lineup the public doesn't often hear about, but it's the sort of thing that happens—quietly—day in and day out throughout our country.

As you know but the legal cynic overlooks, the vast majority of disputes coming to our courts are ones in which all judges do agree on the outcome. The intense focus on the few cases where we disagree suffers from a serious selection effect problem. Over ninety percent of the decisions issued by my court are unanimous; that's pretty typical of the federal appellate courts. Forty percent of the Supreme Court's cases are unanimous too, even though that court faces the toughest assignments and nine, not just three, judges have to vote in every dispute. In fact, the Supreme Court's rate of dissent has been largely stable for the last seventy years—this despite the fact that back in 1945, eight of nine justices had been appointed by a single President and today's sitting justices were appointed by five different Presidents.

Even in those few cases where we do disagree, the cynic also fails to appreciate the nature of our disagreements. We lawyers and judges may dispute which tools of legal analysis are most appropriate in ascertaining a statute's meaning. We may disagree over the order of priority we should assign to these competing tools and their consonance with the Constitution. We may even disagree over the results our agreed tools yield in a particular case. These disagreements sometimes break along

familiar lines, but sometimes not. Consider, for example, the
debate between Justices Scalia and Ginsburg, on the one hand,
and Justices Thomas and Breyer, on the other hand, over the
role the rule of lenity should play in criminal cases,\textsuperscript{50} or similar
disagreements between Justices Scalia and Thomas about the
degree of deference due precedent.\textsuperscript{51} Debates like these are
hugely consequential. But they are disputes of legal judgment,
ot disputes about politics or personal will.

In the hardest cases, as well, many constraints narrow the
realm of admissible dispute: closed factual records; an adversarial
process where the parties usually determine the issues for the
court’s decision; standards of review that command deference to
finders of fact; the rules requiring appellate judges to operate on
colleigate panels where we listen to and learn from one another;
the discipline of writing reason-giving opinions; and the possi-
bility of further review. To be sure, these constraints sometimes
point in different directions. But that shouldn’t obscure how
they serve to limit the latitude available to all judges, even the
cynic’s imagined judge who would like nothing more than to
impose his policy preferences on everyone else. And on top of
all that, what today appears a hard case tomorrow becomes an
easy one—an accretion to precedent and a new constraint on the
range of legally available options in future cases.

ous on its face.”), and Muscarello, 524 U.S. at 138 (Breyer, J.) (“The simple existence of some statutory ambiguity... is not sufficient to warrant application of [the] rule [of lenity], for most statutes are ambiguous to some degree.”).

\textsuperscript{51.} Compare, e.g., McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (“Despite my misgivings about Substantive Due Process as an origin-
al matter, I have acquiesced in the Court’s incorporation of certain guarantees in
the Bill of Rights ‘because it is both long established and narrowly limited.’” (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))), with id. at
3062-63 (Thomas, J., concurring in part and concurring in the judgment) (“I acknowledge the volume of precedents that have been built upon the substantive
due process framework, and I further acknowledge the importance of \textit{stare decisis} to
the stability of our Nation’s legal system. But \textit{stare decisis} is only an ‘adjunct’ of our
duty as judges to decide by our best lights what the Constitution means.” (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J.,
concurring in judgment in part and dissenting in part))).
Now maybe I exaggerate the cynicism that seems to pervade today. Or maybe the cynicism I see is real but endemic to every place and time—and it seems something fresh only because this is our place and time. After all, lawyers and judges have never been much loved. Shakespeare wrote the history of King Henry VI in three parts. In all those three plays there is only a single joke. Jack Cade and his followers come to London intent on rebellion, and offer as their first rallying cry—"let's kill all the lawyers." As, in fact, they pretty much did.

But maybe, just maybe, cynicism about the rule of law—whatever the place and time—is its greatest irony. Maybe the cynicism is so apparent in our society only because the rule of law here—for all its problems—is so successful. After all, who can make so much fun of the law without being very sure the law makes it safe to do so? Don't our friends, neighbors, and we ourselves expect and demand—not just hope for—justice based on the rule of law?

Our country today shoulders an enormous burden as the most powerful nation on Earth and the most obvious example of a people struggling to govern itself under the rule of law. Our mistakes and missteps are heralded by those who do not wish us well, and noticed even by those who do. Neither should we try to shuffle our problems under the rug: we have too many to ignore. The fact is, the law can be a messy, human business, a disappointment to those seeking Truth in some Absolute sense and expecting more of the Divine or Heroic from those of us wearing the robes. And it is easy enough to spot examples where the law's ironies are truly bitter.

But it seems to me we shouldn't dwell so much on the bitter that we never savor the sweet. It is, after all, the law that permits us to resolve our disputes without resort to violence, to organize our affairs with some measure of confidence. It is through the careful application of the law's existing premises that we are able to generate new solutions to changing social

52. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2 (emphasis added).
coordination problems as they emerge. And, when done well, the law permits us to achieve all of this in a deliberative and transparent way.

Here, then, is the irony I'd like to leave you with. If sometimes the cynic in all of us fails to see our Nation's successes when it comes to the rule of law maybe it's because we are like David Foster Wallace's fish that's oblivious to the life-giving water in which it swims. Maybe we overlook our Nation's success in living under the rule of law only because, for all our faults, that success is so obvious it's sometimes hard to see.
Thank you for the great privilege of allowing me to share this special day with you. I am delighted and honored to be with you.

The talent and accomplishment in this room are extraordinary. Through years of hard work, sacrifice and dedication, through highs and lows, through the times when you wondered if you would reach this day, you have finally made it.... But enough about the parents - I need to turn my attention to the graduates.

Class of 2012, congratulations! From 3,000 applicants you 180 were chosen. And over the last 3 years you have made the most of that opportunity. You’ve logged thousands of hours providing legal assistance to the poor and needy. You’ve won moot courts and managed law journals. You’ve studied venture capital and Islamic law, intellectual property and American Indian law. You’ve even started new law school traditions — from the Glamorous Law School Musical to flash mobs dancing in the hall. I’ve had the good fortune

* Judge, U.S. Court of Appeals, Tenth Circuit; Adjunct Professor, University of Colorado Law School. Just because what follows lacks copious footnotes, do not assume anything here is original; everything is borrowed, and from too many sources to try to recite, but borrowed very gratefully all the same.
of getting to know many of you and you are a remarkable group. Your family, friends and the faculty are all rightly very proud of you today.

*

Now, a graduation speech is a tricky business. On the one hand, I’m painfully aware I’m the only thing standing between you, your diploma, and a good party. So I know my job is to keep it quick.

At the same time, there’s more meaning to this moment than any speaker can hope to convey, and it’s tough to say anything that doesn’t sound cliched.

But as I was preparing for today, something struck me. Over the last three years, CU and the remarkable faculty here have helped you become highly skilled in the law, in professional conduct and ethics, in how to treat your clients with dignity and respect while helping them solve their problems. All while maintaining fidelity to your own internal moral compass. These are things you know well. And they are the traditional ingredients for a productive, meaningful, and rich life in the law.
But it also occurred to me that nothing you’ve been taught over the last three years will guarantee you a mansion next to Paris Hilton. Or celebrity status. And yet today many people consider these the real markers of success in the law. Today, some say great attorneys are supposed to be able argue anything, admit nothing, delay everything -- and charge lots of money for it. Atticus Finch and Perry Mason have given way to Denny Crane and Lionel Hutz.

And that’s when I hit on it. How about a talk about the law’s low road? A guide to success Denny Crane style? A peek down the road to perdition? Or, more accurately, a light look at how to become a truly awful modern day celebrity lawyer. Now, that, I thought, is something you haven’t heard about over the last three years.

So here goes.

*

The first rule for the low road to celebrity success is never, ever waste your time on public service or pro bono. You see, everyone I know who has spent some portion of their careers serving others has found new friends and new perspectives on life and the law. They’ve loved and found meaning in their work. And many have become leaders of our community and country — people like Governors Romer, Ritter and Carr,
Senators Allott and Brown, Justices Bender and Coats, Attorney General Suthers, all graduates of this distinguished law school. All have responded to the call, recognizing that to whom much has been given, much will be expected. They have lived lives of service, men and women for others.

Now, of course, we all have to follow our own paths and pursue our own aptitudes and joys. We also have to feed our families and satisfy our lending institutions. But one of the wonderful things about the law is the incredible number of ways it allows us to do all of that while also touching the lives of others. The garden of service isn’t limited to politics or government, but can be tilled richly from anywhere you happen to find yourself in our profession.

But be sure of this. Service to others, however approached, is not the sure road to Lear jets, Mediterranean yachts or Louis Vitton handbags filled with spoiled chihuahuas. The guaranteed road to that destination doesn’t lie in looking out for others but in looking out for number one. So if it’s celebrity riches you’re after, follow instead Lionel Hutz’s maxim: whether you win or lose, make sure someone pays through the nose.

*
The second rule for the low road is to be sure you *never* take risks with your career. Conform, be obsequious, don’t say or write anything that might be controversial, and stay in the same job forever. That way, when everyone else retires or dies off you’ll be left on top and make out like a bandit.

Now, taking risks with your career will make you wildly happy when you succeed and wise when you fail. But it also means you will incur a lot of anxiety along the way. When I was about to start one of my last trials in private practice, I asked a brand new lawyer if she wanted to help. She bravely stuck her head above the parapet and said yes, challenging herself to learn the case from scratch, teaching herself how to examine witnesses before the jury and make arguments to the judge. It turned out great and the client and jury loved her. Her career zoomed ahead, partner in just a couple years. But that was no sure thing. The trial and everything about it just as easily could have come out the other way. (I am still sometimes amazed it didn’t.) And that young lawyer took a big risk — the triple whammy of losing, an unhappy client, and working and worrying so much that she hardly slept for three months.

Yes, people eat sheep. But for the safe and easy path to the top of the mountain, think sheep and follow the herd. And because this is the class of musical productions, remember Gilbert & Sullivan’s advice in HMS Pinafore. They said:
keep your soul fettered to an office stool, stick close to your
desk, and never go to sea. That’s the sure way to become an
admiral in the Queen’s Navy. They might have said about the
same thing about lawyers on the low road.

* 

Sometimes, of course, it’s not enough to avoid public service
and career risks. To be a celebrity, you have to make sure
everyone knows it. Now, the most effective lawyers are great
listeners who care deeply for their clients, take on their
clients’ problems as their own, quietly worry over them and
struggle to solve them within the bounds of the law. But that
sort of graceful legal work won’t land you on a TV show with
Nancy Grace.

For that, you need to take yourself very seriously and become
a first rate self-promoter. You can’t care too much about your
clients or worry about showing them compassion, because
you’re the star. So remember this tip: in your dealings with
other people always, always pretend you’re a federal judge.
Or remember what Vince Lombardi, the great football coach,
told his wife. One cold evening when he climbed into bed
after practice, his wife said, “God, your feet are cold.” The
great coach replied, “Honey, when we’re here alone in bed
you really can call me Vince.” Now, that’s the attitude that
gets noticed.
Better still, remember you’re so important you don’t have to sweat the details, work hard, or get your hands dirty. Justice Byron White, a CU college alumnus, burned the midnight oil into his seventies, typing out draft after draft of his own opinions, reading precedents and revising footnotes, just as he had worked long days in the sugar beet fields as a boy. He knew that what seemed like small stuff to him meant the world to those affected by his work as a lawyer or judge. But his sort of success was the old fashioned high road variety.

If you want to take the low road, try sloth and slapdash instead. Remember Lionel Hutz’s pledge to his clients: “Your case won in 30 minutes or your pizza’s free.” Try ignoring spelling and grammar in your briefs, don’t worry about precedents, and be sure to show up late to court and unprepared for meetings. All this shows everyone around you that you know you’re more important than they are and details don’t matter. And if you’re ever called out on your mistakes, be sure to blame someone else. As Billy Flynn, the lawyer from the Chicago musical, said: just give em the old razzle dazzle.

*

Finally, the most important rule for the low road is to discard your morals. Justice Potter Stewart said that ethics is
knowing the difference between what you have a right to do and what is right to do. When you turned 16 you won the right to drive 2 tons of metal at high speed. With your graduation and admission to the bar, you will win the even more awesome right to direct the great grinding gears of the law. And you will have clients and colleagues who will want you to use that power to do things you know aren’t right, even if they may be legal. You might be asked to shade a discovery response to obscure relevant information. Or to drag out a case for so long that no one alive can remember why it all began. Or you might be asked to pursue a frivolous lawsuit just to punish your client’s enemy.

The greatest members of our profession are those who have stood up not just for what is legal but for what is right. Whether it was in our revolution, the civil war era, or the battle for civil rights. But bravery like that doesn’t guarantee riches, friends or acclaim. Sometimes just the opposite.

So if you’re interested in the low road, don’t take the chance. The low road means avoiding the heroic, doing what it takes to keep your job, and giving in to whatever your boss or client demands. As Denny Crane says, his way of winning clients isn’t through integrity and intelligence but - and I quote - “always, always promising them lots and lots of money.”
Well, that’s my best shot at how to win celebrity superstatus and a villa next to Paris Hilton.

The good news is that I have come to know many of you over the last few years and I just don’t see you taking the low road. Yes, you will suffer setbacks and sometimes fail to meet your own high standards. We all do; no one’s perfect. But I know you are just too talented, too hard working, too good.

In you, I don’t see a room full of law students, but one full of future legislators and governors; prosecutors and defense attorneys; judges and law firm leaders; CEO’s, entrepreneurs, and yes, even law professors. In you, I see so many forces for good in so many different ways. I see all the abiding high road virtues that have long graced this law school’s alumni and made it a proud place.

So let me leave behind the tongue in cheek and offer you just one piece of earnest advice. Frankly, it’s all you need to know – and, truth is, you know it already.
It’s just this: Don’t ever forget why you wanted to become a lawyer in the first place. Was it only to make money and rack up wins, or did you also want to find a way, some way, to make a difference in the lives of your clients, community, and country? I know you came here hoping to make a difference. Remember that. And remember that the law is abundant with many different and rewarding ways to live that kind of life. From the beginning of your career and throughout it, live with the end in mind. So that when the time comes to hang up your gloves you aren’t wandering alone through your mansion wondering what it was all for, but sitting in a warm home surrounded by a family proud of your life’s story.

*

A quarter century ago when I was a law student, I found myself walking one day through the Old Granary Burial Ground. It’s where Paul Revere, John Hancock and many others of the founding generation are buried.

There I came across the tombstone of a lawyer and judge. He wasn’t flashy or notorious. Time has long since overtaken him, as it will us all. He was simply a very fine person and his name was Increase Sumner. Etched into his tombstone over 200 years ago was this description —
As a lawyer, he was faithful and able.
As a judge, patient, impartial and decisive....
In private life he was affectionate and mild.
In public life he was dignified and firm.
Party feuds were allayed by the correctness of his conduct.
Calumny was silenced by the weight of his virtues.
And rancor softened by the amenity of his manners.

Those words have stuck with me over years. They serve for me as a reminder of what is great about the law, of the good and useful life that can be led in its service, of the hard work it takes, of the personal qualities and habits that have to be practiced in trying circumstances, and they serve for me as a source of encouragement when I falter and fail. I leave them here with you tonight as I found them many years ago, as a reminder that might sometimes help you as they have helped me along our shared journey.

Thank you for allowing me to share with you this remarkable moment in your lives. It is a joy and privilege. Welcome to the legal profession. And congratulations!
So there you are minding your own business, attending to dessert, and here I am about to confront you with a talk titled “The Majesty of the Law.” You have to be wondering — that seems awfully heavy going — especially on a full stomach. Does he really have to? Well, let me tell you a short story about how this evening’s topic came to be.

It all began when I was invited back to my old law school to sit on a panel with two luminaries of the Harvard faculty. The panel’s assigned subject was, you guessed it, “The Majesty of the Law.” Pondering whether to take up the invitation, I thought how tough can the assignment be? It will be a walk in the park, a nice excuse to catch up with old professors, a chance to visit Boston in springtime. So I accepted the invitation and off I flew.

But as you trial lawyers know well, things do not always go according to plan. Even a dog of a case can sometimes still bark. And what seems at first like an easy winner can quickly congeal into a hard loss. Something like that happened to me on my way back to Harvard.

As I sat down between my co-panelists, I quickly sensed a rising tension between them — a charged electricity that was distinctly negative. No one said as much, but I had an intuition that the evening wasn’t going to be a happy one.
And soon enough, my fears came true. My co-panelists wrangled, tousled, and fought for almost an hour and a half over legal formalism versus legal realism. It was the academic equivalent of a steel cage wrestling match. All while I was forced to sit quietly between them — a sort of human shield to protect each against the elegant barbs and flying scholarly fire from the other. I confess I more than once looked for the exit signs. When the pair finally exhausted themselves, all eyes turned to me. They apparently expected me to adjudicate their dispute — I felt less like a judge than some sort of referee at WWE smackdown event. So much for an easy and happy trip back to law school.

Now, you ask, why am I sharing this story tonight? The answer is this. There is an important debate going on in our country, but it isn’t the one I saw play out at Harvard. The good professors had a hard time agreeing on why law is majestic, but I am sure they would easily agree that the law is a majestic thing. Yet, that idea — the idea that there’s anything particularly special or noble about law — is under serious and increasing attack in our society. And that’s the real problem it seems to me we should spend our effort taking on.

Now, I admit, the word majesty seems a bit foreign, almost monarchical, to an American ear. And there’s no doubt that in our republic the law’s majesty may not be quite what it is in other countries. After all, when I became a judge, the majesty of the law meant I was told to go buy my own robe. And I was told the best place to get one was the local uniform supply store. And there I quickly
learned that standard choir robes double just fine as judicial regalia. Besides, they’re cheap.

Our version of law’s majesty is a distinctly democratic one. It’s not dressed in ermine or powdered wigs but in honest republican black polyester. But doesn’t that make American law all the more majestic for it?

Still, that’s where it turns out the real action is. While the debate back at law school was over the fine points of what makes the law majestic, the real problem today is that far too many people are skeptical that there is anything majestic about the law.

Ironically enough, the very same day my academic friends were going hammer and tong about formalism versus realism, a major national newspaper carried an op-ed about the law. It decried judges as political hacks, suggesting that they act only on personal preferences, and that they are no more than politicians in robes. On this vision, the law is nothing more than a sort of fancy shell game played by quick witted con artists calling themselves lawyers or judges.

This view is widespread, growing, and the problem is serious in our popular culture. Maybe in a dark moment you might have even had a thought or two along these lines.
Well, they say that before you can confront a problem you first have to know and understand it. And it seems to me that the sort of deep skepticism we face about law today is a little bit like my teenage daughter.

How’s that, you ask? Well, my daughter once believed everything her parents said, she thought we had all the answers. But as these things go, she recently discovered that’s not always true. In response to that realization, she’s now gone to the other extreme, convinced that her mother and I never have any useful answers.

Like my skeptical teenager, the legal skeptic may have once believed that every legal case had a single right answer. Now disappointed by the dawning realization that that’s not so, the legal skeptic ricochets to the other extreme, proclaiming with the zeal of the convert that law is wholly indeterminate, a hack’s shell game.

In veering between the extremes my teenager misses that the truth lies somewhere in the middle. And so does the law’s skeptic. In ricocheting to the extreme, the skeptic passes over the truth lying in the middle. It’s a truth you and I see every day as working lawyers and judges. And it’s a truth we must teach, spread, and share as best we can because a successful future for our entire democratic project — not just a teenage daughter — depends on it.

The truth lying in the middle is, we know, that just because there isn’t always a single right answer to every hard case doesn’t mean the whole thing is
nonsense. Of course, the skeptic has a point that sometimes legal answers aren’t always easy or obvious. But like the teenager, the skeptic exaggerates the problem.

The truth is, the large majority of disputes that come to the courts aren’t hard ones at all. They are cases in which all judges of whatever temperament or background readily agree on the legally determined outcome. And even in the hard cases where we disagree, the legal skeptic fails to appreciate that our disputes are legal, not political, in their logic.

We lawyers and judges may sometimes disagree, say, about which tools of legal analysis are most helpful in the art of ascertaining Congress’s meaning in a complicated statute. We may sometimes disagree over the order of priority we should assign to these competing tools or canons of construction. And sometimes we may even disagree over the results these tools yield in particular cases. But debates like these don’t mean law is indeterminate, or just politics. Instead, they reflect a genuine and abiding concern with how best to do our job of interpreting a text — a distinctly legal, not political, task.

So, for example, when Justices Scalia and Breyer debate whether and to what degree legislative history has a useful role to play in statutory interpretation, they are not seeking to substitute their will for Congress’s. They are not arguing over which policy choice they themselves prefer. In many cases, I suspect, neither of them would have voted for the law Congress passed and they are called
on to interpret. Instead, in every case they are trying to shape the best legal rule for discerning and enforcing not their policy choices but Congress’s. Their dispute is a legal, not a political, one.

In the very hardest cases, as well, many formal and informal constraints still help point the way for us all toward legally acceptable and away from legally unacceptable solutions — the limits of a closed factual record as developed through the adversarial process, the standards of review that command deference to finders of fact, the rules requiring us appellate judges to operate on panels, the discipline of writing reason-giving opinions, and the possibility of appeal and further review. These are but a few of the many constraints on legal decision-making even when existing doctrine may not definitively answer the question at issue.

And on top of all that, what today appears a hard case becomes an easy case in the law as soon as it is decided. Once decided, it becomes a new accretion to precedent, a new limit on the range of legally available options to lawyers and judges in the next case. Think here about *Marbury v. Madison*. If the question of judicial review once posed a hard case in our legal system in 1803, it surely doesn’t anymore. Academics may continue to debate *Marbury*. Other countries may choose to answer the question of judicial review differently. But it is hardly a question open to lawyers and judges in our legal system today.
While not every hard case has a single right answer, the truth lying in the middle is that the law has an integrity to it, a distinctive shape and set of arguments, and its own boundaries and rules. This is the message you and I need to share where and when we can. The din of doubt is growing — the skepticism that law is just politics by another name is seemingly everywhere. But that only makes it more important for all of us to share with our friends, family, and young people the sense of service and privilege we feel in participating in the law’s enterprise.

We have to remind them — and sometimes ourselves — that it is the law that permits members of society to resolve their disputes without resort to violence. That it is the law that provides a stable backdrop against which we are able to organize our affairs. That it is through the careful application of the law’s premises we are able to generate practical solutions to new and changing coordination problems as they emerge. And that, when done well, the law achieves all this in a deliberative, non-discriminatory, and transparent way.

Share with the skeptics and remember, too, the pride and honor you rightly feel to be part of a profession that brings law’s promise to life. When I was a lawyer and my young daughter asked me what lawyers and judges do, the best I could do was explain to her that we help people solve their problems. As simple as it is, I still think that’s about right. Lawyers serve as friends to people with problems. They take on their clients’ problems as their own; they worry over
them; they lose sleep over them; they try to use the tools available in the law to develop plans for solving them; and then they struggle to make those plans real. Surely that is an honorable, maybe even majestic, way to spend a life.

Tell the doubters about and remember your own role models in the law. For me, there’s no better reminder of law’s integrity than the lives of my heroes. Heros who were not hacks but honest and hard working men and women striving to do right by the parties and the legal rules before them. And this one should be pretty easy here in Roswell because I have a hard time imagining a better role model than my colleague, Bobby Baldock.

When it came to describing the personal traits a good judge should have, Socrates identified four things. He said a judge should hear courteously, answer wisely, consider soberly, and decide impartially. Judge Baldock’s life and career model these traits for all of us who follow in the path he has plowed for more than thirty years. His deep humility won’t allow him to admit any of this. But, of course, isn’t that the best evidence of its truth?

Finally, don’t forget why you became a lawyer in the first place, whether it was many or just a few years ago. Did you go to law school just to make money and rack up wins, or to make a difference to the lives of clients and your community? I suspect it was to make a difference. Don’t forget that. Live the life in the law that you planned to live back then. So that when the time comes to
hang up your gloves you can look back with pride and hold your head high before your grandchildren.

A quarter century ago when I was a law student — long before I ever imagined a trip back for a brawl over “The Majesty of the Law” — I found myself one day walking through the Old Granary Burial Ground. It’s a cemetery in downtown Boston where Paul Revere, John Hancock and others of the founding generation are buried. There I came across the tombstone of a lawyer and judge whose name you may not recognize. But this individual reminds me a lot of your Judge Baldock. His name was Increase Sumner. And etched into his tombstone over 200 years ago was this description —

As a lawyer, he was faithful and able.
As a judge, patient, impartial and decisive.
As a chief magistrate, accessible, frank, and independent.
In private life he was affectionate and mild.
In public life he was dignified and firm.
Party feuds were allayed by the correctness of his conduct.
Calumny was silenced by the weight of his virtues.
And rancor softened by the amenity of his manners.

Those words have stuck with me over years. They serve for me as a reminder of what is majestic about the law, of the good and useful life that can be led in its service, of the hard work it takes, of the personal qualities and habits that have to be practiced in trying circumstances, and they serve for me a source of encouragement when I fail and falter. I leave them here with you tonight as I
found them many years ago, as a reminder that might sometimes help you as they
have helped me along our shared — and yes, majestic — professional path.

Thank you.
I want to thank Dean Minnow for allowing me to be with you tonight. It is always a pleasure to return to Cambridge. Especially when winter is in retreat and the crocuses and daffodils are ascendant. Jogging last night down the Charles as the sun set evoked many happy memories — and seeing scullers on the water made me envious knowing my boat is spending its day in the shed.

Tonight reminds me, too, of the happy rhythms of life. It is such a pleasure to see across from me Professor Fried, my federal courts professor of some years ago, when this semester I find myself teaching federal courts. And it’s a pleasure, too, to be sitting next to a friend from clerking days, Adrian Vermeule, and in the audience one of my future clerks.

More to the point of our gathering this evening, I want to thank Professors Mansfield and Vermuele for their vigorous — if very different — defenses of “Law’s Majesty.” In case anyone questions the need for such a defense, look no further (literally) than today’s opinion pages of today’s newspapers. There judges are dismissed (once again)
as political hacks in robes, the process of adjudication treated as no more than the application of political preferences, all of it sort of a stylized kubuki theater, even a sham. No doubt we need the occasional reminder that the law and our courts serve profound functions worthy of respect and a life’s work.

At the same time, Professor Mansfield is also undoubtedly right that in our republican society the law’s majesty may not quite be what it is or has been in other societies.

When Adrian and I were law clerks, the majesty of the law meant the privilege of attending the annual law clerk gathering in my judge’s back yard during hot summer afternoons while we ate bbq and he wore an Elvis t-shirt and sang country songs for us.

When I became a judge, the majesty of the law meant my British wife was surprised when, instead of being measured for an outfit in ermine and a wig, I was told I to go buy my own robe at the local uniform supply store. When the same thing happens to you 20 years from now, remember that the robes are behind the wait staff uniforms, and ask for the standard choir robe. Not one of those with fancy velvet stripes on the sleeves.
Ours is a distinctly republican version of law’s majesty. And doesn’t that makes it all the more majestic?

After a year or three in law school, though, I suspect many of you students in the room are skeptical of any claim suggesting the law’s “majesty,” its greatness, or dignity. In the course of your education — or reading the day’s newspaper — I suspect you’ve heard all too often that when it comes to courts and the law, judges just willy-nilly do as they will and wish.

Now, Professor Mansfield labels this school of thinking with “legal pragmatism,” as do many of its adherents (whether Charles Peirce would welcome or recognize them as pragmatists is another thing). Of course, legal pragmatism comes in many flavors. Too many to be addressed fairly or fully in the course of the fifteen minutes or so I have left. But tonight I would like to offer a brief rejoinder to a couple strains of “legal pragmatism” you’ve no doubt encountered during your law school careers, and along the way offer a reminder why you came to this wonderful laws school and wanted to become a lawyer in the first place.

In one of its more virulent form, “legal pragmatism” argues that American courts (and particularly appellate courts) are a sort of council
of elders, a bunch of old men and women, deciding cases in way they think aimed at producing optimal social outcomes rather than according to rules created by other branches of government or their own prior decisions. A sort of bevy of Benthamite social scientists experimenting on the rest of us, asking, say, whether society would be better off allowing or striking down this or that piece of legislation.

But to the extent that this pragmatic school of thought is defended as normatively good — and no doubt by some it certainly is — it assumes that judges have a comparative institutional advantage over other governmental departments when calculating the costs and benefits of social outcomes, and that judges are legally (constitutionally) authorized to do all that in the first place — two assumptions open to serious question, to say the least.

Looking even deeper still, though, even as a merely descriptive matter the view isn’t even sensible on its own terms. In the hard cases that come before courts, after all, the competing parties both have rationally appealing positions, often aimed at promoting different and incommensurable goods, with attractive but irreconcilable stories about the positive social consequences adopting their preferred position will yield. There are, after all, many competing good ways of living and
many competing good ways to order a legal rule or regime, and precisely because of the multiplicity of good options, good options radically distinct from one another, it is frequently impossible to say whether one or another option is categorically the “single right answer.” Choosing between competing legal rules can sometimes be like asking which is better - the taste of a Colorado steak or the view of Longs Peak at dawn? In a world with so many good but incommensurable options and ways of living, there is no answering that.

*  

Retreating from the ambitious consequentialist claim that wise old judges can reason to solve all our social ills (or can be described as doing so), the legal pragmatist sometimes (not all and always) ricochets to a second and nearly opposite pole. Here the pragmatist proceeds to deny any meaningful reason at work in the law at all. And it is here, we are told, that judges are just political hacks, acting merely on intuition or personal predilection and politics, the what-the-judge-ate-for-breakfast school of thought, if you will.

All this reminds me a bit of my disappointed teenager who, having recently realized her parents aren’t always oracles of received truth, now
assumes that her mother and I don’t have any good answers to offer. Disappointed by the dawning realization that not every hard case has a single right or consequentially optimal answer, the pragmatist with all the zeal of the convert proclaims the law’s indeterminacy.

But this vision of the law is equally misguided. Just because the law may sometimes rationally under-determine hard cases doesn’t mean the law is indeterminate.

Even in hard cases, judges are not rankly unconstrained. Many, a great many, formal and informal constraints hem judges in. The role of precedent, the limits of a closed factual record as developed through the adversarial process, the finite capacity of plain statutory language to admit unbounded ambiguity, the standards of review that command deference to finders of fact or agencies authorized to interpret their organic laws, rules requiring appellate judges to operate on panels, the discipline of writing reason-giving opinions, the possibility of appeal and further review, not to mention the functional limitations placed on judges in our Constitution and codes of ethics — these are but a few of the many and various constraints placed on judicial decision-making even when existing legal doctrine doesn’t definitively answer the question at issue in the hard case.
And besides all that, what today appears a hard case becomes an easy case as soon as it is decided under the rules and constraints of the system. It becomes a new accretion to precedent, itself a new limit on the range of rationally available options to judges in the next case. The pragmatist skeptic often overlooks, too, that the vast bulk of cases decided by courts are not hard cases at all but easy ones — cases in which all judges of whatever temperament or background, agree on the legally determined (not to say consequentially optimized or metaphysically certain) outcome.

And no doubt some of these easy cases themselves once appeared hard, but they aren’t hard cases anymore, having already been decided in accord with the constraining rules and precedents at some prime time. Think here of *Marbury v. Madison*. If the question of judicial review once posed a hard case in our legal system in 1803, it surely doesn’t anymore. No doubt academics continue to debate it. No doubt other legal systems in the world may choose to answer it differently. But it is hardly a question open to judges in our system today.

*

Now, I don’t want to spend all of my very brief time with you tonight simply playing defense, responding to a couple of the more typical
assaults on law’s majesty you’ve no doubt heard plenty of during your
law school careers.

After all, we’re in the thick of March Madness and you also have to be
able to play at least a little offense. Besides, as I’ve said, I’d like to
remind you perhaps why you came to law school in the first place, and
why I did.

The role of courts as I’ve sketched briefly here may seem boring, with
the great many cases readily determined by the law and the role of
deciding hard cases simply to help determine more, to turn them into
easy ones for the future, all through a highly constrained application of
conventional legal materials.

But the law and a life in it is hardly boring. The law is how we solve our
problems short of violence. The law provides a stable backdrop against
we can coordinate our affairs, and through its premises we are able to
generate practical solutions to new and changing coordination problems
as they emerge. When done well, the law achieves these coordination
solutions in a deliberative, non-discriminatory, and reasonably
transparent way. All these features (and more) of the Rule of Law
command our respect and make our participation in its enterprise a
worthy calling.
When my young daughter asks me what lawyers and judges do, I explain to her that we help people solve their problems. Isn’t that an honorable, perhaps even majestic, role to play in society – even when it is done donned in very republican black polyester?

*

Twenty one years ago, when I was a 3L, I found myself one day walking through the Old Granary Burial Ground in Boston. As many of you know, it’s where Paul Revere, John Hancock and others of the Founding Generation are buried. There I came across the tombstone of a lawyer and judge who today is essentially forgotten — as virtually all of us will be. (No doubt precisely as it should be. After all, the world can safely hold only so many great men and women at any one time.) But be this as it may, the man’s name was Increase Sumner. And etched into his (capacious) tombstone over 200 years ago was this description —

As a lawyer, he was faithful and able
As a judge, patient, impartial and decisive
As a chief magistrate, accessible, frank, and independent.

In private life he was affectionate and mild.
In public life he was dignified and firm.
Party feuds were allayed by the correctness of his conduct.
Calumny was silenced by the weight of his virtues.
And rancor softened by the amenity of his manners.

Those words have stuck with me over years. They serve, at least for me, as a reminder of the true majesty of the law, of the good and useful life that can be led in its service, a reminder too of the hard work it takes to make that happen, and encouragement when I fail and falter. A sort of prophylactic medicine and salve for the abundant skepticism that surrounds. Tonight I bequeath them on to the students here in the hope they might provide some refuge and relief for you, as they have for me.

Thank you for the honor of allowing to be here with you this special evening.
Have you had a recent case that sounds like this one? “In the course of time, [this lawsuit] has become so complicated that no man alive knows what it means . . . a long procession of judges [has] come in and gone out, the bills in the suit have been transformed into mere bills of mortality . . . but still it drags its dreary length before the court.”

How familiar does this sound? It doesn’t come from a speaker at the latest electronic discovery conference. Or from the latest briefs in a case I’m working on. And it isn’t lifted from a recent judicial performance complaint.

Instead, it comes from Charles Dickens, his book *Bleak House*, published in 1853. Nearly anything anyone needs to know about complex civil litigation can be found there. But even Dickens was no more than reworking a familiar theme. As long as 2000 years ago Demosthenes and other leading lawyers of ancient Athens routinely complained about the costs and delays associated with the civil justice system — and did so in ways that resonate today. As Arthur R. Miller put it in 1984, “The inefficiency with which the wheels of justice grind is not unique to our time. In ancient China, a peasant who resorted to the courts was considered ruined, no matter what the eventual outcome of the suit. Hamlet rued ‘the law’s delay.’ Goethe quit the legal profession in disgust over cases that had been languishing in the German courts for three hundred years.”¹ The truth is, I fully expect judges and lawyers will be doing the same 2000 years from now. As well they should. Western Civilization’s thirst for a civil justice system that is both fair and efficient isn’t easy to satisfy.

But the difficulty of the cause shouldn’t obscure two things.

The first has to do with the nobility of those who are willing to enter such a perpetually challenging arena. After spending many years toiling as a workaday trial lawyer, it seems to me that anyone who is willing to devote an hour or a week or a month of their lives to the cause of improving our civil justice system deserves a medal.

The individuals we honor tonight have given a whole lot more than that. And when you think about it, it’s a remarkable thing. Remarkable because they’ve not only given up lucrative careers in private practice to serve on the bench. On top of that, they’ve volunteered to help administer and improve the federal rules. Life is altogether too short as it is, and yet they have given a huge percentage of their lives to this cause. For free. All on top of their busy dockets and day jobs. Taking time away from their families and personal interests. Knowing that they can’t possibly make everyone happy and with little prospect for personal glory. Knowing that lawyers and judges will be revising and redoing the rules of civil litigation for millennia to come as they have for millennia in the past. And yet they’ve done it simply because it’s the right thing to do.

Becky Kourlis has already told you a lot about our honorees. Both honorees were directly responsible for the 2010 Duke Conference on civil justice reform, a gathering of many fine minds all laboring to combat the problems of cost and delay. The conference specifically sought to gather empirical data on these issues, materials that were sorely lacking at the time but key to understanding how we might better our system. The conference was incredibly successful in not only bringing together leading reformers and thinkers but in generating a mountain of empirical research that will be mined in the years to come. Beyond the efforts our honorees poured into the conference, there are a couple of much more minor things you might want to know about the honorees with us tonight.

I start with Mark Kravitz. He was not only a key moving force in convening the 2010 Duke Conference. While on civil rules committee he wrestled with Rule 45 so that the simple job of securing the production of nonparty documents doesn’t require lawyers to make trips to exotic locales and before unfamiliar courts across the country. Mark has also helped us judges and lawyers learn our numbers. When I was in practice, the rules spoke of 10 day deadlines. But they really meant 14 days. Except of course in certain situations when they meant 15 days. It was a calendar only a lawyer could love. Now, thanks to Judge Kravitz, lawyers and judges have finally learned to count to ten.

Then there is Lee Rosenthal. She has served for almost 15 years on civil and standing rules committees. She’s given more in blood, sweat, and tears to the cause of civil justice reform than anyone I know. There are so many examples of her legacy I could point to, but here are just a couple very small ones you no doubt appreciate. She helped amend Rule 26 to recognize the chaotic reality of the document production process — and to ensure that the simple accident of turning over a privileged document isn’t always a monumental case-ending and
malpractice-lawsuit-inviting disaster. She also helped amend Rule 23 to provide for increased judicial scrutiny of proposed class action settlements to help ensure we do a better job of guaranteeing that settlements favor class members as much as they do the lawyers. Lee will be very much missed by her colleagues on the rules committee when she steps down this year. We’re just grateful to know she’s handed the baton to such a worthy successor in Mark.

Now, Dickens and Demosthenes may be right that the need for reform will never end, but I am very glad that we are tonight pausing to thank those who have helped get us as far as we have. And to the list of those we must thank I have to add Becky Kourlis and her colleagues at the Institute for the Advancement of the American Legal System. Few have done so much in so little time to such promising effect. Thank each of you for all you do.

And that leads me to my second point.

Becky asked me to speak tonight about some of the work that remains ahead of us. It seems to me that story has to begin with the adoption of the federal civil rules of procedure in 1938. That event marked the start of a self-proclaimed “experiment” with expansive pre-trial discovery — something previously unknown to the federal courts. More than 70 years later, we continue to call our discovery rules the “new” and “modern” rules. And that’s a pretty odd thing, when you think about it. Nearly the only thing that looks new or modern after 70 years may be Keith Richards of the Rolling Stones. And some might say he looks like he’s done a bit of experimenting too.

In any event, our 1938 forefathers expressly rested their “modern” discovery “experiment” on two premises. First, with ready access to their opponent’s information, they posited that the parties to civil disputes would negotiate quicker, cheaper, and more efficient merits-based resolutions. Second, 


(continued...)
they thought discovery could be essentially self-regulating — that it wouldn’t require much judicial oversight or administration — because the process would give attorneys a built in incentive to cooperate.³

How are those two premises working out for you?

Let me turn to the first premise first. Does modern discovery really lead to fairer and more efficient resolutions based on the merits? I don’t doubt it does in many cases, perhaps even most. But the question remains: are enough cases to worry about where modern discovery is more of a problem than a solution? Should we be concerned when 80% of the American College of Trial Lawyers say that the expense and delay associated with pretrial practice prices many injured parties out of court completely?⁴ I recently had dinner with Gerry Spence, who spent much of the evening on this very issue, regaling me with how it’s recently taken him seven years to get a case in which he represents the plaintiff to trial.

And can we be too surprised that so much delay and cost encrusts our system when our discovery rules themselves span 74 pages? That’s single spaced pages. In 9-point type. And that includes not just the rules themselves but layers mention the layers of commentary and qualification accompanying each successive set of amendments. And, of course, even that’s just the beginning. You still have all the reticulations and revisions found in every set of local rules. And then you have individual judges’ discovery orders — with even more reticulations and revisions. As a workaday lawyer I remember many puzzled evenings trying to line all these authorities up to discern the right path, sometimes wondering whether the whole thing was the work of some evil Medieval Glossators.

Who were they and what do they have to do with my dessert, you say? Well, Glossators were legal scholars who sought to make ancient Roman law accessible to medieval society. They started by printing the text of the ancient

---

²(...continued)
Discovery was intended to provide each side with all relevant information about the case to help bring about settlement or, if not, avoid trial by ambush.”

³ Schwarzer, supra note 2, at 178 (“Discovery was designed to be conducted by the lawyers, with little involvement of the judge.”).

Roman Code in the center of page. Around that they would layer their own notes — trying to reconcile inconsistencies they saw in the ancient law and adding their own qualifications. As time progressed, notes would be added around the notes. All in a sort of ever-expanding set of circles. Hence our idea of a “legal gloss.”

Of course, our civil discovery rules aren’t quite there yet. But not only is the complexity and expense of discovery appearing to deter many good suits by plaintiffs. Paradoxically, it seems to be doing just the opposite, too. Forcing, as IAALS has found, defendants sometimes to settle based not on an assessment of the merits — but instead to settle even bad claims at premium prices just to avoid even more crippling discovery costs.⁵

And the problem has become all the more acute our digital age. We live in an age where every bit of information is stored seemingly forever and is always retrievable somehow — though often only at a very high price. We live in a world where there are 36 trillion emails per year. An average employee sends or receives 135 emails per day. Collectively, we shoot around the globe 12 billion Instant Messages per day.⁶ And some estimate it costs $4 to produce every electronic document in discovery. So with a business case involving 500 gigabytes (not a huge amount these days), it can cost $2.5 million to $3.5 million just to supply electronic discovery.⁷

Plainly, this is not a world our forefathers in 1938 could have imagined — no matter how modern they might have been.

If both plaintiffs and defendants are finding the current regime sometimes inhibits rather than ensures an efficient resolution based on the merits, what repercussions does this have for the public? We know we are seeing an increasing number of people simply opting out of the civil justice system. We’ve seen an increasing use of Alternative Dispute Resolution for some time in

⁵ Inst. for the Advancement of the Am. Legal Sys., supra note 4, at 9.


employment and consumer contract cases. Now we’re seeing it move into Class Actions. And even the federal government has started to opt out of its own legal compensation system, using ADR by a private mediator instead of the federal courts to handle claims arising from the BP oil spill and Hurricane Katrina, to name just two recent examples.

While all this may be an understandable response to the comparative expense and delay associated with employing our court system, it raises important questions of its own. Questions about the transparency of the decisions in these matters, the independence of decision makers, the potential use or misuse of bargaining power by one party who wants ADR, and the lack of development of precedent. And, of course, the near death of the civil jury trial, long considered one of our most fundamental democratic institutions. By compiling questionnaires and interviews with thousands of jurors, recent work has demonstrated that participation in jury service and particularly jury deliberations educates our citizenry and promotes civic engagement — even making jurors more likely to vote in elections.

So if the first premise underlying the 1938 experiment — more efficient and fairer resolutions — has become open to some question, let’s see how the second premise is faring. The second premise again is the idea that discovery can be largely self-regulating because parties have interest in working together.

How’s that one working out for you? Of course, in many cases discovery without judicial intervention works just fine. It helps when you have a reasonable opponent, or when you’re operating in a reasonably sized legal community where reputations last. But how realistic is it to expect the lions to lie down with the lambs through a protracted discovery period? All with little supervision from the judge?

_____________________


In virtually every other lawyerly endeavor we expect zeal not happy handholding. Just how far our profession goes in that vein is driven home to me each year when I teach legal ethics at the University of Colorado. Sooner or later, the class comes to confront ABA Model Ethical Rule 1.3. That Rule tells us that being a good lawyer doesn’t “require the use of offensive tactics or preclude treating all persons involved in the legal process with courtesy and respect.”¹¹ So you don’t have to be offensive or rude? At least not all the time? As long as the profession teaches lawyers, young and old, in this school of thought, how much can we really expect from a discovery system that depends on lawyers cooperating rather than contesting? In 2011 alone, and in my court alone, 6 separate opinions have issued affirming the ultimate sanction of dismissal or default judgment for repeated intentional discovery violations.¹² It is a sad record. No one wants to see cases resolved this way. But it does make you wonder about the promise of lawyers directing discovery.

Not only does the assumption that lawyers can run discovery without oversight seem to run against the grain of our adversarial system, in recent years it has been called into question by the rule making process itself. Over the last 20 years amendment after amendment has been added to the civil rules limiting party control.¹³ We now have rules specifying how many depositions a party can take, how many hours a deposition can last, how many interrogatories you get. Thanks to lawyerly fights over that last rule, we’ve even had to go so far as to write a rule specifying how to count interrogatories. Each of the amendments over recent years shares one thing in common — more judicial and less party control.

Some readily admit problems exist with the self-regulation premise but see a ready cure at hand. They say all we need is more active judicial case management.

But the first and most important thing to note about this response is that it seems to be selling us a very different sort of discovery system than the one we were promised back in 1938. And might there have been good reasons why our


predecessors didn’t pursue this approach so many years ago? If we try to keep our extensive discovery process but turn it from a self-directed into a more inquisitorial one led by the judge, will we ever have enough judges to do the work? We didn’t in 1938 when we adopted the discovery rules — but that wasn’t a problem when we expected lawyers to do all the work. Now, though, if we want judges to run the discovery show, where are they going to come from? Individual judges’ caseloads have exploded exponentially since 1938; judicial budgets, never very large, are under increasing pressure; and there’s no reasonable prospect that these facts of life are going to change anytime soon. Yet, even if they did — even if we could wave a wand and guarantee enough judges to the task — we’d still have to ask this: how many quality people could we realistically expect to join a judiciary made up of case managers rather than trial judges? And do we want a this sort of judiciary?

Well at the end of all this, you might say, alright, the two premises undergirding our “modern” discovery system look a little shaky. Like Keith Richards, the rules may not be quite as shiny and new as they once were. But what’s the answer? What can we do other than to grin and bear it?

I doubt my powers to answer a question that is as old as our profession. But these days my 12-year old claims to have all the answers. So I asked her. And if you did the same, she’d tell you, as she told me, this. Consult that great philosopher Douglas Adams, author of the Hitchhikers Guide to the Galaxy. He explained that the answer to the Ultimate Question of Life, The Universe, and Everything is . . . 42.14

I’m not so sure that’s right. But while you take the last bite of your dessert, I will offer three markers or guideposts that might help us all as we struggle forward.

First, it seems to me that in trying to move forward it sometimes helps to look back. We have all grown up under the “modern” rules of discovery. We know no different. But before all that there was our Constitution. And it guarantees a right to trial by jury. Not a right to Deposition by Written Question. Not a right to Requests for Admission. Not a right to 25 Interrogatories, counting each discrete subpart. It seems to me it might be worth asking ourselves whether the results civil courts reached before elaborate discovery were necessarily that

much less reliable, that much less timely, that much more costly than the ones we obtain today.

Second, we might also want to cast our gaze outside our narrow civil justice world. In the criminal justice system something much more valuable is at stake — liberty, not lucre. Yet there we somehow manage to operate without massive pre-trial discovery proceedings. We reach dispositions much more quickly. And the dispositions we reach are widely regarded as among the fairest in the world (if still human and so imperfect).

Third, we might look to the states. Back in 1938, the federal system took its cue on discovery from state courts. The federal government didn’t invent the discovery idea; it stole it from the state laboratories of experiment.\textsuperscript{15} Given the issues we face with our system today, it’s no surprise that the states are busy experimenting again. One experiment worth keeping an eye on is about to take place here in Colorado. Thanks to Ann Frick, Skip Netzorg, Becky Kourlis and many others a new set of rules governing discovery in business cases is about to take effect in January.\textsuperscript{16} Under it, the discovery rules cover just 8 pages, in 12-point type. No glosses there. Neither are the states the only ones experimenting. In the Eastern District of Virginia, the Alexandria courthouse’s inscription reads: “Justice Delayed, Justice Denied.” There, the so-called “rocket docket” has earned a national reputation for speedy and just resolution of cases by setting firm trial dates and codifying a set of local rules that do not allow delay.\textsuperscript{11}

Now, whether any of this is the sort of medicine that will cure our current ailments, I do not profess to know. But I do know this. I am very glad that there are people like our honorees who are unafraid of taking on the admittedly timeless and all-too-often thankless task of improving our civil justice system. I hope you will help their cause and support their efforts. Because the answers to the questions we face may not come quickly or easily, but they matter. They matter for the plaintiffs whose claims aren’t large enough to be viable in our


\textsuperscript{16} Civil Access Pilot Project, Applicable to Business and Medical Negligence Actions in District Court (October 2010), available at http://www.cobar.org/repository/Member%20Benefits/CivilAccessPilotProject.pdf

current system. For the defendants who are forced to make settlement decisions based on cost of collateral disputes. For lawyers who look to find meaning in their work by helping clients reach just resolutions based on the merits rather than other considerations. For a judicial system whose authority depends on public confidence in the integrity and justice of its processes. And most of all, for every litigant who should be able to expect a just, speedy, and inexpensive resolution of his or her case.¹²

¹² See Fed. R. Civ. P. 1 (“These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).
Intention and the Allocation of Risk

Notre Dame Law School

September 2011

Neil M. Gorsuch*

Others have, and will for years to come, write and speak about, learn from and debate John Finnis’s contributions to ethics, philosophy, even Shakespearean scholarship and theology. But as a workaday judge, my daily bread does not consist of such high cuisine. It is instead made up of a comparatively pedestrian—if wholesome and filling—stew of statutes and precedents, regulations and rules. Yet, from time to time Finnis has also been kind enough to dine with those of us who subsist on such doctrinal fare—and here, too, he has applied his remarkable talents in important and enduring ways. He is, after all, not just a philosopher but a fine lawyer and a member of the Bar (Gray’s Inn). And it is on an aspect of his scholarship in the legal arena that I have been asked to comment.

But before I get to that, I seek (and in any event assume) a point of

* Judge, United States Court of Appeals for the Tenth Circuit. Many thanks to Gerry Bradley, Holly Cody, Daniel Furman, Sean Jackowitz, John Keown, Daniel Klerman, Chris Mammen, Jason Murray, Bob Nagel, Eugene Volokh, Phil Weiser, and Steve Yelderman for their helpful comments. Despite such generous assistance, I alone am responsible for any remaining errors and the views expressed here.
personal privilege. This to offer a brief recollection of John Finnis not as philosopher or even as lawyer but in the role I know him best—as teacher. Many years ago, I was lucky enough to study under his supervision. It was a time when legal giants roamed among Oxford’s spires. John Finnis, Ronald Dworkin, and Joseph Raz were all there, busy with their seminal works, their lectures and seminars open to any curious graduate student, their debates the stuff of student coffee house legend. As a graduate student at the same college where Finnis has spent almost a half century, I was fortunate to have him assigned as my dissertation supervisor. And as busy as he was with his research and scholarship, while a leading figure in his field on an international stage, there was never any question about the degree of his devotion to his students. He took on many (and many thankless) tasks in aid of student life, serving variously as the college’s dean of graduates, director of undergraduate studies, and vice-master, even reportedly assuming for a time the position (dreaded by many students) of estates bursar, the keeper of the college finances.¹ Not every great scholar is also such a devoted teacher, taking to heart his role as leader in the daily life of a collegiate community.

Finnis’s concern for his students manifested itself in many other and more personal ways. Like the red ink he poured so carefully—and generously—over

---

the papers we produced. Or the gentle but exacting cross-examinations we
endured while sweating next to (but never raked over) the coal fire in his paneled
college room. To those lucky enough to have experienced all this, we recall well
how the good professor (really, Doctor to many of us, before the Americanism
crept in) patiently and generously read draft after draft we produced, always
encouraging our efforts but also always testing, always questioning, and never
tolerating a weak argument or an implicit or untested premise—let alone the
syntactical sin of a misplaced modifier or split infinitive. I have encountered few
such patient, kind, and truly generous teachers in my life.

And I am hardly alone in this assessment. On his (semi-)retirement from
Oxford in 2010, University College published a number of recollections from
Finnis’s former students. A couple are evocative of my experience and
emblematic of the sort of teacher Finnis was and is. Nicola Lacey, now a fellow
at All Souls, recalled the time she began as one of Finnis’s students. Finnis asked
her what law courses she intended to study. She replied that she would surely
take the popular courses on Jurisprudence and Criminal Justice but that just as
surely she intended to avoid the dry stuff of Restitution. Finnis looked at her
with intense seriousness and thought for a moment. Then, perhaps peeking out
over his glasses—as he does when he wishes to emphasize a really important
point—he replied, ‘But, Mrs. Lacey, Restitution is good for the soul.’ Needless
to say, she took Restitution. Philip Gawith, who later went on to serve as CEO of

-3-
the Maitland communications agency, recalled a time when his tutorial partner triumphantly concluded that a certain argument was ‘circular.’ To which Finnis responded—accompanied, we might imagine, by his characteristically gentle sigh—‘and what is a circle but a collection of points equidistant from the center.’ As Gawith observed, Finnis had certain quiet and dry ways of letting us know that what we considered to be a good argument wasn’t quite so good. I am just happy to know that, while Finnis may now have largely retired from Oxford, students at a university in my own country (Notre Dame) will continue to have the chance to get to know him not just as a philosopher whose works they encounter in print but as a kind and careful teacher to be enjoyed in person.

And with that point of personal privilege exercised, let me turn to comment on an aspect of Finnis’s legal scholarship. Space constraints will allow me to share just one example. But it will, I think, easily suffice to illustrate his enduring importance to the law.

In crime and tort, legal liability has often and long depended on a showing that the defendant intended to do a legal wrong. When it comes to inchoate offenses such as attempt and conspiracy, the presence of an unlawful intent is

---

2 *Ibid.* For these and other recollections, I am indebted to Dr. Robin Darwall-Smith, the University College archivist who directed the college’s published tribute to Finnis, for allowing me to retell here some of the stories he took the time and effort to compile and record.
frequently what separates criminality itself from legally innocuous behavior.³

The same holds true when it comes to accessory liability.⁴ The law of homicide, as well, ‘often distinguishes either in setting the “degree” of the crime or in imposing punishment’ between intended and unintended killings.⁵ And many of our most serious torts (say, battery and assault) are denominated intentional torts.

Of course, what qualifies as ‘intentional’ and thus sufficient to render the defendant liable in the civil context is broader than in the criminal context—embracing knowing as well as truly purposeful wrongs in American law. And perhaps this is so for good reason, given that in tort only money, not individual liberty, is at stake.⁶ But it remains a fact that the nature of liability (punitive damages, for example) is generally more expansive and serious for what

---

³ See, e.g. *Braxton v US*, 500 US 344, 351 n. * (1991); *US v Bailey*, 444 US 394, 404–5 (1980); *Direct Sales Co. v US*, 319 US 703, 711 (1943); Model Penal Code §2.02, Comment 2, §5.01, Comment 2; LaFave, *Substantive Criminal Law* §5.2(b) & n. 9, §11.3; Bishop, *New Commentaries on the Criminal Law Upon a New System of Legal Exposition* §729.4. To be sure, the drafters of the Model Penal Code have suggested extending attempt liability to those who believe their conduct would cause (not intend to cause) an unlawful result. Model Penal Code §5.01(1)(b). As the Code’s commentators admit, however, they have advocated an exception to the common law’s usual requirement of intent and their proposal has not been adopted in most American jurisdictions. Model Penal Code §5.01 comment 2; LaFave, *Substantive Criminal Law* §11.3(a) n. 28.

⁴ See, e.g. Model Penal Code §2.02, Comment 2, §2.06, Comment 6(c); *US v Peoni*, 100 F 2d 401, 402–3 (2d Cir. 1938) (Hand, J.).

⁵ *Bailey*, 444 US at 405.

⁶ *Restatement (Second) of Torts* (1965), §8A.
tort law deems an *intentional* wrong than for wrongs involving only lesser *mens rea*.\(^7\)

In comparatively recent years some have argued for tearing down this traditional legal edifice. These theorists have suggested that the presence or absence of an intent to perform a legal wrong should be neither here nor there when it comes to assigning legal liability; that the common law’s traditional reference to intention should be scrapped or revised; that a better way forward exists. In the space I have, let me outline just two of the challenges to our received tradition and then highlight some of the defects associated with those efforts that Finnis’s scholarship has helped illuminate.

The bolder of the two challenges is perhaps most emblematically identified with the prolific Judge Richard Posner. In Judge Posner’s view, legal liability in tort should turn on a comparison of social costs and benefits. Whether a legal wrong is done intentionally is more or less beside the point. Intentional torts merit stiffer penalties than those done recklessly or negligently only if and to the extent economic efficiency requires that outcome.\(^8\) To explain why this is so, Judge Posner asks us to consider the case of *Bird v Holbrook*\(^9\)—a chestnut that

\(^7\) See, e.g. Keeton et al., *Prosser and Keeton on the Law of Torts* §8.


\(^9\) (1828) 4 Bing 628, 130 ER 911. Judge Posner used the case as the focus of one of his earliest articles on law and economics, and he continues to use it as (continued...)
many of us encountered in law school and that, as it happens, involved an actual bird and, perhaps even better still, a bed of tulips.

So let us begin with the facts of that case. In *Bird*, the defendant owned a walled garden where, as the court put it, he ‘grew valuable flower-roots, and particularly tulips, of the choicest and most expensive description.’ To protect the garden, the defendant-owner set up a hidden spring gun, a shotgun rigged to fire when any trespasser stumbled over a contact wire. The plaintiff, a William Bird, was a young man of nineteen who saw a neighbor’s female servant in distress. She was in distress because a wandering pea-hen apparently belonging to her employer had escaped and ‘alighted in the defendant’s garden.’ So young Will Bird, a well raised young man it would seem, volunteered to collect the bird. He clambered to the top of the defendant’s garden wall and called out two or three times to see if anyone was around. Receiving no reply, he jumped into the garden. Once in the garden he saw that the pea-hen had taken shelter near a

---

9(...continued)

10 4 Bing at 631, 130 ER at 912.


summer house and so he went to collect it.\(^{13}\) Seeking to pluck the bird, not pick the flowers, he was nonetheless rewarded for his troubles with a spray of swan shot from the defendant’s hidden spring gun.\(^{14}\)

When his case for damages eventually made it to court, the English bench found the garden owner liable.\(^{15}\) The court did so on the basis that it is unacceptable (at least without notice, it said) for anyone to maim others \textit{intentionally} simply for picking tulips.\(^{16}\) The \textit{intentional} harming of another’s person is a grave thing and generally impermissible at law, even for the protection of property. Neither, the court pointed out, was the defendant really even seeking to defend his tulips. By leaving a hidden spring gun lying around, the owner demonstrated that he was just as happy to injure someone who had \textit{already} picked his flowers as he was someone \textit{about} to pick them. And no doubt in the owner’s view punishing the completed picker was a useful deterrent, a way to dissuade other future would-be pickers from even trying. But this was a serious wrong because, as counsel for Mr. Bird put it, the sanction of law is required ‘to give effect to punishment, and pain \textit{[intentionally]} inflicted for a supposed offence, at the discretion of an individual, without the intervention of a judicial sentence, is a

\(^{13}\) \textit{Ibid.} at 633, 130 ER at 913.

\(^{14}\) \textit{Ibid.}

\(^{15}\) \textit{Ibid.}

\(^{16}\) \textit{Ibid.} at 640–6, 130 ER at 916–18.
mere act of revenge."  

Now back to Judge Posner. For his part, Judge Posner encourages us to analyze *Bird*, and tort law generally, in a radically different way. In his view, the case can be and is perhaps better understood *not* as involving an intentional wrongdoing but as involving an effort to achieve the optimal social balance between two perfectly ‘legitimate activities, raising tulips and keeping peahens.’

Spring guns, Judge Posner suggests, may well be an efficient, perhaps even the most efficient, way of protecting tulips in a time and place where police protection is not readily available; conversely, spring guns may be inefficient in times and places where other means of protection are more accessible and accidental shootings more likely. The real trick, Judge Posner argues, and what he says judges already may be doing subconsciously, is ‘design[ing] a rule of liability [in tort] that maximize[s] the (joint) value of both activities, net of any protective or other costs (including personal injuries).’

Neither does Judge Posner confine his critique to the realm of civil liability. In criminal law, too, he argues that intent has significance only as a *proxy* for other variables in an

---

17 *Ibid.* at 636; 130 ER at 914.
18 Posner, ‘Killing or Wounding to Protect a Property Interest’, at 209.
economic cost-benefit analysis. So it is that, under his approach, the fact that a defendant may have intended to kill or maim others is itself really ‘neither here nor there.’

To those who might object that liability for intentionally killing or maiming another human being should not turn on a balancing of economic costs and benefits, Judge Posner offers this reply:

It is surely not correct to say that society never permits the sacrifice of human lives on behalf of substantial economic values. Automobile driving is an example of the many deadly activities that cannot be justified as saving more lives than they take. Nor can the motoring example be distinguished from the spring-gun case on the ground that one who sets a spring-gun intends to kill or wound. In both cases, a risk of death is created that could be avoided by substituting other methods of achieving one’s ends (walking instead of driving); in both cases the actor normally hopes the risk will not materialize. One can argue that driving is more valuable and spring guns more dangerous; but intentionality is neither here nor there.

A second, perhaps more modest, challenge to our received legal tradition, though one headed in much the same direction, might be identified with Glanville Williams and his theory of ‘oblique intention.’ While Williams did not insist that intention (however defined at law) is entirely irrelevant to the assignment of legal liability, he argued for collapsing intent with foresight or knowledge and treating the two the same when it comes to determining culpability in the criminal law,


much as American law typically does in tort.\textsuperscript{24}

To make his point, Williams once offered this example—a colorful and complex one in its own right. Suppose a spy is discovered to be ferrying a top secret and highly sensitive device to a hostile state by way of an international flight. Detected in air, the spy fears he will be prevented from completing his mission, so he seizes a hostage and demands that the flight steward prepare a parachute so that he can escape with the device intact. The steward (apparently steeped in national security matters himself) recognizes that the consequences will be dire if the secret device falls into the hands of the enemy, so he discreetly cuts the parachute’s ripcord. In a rush, the spy fails to check the parachute, leaps from the plane, and the device (along with the spy) is destroyed upon hitting ground. Applying his oblique theory of intention, Williams had this to say:

> It seems clear that, as a matter of law, the steward must still be credited with an intention to kill the criminal. He foresees the certainty of the criminal’s death if the events happen as he sees they may, even though he does not desire that death.\textsuperscript{25}

Of course, the steward’s killing might be legally justified on other grounds, say perhaps because of the affirmative defense involving the defense of others. But Williams used his hypothetical to make a different point. He used it to argue that whether the steward intended the spy’s death or merely knew it would happen

\textsuperscript{24} Williams, ‘Oblique Intention’; Williams, \textit{Textbook of Criminal Law} 84–7; Williams, \textit{The Mental Element in Crime} 52–3.

\textsuperscript{25} Williams, \textit{The Mental Element in Crime} 51–3.
should not matter when assessing his legal liability or access to any affirmative
defense. In Williams’s view there is no point in distinguishing between at least
intended and foreseen homicides because all that does is ‘involve the law in fine
distinctions, and make it unduly lenient.’

With Judge Posner’s and Glanville Williams’s views now (albeit very
briefly) sketched, we might begin to ask some analytical and normative questions
about their project, questions that Finnis’s scholarship has suggested and
illuminated. Once scattered across various journals and years, Finnis’s efforts in
this area have been recently and happily married together, and can be found
published as essays 10 and 11 in volume 2, and essay 16 in volume 4 of Oxford
University Press’s recent collection of Finnis’s work.

Let us begin with the analytical. Judge Posner rests his argument in large
measure on the notion that intended harms (however defined) and purely
negligent harms are much the same because both involve the imposition of a risk
of harm on someone else. In particular, the automobile driver and the spring gun
operator, he says, are essentially indistinguishable. Both take actions that create
some risk of harm, even though both hope that harm will not materialize.
Whether any harm is intended is beside the point, neither here nor there, because
the risk of the unhoped-for harm is just an inherent cost associated with

---
26 Williams, ‘Oblique Intention’, at 425.
performing two generally beneficial activities, driving and tulip growing.

But we might well question whether this line of analysis conflates two different things, hoping and intending. After all, as Finnis asks, can’t one ‘intend to achieve a certain result without desiring it to come about’? Can’t one ‘choose and intend to do what is utterly repugnant to one’s dominant feelings’? Consider the spring gun owner. We can all agree with Judge Posner that he may well hope everyone stays away from the trap he sets. But if he thinks that many will be deterred and only a few will come, then does not he really intend to shoot those few? Isn’t the whole point of a spring gun deterrent that the owner intends to injure or kill those who ignore or test it, however repugnant that result may be to the owner’s hopes? In this way, doesn’t the spring gun owner intend to maim or kill even if he may hope not to have to do so? And, having observed this much, can we really say the negligent driver is in the same position as the spring gun owner? After all, the negligent driver neither hopes nor intends to hurt anyone when he takes to the road. He may hurt someone by accident, but killing or maiming is simply not part of his plan or intent—as either a means or as an


27 CEJF II.10, at 174 (emphasis added).

28 Ibid. at 175.

29 CEJF IV.16, at 342.
end. Any injury he might cause would be grounds for serious regret, not the fulfillment of any intention he harbors. In this way, the cases of the spring gun owner and driver come to us in very different postures analytically—not at all indistinguishable as Judge Posner’s analysis would have us posit.

A similar analytical question attends Williams’s effort to equate intent and knowledge or foresight. We might approach that question by asking whether it is really fair to say that Williams’s steward is guilty of an intentional killing. To be sure, the steward knew the spy would die; but did he intend that death? Or might there be, as Finnis suggests, a strong argument that Williams’s steward ‘did not intend to kill the spy, though he foresaw and accepted that his own choice would certainly bring about [the spy’s] death’? Indeed, might it be a fairer view of the facts that the spy’s ‘free-fall and death are side effects of the steward’s plan to destroy the . . . device’ that might do harm to his country? After all, for all we know from Williams’s hypothetical, if the steward could have destroyed the device without killing anyone, he would have gladly done so.

And this leads us to the real analytical question confronting Williams’s project: Is he right that no meaningful distinction exists between intent and foresight that the criminal law might recognize, at least sometimes? In answering

30 Ibid. at 345.

31 CEJF II.10, at 185.

32 Ibid.
this question, it is hard to do better than Finnis once did with this illustration:

Those who wear shoes don’t intend to wear them out [even though they may foresee that as an inevitable consequence]. Those who fly the Atlantic foreseeing certain jetlag [likewise] don’t do so with the intention to get jetlag; those who drink too heavily rarely intend the hangover they know is certain. Those who habitually stutter foresee with certainty that their speech will create annoyance or anxiety, but do not intend those side effects. Indeed, we might well call [Williams’s] extended notion of [oblique] intent the Psuedo-Masochist Theory of Intention—for it holds that those who foresee that their actions will have painful effects on themselves intend those effects.\(^{33}\)

Plainly, a meaningful analytical distinction does exist between intending and foreseeing a consequence. And recognizing exactly this, the Model Penal Code acknowledges that a line can and sometimes should be drawn in American criminal law ‘between a [person] who wills that a particular act or result take place and another who is merely willing that it should take place.’\(^{34}\) So, too, the U.S. Supreme Court, which has emphasized that, at least in the criminal law, the idea that ‘knowledge is sufficient to show intent is emphatically not the modern view.’\(^{35}\) Tellingly, even Williams himself ultimately conceded that in certain areas of law—treason, for example—society should require proof of intention rather than knowledge before imposing liability. Yet, Williams notably failed to explain why this should be so or how it might be reconciled with his claim

\(^{33}\) Ibid. at 183 (emphases added).

\(^{34}\) Model Penal Code §2.02, Comment 2 n. 6 (quoting National Commission on Reform of the Federal Criminal Laws, Working Papers 1: 124).

\(^{35}\) Giles v California, 554 US 353, 368 (2008).
elsewhere that the intent-knowledge distinction lacks force.36 His ambiguity and equivocation seem the product of a largely unexplored (if ultimately correct) intuition that, at least sometimes, intent does matter.

Not only does Finnis help us see that the traditional intent-knowledge distinction in law bears analytical power overlooked by its critics. He also helps expose the undergirding normative reasons for the law’s traditional cognizance of intention. He reminds us, for example, that some of the law’s harshest punishments are often (and have long been) reserved for intentional wrongs precisely because to intend something is to endorse it as a matter of free will—and freely choosing something matters.37 Our intentional choices reflect and shape our character—who we are and who we wish to be—in a way that unintended or accidental consequences cannot. Our intentional choices define us. They last, remain as part of one’s will, one’s orientation toward the world. They differ qualitatively from consequences that happen accidentally, unintentionally: after all, even a dog knows the difference between being tripped over and being kicked.38 Even to the dog, it’s not always just the result that matters so much as, sometimes at least, the intention behind it. Intending to do a legal wrong to another person is something special because, as Finnis puts it,

37 CEJF II.10, at 194.
[t]o intend something is to choose it, either for its own sake or as a means; and to choose is to adopt a proposal (a proposal generated by and in one’s own deliberation). Once adopted, the proposal, together with the reasoning which in one’s deliberation made that proposal intelligently attractive, remains, persists, in one’s will, one’s disposition to act.\(^{39}\)

This is a view, of course, that has long and deeply resonated through American and British jurisprudence, and indeed the Western tradition. It is precisely why the law treats the spring gun owner who maims or kills intentionally so differently from the negligent driver whose conduct yields the same result. As Roscoe Pound once put it, our ‘substantive criminal law is,’ at least at minimum, ‘based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong.’\(^{40}\) At bedrock, and whatever else it may require of citizens, our law rests on what Justice Jackson called the ‘belief in freedom of the human will and [the] consequent ability and duty of the normal individual to choose between good and evil.’\(^{41}\) Finnis reminds us of the normative power lurking behind familiar precepts and proclamations like these.

But there are still other normative justifications for the special emphasis the law places on intentional conduct. One has to do with human equality. When someone \textit{intends} to harm another person, Finnis encourages us to remember,

\(^{39}\) \textit{CEJF} IV.16, at 347.


‘[t]he reality and fulfillment of those others is radically subjected to one’s own reality and fulfilment, or to the reality and fulfilment of some other group of persons. In intending harm, one precisely makes their loss one’s gain, or the gain of some others; one to that extent uses them up, treats them as material, as a resource.’\textsuperscript{42} People, no less than material, become means to another’s end. To analyze \textit{Bird v Holbrook} as the challengers to extant law would have us, we ask merely whether superior collective social consequences are produced by ruling for the plaintiff or defendant. On this account, there is nothing particularly \textit{special} about the individual. Like any other input or good, it gives way whenever some competing and ostensibly more important collective social good is at stake. But it is exactly to prevent all this that the law has traditionally held, in both crime and tort, that one generally ought not \textit{choose} or \textit{intend} to harm another person, and that failing to observe this rule is a particularly grave wrong. This traditional rule ‘expresses and preserves each individual person’s . . .\textit{dignity} . . . as an equal.’\textsuperscript{43} It recognizes that ‘to choose harm is the paradigmatic wrong; the exemplary instance of denial of right.’\textsuperscript{44} It stands as a bulwark against those who would allow the human individual to become nothing more than another commodity to

\textsuperscript{42} \textit{CEJF} IV.16, at 347–8; Kant, \textit{Groundwork for the Metaphysics of Morals} 46–8.

\textsuperscript{43} \textit{CEJF} IV.16, at 349.

\textsuperscript{44} \textit{Ibid.} at 349–50.
be used up in aid of another’s (or others’) ends.\textsuperscript{45}

Assigning legal liability based on intent can serve still other virtues. While Williams said that requiring a showing of intent rather than knowledge leads to unduly fine distinctions and too much leniency in criminal matters, lawmakers and courts have frequently found these distinctions necessary to avoid results they perceive as unjust. So, for example, when it comes to attempt and conspiracy crimes, a showing of intent is often required to establish criminal liability, even though a lesser \textit{mens rea} may suffice to establish liability for the same completed offense.\textsuperscript{46} And even when criminal liability attaches to the primary criminal offenders on a lesser \textit{mens rea} showing, proof of intent is typically required to hold liable those only tangentially involved with the illegal enterprise as accessories.\textsuperscript{47} While of course legislators are free to vary these rules and sometimes have, these rules largely persist and are no doubt what the Supreme Court has called a product of ‘an intense individualism . . . root[ed] in American soil’ willing to attach criminal sanction for actions just indirectly (or not at all) responsible for harm befalling others \textit{only if a choice to do wrong} is present.\textsuperscript{48} In this way, attention to the defendant’s intent can help address and prevent what

\textsuperscript{45} \textit{Ibid.}

\textsuperscript{46} \textit{See supra} note 3.

\textsuperscript{47} \textit{See supra} note 4.

\textsuperscript{48} \textit{Morissette}, 342 US at 251–2.
Learned Hand once called a ‘drag net’ effect of sweeping up ‘all those who have been associated in any degree whatever with the main offenders.’  The intent requirement in attempt, accessory, and conspiracy law ensures that there is no criminal prosecution, for example, when a utility provides telephone service to a customer ‘knowing it is used for bookmaking’ or ‘[a]n employee puts through a shipment in the course of his employment though he knows the shipment is illegal.’ In this way, American law seeks to allow the liberty of normal commerce and communication between individuals without forcing them always to be on guard against Williams’s ‘oblique’ intentions.

In response to all this, one might imagine Judge Posner or Williams replying that all the doctrine of intent does could be done just as easily through a system that looks purely to social consequences. Or arguing that intent doctrine does, in some sense, serve to maximize collective social welfare because of the very features that distinguish it. But replies like these would, of course, only serve to demonstrate that the fine gradations of mens rea traditionally recognized in the common law are not beside the point (neither here nor there) as both Judge Posner and Williams have suggested (albeit in their own different ways). Neither would such responses entirely answer the objection that the common law’s frequent focus on intent has meaning for the reasons the law has traditionally

49 US v Falcone, 109 F 2d 579, 581 (2d Cir. 1940) (Hand, J).

50 Model Penal Code §2.06, Comment 6(c).
given (free will, equality, liberty)—reasons that seem to be justifiable on bases independent of any underlying social welfare calculus. Nor would they address the objection that the common law’s stated reasons for focusing on intent are its true and accurate reasons—that the law possesses an integrity and deep logic to it. And they would do little to confront the argument that the law’s prohibition of intentional wrongs should sometimes trump even (and perhaps especially) when a utilitarian calculus suggests a different result.

To be sure, much more could be said about Finnis’s contribution to the question of intention in crime and tort. There is a great deal more complexity and subtlety both to his arguments and to those of his antagonists than I can stitch out in these few pages. And many more difficulties to explore. Like the incommensurability problems Finnis argues can sometimes attend consequentialist explanations of the law. Or the complexities involved in trying to distinguish intended means and ends from unintended side effects. Or the question when exactly the law should and should not take special cognizance of intent and distinguish intended consequences from those merely known or foreseen. After all, while Finnis reminds us that the law may take cognizance of an analytically and normatively meaningful distinction between intended and unintended conduct, he hardly suggests that the law always must do so or that other bases for legal liability should not exist—two positions that would themselves be plainly mistaken.
But while these questions are more appropriately material for other discussions, and certainly more than I might manage to address in these few pages, let me offer one example of how the intent-foresight distinction might play a critical role in the debate over one issue of contemporary interest: the law of assisted suicide and euthanasia. As I explained in my book on that subject, Anglo-American assisted suicide law has long depended on the intent-knowledge divide. As with many other accessory offenses, liability here traditionally falls upon those who intend to kill another human being but not on those who foreseeably cause death but intend no such thing. In this way, assisted suicide laws have generally sought to ensure that only actors most closely associated with the enterprise are subject to liability; others more loosely affiliated are not swept into the drag net. Unsurprisingly, both Judge Posner and Glanville Williams have sought to level the law’s traditional distinction in this arena (too), all in aid of an effort to undermine and undo altogether laws prohibiting assisted suicide and euthanasia.

Their work in the assisted suicide context, however, merely revives and echoes the analytical and normative difficulties and questions we have identified. Using his theory of oblique intention as a starting point, Williams argued that the case for legalizing assisted suicide follows ineluctably from the fact that law

---

51 Gorsuch, *The Future of Assisted Suicide and Euthanasia* ch. 4.
already permits a physician to prescribe a lethal dose of palliative drugs to a patient in order to relieve pain, even if he knows that doing so may (even will) cause the patient’s death. In Williams’s view, the doctor who performs the same act intending to end the patient’s life is in essentially the same position. But here again, one might ask whether Williams conflates two analytically different things. Can’t the law draw a rational distinction (as, in fact, it long has) between the act of a caring physician who administers morphine to ease his patient’s grave pain, foreseeing death without any intent to kill, and the act of a Dr. Kevorkian who injects his patients with potassium chloride in order (intending) to see them dead? In *Vacco v Quill*, the Supreme Court expressly recognized and endorsed the historical pedigree and analytical validity of laws that have long made just this distinction between foreseen and intended deaths in the assisted suicide context; are we really sure it was wrong to do so?

And if we do pull down the law’s traditional dependence on intention in this arena, we might ask, what would be the upshot for our commitment to human equality? Judge Posner contends that assisted suicide should be legalized because (in his view) the balance of social utility appears to justify it. But his utilitarian

---

52 *Ibid.* chs. 4, 9 (discussing Williams’s theory, among others).

53 521 US 793, 802 (1997) (distinguishing assisted suicide from acceptable medical practice on exactly these grounds, explaining that ‘'[t]he law has long used actors’ intent or purposes to distinguish between two results that may have the same result’’).
argument for legalization leaves him forced to concede that some human lives are worth greater legal protection than others because of their comparative instrumental value; on his account, some lives should never be taken, but others can (and perhaps should) be. Yet, if human lives bear only instrumental value, how do we decide which lives have sufficient utility to warrant the law’s protection and which do not? And if some human lives lack sufficient instrumental utility to merit protection against being intentionally taken, what are we saying about our commitment to human equality? Might existing law do more to protect equality than the would-be authors of its demise might wish to admit? And if we throw over existing law and admit that some persons’ lives may be taken intentionally, how are we to go about the business of sorting out which lives may be so taken? Does it really matter, for example, whether we have the consent of those to be killed, at least if we can confidently conclude their lives really lack (what someone deems to be) sufficient instrumental value? Peter Singer’s work advocating infanticide reveals just how far the logical


56 Walton Report para. 237 (‘Th[e] prohibition of intentional killing . . . is the cornerstone of law and social relationships. It protects each one of us impartially, embodying the belief that all are equal.’).
progression ignited by this line of inquiry may take us.\textsuperscript{57}

But let me leave that preview there, with those dangling questions asked but unanswered. The permutations and even just some very tentative answers took me a long book to spell out. For our purposes here it is enough to note that Finnis has done much to remind us that the law’s use of intention as a basis for liability isn’t always and wholly beside the point; that the law’s focus on intent can, at least sometimes, be both analytically and normatively justified; and that all this can make a significant difference in the analysis of many legal questions across many fields and in many different ways. Finnis’s work has helped explain and defend the thicket of the common law’s traditional \textit{mens rea} rules, reminding us of the intellectual pedigree of those rules and of the reasons why the law has often and for so long taken care with what sometimes seem complex and unduly fine distinctions. No doubt the debate will continue, with rejoinders made, new lessons learned, and echos heard in the assisted suicide and many other debates for years to come. But no one seeking to raze or reimagine the law’s protective \textit{mens rea} forest in favor of some (surely well intentioned) alternative vision will be able to do so without first confronting Finnis’s defense. And that, though but a very small part of Finnis’s body of work, represents a significant achievement indeed.

\textsuperscript{57} Gorsuch, \textit{The Future of Assisted Suicide and Euthanasia} ch. 9 (discussing Singer, \textit{Practical Ethics}).
Works Cited


Holmes, Oliver Wendell (1881), *The Common Law* (Boston: Little, Brown & Co.).


——— (1971), ‘Killing or Wounding to Protect a Property Interest’, *J Law & Econ* 14: 201.


But My Client Made Me Do It:
The Struggle of Being a Good Lawyer
And Living a Good Life
February 2010
Oklahoma City University

[Thank yous - esp Dean Hellman]

Some time after I joined the Tenth Circuit, the University of Colorado Law School asked me to teach legal ethics and professionalism. My immediate reaction was: But I thought *that* course was supposed to be taught by some greying, battle worn practitioner who told a bunch of war stories to scare students straight. Then I looked in the mirror... And then I reluctantly signed up...

* * *

The issue my ethics students seem to struggle with most concerns how far they should go to pursue a client’s
interest. The Model Rules of Professional Conduct tell us that a lawyer has a duty to represent the client’s interests “diligently.” But that doesn’t really answer my students’ question. They know they have to be diligent. But what does that mean, they ask?

The comments to the Rules offer a little more guidance, exhorting members of the profession to act with zeal for their clients.1 But what the comments giveth, they also taketh away. Immediately after telling us to act zealously, the comments add that lawyers may choose not to employ what they call “offensive tactics.” The comments likewise tell us that lawyers don’t have to “press for every legally available advantage” for their clients.

____________________

1 Note change from prior version
Note how the comments are worded. We are told lawyers *may* choose not to use offensive tactics. Now... that’s not exactly a ringing endorsement of taking the high road, is it? Doesn’t it intimate that a lawyer *may also* choose to use offensive tactics? In fact, could it even subtly suggest that *most* lawyers will employ such offensive tactics, and you’re a bit of a coward if you don’t?

*These are questions my students struggle with. Not when *may* they choose to avoid offensive tactics, but when, if ever, they *should* do so.*

* * *

As it happens, many students seem to come to my class with the conviction that they have some obligation to use
EVERY LAWFUL MEANS AVAILABLE TO VINDICATE THEIR CLIENT’S INTERESTS, WHETHER OFFENSIVE OR NOT. THEY VIEW LITIGATION AS SOMEWHAT MORE DIGNIFIED AND BETTER-GROOMED VERSION OF A RAMBO MOVIE.

HOW IS IT THAT SO MANY LAW STUDENTS, SO EARLY IN THEIR PROFESSIONAL LIVES ALREADY HARBOR THIS VIEW ABOUT OUR PROFESSION? MY LAW CLERKS SUGGEST THAT POPULAR CULTURE IS A CONTRIBUTING, THOUGH NOT EXCLUSIVE, CAUSE. AND IT’S EASY TO SEE THEIR POINT.

WHEN I WAS GROWING UP, THE LEADING TV LAWYER WAS PERRY MASON AND NO DOUBT HE INSPIRED A LOT OF FUTURE LAWYERS TO HIGH PROFESSIONAL STANDARDS. TODAY, WHO IS MODELING THE PROFESSION FOR OUR FUTURE LAWYERS? MAYBE DENNY CRANE OF BOSTON LEGAL? OR LIONEL HUTZ OF THE
SIMPSONS? I confess I enjoy watching them, but they’re not quite Perry Mason, are they?

Denny Crane tells us that the first rule of thumb in practicing law is this: “Always, always promise the client millions… and millions of dollars - it’s good business.”

Meanwhile, Lionel Hutz’s business card reads: “Lionel Hutz, Attorney at Law, as seen on TV... your case won in 30 minutes, or your pizza’s free.”

If you think I’m picking on lawyers, consider how we judges are treated. In addition to Lionel Hutz, the Simpsons features Judge Constance Harm. What a name. And she’s so tough that, when she sentences a defendant, she likes to tell them that they will be in jail “until frogs
can do fractions.” And that’s a step up from the judge on Boston Legal who’s so senile he seems close to drooling while issuing erratic orders.

Meanwhile, try sometime doing a Google search combining the terms “lawyer” and “shark.” Guess how many hits that yields? Over 2 million, including this one. It’s a painting called: Lawyers approaching the bench.....

Flash Picture

Or this one, from outside an attorney’s office.....

Flash Picture
AND SPEAKING OF MEDIA PORTRAYALS OF OUR PROFESSION,

FRIENDS CAN’T HELP BUT PASS ALONG TO ME ADVERTISEMENTS
LIKE THIS ONE FROM AN ATTORNEY’S WEBSITE.

PLAY VIDEO

IN A DISPIRITED MOMENT ONE MIGHT WORRY THAT THE TERM
LEGAL ETHICS HAS, AT LEAST AS IT IS VIEWED IN POPULAR
CULTURE, BECOME SOMETHING CLOSE TO AN IRONY, A
CONTRACTION IN TERMS. OR ONE MIGHT WONDER WHETHER IT
HAS COME TO MEAN ONLY THIS: DO IN YOUR OPPONENT BEFORE HE
CAN DO IN YOU.²

OF COURSE, WE CAN’T BLAME THE MEDIA FOR OUR
PROFESSIONAL IMAGE. THE MEDIA HOLDS THE MIRROR. THE

² Dickens
reflection is our own. So, where does this lawyer-as-land-shark view of legal ethics come from?

* * *

Dean Hellman wrote an influential and thoughtful article in the Georgetown Journal of Legal Ethics in which he documented a couple possible answers. He pointed to evidence suggesting that many law students get their ethical cues during internships or summer associate work or during their early years in practice. What the student learns about ethics in the workplace tends to overshadow whatever is taught in the classroom.

___________________________

3 539 et seq
AT THE SAME TIME, DEAN HELLMAN ALSO POINTED TO EVIDENCE SUGGESTING THAT LAW SCHOOL ITSELF TENDS TO HAVE A CORROSIVE EFFECT ON STUDENTS’ VALUES – IN SOME WAYS, LAW SCHOOL SEEMS TO BE LEAVING STUDENTS WITH LOWER STANDARDS THAN THOSE THEY ARRIVE WITH.\(^4\) BUT WHEREVER STUDENTS GET THE IDEA FROM, IT DOES SEEM WE TODAY ENJOY A SUPERABUNDANCE OF LAWYERS – BOTH IN PRACTICE AND IN THE ACADEMY – WHO DEFEND THE VIEW THAT A CLIENT’S IMMORAL COMMAND SHOULD BE FOLLOWED.\(^5\)

TONIGHT, I HOPE TO PERSUADE YOU TO THINK AGAIN ABOUT THIS AND ABOUT WHAT KIND OF LAWYER AND PERSON YOU MIGHT WISH TO BECOME IN THE PRACTICE OF LAW. THOUGH WE LAWYERS ARE FIDUCIARY AGENTS GENERALLY BOUND TO ASSIST OUR PRINCIPALS, WE ARE ALSO PEOPLE TOO (POPULAR MYTHOLOGY AND _______  

\(^4\) 548

\(^5\) Monroe Freedman
MANY JOKES NOTWITHSTANDING). SAYING “BUT MY CLIENT MADE ME DO IT” DOESN’T MEAN WE ALWAYS ESCAPE MORAL CULPABILITY FOR OUR ACTIONS.\textsuperscript{6} IT IS POSSIBLE TO BE BOTH A GOOD LAWYER AND A GOOD PERSON. BUT IT TAKES WORK. AND I WANT TO SUGGEST TONIGHT THAT IT’S WORK WELL WORTH YOUR ATTENTION.

* * *


\textsuperscript{6} This is what David Luban once aptly described as the “positivist excuse” — an excuse that, because positive law permits the action and a superior requested it, an agent is morally blameless for pursuing it. Lucan 2351
DEFENDANT ACTED PURSUANT TO AN ORDER OF HIS GOVERNMENT OR OF A SUPERIOR” WOULD NOT, CATEGORICALLY AT LEAST, “FREE [THE DEFENDANT] FROM RESPONSIBILITY.”

SO I ASK MY STUDENTS: WE HELD THAT NAZI GENERALS COULDN’T ESCAPE ALL CULPABILITY FOR THEIR ACTIONS JUST BECAUSE A SUPERIOR OFFICER “TOLD THEM TO DO IT.” AND THAT’S IN THE MILITARY WHERE CHAIN OF COMMAND PRINCIPLES ARE AT LEAST AS STRONG AS THE FIDUCIARY DUTY GOVERNING LAWYERS IN THE PRACTICE OF LAW, RIGHT? WHERE DOES THAT LEAVE YOU, I ASK? By the end of the semester, I hope I have convinced at least a few people in the class that there are some circumstances when a good lawyer should not blindly follow the client’s orders.

7 Charter quoted id.

8 We usually follow that discussion by looking at the ABA Model Rule noting that instructions from a superior will not always absolve a junior lawyer from the consequences of following orders. ABA Model Rule 5.3
Now, to be clear, I don’t mean to suggest a lawyer should disregard a client’s orders and simply do whatever the lawyer thinks best. Some, of course, have advocated for such a view of the lawyer’s role. The lawyer’s job in Soviet systems, for example, was sometimes described as involving “no division of duty between the judge, prosecutor, and defense counsel” because “the defense counsel [was] required to assist the prosecution” in a purported search for the “truth” to promote overall social welfare. The lawyer, on this vision, owes his or her client’s wishes no particular deference because society’s interests outweigh the individual’s.

* * *

---

9 Kaplan. criminal justice - introductory cases and materials 264-65 (1973)
Such a regime, of course, can work serious injustices. A just legal order seeks, among other things, to assure equal treatment for individuals and to ensure that an individual’s claims and defenses may be heard and receive due process. Lawyers serve a critical instrumental function in our adversarial legal system by ensuring that their client’s positions are presented and heard. To usurp the client’s voice, to become not just the client’s advocate but the judge and jury of the client’s cause is to do serious damage to the integrity of our adversarial legal order and, with it, to the dignity of the individual client.

Neither is there anything immoral in preferring the interests of one’s client to the interests of others. We do just this all the time. The fact that you might choose to

10 QUOTE Donagan at 128
SPEND THIS WEEKEND WITH YOUR CHILDREN MAY PRECLUDE YOU FROM SPENDING TIME VOLUNTEERING. BUT THAT DOESN’T MAKE YOUR CHOICE IMMORAL. YOUR CHOICE TO PURSUE ONE GOOD (FAMILY) MAY DO INCIDENTAL, UNINTENDED, EVEN IF FULLY FORESEEABLE, HARM TO ANOTHER GOOD (VOLUNTEERING). BUT WE LIVE IN A WORLD WHERE THERE ARE MANY UPRIGHT WAYS TO LIVE LIFE, AND CHOOSING ONE GOOD UNAVOIDABLY MEANS YOU WILL DO INCIDENTAL, IF NOT INTENTIONAL, HARM TO OTHER GOODS.

SO I AGREE THAT WE CAN AND SHOULD GENERALLY PREFER OUR CLIENT’S INTERESTS TO OTHER INTERESTS. BUT, JUST AS WITH THE CASE OF THE NAZIS AT NUREMBERG, WE SHOULDN’T ALWAYS DO SO.

* * *

14
In an effort to capture this balance of duties, Charles Fried once famously\(^\text{11}\) offered this metaphor. He suggested that a lawyer should act as a sort of *friend*.

A friend generally prefers his friend’s interests to the general population’s. In all sorts of ways, we give our friends loyalty and preference that we would never give a stranger. This is natural, human, and appropriate. At the same time, this doesn’t mean that we will or should do anything for a friend. A line is and must be drawn somewhere. So, for example, generally we say we won’t kill or tell hurtful lies for friends. Respect for ourselves and others generally precludes us from following friendship to the point it involves us doing intentional wrongs to ourselves or others. Fried argues

\(^{11}\) If the success of a law professor is related to how often he is cited, whether favorably or unfavorably, Fried’s lawyer-as-friend metaphor was an academic’s home run. cite Luban or condlin who makes this point

15
THE LAWYER-CLIENT RELATIONSHIP WORKS MUCH THE SAME WAY. WE GENERALLY PREFER OUR CLIENTS’ INTERESTS TO THOSE OF NON-CLIENTS, BUT THERE ARE SOME THINGS WE DON’T, AND SHOULDN’T, DO.

Many have argued the lawyer-as-friend metaphor has its problems. On close inspection, they say, the lawyer-client relationship doesn’t compare well to a true friendship. Lawyers and clients premise their relationship on money, not true affinities. Also, there is often an inequality in power in the lawyer-client relationship that is not typical of true friendships based on mutual admiration. Lawyers and clients sometimes might not like each other at all and still have a professionally satisfactory relationship.13

12 reference to Aristotle discussion of true friendship see condlin 254 et seq
13 Condlin (collecting some more prominent criticisms);=
All these and similar criticisms may well have something to them. But even if the lawyer as friend metaphor is imperfect, I wonder whether it at least captures the one important truth I am arguing for tonight—namely, that, while lawyers generally should prefer their clients’ interests, *sometimes* they should not do so.

* * *

But even if we agree with this premise, the question remains *when* a lawyer should say no to a client. Professor Fried has sought to answer this question by distinguishing between what he calls institutional and personal harms. If in helping a client you happen to harm another person through the use of a legally approved rule, Fried would say you bear no moral culpability for
the harm that follows.\textsuperscript{14} This permissible type of harm he calls an institutional harm because it is the legal institution, not the lawyer personally, that he believes is accountable for the harm that results. As an example, Fried points to statutes of limitations. Asserting a statute of limitations defense might extinguish a meritorious legal claim, but it is a defense the law allows. And Fried would say that it is the statute of limitations, not you, that is harming the plaintiff. So, you may feel free to assert it.

\textbf{By contrast,} Fried condemns what he terms personal harms – wrongs a lawyer does by his person to the person of another that are \textit{beyond} what is sanctioned by the legal institution. These are things a lawyer should not do

\textsuperscript{14} Fried 1085 — so long as the legal system involved is “a generally just and decent” one.
EVEN IF A CLIENT DEMANDS IT. BY WAY OF EXAMPLE, FRIED POINTS TO A CLIENT’S REQUEST THAT YOU LIE TO OPPOSING COUNSEL. THIS, HE SAYS, IS A MORAL ACT AIMED AT AN INDIVIDUAL, SO THE LAWYER DOES BEAR CULPABILITY FOR IT AND SHOULD REFRAIN FROM IT.

I CONFESSION I AM NOT SURE WHETHER THIS ACCOUNT IS TOTALLY SATISFYING. CONSIDER FIRST THE CLAIM THAT A LAWYER BEARS NO MORAL CULPABILITY FOR INSTITUTIONAL HARMS. WHAT IF THE LAW SAYS, AS IT DID IN ANTEBELLUM AMERICA, THAT YOU CAN USE LEGAL PROCESS TO COMPEL A PERSON HIDING A RUNAWAY SLAVE TO RETURN THAT SLAVE TO YOUR CLIENT?¹⁵ THAT’S A CLAIM OR DEFENSE PERMITTED BY THE LEGAL INSTITUTION AND SO AT LEAST ARGUABLY PERMISSIBLE ON FRIED’S ACCOUNT. YET, ARE WE REALLY CONFIDENT A LAWYER WOULD BEAR NO MORAL

¹⁵ Examples supplied by Donagan. 125-26. Assumes America was generally just legal regime.
CULPABILITY FOR INTENTIONALLY INVOKING SUCH AN OBVIOUSLY UNJUST LAW?

Next, let’s take Fried’s claim about personal harms. Here, consider a vigorous cross-examination that you know will undermine the witness’s character and general credibility. This undoubtedly will benefit your client, but it will also upset the witness and cause him emotional harm. Fried suggests that such questioning may be a personal harm to the extent it implies that the witness “is unworthy of respect.” But it isn’t clear why this harm is properly characterized a personal rather than institutional one. Isn’t the very institutional purpose of cross-examination to call into question a witness’s direct testimony, especially when that cross-examination is permitted by an overseeing judge? The same question can be asked about Fried’s example of lying to counsel in
court. He characterizes that as a **personal** harm. But such lies are also often forbidden by **institutional** rules as imposing a wrong on the justice system itself by misleading the tribunal.

* * *

Instead of trying to distinguish between institutional and personal harms, I wonder whether it might be more useful, at least as a tentative starting point, to focus on whether the action involves the lawyer **intentionally** doing harm to other persons and goods. As we’ve discussed, the lawyer generally serves a morally upright function by helping ensure that a client can access our justice system. In this way, the lawyer usually intends to
HELP REALIZE IMPORTANT ENDS FOR HIS CLIENT, INCLUDING EQUAL TREATMENT AND DUE PROCESS.

TO BE SURE, IN VINDICATING A CLIENT’S LAWFUL INTERESTS THE LAWYER ALSO OFTEN DOES DAMAGE TO SOMEONE ELSE’S INTERESTS. WHEN THE PLAINTIFF WINS, THE DEFENDANT LOSES. LITIGATION IS OFTEN A ZERO-SUM GAME. BUT IN ACTING TO VINDICATE THE CLIENT’S LAWFUL INTERESTS, THE LAWYER DOES NOT INTEND TO DO ANY HARM TO THE CLIENT’S OPPONENT – THIS IS MERELY AN UNINTENDED CONSEQUENCE. THE CONSEQUENCE MAY WELL BE FORESEEN AS LIKELY OR EVEN INEVITABLE, BUT IT ISN’T INTENDED.

CONSIDER, FOR EXAMPLE, A CLIENT WHO COMES TO YOU CONTENDING SHE WAS INJURED BY THE DEFENDANT AND SEEKING COMPENSATION FOR HER MEDICAL BILLS. IN SEEKING
COMPENSATION FROM THE OTHER PARTY, NO DOUBT YOU WILL
INJURE THE OTHER PARTY’S INTERESTS AND PERHAPS CAUSE THE
OTHER PARTY SERIOUS EMOTIONAL AS WELL AS FINANCIAL
TRAUMA. BUT IN DOING ALL THIS YOU HARDLY INTEND TO HURT
THE OPPOSING PARTY. YOU ONLY INTEND TO HELP VINDICATE
YOUR CLIENT’S LAWFUL INTEREST. THAT THIS IS TRUE IS
SUGGESTED BY THE FOLLOWING COUNTERFACTUAL HYPOTHETICAL
– IF YOU COULD FULLY VINDICATE YOUR CLIENT’S INTEREST,
OBTAIN FULL COMPENSATION FOR HER INJURIES, WITHOUT HURTING
ANYONE ELSE IN THE PROCESS, WOULD THAT SATISFY YOUR
PURPOSES JUST AS WELL? THE ANSWER HERE IS EMPHATICALLY
YES. INJURING OTHERS, ALTHOUGH IT MAY BE A CONSEQUENCE OF
YOUR ACTIONS, IS NOT PART OF YOUR INTENT.16

16 The same holds true for the prosecutor seeking to convict a burglar. His
intent isn’t to do any harm to the defendant, but to express society’s disapproval
of the defendant’s actions and protect other citizens against future wrongs of that
sort.

Consider an analogy to the doctrine of self-defense and defense-of-others.
Someone breaks into your house in the night and points a gun at you and your
family. You and they are in imminent danger of death and you shoot and kill the
(continued...)
ALL THIS IS BECAUSE, AS I ALLUDED TO BEFORE, IT IS A FACT OF THE WORLD WE LIVE IN THAT, IN PURSUING ONE GOOD, YOU WILL INEVITABLY DO HARM TO OTHER GOODS. SPENDING TIME WITH FAMILY THIS WEEKEND – SURELY A GOOD THING – MEANS FEWER VOLUNTEERS WILL BE OUT WORKING. YOU MAY FORESEE THIS RESULT, EVEN TO A MORAL CERTAINTY, BUT YOU DO NOT INTEND IT, WISH IT, WANT IT. IN AN ANALOGOUS WAY, PURSUING COMPENSATION FOR YOUR CLIENT MAY MEAN THAT ANOTHER PERSON WILL HAVE TO PAY. YOU MAY KNOW THIS TO BE TRUE

____________________________________

16(...continued)

aggressor. The law generally approves of self-defense in such cases because your intent is to save yourself and others by stopping an unlawful aggression, and involves no particular intent to see the aggressor dead. That death may be an unavoidable and even foreseeable consequence of your action, but an unwanted, unintended one. This is suggested by asking the counterfactual question whether you would’ve been perfectly happy if you could’ve stopped the aggression without killing the aggressor. When, as here, the answer is yes, it is hard to see how the killing, while foreseeable, was any part of your intentions. In acting to protect the good of your life and those of your family members you took an action that foreseeably or knowingly caused the death of another, but it is not a death you wished or intended. In much the same way, can’t the lawyer take actions for the defense of his client without wishing any particular harm on the opposing party?
WITHOUT WISHING OR INTENDING ANY HARM BEFALLING ANYONE ELSE.

UNDER THIS LINE OF REASONING, A LAWYER MAY TAKE A GREAT MANY ACTIONS IN AID OF A CLIENT. BUT AT LEAST SOME IMPORTANT THINGS ARE CATEGORICALLY RULED OUT AS THINGS A LAWYER SHOULD NOT DO FOR A CLIENT.

FOR EXAMPLE, SUPPOSE YOU FILE A COLORABLE CLAIM BUT DO SO WITH THE PURPOSE OF INFlicting DAMAGE TO THE OTHER PARTY, USING THE LEGAL SYSTEM AS A SORT OF WEAPON TO HARM ANOTHER. NOTE THAT THE MEANS YOU’RE USING ARE ENTIRELY LAWFUL AND YOU ARE ENTITLED AS A LAWYER TO USE THEM. THE CLAIM IS ITSELF VALID ON THE MERITS. BUT YOU HARBOUR AN ULTIMATE PURPOSE OR END TO HURT ANOTHER PERSON. IF THE ANALYSIS I’VE SUGGESTED HOLDS, THIS IS A NO-GO. THE LAWYER
SHOULD NOT PURSUE THE END PURPOSE OF HARMING OTHERS, EVEN IF THE MEANS HE USES ARE INSTITUTIONALLY PERMITTED. IT IS, I THINK, FOR EXACTLY THIS REASON THAT WE HAVE TORTS LIKE ABUSE OF PROCESS.\footnote{17}

\textbf{Consider as well the fugitive slave law example.}

\textbf{What if an antebellum client sought your assistance to recover a fugitive claiming he is merely asserting a property interest protected by law? To vindicate your client’s property interest you must intentionally seek to place another person in chains. And you don’t just foresee the fugitive’s enslavement as a possibility, you intend it. It would, after all, frustrate your whole purpose in the case to see the fugitive slave remain a free person. Of course, we can hope that examples of such profoundly unjust laws are few and far between in a decent society.}

\footnote{17 Diff if client intends and you do not...}
But we still might ask whether lawyers can be any more willfully blind to their possibility than the Nazi field marshal.

Tonight I have sought to suggest, at least as a starting point, that we have a duty to avoid taking actions for our clients that involve using *means or ends* that intentionally do harm to other persons or goods. To be sure, this leaves considerable room for the lawyer to defend the client’s interests vigorously and thoroughly, to interpose alternative defenses, to conduct vigorous cross examinations. But it does not leave us lawyers totally morally blameless whenever the client tells us to do something.¹⁸ Saying that the client made me do it isn’t a total answer to the question of legal ethics.

¹⁸ Of course, one might say that all I’ve addressed here are intentional wrongs to others: what about wrongs imposed unintentionally. That’s more than I can bite off tonight. Golden Rule
IF TONIGHT WE’VE IDENTIFIED A STARTING POINT, AND ESTABLISHED THAT THERE ARE AT LEAST SOME THINGS A LAWYER SHOULD NOT DO, YOU MIGHT REASONABLY ASK WHERE THE END POINT IS? WHEN ELSE SHOULD A LAWYER DECLINE TO FOLLOW HIS OR HER CLIENT OFF THE MORAL CLIFF. THIS IS SURELY AN IMPORTANT QUESTION AND THE ANSWER I’VE STARTED TO SKETCH DOESN’T PURPORT TO COVER ALL CASES. AT MOST, I’VE ONLY HOPED THIS EVENING TO SUGGEST THAT THERE ARE AT LEAST SOME CASES WHEN THE ANSWER “MY CLIENT MADE ME DO IT” ISN’T GOOD ENOUGH. TO TRY TO GO FURTHER THAN THAT WOULD REQUIRE AN EVEN LONGER-WINED TALK THAN THE ONE YOU’VE ALREADY HAD TO ENDURE.
FOR OUR PURPOSES TONIGHT, IT MIGHT BE ENOUGH TO SAY THAT MOST OF THE ANSWER TO THAT QUESTION WE PROBABLY LEARNED A LONG TIME AGO. THE GOLDEN RULE, TOLERANCE, CIVILITY, AND SELF-DISCIPLINE COME TO MIND AS SOME OF THE CARDINAL VIRTUES OF THE GOOD LAWYER AS WELL AS GOOD PERSON. AS DEAN HELLMAN OBSERVED, WHEN YOU ENTER THIS PROFESSION YOU ARE LIKELY TO ENCOUNTER SOME WHO WILL ENCOURAGE YOU TO UNLEARN THESE OLD TRUTHS. BUT JUST BECAUSE YOU HAVE A LAW DEGREE DOESN’T GIVE YOU A LICENSE TO FORGET WHAT YOUR GRANDMOTHER TAUGHT YOU OR WHAT YOU LEARNED IN KINDERGARTEN.

AT THE SAME TIME, LET’S ALSO ADMIT THAT WE ALL MAKE MISTAKES AND GO AWRY. AND, YES, THAT MOST ASSUREDLY INCLUDES US JUDGES. I CERTAINLY DO. NO ONE IS PERFECT AND ALL OF US IN THIS PROFESSION ARE PROBABLY MORE IN NEED OF PENANCE THAN SELF-CONGRATULATORY PRAISE WHEN IT COMES TO
ethics and civility. There are few in our profession who can afford to live in glass houses.

The ethical virtues take hard work and constant practice, trial and, yes, error. Aristotle said that ethics involves a state of character that exhibits itself in actions. On this view, ethics is a habit, something that involves not just belief but action, repetition, reinforcement, success, and learning from our mistakes.

And let me assure you, too, that you will face many ethical challenges in the practice of law. I guarantee it’s coming your way.

Consider this: your opposing counsel shades facts or case holdings in his or her brief. How tempting is it to respond by calling that a “lie,” rather than simply point
OUT TO THE COURT THAT COUNSEL ERRED AND THEN CITE THE TRUE FACTS AND LAW TO THE COURT?

OR MAYBE OPPOSING COUNSEL WON’T PRODUCE ANY DISCOVERY TO YOUR SIDE, YET DEMANDS MASSIVE DISCOVERY FROM YOUR CLIENT. YOUR CLIENT DOESN’T WANT TO INCUR THE EXPENSE OF PROVIDING DISCOVERY WITHOUT GETTING SOMETHING IN RETURN. HOW EASY IS IT TO REFUSE PRODUCTION AND ENGAGE IN A GAME OF TIT FOR TAT?

CAREER, WHEN YOU RETIRE WITH A CLEAR CONSCIENCE. AND, LET
ME ASSURE YOU, THESE ARE NO SMALL THINGS....

FOR ME, ONE GREAT REMINDER OF ALL THIS IS THE SCENE IN
ROBERT BOLT’S PLAY A MAN FOR ALL SEASONS WHEN THOMAS
MORE IS BETRAYED BY HIS PROTÉGÉ, RICHARD RICH. AFTER RICH
OFFERS PERJURED TESTIMONY AT THE TRIAL AGAINST MORE, MORE
SEES RICH WEARING A NEW CHAIN OF OFFICE – ONE THAT SIGNIFIES
RICH HAS BECOME ATTORNEY GENERAL FOR THE RELATIVELY
SMALL PRINCIPALITY OF WALES. MORE ASKS, “RICHARD, THE
LORD SAID THAT IT DID NOT PROFIT A MAN TO GAIN THE WHOLE
WORLD IF HE LOST HIS SOUL. THE WHOLE WORLD, RICHARD ... BUT
FOR WALES?” TODAY, WE MIGHT ASK OURSELVES: OUR SOUL FOR
A TRIAL? OR SOME LOUSY DISCOVERY MOTION?

* * *

32
Toward the end of the semester when my legal ethics class is grappling with the question what it means to be a good person and a good lawyer, when they are confronting their instinct that lawyers should simply follow client orders, I ask them to do this exercise. I ask them to take time to write their obituary as they hope it will appear in the local newspaper. I then ask them: Did your obituary extol your virtues at using Rambo litigation tactics for your client? Your ability and willingness to win at any cost?

Then I sometimes read to them one obituary I came across many years ago as a law student, walking through the Old Granary burial ground in Boston. It’s where Paul Revere, John Hancock, and other leaders of our founding generation are buried. And there, I came across the

19 Lerman Schrag suggestion
TOMBSTONE OF A LAWYER WHO TODAY IS FAR LESS WELL-KNOWN.\textsuperscript{20} His name was Increase Sumner. He served as a judge and public servant and also as a private practitioner. Etched into his tombstone over 200 years ago was this description of the man --

\textbf{As a lawyer, he was faithful and able;}

\textbf{as a judge, patient, impartial, and decisive;}

\textbf{as a chief magistrate, accessible, frank, and independent.}

\textbf{In private life, he was affectionate and mild;}

\textbf{In public life, he was dignified and firm.}

\textsuperscript{20} Work in Lyceum address.
Party feuds were allayed by the correctness of his conduct;

Calumny was silenced by the weight of his virtues;

And rancor softened by the amenity of his manners.

Those words have stuck with me over the years. They serve, at least for me, as a reminder of the good life that can be led in the law, a reminder of the work and practice that it takes to make that happen, an encouragement to good habits when I fail and falter, and an assurance that it is possible to be both a good lawyer and a good person.

Thank you for the opportunity to be with you this evening.
I want to thank Judge Bacharach and Judge Couch for their kind invitation to join you tonight. I also want to thank my colleague and friends Robert and Jan Henry for allowing me to bunk tonight at their beautiful home. As you know, last week Chief Judge Henry announced that he will be leaving us on June 30 next year to serve as President of OCU. And I don’t need to tell you that our loss is OCU’s gain. Robert Henry has been a great judge, a great advocate for the cause of justice and the rule of law in our circuit and around the world, and a great friend. He will be sorely missed. At the same time, though, I know Robert will also make a superb university president. His enthusiasm and energy seem boundless. I have no doubt he will excel in every aspect of his new job - including fund-raising. So come June 30th, all
you OCU graduates better watch your wallets.

Turning to happier happenings, from my perspective at least, it is a pleasure to be with you on an occasion honoring Judge William Holloway. Judge Holloway is universally admired by the members of the Tenth Circuit, as I know he is by members of the Federal Bar in Oklahoma. To be a part of a lecture series that is an ongoing, living tribute to Bill and Helen Holloway is a special pleasure and honor.

When I was trying to decide what topic I might usefully address tonight, Judge Bacharach suggested that I might offer some reflections on what it’s like to be a still-somewhat-new federal appellate judge. Though now three years into the job, I confess the memory of my first day on the bench won’t soon
fade. I donned the robe, shook hands with my colleagues, and headed into the courtroom. But as I ascended the steps to the bench, I stepped on the bottom of my robe, tripped, and just about sent my papers flying. I spent the remainder of the day’s arguments crimson red in embarrassment. When I finally made it back to chambers, my wife called to ask how my day went. After I sheepishly recounted my misadventure, she advised me, “Neil, you have to lift your hem as you climb stairs.” . . . So it was that my first lesson in judging was really a lesson in fashion. And so it is that tonight I will offer a peek inside the robing room and hazard a few early – and so necessarily tentative – reflections on how an appellate judge thinks.
In approaching this topic – how appellate judges think – I recognize it is a delicate one. One fraught with disagreement. One on which some harbor grave reservations. After all, many of our brothers and sisters on the district court doubt whether appellate judges think at all. Or whether appellate judges can only do so in groups of three or more. Or whether the deferential standards of review we appellate judges owe to district courts really mean appellate judges are best off not even trying to think.

And there is something especially peculiar about the role of the intermediate appellate judge. As the saying goes, it is the duty of the district court judge to be quick in ruling and courteous to the litigants. But that doesn’t mean judges of the
court of appeals have to be slow and crapulous. After all, it’s not their job to usurp the functions of the *Supreme Court*.

Of course, this adage only suggests what the intermediate appellate judge isn’t. Let me begin the same way, suggesting first what the federal appellate judge *isn’t*, before focusing on what the appellate judge *is*. Now, I realize this is a roundabout way to proceed. Still, I follow this route not only because it is easier, but also because I can’t help it. After all, even now I remain a member of the only profession known to mankind that could call a 10,000 word document a “brief.”

What is it that I want to *exclude* from the idea of the good appellate judge? It’s the idea that the appellate judge should or does decide cases based on his or her views of social policy. It seems this view of judging is everywhere these
days. Television, movies, and popular culture all reinforce the view of the judge as some autocrat issuing idiosyncratic orders from his armchair. Yet, somewhat surprisingly, this view of judging is also sometimes given a degree of credence, though in a much more sophisticated form, by members of our own tribe.

In particular, I have in mind here my Seventh Circuit colleague, Richard Posner. Judge Posner is among the most accomplished federal appellate judges in our country. He is renowned for his intellectual prowess and efficiency — I hear he can simultaneously write an opinion with his right hand and a book with his left. But my sincere respect (and even envy) of Judge Posner notwithstanding, I must respectfully dissent from the thesis of his recent book, entitled *How Judges Think*, a title on which I have played a bit in the title
of my remarks tonight.

In his book, Judge Posner advocates what he calls judicial pragmatism. He tells us that, at least in hard cases where there isn’t yet a clear legal rule, judges can and should assess the potential consequences of available outcomes, and choose the one that they think, based on their personal assessment, will yield the best consequences for society. Judge Posner is candid about all this, telling us that in hard cases, quote, “American appellate courts are councils of wise elders and it is not completely insane to entrust them with responsibility for deciding cases in a way that will produce the best results in the circumstances rather than just deciding cases in accordance with rules created by other organs of government or in accord with their own previous decisions.” [pragmatic
Bigger problems, though, also exist. Under this theory, the judge is supposed to weigh all the potential worldly costs and benefits of various possible outcomes of the case before him or her and pick the one best calculated to maximize our collective social welfare. But the difficulty is that by the time
cases reach us in an appellate court, both sides usually have a good story about how deciding in their favor would advance the social good – especially in the hard cases Judge Posner discusses. In criminal cases, for example, we often hear arguments from the government about how its view would promote the goods of public security or finality. Meanwhile, from the defense we often hear about how its view would promote the goods of personal liberty and procedural fairness. How is the judge supposed to weigh or rank these radically different goods? How is the judge supposed to say one good is more important, or socially preferable to another?

The problem is that the pragmatic model of judging offers us no value or rule to compare or rank which costs and benefits are to be preferred and which aren’t. It’s sort of like asking judges to decide which is better, the taste of steak or the look
of a mountain? Or trying to decide between the taste of an apple versus the look of an orange. Both are good and maybe I can tell you which I prefer, but my preference is only that, a preference — not something based on any principled analysis. In a very real way, then, the pragmatic enterprise is senseless, impossible; or, to borrow a phrase, it is rationally indeterminate. It may help us identify the costs and benefits, but it doesn’t offer any guide on which to choose.

And this leads to a separate problem with the pragmatic approach to judging. In a representative democracy, deciding which competing social good to choose and which to forgo generally isn’t supposed to be left to judges. We are a nation governed by the consent of the People. It is usually they, through the Constitution they adopted or through the representatives they elect, who are supposed to choose
between and prioritize the many competing goods that are worthy of our attention — deciding, say, how much of our collective social resources should be devoted this year to promoting education of the young versus caring for the elderly. Or how much to devote this year to guns versus butter. Or to take two more mundane but real examples of the sorts of things our Congress debates – whether to fund this year either barnyard fly control in Colorado or a sheep museum in Wyoming. The point is that we are a nation under laws as adopted by the People, not a nation ruled by unelected elders.

And of course federal law is typically enacted through the arduous bicameralism and presentment procedure prescribed by the Constitution. This process forces compromise and thus ensures that at least some social consensus has been
hammered out before a law binds the nation. How can it be pragmatic to say that a few unelected judges are entitled to do the job constitutionally assigned elsewhere? For that matter, are we really sure that we would do any better a job? We lawyers and judges are trained in logical reasoning, not the social sciences, economics, business, sociology, or management. Even if pragmatism were possible, as a matter of institutional competence are we sure it would be sensible to assign judges the job?

And here’s another problem. The pragmatic model for judges also tends to have troubling consequences individual rights and equality. This problem can be illustrated through the old chestnut English tort case of Bird versus Holbrook – a case that many of us studied in law school and that, as it happens, involved an actual bird. The defendant was a grower of
tulips. To protect his garden, he set a spring gun to shoot any trespasser. (These were the days when it seemed reasonable to shoot a man for picking your tulips...) The plaintiff was the owner of a wandering peahen that strayed onto the defendant’s property. Seeking to capture the bird, the plaintiff followed it onto the defendant’s property, and was rewarded with a spray of shotgun pellets from the defendant’s spring gun. When the case made it to court, the English bench finally applied long-standing homicide principles to prohibit the use of spring guns. The courts did so on the basis that it is unacceptable to kill people intentionally merely to prevent the picking of tulips. The intentional taking of human life is a grave thing and generally impermissible at law. Even self-defense usually involves only an intent to stop a threat to your own well-being, not a design to see anyone else dead.
Approaching the case from the direction of consequences rather than intent, however, Judge Posner encourages us to analyze Bird versus Holbrook very differently. As he formulates the case, it merely involves “two legitimate activities, raising tulips and keeping peahens.” In other words, the question is one of flowers and birds — not one of people being intentionally shot. And the challenge to Judge Posner is for the judge to “design a rule of liability that maximize[s] the (joint) value of both activities, net of any protective or other costs (including personal injuries).” Under this view, the fact that the defendant intended to kill the plaintiff is, as Judge Posner puts it, “neither here nor there.”

It seems to me that this just misses an important feature of our world. Intent does matter because to intend something is to choose it, to endorse it. Our intentional choices reflect our
character – who we are and who we wish to be – in a way that unintended and accidental consequences cannot. Intentional choices define and shape us. As the saying goes, an act forms a habit, a habit forms a character, and a character forms a destiny. In short, there is a qualitative difference between intentionally causing harm and pursuing a good that unintentionally results in harm. As Justice Holmes once famously observed, even a dog knows the difference between being tripped over and being kicked. Yet, under the pragmatic judge’s logic, no dispositive distinction can be made between the accidental trip and the intentional kick. The only thing that matters are the consequences they yield in the world. But saying there is no difference between the accidental and intentional is sort of like saying that those who ski mogul fields intend to have knee problems. And that’s a view of the world that just doesn’t fit with human experience.
I mention this not only because it fails to fit with our sense of reality, but because, when you insist that consequences alone should determine legal rules, without regard to the intent behind them, strange things happen to what we call human rights, especially our conviction about human equality. The plaintiff’s life in Bird versus Holbrook is not categorically protected because it enjoys some inherent value. Instead, we must ask the pragmatic question of whether his life can yield superior collective social consequences when compared against the defendant’s tulip growing operation. So it is that, to a pragmatist, there is nothing *special* about individual human rights. Like any other social good, they give way whenever some competing and ostensibly more important collective social good is at stake. Under this view, the lives of the more socially productive deserve more protection from the law; the lives of the less productive, the less
instrumentally valuable, deserve less protection. In the pragmatist’s view, then, people are not equal or endowed with certain inalienable rights. Instead, human rights are respected only to the extent they prove instrumentally valuable to some other end.

Since we’re discussing consequences, here’s one more. If hard and ambiguous cases liberate judges to act as councils of elders who tote up consequences and proceed to the result they consider socially optimal, no doubt judges will find a great many cases to be hard and ambiguous. Why would a judge want to spend hours parsing convoluted statutory and contractual language, or reviewing a voluminous administrative record, when he or she could just announce his own preferred rule? God knows, sometimes I’d rather suffer an appendectomy than scour through a joint appendix. Legal
clarity thus becomes the chain that binds the brilliant judge from fixing society. The clever judge has every incentive to wrest himself from that chain — to find the liberating ambiguities necessary to become a benevolent social engineer.

All this brings to mind a scene from the play *A Man for All Seasons*, where Thomas More’s young protégé William Roper exclaims that he’d cut down every law in England to get to the Devil, to which More retorts: “And when the last law was down, and the devil turned on you — where would you hide, Roper, the laws all being flat? . . . [D]’you really think you could stand upright in the winds that would blow then?” The history of the world is rife with examples of well-intentioned men who, in an effort to root out some perceived social devil, sought to unchain themselves from the strictures of the law. The problem is that, when these men have succeeded in
breaking law’s binding chains, they have left citizens and countries without much protection for their lives, liberty, and property, especially when the less well-intentioned inevitably men followed.

At this point let me turn from this bleak picture to a more affirmative one. Federalist 78 long ago put its finger on the essential attribute of the good appellate judge when it called on members of the judicial branch to bear in mind the distinction between that it called the exercise of political WILL and the exercise of legal JUDGMENT, noting that judges in our constitutional system do well to avoid, quote, “the substitution of their pleasure to that of the legislative body.”

Though based on limited and anecdotal experience, I can
report from the robing room that what I see in my colleagues are men and women striving hard to live up to the promise of Federalist 78 – seeking not to impose their own will on others, but seeking instead to judge and enforce the will or intent of the People, as expressed in the text of the Constitution, the Bill of Rights and its seminal amendments, the statutes passed by Congress, or the contracts adopted by the parties. Of course, judges sometimes make mistakes. As my daughters remind me, putting on a robe doesn’t make me any smarter! But I will say that donning that robe does mean something — and not just that I can hide coffee stains on my shirts. It serves as a profound reminder to me and my colleagues of our distinctive role as judges exercising legal judgment, not as elected officials exercising political will.

My colleagues afford great respect to the elected branches
who are the primary vehicle for lawmaking. They evince appreciation for the fact that, in our federal system, the Constitution reserves certain lawmaking powers not just to the federal government but to the states. They are careful to respect our limited Article III charter to decide only “cases” or “controversies,” rather than offer our two cents whenever we happen to think we have a good idea to share. In these and many other ways large and small, my colleagues demonstrate on a daily basis a profound modesty, an appreciation of the fact that our job isn’t to add up the consequences of potential competing social rules and decide which we think is optimal, but instead to exercise legal judgment to discern and enforce the will expressed by others.

Of course, there are hard cases. Plenty of them. And judging is more of an art than some mechanical science always
yielding a single obviously right answer. So, one might ask, what are judges supposed to do when faced with, say, a cryptic congressional statute whose meaning is genuinely ambiguous? Federalist 78 suggests that it is the judge’s job to employ not their own will but the traditional tools of legal analysis – the various canons of statutory construction, rules of grammar, analogies to precedent, and the like – in an effort to discern the meaning of Congress’s commands. Of course, judges sometimes disagree about which tools of legal analysis are most helpful in the art of ascertaining Congress’s meaning in hard cases. They also sometimes disagree over the order of priority we should assign to these competing tools. And they sometimes even disagree over the results these tools yield in particular cases. But debates like these reflect a genuine concern with how we can best reach or approximate Congress’s will, not our own. So, for example, when Justices
Scalia and Breyer hold one of their debates over whether and to what degree legislative history has a useful role to play in statutory interpretation, they are arguing about the best way to discern and enforce Congress’s policy choice. They are not seeking to substitute their will for Congress’s, nor are they arguing over which policy choice they themselves prefer. Theirs is a distinctively legal dispute, not a policy dispute.

Many other features of our legal system do much to encourage this view of the good judge. One of them is the adversarial process. When I was his law clerk many years ago, Judge David Sentelle of the D.C. Circuit liked to remind me, in his North Carolina drawl, that: “In this country, Neeeilll, we have a little thing called party control of litigation.” It seems to me that the good judge recognizes that, in our adversarial process, many of the lawyers in the cases before us have lived
with and thought deeply about the legal issues for months or years before the judge ever comes on the scene. Unlike continental Europe, where the judge often charts the course of litigation in an inquisitorial search for the truth, our common law system generally affords litigants the opportunity and duty to choose which arguments to advance and how to develop the record. We usually depend on the parties rather than a judicial bureaucracy to identify, limit, and sharpen the issues for our decision. The judges I have come to know generally have a healthy dose of skepticism about their capacities to arrive at the optimal legal answer in complex cases purely by judicial self-direction. Instead, they rely heavily on you, members of the bar, as partners in the process of identifying the issues and arguments for decision.

Another constraint on the judicial function lies in the collegial
process of deciding appeals. We do not sit alone, but work in panels — or, as a veteran appellate attorney might put it, in packs. This process rewards efforts to reach consensus. Of course, consensus isn’t always possible, or even necessarily desirable. After all, who would have wanted Justice Harlan to forgo his dissent in *Plessy* calling on the Court to recognize the true meaning of the constitutional promise of equal protection under law for all persons? Or Justice Holmes to forgo his dissent in *Lochner* emphasizing that the words of the Constitution, not Mr. Herbert Spencer’s *Social Statics* nor any other popular economic theory, should guide our jurisprudence? One of the most important aspects of the judge’s role is to bear faith to the meaning of the Constitution or a statute in the face of criticism and majoritarian opposition. Ours is often a counter-majoritarian function, aimed at protecting the constitutional rights of every person,
even (and perhaps especially) in the face of strong opposition.

At the same time, the process of at least trying to obtain consensus within the court often serves to illuminate the more subtle issues, sharpen the analysis, and help guard against individual biases, temptations, and willful preferences. It also means that a nuance one colleague may miss might be captured and corrected by another colleague. And in this respect, the Tenth Circuit is particularly blessed. Even when we do not agree, our interactions and opinions are usually collegial. I think that serves the people of this part of the country well, and it is surely the envy of many of our appellate court colleagues elsewhere.

The role of precedent in our legal system also serves to constrain the good judge. While other legal systems afford
little or no deference to precedent, in our system the good judge is bound to respect and follow precedents written by colleagues who preceded us in the profession. We rightly treat these precedents as a form of intellectual inheritance, as learning handed down from those who have faced similar problems in the past, and we are obliged to give them the respect one well owes those who have come before, seen it, been there, and done that. And we remember that people presumably read these precedents, and rely on them in ordering their lives — though I do confess that I have a hard time imagining concerned citizens browsing through the Federal Reporters with their morning coffee. . . .

There are also our standards of review. Though cynics question whether they have any meaning, they have real and important meaning to the good appellate judge. Take “abuse
of discretion” review. That standard, music to the ears of many a district judge, implies a recognition that the district court frequently faces situations in which there will be a range of possible outcomes that the facts and law can fairly support. Rather than pick and choose among them ourselves, we defer to the district court’s choice so long as it falls within the realm of those rationally available under the facts and law. So, for example, in sentencing we recognize that the district court is required to balance a host of disparate considerations, ranging from the degree of the defendant’s cooperation and remorse to the need for deterring potential future offenders. And we recognize that the district court is in a far superior position to engage in this act of discretion, having had a chance to see and hear from the defendant, try the case, and listen to victims. At the same time, a district court’s discretion is neither boundless nor bounded by
appellate judges’ personal preferences. We act as a backstop by, among other things, scrutinizing purely legal questions anew, *de novo*, and by double checking to make sure the factual findings of the district court enjoy some basis in the record. As appellate judges, then, we do not cut down the thicket of law to get to the right result in a case. We do not displace the jury or the district court’s judgment with our own. We serve a backstop function, but that function requires us very often uphold decisions we would not ourselves make. And that is, I think, essential to the rule of law in the appellate system.

Ultimately, I can offer tonight only a few examples of the sorts of institutional constraints and personal characteristics of the good judge that help distinguish legal judgment from willful policy making. But there’s one more feature I would
like to comment on, given the individual we are here to honor tonight — a feature on which I think Judge Posner and I would agree.

It has to do with personal integrity. In my three years on the bench, I have served with judges who strive to leave aside their personal biases, who do not aspire to shake the earth as willful Legal Titans. I’ve witnessed men and women quietly working hard to be fair arbiters of the disputes placed before them, knowing they, like most of their cases, will soon be forgotten in the sweep of time. Judges who struggle to decide cases dispassionately, assiduously seeking to avoid the temptation to secure results they prefer. Judges who pause to ask whether the results they are reaching are self-indulgent or ones justified by the law and facts of the case. Ones who act independently, without fear of disfavor or desire for public
plaudits. Men and women who do not thrust themselves into
the limelight but who are patiently tending to the great
promise of our legal system – that all litigants, whether
popular or reviled, will receive equal protection under law
and due process for their grievances. These are judges who
realize that every case, no matter how small, matters
monumentally to the people involved. And all this, I think, is
what makes our jobs most meaningful. It is the timeless
virtue of a life well lived in the service of others in matters.

I emphasize this particular trait of the good judge tonight
because there can be few better models of it than the man we
are here to honor.

When it came to describing the personal traits a judge should
strive to embody, Socrates identified four things. None
involved the exercise of will. All involved hard-won traits of personal discipline, quiet integrity, and devotion to the good of others. As Socrates put it, a judge should hear courteously, answer wisely, consider soberly, and decide impartially.

Judge Holloway’s life and career model these traits for all of us who follow in the path he has now walked for more than forty years. His deep and honest humility won’t allow him to admit any of this. But that, of course, is the best evidence of its veracity.

In the midst of the Great Depression, as Judge Holloway’s father was wrapping up his term as Governor of Oklahoma, some of you may know that he sat down and wrote a note to his son. It was January 12, 1931, the last day the Governor was to serve in office. In his letter, the Governor related that it was the last instrument or message he would sign while he
was Governor, and he went on to say to his son that “my prayer and greatest ambition is that you may have good health and live to become a useful and upright citizen. To the accomplishment of this high purpose for you I shall devote my life. I am as proud of you as it is possible for a father to be of a son.”

I think it is safe to say that Judge Holloway has not just met, but surely exceeded, his father’s aspirations for him. And how many better things than that can be said about any man’s life?

Thank you for allowing me to be here with you tonight. Please would you now join me in recognizing the man we all admire so much? Judge William Holloway.
MUSINGS ON THE STATE (DISREPAIR?) OF THE BENCH-ACADEMY
RELATIONSHIP

UNIVERSITY OF COLORADO SCHOOL OF LAW

FACULTY TALK - APRIL 21, 2009

IN 1993, WHILE I WAS SERVING AS A LAW CLERK TO JUSTICE WHITE AND IN THE MIDDLE OF A DPhil PROGRAM, THE MICHIGAN LAW REVIEW PUBLISHED A STINGING INDICTMENT OF LEGAL SCHOLARSHIP PENNED BY JUDGE HARRY EDWARDS OF THE DC CIRCUIT. JUDGE EDWARDS COMPLAINED THAT LEGAL SCHOLARSHIP WAS NO LONGER RELIED ON – OR EVEN READ BY JUDGES – IT WAS TOO FOCUSED ON WHAT HE CALLED “IMPRactical” THINGS. INDEED, HE WENT SO FAR AS TO SAY THAT LAW SCHOOLS HAD, QUOTE, “ABANDONED THEIR PROPER PLACE, BY EMPHASIZING ABSTRACT THEORY AT THE EXPENSE OF PRACTICAL SCHOLARSHIP AND PEDAGOGY.” JUDGE EDWARDS WAS ESPECIALLY CRITICAL OF THE TREND IN FAVOR OF MAKING LAW SCHOOLS LOOK LIKE
GRADUATE SCHOOLS – NOT ONLY IN THEIR CURRICULA, BUT IN THEIR FACULTY. THE “LAW &” MOVEMENT WAS THE CHIEF CULPRIT HERE, HE THOUGHT. A PROFESSOR WITH A J.D. ALONE WOULD DO POOR ECONOMIC WORK, WHILE AN ECONOMICS PH.D. MIGHT NOT KNOW OR CARE ENOUGH ABOUT THE NUTS AND BOLTS OF LEGAL DOCTRINE.

JUDGE EDWARDS’S ARTICLE OF COURSE PRODUCED QUITE A REACTION. THE MICHIGAN LAW REVIEW PROMPTLY PUBLISHED A SYMPOSIUM VOLUME FULL OF RESPONSES TO THE INDICTMENT. JUDGE POSNER, NATURALLY, WROTE IN DEFENSE OF ABSTRACT SCHOLARSHIP. HE ASKED US TO IMAGINE WHETHER THE LEGAL PROFESSION WOULD REALLY BE BETTER OFF WITHOUT BRUCE ACKERMAN, RONALD DWORKIN, DUNCAN KENNEDY, AND JAMES BOYD WHITE. (I THOUGHT THAT RESPONSE WAS PRETTY GOOD.) GEORGE PRIEST DEFENDED INTERDISCIPLINARY WORK.
ONE OF THE MANY WHO RESPONDED TO HARRY EDWARDS WAS PROFESSOR PIERRE SCHLAG. AND AS YOU MAY KNOW, PROFESSOR SCHLAG HAS JUST WRITTEN A NEW ARTICLE IN THE GEORGETOWN LAW JOURNAL ELABORATING HIS OWN INDICTMENT OF THE LEGAL ACADEMY. IT HAS THE FOLLOWING FANTASTIC TITLE: “SPAM JURISPRUDENCE, AIR LAW, AND THE RANK ANXIETY OF NOTHING HAPPENING (A REPORT ON THE STATE OF THE ART).” IT IS ONE OF THE MOST ENTERTAINING LAW REVIEW ARTICLES I’VE READ IN A LONG WHILE, LITERATE, INFORMAL, FUNNY, CAUSTIC, AND INSIGHTFUL ALL AT THE SAME TIME. IN ONE SENSE, HOWEVER, THE ARTICLE IS SIMILAR TO JUDGE EDWARDS’S PIECE: BOTH ARGUE THAT MOST LEGAL SCHOLARSHIP AND LAW REVIEW ARTICLES THESE DAYS ARE PRETTY WORTHLESS.
But there the similarity ends. Professor Schlag is not on board with Judge Edwards’s project of helping judges or legislators or other governmental officials do their job. In fact, he argues that one of the principal reasons legal scholarship is so tedious, and even intellectually stultifying, is its similarity to judicial writing. He points out, rightly, that in a courtroom, even the most interesting legal questions must be ultimately reduced to “affirmed” or “reversed.” When every intellectual inquiry can only result in the same two answers, one could fairly question how intellectual the inquiry ever was in the first place. And yet, he says, academic legal writing is modeled on this reductionist paradigm—much as playing the air guitar is modeled the real thing.
HE ALSO ARGUES THAT NOT MUCH DOCTRINAL, PRACTICAL SCHOLARSHIP IS ACTUALLY NEEDED. THE LANGDELLIAN PROCESS OF COMPILING AND DISTILLING CASES INTO TREATISES NEED ONLY OCCUPY THE ATTENTION OF MAYBE SIX PEOPLE PER FIELD. THE REST OF US SHOULDN’T BOTHER.

PROFESSOR SCHLAG WOULD HAVE US OVERTHROW THE PREVAILING NORM IN LEGAL SCHOLARSHIP AND REPLACE IT WITH SOMETHING GRANDER, SOMETHING LESS CONFINING. IT ISN’T ENTIRELY CLEAR WHAT THAT WOULD BE, BUT ONE POSSIBILITY IS PERFORMANCE ART. “SPAM JURISPRUDENCE” IS ITSELF A MAGNIFICENT PERFORMANCE. IT IS SURELY THE FIRST LAW REVIEW ARTICLE WITH AUTONOMOUS FOOTNOTES NAMED DANIEL. IN HIS SPACE BELOW THE LINE, DANIEL SCORNFULLY MOCKS THE AUTHOR’S TEXT WHILE PROUDLY CLAIMING TO BE NOT ONLY THE FIRST AUTONOMOUS FOOTNOTE EVER, BUT (UNDoubtedly) THE

-5-
FIRST AUTONOMOUS *gay* footnote. If nothing else, Professor Schlag has accomplished one thing he set out to achieve: this is surely not an emulation of the judicial task! I doubt that I or any of my colleagues – despite whatever pressure is brought to bear on us by our clerks – will soon publish an opinion with sentient footnotes that make fun of our efforts at judicial insight.

So between Harry Edwards and Pierre Schlag, legal scholarship seems besieged on both sides. On the one account, it is too impractical these days to aid judges. On the other, it is too practical to be edifying. After only 2 ½ years on the bench, I can’t say my views on all this are fully formed. But at least for now I cannot quite sign on to either critique. Instead, I’d like to suggest something of a middle course.
I SHOULD BEGIN BY SAYING THAT I HAVE BECOME MORE
SYMPATHETIC TO JUDGE EDWARDS’S POSITION SINCE BECOMING A
JUDGE. WHEN HIS ARTICLE FIRST APPEARED, FRANKLY, I
SYMPATHIZED WITH HIS TARGETS. WHAT MIGHT BE LABELED
ABSTRACT THEORY HELD MY ATTENTION AS A STUDENT IN A WAY
THAT THE MOST PRACTICAL THINGS – THINGS I FELT THERE WOULD
BE TIME TO LEARN LATER – SOMETIMES DID NOT. I WAS IN THE
MIDDLE OF A DPHIL THAT I UNDERTOOK AFTER LAW SCHOOL
PRECISELY FOR THIS REASON – NOT BECAUSE I THOUGHT AN
ADVANCED UNDERSTANDING OF THE DWORFIN OR RAZ WOULD
HELP ME WIN CASES. SO YOU MIGHT SAY THAT I WAS NOT DISPOSED
TO AGREE WITH JUDGE EDWARDS’S VIEW.

BUT AFTER BEING AN APPELLATE JUDGE FOR A COUPLE YEARS
NOW, I HAVE COME TO THINK HARRY HAD SOMETHING MORE OF A

* * *
point than I first gave him credit for. The truth is that we judges encounter a number of cases every year that would greatly benefit from the kind of practically oriented scholarship Judge Edwards is after. It always happens that, by summer, there are one or two opinions that have been on my desk since fall. Cases with open, important questions calling for scholarly attention. When I send my clerks looking for that scholarship, as I always do in those cases, it usually turns out that there’s nothing that helpful in the law reviews. And that’s not because the questions are obscure or insignificant. We’re talking here about constitutional or other significant questions that have split the circuits – questions that entail real consequences for lots of real people.

* * *

-8-
So how did we get here? I mean to ask a descriptive question: why isn’t there more doctrinal, practical scholarship these days? I’m not sure there is a complete answer. But we judges who’d like to see more of it should probably look inward first before looking to blame the academy for not doing things as we’d like.

The truth is we don’t create much demand for it. Judges don’t cite secondary literature much these days, and (perhaps as a result) the amount of literature directed to us is marginally reduced. I should add that there may be a good reason for this reluctance. When I mentioned this talk to my friend John Goldberg at Harvard, he made what I thought was an interesting observation: even doctrinal scholarship has grown increasingly contentious. It used to be that there was a
leading treatise in a field. Wigmore on Evidence. Prosser & Keeton on Torts. Areeda on Antitrust. Judges knew who the authorities were, and trusted what they said. But today, often scholarship is deliberately focused on the novel and the controversial rather than on the project of assimilation and distillation. And it is not unknown that many judges prefer their opinions to read more like papal pronouncements than anything else: infallible and inevitable. The average judge may not be inclined to wade into protracted law review debates and rely on hotly contested and deliberately provocative scholarship. Certainly doing so doesn’t enhance the sense inevitability so many judges like to engender in their opinions.

Now, Judge Brett Kavanaugh of the DC Circuit learned this lesson the hard way during his one and only
ORAL ARGUMENT AT THE SUPREME COURT. HE WAS ARGUING FOR THE GOVERNMENT IN Swidler & Berlin v. United States, a case concerning at one level the death of Vince Foster and at another a question of the law of evidence – namely whether the attorney client privilege survives the client’s death. Brett lost 9-0. Wigmore might have been more helpful.

He began his argument by saying:

“PETITIONERS’ THEORY WILL LEAD TO QUOTE ‘EXTREME INJUSTICE.’ NOT OUR WORDS, THE WORDS OF Mueller & Kirkpatrick.”

Chief Justice Rehnquist interrupted to ask in the way only he could, “WHO ARE Mueller AND Kirkpatrick?”

Brett responded, “THEY ARE TWO COMMENTATORS ON THE LAW OF EVIDENCE.”

The Chief, said: “Oh.”

And Justice Stevens piped in “THEY’RE NOT QUITE AS
WELL KNOWN AS PROFESSOR WIGMORE.”

THE HOPELESS INDETERMINACY OF CONSTITUTIONAL THEORY inspired Larry Tribe to abandon updating his con law treatise. I can’t say I blame him. Much of normative constitutional theory is impenetrable, and some of it impossible to reduce to a holding. For example, Professor Tribe’s new book depicting the “Geological Construction” and the “Gravitational Construction” of our Constitution. Even if I could understand this, I am doubtful I could reduce it to a legal rule.

There are also institutional factors in play. Surely Judge Edwards is right that the influx of Ph.D.’s into the legal academy plays a role. I don’t buy his implicit suggestion that Ph.D.’s without J.D.’s aren’t careful
LAWYERS. OR AT LEAST I SHOULD SAY I HOPE THIS ISN’T THE CASE, AT LEAST ALWAYS. BUT IT IS SURELY TRUE THAT THOSE WITH DOCTORATES MAY BE INTERESTED IN WRITING ABOUT THE SORTS OF THINGS JUDGE EDWARDS FINDS UNHELPFUL. AS J.J. WHITE (OF WHITE & SUMMERS) POINTED OUT, EVEN IF A POLITICAL THEORY PH.D. TEACHES A FIRST YEAR TORT CLASS, HIS OR HER SECOND COURSE IS LESS LIKELY TO BE BANKING LAW THAN LAW & POLITICAL THEORY. THAT PRODUCES NOT ONLY LESS BANKING LAW SCHOLARSHIP, BUT – HERE I’M SURMISING – FEWER STUDENTS WHO GROW UP TO LOVE BANKING LAW AND WRITE ARTICLES ABOUT IT. AND FEWER STUDENTS ON LAW REVIEWS WHO ARE INTERESTED IN PUBLISHING THOSE ARTICLES.

THERE’S ALSO THE PRESTIGE THING. GIVEN IT’S SOCIAL HEGEMONY, IT’S ODD HOW INSECURE OUR DISCIPLINE CAN BE ABOUT ITSELF. LAWYERS CRAVE RESPECT AS SCHOLARS, NOT JUST
professionals. And the more we produce stuff that looks like traditional humanities work — and hire junior faculty that do — the more scholarly we seem. “Seem” may be the key. In an age of U.S. News and citation counts, law schools need to seem prestigious as much as be prestigious. Perhaps the average constitutional theory piece is more likely to get published in the Columbia Law Review than an equally good banking law piece; that encourages faculties to produce more of the former and less of the latter.

Finally, there’s money. Law professors used to make a lot less money than they do now. And, I’m told, treatise writing was a helpful supplement to a professor’s income. Nowadays legal faculty do all right; it’s not private practice, to be sure but it’s enough to drive colleagues in
THE HUMANITIES DEPARTMENTS (TO SAY NOTHING OF JUDGES) TO
envy. The financial incentives to produce Langdellian
compilations of law are at least marginally reduced.

* * *

So what to do about all this? Well, I’m trying to do
my part. I look for good secondary scholarship and cite it
often. I am told by a helpful intern that in my last 53
published opinions, I have cited 98 times to secondary
sources, including 39 law review articles or notes. Even if
I don’t discuss them at length, I try to cite the articles I
found helpful to my understanding. Hopefully, it
encourages a few more of those articles to be written.
For example, I’m working on an opinion now, on a
contentious criminal procedure question, that relies
heavily on academic scholarship to reach our result. I
NEEDED THAT SCHOLARSHIP NOT TO DEFEND AN ANSWER I HAD IN
MIND, BUT TO FIGURE OUT \textit{what} the right answer was. It made
my job easier, and, I hope, made my work product better.

BY CONTRAST, I HAVE ANOTHER OPINION ON MY DESK RIGHT
NOW, INVOLVING AN ARCANE QUESTION OF CIVIL PROCEDURE THAT
HAS VEXED MANY OF OUR SISTER CIRCUITS. \textbf{There is no helpful}
scholarship out there at all. \textbf{There is some stuff that}
describes the existence of the circuit split. \textbf{Great. Very}
helpful. \textbf{What would have been useful is some rigorous}
historical and theoretical analysis wedded to doctrine. I
can devote a few hours a week to this question, every week
for a few months, until I have enough confidence to say
\textbf{“AFFIRM” or “REVERSE.”} \textbf{But as one of my colleagues}
likes to say, this job is like being in the engine room of a
large ship. \textbf{You wake up in the morning to a pile of coal.}

-16-
You spend all day shoveling it into the engine. You finish the day well pleased with yourself for having cleared the deck. But the next day it starts all over again. The coal keeps coming. You have to keep shoveling. The academy of course affords far more opportunity for reflection and depth than any judge can hope to achieve. A really sharp article on the subject, untangling all the knots, would have been tremendously useful. But none exists.

And the thing is: there are tons of these cases. Every year, my law clerks say the same thing at the end of the clerkship: “Judge, I’ve got two or three really good articles out of this year.” These articles make themselves apparent from our work on a daily basis. At the bar, Tom Goldstein, a founder of SCOTUSBlog and a leading Supreme Court practitioner, made his career by searching
FOR UNRESOLVED CIRCUIT SPLITS, CALLING UP THE LAWYERS IN THOSE CASES, AND OFFERING TO WRITE THE CERT. PETITIONS FOR LITTLE OR NOTHING. IN NO TIME HE HAD A BOOMING SUPREME COURT PRACTICE, THE ENVY OF MORE SENIOR AND SEASONED COLLEAGUES ACROSS THE COUNTRY. AN ASSISTANT PROFESSOR OF LAW COULD DO SOMETHING SIMILARLY ENTREPRENEURIAL. IT’S NOT JUST DISCRETE QUESTIONS, EITHER. THERE’S GOOD TREATISE WORK TO BE DONE. PROFESSOR SCHLAG TELLS US WE ONLY NEED SIX TREATISE WRITERS PER SUBJECT; I’M NOT SO SURE WE EVEN HAVE THE SIX. TO TAKE BUT ONE EXAMPLE, PROSSER & KEEFTON ON TORTS HASN’T BEEN UPDATED SINCE 1984. NOW, ALL THIS SN’T TO SAY ONE SHOULD WRITE DOCTRINAL STUFF ALL THE TIME; BY ALL MEANS, TELL ME ABOUT LAW & DICKENS IF YOU’RE SO INCLINED. I’LL READ IT FOR PLEASURE. BUT, RESPECTFULLY, PLEASE ALSO CONSIDER THROWING US SOME HELP OCCASIONALLY,
THE SORT OF NUTS AND BOLTS WORK I’M DESCRIBING HERE IS “GOOD” WORK. I MEAN THAT IN THE SENSE OF BEING AT LEAST REASONABLY VIRTUOUS. IN HIS ARTICLE, PROFESSOR SCHLAG QUESTIONS WHETHER “HELPING OUT APPELLATE COURTS”, WHAT HE CALLS QUOTE “FREE-LANCING FOR THE STATE,” IS REALLY A WORTHWHILE THING TO DO. (IN FAIRNESS TO HIM, I SHOULD SAY THAT IT WAS NOT SO MUCH PROFESSOR SCHLAG AS THE SKEPTICAL FOOTNOTER, DANIEL, WHO RAISED THE QUESTION.) I BELIEVE IT IS. I’M WILLING TO CONCEDE TO DANIEL THAT THE ACADEMIC STUDY OF LAW, JUST LIKE ANY OTHER PURSUIT IN LIFE, CAN DEADEN THE SOUL IF UNDERTAKEN FOR THE WRONG REASONS OR IF LEAVES ONE
WITHOUT ANY SENSE OF HIGHER PURPOSE. BUT HELPING OUT YOUR NEIGHBORHOOD JUDGE IN RESOLVING THE HARD STUFF IS NOT REALLY SERVICE TO SOME DETACHED “STATE” OR “GOVERNMENT.” IT’S SERVICE TO THE COMMUNITY – TO THE POLITY, WHAT ARISTOTLE WOULD CALL AN ESSENTIAL PART OF A GOOD LIFE.

I MUST CONFESSION THAT PROFESSOR SCHLAG IS RIGHT THAT THIS SERVICE IS NOT ALWAYS INTELLECTUALLY LIBERATING. NEITHER IS WHAT I DO. BUT IT CAN BE A COMPONENT OF A BALANCED GOOD LIFE. BESIDES, NOT OF ALL OF US CAN BE GREAT. MOST OF US MUST BE CONTENT WITH BEING MERELY GOOD. ABRAHAM LINCOLN, IN HIS FAMOUS SPEECH TO THE YOUNG MEN’S LYCEUM IN SPRINGFIELD, MADE THIS POINT, IF ADMITTEDLY IN A DIFFERENT CONTEXT. HE SAID THAT THE FRAMERS HAD ACHIEVED GREATNESS AND GLORY BY ERECTING “A POLITICAL EDIFICE OF LIBERTY AND EQUAL RIGHTS.” IT WAS NO LONGER POSSIBLE TO BE GREAT BY
BUILDING UP; THEY HAD ALREADY DONE THAT. INSTEAD,

AMBITION MEN, SEEKING GLORY AS AN END, WOULD TURN TO
TEARING DOWN. LINCOLN WARNED THAT THIS COULD ONLY BE
PREVENTED BY ENSURING THAT WE WERE A NATION OF GOOD MEN:
INTELLIGENT, MORAL, AND RESPECTFUL OF THE CONSTITUTION AND
THE RIGHTS IT ENSHRINES. I DO NOT MEAN TO SAY, AS LINCOLN
DID, THAT OUR LAWS ARE PERFECT OR EVEN ALWAYS VERY GOOD.
OR THAT AMBITIOUS MEN WILL TRY TO OVERTHROWN THEM. BUT I
DO MEAN TO SAY THAT A GOOD LIFE DOES NOT REQUIRE
REVOLUTIONARY ACTS. A PROFESSOR DOES NOT CONDESCEND
WHEN HE WRITES SOMETHING THAT AIDS THE JUDGE.

BEFORE I FINISH THIS OVERLONG PLEA FOR HELP AND SIT
DOWN, I SHOULD ADD ONE MORE THING. ASIDE FROM LEGAL
SCHOLARSHIP, THERE IS ANOTHER AREA IN WHICH WE COULD USE
YOUR ASSISTANCE. CLINICAL WORK. STUDENT ADVOCATES ARE
OFTEN EXCELLENT, AND INDEED OFTEN BETTER THAN SOME OF THE PRACTITIONERS WE SEE. I’D LIKE TO ENCOURAGE YOU ALL TO SEND US SOME CU STUDENTS IN THE 10TH CIRCUIT. WE SEE SOME FROM OTHER SCHOOLS, BUT WOULD LOVE TO SEE MORE FROM CU. IN PARTICULAR, I KNOW THERE’S A GAPING NEED IN IMMIGRATION LAW. IMMIGRATION APPEALS OFFER GREAT EXPERIENCE IN THE COURT OF APPEALS. THE LAW IS OFTEN INTERESTING, AND THE IMMIGRATION LAWYERS WE SEE ARE NOT ALWAYS GREAT.

THANKS.....
Ten Things to Do in Your First Ten Years of Practice

Speech Given at Florida State University Law School (05-03-08) and various other times

[thank yous]

When I was invited to speak with you, the question arose: What fascinating legal topic would new law school graduates want to hear about? Maybe the fine points of the Rule Against Perpetuities? The fertile octagenarian? Perhaps the thrilling opinions I’ve written lately? Or if you stayed up late reading those opinions, perhaps you might consider my recent book on assisted suicide? But then I thought: Why spoil such a beautiful Spring day? . . .
So how about a little more practical advice?

With a nod to David Letterman, here’s a Top Ten List of Things You Should Do in Your First Ten Years after leaving law school….

Number 10: Get in the Game.

Some of you will become corporate or appellate or public policy lawyers. And those are great and rewarding careers.

But if I had to guess, most of you came to law school with at least a twitch of a desire to try cases, perhaps inspired by Boston Legal or Law & Order … or maybe misled by them.

Whatever your ultimate speciality, trying a case from soup to nuts is one of the great thrills of the practice of law. And know this: You can do it.
Sure, you’ve spent three years reading a lot of appellate opinions and scholarly articles. And saying you learned how to win a jury trial in law school is sort of like saying you learned how to play baseball from George Will’s book or Ken Burns’s documentary.

But a trial isn’t rocket science. You don’t need to be 60 years old to be effective. If you’re willing to immerse yourself in the law and the facts of your case, and if you’re willing to take guidance from those who’ve been in the trenches before, there’s no reason why you can’t be an effective trial lawyer right out of the gate.

One of my last trials in private practice was a $20 million fraud dispute. I asked a 3 month lawyer to help, gave her witnesses and arguments. She did a
BRILLIANT JOB..... TRUE, SHE DIDN’T SLEEP FOR A MONTH....

BUT SHE DID DO A BRILLIANT JOB – AND YOU CAN TOO.

Now, to be sure, standing up in court can be scary. I remember my first case in private practice. I was told to argue motions and prepare for trial a $80 million fraud claim. I had little idea what I was doing. OK, no idea. But I had a great mentor, and worked day and night. And when time came to go to court for this or that motion, I would often rent a car (I was too poor to own one) to drive the 80 miles to the county courthouse by myself. The other side would show up with a phalanx of lawyers, sometimes in a limousine. My knees were knocking in court. BUT BOY IT WAS FUN.
NUMBER 9: LEARN TO WIN – AND LOSE – GRACIOUSLY.

THE FIRST PART IS OF COURSE THE EASIER PART. WE CAN ALL AT LEAST SEEM GRACIOUS WHEN WE’RE WINNING. THE OTHER PART OF THE EQUATION REQUIRES A LOT MORE EFFORT, AND A SENSE OF ETHICS. ASK THE SEVERAL PROMINENT NATIONAL LAWYERS WHO’VE BEEN IN THE HEADLINES RECENTLY FOR TRYING TO BRIBE JUDGES OR PAY OFF WITNESSES. THEY HAD GLITTERING CAREERS AT THE TOP OF THE PROFESSION, BUT THEIR INDICTMENTS FOR CUTTING ETHICAL CORNERS -- BEING UNWILLING TO LOSE GRACIOUSLY WHEN THE LAW REQUIRED IT -- LEAVE BEHIND A STAIN ON THEIR CAREERS THAT MUST BE HARD TO BEAR. CAUTIONARY TALES FOR ALL OF US.

WHAT DO I MEAN BY ETHICS? WELL, I DO NOT MEAN THE FILL-IN-THE-BUBBLE ETHICS PROFESSIONAL ETHICS EXAM YOU WILL TAKE. (YOU WILL HEAR THE JOKE ABOUT
THAT EXAM – THE RIGHT ANSWER SEEMS ALWAYS TO BE THE SECOND MOST ETHICAL CHOICE.)

INSTEAD, I MEAN WHAT ARISTOTLE MEANT BY ETHICS, AND WHAT MY COLLEAGUE JOHN KANE MEANS BY THE TERM WHEN HE SPEAKS ON THIS SUBJECT -- A STATE OF CHARACTER DISPLAYED IN GOOD, THAT IS MORALLY UPRIGHT, ACTIONS. ACTIONS CONSISTENT WITH BASIC HUMAN GOODS AND THE GOLDEN RULE. OR, TO TAKE A MORE PRACTICAL DEFINITION, WHEN IN DOUBT ASK YOURSELF – WOULD YOUR GRANDMOTHER APPROVE OF YOUR BEHAVIOR?

YOU WILL FACE MANY ETHICAL CHALLENGES IN THE PRACTICE OF LAW. I GUARANTEE IT. IF OPPOSING COUNSEL BEHAVES INAPPROPRIATELY, YOU WILL BE TEMPTED TO RESPOND IN KIND. YOUR CLIENTS AND COLLEAGUES MAY EVEN ENCOURAGE YOU TO DO SO.

AND IT'S EASY TO FALL INTO THE TRAP. NO ONE IS PERFECT AFTER ALL; WE ARE ALL HUMAN. AND NEITHER IS
THE PRACTICE OF LAW SUPPOSED TO BE A GAME OF
TIDDLYWINKS. IT IS AN ADVERSARIAL PROCESS AND
DISAGREEMENTS ARE THE REASON WHY OUR PROFESSION
EXISTS. BUT IT IS POSSIBLE TO DISAGREE WITHOUT BEING
DISAGREEABLE.

CONSIDER. OPPOSING COUNSEL SHADES FACTS OR CASE
HOLDINGS IN HIS OR HER BRIEF. HOW TEMPTING IS IT TO
RESPOND BY CALLING THAT A “LIE,” RATHER THAN SIMPLY
POINT OUT THAT COUNSEL ERRED AND THEN CITE THE TRUE
FACTS AND LAW TO THE COURT? OR OPPOSING COUNSEL
WON’T PRODUCE BASIC MATERIALS IN DISCOVERY, YET
DEMANDS MASSIVE DISCOVERY FROM YOUR CLIENT. YOUR
CLIENT DOESN’T WANT TO INCUR THE EXPENSE OF PROVIDING
DISCOVERY WITHOUT GETTING SOMETHING IN RETURN. HOW
EASY IS IT TO REFUSE PRODUCTION AND ENGAGE IN A GAME
OF TIT FOR TAT?
At the end of the day, however, your integrity—your state of character, as Aristotle would have it—is among the most valuable things in your possession. Not the money or the clients, the wins or the losses.....The reward of ethical practice is the ease of mind you will enjoy when you go to sleep, when you tell your children about your career, when you retire with a clear conscience. And, let me assure you, these are no small things....

So, try hard to keep watch of the state of your character. And remember the scene in Robert Bolt’s play A Man for All Seasons when Thomas More is betrayed by his protégé, Richard Rich. After Rich offers perjured testimony at the trial against More, More sees Rich wearing a new chain of office – one that signifies Rich has become Attorney General for the relatively small principality of Wales. More
asks, “Richard, the Lord said that it did not profit a man to gain the whole world if he lost his soul. The whole world, Richard … but [to do it] for Wales?”

Today, we might ask ourselves: our soul for a lousy discovery motion? Even a trial? Or an appeal?
Number 8: Take a risk.

If you’re headed into private practice with a large firm, you will find the golden handcuffs are real. And they get tighter over time, as your income increases and you take on responsibilities for feeding other people, both at home and at the office. Nothing is wrong with that. It is the nature of life, and we all have obligations to take care of those who depend on us.

We lawyers are also a risk averse lot. That’s why so many of us went to law school in the first place – because it was a “safe” option.

But don’t always succumb to the most obvious path. You don’t want to find yourself headed into retirement wondering: What if you had run for office? Started your own law firm? Joined that nonprofit? Give those things a try. A law degree
GIVES YOU A TREMENDOUS SAFETY NET, A MARKETABILITY, EVEN IF YOUR RISK DOESN’T ALWAYS PAN OUT.

WHEN I CAME OUT OF LAW SCHOOL, I THOUGHT ABOUT JOINING AN ESTABLISHED FIRM. THEN A NEW AND VERY SMALL LITIGATION SHOP APPROACHED ME, ONE THAT FEW HAD HEARD OF AT THE TIME. I WAS INTRIGUED BY THE OPPORTUNITY THE FIRM OFFERED FOR A YOUNG PERSON TO GET LOADS OF EXPERIENCE. BUT I WONDERED: WHAT IF THIS LITTLE SHOP DIDN’T MAKE IT? THE ANSWER I RECEIVED FROM A GOOD FRIEND STICKS WITH ME: WHAT’S THE WORST CASE? GIVE IT A TRY FOR TWO YEARS AND IF THE FIRM FAILS, ONE OF THOSE BIG PLACES WILL STILL HAVE YOU. GOOD ADVICE THEN. GOOD ADVICE NOW.
Number 7: See the world.

There are two great times in life to see the world: When you’re a poor student and don’t need the comforts, or when you retire and can afford them. In between, the demands of a busy career and even busier little ones running around make travel difficult. Ask any parent who spends a long flight with a screaming child, trying to change a diaper while wedged into one of those airplane bathrooms.

If you haven’t had a chance to see a bit of the world, now’s your chance. Don’t wait until you’re 65, or 67 or whatever it is... Heck, by the time you retire, Social Security will probably have you working until you’re 80.

The simple fact is, most employers don’t care whether you start work in August or December. But
THOSE FEW MONTHS COULD GENERATE SOME OF YOUR FONDEST MEMORIES, AND BEST EXPERIENCES IN LIFE. I TOOK SOME TIME OFF AFTER LAW SCHOOL TO STUDY IN ENGLAND AND WOUND UP ENGAGED TO A BRITISH WOMAN [WHO IS NOW MY WIFE AND THE MOTHER OF MY TWO CHILDREN]. BEST FORTUITY IN MY LIFE. WHO KNOWS, TRAVEL MIGHT YIELD YOURS TOO.
Number 6: Write something significant.

Lawyers are writers. The written word is the dominant tool we use to persuade judges or close a deal. Doctors have their stethoscopes and knives. Engineers have their calculators and cranes. For better or worse, we have our laptops and Blackberries.

You will experience a lot in this profession, become an expert in a field, and a good deal of wisdom will reside in your heads. Please take the time at some point along the way to write it down. There’s no better way to share your learning with those who will follow you in the profession. And there’s no better way to educate the generalist judges who do not operate in your specialized field every day.
I suspect you will also find the process of writing something significant to be a great reward. Contributing to the development of a field of law, or to the solution of a contemporary social problem, you will be surprised the influence your written word can have.
Number 5: **Pro Bono is pro bono publico – and pro bono for you, too**

You will find it easy enough to sell every hour of your professional time to companies or millionaires and billionaires. Lord knows, they have their troubles, need your help, and will pay you well for it.

But find the time to take on other clients. You can eliminate your fee, or work out some creative alternatives. You will find the time spent representing worthy individuals and non-profits incredibly rewarding. From those seeking asylum in this country, to criminal defendants proceeding pro se on appeal, to litigation work for non-profits operating on a shoestring budget, all need desperately access to the skills you’ve learned in law school. And helping them will benefit you too.
YOU WILL FEEL MORE GROUNDED AS A PERSON, MORE A PART OF YOUR COMMUNITY. AND THE PSYCHIC INCOME IS REAL: MOST OF THESE CLIENTS WILL BE GRATEFUL FOR YOUR HELP BEYOND YOUR IMAGINATION.
Number 4: Relish your friendships developed here in law school.

It’s hard to pick out the best thing about law school – the professors, the time to think hard about new concepts and ideas, the opportunity to learn new skills. But maybe the best thing of all are your classmates. You’re surrounded by an amazing group of people who will go on to do great things. Among those at law school with me, as it turns out, were a future Solicitor General of the United States, the head of the Republican party, a current Democratic presidential candidate, not to mention loads of law professors and judges. Now, not every one of these folks was among my close friends at law school, but what a collection of interesting people. Relish your friendships from law school. They will be some of your most lasting treasures from your time here.
Now, I know you will respond: but I’m looking forward to having memories of law school fade away as quickly as possible! And fair enough. After all, some things are best forgotten. But don’t forget your friends. You will enjoy watching them, their families, and their careers unfold almost as much as your own.
Number 3:  Find a passion outside the law.

We all hear the tales of the fantastic young lawyer who died of a heart attack at 44. He was super at what he did, but that’s all he did. No sports, no hobbies, just a grind. Beware.

Now, I readily concede that hard work is inevitable in the profession you’ve chosen -- especially if you want to be any good at it. She who works hardest often produces the best results.

But at the same time, a life in the law doesn’t mean your life has to be the law. You will enjoy your profession (not to mention your life) much more if you also pursue a passion outside the law. You may even be a more successful lawyer for it. Clients and jurors, after all, are real people and they relate to real and balanced people.
Whether it’s flying or fly fishing, skiing or squash, find something you love. If you already have a passion, don’t forget it in the first few years of practice. Keep at it. If you don’t have something you’re wild about yet, it’s hardly too late. But take up that new sport or activity now. Let me assure you, it doesn’t get easier with age.
Number 2: A don’t.

I’ve tried to focus on things you should considering doing -- the “dos,” if you will -- rather than dwell on the negative, the things you shouldn’t do. But let me mention just one here.

Please don’t take yourself too seriously. Law school gives you many skills, but there are a lot of mighty smart people out there who didn’t go to this esteemed law school, or any law school at all. Some of the wildest trial lawyers I know went to law schools you probably turned down, and I have learned as much or more from them as I ever did from those with fancier degrees.

Many of the most creative, entrepreneurial clients I represented also never went to graduate school or even college. Some dropped out of high school. Just because they don’t speak our legal
LANGUAGE DOESN’T MEAN THEY ARE ANY LESS ABLE. FAR FROM IT.
** * **

And now, **finally**, the *Number 1 thing you should do during the first ten years after leaving law school* (*Letterman would have a nice drum roll about now*) – Remember why you came here in the first place.

Did you come to law school to make money or make a difference? I **suspect** it was to make a real difference in your community and the world around you. Don’t forget that.

One of the great things about the legal profession is the many ways in which you can use your knowledge to make such a large and positive public contribution. Lawyers have shaped this country since its founding. Thirty-five of the 41 signors of the Declaration of Independence had legal training.
AND PUBLIC SERVICE IS, I THINK YOU WILL FIND, THE MOST REWARDING THING YOU CAN DO WITH YOUR LAW DEGREE. I CAN TELL YOU THAT 7 AM MEETINGS AT THE DEPARTMENT OF JUSTICE WERE ALWAYS EASY FOR ME TO MAKE.

ALSO, PLEASE DON’T FORGET TO AIM HIGH. IF YOU DON’T TACKLE THE ISSUES FACING OUR COUNTRY TODAY—ITS DEBTS, ITS WARS, ITS SOCIAL, LEGAL, AND ENVIRONMENTAL PROBLEMS—SOMEBODY ELSE WILL. AND THE RISK IS THAT IT WILL BE SOMEBODY LESS CAPABLE. SO PLEASE DON’T WORRY ONLY ABOUT MAKING MONEY AND “CHECK OUT” OF CIVIC SOCIETY AND OUR GOVERNMENT. IF YOU DO, OTHERS WILL SURELY CHECK IN. AFTER ALL, AS THE SAYING GOES, SOMEBODY HAS TO RUN THE ZOO. FOR THE GOOD OF OUR COUNTRY, I HOPE IT WILL BE YOU....

THANK YOU FOR ALLOWING ME TO SHARE THIS HAPPY DAY WITH YOU. IT’S BEEN A GREAT PLEASURE.
I’ve been asked to share some reflections about my first year and a half on the bench. Now, that seems to be a perfect way to spoil this beautiful day. So head for the exits while you can.... No takers? Well, you’ve been warned and here goes.

* * *

Of course, after just 18 months on the bench, any reflections I might offer are necessarily tentative. I have, after all, wise colleagues who have served as judges for longer than I’ve been alive. Your own alumnus, Robert McWilliams, a very wise judge, has, in fact, been on the bench for almost 60 years. And that came after a highly successful tenure as Denver District Attorney and a turn in private practice. Judge McWilliams was a great friend of my grandfather, himself another proud DU Law alumnus who serves as one of my great models in the law and in life. But as you can see, a healthy dose of skepticism about me having any great insights on the topic you’ve set before me is well warranted.
With that caveat, though, here’s what I might – tentatively – offer. It starts, as it should, with our Constitution. The Constitution requires judges to strike a delicate balance. The separation of powers embodied in our founding document provides the judiciary with a limited charter. Judges must allow the elected branches of government to flourish and citizens, through their elected representatives, to make laws appropriate to the circumstances of the day. Endowed with the power of judicial review – the right to have the last word on the meaning and application of the Constitution – we must beware of the temptation to usurp the roles of the elected branches; in judging we must appreciate the advantages democratic institutions have in crafting and adapting social policy, as well as their special authority, derived from the consent and mandate of the people, to do so. As Hamilton put it in Federalist 78, if the courts “should be disposed to exercise [political] WILL instead of [legal] JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.” Think here of the paradigm case in our history exemplifying the point – Chief
Justice Taney who thought the Court in *Dred Scott* could “solve” the slavery problem by itself in one fell swoop by overturning the Legislature’s Compromise of 1850 and reaffirming the institution of slavery. Or perhaps the *Lochner* era when judges impressed Mr. Spencer’s economic theory into the Constitution.

At the same time, the founders were anxious to ensure that the judicial branch never becomes captured by or subservient to other branches of government, recognizing that a firm and independent judiciary is critical to a well-functioning democracy. As Federalist 78 put it, “This independence of the judges is equally requisite to guard the Constitution and the rights of individuals . . . and serious oppressions of the minor party in the community.” The Constitution imposes on the judiciary the vital work of settling disputes, vindicating civil rights and civil liberties even when doing so may be unpopular, ensuring equal treatment under law, and helping to make real for all citizens the Constitution’s promise of self-government. Here, one thinks immediately of the failure of the Court in *Plessy* to fulfill the Constitution’s guarantee of equal protection under law for all persons, and Brown’s effort to undo that error.
Unfortunately, it seems to me that there is no easy, fixed formula on how to strike the balance envisioned by the Constitution in specific cases – no way for a busy judge to know in advance whether he or she may be erring by going too far in one direction or the other in this or that case. History is, of course, the judge of us all. And unlike the judge, History enjoys 20-20 hindsight.

But it does seem to me that there do exist some proven guideposts, discernible in the best traditions and customs of our judiciary and our inherited common law tradition, that the wise judge tries to rely upon in charting the course the framers of the Constitution contemplates. In the time we have, let me touch on just three today.

* * *

First, it seems to me that the good judge recognizes that many of the lawyers in cases before us have lived with and thought deeply about the legal issues before the court for months or years before the judge ever comes on the scene. A lawyer in the well is not to be browbeaten, but is rather a valued colleague. To be sure, a judge should test a lawyer, probe the contours of his or her arguments in order to understand fully the issues and implications of the case at
hand. But this can almost always be done with common courtesy and respect. Humanity, patience, and fairness (if also a dose of firmness when needed) are hallmarks of the great judge. So is not forgetting life before joining the bench when we faced the stresses and strains of practicing in the arena.

Respect for the litigants has other consequences as well. Unlike the civil legal system where the judge charts the course in an inquisitorial search for the truth, our common law system is an adversarial process. That means that the litigants and their counsel have the opportunity and duty to choose which arguments to advance, and which to leave for another day. These are decisions that we, as judges, generally respect. After all, more than one lawyer would rather lose a particular case than win on a principle that does his or her client more harm than good in future cases. It likewise means that we generally won’t consider arguments raised for the first time on appeal. To avoid error in setting legal rules generally applicable over the six state region our circuit encompasses, we depend heavily on the full development and initial testing of issues and ideas in the trial court where advocates have an opportunity to present more than thin briefs.
and fifteen minute oral arguments.

Of course, the rule against entertaining arguments not raised by counsel in no way forbids a court from supplementing the contentions of counsel through its own efforts. Lawyers cannot stipulate to a false legal rule. But we are only just three judges aided by newly minted lawyers, without the resources of an administrative agency or even the resources of most law firms. We have a healthy dose of skepticism about our own capacities to at the optimal legal answer in complex cases purely by judicial self-direction.

* * *

Second, it seems to me that a good judge will also listen to his or her colleagues and strive to reach consensus with them. Every judge takes the same judicial oath; every judge brings a different and valuable perspective to the office. And Congress has seen fit to ensure that appellate courts sit in panels of three or more judges. It seems to me that a good appellate judge will appreciate the wisdom of this design and seek to respect and tap the different experiences and perspectives of his or her colleagues on the complex questions that sometimes wend their way to the courts of appeals. As Justice White,
for whom I was lucky enough to clerk, used to say: two heads are better than one. And we are very fortunate on the Tenth Circuit to have a set of colleagues with a vast and diverse array of talents and experiences. A former state attorney general, solicitor general, state legislators, law professors, state appellate court judges, highly respected private practitioners, and those who have served at high levels in our federal government.

Of course, reaching consensus is not always possible. Who would have wanted Justice Harlan to forgo his dissent in *Plessy* calling on the Court to recognize the true meaning and consequence of the Civil War Amendments and the promise of *equal* protection under law. Or Holmes to forgo his dissent in *Lochner* where he emphasized that judges are no experts in economic policy? Clearly agreement is not always possible, or perhaps always wise.

But very often reaching consensus does serve the valuable purpose of ensuring that the ultimate decision of the court reflects the collective wisdom of multiple individuals of disparate backgrounds who have studied the issue with care. And in this respect, the Tenth Circuit is particularly blessed. While we may not always agree, we
usually do. And even when we do not agree, you will see in our interactions and opinions that we are among the most collegial of appellate courts in the country. I think that serves the people of this part of the country mighty well. And it is surely the envy of many of our colleagues elsewhere.

* * *

Third, a good judge will recognize that he or she is not a partisan for an outside cause and is willing to work earnestly with traditional legal tools and follow, wherever they lead. I think this is what Chief Justice Roberts may’ve had in mind when, at his confirmation hearing, he described the role of judge as like that of the baseball umpire, calling balls and strikes.

Now, of course, the judge exercises judgment. But the sort of judgment a judge exercises isn’t driven by personal preferences. A good baseball umpire doesn’t call strikes and balls based on his or her personal preference for teams or players (though basketball referees may). Instead, the good umpire seeks to follow the rules of baseball. Similarly, in law, the good judge doesn’t follow his or her personal policy predilections but is instead guided by the policy preferences
expressed by the Legislature in the statutes they pass, those embodied in the Constitution and its Amendments, or perhaps those found in our received common law. We exercise, then, legal judgment, seeking to ensure the integrity and coherence of distinctly legal authorities. That is, we work with the facts as they are given to us, not as we might wish them to be. To those facts we apply orthodox legal principles from received and recognized legal sources. And we do so in an open and candid way that can be scrutinized by any reader. We seek in the end to reach results that are most coherent and consonant with those facts and principles, not our own policy preferences. [In trying to describe what the phrase “The Rule of Law” means, Joseph Raz emphasizes that part of its definition must include the need for legal decisions to be guided by open, stable, and clear rules.] I think the sort of process I’ve described – reasoning candidly and openly using distinctly legal principles toward a result particular to the facts at hand – is part of what he means.

Now, there may not always be an obvious single right legal answer to every case. Or at least one obvious to the busy judge who is dealing in real time with a burgeoning docket. Just as different
umpires may in good faith call the close pitches a little differently when confronted with a ball whizzing by at 90 or 100 miles an hour, so too with judges. But at the same time what I describe is no doubt a disappointment (or perhaps seems unduly optimistic) to those who wish to deconstruct law into nothing more than another form of politics, view it as simply another way to impose one’s will on others, or a mask for ideology. It is, after all, an affirmation that legal reasoning is distinct from political processes. And it seems to me that maintaining this process and discipline of distinctly legal reasoning is essential to ensuring that we continue to live in a nation governed by law, not men.

Here I think of the famous exchange between Thomas More and his son-in-law William Roper in Robert Bolt’s *A Man for All Seasons*:

**More**: The Law, Roper, the Law, I know what is legal not what is right. And I will stick to what’s legal...

**Roper**: So now you’ll give the Devil benefit of law!

**More**: Yes. What would you do? Cut a great road through the law to get after the devil?
Roper: I’d cut down every law in England to do that!

More: And when the last law was down, and the devil turned on you – where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast – man’s laws, not God’s – d’you really think you could stand upright in the winds that would blow then?

Let me offer an example of what I have in mind here. Appellate standards of review, like our “abuse of discretion” standard that applies in many appeals, are sometimes dismissed as entirely indeterminate. An abuse of discretion, some charge, is only whatever the appellate judge dislikes. I respectfully disagree.

The term “abuse of discretion” implies a recognition that the district court is often faced with situations that may not, at least obviously, lend themselves to a single right answer. That is to say, we recognize that in many cases there will be a range of possible outcomes that the facts and law at issue can fairly support; rather than pick and choose among them ourselves, we will defer to the district court’s judgment so long as it falls within the realm of these rationally available choices. Thus, for example, in sentencing, we recognize that
the district court is required to balance a host of incommensurate and disparate considerations, ranging from the degree of the defendant’s cooperation and remorse to the need for deterring potential future offenders. Plainly, judgment and discretion is implicated.

But a district court’s discretion is not boundless or bounded only by appellate judges’ personal predilections. Appellate courts will find that a district court abuses the discretion afforded to it by law either when, for example, (1) it errs on a question of pure law, or (2) rests on a factual finding that is clearly without basis in the record. So, choices -- close calls about balls and strikes -- are left primarily to the district court when the abuse of discretion standard of review applies.

But there is something of a safety net on appeal. The safety net requires close scrutiny of purely legal questions and a double check to make sure the factual findings of the district court find some basis in the record. As appellate judges, then, we do not cut down the thicket of law to get to the right result in a case. We do not displace the jury or the district court’s judgment with our own. We very often, in fact, uphold decisions we would not ourselves make. That is, I think, one essential feature of the rule of law in the appellate system.

-12-
I could go on about judging, but .... I’d bore you even more. And I would very much like to take some questions and have an opportunity to chat with you. Before closing, however, I would like to say a few words not about judging but lawyering.

One thing that has become increasingly clear to me over my career – from clerking and academic research, to private practice, to the Department of Justice and now on the bench – is the importance of the role of ethics in the practice of law.

What do I mean by ethics? I do not mean what is called “professional ethics,” or the multiple choice ethics bar exam you will take to become lawyers. You will hear the joke about that exam – the right answer seems always to be the second most ethical choice.

Instead, I mean what Aristotle meant by ethics, and what John Kane means by the term when he speaks so well on this subject and to whom I owe much in this area – a state of character displayed in good, that is morally upright, actions. It is a way of being, a trait of your personality, that is exhibited in and by your conduct. Or, to take a definition closer to home, ask yourself – would your grandmother
approve of your behavior? If so, that’s ethical conduct – that is, unless, as Judge Kane points out, your grandmother was Cruella DeVille or Lizzy Borden.

You will face many ethical challenges in the practice of law. I guarantee it. Opposing counsel will engage in unethical conduct and you will be tempted to respond in kind. Your client and colleagues may encourage you to do so. They may even demand that you do.

And it’s easy to fall into the trap. No one is perfect after all. We are all human and fall prey to temptations we later regret. And neither is the practice of law supposed to be a game of skittles. It is an adversarial process and disagreements are the reason why lawyers exist. But it is possible to disagree without being disagreeable.

Consider. Opposing counsel shades a fact or a legal principle in his or her argument or brief. And does so repeatedly. How tempting is it to respond by calling that a “lie,” rather than simply point counsel was mistaken and point out the true facts to the court? Or opposing counsel won’t produce basic materials in discovery, yet demands massive discovery from your client. Your client doesn’t want to incur the considerable expense of providing discovery without getting
something in return. How easy is it to refuse production and engage in a game of tit for tat?

At the end of the day, however, your integrity – your state of character, as Aristotle would have it – is among the things you will cherish most. Not the money or the clients, the wins or the losses. The reward of ethical practice is the ease of mind you will enjoy when you go to sleep, when you tell your children about your life and career, when you retire with a clear conscience. And let me assure you these are no small things. Ask Jack Abramoff. Or William Lerach. Look them up if you don’t recognize the names. They’re lawyers in the news recently who had glittering careers, at the top of the profession, but whose indictments for cutting ethical corners leave behind a stain that must be hard to bear. Cautionary tales for all of us.

But even if I cannot convince you of the intrinsic rewards of ethical practice, let me persuade you of its instrumental benefits. I am a great believer in what I call Judicial Karma. Restraining yourself and your client from engaging in discovery intransigence just because opposing counsel won’t produce is hard. Restraining yourself from calling opposing counsel a liar despite his or her habitual
misstatements is tough; really tough. You will wonder whether the court will ever take notice. Whether the unethical conduct will ever be uncovered. Or, worse, whether it might actually be rewarded.

All I can tell you is that, sooner or later, it all comes out in the wash. The judge or jury may not see the picture fully at first. They may not witness all the conduct you do. But eventually, if the state of character of your opponent is bad, he or she won’t be able to hide it forever. When the judge notices -- and we do -- watch out. Judicial Karma is powerful stuff. So even when you’re sorely tempted to respond in kind, try hard to keep watch of the state of your character, make your record, and wait for Judicial Karma to take hold. And remember the scene in Robert Bolt’s play when Thomas More is finally betrayed by his protege, Richard Rich. After Rich offers perjured testimony at the trial against More, More notices that he is wearing a chain of office – one that signifies Rich is now Attorney General for Wales. More asks, “Richard, the Lord said that it did not profit a man to gain the whole world if he lost his soul. The whole world, Richard ... but for Wales?” Today, we might ask ourselves: our soul for a non-dispositive motion?
In closing, let me add this. As you may know, we recently lost one of the fine federal district court judges in our circuit, Phil Figa. Judge Figa was extraordinarily kind to me as I joined the Judiciary. And I won’t soon forget a trip into his courtroom shortly after I joined the Tenth Circuit. He showed me a post-it note he kept on the bench—a reminder to himself. One of his law clerks read that note at his funeral last month. I keep a copy in my chambers. It pretty well sums up what this speech is about, and what I hope to have learned about judging—and lawyering—over the last 18 months. It says:

Be Patient
Be Humane
Be Firm
Be Polite
Give All Fair, Due Process.

It’s hard—maybe impossible—to be all these things at once, let alone all the time. And for one I am certainly not perfect, not even some of the time. But we’re surely at our best as judges and lawyers when we are at least keeping Judge Figa’s goals in mind and aspiring
to them.

    Thank you for having me here to DU. It is an honor to be here with you and always a pleasure to visit the campus where my grandparents first met as undergraduates the better part of a century ago. I look forward to your questions.
THANKS TO BRYAN LEACH AND KEVIN LYNCH FOR PUTTING THIS TOGETHER, AND PUTTING THIS GROUP IN TOUCH.

I HAVE ALWAYS FOUND MY FELLOW MARSHALLS AMONG THE MOST INTERESTING PEOPLE.

indeed, every time i’ve been to a marshall gathering, i always begin wondering how i managed to slip into the group.

tonight, meeting some of you already, has only reconfirmed that conviction.

* * *

tonight, i wanted to speak briefly about the fact that i understand a review of the marshall program is underway.

and in some ways it’s understandable that the british govt might wish to review the program.

no doubt it must expensive.

and no doubt some might ask how long the uk should continue thanking the people of the united states for the marshall plan of half a century ago.

but in being asked to say a few words tonight, i cannot help but reflect on what a tremendous impact the marshall program had on my own life, profession, and view of the uk and world... and
WHAT A SAD THING IT WOULD BE IF OTHERS WERE NOT ABLE TO HAVE A LIKE EXPERIENCE.

* * *

I GREW UP HERE IN COLORADO UNTIL THE MARSHALL, NEVER BEEN TO THE UK OR EUROPE. VERY LITTLE CONCEPTION OF EITHER THAT DIDN’T COME FROM BOOKS, MONTY PYTHON OR, I AM AFRAID TO ADMIT, BENNIE HILL.

TODAY, BY CONTRAST, EVERY FACET OF MY LIFE IS TOUCHED BY THAT EXPERIENCE –

STARTING WITH MY ENGLISH WIFE, LOUISE, WHOM I MET WHILE WE WERE BOTH STUDYING AT OXFORD.

I CONFESS TO USING NO SMALL DEGREE OF CONNIVING AND PERHAPS EVEN DECEPTION IN CONVINCING HER TO GIVE UP THE UK AND MOVE WITH ME BACK TO THE US. AS A RESULT, MY FATHER IN LAW INSISTS ON CALLING MY WAR BRIDE

THE BLESSINGS OF THE MARSHALL ARE EVIDENT AS WELL IN MY HALF-ENGLISH CHILDREN WHO ARE AS MUCH AT HOME IN THE ENGLISH COUNTRYSIDE AND AMONG THEIR ENGLISH FAMILY AS THEY ARE IN COLORADO AMONG THEIR AMERICAN RELATIVES.

INDEED, AT 6 AND 8 THEY KNOW MORE OF THE WORLD THAN I DID AT 21

TO THE MARSHALL, IN MY PROFESSION I OWE ANOTHER SUBSTANTIAL DEBT. MY KNOWLEDGE OF ENGLISH LAW AND LEGAL PHILOSOPHY HAS PROVEN INVALUABLE TIME AFTER TIME IN MY CAREER.
THE MANY GOOD ENGLISH FRIENDS AND PROFESSIONAL
COLLEAGUES IN THE LAW I HAVE MET IN THE UK ALSO
CONTINUE TO ENRICH MY LIFE AND MY CAREER

AT THE END OF THE DAY, IF GOOD WILL AND THE CEMENTING
OF THE TRANSATLANTIC RELATIONSHIP WAS THE GOAL OF
THE MARSHALL PROGRAM, I FEEL LIKE A CASE STUDY OF ITS
SUCCESS.

* * *

OF COURSE, A COLORADO KID GOING TO OXFORD HAD TO
HAVE ITS COMICAL MOMENTS. HOW COULD IT NOT?

I AM SURE YOU HAD YOURS, TOO... AND A COUPLE
ANECDOTES WILL NO DOUBT SPUR YOUR OWN MEMORIES.

FOR ME, I WON’T SOON FORGET ARRIVING AT
UNIVERSITY COLLEGE OXFORD

AFTER MY FIRST TRANSATLANTIC FLIGHT.

I WAS EXHAUSTED BUT EXHILARATED.

THE VERY FIRST PERSON I MET AT COLLEGE WAS
GRUMPY OLD FELLOW AT THE DOOR IN A BOWLER
HAT – DON’T SEE MANY OF THOSE ON THIS SIDE OF
THE ATLANTIC...

THIS FELLOW TOLD ME IN THE DEEPEST OF
SCOTTISH BROGUES TO CHECK MY PIGEONHOLE
FOR A NOTE FROM THE DEAN, LESLIE MITCHELL.

WELL, IT TOOK ME SOME TIME TO FIGURE OUT
WHAT THE MAN WAS TRYING TO TELL ME, OF
COURSE.

AND I AM SURE MY LOOK OF PUZZLEMENT CAME AS
NO SURPRISE TO HIM – JUST ANOTHER DIMWIT NEW STUDENT WITH HIS MOUTH AGAPE.

OVER THE YEARS CAME TO KNOW, RESPECT, LOVE – THOUGH STILL FEAR – THAT COLLEGE INSTITUTION A BIT

AT ANY RATE, THE NOTE I FINALLY FOUND WAS AN INVITATION TO TEA FROM THE DEAN, ASKING ME TO COME BY HIS ROOMS ONCE I GOT SETTLED.

THOUGHT HOW KIND, IF QUITEESSENTIALLY ENGLISH.

EVENTUALLY, HEADED UP THE SPIRAL STAIRCASE IN THE MAIN QUAD.

STONE STAIRCASE, SURROUNDED BY WISTERIA.

STEPS WORN IN THE MIDDLE BY CENTURIES OF USE.

THOUGHT HOW PICTURESQUE, THOUGH THE LAWYER IN ME COULD NOT ALSO HELP THINK THAT IT WOULD BE THE BASIS OF MANY A TORT SUIT HERE...

AT ANY RATE, ATOP THE STAIRS, I ENTERED WOOD PANELED OFFICE, FIRE BLAZING, AND PIPING HOT TEA WAITING.

EVERYTHING EXACTLY WHAT AN OXFORD DON’S ROOMS SHOULD LOOK LIKE.

AND SO WAS DEAN MITCHELL. DIGNIFIED, SCHOLARLY, AVUNCULAR.
TOWARD THE END OF OUR CONVERSATION, HE WARNED ME THAT MARK TWAIN WAS WRONG.

TWAIN HAD SAID THAT WE ARE TWO COUNTRIES SEPARATED BY A COMMON LANGUAGE.

LESLIE DISAGREED, AND SAID I SHOULDN’T BE CONFUSED BY THE LANGUAGE. WE ARE TWO COUNTRIES WHO DO SPEAK DIFFERENT LANGUAGES.

AND ON ONE LEVEL THAT WAS GOOD ADVICE ABOUT APPRECIATING, ACCEPTING, EVEN ENJOYING THE DIFFERENCES BETWEEN US.

THEN, AS IF ALMOST TO PROVE THE POINT, PROCEEDED TO INTRODUCE ME TO SANDY,

SANDY A YOUNG LADY SITTING ON A CHAIR IN THE CORNER OF THE ROOM THAT I HADN’T PREVIOUSLY NOTICED.

AT FIRST, I FELT RATHER EMBARRASSED FOR NOT HAVING NOTICED HER EARLIER.

BUT THEN I REALIZED SANDY WAS A BLOW UP SEX DOLL – AND SHE WAS WEARING ONLY A FEATHER BOA AND BICORN NAPOLEONIC HAT.

AS IT TURNED OUT, SANDY WAS A PERMANENT FEATURE IN LESLIE’S ROOMS, ONE HE ADDRESSED REGULARLY AS A FELLOW OF THE COLLEGE AND WHO SAT THROUGH ALL OF HIS TUTORIALS.

INDEED, LESLIE LIKED TO SAY THAT SANDY WAS A HAPPIER PRESENCE IN HIS TUTORIALS THAN CERTAIN OF HIS STUDENTS.
AT ANY RATE, I AM HAPPY TO REPORT THAT SANDY IS, TO MY KNOWLEDGE, STILL THERE, AT HER POST. AND SO IS LESLIE.

AND LESLIE - IF NOT SANDY - HAS BECOME A GREAT FRIEND.

* * *

AS YOU CAN SEE, THE DONs AT UNIV IN MY TIME WERE NOT WITHOUT A SENSE OF HUMOR.

THAT WAS PRESSED HOME TO ME WHEN I WAS INVITED, TOGETHER WITH THE OTHER AMERICAN GRADUATE STUDENTS AT THE COLLEGE, TO HIGH TABLE EVERY TERM.

WONDERFUL EXPERIENCE, DONs WERE ALWAYS JOVIAL AND GOOD COMPANY – PERHAPS ESPECIALLY AFTER THEIR SHERRY APERITIF.

BUT ONE THING WE COULDN’T FIGURE OUT, FOR THE LONGEST TIME, WAS WHY ALL AMERICAN GRADUATES WERE ASKED TO DINE COLLECTIVELY.

IN OTHER CASES, INVITATIONS WERE HANDED OUT BY SUBJECT MATTER, YEAR, OR OTHERWISE.

BUT EVENTUALLY WE BEGAN TO DISCERN THE REASON.

THE GIVE AWAY WAS THE FACT THAT THE SAME PUDDING SEEMED TO BE SERVED EVERY TIME WE WERE THERE -- STEWED PEARS.

AND THEN IT FINALLY CAME CLEAR –

THE DONs GOT A PRIVATE CHUCKLE OUT OF WATCHING AMERICANS TRYING TO COPE WITH A SOLID PEAR WITH
AID ONLY OF A FORK AND SPOON – NO KNIFE.

THEY KNEW THEY COULD COUNT ON BITS FLYING IN NEARLY EVERY DIRECTION.

AND I AM NOT PROUD TO REPORT THAT I SURELY PROVIDED MY SHARE OF THEIR ENTERTAINMENT...

* * *

I COULD GO ON TO BORE YOU AT MUCH GREATER LENGTH WITH MY MISADVENTURES, MANY OF WHICH I KNOW YOU SHARED. LIKE

THE BIO-HAZARDOUS ENCOUNTERS WITH KEBAB VANS.

STRUGGLES WITH COIN OPERATED DORM ROOM HEATERS

BUYING A BIKE FROM THE POLICE SALE AT THE UNION OF PREVIOUSLY STOLEN BIKES, ONLY TO HAVE THE BIKE THEN STOLEN, AND THEN BUYING THE SAME BIKE AGAIN AT THE NEXT POLICE SALE.

AND THE WONDERS OF THE FULL ENGLISH BREAKFAST.

HAPPILY, THOUGH, I WON’T BORE YOU WITH MORE DETAILS EXCEPT TO SAY THAT --

THROUGH EXPERIENCES LIKE THESE I LEARNED THAT – IF YOU’RE WILLING TO EXPEND SOME EFFORT TO CRACK THEIR SOMETIMES SEEMINGLY FORMAL EXTERIOR --

WHAT A WONDERFULLY WARM, WELCOMING, AND, YES, WICKEDLY FUNNY PEOPLE OUR BRITISH HOSTS COULD BE.

* * *

-7-
ON PERHAPS MORE IMPORTANT NOTE – OR AT LEAST MORE SERIOUS ONE --

I ALSO CANNOT HELP BUT SAY THAT I THINK LESLIE MITCHELL MAY’VE OVERSTATED HIS CASE TO ME THAT FIRST DAY IN OXFORD.

WE ARE DIFFERENT PEOPLES TO BE SURE. POLICIES AND POLITICAL DIFFERENCES OFTEN SEPARATE US.

AND, YES, I KNOW OUR BRITISH COUSINS THINK THEY SPEAK A VERY DIFFERENT LANGUAGE. IN THAT, THEY MAY BE RIGHT.

BUT, TRITE THOUGH IT IS, THE BONDS BETWEEN US RUN FAR DEEPER THAN ANY OF THAT -

AND INVOLVE SHARED VALUES ON SOME OF THE MOST BASIC YET IMPORTANT ISSUES OF OUR TIME

INCLUDING THE RULE OF LAW

AND THE AUTONOMY AND DIGNITY OF THE INDIVIDUAL HUMAN PERSON

WHILE WE APPROACH THINGS SOMETIMES IN VERY DIFFERENT WAYS, OFTEN OUR OBJECTIVES AND PURPOSES ARE COMMON ONES.

AND EVEN WHEN WE DO DIFFER, WE CAN OFTEN LEARN A GREAT DEAL FROM SEEING HOW AND WHY A SIMILAR PEOPLE CAME TO TAKE A DIFFERENT APPROACH THAN WE HAVE.

FOR THE OPPORTUNITY TO SEE AND LEARN ALL THIS AND MORE -- UP CLOSE AND IN A VERY CONCRETE WAY OVER A STRETCH OF NEARLY 3 YEARS -- I WILL ALWAYS BE SELFISHLY GRATEFUL FOR THE EXPERIENCE THE MARSHALL
PROGRAM GAVE ME.

LESS SELFISHLY, I ONLY HOPE THAT MANY OTHERS FOR YEARS TO COME WILL BE GIVEN THE SAME OPPORTUNITY FOR A SIMILAR SORT OF LIFE-TRANSFORMING EXPERIENCE,

ONE THAT DRAWS OUR NATIONS AND PEOPLE TOGETHER,

AND THROUGH WHICH WE CAN LEARN MORE ABOUT EACH OTHER AND OURSELVES.

TOWARD THAT END, I LOOK FORWARD TO SITTING DOWN NOW -- TALKING LESS AND LISTENING MORE.

BEFORE DOING SO, THOUGH, I’D LIKE TO FINISH BY PROPOSING A TOAST. IT IS ONE OF THANKS. I INVITE YOU TO JOIN ME. --

TO THE QUEEN!
Welcome to the US Court of Appeals for the 10th Circuit and to its home, the Byron White Courthouse.

I’ve been asked to share a few words both about the man for whom our courthouse is named, as well as about the building itself. As someone who treasures the year I spent working for Justice White as his law clerk, I am very happy to oblige.

In many ways, it is hard to imagine a more remarkable 20th Century American life.

Byron White grew up during the Great Depression in Wellington Colorado, a farming community of 350 souls.

His hardened hands bore evidence throughout his life of the physical labor of his youth, and his work on the sugar beet farms and railroad lines of Northern Colorado.

He first rose to national prominence, of course, during college at the University of Colorado. There, he was an All-American football player and perhaps the most famous college player of his day.
In fact, he held the NCAA football record for all purpose yards per game for nearly 50 years (a record now held by Barry Sanders).

And no wonder that record stood so long: Justice White averaged fully 246 yards per game.

But academics were always more important to the Whites than athletics.

Byron White graduated 1st in his class academically from CU.

He then won a Rhodes scholarship to Oxford.

Incredibly, his brother Sam won a Rhodes a few years earlier. I am not sure whether this family feat has ever been repeated.

Before heading off to Oxford, he took a brief sojourn into the National Football League, playing for the Pittsburgh Pirates, now the Pittsburgh Steelers. Justice White hoped to earn a few dollars for subsequent studies at law school.

And boy, did he. His salary was $15,000 – the highest in the league in 1938-39.
To give you a frame of reference, that amount was several times the franchise fee Art Rooney paid for team in 1933.

All White did in return was be the number 1 draft choice in the entire draft; lead the NFL in rushing; and win the Rookie of the Year Award.

Later, at Yale Law School, Byron White showed his performance at CU was no fluke.

He again graduated first in his class academically.

Apparently feeling he had a little too much free time on his hands, he also played two seasons for the Detroit Lions.

There he again led the NFL in rushing yards and later earned election to the Pro Football Hall of Fame.

As World War II heated up, Byron White signed up for the Navy and served in the Pacific Theater.

He served on 2 ships hit by kamikazes and earned a Bronze Star after he went down into the burning hold repeatedly to carry wounded sailors up to the deck to safety.
After the War and finishing law school, he was selected to clerk for Chief Justice Fred Vinson of the U.S. Supreme Court.

A mere 15 years later, Justice White returned to that building to take his own seat. In the process, he became the 1st person ever to serve as both a law clerk and Justice at the Court.

After his clerkship, Justice White spent 14 years in private practice here in Denver at the firm now known as Davis, Graham and Stubbs.

But when Jack Kennedy decided to run for President, Byron White signed up to help run the campaign’s outreach to independent voters. White and Kennedy, of course, had known each other from days together in England the South Pacific.

After President Kennedy’s victory, he asked White to serve as Deputy Attorney General, Bobby Kennedy’s right hand.

As Deputy Attorney General, Justice White helped oversee the Kennedy Administration’s civil rights efforts. Indeed, once he checked himself out of the hospital to go to Montgomery, Alabama to confront the Governor and ensure the safety of the Freedom Riders in a very tense situation.
After only little more than a year at the Department, President Kennedy nominated Justice White to the Supreme Court at the tender age of 44. His confirmation hearing lasted less than an hour.

He went on to serve 31 years on the Supreme Court, the 11th longest tenure in our history.

During that time, wrote 475 Supreme Court majority opinions; 320 dissents; and 130 concurrences (for a total of nearly 1000 opinions).

As you well know, the liberals considered him a conservative; the conservatives thought him a liberal. Though a lifelong loyal Democrat, he could’ve cared less what the pundits had to say.

And he cared little for showmanship. One of his early clerks tells the story of having spent many late nights wordsmithing a draft opinion for the boss and waiting anxiously for the Boss’s reaction. The Justice reacted in a characteristic way, telling the law clerk, “You write elegantly. Justice Jackson had that problem, too.”

The substance is what Justice White cared about, getting the answer in the case before him absolutely right - or as close to right – as he could employing conventional legal reasoning and principles. And doing so with humility and humanity.
In encouraging his novice law clerks to offer their views - often a daunting proposition to a new lawyer in the face of such a wise and experienced man - Justice White always said humbly and encouragingly: “Two heads are better than one.”

If his opinions bear any common theme, it is perhaps the centrality of judicial restraint. Raised during the Great Depression, Justice White had great faith in the elected branches and their constitutional responsibility for making policy decisions. At the same time, he also believed the Constitution required those branches to be fair, and that the powers of government must be exercised without discrimination. Human equality and dignity, and civil rights were to him essential ingredients to fair politics. The Constitution guarantees a level playing field in the procedures and operations of government, Justice White thought, but guaranteed few policy outcomes.

* * *

Thanks to the generosity of the White family, downstairs on the First Floor, you will see an exhibit of some of Justice White’s memorabilia.

It tells the story of Justice White, as well how fully life can be lived.

For one, I confess that I can’t walk past the glass case containing the Justice’s golf putter without smiling and remembering the many happy moments spent putting golf balls around chambers in fierce competition with the Justice.
I hope you will spend some time in the White exhibit.

Beyond that now, a few promised words about our courthouse generally in advance of your tour after lunch.

* * *

The building was constructed in the early part of the 20th century. Denver was then maturing from a rowdy mining camp into the center of commerce for the Rocky Mountain region. With rather grand ambitions for its new role, Denver thought it merited a worthy building to house the Post Office and federal courts.

Previously, the post office and federal offices were located at 16th and Arapahoe, the site now of the Federal Reserve Building. That building – the Tabor building – is named for one of Denver’s Silver Kings, Horace Tabor who donated the land to the public for a grand federal building.

And therein lies an interesting footnote to our story. Tabor had started life as a dirt poor Vermont stonecutter. With his stoic wife, Augusta, he labored in the mountain mines of Colorado for 20 years before striking it not just rich but beyond rich.

Indeed, he became one of the richest men in America, and then, as often is the case, he purchased a US Senate seat for himself, quickly
shucked off Augusta, and held a wildly elaborate wedding at the Willard Hotel for his new young bride, Baby Doe, a gauche affair attended by virtually every Washington dignitary, including the President.

But as quickly as Tabor ascended, so he descended. In 1893, the Silver Panic hit, and his holdings became worthless.

He spent the last painful years of his life in a tiny home and serving as postmaster in the very building at 16th and Arapahoe he had helped erect years before.

Baby Doe, incidentally and surprisingly to many, stuck by him faithfully to the end. Indeed, she spent her last years working by hand the one mine left to her. Before he died, Horace told her to hold onto the Matchless Mine. She did just that until she was found frozen to death in her unheated shack atop the Leadville mine at over 10,000 feet.

***

From this brief detour in our story you can see Denver came a mighty long way from its early gold rush days in 1859 to its establishment as a financial and commercial hub in the early part of the 1900s.
Signifying this transition, the city fathers lavished on this building great attention.

It is constructed of marble quarried from the same mine in Colorado that was the source for the Lincoln Memorial. And it has many hidden charms.

The first floor was originally home to the Post Office. You will see names inscribed into marble on the first floor of some of the most famous Pony Express riders who served the West.

You will also see two murals at either end of the hall, one entitled Mining and the other Agriculture. Both are distinctively Colorado scenes, and I cannot look at the rugged shirtless miner with his pack mule on a winding and perilous mountain trail without thinking about poor Horace and Augusta.

On the first floor, as well, are two of our courtrooms. Originally part of the work space for the Post Office, you will see the sky lights that allowed natural light to aid in mail sorting.

The glass ceiling of the en banc court room is now etched with the seals of each of the states encompassed within our circuit – Colorado, New Mexico, Utah, Kansas, Oklahoma, and Wyoming. Six states accounting for over 20% of the continental United States’s landmass.
The second floor was the original home to the federal courts. On one end of the building, you will see the original district court, replete with velvet, marble chandeliers, and Latin inscriptions.

That historic courtroom, still in use, has been home to many of the West’s most notorious trials, not least of which those of the Oklahoma City bombers.

Half way down the hall, you will see what had been the court’s library. Oak paneled, it bears the names of great law givers through history. Recently, it has been converted into a courtroom. I always feel sorry for the lawyers who appear here. They are no more than 5 feet from bench, and you really can see when they sweat!

Finally, on the second floor you will come to the original court of appeals courtroom, restored in the 1990s to its original condition.

It, too, bears the names of a number of law givers and several quotations, including one directly above the bench that stares at the advocates – Reason Is the Soul of All Law. Lawyers seem constitutionally incapable of resisting the urge to work that quote into their oral presentations...

Perhaps my favorite inscription, however, is outside the building, next to one of our formidable granite Rocky Mountain Bighorn Sheep. It
sagely advises all of us that “If thou desirest rest, desire not too much.”

By this time, I suspect you are ready for a rest, and I propose now to give it to you. I’d like only to point out Vicky Parks, our Deputy Circuit Executive who would be delighted to give you a tour of the building and the White exhibit.

Thank you so much for the opportunity to be with you this afternoon.
Thank you for that introduction and the lies you told on my behalf. I want to thank Ms. Messall for the kind invitation to be with you today. It is a privilege to be here. I know the groups represented contribute to the Colorado community on both legal and ethical matters. So I thought to myself: “What can be more timely, just before dinner, than a discussion of assisted suicide?”

Now, I hope my brief talk does not bore you into contemplating such a course of action. And to be fair, I give this disclaimer up front: None of my discussion touches on questions of religion or theology, let alone the administration of the federal courts. So if you want a refund for your meal, I understand entirely.

Before beginning, I also want to add that, at the end of this short talk, I’d be delighted to answer questions and chat with you about the Tenth Circuit, judging, and our shared profession. But first, for better or worse, to the assigned topic – assisted suicide.
Last year, Princeton published a book I wrote on the future of the assisted suicide question. Recently, Raymond Tallis, the former Chairman of Britain’s Royal College of Physicians Committee on Ethical Issues in Medicine, reviewed the book for The Times of London’s Literary Supplement. I have prepared a brief written response to Dr. Tallis that will be published later this year and thought I might share with you something of a preview.

Now, all this sounds mighty academic. But the issue hardly entirely of academic interest. Oregon, of course, has legalized the practice of assisted suicide. Vermont is now debating whether to follow that lead. The Netherlands and Belgium have made assisted suicide and euthanasia lawful. England is considering whether to join them.

And in this debate, Dr. Tallis is a well known international advocate for the legalization of assisted suicide. His review of my book was thoughtful, and as generous as one might hope in view of his advocacy for legalization and the skepticism I express about that project in my book. But I think the
review offers a truly tantalizing glimpse at some of the sometimes unspoken premises that underlie the contemporary assisted suicide movement.

For example, Dr. Tallis expresses a deep conviction that legalization would bring a net benefit to society, outweighing any undesirable and adverse consequences, as well as a heartfelt belief that the legalization of assisted suicide is necessary to address patient suffering. None of these views is unique to Dr. Tallis; they are shared by a great many people today and they hold a natural, even intuitive appeal. But all too early this morning I want to pose the question: Can we be so confident that these assumptions, taken as virtual articles of faith by many, are well-founded?

Consider first Dr. Tallis’s assertion that society can draw and maintain an “objectively reasonable” line by limiting voluntary assisted suicide only for individuals who meet two criteria: they are terminally ill and suffering intolerable pain. Such a line, Dr. Tallis asserts, is justified by our obligation to respect the right to self-determination. But on such a principle, I submit, one might ask: Why would we honor fully autonomous decisions to seek out assisted suicide (or euthanasia for that matter) only by the terminally ill or
those suffering intolerable pain? Much less to individuals satisfying both conditions? Are we really sure we won’t slip down the proverbial slope?

In fact, while Dr. Tallis repeatedly touts Oregon’s assisted suicide law as a model worthy of emulation elsewhere, that law makes no mention of suffering. Instead, it allows terminally ill individuals to seek and receive assistance in killing themselves whether they suffer great pain, little pain, or none at all. Conversely, in the Netherlands – perhaps the only other real model for emulation available – the Dutch permit euthanasia and physician-assisted suicide only in the presence of a patient’s subjective sense that he or she is suffering “unbearably,” but they do not require the presence of any terminal – or indeed physical – illness. So, the leading jurisdictions Dr. Tallis and others cite as our models simply don’t pay any heed to the limitations he and others claim necessary.

But even supposing we take Dr. Tallis’s two requisites seriously, we might reasonably ask: exactly what do they mean? Should a qualifying terminal illness be understood to encompass those with only six months to
live according to doctors? A year? Two? Slippery slope problems seem to inhere even in the very application of this requisite.

Likewise, what qualifies as “intolerable” pain? Here, the Dutch experience is illuminating. In 1984, Dutch law required that assisted suicide or euthanasia be a “last resort” in cases of “unbearable suffering” and the Dutch justification focused squarely on the terminally ill patient experiencing grave physical suffering. In a series of steps over the last 23 years, however, the Dutch focus has shifted dramatically. Today, even psychological suffering, subjectively considered by the patient to be intolerable, suffices to merit assisted suicide or euthanasia even for the physically fit. And where assisted suicide and euthanasia were once available only to adults, Dutch legislation allows even children as young as 12 to qualify for either procedure. Remarks by Dutch officials such as Els Borst, the former Dutch Health Minister, suggest that the law will continue to evolve; in her view, elderly people simply “tired of life” should be afforded assisted suicide. So much, it seems, for the “intolerable” pain requirement.
In fact, contrary to Dr. Tallis’s calming reassurances, many of the leading intellectual defenders of assisted suicide readily admit and even embrace the slippery slope using the same justification upon which Dr. Tallis constructs his argument for legalization – individual self-determination.

For example, Professor Sherry Colb of Rutgers Law School – a former classmate whom I hold in great esteem – acknowledges that respect for the principle of patient autonomy entails – and will logically tend toward – legalizing assisted suicide for all competent persons, regardless of their medical condition or reasons for wishing to die. This she candidly admits she thinks to be a good thing.

Ronald Dworkin of Oxford and Margaret Battin of the University of Utah similarly suggest that respect for patient autonomy means that we must honor a competent patient’s advance request to be killed when dementia sets in – and do so even if the patient later retracts her request after the disease strikes. They tell us that it is the autonomous request, not the one infected by dementia, that counts. And they would seemingly force patients to abide by
their original requests – that is, submit to be killed against their current 
wishes.

From that perspective, we might also ask: How much of a step really 
remains before we conclude that persons incapable of exercising autonomy 
are better off dead? Peter Singer of Princeton, for one, insists that respect for 
autonomy means that it is a positive good for parents to kill infants suffering 
from Down’s Syndrome, hemophilia, or any other inconvenient malady, and 
to, quote, “replace” them with better candidates. Professor Singer reasons 
that doing so would allow parents to fulfill their own autonomous life plans 
and inflict no real harm on infants because small children do not enjoy the 
basic prerequisites necessary to exercise autonomy or self-determination. 
Neither can Professor Singer be dismissed as a quack. The New England 
Journal of Medicine has hailed him as one of the most influential 
philosophers since Bertrand Russsell, and he holds an endowed chair in 
Bioethics at the University Center for Human Values at Princeton.

On Singer’s reasoning, we might continue along the slippery slope and 
ask, too: Why not allow baby boomers to decide when to “divest themselves”
of their burdensome Alzheimer-inflicted parents – and do so even without their parents’ consent? At least one leading Dutch scholar, John Griffiths, has already begun pushing for the regularization of non-consensual adult euthanasia to supplement the existing infanticide protocol. And it has long been clear that several mainstream leaders of the euthanasia movement support not only consensual assisted suicide for (all) competent persons but also the non-consensual destruction of unwanted infants and the demented elderly, among others. This has indeed been the stated goal of many in the American euthanasia movement since its own birth in the Social Darwinian eugenics era of the latter part of the 19th century. Remember Justice Holmes’ infamous dictum in Buck v Bell, where the Supreme Court upheld Virginia’s Eugenical Sterilization Act with these words: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind...Three generations of imbeciles are enough.”
Neither should this project come as much of a surprise. It follows logically from their basic premise that certain lives are not worth living. If killing people who request it is warranted, after all, why can it not also be warranted for those in the same situation who are, through no fault of their own, unable to request it? Although Dr. Tallis calls on us to believe that the slippery slope can be avoided, he offers us no reason to ignore the empirical evidence, logical extensions, and stated intentions of others within the euthanasia movement.

Let me turn from Dr. Tallis’s reassurances that we could never travel down a slippery slope to his utilitarian contention that, quote, “[a]ny reasonable reading of the experience in countries with liberal legalisation” shows that “there was a net benefit” to society. This also seems to me more of an unexplored article of faith than a proven fact. The Netherlands is perhaps the showcase jurisdiction for the assisted suicide and euthanasia movement, yet official Dutch surveys reveal that thousands of adult patients, some competent, have been killed without their consent. The Dutch government, entrusted as the guardian of the civil rights and equal treatment
of all members of the nation, has sought to justify them on the basis that many of the patients involved were living in what a government committee of inquiry called a – quote – “degrading condition.” And official Dutch surveys have unearthed a high incidence of clandestine euthanasia suggesting that up to half of all physician killings go unreported to authorities as required by law. One might ask: can we be so sure that “any reasonable reading” of the record commands a conclusion that legalization would result in a “net benefit” to society as Dr. Tallis claims?

Unlike even the Dutch, Oregon has no legal process to ensure that doctors obey the state’s laws governing assisted suicide, report their cases with accuracy, or investigate questionable cases. We have little data about the role of depression or social isolation in Oregon assisted suicides. Or Mental illness, treatable versus untreatable pain, or coercion from family members and guilt. In fact, Oregon, doesn’t ask questions along most of these lines even of the physicians participating in the process. At least until Oregon implements a transparent and reliable regime for reporting and investigation, it remains difficult to divine anything with certainty from
Oregon’s experiment, let alone that it has netted vast societal benefits. And while dependable data may be wanting, anecdotal evidence from Oregon does raise concerns that it may be something less than an ideal situation, with patients suffering no more than dementia and depression having been coerced by family members into accepting early deaths.

Finally, Dr. Tallis expresses the belief that legalization is justified as a matter of necessity to alleviate unremediable suffering and miserable deaths. Let me pause here to note that I agree with Dr. Tallis, for reasons I detail in my book, that refusals of even life-sustaining treatment should be considered morally and legally permissible under a great array of circumstances. We live in a sometimes hyper technological world and there is nothing wrong with a patient saying: I’ve had enough poking and prodding, thank you. I know I am going to die – as we all must – and I just want to die at home in my own bed. Or just be left alone with my family.

But this, to Dr. Tallis, is still an insufficient response. Without legalizing assisted suicide, Dr. Tallis argues, we are doomed to, quote, “disintegrating, pain-racked” and agonizing deaths. And surely this is a
concern that none of us, facing inevitable death as we do, can afford to
dismiss lightly. Yet, Dr. Tallis again offers no substantiation for his
assertion. In fact, as palliative and hospice care techniques have improved
over recent years, pain has largely receded into the background as an asserted
basis for legalizing assisted suicide.

For example, where the Dutch once required evidence of unbearable
physical suffering 23 years ago, that requirement has evaporated, even for
teensagers.

In Oregon, physical suffering has never been required to qualify for
assisted suicide.

Meanwhile, a recent empirical study published in the *Journal of
Clinical Oncology* expressly set out to prove that Dutch patients rationally
choose assisted suicide and euthanasia in response to grave prognoses. But
the data led the study authors to a very nearly the opposite conclusion. Their
study revealed that *depression* – not a rational reaction to a poor prognosis –
is far and away the primary factor motivating requests for early deaths in the
Netherlands. We have long known that old-fashioned suicide is often
motivated by depression. Such results compel us to wonder whether the same might be true of its modern cousins, assisted suicide and euthanasia.

One also cannot help but ask whether, given the laws of economics, the increasing availability of assisted suicide (a cheaper solution) might serve as a deterrent to the development and dissemination of (more expensive) palliative and hospice options. John Griffiths, a thoughtful Dutch legalization proponent, readily concedes that there are, quote “occasional indications” that economic considerations do play a role in the administration of assisted suicide in the Netherlands. He chillingly admits, too, that budget-cutting in the Dutch heath care system, quote, “could lead to increased pressure to engage in life-shortening practices.” Why should we suppose that our own financially besieged healthcare systems would respond any differently than the Dutch system? Might Dr. Tallis’s well-intentioned wish to alleviate suffering actually disincentivize the provision of palliative care and lead to more suffering and more killing?

* * *

– 13 –
At the end of the day, I do not mean here to offer any easy answers to the difficult questions – empirical, ethical, and moral – presented by the assisted-suicide debate. They are profound and profoundly difficult. But the proper resolution of these questions means a very great deal to all of us – as individuals facing inevitable death and as a society seeking to ensure both equal treatment and liberty for all persons. I submit merely that we deserve a concerted effort by all involved on every side of the issue to address these questions with care, rigor, and mutual understanding – and without resort to easy, alluring, and unexamined assumptions.

Thank you very much for allowing me the chance to share these few thoughts with you this morning. As I said before, I am happy to take questions on this or any sunnier topic, including those that might be more relevant to the Tenth Circuit.

I look forward to the chance now to visit with you about some happier topics.
The above-entitled workshop was held on Monday, September 13, 2004, commencing at 9:00 a.m., at the Federal Trade Commission, First Floor Conference Room, 601 New Jersey Avenue, N.W., Washington, D.C., 20001.

Reported and transcribed by Deborah Turner, CVR
MS. KOLISH: Good morning, everyone. I’m the Associate Director for the Division of Enforcement in the Bureau of Consumer Protection. My division, along with many colleagues from other offices, have had the pleasure of putting together this event today.

Before we start we want to go over a few important housekeeping matters for your safety. Security. If you leave the building for lunch or any other time you will have to be rescreened through security to reenter. So that may be something you’ll want to consider. And if you come back tomorrow, as we very much hope you will, you’ll have to sign in again.

For security reasons we also ask that you wear your name tags at all times and if you notice anything suspicious please report it to the guards in the lobby.

Now, in the unlikely event of an emergency, we want you to know where the fire exits are and where to go. You can go through the main doors that you came in or you can go out this hallway and there’s a pantry, go through that little hallway, turn left and go to G Street. And then our practice is we all congregate at the Union Life...
building. It’s the tall black building over there. So we all check in and make sure everyone’s safe.

We also ask that you would turn off your cell phones and pagers. Bathrooms and the water fountain are across the lobby that you came through. You don’t have to go through security to use those.

Process issues. There are going to be ten minutes at the end of each panel for questions and you’ll find question cards in your packets and if you need more there’s a pile in the back of the room. Please fill out the card with your question and hold it up and someone will collect it and then it will be read from the podium so everyone can hear it.

We would also ask that you fill out the evaluation forms that are provided in your folders. These give us critical feedback that can help us in planning future workshops. We’d also recommend that you visit the tables in the foyer. There’s a lot of consumer education materials we provide as well as materials from other organizations, including information from the Georgetown Journal of Ethics, which is cosponsoring today’s event.

We would also like everyone to thank Hogan & Hartson; Paul, Weiss, Rifkin; Wharton & Garrison; Mayer, Brown and Rowe; O’Melveny and Myers; and Gibson, Dunn &
For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503

Crutcher for providing coffee for all of us at this
collection and for hosting a cocktail reception that will
immediately follow our program today at Georgetown
University Law Center, which is directly across the street.

We would also like to thank Georgetown University
for hosting this special event for us to get together
informally.

And now, I’d like to introduce the new chairman
of the FTC, Deborah Platt Majoras. As you know, Chairman
Majoras is a distinguished antitrust practitioner who also
has experience doing class action litigation but in the
short few weeks she has been here she has demonstrated a
great deal of interest in the consumer protection law that
we practice here and she’s rapidly becoming a master of
those issues.

Now, this comes as no surprise to me because I
believe that all antitrust lawyers, whether they know it or
not secretly want to be consumer protection lawyers. And
why not? After all, it’s the stuff that vividly directly
and personally affects all of us. And I think it just has
to be more fun than figuring out whether paper cups or
Styrofoam cups are in the same market. So that’s my take
on consumer protection and antitrust. And with that,
Chairman Majoras. (Applause.)
CHAIRMAN MAJORAS: Good morning and welcome to the Federal Trade Commission's workshop on Protecting Consumer Interests in Class Actions. I’d like to extend a special welcome to our fellow enforcers with the states and I’d also like to recognize our distinguished members of the judiciary who are here with us today.

The Honorable Diane Wood, Circuit Court of Appeals judge for the Seventh Circuit; the Honorable Brock Hornby, U.S. District Court judge for the District of Maine; the Honorable Vaughn Walker, U.S. District Court judge for the Northern District of California; the Honorable Lee Rosenthal, U.S. District Court judge for the Southern District of Texas; and the Honorable Ann Yahner, Administrative Law judge for the District of Columbia, Office of Administrative Hearings. We’re very grateful for your participation in our workshop.

I’d also like thank the Georgetown Journal of Legal Ethics, our cosponsor, and in particular, Jaimie Kent, the editor of the Journal. The Journal will be publishing a transcript of our proceedings and I understand also that if you are inspired by our workshop to write, that they will, in fact, be accepting articles for publication.

I am particularly pleased to open this workshop,
my first as FTC Chairman. As most of you know and as
Elaine has reminded us, I am an antitrust lawyer and I’ve
long understood that the goal of antitrust is to protect
and enhance consumer welfare.

Since joining the FTC -- Elaine is right -- I have immersed myself also in the FTC's vital consumer
protection mission which has the same goal. And as I have
learned in just the last month, FTC should be the acronym
For The Consumer, which aptly summarizes the joint goal of
both our competition and our consumer protection missions.

In holding this workshop, we continue the FTC’s
practice of hosting fora to discuss issues of concern to
consumers. Private litigation in both the competition and
consumer protection fields has always played a significant
role in compensating consumers and in deterring wrongful
conduct. Managed appropriately, consumer class actions can
be an effective and efficient way to do both.

As consumer class actions have evolved over time
however, concerns have been raised about whether some of
these actions, and in particular some of the settlements of
these actions, truly serve consumers’ interests by
providing them appropriate benefits.

Under the leadership of my predecessor, former
Chairman Tim Muris, the Commission sought to address these
concerns by initiating the Class Action Fairness Project. The goal of that project was simple: to ensure that when consumers have meritorious claims they get meaningful, not illusory, relief.

It’s now time to evaluate the results of this project as well as to examine the benefits and shortcomings of the class action mechanism. As my colleague Commissioner Tom Leary has stated, the FTC is a very small agency with a very large mission. And as such we have never been shy about asking for help.

To this end here, we have enlisted an impressive array of experts from the bench, the bar and academia to help us explore the complex issues raised by class actions. And I know that the Commission will benefit from the expertise of our assembled panelists and we hope those of you in the audience.

Since the FTC began the project many observers have asked why the FTC is involved in the consumer class action area at all. Contrary to what some may have concluded, the FTC is not opposed to class actions. Rather, the FTC is interested in consumer class actions and in particular consumer class action settlements because they raise issues that are at the core of the FTC's consumer protection mission.
In fact, in recent years we have seen numerous consumer class actions related to cases that the FTC has already brought and in some instances we’ve worked closely with class attorneys to obtain effective relief for consumers.

Unfortunately, however, in some cases class actions may have been an impediment to truly protecting consumers. The Commission therefore has participated as an amicus in cases where it believed the interests of consumers were inadequately represented or in some instances not represented at all.

The FTC's primary concern has been whether coupon and other non-pecuniary redress provide adequate relief to consumers. Such settlements are notoriously difficult to value yet their face value is typically used as a basis for setting fees.

This can pose two related problems. First, consumers may not get meaningful relief or the amount of relief claimed. And second, class counsel’s compensation may be inflated due to the overly optimistic value of the coupon settlement.

In our first panel today, we’ll specifically address this type of relief and provide an opportunity to discuss these issues in a broader context than an
individual case may allow.

Amicus briefs are not the only activity within the Class Action Fairness Project. As the Commission has done with respect to a host of important issues, it has used its educational platform to provide helpful information to consumers.

Specifically, the Bureau of Consumer Protection has published a piece entitled, "Need a Lawyer? Judge for Yourself." And the purpose of this piece is to ensure that consumers who need a lawyer are fully informed of their rights and their options.

Among other recommendations, this piece advises consumers to carefully scrutinize opt-out notices and class action settlement terms and particularly attorney fee awards that may reduce the total compensation available to consumers.

And in addition to this education, the Commission has also offered the consumer perspective on the proposed amendments to Federal Rule of Civil Procedure 23 to the Federal Judicial Conference.

Our panels over the next two days will address the question of attorneys’ fees and how consumer class actions can fairly compensate lawyers while protecting consumers. In other panels we’ll address equally important
issues such as special ethics concerns which is particularly apt considering our cosponsor, the Georgetown Journal of Legal Ethics.

Through this dialogue we hope to gain insights on a full range of issues but there are four in particular relating to the Class Action Fairness Project. First, we would like to explore strategies for making class action settlement information available in a more systematic and comprehensive way.

It may surprise you to learn that one of the greatest challenges for the project has been identifying potentially troublesome class settlement terms with sufficient lead time to permit evaluation and, if perceived necessary, action.

In some instances interested parties, attorneys, objectors, consumer advocacy groups have provided us with this information but more often settlements have come to the Commission’s attention by chance, for example, through an FTC staff member reading about a particular settlement in the newspaper or actually as a member of a class receiving a notice.

Other interested parties may be also finding it difficult to obtain this information and we would like to talk about that.
Second, we would like to solicit feedback on the amicus component of our project. To date, the FTC settlement objections have focused particularly on two issues: coupon settlements and excessive attorneys’ fees. The Commission’s briefs have also raised to a lesser degree such issues as insufficiently clear notices, burdensome claims procedures and so-called piggyback class actions.

Are these the issues that raise the greatest consumer concerns? Are there other issues on which we should be focusing our attention?

Third, we’d like to solicit input on the empirical research component of our project. In addition to our capabilities in law enforcement, we have substantial policy analysis and research capabilities which we implement not only using our attorneys but also the Bureau of Economics, one of the world’s preeminent teams of industrial organization economists.

The FTC strives not only to ensure that we improve the procedures directly under our control but we also work with public bodies to promote the development of approaches that would enhance consumer welfare.

And we hope that this workshop will provoke discussion about how we can use our research resources to bear on important questions.
And finally, looking beyond the limited role of our own agency, we would like the panels to explore opportunities for more effective coordination among all of the parties involved in the class action process. More participation and especially parallel participation by states and private attorneys may be helpful in some cases. And we hope that the workshop will provide an opportunity for all entities to discuss the fundamental issue of coordination.

Before concluding I would like to acknowledge the FTC staff who have worked so diligently in planning this workshop. First, in the Bureau of Consumer Protection’s Enforcement Division, Elaine Kolish from whom you’ve already heard this morning; Assistant Director Robert Frisby; attorneys Pat Bak, Adam Fine and Angela Floyd and paralegal, Heather Thomas.

In the Office of Policy Planning, Maureen Ohlhausen, Acting Director; and John Delacourt, Chief Antitrust Counsel. In the Bureau of Economics, Joe Mulholland and finally in BCP’s Office of Consumer and Business Education, Erin Malick and Callie Ward.

And now I will turn this over to John Delacourt to begin our first panel. Thank you again for being here.
MR. DELACOURT: Thank you, Chairman Majoras. I think we’re ready to begin. Our first panel this morning is on the use of coupon compensation and other non-pecuniary relief in class action settlements.

All of our panelists have done quite a bit of thinking on this issue and some of them have extensive experience both in court and in settlement negotiations so rather than standing in the way of their collective wisdom I will try to keep my own initial remarks pretty brief.

To date, the FTC’s Class Action Fairness Project has consisted primarily of a series of amicus objections to particularly problematic class action settlements. Even in these early stages of the project, however, the use of coupon compensation has already become a recurring target.

One reason for this is that coupons, much more so than cash compensation, are difficult to value and may offer class members only speculative relief. This was the situation that confronted the Commission in Erikson v. Ameritech.

In that case, the defendant was alleged to have made deceptive representations regarding its voice mail service and proposed to settle the case by offering to class members coupons for one free month of speed-dial service.
FTC staff objected to this arrangement, however, noting that among other problems, after the initial free month, class members that took advantage of this offer would be enrolled in a speed dial program on a continuing basis at the full subscription rate unless they took active steps to cancel the service. In other words, the proposed settlement was more akin to a promotional gimmick than to a genuine effort to provide injured consumers with relief.

A second reason for heightened FTC scrutiny of coupon compensation is that due to their speculative value coupons can be used in certain situations to inflate attorney fee awards. This was the situation that confronted the Commission in Haese v. H&R Block.

In that case, the defendant was alleged to have made deceptive nondisclosures regarding its arrangements with other financial institutions when issuing refund anticipation loans. The defendant proposed to settle this case by offering class members coupons for a variety of products and services including H&R Block tax preparation services, do-it-yourself tax preparation software and do-it-yourself tax preparation books and worksheets.

Though the use of many of these coupons was mutually exclusive, for example, if you’re a do-it-yourselfer you don’t have any need for H&R Block tax
preparation services, class counsel proposed to base its fee on the total value of all of the coupons. That factor as well as various flaws with the coupons themselves ultimately triggered an FTC objection.

Perhaps the best example of the stark contrast between cash and noncash compensation, however, is a case that is both more recent and likely more familiar to many of you, that is, the music CD minimum advertised price litigation.

In order to resolve the variety of antitrust charges, the defendant music distributors in that case agreed to a hybrid settlement that included both a cash and a noncash component. Defendants agreed to pay $67 million in cash directly to consumers. They also pledged to distribute 5.6 million CDs to governmental and nonprofit organizations such as public libraries.

While I can’t claim to have any particular knowledge of an official consensus on the settlement, my own anecdotal experience was that the cash component was very well received. I spoke with a number of acquaintances just in the ordinary course of things who indicated that they thought the claims procedure was very easy. You could file online. They were happy with the fact that they received their compensation right away and many of them
were actually amazed that they received a check. That had not been their experience in other cases.

So though the checks were relatively small, in the range of $13 to $16, they were very happy to receive a check. So that was the cash component which received high marks all around.

The noncash component, that is, the 5.6 million CDs that were distributed to public libraries, was another story. That portion of the settlement continues to be subject to criticism.

In a recent news story, for example, an official from the Milwaukee public library described some of the CDs that his institution received. Among the take for the settlement are the following: not one but 104 copies of Will Smith's "Willennium."

For those of you who are not Will Smith’s fans, there are also 188 copies of the Michael Bolton classic, "Timeless". And finally, there were 1,235 copies of Whitney Houston’s 1991 recording of the national anthem. So I can only conclude that the defendants must have regarded this particular single as an underappreciated work.

So anyways, subsequent reporting on this portion of the settlement revealed that in fact Milwaukee’s...
experience was not an anomaly, that in Virginia, for example, they received 1600 copies of the Whitney Houston single and in Maryland they received 1200 copies.

Adding insult to injury, defendants valued this noncash component of the settlement at almost $76 million. So that was more than the $67 million in cash. Furthermore, this $76 million figure was incorporated into the total settlement value from which class counsel’s attorney fee was ultimately derived.

So clearly, there is room for improvement with respect to coupon compensation in class action settlements and for that I will ask the assistance of the panelists.

Before I begin, however, I should raise one final issue and that is that we will be taking questions today. I believe there are 3 x 5 index cards included in the folders that you received this morning, so if you have a question, please write it down on the card and get the attention of an FTC staff person and they will make sure that those cards are passed to the front so that I can read and pass them on to the panelists.

So with that out of the way, I will turn to our first panelist, Professor Christopher Leslie, immediately to my left. Professor Leslie is an Associate Professor of Law at Chicago Kent College of Law. His current research
focuses on antitrust and business law as well as class
actions.

In particular, I would like to commend to you his
article, “A Market-based Approach to Coupon Settlements in
Antitrust and Consumer Class action Litigation,” which was
published in the UCLA Law Review and recently, because of
our program, was also added to the FTC's web site.

Professor Leslie.

PROF. LESLIE: I would like John and his
colleagues at the FTC for holding this important workshop
and for inviting me to participate.

Like most private litigation the primary purposes
of class action litigation are to compensate individuals
for their injuries and to deter misconduct by disgorging
ill-gotten gains. The success of any class action lawsuit
should be evaluated based primarily on whether or not it
achieves one or both of these goals.

Also like most private litigation, most class
action litigation settles. However, unlike private
litigation, class action settlements run a significant risk
of collusion between opposing counsel. This is
particularly the case with coupon settlements.

When the class members are paid in coupons, each
class member will have one of four outcomes. First, the
class member might not use the settlement coupon at all. This nonuse outcome results in the class member receiving nothing of value from the settlement. There is no compensation. Similarly, the defendant pays out nothing to that class member and there is no disgorgement.

Second, the class member could use the coupon because the settlement coupon induced her to make a purchase that she otherwise would not have made. This induced purchase outcome occurs when the class member makes a purchase with her settlement coupon simply to avoid the feeling of getting nothing from the settlement.

The defendant is actually in a better position in this scenario because it makes a sale that it otherwise wouldn’t have made and gets that additional marginal profit. The settlement coupon operates as a promotional coupon. This is the antithesis of disgorgement.

Third, the class member could use her coupon for a purchase that she was planning to make anyway. This noninduced purchase outcome shows that settlement coupons are not inherently worthless. The class member who uses the coupon for a planned purchase receives, in essence, a payment equivalent to the face value of the coupon. The defendant loses money if that purchase would have taken place without the settlement coupon. Thus, there is some
level of both compensation and disgorgement.

Fourth and finally, the class member could transfer the settlement coupon to a third party who uses it. This transferred use outcome is a variant of the third only someone other than the class member is redeeming the coupon making a noninduced purchase. The class member receives value if she sells that settlement coupon to the person who eventually uses it.

Because defendants prefer outcomes where the class member either does not use the coupon, and thus the defendant pays nothing, or the class member uses the coupon for an induced purchase and thus the defendant earns additional revenue, defendants often structure settlement coupons to increase the probability of one of these first two outcomes occurring.

Defendants do this by imposing often one of five common restrictions in settlement coupons. First, there are limits on transferability. Settlement coupons are sometimes nontransferable. In some cases, they limit transfers of the coupon to within households or they limit the number of times that the coupon can be transferred. Or they reduced the value of the coupon if it is transferred to a nonclass member.

All of these transfer restrictions reduce the
value of the settlement coupon and reduce the probability
of the settlement coupon ever being used.

Second, short settlement coupon expiration dates
reduce the probability of use. Settlement expiration dates
can be as short as a few months, such as the 120 days in
the Cuisinart case.

This is particularly a problem with durable goods
where class counsel and defendants had proposed settlement
coupons in heavy trucks where the consumers had to use the
coupons within 15 months even though the trucks they had
bought to qualify for class membership would last a lot
longer than that.

Third, restrictions on coupon aggregation reduce
the value of settlement coupons. Coupon aggregation would
allow class members to combine settlement coupons with
other available discounts or to combine multiple settlement
coupons in a single purchase. Defendants commonly
structure settlement coupons to preclude both types of
aggregation. This negates the value of the settlement
coupon.

For example, in the recent Schneider v. Citicorp
mortgage case, the proposed settlement coupon was for $100
and could not be aggregated with any other discounts. Yet,
a $500 discount was widely available. Thus any class
member who actually used the coupon would be foregoing a $400 net discount available to everybody who was not a member of the class.

Fourth, redemption restrictions are common. Some class action settlements have involved class members receiving multiple coupons that can only be redeemed over time in specific intervals. For example, one settlement provided each class member with 40 coupons that could only be used once a quarter over the next ten years.

Fifth and finally, product restrictions are common. For example, in the Cuisinart settlement the settlement coupons could be used for anything except food processors.

In the much-hyped antitrust airlines litigation, the coupons to be redeemed for discounts on airlines couldn’t be used during blackout dates, such as Christmas, Thanksgiving, holidays, i.e., when people would actually want to use the discounts.

The net effect of these restrictions is low redemption rates of settlement coupons, as low as 3 percent, 1 percent, and in one famous case, 0.002 percent redemption rates.

Besides these restrictions, other problems with settlement coupons include that most settlement coupons
require the class member to continue doing business with
the very defendant in order to receive any compensation.

Also, defendants can set settlement coupon values
so that the defendant still makes a profit on each sale in
which the class members redeem settlement coupons.

The Haese v. H&R Block case that John referred to
is typical here when after the settlement was announced H&R
issued a press release that assured people that the
settlement really wouldn’t do anything because they were
going to make money on every sale that involved a
settlement coupon.

Finally, there is the risk that defendants can
negate the value of settlement coupons either by increasing
the price of their product or by reducing the quality.

The class action system is designed with three
potential safeguards to prevent these inadequate
settlements.

First, the class counsel is supposed to negotiate
a settlement in the best interest of the class. Second,
class members are given the opportunity to object to any
proposed settlement and third, the proposed settlement must
be approved by a judge who determines whether it is fair,
adequate and reasonable.

Unfortunately, evidence suggests that the
safeguards may fail in the context of coupon settlements. First, because of agency cost, class counsel may pursue their own interests instead of those of the class. Because the class counsel are paid in cash, often based on a percentage of the face value of the settlement coupons, the class counsel may maximize their attorney fees by negotiating a coupon settlement even if that settlement provides little real value to the class.

Defendants have a strong incentive to laden settlement coupons with restrictions that increase the probability of either the nonuse outcome or the induced purchase outcome. And the class counsel have insufficient incentive to prevent this so long as the aggregate face value of the coupons is high and the class counsel is being paid in cash.

Rational defendants will be willing to pay higher attorney fees in exchange for class counsel agreeing to allow restrictions on settlement coupons. Unfortunately, the interests of the defendant and the class counsel are more aligned at this point than the interest of the class counsel and the class members.

Second, class members appear ill-equipped to monitor the class counsel and to protect their own interests. The class counsel controls the relevant
information. Notices of the proposed settlement are often opaque and the terms of the coupon settlements are often too confusing to understand. In some cases, class members have thought that they were the ones being sued instead of they were the ones being offered the coupons.

Many judges appear unreceptive to class member objections as well. Furthermore, given the low stakes for each individual class member it is perfectly rational for class members to remain silent even if they think the coupon settlement is not worth anything.

Third, with a few notable exceptions reviewing judges may be loath to reject proposed coupon settlements. Some judges treat the face value of coupons as their true value even though this is not the case.

Judges cannot be faulted. It is exceedingly difficult to calculate the true value of settlement coupons, especially when they are laden with restrictions. Add to that both the defense counsel and the class counsel are singing the praises of the coupon settlement.

Systemic pressures also play a role here. The judge must accept or reject a proposed settlement in its entirety and there is some level of traditional deference to class counsel who, after all, is there to protect the interests of the class. All of these make it difficult for
a judge to reject a coupon settlement.

In sum, despite the safeguards in place to protect class members, the problem remains that class action litigation is often settled with settlement coupons that are largely worthless.

In my scholarship, I have discussed potential responses to this, including banning settlement coupons, restructuring them, imposing minimum redemption rates and even having the class counsel paid with the exact same currency as the class. Thus, the class counsel would receive coupons if the class does.

In this forum I would like to consider two new potential solutions. First, collecting greater data so that we can study the problem and get a better understanding of what restrictions are imposed on settlement coupons and the effects of these restrictions. And second, encouraging greater FTC intervention and fairness hearings to evaluate coupon-based settlements, including having the FTC receive notice of all proposed settlements, especially those that involve coupons. And I will save the discussion of those for the group discussion, which I am very much looking forward to.

MR. DELACOURT: Thank you very much, Professor Leslie. Our next panelist is Judge Brock Hornby. Judge
Hornby is a United States District judge for the District of Maine. He has dealt with class action issues extensively from the bench and most recently has presided over the much-maligned MDL music CD cases, although I must note that I was very happy with the cash component as well as the new motor vehicle Canadian export antitrust litigation. Judge Hornby.

JUDGE HORNBY: Thank you. Good morning. I’m here on the panel to give you the judge’s perspective. I hope you find it helpful but remember what George Burns said. He said, I was married by a judge. I should have asked for a jury.

Many of the positions that you’re going to hear on this panel and at this conference are what I call political with a small P. They represent substantive policy preferences about how money or goods should be distributed among plaintiff class members, defendants, lawyers and others. And typically, they either endorse or they bemoan class actions or class action lawyers.

Well, as the judge on this panel I’m not going to take a position on those issues. Instead, I’m going to speak from a judge’s perspective and try to tell you what a judge looks for when he or she is presented with a proposed settlement involving coupons or other nonmonetary relief.
I’m also going to talk about some of the baggage that a judge brings to the task because I think many of you have an unrealistic expectation of what we judges are capable of. In fact, I’m reminded of the psychiatric evaluation that I commissioned for a defendant whose competence was in question for trial and the Bureau of Prisons psychiatrist at the customary interview was asking him what the role was of all the various participants in the courtroom. And when it came to the judge his response was, and this is a direct quote, the role of a judge was “takes the facts presented to him and makes everybody happy, justice or something.”

I think some of you think that’s what judges are capable of. We’re not. Remember first that American judges are accustomed to resolving disputes in an adversary system. Originally, we were umpires. When a judge is called upon to decide a case or a conflict we’re trained to do so by applying legal rules, attempting to limit our individual value preferences.

Yet, over the last 25 years we have become case managers and we’ve learned to manage litigation and settle cases but even there we start from an adversarial perspective. For us, a good settlement in the typical case is one that first and foremost makes the lawsuit go away, a
settlement that will stick, not come unglued.

If we suggest an appropriate settle amount in such cases we come up with a number not by determining what’s good for the plaintiffs or what the defendant ought to pay but by asking what’s the overall financial exposure of the defendant in a collectible judgment? In other words, what amount could the plaintiff actually put in his or her pocket after a trial and an appeal and then we discount it by the risk of losing the case and the transaction costs of getting there, things like legal fees, expert fees, administrative downtime, things like that.

In encouraging the parties to settle a typical case we’re merely trying to bring the particular dispute to a conclusion. We’re not expressing a viewpoint about litigation or justice or particular kinds of litigation or settlement categories.

And then suddenly we’re told that things are different in settling a class action, that there judges are fiduciaries for the entire class. It’s a catchy label but it's dangerously misleading as a description of what trial judges are able to do.

Lawyers are fiduciaries. Trust officers are fiduciaries. Certain kinds of agents are fiduciaries. Fiduciaries have a duty of loyalty to a particular client.
that supercedes other obligations. In fulfilling their role they go out and investigate on their own. They acquire an expertise. They hire professionals to do work for them. They follow certain standards and they are sued when they fail.

That’s not what most judges do for a living. In fact, some of you suggested a judge should turn down a coupon settlement even though it might have a small benefit to the class, should turn it down for institutional reasons or so that other class actions might be better in the future. A fiduciary could not do that.

So what does a so-called fiduciary judge do when he or she is presented with a proposed settlement in a class action? All the lawyers, the adversaries with whom he’s accustomed to deal, are lined up on the same side defending the settlement.

The judge wonders, how am I to evaluate this proposed settlement? Should I accept what they say or should I independently gather evidence? Shall I subpoena witnesses or documents? Shall I commission experts to conduct independent studies at substantial expense?

If I want assistance or advice I can’t just pick up the phone and call a professor I know. That would probably be unethical. I can only consult a colleague or
law clerks who, like me, are trained only in law.

In other words, the judge who’s faced with a class action settlement is more than ordinarily anxious. Now, Judge Posner of the Seventh Circuit suggested a dozen years ago that perhaps a different model is needed. He said, and I’m quoting, “Judges in our system are geared to adversary proceedings. If we’re asked to do nonadversary things we need different procedures.”

In class actions -- Judge Posner was speaking of attorney fee requests -- lawyers are not like adversaries in litigation. They are like artists requesting a grant from the National Endowment for the Arts. Grant-making organizations establish nonadversarial methods for screening applications. Perhaps we need something like that for cases like this, the case he was referring to.

I suggest that Judge Posner hit upon a much broader problem than attorney fee requests. His observation applies to class action settlements in general. It applies to consent decrees proposed by the parties in government-initiated litigation like environmental lawsuits. And it applies to other instances where the adversarial systems no longer work.

I’ve not seen a good response to his observation. I can assure you that I’ve not seen judicial education that
focuses on this unique role for a judge, and most judges do not get a steady diet of these kinds of cases so as to become self-taught.

So what does the anxious judge actually do in this context where he’s asked to make a decision without legal rules and with no parties arguing the pros and cons? We don’t like to subpoena witnesses. If we do we may prejudice our ability to try the case later. We look for some kind of checklist of items against which to measure the application for settlement approval.

It may not actually tell us where to come out on a question but it gives some comfort that we’re engaging in a rational assessment that can be defended. So perhaps instinctively we are behaving somewhat like a grant-making organization that promulgates criteria and measures applications against them. But I’m sure we could learn or be taught a lot more about improving those techniques.

What does a judge do in particular when presented with a settlement involving coupons and other nonmonetary relief? First, we look to the Rule 23 language and the case law and they both tell us that neither device is absolutely prohibited.

And that’s appropriate. Never say never. There are limited cases where these devices can add value to
everyone's benefit but they are certainly greeted now with
emphatic skepticism by judges given all the public and
appellate criticism. After all, with or without life
tenure we don’t like to be publicly criticized. We live in
communities just like all of you do.

So we look for additional factors or criteria
against which to measure the proposed coupons or cy pres
relief. We look carefully at what the appellate courts say
about them too because we don’t like being reversed on
appeal.

I’ve summarized in my outline that’s online what
the cases and commentators say are the important factors
and other panelists refer to them as well. I’m not going
to list them all here. If necessary, during the discussion
we can talk about them but most judges, most federal judges
will consider each of these factors. So if you are
supporting or opposing a proposed settlement you’d be well
advised to take them into account as well.

Just a comment about the valuation problem. A
judge is hard pressed to put a dollar value on coupons or
alternative relief but remember that what Professor Leslie
has called noise in his written remarks is already present,
that a judge already has to do a lot of guessing in
evaluating even a straight dollar settlement of a class
action.

After all, we don’t see all the discovery materials. We don’t see the witnesses’ performance at deposition. We don’t know which witnesses are available or unavailable for trial. We don’t know what the weaknesses are in the expert’s opinion. We haven’t seen the e-mails and the documents.

We can make a pretty good assessment of the status of the law but on the facts we have to make an informed guess or go by instinct. Coupons and cy pres just add more uncertainty to the uncertainty that’s already there in that context.

Greater FTC involvement as an amicus or perhaps as an intervener would certainly be welcomed by most judges that I know as consistent with the adversarial universe that we’re accustomed to. In other words, the FTC's presence presenting evidence and argument to the Court would restore some of the balance currently lacking.

It would also be a useful antidote to a growing unease some of us have about the role of objectors, professional objectors who first appear and then they disappear, perhaps being bought off, we’re told, or perhaps pressing a narrow or broader political or policy objective.

The FTC role would be somewhat like the role of

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
state attorney generals who prosecute civil lawsuits in some of our courts although I realize that some of you here are distinctly unenthusiastic even about their role.

But there is also this other risk that if the FTC intervenes or files an amicus more than occasionally to attack coupon settlements will there be an inference that its failure to do so is somehow tacit approval? I just raise that question.

In conclusion, let me say that unlike the Rand study authors of a few years ago, the class action one, an excellent analysis that you ought to read if you haven’t done so, but I do not volunteer judges as the solution to what some of you call the class action problem. We’re not ombudsmen. We’re not trained for it. We are not information gathering judges like are civil law counterparts. We’re not trained for that either. We will do our best but you won’t be satisfied.

Remember, the public, Congress, the legislatures are not even satisfied with how we sentence criminals. We’ve been doing that for hundreds of years and we can’t get that right. So if you think that we’re going to do better in this more open-ended job of settling class actions, I think we need to think again. Thank you.

MR. DELACOURT: Thank you, Judge Hornby. Our
next panelist, as some of you may have noticed, is a last
minute replacement. We had originally scheduled Steven
Hantler from DaimlerChrysler but now we have in his stead
Leah Lorber.

Leah is of counsel in the public policy group in
the Washington, D.C. office of Shook, Hardy & Bacon. And I
also have a note here that she was named a legal reform
champion by the America Tort Reform Association in 2004.
Leah.

MS. LORBER: Thanks. I wanted to first thank the
Federal Trade Commission and the Georgetown Journal of
Legal Ethics for having this symposium. I also wanted to
thank Steve Hantler for getting sick so I could show up and
talk at it, although I think he’ll get well pretty quickly
and I’d like to refer everybody to his remarks that are
online.

I’m glad that John described to you my background
a little bit so you have some context for my remarks. I’m
a defense attorney. I’ve done public policy tort reform
work for the last five years so I take a pretty predictable
approach.

I think that coupon settlements create a perverse
incentive for over-lawyering. They waste litigant and
court resources to no real consumer benefit. Attorneys
bring them so they can get high fee awards and some courts, particularly in state courts -- just so Judge Hornby doesn’t get mad at me -- know that companies will settle class actions rather than litigate them. So I think it encourages courts to certify weak cases.

Basically, what I wanted to do was tell you about some of my favorite coupon settlement stories today. Professor Leslie had already talked a little bit about the airline price-fixing case in the early 1990s. This is a case where a number of different airlines were sued for price-fixing because they used a consumer-accessible database in order to track ticket prices.

The settlement resulted in $408 million in discount airline tickets and $50 million in attorneys fees and administrative costs. The reason I like this one is this is the first time I’d ever heard of a class action lawsuit.

I was right out of college in a very low-paying job and I had a long-distance boyfriend. We flew back and forth constantly. I had huge credit card bills because I couldn’t afford to pay them off and I thought I was going to get some money to pay off my debt.

Well, when the settlement was announced, it wasn’t worth anything to me as a consumer. There were
blackout dates. I couldn’t combine the discounts with any kind of other ticket discounts and at most it was good for 10 percent off a flight.

The critics, including some of the counsel for the objectors, said that this was a promotional scheme to induce travelers to fly and a deal worked out so plaintiffs’ lawyers could collect fees of up to $1400 an hour.

Some of the other coupon class settlement cases that I’ve been interested in reading about include the case against the makers of Cheerios. In this case, General Mills was sued because pesticides approved for use on other grains other than oats had come into contact with the oat grains for Cheerios. The plaintiffs’ counsel admitted that nobody had been hurt. The lawyers got $1.35 million in fees and class members got a coupon for a free box of Cheerios, if they had kept their grocery store receipt proving that they had bought one in the first place.

A similar case was the Poland Springs case. Poland Springs was sued for allegedly selling bottled water that was not pure. The lawyers got $1.75 million in fees and the class got more bottled water.

These can go on and on. The earmarks of coupon settlements that cause the problems for us is basically
that as these stories show, the consumers don’t get value
and the plaintiffs' lawyers do. Often, consumers have to
buy more of the product or service in order to get some
benefit from the coupon settlement in the first place.

Several people today have already talked about
the H&R Block case. H&R Block was sued for allegedly
taking kickbacks from a bank that issued loans to H&R
Block’s tax preparation customers. The lawyers got $49
million and the class got up to $45 per year in coupons for
tax software and planning materials. To get the benefit of
a $20 coupon to run your tax return preparations the
typical plaintiff would have to spend $102.

Other cases include a suit against Blockbuster
Video for inflated overdue video fees where the class got a
dollar off of future coupon (sic) rentals. In a case
against a computer manufacturer for allegedly
misrepresenting the size of the computer monitor the class
got $13 rebates on new computers and monitors or $6 in
cash.

A lot of times these lawsuits aren’t necessary in
the first place. Sometimes, we believe that they are just
cooked up by plaintiffs’ lawyers who want to make a big
fee. A Florida trial judge has called coupon settlement
cases the class action equivalent to squeegee boys who at
urban intersection splash water on your windshield, wipe it off and then expect to get paid for it. They create the problem; they provide the solution and you really don’t get any benefit.

In other cases defendants have already acted to resolve the problems and the settlement provides no additional value to the class. One example is the Intel Corporation case. Intel found a minor computer chip flaw that created about once in every 9 billion random division operations there was a small error. Intel created a program for its consumers to see if their computer indeed had that flaw, expanded its toll-free hotline for inquiries and offered free lifetime replacements.

When Intel publicized this problem and the solution widely, 13 class actions were filed. Plaintiffs’ lawyers took in $4.3 million and the plaintiffs' class got nothing more than what was already going on by Intel, its continuation of existing company solutions.

Also in coupon settlements courts too often don’t make sure that the settlements don’t mean something. This has been getting a lot better since the coupon settlement problem has been publicized but there is still too much availability for plaintiffs’ attorneys to be litigation tourists and forum shop their cases around to what the
American Tort Reform Association has called judicial hellholes and what some prominent plaintiffs' attorneys have called magic jurisdictions where plaintiffs are always going to win regardless of what the facts and the law might be.

There is going to be some discussion, I’m sure, today about what can be done. A couple of solutions that have come up in the materials or in our past reading have been creating a secondary market for the coupons, which we don’t think tends to work. Some of the studies have shown that the coupons actually have to be worth $250 in order for the consumers to get a benefit on the secondary market.

Another solution has been to share the class award with charities and government, and this is kind of a feel-good resolution but it doesn’t really do anything if it’s not very carefully scrutinized and also may be an incentive for courts to certify more class actions if they know that the public is going to benefit.

Good solutions include when the parties and courts make sure that the settlement actually means something. I think one of Lisa’s cases that she discussed was the Mercedes-Benz suit in which it was alleged that Mercedes had failed to warn their customers about using nonsynthetic motor oils in the engine in their cars because...
the suit said that this could cause engine wear. 

The settlement that was reached was targeted at 
the problem. The consumers got a $35 coupon for an oil 
change and they got revised warranty protections that said 
if you have a problem you can take your car in and we’ll 
fix it.

Another way to resolve these problems is to have 
defendants fight, not settle, frivolous lawsuits. There 
was a case in Illinois involving a Jeep Cherokee where 
there were allegations of excessive engine noise at idle in 
the SUVs. The suit was filed after one of the named 
plaintiffs got buyer’s remorse and wanted to have his car 
upgraded to a V-8 engine. The second named plaintiff had 
135,000 miles on his vehicle when he said that it was 
defective and the third named plaintiff was just afraid 
that her car would develop the problem. The court 
certified the class as a nationwide class but found that 
the plaintiffs were unable to prove their case and entered 
judgment for the defendant.

In sum, I think there are a number of different 
solutions that will be discussed today but we encourage 
very close scrutiny of coupon settlements and fighting 
lawsuits where they’re frivolous. Thank you.

MR. DELACOURT: Thank you very much, Leah, and
thank you in particular for pinch-hitting at the last second. Our next panelist is Lisa Mezzetti. Lisa is a partner with Cohen Milstein where she works exclusively on consumer litigation and securities regulation matters. In that capacity she has had the opportunity to serve as lead counsel or principal attorney in dozens of class actions.

MS. MEZZETTI: Thank you. I am a plaintiff’s class action attorney and I feel compelled --

UNIDENTIFIED SPEAKER: Yay.

MS. MEZZETTI: Thank you. And I feel compelled to note that when I walked in the door this morning I was five foot, three inches tall and I’m going to keep track of how short I am when I leave this table.

One other thought that I want to open with is that I was interested to see in one of the academic papers prepared for today's workshop that only 24 percent or so of class actions lead to settlements. The rest of them go through the judicial process and they are dismissed or they go to trial.

An earlier academic report indicated that a very small percentage of those settlements, in the single digit percentages, actually provide only coupon benefits. So I’m not sure, truth be told, why there is such an emphasis on
coupon settlements because, in fact, there is a long list of the benefits that are given to class members in today’s settlements.

The list includes and is not limited to injunctive relief, changes in corporate day-to-day operations, changes in corporate structure and governance, credit programs to give automatic credits to the class members, settlement research funds, coupons for free products, coupons for discounts, charitable contributions at the election of a class member if they choose not to take a coupon, ADR processes for claims if class members choose not to settle, monitoring programs, cy pres funds. The list does not end there.

So an emphasis on only one part of all of those benefits would seem to ignore at least three points. All nonmonetary benefits provide a value and we have to look at them all. All of them allow for the very important adjudication of class members’ rights, rights that then lead to the return of damages. And they also allow for the recognition that there is no settlement that does not change behavior prospectively for the better.

All of that, I think, brings value from the class actions and for every class action that can be listed here as a bad class action, I could, but I don’t have anywhere

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
near the amount of time I need, I could list all the good
class actions.

The laundry list also allows class members
choices. They choose their value so they’re showing us
that they think there is value in some parts of this buffet
of choices that they are given.

And in addition, this choice, this list also
acknowledges what the Supreme Court recognized in 1980,
that the opportunity given to class members is of value
even if they choose not to avail themselves of it in the
Boeing Corp. case.

So I think we have to focus on all of the values.
And as I noted, the laundry list includes the very valuable
injunctive relief. Now, my written paper for the workshop
talks a lot about changes in corporate structure and
changes in day-to-day operations.

And these include for corporate structure new
management positions, education committees, the requirement
that certain issues raised by line workers are reviewed by
executive committees, independent executive committees.

Day-to-day operations can also be changed, geared
specifically to the class action allegations. So, for
example, in a credit card case we arranged for, where the
credit card company was alleged to have charged fees
inappropriately and too quickly and charged products to
class members when they didn’t know that they were being
purchased, we were able to get 12 changes, right down to
the script used for the telemarketing.

The jurisdiction was maintained by the court.
Reports were given to the court to confirm that the changes
were made. And some people can wave their arms and say,
well, but they’re only temporary. How many years of
changes did you get?

But I submit that first off, it's possible that
it can be permanent and if it is not permanent then either
-- if illegal actions occur -- then another class action
can be brought and should be brought in certain
circumstances or more specifically, government agencies
like the FTC can step in and make sure that the appropriate
actions are taken long term, or longer term than the class
action attorneys have brought about.

I also want to note that these changes in
corporations and these laundry lists of benefits came about
because settlements with nonmonetary benefits have changed
over the years.

In the 1980s when these started, these coupons
were the very essence of the definition of coupons. Here’s
a piece of paper. You get a free product or you get a
discount. You won’t have to pay your bill this month, Mr. Businessman, because you have a coupon.

They changed. There’s no question. Sometimes businesses wanted to use this for business generation. Sometimes, in large part what happened was the economies of the country changed. Because there were hundreds of thousands of class members in a case or because there were hundreds of millions of dollars of damages, each individual coupon became less valuable in and of itself.

So criticisms, whether they were valid or not, grew and the parties to class actions, the plaintiffs, the defendants and the courts all listened and learned and we changed class actions. We changed coupon settlements.

We put secondary markets in. We have minimum distributions. We have cy pres funds. We have coupons for only certain types of products, less-expensive products that we know the individual is going to buy like the music club CDs cases. The settlements are bolstered by the laundry list but they are also bolstered by these changes. So the process moves and the process grows.

And looking back at old settlements does not necessarily mean that they are all bad. Indeed, I believe and I've seen and I think I have never personally been involved in a bad settlement. That just gets weeded out.
Criticisms are lodged and the system works.

The courts put pressure on the parties or the objectors and the FTC whether government or private objectors put pressures on the parties, usually on the defendant, truth be told, to make a settlement better. I have had settlements become better after they were disapproved. Bad settlements that are never approved are weeded out by the system and I don’t think we should lose sight of that.

Even with all of this, however, I do want to say that we shouldn’t run from coupon settlements. We shouldn’t run from redemption rates, which seems to be a very big concern for the FTC and for a lot of different critics.

And indeed, already plaintiffs and defendants and courts do not run from them. Courts already discount the value of the face of the coupons when they are valuing settlements and they grant fees on the lower amount.

Courts also, especially in the recent past, the last three to five years, courts demand reports on redemption rates. This has happened significantly in the Microsoft case where redemption rates will be reported not only to the court but to a newspaper in the local area. And although defendants are sometimes hesitant they’re now
changing because the courts and the objectors are requiring this.

So although I believe compiling these types of statistics is already occurring and a special process for it, such as Professor Leslie talks about, is probably not necessary, if we are going to do it, then I think we have to do it on an even and fair ground.

Every class action settlement is different based on the class members, based on the coupon, the product, the terms, whether there’s a secondary market, whether separate terms, separate contracts can be negotiated with class members. And that actually happened in the airline antitrust case where the businesses that received the very large bulk of those coupons used those coupons to a very high percentage of, I believe, over 85 percent.

The thought of using redemption rates and statistics from one class action to determine whether another class action is valid is, I think, wrought with problems unless we recognize the differences among the class actions and among the coupons because looking at a settlement value in hindsight without all the facts will always result in an unfair analysis.

Thus, I believe we cannot lose sight of the total value of these settlements, of all of the benefits. We
shouldn’t lose sight of the value of coupons and their
redemption rates. And I think we should maintain a correct
focus on recognizing all of the values of the different
types of benefits and the restrictions and the protections
that are already in place for these settlements. Thank
you.

MR. DELACOURT: Thank you, Lisa. Our next
panelist is Phillip Proger. Phil is a partner with Jones
Day where he serves as coordinator of the firm’s government
regulation group. His practice, which focuses on antitrust
matters before the U.S. and international enforcement
agencies, as well as antitrust litigation, has given him
frequent exposure to both the litigation and settlement of
so-called follow-on class actions. Phil.

MR. PROGER: Thank you. I’m going to try and be
brief because I think it would be good to get to some
questions and the panelists ahead of me have been excellent
and covered a lot of the territory. I do want to thank the
FTC for holding this.

I guess I come at this a little bit differently.
One, I think a lot of the problems we’re talking about here
are problems inherent in class action litigation and not
inherent with noncash settlements. And I want to be clear,
when I think about this I’m not thinking about just
I’m thinking about the broad array of noncash settlements.

I start with one sort of basic theme which is a lot of the criticism on cash settlements are that they bring very little value to the individual class member. And that strikes me as kind of an odd thought when class actions, in essence, in many cases, are designed to allow people who have had very small individual injuries to aggregate them so you can overall as a society redress the problem.

So why are we surprised now that individual class recovery is relatively small? And Lisa, I thought, makes a good point when you say that we -- and I think this is the point you were trying to make -- that we’re undervaluing injunctive relief. I think injunctive relief in a lot of these cases is very powerful.

I will say that I think in some cases we ought to have the courage to just have injunctive relief. I think too often we throw in noninjunctive, noncash parts to frankly dress it up so it can be settled. Class actions are very difficult to settle. There’s a lot of divergent interests involved in the settlement. And while some people say that the defense counsel and the plaintiffs’ counsel have similar interests, I’m not sure that’s really
true.

A, the plaintiffs’ counsel often have very diverse interests as has been pointed out when it comes to fees with defense counsel. In some cases that are vertical, defense counsel have very divergent issues. There are, frankly, lawyers who specialize in objecting to these cases and can bring an adversarial position to them so these are very, very difficult cases to settle.

And one of the things I’d like us all to think about is there is a societal value in settlement. You know, Your Honor, when you made the remark that as a judge what you think about is making the case go away as a defense lawyer reminded me of Renee Zellweger’s comment in Jerry Maguire, “You had me with hello.” We’re trying to now make a case go away.

And one of the other problems with this is a fundamental premise -- well, look, class actions are neutral in the sense of what they do. The problem is with the case itself. If it’s a meritorious case and a meritorious case where the individual harm is so small that it would have never made any sense to bring it in the first place, Rule 23 is a very good idea.

The problem is there are also cases where, frankly, there are no real meritorious individual claims
but the sheer weight of the size does produce an
extortionary effect on the defendants who are not willing
to bear the risk of going to litigate what they believe to
be dubious claims but because of the sheer size the risk
could virtually put them out of business.

So what does noncash do in this situation? Well, it provides some ability to deal with the divergent risks and their assessments. The plaintiffs assess their risks of litigation and the value of the settlement. The defendants do the same and often there is a large difference between those assessments.

What noncash permits the parties to do, and if we view settling these cases as having a societal value, what noncash does is often allow them to bridge those differences so that the plaintiffs feel that they are getting more value for the class. The defendants, frankly, feel that they’re providing a lower cost.

I don’t think you have to have this exclusively. You can combine injunctive, cash and noncash into settlements. You can include cy pres. But I think to try and criticize noncash and think about excluding it would, in fact, make the class action process even more difficult than it is.

The last thing I would just say on this is, with
all due respect to the courts, that I do think that there
has to be some system within the process, maybe the parties
at the court’s direction retain as you do in mediation a
master or someone like that.

But I think that we have to do a more aggressive
job at really sorting out through the judicial process the
adequacy of the settlement, keeping in mind the various
factors that have been discussed here today.

But I would hope that as we deal with the
difficulties of Rule 23 and its administration that we not
limit to the parties in the litigation creativity in
settling the class while at the same time retaining a
vigorous standard of review for that settlement as to the
consumers. Thank you.

MR. DELACOURT: Thank you very much, Phil. Our
final panelist is Paul Kamenar. Paul is Senior Executive
Counsel of the Washington Legal Foundation. WLF has a very
active class action amicus program and has filed objections
to class action settlements, most recently in the MDL music
CD case, the magazine antitrust litigation and the Ninth
Circuit’s Microsoft case. Paul is also Clinical Professor
of Law at the George Mason University School of Law. Paul.

MR. KAMENAR: Thank you, John. I want to also
thank the FTC and the Georgetown Journal of Legal Ethics.

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
for sponsoring this. We are a public interest law and policy center here in Washington, D.C. and we not only file amicus but we also file actual objections on behalf of many class members.

Our focus, though, is on fighting what we think are excessive attorneys’ fees where class members get very little if anything but the attorneys reap millions because in a typical common fund case for every dollar that doesn’t go to the attorneys that’s an extra dollar that does go to the class members.

The Washington Post, I think, aptly characterized the class action system as "an extortion racket that needs to be fixed." And Leah described some of the examples of some of these abusive class actions.

Other chronic problems we see with the class action will be on later panels probably today are the adequacy of the notice, the class administrator’s claim that oh, 90 percent of the class members received notice about the lawsuit but these are notices buried in the back pages of newspapers and magazines.

I’d like to say that they really say that 90 percent are exposed to the notice, not actually receive it. And like I say, being exposed to these notices are like being exposed to carbon monoxide. You don’t know about it
until it’s too late. And it is too late to object or opt out of these settlements and you only have like a week or two to do that.

I’d like to discuss briefly a couple of pros and cons of some of the relief in the form of coupons, cy pres and tie it in a little bit to attorneys’ fees. Generally thinking, money does seem preferable to coupons but if a coupon is for a consumer product you normally regularly buy, a $20 coupon may be more valuable to the consumer than its cash equivalent of, say, $10.

In other words, if it’s a hundred percent markup that the company is giving they would settle for the $10 cash. You might say, well, I’d rather have the $20 coupon because if I only get $10 cash and have to buy a $20 product I have to come up with another 10 bucks in cash to do that.

I’d like to discuss briefly two cases to illustrate this phenomenon. One is the CD case you’ve already talked about and another one is one that we’re in litigation right now. Actually, Phil is representing the defendant and that’s the cosmetics settlement case that involves not providing coupons but for providing actual sample size or bigger cosmetics to those who purchased what are called high-end cosmetics from the department stores,
Estee Lauder, Clinique, Lancome over the years.

And there you’re not getting a coupon but you are going to get the opportunity to get an actual cosmetic product that’s valued between $18 and $25.

On the CD case, one little thing on background about that briefly that John didn’t mention. Actually, the FTC got a settlement against the compact disc industry on May 10th, 2000, an injunction, a consent decree.

And amazingly, that same day, the first of 52 class action suits were filed by the plaintiffs’ attorneys. Well, obviously, there’s no coincidence what was going on there.

That CD case actually involved two cases, one involving those who purchased the CDs through the CD club and they got vouchers that Judge Hornby, I think, alluded to which are 75 percent off the CD and then those who purchased the CDs at retail stores, there you got a check in the mail, as John indicated, and I think the check was for approximately $13.80. And basically the class members were fairly happy with that.

But what is interesting there is that you had a cash fund of $67 million depending upon pro rata how many people registered to get the claim. So if 67 people registered to get the claim everyone would get $1 million
out of the $67 million fund.

As it turned out, there was also a clause in the settlement agreement that said if too many people filed a claim such that each person would get less than $5 the whole entire $67 million would be transferred over to the cy pres fund. So there was kind of a game going on here and as it turned out, four million people did register and pro rata into $67 million each got a check for $13.80. We objected on behalf of several class members. The cy pres also, we objected about the evaluation. Of course, the defendant and the plaintiffs' attorney wanted to blow up the value of the CDs, the Michael Bolton CDs, the Whitney Houston CDs to around $17.38 apiece. We said, look that’s got to be discounted considerably. I think Judge Hornby did discount them to about 20 percent off of that.

Now, if you look at that case and compare it to the cosmetic case that we’re in court about now, as I said, it proposes to provide up to the class size is 38 million women who bought cosmetics over the last ten years and the settlement now allows you to get an opportunity but not a guarantee to show up at a department store one week in January in the middle of winter and pick up your product that you may not even use but -- and it’s only when
supplies last, so you’re not even guaranteed actually getting anything there.

Now, Phil argued and I kind of agree, that this suit was a meritless lawsuit. The plaintiffs’ own expert said they only had about a 7 percent chance of winning this antitrust case. So the question is from the defense point of view, well, this is the best we can do. This is what the case is worth.

But from the consumer point of view you had this problem. So we objected in that case saying perhaps maybe the consumers might rather have a coupon where they could go in within a six-month period, redeem it as a voucher towards cosmetics they actually purchase as opposed to waiting in line as the plaintiffs' attorney said, there’s going to be a stampede at the stores during this one-week period to get your free cosmetics and then you might not even get a guarantee that you’ll get anything.

I understand that during the settlement negotiations one of the cosmetics companies was amenable to the coupons but interestingly, the plaintiffs’ attorney said no, we don’t want to have coupons because the courts won’t like it and they said if we give you cash you’re only going to get a 15-cents check. I don’t know where he came up with that number, either.
But it seems to me that what was really going on here was that the plaintiffs’ attorneys would like to have this product, which is valued at $175 million at retail in order to tell the court, gee, our attorney fee request of only $24 million is only like about 15 percent of this $175 million product fund and therefore that is within the ballpark of the 15 to 25 percent range.

However, if that product was reduced to an actual cash value, let’s say the $175 million worth of cosmetics is really only worth $25 million in cold cash to the company, let’s discount the cosmetics some 80 percent, well, the attorneys are asking for about $25 million. Obviously, their fee would look too high if they took cash in that case, even though the consumer might want that $25 million. If you have two million filed claims they’ll get $12 checks. That may be preferable.

Solutions. How do we control this? Well, there was some talk about having special masters, waiting until the fee is redeemed -- I mean, the coupons are redeemed before the fees are paid.

One actual example that the courts are using is paying the attorneys’ fees in coupons. A couple of quick cases. One where a securities settlement ended in both cash and stock and the court said that if counsel, quote,
expressed faith and confidence in the value of the settlement for their clients it’s not unreasonable to require them to some extent to stand equally with plaintiffs in sharing the distribution in kind and awarded part of the fee in stock warrants. The airline travel case awarded $200,000 in nontransferable credit to the law firm for air travel. They do a lot traveling so I guess they could use it. A cruise line case, the court in Florida awarded a chunk of the attorneys’ fees in these vouchers for cruise line trips.

And finally, with respect to statutory solutions you have in Texas for the first time, any case filed after September 1, 2003, in Texas, a class action case, says in a class action if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorneys’ fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

And currently before Congress is the Class Action Fairness Act of 2004 and a couple of provisions there require that the fees, quote, attributable to the award of coupons shall be based upon the value the class members of the coupons that are redeemed and therefore there’s some kind of a check there in order to determine whether the
fees should be reasonable. And certainly courts can do
that by waiting until the coupons are redeemed.

Another is to use the lodestar fee where you look
at the lodestar rate, the hourly rate that the attorneys
are making rather than a percentage of this overinflated
coupon settlement.

In conclusion, courts should carefully scrutinize
all these class action cases, paying particular attention
to settlements that provide for coupons and other
nonmonetary relief to ensure that the settlement is fair,
reasonable and adequate. And courts should also ensure
that attorneys’ fees in coupon cases are not excessive,
perhaps unless the special master, as Phil mentioned, in
fact, there is a special master in the cosmetic case right
now, and to make sure that the fees are not greater than
the lodestar amount. Thank you.

MR. DELACOURT: Okay. Paul, thanks very much.
And I’d like to thank all the panelists for staying within
their time. Thanks to that we do have a good bit of time
here for questions and answers.

I’d like to start off with a first question that
ties back to Chairman Majoras’ introductory remarks. She
mentioned that one of the big purposes of this workshop, we
have kind of a general objective of informing ourselves
about the class action mechanism and what are the issues
and what can we do to improve the class action mechanism.

But a more specific objective is what can the FTC
do? Which of these problems can be addressed by the FTC
and specifically for this panel, what can the FTC do about
some of the problems with coupon compensation and non-
pecuniary relief that we’ve identified?

So I guess I would break that down into two more
specific questions. One is the way we’ve addressed this
problem so far is by filing a series of amicus briefs. And
my question would be are there certain types of coupon
compensation settlements that should raise red flags, that
we should be particularly concerned about and focus on?

And second, should we be taking other steps?

Should we be looking beyond the amicus filings we’ve been
doing and look to other ways of remedying the problem?

Chris, would you like to start off?

PROF. LESLIE: Sure. It seems to me what you
look for for red flags are the restrictions that you see on
many settlement coupons. So you look for
nontransferability. That’s a huge red flag. You look if
there are product restrictions. You look if there is an
expiration date that seems relatively short, especially if
it’s a durable product.
But I think more importantly what we need is more
data. We’ve got a lot of anecdotal data of coupon
settlements that don’t look so good. We’ve got some
anecdotal data of coupon settlements that were fine. What
we don’t have is any systematic collection of data whereby
we can actually look coupon by coupon and see what
redemption rates are and try to get a sense of what are the
restrictions in settlement coupons that are associated with
low redemption rates so we can have an empirical basis for
figuring out what the real red flags are.

Currently, there’s no requirement that there be
reporting of redemption rates or the coupons. And it seems
to me that that’s the first step so that we can
systematically understand settlement coupons and try to
separate the good from the bad.

MR. DELACOURT: Do any of the panelists have
thoughts on that? Phil?

MR. PROGER: Well, I think first and foremost,
you can do what you’re doing, having a workshop like this
and commenting in amicus in certain cases I think it’s very
important.

I think one thing you could do, and I think that
this workshop starts that process, is to take a step back
and try and think through what the problem is and try and
properly analyze what the problem is.

    With all due respect to those who want to look at redemption rates, transferability, counsel taking it, they may be appropriate. I’m not saying they’re not but I’m not sure that we’re really focusing on the cause. I think we may be focusing on a very small part of the effect, the end.

    And I think we need to look at the more fundamental questions under the system whether there is adequacy, reasonableness and fairness in this process and whether or not consumers are being protected. And to go back to a point I made earlier, whether we maybe should be looking at less what did this consumer receive in this case and more what was the overall relief to society? What was the injunctive relief? What was the cy pres? And what were the benefits from that?

    MR. DELACOURT: Lisa, do you have a comment?

    MS. MEZZETTI: I don’t agree with everything you’re saying but the plaintiffs’ side is not going to run away from that any faster than the defense side. So looking at those types of analyses are probably not a bad thing and the FTC may be, maybe with other groups, the right entity to do those types of analyses.

    I do agree with Chris that looking at coupon-only
settlements and looking at the restrictions on those coupons is very important. I have already said using each coupon settlement as an example for the next, I think, is very dangerous.

If we’re going to collect this data we have to do it very carefully and judges and the FTC and anyone else, academics who are going to use it in addition to the parties and the courts need to know that there has to be some true version of comparison among the cases.

Having said that however, it will show why certain coupons are used dramatically. And I want to make a correction to one misstatement I made during my remarks. I talked about the airline coupon settlement and the percentages used there. What I should have said is that is an example of businesses using coupons.

And the statistics that I’ve read indicate that indeed when businesses are the class members well over 80 percent, the number I quoted, are used, not necessarily in just the airlines case but in business class member cases in general.

In a good consumer case, one where a coupon allowed -- although litigation was involved with only one product, the coupon allowed purchase of any product in any store in a nationwide department store, over 99 percent of
the coupons were used.

So there are coupons out there that get used and getting data on why, I agree, is a good idea. But we need to compare apples to apples all the way through, historically.

MR. DELACOURT: Paul, did you have a comment?

MR. KAMENAR: Well, I think that in terms of trying to get this information I suggested in my written comments that all class actions be filed or registered on an FTC web site.

Right now, many class actions have their own web site but I daresay everybody in this room is a class member of two or three class actions and you don’t even know about it. You don’t have the time to surf the web and go through every product you purchased, gee, am I a member of a class action?

On Saturday I got in the mail, some of you may have a notice, in a case dealing with life insurance and typically it's in this microprint of 40 pages and so forth right here. The point size is about 7-point or 8-point. But the point I’m trying to make is if the FTC had a web site where all the web sites of the class actions were there with a hotlink to those cases, everybody would at least have better notice.
Number two, since the attorneys and the parties have to file those things and are required to file on their own web site for that case that, too, can then be available to everyone to monitor what is going.

And finally, the judges should require that the fees don’t be paid until the coupons are redeemed. If there’s a 99 percent redemption rate like Lisa mentioned, great. You attorneys did a good job of getting good coupons. If the redemption rate is less than 1 percent because of the restrictions, why should the attorneys get the value of the whole amount?

So that kind of information, I think, should be on a centralized web site so that way for academics, practitioners, objectors we have a way to find this rather than have a hit-or-miss system.

MR. DELACOURT: Judge Hornby.

JUDGE HORNBY: I think the more the FTC can be involved in the actual litigation as an amicus or otherwise the better because at least from the judicial point of view we think we know whom you represent just like we do for state attorneys general. We’re less certain often in terms of objectors. We’re not sure of the parties when they’ve settled who the presenting -- if they have an FTC role is a great help to the judge who’s reviewing a proposed
MR. DELACOURT: All right. I’m going to turn now to a question from the audience. This one was submitted. The question is, if baseless class actions are filed, why don’t defendants take a principled stand and fight them with motions to dismiss, et cetera instead of settling to save litigation costs? In other words, don’t pay the guy with the squeegee.

So I take that one as being directed to the defense bar. So maybe, Phil, if you want to take the lead on that and then others can chime in?

MR. PROGER: Actually, not particularly. Well, look, I mean, I understand the point but you have to deal with reality in life and the defendants aren’t the only ones in sole control of the situation. In the case that Paul mentioned the cases were filed in state court. There is under the state court procedure the equivalent of an MDL.

The judge is a very competent, intelligent person but from the very beginning she told one, the panel, that she didn’t want the case; two, she had never tried a class action; three, she had never had a competition case.

Before discovery was commenced the court ordered the parties into mediation, ordered the parties to retain a
mediation expert which the parties did from one of the firms that provided an individual who is a former state court judge. Mediation lasted 18 months and there was enormous pressure, frankly, on both plaintiffs and defendants to settle the matter, the court made it very, very clear.

A principled approach, frankly, would have cost more than a settlement. A principled approach would have cost consumers more than the settlement. And at least in my view the case had no merit and the plaintiffs have been fairly forthright in the settlement review, which by the way, there are numerous objectors including 13 state attorney generals. And so this is fairly vigorously contested.

I think, again, when we start isolating the particularities of an individual settlement and we do so without the context of the value and the merit of the underlying claim you get into dangerous territory.

There is, however, injunctive relief and the injunctive relief, I believe, is very beneficial to consumers and plaintiffs’ counsel are entitled to some benefit for taking on a difficult case and bringing the case home where overall, I believe, consumers benefit from the injunctive relief.
But I don’t think defendants always have the ability to decide to go forward and just contest it. By the way, there were motions to dismiss. There were summary judgment motions. They haven’t been ruled upon.

MR. DELACOURT: Does anybody else have a comment on that one? Professor Leslie?

PROF. LESLIE: I’d like to focus on this injunctive relief notion because it seems to me it’s a little bit of a red herring at a certain level, that when the class counsels say look at what we’re bringing, it’s injunctive relief and we’d like these high attorneys fees they try to justify it by saying but we’re also bringing all these coupons and look at the face value of the coupons are so high.

And then when you say but the coupons aren’t worth very much money, the response is yeah, but we’re getting injunctive relief, too. They’re bouncing back and forth between them.

The coupons often are worthless such as in the case of Schneider v. Citicorp Mortgage, which is just going down right now where the settlement coupons are the ones that are for $100 but you can’t aggregate it so you can’t use the $500 coupon that’s available. To use it you have to get a new mortgage or refinance your mortgage within two
years, which would require a great loss of money because you’d have to refinance at a higher rate in order to use the coupon. The coupons are nontransferable at a public sale.

So the response might be yeah, but there’s injunctive relief, too. The injunctive relief that the attorneys are trying to justify their attorneys’ fees on are if HUD adopts a new rule, Citicorp will follow it. And actually, at court the judge asked, what do you understand -- to the defense counsel -- what do you understand that the provisions of the settlement require your client to do that they otherwise don’t have to do? The response?

Nothing.

So I just want to make sure that we’re not buying this notion of there’s coupons and injunctive relief because it’s possible that neither one of them gives a whole lot of value to the class and we still run the risk that the settlement coupons have a high face value that’s being used to justify higher attorneys’ fees than are warranted.

MR. DELACOURT: Leah, did you have a comment on that?

MS. LORBER: I wanted to follow up on the injunctive relief argument a little bit. I think there is
a basic policy controversy over whether or not you want
plaintiffs’ lawyers in class action lawsuits setting policy
and regulating businesses or if you want the government
agencies who are trained in doing the regulation and are
familiar with the information that is needed to regulate
the companies and the industries doing the regulation.

   A lot of the class action lawsuit settlements or
if there’s a jury award this all comes up in an adversarial
process where there’s very little opportunity to collect
all the information that you need to make a good public
policy decision about what’s best for the country as
opposed just to what’s best for the particular litigants
and the attorneys on both sides and the company in the
particular case.

   Also, you get, and this I’m sure is going to be
discussed at length tomorrow but you can get contradictory
results if you’ve got class action versus state attorney
general regulation versus government agency regulation. So
I can see that injunctive relief is appealing in some cases
but I don’t think it’s a blanket panacea for everything.

   And just to follow up really quickly about the
companies why don’t they settle -- or excuse me, why don’t
they fight the cases instead of settling them, we wish the
companies would not just because they would pay us to
litigate them but also because you’re just encouraging more and more lawsuits to happen if you’re going to settle stuff that isn’t worth a suit in the first place.

I mean, you look at Madison County, Illinois, where there’s this huge class action lawsuit industry going on and there’s just this little industry there where the defense attorneys are charging what they charge in New York and D.C. to litigate things in rural Illinois and it’s just encouraging the growth of a problem.

MR. DELACOURT: If we could have one comment from Judge Hornby and then one from Paul, we’ll wrap up on this question.

JUDGE HORNBY: It is important to distinguish between distaste for attorneys' fees and distaste for the small amount of a settlement or distaste for injunctive relief.

Typically, we get them altogether and so we’re unhappy because there’s coupons plus attorneys' fees or small settlement plus attorneys' fees but as I think it was Phil Proger pointed out the whole point of class actions is to permit the small claims to be brought. It’s a separate question from the attorney fee issue. Even an individual can get injunctive relief, may or may not get attorneys' fees. That too, is a separate issue. I think it’s
important not to collapse these in our discussion.

MR. DELACOURT: Paul?

MR. KAMENAR: Yeah, just briefly, I think actually, Your Honor, with all due respect, I think there is a connection there to collapse the two because the fees are such that they are able to get higher fees for very little value to the class.

Just one case in the paper on Saturday, the Halliburton securities class action case, federal judge there in Texas rejected the settlement. You would get up to 62 cents for each hundred shares of stock you own. That’s less than half a cent a share.

And one of the lead plaintiffs said, we don’t want this proposal. And it quoted their attorney saying, "It conferred no benefit on anyone but the lawyers. We’re not going to become poster children of the ridiculous settlement." So this is what Leah was kind of saying is, "hey, just say no."

One final thing was an injunctive case was the In Re Magazine Antitrust Litigation case. Magazine prices were being too high on your subscriptions. There was just an injunction only, not even a free magazine. And the court there in the Southern District of New York this year, earlier this year said, look, you just got an injunctive
relief that was minor.

It didn’t provide a substantial benefit on the class and therefore you attorneys when you’re trying to use what’s called a common-benefit system as opposed to a common fund where you get your fees since there was no substantial benefit, your fees are hereby denied entirely.

And we think judges should start cracking down on this and that might prevent some of these kind of worthless results for consumers.

MR. DELACOURT: I’m going to take the moderator’s prerogative now and combine two questions. Both of them will be directed to Judge Hornby. To what extent in the approval process does the court have access to a neutral economic report evaluating the settlement, especially the nonmonetary aspects it contains?

And a related question is why don’t judges more often appoint experts under Federal Rule of Evidence 706 to assist in valuing coupons and other nonmonetary benefits in a class settlement?

JUDGE HORNBY: Well, those are related. Automatically, you don’t have any access. In other words, it’s not presented to you just off the bat by definition because instead you’re being presented with expert reports that have been put together by the plaintiffs’ or the
defendant’s lawyers.

There is appointing authority under Rule 706 and I note that the 2004 edition of the Complex Litigation Manual suggests that courts may have the authority to appoint a special master to help evaluate settlements.

I think you have to remember the context in which these things come up. The litigation has been pending usually for several years and the court is presented with a complex settlement proposal that is defended by the lawyers in written submissions that are both legal argument and probably affidavits and analyses of various sorts.

Hearing is held. If the court is to appoint its own special expert there has to be a procedure set up for first finding an independent expert. That having been done then new studies have got to be undertaken, perhaps empirical studies or whatever. There will be expense involved and there will be delay and so we’re probably talking about a very considerable delay period after the litigation has already been pending for a long while.

So all of a judge’s instincts are to the contrary, maybe not correctly so, but they’re to the contrary in the sense of here is a lawsuit that’s been pending. It’s time to resolve it. If I now have to consult with the parties about getting an independent
expert how long will that take? How long will the expert
take? We probably ought to do it more but bear in mind it
will mean these things will take even longer to resolve
before the consumer does get a payback.

There have been efforts made. Justice Breyer’s
been involved, I know, with setting up panels of
independent experts that courts can select from. Probably
that ought to be given more attention. The money will come
out, of course, of the proceeds that are involved as to
what takes place because courts don’t have any independent
authority on their own to pay such fees but we ought to do
it more, probably.

MR. DELACOURT: Lisa, did you have a comment on
that?

MS. MEZZETTI: The expense of these types of
masters is always a concern because the court system cannot
accept, probably, the expert costs, and imposing it on the
parties means that, in fact, you’re imposing it on the
class members.

It does not mean, however, that it shouldn’t be
used and in the appropriate case I have seen it used very
well. And in that circumstance it was another example of
the system working because the court said I need more
information and I need some analysis, not unlike the
analysis that Professor Leslie is looking for on data and information. It’s part of the system working.

And, in fact, I noted that Paul started his last comment about a settlement that you found unacceptable by noting that the court found it unacceptable and did not approve the settlement. So the system works and it works for coupon settlements and it works based on data and it works based on all of the information provided to the court.

And as a plaintiffs’ counsel I doubt that Phil will disagree with me. I can tell you this: when a court asks me for information I get it and I give it to the court. So everything that the judge has talked about is true in terms of delay and cost but it doesn’t mean that in the right case it shouldn’t be done.

MR. DELACOURT: I think we have time for one more question if everyone can give a relatively quick response to this one. It’s actually one of the more challenging issues that the FTC faces when we are evaluating a settlement, a coupon settlement and trying to determine whether we should file an amicus objection or not.

And the question is when you face a case where the underlying harm is questionable or maybe it’s very minimal and the coupon that is proposed by way of relief
also provides minimal relief, is that a situation that we
should be concerned about or is that appropriate? Do
claims of low value merit coupons of low value as a
solution or is there a problem with approval of such
settlements going forward? Judge Hornby?

JUDGE HORNBY: I think it’s important to
distinguish between small injury and small likelihood of
injury. Just because an injury is small doesn’t mean it
doesn’t deserve redress. The principle of our system is
that every injury does get some kind of redress. But if
it’s a small likelihood of injury then you’re weighing the
frivolous versus the meritorious lawsuit and that ought to
pay an important role.

MR. DELACOURT: Phil?

MR. PROGER: I think that’s a very good point and
I think one of the problems we have in class actions for
the courts and the parties is that often there’s no easy
way to separate that out and there’s no efficient way to do
it.

And so when we talk about these settlements and
we talk about the benefits, it is an adversarial system
between the defendants and the plaintiffs and the objectors
and the opt-outs and the court.

Hopefully -- I don’t know if I’d go as far as
you, Lisa, to say the system is working. As a matter of fact, I’d probably say it’s not but in this process there certainly is the mechanism to try and reach what is a fair resolution.

I want to add one other thing from the parties’ standpoint. We need to understand that parties in litigation should have the right to settle the cases and to now put an additional burden on them beyond what Rule 23 provides of more litigation, more proof on some of these issues, I think, is going to create more expense, more problems.

Maybe we need more vigorous use of masters. Maybe what we need to do is in some state courts you know that only certain judges handle complex cases. Maybe in the judicial system, federally and state, we can get judges who are interested in this area and want to do only class actions. I don’t know. I don’t know if that’s a good solution but I hope we don’t leave this area without keeping in mind that the parties do have a right to settle their cases.

MR. DELACOURT: Okay. Everyone wants a taste of this one. Leah, what do you think?

MS. LORBER: Just real quickly, at first glance it sounds like a good idea: frivolous claims get coupons
that aren’t worth much but to get there you have incredibly huge transaction costs, large defense costs, large imposition on the court’s time. You’re slowing claims of people who are legitimately injured who may have to be backed up behind these class action suits that are taking a while. Even if they settle, they’re still taking several years again in court, taking the court’s attention and resources.

In turn, these large transaction costs turn into things like increased consumer prices, decisions to pull products from the market because they’re being the target of class action lawsuits, the loss of money that would go into R&D, all kinds of things that have an effect on society. So overall, I would say it sounds like a good idea or a cute idea but it’s not something that I’d be in favor of.

MR. DELACOURT: Lisa and then Paul and if you could keep it brief, please.

MS. MEZZETTI: I agree with Phil that the parties, because of the professionalism of their counsel, will always seek appropriate results. When parties are not acting professionally then those settlements get weeded out.

So given the judge’s distinction between a
frivolous claim and a small injury, and recognizing that
the parties are seeking to equitably and appropriately
reach a resolution with the help of the court, I think we
can reach good settlements and sometimes those are small
coupons.

MR. DELACOURT: Okay, Phil, you get the last word
-- I’m sorry, Paul.

MR. KAMENAR: Just briefly, I mean with respect
to small claims there used to be a principle in the law, de
minimis non curat lex, the law does not consider itself
with trifles. The class action takes that principle and
discards it and now makes these little trifles to be class
actions.

With respect to the merits of the case,
meritorious cases, I think judges should look at these very
carefully. As Phil said in the cosmetics case, there were
motions for summary judgment that were pending. The
plaintiffs’ attorneys said, their own expert said that we
only have a 7 percent chance of winning.

The court should decide those motions right off
the bat rather than forcing the defendants to settle these
things where the attorneys, sad to say, or for the
plaintiffs they like to say, they get all the money out of
this and the consumers get very little.
MR. DELACOURT: Okay. Well, thank you very much to everyone. (Applause.) And we’re going to be taking a short break right now and we’ll reconvene at 11:00 for a panel on insuring that settlements are fair, reasonable and adequate.

(Whereupon, a short recess was taken.)

MR. FRISBY: My name is Robert Frisby. I’m an Assistant Director in the FTC’s Bureau of Consumer Protection, Division of Enforcement and I’ll be moderating our second panel of the day which is on tools for ensuring that settlements are fair, reasonable and adequate.

We plan to cover the role of third-party objectors and amicus filers as well as the impact of the Rule 23 amendment allowing parties to appeal orders granting or denying class certification, the recent Rule 23 amendment addressing second opt-outs and the more general question of whether bad cases lead to bad settlements and the implications of this.

Finally, we’ll close with a discussion of some common fund case issues involving the practice of determining class counsel fees separate and apart from the common fund.

We have assembled a very distinguished group of

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
panelists for today’s panel number two, including the Honorable Diane Wood of the United States Court of Appeals for the Seventh Circuit in Chicago; the Honorable Ann Yahner, Administrative Law Judge in the District of Columbia Office of Administrative Hearings; Professor Samuel Issacharoff, Harold R. Medina professor in procedural jurisprudence, Columbia Law school; Brian Anderson, a partner at O’Melveny & Myers; Neil Gorsuch, a partner in Kellogg, Huber, Hansen, Todd & Evans; and finally Arthur Bryant, executive director of the Trial Lawyers for Public Justice.

You will find much more detailed information about the panelists in your workshop folders and on the Commission’s workshop web page. We plan to spend about 60 minutes talking about the issues of the panel and then we’ll spend about ten minutes or so on questions from the audience.

If you all have a question, please write it down on one of the cards in your folder and hold it up so that our staff can collect the cards and we’ll make sure we ask as many of those questions as we can at the end of the panel.

As I said, our first sub-topic of the panel will be the role of third-party objectors and amicus filers and,
Arthur, would you mind starting off with some background discussion about the role of objectors and some of the value they provide and costs they may impose?

MR. BRYANT: I’d be happy to. First, let me say that I have an assigned role at this particular workshop. I actually have been class counsel in a wide range of class actions. I’ve actually consulted with and advised defendants in some class actions but just about eight years ago we launched a special project to object to class action settlements that we thought were abusive. So I’ve been assigned the role here of representing objectors.

I will say that it is true that before we started objecting to class action settlements I did not have an eye patch, I did not need a cane, and you can draw your own conclusions from that. It was a meeting of plaintiffs’ and defense counsel that I attended.

I will say that part of what the role of objectors and amici becomes very important in class action settlements because of some structural problems in the way class actions are structured. And let me mention three in particular.

The first is that when you settle a class action, of course, the really fair, reasonable, adequate settlement should be an appropriate discounting of your likelihood of
success when you go to trial. That’s not just true in class actions but in all litigation. It’s sort of what could we get if we get to trial discounted by the reasonable likelihood of that and the value of the case.

One structural problem that affects some settlements in class actions -- and I have to say at the outset here, of course, I don’t know exactly how the FTC defines consumer class actions and how it determines which those are. So I may be talking about some that don’t involve that.

I’m thinking of the Bridgestone/Firestone litigation. But the Bridgestone/Firestone litigation is sort of the prime example of this structural problem which is the Seventh Circuit came out and said you cannot certify this case as a class action for litigation purposes anywhere in nation. And then the case was settled as a class action nationally in Texas state court.

The structural problem with that is of course the plaintiffs’ counsel don’t really have the full threat of what they could get if they went to trial if everyone knows they can’t ever go to trial. And that was the problem in that litigation. But it’s also a problem that’s increasingly coming up much more, frankly, in mass tort and large consumer class actions than the cases where small
dollar amounts are involved.

The second structural problem that sort of cries out for the need for often objectors and amici is, as the judge on the last panel talked about, when we come in it is that the deal has already been reached. The plaintiffs’ counsel and the defense counsel are going to the judge, who often is thinking, I just want to get this off my docket, and saying we’ve got a deal. We’re all happy. You should be happy. We can go home.

And we are the ones who come in and say, now just hold on and everything, which explains the joyous reaction of all the parties to our arrival. And the role we play there is in some ways helpful to what Judge Hornby, I think, was talking about is the third structural problem.

And this is something I hope the FTC and the Federal Judicial Center, among others, would address is that many judges aren’t prepared to play the role of the fiduciary and evaluate the class action. They may not have even had a class action in front of them. So I mean this presentation, this panel is entitled “Tools for Ensuring that Settlements are Fair, Reasonable and Adequate.” Objectors are one such tool. I’ve been called a tool by a lot of people but that’s a little different. (Laughter.)

Now, the amici and the objectors can play that
role, but you have to understand, when we go in the deal’s
already done. The only question is whether it’s going to
be approved and often it is not only a case that the judge
is looking to get rid of but almost always, and there’s a
couple of exceptions, it’s a case where the judge has
already reviewed the proposed settlement, approved it
preliminarily as being within the range a reasonable person
could approve finally, and ordered notice out to the class.
That’s usually how we found out about it.

So the judge is already partly committed to the
settlement in addition to the parties being very committed
to the settlement. And we are viewed as problematic
troublemakers. And at the same time there are some very
important roles that objectors can play.

First, obviously, we can focus the judge’s
attention on problems in the settlement that neither the
plaintiffs’ nor the defense counsel want to call the
judge’s attention because they want this thing approved.

Second, we can force the settling parties to
therefore justify these weaknesses in the settlement or not
but at least try to justify them.

And third, we can therefore either prompt an
improvement in the settlement’s terms of the refusal to
approve a settlement, and the settlement is disapproved and
the case goes back to litigation.

Now, I will say I was asked to talk a little bit at the start about costs and benefits of objectors and so I told you the benefits. The costs, in terms of amici, I think the costs are relatively minimal. I mean, it’s a little time. You have to read their brief, consider the arguments, the settling parties respond to the argument perhaps in the brief but there’s not a lengthy delay caused or anything by amici.

In terms of objectors, however, well, we not only can delay the resolution but because we can act in some respects like parties and most particularly we can seek discovery, we can challenge the proceedings in the way they’re being structured and what’s being done and we can appeal we can dramatically delay the resolution of the case.

Our impact on the timing can be dramatic and we also can cost the defendant or the class counsel or both a significant amount of money. And that really gets to what I think is a real problem. I will say it’s our goal when we get in there, there are some settlements where we’re just looking to kill the deal, because, for example, I’ll give you one that’s in Mississippi right now.

There’s a Federal District Court in Mississippi
where there’s a proposed settlement. The terms of the
settlement are, and I’m not going into the dollars amounts
because from our perspective they’re interesting but don’t
really matter to this point, the terms of the settlement
are everybody in the settlement, in the class gets
compensatory -- an amount of money that they categorize as
a settlement of compensatory damages and an amount as
settlement -- I’m sorry, amount of money they characterize
as punitive damages.

Anybody who opts out is free to seek compensatory
damages but is not free to seek punitive damages and
because they opted out of their compensatory damages is not
allowed to get a portion of the punitive damages
settlement. So structurally it’s just wacky and we’re
objecting to that.

There’s another settlement, for example, right
now in Maryland we objected to successfully six months ago.
It ended up with the deal being $108,000 total to the
class, $13 million to class counsel. We objected, the
settlement was disapproved.

We are now going back in because they’ve
negotiated and they’ve reached a new deal. The class will
get $12.5 million -- that’s a lot better than $108,000 --
but the key part of the negotiations were class counsel has
the right to still recover $12.5 million themselves for
going this $12.5 million for the class.

Now, I will say, even there, the dynamics you
have to understand is we are fighting both Bell Atlantic's
counsel who favored the first settlement and favored the
second settlement and the class counsel who, of course,
favored each of the settlements that would get them $12.5
or $13 million. And we are the ones, as well as some
others, who are causing trouble.

And yes, we have already in that case, for
example, cost the defendants an increase in payout from
$108,000 to $12.5 million minimum. So if we are successful
we end up costing them money not so much for our fees
because we rarely seek fees but much more for paying the
class.

But also, we will cost class counsel fees because
even in this litigation as just one example, because we are
objecting to them getting a 50 percent fee in the entire
class action, another $12.5 million. And if we succeed the
class will get much more and they will get much less or the
settlement won’t be approved.

The problem is, and I think it’s a serious
problem, I can’t just paint objectors as these pure, lily-
white people doing just the public’s good because there
really are, to overstate the extremes, two different kinds of objectors.

There are a set of objectors that really are motivated by a desire to improve the settlement for the class, to protect the class members from having an unfair deal made. But there is another type of objector and there is a type of objector that understands that if they hold up this deal they can get paid off to go away, period.

I first heard the term of them being called professional objectors and I took it a little personally. What am I? An amateur? (Laughter.) But their motive is dramatically different. They’re looking to get paid to go away. And I will tell you as class counsel in cases we’ve had to deal with people like that.

And the most dramatic example I had of this problem -- well, I was going to say there are two types objectors -- and none of them announce that they’re the second type. Right? They all pretend to be, and some of them probably are in their heads even though I think they’re not, people out just to make a better deal for the class.

But I will tell you sort of where an example of a real education took place. We went down to object to a proposed class action settlement in Mississippi Federal
court before, actually, a judge who’s now become famous, Judge Pickering.

And the settlement provided, basically it was for people who were in mobile homes, primarily, on forced-placed insurance. I don’t remember the precise dollar amounts but let’s say the claims were worth a couple of thousand dollars per person. No one was going to sue individually except for maybe punitive damages to Mississippi.

And the settlement provided that each class member get, let’s say, $500 or $1,000 per person and that it was no opt-out as to punitive damages. You could not opt out and seek punitive damages separately. You got $1,000; that was the end of it.

And so we went down to object and we appear before Judge Pickering. We have three clients, class members who had mobile homes and were treated like this. And he calls a conference a week before the fairness hearing, the final fairness hearing.

And our lawyer goes in and the judge walks in and he says, now, listen, I have to tell you, this is my very first class action settlement. And I’ve been thinking about this and there are only three people objecting and I can’t tell the defendants to settle those individual claims
but it seems to me if those three people were satisfied as
to their recoveries this case would be much easier to
approve because there would be no objectors at all.

And I am not making this up. You know, I’m
sitting up here in Washington, D.C. having sent our lawyer
down there and the defendants put enough money on the table
that these three, poor African-American clients who live in
mobile homes, you know, they’re talking about over $100,000
total for three people on a settlement that would pay a
thousand bucks apiece if they stay in the class and they
buy out the case at the judge’s urging, in some respects.

And then another settlement within six months
along very similar lines is struck in front of Judge
Pickering. And this time I fly down and I walk in the room
-- literally, I go in the courthouse and there’s about 40
lawyers sitting out in the courtroom and I’m waiting for
the judge.

And the judge’s law clerk comes out to see me and
she says the judge would like to meet with you and counsel.
And I said okay, and I started up and she walks me back in
and nobody else gets up. I said, well, what about the
other counsel? She says, oh, they’ve been in there with
him for the last half an hour.

And I get in there and he says, look, the deal
has been improved dramatically as a result of your objections. Here’s the new settlement but it still didn’t let anybody opt out. And you know last time you guys were here your clients got paid off and everybody went away.

And I’ve decided that’s a mistake because all it does is it encourages people who are looking to get bought off -- meaning me -- to come back again and again. And I’ve decided that’s a mistake and it’s not going to happen again.

And I said to him, thank you, so much. We’re not looking to get bought off. We want a better deal for the class. We were so angry the last time that we waived the fee we could have gotten from our clients. And he sat back and said, would you repeat that last part?

And I explained again. He said, I’ve never heard of a lawyer waiving a fee in a class action. What are you talking about? And I explained to him about the organization.

He said, well, you’re a very different sort of person. Your organization is very different than the way you’ve been painted to be by these other guys who painted me as a professional objector. And we ended up finally getting the whole deal corrected.

It was actually written up by Rand. In the Rand

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
book of class actions we’re the only group, both talked
about for a case we prosecuted and for a case we objected
to.

But I will say that there’s no way to parse out
which kind of objector is which kind of objector for
certain. And so the solution, I think, to that, there’s
really two. One is you’ve got to focus on the content of
the objections. It doesn’t matter who they’re coming from.
Ultimately, they’re either valid or they’re not valid and
the judge has to look at them.

Second is, I think the federal rules changes that
have gone into effect should help prevent the buyout
objectors and expose them and help a judge stop them from
going paid off to go away in some respects.

MR. FRISBY: Thank you, Arthur. Why don’t we
move on to Judge Yahner? Would you like to weigh in on
this subject?

JUDGE YAHNER: Sure. I should make clear that
I’m weighing in as an ex plaintiffs’ lawyer, not as a
judge. I litigated antitrust class action cases as a
plaintiff for nigh on 20 years and that’s the basis of
experience I’m speaking from.

I partially agree with Arthur and partially
disagree. I think it's very important, just as the first
panel showed, to distinguish among class actions. I believe that class actions are not as a group bad things. There can be bad subsets of class actions but the purpose that a class action was designed to meet is generally met.

And giving Arthur the benefit of the doubt, I will contend that there are good objectors and that they all should not be tarred with the same brush but the presence of objectors can cause a whole lot of problems both from a practical and a philosophical point of view.

I think that if an objector comes in with the idea as Arthur said to look to kill the deal then it’s not helpful. Looking to kill the deal is a kind of blanket condemnation of what has happened during the course of the litigation and the settlement process which may be an appropriate outcome but isn’t really helpful to the parties.

I think having third-party objectors come in does impose considerable costs on the litigants and as a consequence class members see their recovery pushed down the line. It can run up costs. There is a possibility of extortion, to put it bluntly. There are people who go around the country and object to class action settlements. They are generally well-known and it is still generally very difficult to deal with them because they can impose
costs on the process.

And I don’t think that there are any courts that have really said Mr. So-and-so, we know how you’ve operated in the past and therefore we’re not going to hear the kind of objections you’re raising in this case.

I think that a third-party objector can raise legitimate issues that have gotten lost in the adversarial process. I think they can bring in points of view from different class members that are helpful, and one of the objectives of a useful objector should be not kill the deal but if this has to go back to a negotiating table, what can be done to deal with the problem that we’ve identified?

Just their presence, however, can make reasonable compromises very difficult because to justify their presence many times they have to be able to say we killed the deal or we killed 50 percent of the deal or this is the reason why we’re here and either we should be compensated for it or we should get a good press release for it. So they complicate the dynamic of the negotiations that have been going on.

I think generally if it is a public-interest group, if it is a state government, if it is a federal entity they come in with a higher degree of respect.

That’s appropriate, but I think that litigants usually look

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
at state and federal interveners and objectors with somewhat of a jaundiced eye because they may be coming into a particular piece of litigation with a policy objective that may not be appropriate to work out in the context of a particular class action.

I’m not going to say that this could be the Federal Trade Commission since we are sitting here in its building but I think it's important that if an agency is pursuing a policy objective that it be careful about the case that it gets involved in to make the point. So just like all class actions aren’t bad I think all objectors are not bad and some can be very useful.

MR. FRISBY: Thank you very much. Why don’t we hear now from someone who’s represented the defense side? Brian, would you care to weigh in?

MR. ANDERSON: Well, I’ve gotten some class action settlements approved. I’ve gotten some class action settlements rejected. I’ve won some class actions and I’ve lost some class actions so I think in the course of my defense career I’ve seen this from many different angles.

When a client wants me to negotiate and obtain approval of a class action settlement the client is looking for two things. First, it’s looking for compromise. A settlement is, by definition, a compromise, which means
that the plaintiffs are not going to get everything that they think they should have gotten had they successfully pursued the lawsuit to the very end.

And the second thing the client is looking for is finality, a termination of the cost and the disruption associated with high-stakes litigation.

Into that arena comes the objector. And I agree with both of the panelists that there are good objectors and bad objectors and you cannot just look at their name tag and determine before they have spoken whether they are a productive source of third-party information to help the judge keep me honest and the class counsel honest or whether they are motivated by some personal agenda that is inconsistent with what the purpose of a class action settlement ought to be.

Interest group objectors, like the Trial Lawyers for Public Justice or the Washington Legal Foundation, or potentially a government agency, can quite often provide the judge with a useful, appropriate perspective and, frankly, keep the lawyers honest so they can be a productive role in the settlement implementation process even if they do drag out the process and make life uncomfortable for the lawyers who are pursuing the settlement.
Conversely, if the interest group is one that does not believe in compromising the issue that is being litigated, they are a destructive force. And so, if they are an interest group that believes that the only fair settlement is one that involves complete capitulation by the defendant, they are acting inconsistently with the purpose of a settlement in the first place.

Other lawyers who have a financial interest in killing the settlement, either because they are professional objectors or as is often the case when we have multiple class actions filed around the country on the same issue, are lawyers who are prosecuting other lawsuits and they have been left out of the settlement tent, often because their fee demands were exorbitant, come in and try to kill the settlement in one of two ways: either get the judge to order exhaustive discovery of the settling parties, which is tantamount to having to litigate the lawsuit in order to get it settled, which is not what you’re trying to accomplish when you’re settling.

Or they are taking the position that if you will kill the settlement and let me pursue my class action in some other court I will get more recovery. That, too, is inconsistent with the notion of a settlement.

So you can’t trust the hat that the objector is
wearing. You do, as a judge, I think, have to listen very carefully to the nature of the objection that is being made and try to promptly make a decision whether this is somebody who’s bringing a productive point to the table or simply being mischievous.

MR. FRISBY: Thanks very much. Let’s turn now to Neil and perhaps you could also address the point made by the two previous panelists about the role of amicus filers like the FTC in particular.

MR. GORSUCH: Sure. I come at this from someone who’s litigated all three sides of this awful triangle we’ve discussed: plaintiffs, defendants and objectors. I should make that clear.

I think what’s underlying all of this and has not yet been fully explained is that in the normal adversarial process the parties have strong interests against one another and give the judge the benefit of that adversarial interaction.

When it comes to class action settlements, that disappears or at least it can be diminished significantly. You have on the one hand defendants who want to buy peace and the threat of certification can mean the destruction of their companies. They have to buy peace even sometimes of what some folks would consider less than fully meritorious
The other side of the triangle -- and to buy peace they don’t care how that money gets split up. They don’t care whether it goes all to the attorneys, whether it goes to class members or how the settlement is structured. They are indifferent to that.

And that’s an important structural difference between the normal private litigation scenario that most judges see from day to day and assume is going on where the parties are clashing and the class action settlement arena.

On the other hand, plaintiffs’ lawyers, who frequently don’t have to report to their clients in a meaningful way that normally exists in private litigation, have no particular interest to structure the settlement to favor the class as opposed to them. That’s the incentive problem that you find in the class action litigation arena, I think. And how you correct it is an interesting problem.

As to objectors, there is, in my mind, there is no question that they can serve a useful role though there are professional objectors, no doubt. One example of this is what the FTC is doing and has been doing for some years and under the initiative of this particular leadership, and you can go online and look at the cases that they have, in fact, pursued.
Some astonishing results, including situations where class members were going to receive telephone services that they had never subscribed to at an additional cost. And they could only get out of those additional services by later asking to be removed. But in the interim they were going to be charged for them. This is an astonishing settlement and I encourage you to go look at it.

The problem that the FTC confronts and that legitimate objectors, excluding some we’ve represented, CalPERS, Council of Institutional Investors, is that they have absolutely no notice of what is going on until after it’s often too late.

Class members get notice sometimes with three to four weeks before the class settlement hearing, the final class settlement hearing. Arthur’s talked about the preliminary one that’s already done by the time objectors hear about the case.

So you have four weeks to put together an analysis of a case. Who amongst us has done that on a regular basis? It’s like a PI hearing or a TRO hearing. It’s extraordinarily difficult. You don’t have an opportunity to conduct any discovery and so you walk into court really handicapped. Four weeks of notice and you
have no opportunity to put together any evidence or often present it.

Nonetheless, the statistics are telling. In the Devlin v. Scadelletti case where we represented the Council of Institutional Investors we looked at 30 years worth of history of nonparty objector appeals and we found that fully 32 percent of the cases in which nonparty objectors had participated were reversed. This compares with about a 12 percent reversal rate of average civil litigation. So the participation of objectors proves itself by the statistics.

The FTC has proposed a rule amendment to Rule 23, which I think is too modest. Under that proposal they would require litigants to notify the FTC or the appropriate governmental agency of any class settlement that’s about to occur involving a case where the government has an ongoing investigation.

So if the FTC has already initiated an enforcement proceeding against the company and the plaintiffs’ lawyers are merely piggybacking on that, the FTC wants to know about it in order to see whether the settlement that’s going to be achieved for the class is fair and reasonable or whether it’s winding up just benefitting plaintiffs’ counsel and defense.
I think this is too modest because it limits the notice to cases where the government is already active. Why isn’t government being notified of cases where it hasn’t acted yet but perhaps should?

I would also just note that the FTC so far has limited its activities to consumer class actions. I’m not sure how it defines consumer class actions either but one has to ask, why stop there? What about mass tort cases? What about securities cases? I think it’s a useful function that they can serve and should be expanded.

MR. FRISBY: Great. Thank you very much. Could we turn now to Professor Issacharoff?

PROF. ISSACHAROFF: I think what this discussion shows is that it’s very hard to categorically assess objectors under a one-size-fits-all model. We can look at the Supreme Court cases of Amchem and Ortiz, the leading class action cases of the last decade and you can say that both of them were the result of objectors who litigated successfully all the way through the Supreme Court.

At the same time, anybody who has been in a courtroom in a significant class action settlement knows that there is a predictable group of characters who will show up in every case with standard pleadings only sometimes adjusted for the facts of the particular case who
seek a payment to go away. And the parties being both friends of the deal have an incentive to pay them to go away. And very often they come into the courtroom and the first question they ask is how much can I get. And everybody knows that that’s what they’re there for.

So the question is how can we differentiate between these two groups? How can we do so in a way that protects consumers. And let’s be frank about this. When parties know that they will face professional objectors they have to withhold some of the funds that would be potentially available for settlement and for payment of the class in order to pay off extortionate amounts. So there is a transaction cost associated with this. There is a drag on the system.

I think the key point to remember in this is the point that Judge Hornby made in the first panel which is it is very difficult to assess the bona fides of a settlement unless one has full information about the record.

Courts are poorly positioned to retry the case, to go through the discovery that has been had, to appoint masters, to get into all the internal workings on an ex poste basis, which is increasingly what objectors push us to, to assess the merits of the settlement as the
settlement is structured.

I think we have to go back to first principles and to go to the Amchem insight which is are there structural assurances of fairness in the way that this was done? I think it is important to tell courts that the only way that they can judge the bona fides of a settlement is on an ex ante perspective.

Are the incentives of class counsel properly aligned with those of the class? Is there an incentive to litigate this as fully as possible? A lot of this is going to turn on the way the fees are structured because that’s what disciplines the class.

I think it is a mistake to say we don’t like this provision; we don’t like that provision. We think the settlement could be improved because very often those settlements, if they are the product of arm’s length negotiation, were a compromise. And of course it doesn’t give everyone everything they want.

One final last small point. Arthur has a philosophical objection to punitives not being available in every single case. That is a fine point of principle. I happen to think that punitives do have to be resolved once and for all basically and what the procedural structure is.

That is a very complicated question. That’s a
legitimate position for an objector to take in a case because that’s a position saying you should not be able to close out certain kinds of third-party claims going into the future.

That is very different from what one sees in the bulk of these class action settlement objections where you get microscopic tweaking of the settlement so that you have, as the objector, a hook to get in there to demand some kind of fees to be paid off.

And if you look at these cases it may be that after the fact the objectors do succeed but in most instances there is a cosmetic change to the settlement with a dollar figure attached to it.

MR. FRISBY: Thanks very much. Why don’t we finish off with Judge Wood? I’m sure we’d all like to hear more about how objectors and amicus filers can do a better job for the ultimate decision-makers such as yourself.

JUDGE WOOD: Thank you. It’s a real pleasure to be here and I do appreciate the opportunity. I’m going to speak very briefly separately about amici and objectors because from my point of view at least they present quite different issues.

In general, for any kind of case, whether it’s a class action case, whether it’s an antitrust case, any kind
of case where we might expect you see amicus briefs we really in the Seventh Circuit anyway ask one question, which is, are you going to add anything to our understanding of this case before us that we have not already gotten from the briefs of the parties? And sometimes the answer is a very easy yes. You discover that somebody comes in with a perspective on the legal issue before us that we would not have expected to see from the parties and it’s plain that it’s really helpful.

Sometimes the answer is equally obviously no. I have seen cases where there’s Party A and Party B. Party A is the appellant; B’s the appellee, and let’s say the appellant comes in with, well, five amicus briefs come in from organizations purportedly trying to come in as amici and then you look at who’s writing the brief and it’s the same lawyer as filed the brief for the appellant.

Well, I’m sorry, that really doesn’t advance the ball for us. It’s a waste of time and frankly we are not in want of reading material, to put it mildly. So we ask that question: what are you adding? I think there’s a special consideration if it’s a governmental party, whether it’s the FTC, whether it’s a state attorney general’s office.
In that instance you at least have a presumption that there is a public interest motivation for coming in with this brief and interest in letting us know what the position of someone with broad-based responsibility for a particular area is.

So I’m not saying we wouldn’t take -- of course we’d take an amicus brief from a governmental authority but the question is how much weight would it carry with us. Unless you rebut that presumption for us we’re very interested in the point of view of the governmental parties.

So in terms of amicus briefs you can see actual specific Seventh Circuit opinions on the criteria that we apply. We probably turn down more amicus briefs than any other court of appeals but that’s because of this failure to add anything to the set of information that we already have. And we will also similarly reject an amicus brief if somebody else has already come in and made the point.

When I’m motions judge and I’m on the motions panel, and that’s what this comes before, I look at the other briefs that have been filed and I look at this and I say is this something I want to inflict on my colleagues as more reading material or is it already covered? And I make the call that way. And that is in fact laid out in
published opinions that we have.

In terms of objectors, I see it as quite differently, as a somewhat different problem anyway. Let me preface this remark by sharing with you an experience I had a couple of years ago when I went to France at the invitation of the State Department to participate in a seminar that their highest court, the Cour de Cassation, was having on the common law system.

And the panel they had invited me to participate in was on what they called roughly translated third-party interveners. So I, you know, got ready and actually took more than the usual care because I had to do this in French, which was a bit of an intimidating challenge for me. But anyway I was looking at third-party interveners, les tier intervenent. If you speak French that’s what they called it.

It turned out they meant unnamed members of classes. Very interesting conceptual difference. They saw unnamed members of classes as much more in the box of third parties who are involved in cases than they did direct parties, which takes me to this point.

When we are thinking about the role of objectors, in a sense what we’re doing is we’re checking on the validity of the class certification to begin with. Have
we, in fact, got before us the right parties? Are the parties representing the class normally a plaintiff class really speaking for everybody who is out there?

And, of course, if the 23A process has happened the way it’s supposed to, the answer ought to be yes. But we find out from the objectors whether there are below-the-surface differences of opinion about the commonality of the class and we certainly can find out whether the attorneys as representing the class properly, all of the things that we’ve been through in 23A. I think that’s part of the insight that lay behind the choice in this recent amendment to Rule 23 to have the second stage opt-out.

And I suppose from my point of view the question of objectors really is a merits question. I don’t really care if they come in every day or if they come in only on occasion. I want to know what they’re saying. And even the professional objectors may now and then hit on a meritorious point. Fine. If they have, then we’ll listen to it.

I know it’s a costly matter but the fact is people have the right to point out different things to the courts and we don’t want to approve settlements if, in fact, they are not a reasonable compromise. That doesn’t mean it has to have every last thing that the plaintiff
class would have wanted had they litigated to conclusion. We know that. But we have rejected settlements, even at the Court of Appeals level, that we thought were not fairly representative.

MR. FRISBY: Thanks very much. I know we could spend a lot more time on this subject but we are running a little behind schedule so I think we’ll move on to the next topic, which is whether bad cases lead to bad settlements. But before going into that I thought we could spend just a few minutes on some recent amendments to Rule 23 starting with the older amendment providing for the appeal of orders granting or denying class certification. And Brian, would you mind starting off on that with a little introduction?

MR. ANDERSON: Sure. Rule 23F had its fifth birthday last December. Before December of 1998 there were 18 published decisions by Federal Courts of Appeal on an interlocutory basis reviewing orders that either granted or denied class certification over a ten-year period. So that was about two decisions per year.

Basically, it was very, very difficult to get an interlocutory appeal of an order by a District Court certifying or refusing to certify a class action. And that was because the only ways you could get into the appellate
system on an interlocutory basis was through a Section 1292
certification or a writ of mandamus, both of which are very
difficult.

This led to a lack of robust appellate court
guidance to Federal District Courts regarding the standards
that they should apply when entertaining class
certification motions. And because many state courts look
to the federal system for guidance about how to handle
class certification motions, the lack of federal appellate
guidance trickled down to the state courts.

And so as a result you had trial court decisions
standing for virtually any proposition that a proponent or
an opponent of a class classification motion might want to
advance.

The federal courts decided that this was an
unhealthy regime and it would be a good thing to develop a
more robust body of case law concerning class certification
standards and so Rule 23F was enacted in December of 1998.

Earlier this year I published an article in which
I went back looking through LEXIS at published orders
resulting from Rule 23F petitions. And that article was
published by the Washington Legal Foundation. You could
either pick up a copy out in the lobby or get it on its web
site.
Bottom line, what we did is look at the use of the rule in the five years after its enactment and we found the following: Rule 23F has led to a fourfold increase in the number of published appellate court decisions at the federal level concerning the grant or denial of class certification. There had been 44 appellate decisions in five years or roughly nine per year. Contrast that again with 18 rulings in a ten-year period or two per year.

During the first five years the circuits, at least according to the published decisions that we found, were quite generous in granting requests by litigants for interlocutory review of class classification orders. Eighty percent of the time those petitions were granted.

Six of the circuits granted every one of the petitions that were submitted and 11 of the 12 circuits granted at least one petition. So you’ve got 11 of the 12 circuits now with at least one class certification ruling in the last five years.

Defendants who are challenging class certification orders have filed roughly twice as many requests for interlocutory review as have plaintiffs who are challenging the denial of class certification but courts have been even handed as between plaintiffs and defendants in terms of the percentage of the petitions that
At the end of the day expanded interlocutory review of classification of rulings has benefitted defendants more than plaintiffs but both sides have benefitted from the tool.

Defendants have won 70 percent of the interlocutory appeals that have occurred over the last five years, either because they obtained a reversal of a trial court order certifying a class or they sustained a trial court order denying class certification. Plaintiffs, of course, have won 30 percent of the time either by winning affirmance of a class certification order or reversing the denial of class certification motion.

The most common outcome in these 44 cases in the last five years has been reversals of class certification orders. That has occurred 26 times but there have been nine decisions affirming class certification, five affirmances of orders denying class certification and four rulings reversing the denial of class certification, if you can keep up with all those double negatives.

Interestingly, the Fifth Circuit, the Seventh Circuit and the Eleventh Circuit have been at the center of the appellate action on this issue. Fully 28 of the 44 published cases have emanated from those circuits.
And in those circuits which are thought by some to be marginally more defense-oriented than plaintiffs oriented on these issues it is true that defendants have won 22 of those 28 cases in the three circuits. Plaintiffs have at least one victory in each of the three circuits.

So bottom line, Rule 23F has certainly led to a larger flow of appellate guidance on class actions. I think this has been to the benefit of district court judges as well as practitioners and certainly state court practitioners as well.

My hunch is that over time the rate of petition approval will decline as circuit courts perceive the issues to have been largely resolved and perceive that there are fewer newer issues coming down the pike. But I certainly hope that circuit court judges will use the tool to take interlocutory appeals of clearly problematic orders either way or to resolve new issues that come down the pike.

MR. FRISBY: Thanks. Judge Wood, would you mind telling us a little bit about the procedural issues in your circuit and your views on this?

JUDGE WOOD: Sure. Well, just mechanically, the way a 23F petition is handled in the Seventh Circuit is that the petition comes in and it’s handled in precisely the same way a 1292B motion might be handled or any other
thing other than a full-blown appeal of either -- and I’m including in full-blown appeals anything that one is entitled to appeal either from a final judgment or a preliminary injunction, namely, it goes first to a motions panel.

We have just rotating motions panels, an extremely rigid rotation that we set out a year in advance so it’s always clear whether you’re on the motions panel or not and exactly who presides over it. So they’ll present the 23F petition to us. The motions panel will consider, one judge at a time, whether this particular effort to bring an interlocutory appeal is worth taking and we’ll just vote informally one at a time.

Obviously, the real question is which ones should we take? In which instances should we deviate from the rule that we normally don’t want to hear an interlocutory appeal? There is so much that is not developed about the case at a rather early stage when many class certification orders come along that interlocutory appeals are disfavored in that sense.

The other point I would make is that if somebody has erroneously denied class certification there is only one person whose rights are going to be affected by that, not to say that that isn’t important for that person,
especially if it’s a $15 case and it may go away, but that will take me in a minute to what the standards are anyway for 23F.

There’s no preclusion effect on the other members of the class if it really is going to be a good class. There’s a self-correction built into the system because someone else is probably out there with the same class action.

So the costs of making a mistake in some instances are addressable unless we are in one of the areas where we would take it. You know that in the Seventh Circuit the leading case is Blair against Equifax in which we’ll look on one side or the other whether the class certification decision is really a surrogate for the whole case. Is it the death knell of the plaintiffs’ case not to be able to have the class? Is it a loss to the company case on the defendant’s side if there is a class? So one side or the other of that coin.

So either one of those we try to pick up and see if those are the cases where this really is, in effect, the whole case. And that is an instance in which we would grant the 23F petition.

The third category that’s outlined in Blair talks about unsettled questions getting more appellate law on the
issue. And I just want to spend one second saying what is
the issue. We have tried at least to focus on points
specific to class actions rather than to the extended
distinguishable points specific to the underlying
litigation.

So we’re not going to be as taken with the
question whether there is some underlying merits issue.
Maybe you think that the plaintiffs’ theory is frivolous
anyway or maybe you think something about the merits. The
point of 23F is to clarify class action law issues such as
what kinds of choice of law rules.

That was one of the things in the
Bridgestone/Firestone case that the court pointed out. Is
this going to be suitable for a class from that point of
view? The precision of the class definition process if
there’s anything general you can say about how closely
interests should be aligned for someone to be in the same
class.

How many common issues? Is one enough if it’s a
big issue, a dispositive issue? What about issues of law,
issues of fact? What are you doing with subclasses? How
much do you want to rely on ancillary procedures to resolve
issues that are not in that common issue box? Anything
like that which is a class action specific thing would be
something that would seemingly justify taking this on a 23F basis.

So at least in terms of the way we try to think about 23F it’s not just a quick and early look at the merits of the case. It’s really does this case qualify as a class action or should it be handled in individual litigation?

The only final thing I want to say is just to cross reference over to another debate that’s raging in the federal courts of appeals, namely, published and precedential decisions.

The vast majority of our rulings on 23F motions are not published. It just happens quietly in the chambers of the judges and we normally don’t take them so you’re going to have a distorted view of what’s going on if you’re looking only at the published opinions.

MR. FRISBY: Thank you. Judge Yahner, any downside to these appeals that we should be thinking about?

JUDGE YAHNER: Yeah. I think to use a technical term they’re a real pain in the neck. I think in many ways the Rule 23F phenomenon is like the Daubert or Daubert case phenomenon, that when that case came down there was a sense of now we’re going to see these motions in every case down the pike. And that happened for awhile.
And very frivolous Daubert motions were filed and I think very frivolous Rule 23F motions have been filed. As the courts deal with them there will be an established set of opinions that will discourage some nonsensical or frivolous motions but there are some people who are always going to do it as a litigation tactic because it ups the ante and puts plaintiffs through one more hoop of showing that they’re serious about the litigation. So I think at times they’re very meritorious; at other times they’re not and over the course of time these things will shake out.

MR. FRISBY: Thank you. We need to move on to the second opt-out issue fairly soon but do the rest of the panelists want to say anything quickly about this topic?

MR. GORSUCH: Robert, just one thing and it also applies to the second opt-out rule. Whatever you think of them as changes to the federal rules I think it bears asking to what extent they’re actually going to impose a restraint or a constraint on the settlement process, given that in fact so many of these cases often in the securities area I’m thinking of particularly are settled before the class is ever certified. The deal is done.

So having an interlocutory appeal for a class certification hearing that hasn’t happened doesn’t impose, I think, one might argue, a heck of a lot of constraint on
the parties in terms of how they craft their settlement.

MR. FRISBY: Why don’t we move on now to the
second opt-out issue. The recent amendment to Rule 23
authorizes courts to reject settlements that do not provide
members with a second opt-out opportunity. Professor,
would you like to start off on this one?

PROF. ISSACHAROFF: Well, this is actually a
pretty easy one. I think that this rule has had no effect
whatsoever. And I think that’s for two different reasons.
Actually, there’s a third which I’ll start with which is
the empirical one. As best I can tell it’s never been
used.

It’s hard to get the data to make sure you have
all the cases covered but I have not seen any decision in
which a second opt-out has gone out as a result of the new
rule. And I think that is true for two reasons, one
conceptual and one practical.

The first is, the conceptual one is that, as we
saw the Supreme Court address in Amchem, it is very often
not enough protection for individual class members to
simply be given the right to opt out.

There are all sorts of structural reasons why
class members don’t opt out. It may not be worth their
while. They may not know they’re members of the class.
They may not understand the full implications of what the class action gives them or what effect it might have on them so giving them two chances to do this when they haven’t opted out the first time is unlikely, in my view, to get a lot of correction back into the system.

But the second reason is more of a practical one which is that, as Neil just said, the overwhelming number of class actions after some initial discovery where the merits discovery invariably gets infused in part into the class question discovery the cases will settle prior to the certification process. And so the first notice to the class will be the notice of the class settlement and therefore this second opt-out is not triggered.

In those cases in which a class is certified for litigation purposes which is the only time you could have a second opt-out unless the strange experience of the Seventh Circuit recently where you have a first settlement rejected and then a second settlement, leave that aside because the rule really doesn’t address that, in cases where you have a litigation class settle and then there is the question potentially of a second notice after settlement something has happened in between.

And that’s what Brian was just addressing. We have Rule 23F. These cases get appealed and the uptake
rates in the court, from as best we can tell on
certifications for litigation purposes, is very high, which
means that before any notice has gone out the courts of
appeal are willing to entertain the certification order.

Now, it’s true, as Judge Wood says, that the
formal law in most circuits, including the Seventh Circuit,
is that the courts will take up only the certification
decision and not the merits on Rule 23F.

It is also true as the Seventh Circuit has
written by Judge Posner that it’s really hard to tell the
difference between the two in a whole lot of these cases.
So the parties will infuse the certification decision with
a great deal of the merits of the underlying controversy,
which means that an appellate decision on the certification
question, whether it’s upheld or reversed, will heavily
inform the parties as to what the likely litigated
prospects of the case will be.

As a result parties will settle on the basis of
that information obtained through the 23F appeal. That is
why I think we have no cases where there is this two-track
process. So I think that, sure, give people more
information, give them more of a chance. This is a
proposal that my colleague Jack Coffee came up with
originally. In practice I think it’s had very little
MR. FRISBY: Thank you, Arthur, what do you think about this issue?

MR. BRYANT: Well, I generally agree with the professor’s comments. I want to distinguish, though, there is one set of cases or type of class action where a second opt-out becomes very important and they are not ones where they were litigated.

And that is some kind of mass tort settlements, particularly where you’re talking about toxic torts and exposure to a chemical that can, over time, cause different injuries. One example is the Fen-Phen litigation is where there was a second opt-out, actually more than that, in the settlement agreement itself.

They reached a settlement, said here’s what you get but if it turns out you have another illness three years from now or whatever the time is that you didn’t have at the time the settlement first went through, then you have a new right to opt out and there are certain limitations on that right.

And actually, there are settlements that at least I’ve seen in the proposed fashion have that even further where they were not litigated — I mean, at the start they were but the opt-outs were built in because we were talking...
about a mass tort exposure where the injuries change over time. And I think it’s a great addition in that respect. Otherwise, I agree entirely.

MR. FRISBY: Thanks. Does anyone else want to add anything quickly on this topic before I move on?

MR. BRYANT: I just wanted to add one thing about this and the other topics. I just think it needs to be flagged at this program which is at least up to now the percentage of class actions that we are talking about is minuscule in the big picture, that is, coupon settlements was the first panel.

The statistics you showed us you’ll hear later from the reporters the number of cases that have objectors or amici is actually, at least according to the statistics, a very small percentage. The Rule 23F cases, the second opt-out cases is a very small percentage.

And I think it’s critically important that the FTC does want to do something to make class actions fairer for consumers but I’m very concerned that the eye is not on the real ball here and that we’re looking at tiny little pieces here and there.

I’d raised in a conference call at some point when we get to this and I’ll just flag a couple of places and I don’t know if this is the right time or not but you
told me to raise it so I will.

MR. FRISBY: Could we save those until closer to
the end --

MR. BRYANT: Sure. Be happy to.

MR. FRISBY: So I can get to the other topics?
But that is a great segue to our next topic which is to
what extent bad cases lead to bad settlements and this
topic came up very vividly in the first panel.

What happens when there’s a case that may not be
very strong but the parties want to settle it? What are
the implications and what do we do about it? Brian, do you
want to start off on that one?

MR. ANDERSON: Well, I think bad cases absolutely
make bad settlements. I think every day there are class
actions filed that I would call junk lawsuits that complain
about the world as it is and will always be an attempt to
exploit that situation to justify a lawsuit, that exploit a
situation where the company has made a mistake, often has
rectified that mistake and then the plaintiffs’ bar seeks
to exploit that mistake by filing one or often multiple
lawsuits over the same issue.

The defendant then has a decision to make. In a
perfect world the defendant would vigorously contest that
lawsuit, explain its conduct, explain why there is no good
public interest to be served by spending lawyers fees and
employee time litigating this issue and in a perfect world
judges would quickly spot these lawsuits for what they are
and dismiss them properly.

Unfortunately, we don’t live in a perfect world.
Companies that are faced with these kind of class action
lawsuits have to recognize that even if they think they’re
frivolous the plaintiffs’ bar has the ability to impose
great cost and great disruption on the company’s processes
by subjecting its senior management to depositions, by
requesting huge amounts of document and computer discovery
and it is often in the company’s short-term economic
interest to pay off the plaintiffs’ lawyers, provide
something to the class members even if they have not really
been injured in order to make the lawsuit go away.

And it is also regrettably true that not all
judges spot junk lawsuits quickly and get rid of them.
Plaintiffs’ lawyers have become quite adept at filing class
actions in these so-called magnet courts, often state
courts, often where there is a very close relationship
between the elected state court judge and the plaintiffs’
lawyer who brought the case and it is, as a practical
matter, impossible for the defendant to get rid of even the
most frivolous lawsuit.
Those are the kinds of cases where you get these kinds of coupon settlements, where the class members did not get anything of value and the plaintiffs’ lawyers got millions or tens of millions or even hundreds of millions of dollars of attorneys’ fees.

Now, are those settlements ipso facto unfair? In a sense they are not because if the class members really were not injured by the conduct at issue or they don’t care about the issue that is being litigated they weren’t injured, the settlement isn’t giving them much, why is that unfair?

But in the long run it is unfair because these kinds of junk lawsuits, if encouraged through settlements that reward the plaintiffs’ lawyers richly for bringing them, impose a litigation tax upon our economy. The cost in fees and the cost in coupons and the cost in overhead litigating and then settling these cases ultimately gets built into the price of every product and every service that is sold that is subjected to one of these class actions.

And to the extent that these class actions make corporations risk-averse, make corporations not want to admit a mistake and correct the mistake because they know that they are going to get hit with class actions.
thereafter we, in the long run, I think, harm the public
interest by rewarding these kinds of lawsuits with these
types of settlements.

MR. FRISBY: Thank you very much. Judge Yahner,
would you like to respond to that? I suspect you might
have some disagreement with --

JUDGE YAHNER: I’m sorry. I just can’t control
myself. I think we have to work from the presumption that
lawyers are ethical and even plaintiffs’ lawyers are
ethical and they don’t walk around filing junk lawsuits day
in and day out.

I think you can just as easily say, for example,
in the antitrust area, that there’s a big problem because
companies get together and fix prices. And if they didn’t
do what they did then we wouldn’t have an issue about
antitrust price-fixing cases.

I don’t think that the coupon junk lawsuits
scenario that you’re painting is a typical scenario. I
don’t think that there are a lot of bad cases out there
that we have to worry about where we don’t already have
some very good tools built into the system to deal with it.

We just as well have very good cases that are
litigated without fees for years and years against
defendants who are in my mind as a plaintiffs’ lawyer
clearly culpable but they’re not going to give up.

I mean, you can exaggerate on either side of this and I think that it is better to look at solutions when we come more to the middle scenario of what are the vast majority of cases like. And thank you for my rant.

MR. FRISBY: Thank you very much. I do want to spend some time on the last topic and the Q and As from the audience but does anyone else want to chime in on this last part of the topic before we move on?

MR. GORSUCH: Very briefly, Robert, I just want to say I think both points of view have their merits but I think it’s hard to say that there is no merit to the view that we are overincentivizing certain of these suits.

To take just an example, since the passage of the PSLRA in the securities context in 1995 over 2000 securities fraud suits have been brought on a class action basis. Only 1 percent have gone to trial.

The incentives to settle these things by defendants cannot be underestimated. You’re essentially risking your company, staking it on the outcome of a single jury verdict. You’re going to settle even cases -- you have a strong incentive to settle even cases that may lack merit. And that’s a fundamental structural feature of the system that I don’t think we can overlook if we want to
make settlements fairer.

MR. FRISBY: Anyone else with a last comment on that? If not, let’s move on to our final subtopic, the common-fund issue. Here we’re interested in the practice in common-fund cases of negotiating attorney fees separate and apart from the common fund. Professor, would you like to start off on this one, please?

PROF. ISSACHAROFF: Yes. One quick comment. The latest data indicate that roughly about 2 percent, maybe even a little less, of the cases filed in federal court go to trial. So if the data are going to set up the presumption that all class actions are presumptively frivolous then we should carry that forward and say all litigation is presumptively frivolous and try to disincentivize that. On the --

MR. BRYANT: Neil and Brian may want to speak to that.

PROF. ISSACHAROFF: The issue that’s here, very quickly, is should we require class counsel to negotiate their fees separately from the common fund in cases where the recovery is not on a statutory fee basis but on a common fund basis?

And the law on this has gone back and forth from a presumption that it should always be done differently,
separately to a recognition that it's likely to be handled all at once to a redirection toward a requirement, more or less, in many courts that there be a two-stage discussion on this issue.

I think that is a high point of formalism that sophisticated parties know has no meaning. It has no meaning first of all as an economic matter because as both Neil and Brian have mentioned, in the past companies want two things out of these cases. They want peace and they want to know what the price is.

And you can split the price up into 14 parts or two parts or one part but at some point you’re in the Yogi Bera scenario of wanting your pizza cut in six slices rather than eight because you’re not that hungry.

Everybody understands that it’s the bottom-line figure and all sophisticated parties in the room recognize that. And so if you say we’re going to negotiate the fee secondly, subject to court approval, the parties understand that a certain amount has to be withheld from the initial offer in order to cover that. And so there’s a great deal of formalism to that.

The second reason is that it’s again an attempt to regulate how class counsel performed ex poste. And I think that we should really be trying to get courts to look...
more carefully at what the incentives of the parties were in the litigation as they approach the certification decision, as they took on the lawsuit in the form that their compensation will be tied to the recovery of the plaintiffs’ compensation, will be tied to the recovery of the plaintiff class.

Attempts to flyspeck the actual terms of the settlement and the question of how the negotiations were conducted in a very ritualized, formalized way, I think, are going to be unavailing ultimately.

MR. FRISBY: Thank you. Neil, would you want to respond to that? Also I’m curious if you have any views about the potential problem posed by calculating attorney fees based on common funds where the class does not end up getting very much of the common fund?

MR. GORSUCH: Well, there’s a recent case that kind of illustrates that. It involved AT&T and Lucent and they settled a class action lawsuit setting up a $300 million fund. It sounds like a lot of money. The plaintiffs’ lawyers took $80 million of it. And then of course you had to wait to see who was going to actually claim on the fund.

And at the end of the day they found out class members found the fund so unattractive that they redeemed
only $8 million worth of the fund. So plaintiffs’ lawyers were rewarded with literally ten times the amount the class recovered. I think something has to be done about that.

Now, what do you do? One, it seems to me that judges all too often fail to take account of redemption rates or whether there’s a cy pres aspect to the award which they could do to see if the money is actually going to be redeemed by class members or put to some sort of public purpose that’s identifiable and concrete so that money’s actually going to be spent other than by the defendant’s and the plaintiffs’ lawyers.

Second thing, I do think it’s valuable to consider taking the fee award separate from and after the settlement process approval. And the reason there is, again, the incentive structure behind class settlement. If defendants normally don’t care how the money, settlement fund is allocated one way to make them care is if it comes more directly out of their pockets and they can scrutinize bills and they have an adversarial incentive to reduce the bill rather than having it all lumped in as part of the overall common fund.

Plaintiffs’ lawyers submit their hours and rates and the judge is left to scrutinize it himself without the
benefit of defendant’s commentary. If you put it outside
the process defendants have something to say about it.

MR. FRISBY: Thanks very much. I’m afraid we’re
out of time and I apologize to those who submitted
questions and Arthur for not getting to your issues but
perhaps those with questions can bring them up to the panel
during the break or at the first start of the lunch break.
And thank you all very much for participating and sharing
your insightful views about this topic. (Applause.)

(Whereupon, a lunch recess was
taken.)

AFTERNOON SESSION

(1:48 p.m.)

MR. FINE: My name is Adam Fine and I’m an
attorney with the Bureau of Consumer Protection’s Division
of Enforcement and I’d love to welcome everyone back from
lunch. If this is the first program that you’re attending
today, welcome. So far it’s been an exciting program and
we’re looking forward to an excellent panel.

This panel discussion focuses on clear notices,
claims administration and market makers. The format of
this panel is going to be that of a moderated guided
discussion and we have a lot of time at the end of the
panel question-and-answer period for your questions. And
that should be the final ten minutes or so.

One thing I do want to note, a housekeeping
reminder that the materials that people have alluded to in
earlier panels plus materials by these panelists are posted
on the FTC’s web site in the workshop web page. So please
take a look and print those out and you will see a lot of
the main components of what we’ve discussed some of these
panelists have addressed.

And with that it is my pleasure to introduce the
following panelists all of whom bring different
perspectives and experiences regarding the topics at hand.
Immediately to my left is Todd Hilsee. Todd is the
president of Hilsoft Notifications and is regarded by
courts and practitioners as one of the leading class action
notice experts.

Bob Niemec is a senior researcher and project
director at the Federal Judicial Center. Howard Yellen is
the CEO of the Settlement Recovery Center, a leader in fund
recovery from class actions.

James Tharin is the CEO of Chicago Clearing
Corp., the preeminent market maker of class action
certificates and in-kind settlement awards and Deborah Zuckerman is a senior litigation attorney at the AARP Foundation.

And with that we’re going to get started. First, Bob, let me start with you. The Federal Judicial Center has been spearheading a class action notice project for some time now. Can you provide some background of the project's goals and objectives?

MR. NIEMEC: Sure. I’d be very happy to, Adam.

First of all, let me apologize that I’m going to be speaking pretty much in this direction because I understand that there’s a transcription that will be done based on a tape recording and if I deviate too much from side to side apparently the tape cannot pick up my voice. So I’m not ignoring those people who are on either end.

I’d be very happy to describe our project. It started with a request from the Advisory Committee on Civil Rules, which for those of you who are not familiar with the committee process in the federal judiciary, that’s an advisory committee of the Judicial Conference, which is like the board of directors that runs the federal judiciary made up, of course, of federal judges on that Judicial Conference.

So there was within the Advisory Committee on
Civil Rules a subcommittee on class actions that had been looking at lots of different areas of class actions generally. And one thing in particular was that they were looking at a rule change, a change to Rule 23, which is the civil rule that governs class actions.

And that rule change, which eventually was approved by that Advisory Committee and all the way up the process in the judicial branch so that it’s now effective as of December 1, 2003, that rule required plain language notices.

More particularly, it said that class action notices, quote, must concisely and clearly state in plain, easily-understood language, close quote -- and then I paraphrase the rest of it -- specific information about the nature and terms of the class action and how it might affect potential class members’ rights.

Given that that was the rule that was being considered and it looked very likely that it would be approved, the subcommittee on class actions asked us to take a stab at drafting what we would consider and experts would consider to be plain language notices.

And we did that and I just want to give a little advertisement here for the Federal Judicial Center. You can go to our web site. We don’t get any rewards for each
of your hits or anything like that when you go to the site
but I think you might find it interesting to look at the
notices that I’m talking about here and we might talk about
a little bit more. I know we’re pressed for time.

If you got to www.fjc.gov, that’s FJC standing
for Federal Judicial Center, you will see on the homepage,
on the first page in the lefthand column there’s a link
called Class Action Notices Page. Pretty straightforward.

And if you click on that you’ll see a description
of the process that we went through to devise these
illustrative class action notices and you’ll see notices
themselves.

And I can go into more detail on that as time
allows later. But they’re in three different areas:
securities, products liability, and employment and they
cover notices of certification and settlement. And they
include full notices, publication notices and also
information to include on envelopes for the eye-catching
part of this process.

MR. FINE: In a few minutes, actually, Todd
Hilsee’s PowerPoint presentation is going to show examples
of both good and bad notices. But before we turn to that,
Bob, let me ask you another question. During the process
when FJC was involved in drafting plain language notices
did you guys conduct studies, have focus groups to see the
effects that plain language notices could have in
increasing redemption rates?

MR. NIEMEC: Yes, we did. And I’ll describe that
very briefly and, Adam, tell me when you think that it’s
time to move on to Todd because I certainly don’t want to
take too much time because I could probably talk for this
entire hour that’s allocated to us about this process.

Focus groups was just one of the research methods
that we used to determine what might best be the format and
the wording of a plain language notice. But I do want to
very briefly thank those who without their assistance and
their work and their taking on a major role in this project
this project could not have been done. And those include
in no particular order my colleague at the Federal Judicial
Center, Tom Willging; also Shannon Wheatman who was a
colleague at the Federal Judicial Center but she got hired
away by Hilsoft in the process; Todd Hilsee from Hilsoft;
and also a professor from the United States -- from the
University of Texas law school in Austin. Forget the
United States. Which is in the United States. Terry
LeClerc.

They were very helpful in this process and
brought different types of skills to the table and we were
able to come up with these notices.

We also hired an expert who helped us with our focus groups that we wanted to hold. The expert helped us with the methodology but also more importantly was the moderator during these focus groups because that takes some very special talents.

And we did them in Baltimore, Maryland. We did four separate focus groups on two different types of class action notices. And there, of course, was a selection process. We went through a professional facility where they assisted in the selection of a diverse group of participants and it was fascinating to see what they did.

We showed them what our then preliminary drafts of the plain language notices were. We gave them a summary notice and we gave them a more detailed notice. Again, this was in the securities area and the asbestos products liability area and we got their feedback.

And we found -- I’ll just try to summarize a little bit of what we found because that whole process itself is a long one, which if you’re interested in that you’ll find the text describing that process again on our web site on the Class Action Notices Page.

We found that the notices even in that preliminary stage, and they’ve been much improved since by
many other methods that we used, appear to succeed primarily as a result of the following elements: the nonlegal plain language throughout the notices in the summary form and in the full notice form. We also had claims forms attached to the notices and we color-coded them and we did some very interesting things.

There was a benefit from the concise opening page that makes very specific points that are important up front. We had a detailed table of contents that, of course, was keyed to the section headings for each of the sections.

We used a question and answer format for the table of contents listing and the section headings which proved to be very valuable to the focus group people.

We also had a summary chart or table of the most important information including dates by which certain things needed to be done and we had the color-coded response forms. And again, you can see those notices on the web site.

MR. FINE: Thank you, Bob. Howard, do you have something you want to add?

MR. YELLIN: Yeah. A very quick question, Bob. Has there been any subsequent empirical work done where one of the advantages of notices as in a direct mail context is
being able to do a split test? Has anyone taken on a
single case and sent out one form of notice as opposed to a
purportedly better form of notice and compared the response
rates among the recipients?

MR. NIEMEC: Yes. We did that. It's a very good
question. It’s difficult to do such empirical research
because we didn’t want to deal with a live case because
then you would have a denial of due process if you gave one
notice to one portion of the class and another notice to
another portion.

So Shannon Wheatman devised a survey on the
Internet because also survey research is very expensive and
we have a limited budget and limited time, and we did have
a comparison notice, which was the best of the securities
notices that we could find that were out there in the sets
of notices that we looked at, and gave that to a portion of
the sample and then the other portion received our at that
point still preliminary plain language notices that at that
point had benefitted from the focus group. And we did find
significant increase in comprehension and understandability
for the plain language notices.

MR. FINE: Thank you. Todd, let’s now turn to
you. Certainly, and as your paper that’s posted on our web
site points out, obviously a critical issue is not just
writing notices in plain language but also making sure that
notice is received by all or at least a very high
percentage of the class. Can you tell us what additional
changes you think the courts and counsel need to make to
address this ongoing problem?

MR. HILSEE: Yes. Well, first, what was so
wonderful about working with the Federal Judicial Center on
the illustrative notices was a recognition that despite the
rules speaking to clear, concise plain language, they
really wanted to do the types of things with notices that
we were championing and talking about for years.

And when I talk to the Advisory Committee -- when
I spoke to the Advisory Committee on Civil Rules I said
plain language is awesome. It’s great. Nobody should be
against it. Nobody was against it but before you can have
a positive effect from plain language you actually have to
reach people with the notice. You have to get it to them,
in front of them. And then once you’ve accomplished that,
they have to notice it.

And so you should have notices that are designed
to be noticed. And they liked that idea. So working with
Bob and Tom and Shannon was tremendous and Terry because we
could do those types of things. And you’ll see that in the
illustrative notices that are at the FJCs web site.
I have always approached class action notice development from the perspective that the main issue is -- and I think the standards are not new, they just haven’t been followed as well as they should have been for years because I think that due process has always, in the class action notice context, required that the people doing the notice programs do the notices and issue them, disseminate them in a way that you would do if you really wanted to inform someone.

And having worked in this field in so many cases and I see the arguments back and forth and obviously the Mullane case from 1950 which is a significant due process case on notice says exactly that. It says when notice is a person’s due, process which is a mere gesture is not due process and means employed must be such as one desirous of actually informing the absentee.

And it goes on to say the notice should be reasonably calculated to inform. And so you actually have to want to do a good job is really where it comes from.

And I will tell you that I get phone calls a couple of times a week, a month, what’s the least we can get away with? We want to do the minimum amount of notice that will get us the best notice practicable.

And there’s some kind of non sequitur there. We
don’t think the judge will require us to do more than X.
Or we don’t anticipate objectors so we’re not sure the
notice needs to be -- we’re not worried that much about the
notice.

I think the problem with these sentiments is that
they seem to me in violation of due process. If you really
wanted to inform someone would you put out a notice in fine
print if you really wanted to tell them about a settlement,
about their rights, about being able to file a claim, get
the benefits? No, you wouldn’t.

And if you really took to heart the fact that you
should be reasonably calculated, what about the fact that
in the communications field, and we brought this to the
field way back in the late ‘80s, actually in the case that
was mentioned this morning, Domestic Air, which became
famous for coupon issues, but on a notice front, the issue
was how do we know this notice program is going to actually
reach people?

And there’s a long-standing science in the field
of communications advertising that we can figure it out.
We can say, based on this universe of class members we can
figure out the net effect of different methods of notice
whether it be mailing, publication, media because the
data’s there.
The audience data is there on who’s reading these things and we can figure out what percentage of a class is reached. It’s used by 95 percent of all advertising media departments that figure this stuff out. It is used in 3000 different agencies in hundreds of countries. It’s been so for years.

The Audit Bureau of Circulations' data has been around since 1914. MRI data, which is audience data, which tells us how many people are you going to reach with this campaign against targeted demographics, which we can often get down to matching up with specific settlement classes. We can figure out of prescription drug takers what percent are going to read this mixture of outreach methodology.

Now that data’s there. I think courts need to know it and I think when they’re presented it in the context of class action, when they’re given this evidence whether a point during the litigation, preliminary approval, when they get from us the detailed notice plans saying this is why this plan is good.

I think if they saw that from a lot of plans where you see a notice, it gets mentioned this morning, notices are all alike. They get slugged in the back of the paper. Somebody slugs it in the USA Today and lets the judge think that, hey, you know, this is a national paper.
It’s the biggest national paper. It’s out there for all the world to see. Surely, it’s good enough notice.

But you can crunch the numbers and it's pretty easy to see that that’s going to reach about 3 percent of your class and 97 percent will have had no opportunity at all, let alone come in at the end and be able to file a claim from that.

MR. FINE: And how easy is it to get data-specific information for a particular class? How long does that take and what are the costs?

MR. HILSEE: Well, you get what you get from the parties and the defendant has a lot of information in terms of its mailing list and such. But in terms of the data available there’s secondary source data for media vehicles for sure that we have readily accessible that other professionals do.

And it’s not a time-consuming process. It’s done -- when we work with the parties we do it in a matter of weeks in preparing for submission of a sophisticated notice program. It can be done in a fairly short time frame.

MR. FINE: Do you do that with all of your notice programs or is it case specific?

MR. HILSEE: We do it with all of our notice programs. I think the courts need to have the information
available. We provide a detailed analysis of why the program we’re recommending is going to be effective and we show the forms of notices and design not just the words but design them so that they are visible and noticeable. And that’s sort of a no-cost issue really.

And oftentimes, we can find a way of reaching more people that is even cheaper than the parties might think is otherwise not affordable.

MR. FINE: Well, let’s now turn to your PowerPoint presentation, if you want to start that up.

MR. HILSEE: I am going to give you some examples of what we still see, quite frankly. And I brought a stack of these with me. These are the types of things we see on a daily basis.

I mean, this one, I think, is intending to reach people who bought a certain insurance policy. And it starts off with notice of class action certification and settlement hearing thereon. And nowhere in the notice is it mentioned what you can get from the settlement. And I think a mention of the claims process is buried way down at the back end. I mean, it goes through a lengthy description of the settlement hearing to begin with.

Another one. I mean, these things, we see them every day not just in the newspaper. Here’s one, this one...
sort of in the left-hand side at the top you can sort of see the print that’s even smaller, way smaller than the print in the bomb scare story, that is to reach, believe it or not, juveniles who smoked cigarettes.

And so it’s not hard to figure out that they’re not big newspaper readers to begin with and number two, that they’re not going to read this fine print notice and there’s nothing to call itself to their attention, to a notice like this in the mail with blocks and blocks of strung-together, all-caps type when every single marketing or advertising or communications person will tell you that people don’t read long strings of all capital type.

That belongs in legal pleadings for a courtroom, not to mailers where you’re not sure what it is. I mean, there’s a lot of statistics on junk mail. The volume of junk mail is extraordinary. The Postal Service documents it. Even the Postal Service survey says that 86 percent of people don’t open or read all the mail that they get that they perceive to be junk mail. They’re looking for a reason to throw it in the trash.

This notice would -- we got this and we don’t have a Sears account. Okay? So right away you’re thinking I don’t have a Sears account. This is obviously a pitch.
And so it turned out it was notice. We save them because I’m in the notice business but otherwise I can’t imagine a lot of people would.

The differences sometimes are pretty obvious.

I’m going to click to this slide. Here’s a notice we did in a case involving Progressive Auto Insurance that settled a case that we put in some things like a bold headline that said, and you’ll see this in the model notices that Bob’s talking about, we put in a headline: if you bought Progressive Insurance you could get benefits.

We put a claim form right in the notice, published it, mailed it and all the nine yards. We got 680,000 claims in this case and there’s -- just to see if I can go backwards here -- compare that to this which is a similar type of case when what’s different? I mean, there’s nothing to stand out. It arguably has a claim form. It has a headline that I have trouble reading here but it’s somewhat similar and this makes all the difference.

Although it may seem like to some parties the notice, how you do it, what it looks like is sort of the last piece of the pie, it’s critical. I don’t know what response that other case will get or did get but you can see a headline, simple words, subheads, organize things,
claim form, fairly short, easy to fill out, response mechanisms.

You can focus notices on different types of class members. When we had the Hospital Corporation of America settle billing practices case we focused notices on the entities as well as consumers. And if you could see a notice that gets mailed to entities we actually mailed a summary notice so they would be more likely to actually take the time to read a brief message about it.

The outside of the envelope told them why they should read it, not like a Sears notice. It says exactly and the backside of it says -- you could read this -- this comes from an example case that we used in an ABA seminar last year for a prescription drug. These types of techniques on the outside of these envelopes are in and have been supported by and in the model notices at the FJC site.

Some other cases, Synthroid marketing litigation. If you bought it you may have a claim. We’re telling people, this many claimants; this is what your payment could be. Here’s the phone number. About 800,000 women came forward and filed claims in that case.

In the Swiss Banks case is an example of what courts will do and let professionals be creative and do the
right thing to really try to get notice. We went out all over the world. Other groups of experts along with us did a great job at different parts of the notices. We did the advertising all over the world in 36 different languages. We figure out what language people are most likely to read, what the best ways to reach them. We put clip-out forms in here.

Others on our team went to -- and with me went to countries in the former Soviet Union, figured how we could put a notice in a food package to go out to poor communities in Belarus.

Courts can look for this kind of stuff and within each case is different, obviously, what can be afforded and what can be done but there’s creative ways you can get and here’s a graphic that helps you, the purchaser of a Cooper tire determine whether they’re in the settlement.

For the International Organization Migration compensation for victims of Nazi persecution with imagery and many courts are approving photographs and the model notices themselves suggest you can even use photographs in a legal notice to capture people’s attention, help them understand whether they’re affected that they may be part of it.

An interesting case I wanted to tell you is
Thompson v. MetLife, which is a race-based pricing litigation, one of the largest insurers, obviously a number of the insurance companies are involved in these cases involving whether they charged African-Americans too much, basically.

And one of the interesting points about this case is when this went to preliminary approval in the Southern District of New York, Judge Baer actually did, at preliminary approval, say I want to have an independent review panel look at this settlement, look at whether it’s right, whether the settlement notice procedures are right.

We actually reviewed our extensive notice efforts with an independent reviewer before he granted preliminary approval, which this morning was suggested maybe that’s never been done, but we looked at the best ways to reach people.

It wasn’t just sending it out, which of course we mailed it to everyone we could, but of course in a noticeable, clear fashion we also did newspapers, African-American newspapers, reached out on urban radio stations and other mass media including a television. You can do this kind of thing. (Whereupon, a videotape was played.)

So that gives you an example of some of the things you could do. During maybe some of the other

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
questions I want to show that Masonite spot.

MR. FINE: Sure. I think we’ll do that at the end should we have some time. Next I’d like to turn to Howard Yellin. Howard, there are certain types of class actions that despite counsels' best efforts for whatever reason class members have trouble with participation. What services does the Settlement Recovery Center offer?

MR. YELLIN: Well, class participation is really sort of in many cases the seamy underbelly of the class action system. This morning references were made to the Lucent/AT&T case where $8 million representing about 2.5 percent of the available claimants participated. Someone referenced the case where there was .0025 percent participation.

There is an intrinsic problem, I believe, which is that once a case receives preliminary approval there is no party involved whose financial interests are directly aligned with the plaintiffs, with the class of plaintiffs, to actually participate in the settlement except in those cases, of course, where counsels’ fees are tied to ultimate participation, which we support.

Settlement Recovery Center works for individuals, for businesses, for securities entities, for nonprofits in many cases in an attempt to drive participation in a
settlement. And bottom line, that is our job is to get
people to participate in settlement.

    In a sense, we pick up where Todd leaves off with
official notice. And notice is so deeply rooted in notions
of substantive due process that while I certainly applaud
the work that Todd has done and I think it’s really
meaningful and tremendously effective in driving more
members to participate in classes, we still know that in
broad class actions, a 30 or 40 percent participation rate
would be tremendous.

    So the way that we work is clients come to
Settlement Recovery Center through our outreach programs
and we help them participate in the class. It’s as simple
as that. In some cases where there are a significant
number of individual claimants involved this may involve
actual advertising on our part.

    We’ve been working extensively on the Microsoft
litigation around the country. We’re working actively in
six of the states that settled and have run a substantial
number of radio spots, of TV spots. We have done extensive
earned media PR work and have gotten tremendous publicity
for the cases.

    The advantage we have, of course, as compared
with Todd is that while we have an obligation to be honest
and truthful and fair and transparent in our communication with our audience, we don’t have to run it by plaintiffs’ counsel. We don’t have to run it by defense counsel. We don’t have to run it by the judge.

We are, in effect, a marketing agency. The way that we work is we sign up clients. We collect a fee, typically a contingency fee, that’s paid only on the back end, only based upon the amount that an entity recovers. And we have seen really tremendous effects. I’ll just give you an example.

In California, where we are involved in the Microsoft claims cases, we have brought in claims totaling at this point approaching, I should say, about half a million claims that have come in through us out of a total of just over ten million potential claimants and I believe about two million actual claimants. So we represent about a quarter of the class that is actually participating in the settlement.

In Florida, where we have not been active because of the nature of the settlement and the structure of it, the claims rate is languishing at an incredibly low number and at this point the case appears virtually to be on hold because participation is so low.

MR. FINE: Why would an individual use you for
one class action? Why wouldn’t they just file the claim
form themselves?

MR. YELLIN: Well, there are a couple of answers
to that. We are moving toward sort of a subscription model
where both individuals and companies can sort of
participate through us and any potential claim that they’re
entitled to, sort of giving folks an opportunity to -- I
apologize Todd -- to substantially ignore the notice that
they get and know that we’re going to keep them
affirmatively informed of what they may be entitled to.

The challenge, of course, I think implicit in
your question is what about in the CD cases where someone
is going to receive $14 or in the Microsoft case if an
individual is claiming just a hundred bucks? And there
what we’ve looked for are novel ways of aggregating, and I
think this will tie into James’ work as well, aggregating
claimants in positive ways to encourage them to
participate.

Specifically, we have a program called Donate
Direct and how that works is we sign up nonprofits to be
the beneficial recipients of folks’ claims under
settlements. And then they use their connections to their
membership to get folks to participate in the settlement
and then donate their recovery back to the nonprofit.
MR. FINE: Certainly in securities class action cases it's easier to monitor them just based on what Stanford has done and what others have done. In consumer class actions, certainly the FTC and others that we have spoken with have found it difficult to monitor class action settlements and oftentimes we hear about a settlement after it's already been approved and perhaps the claims period has ended. How do you monitor that to make sure that you service your clients’ needs?

MR. YELLIN: That certainly is a challenge. We do a lot of independent research. We have a number of folks who do nothing but scan public databases, the Internet, LEXIS-NEXIS, West Law, all over the place, obviously the Stanford site, for progress on cases and trying to track them.

We call courts frequently. When we hear a rumor of actions we try to stay as involved as possible. We do have one secret weapon, though, which is we have clients. We have subscribers. And frequently we hear about cases through our clients. They receive the notice and they pass it on to us. And if we’ve missed it, it’s a great way for us to know about a case and then dig in and see what we can do for our clients in that regard.

MR. FINE: So in part a business client would
hire you to find out about class actions they don’t know
about but also for class action settlements that they do
know about just so they don’t have to do the administrative
aspect of filing it and they basically say you guys take
care of it for us. Is that right?

MR. YELLIN: That’s exactly right. It’s a
fundamental outsource kind of thing. There’s no company
that has a chief officer responsible for claims filing, or
not one that I’ve found. The cases very obviously, there
are cases where clearly the value that we can add is de
minimis. If all that’s involved is filling out a simple
form and your membership in the class is predetermined and
what you’re going to recover in the class is predetermined,
all that we can do is make sure that that is filed by the
claimant.

In other cases, certainly the Microsoft cases are
good examples, all securities cases where you have to
analyze substantial trading data, I know that we may see
Todd’s Masonite ad although we were not involved in
Masonite cases, folks needed help in the Masonite cases to
determine whether they had the right products, what their
extent of damage was, et cetera.

So the value add that we bring varies really
substantially based on the type of case. But that’s fine.
I mean, at the end of the day, the simple reality is that even in the simplest cases, even when we look at notice like Todd showed us that was really tremendously clear and there’s a simple form for people to fill out at the bottom, the claims rates are still tremendously low and everyone who we get to sign up who would not otherwise is one more member of the class who is benefitting from the settlement. And that, frankly, is our mission in a nutshell.

MR. FINE: Okay. I think that’s a good segue now to James Tharin who is the CEO of Chicago Clearing Corp. James, basically let me ask you this question. What do you look for in a coupon settlement in deciding whether Chicago Clearing Corp. should get involved as the market maker and can you provide a couple of examples of your involvement?

MR. THARIN: Yeah. Thank you, Adam. I’d also like to thank the FTC for inviting Chicago Clearing Corporation here. Naturally we’re a strange fit when there are a bunch of academics and attorneys since we are an entrepreneurial organization that buys and sells coupons for profit, and of course we’re not afraid to admit that.

When we look at a settlement to value it, to determine if we’re indeed going to make a market in the settlement there are five or six basic tenets that we look at.
First, of course, we look at the notice and the claims process. We look at the transferability of the coupon. We look at market maker access to the class, the marketability or economics of the case, the rules of redemption in reimbursement and the oversight and enforcement that exists in the case.

We also, of course, take note of who the players are, who the plaintiffs’ attorneys are, who the defense attorney are, who the defendants are and what court it’s in to make a determination of whether we can figure out a way to buy and sell these coupons from class members.

The threshold issue for us, initially, is who can we buy these from? Who can we sell them to and what’s the spread and what’s the transaction cost in between?

So naturally, lower-priced coupons are more difficult for us because they present certain hurdles as far as transaction costs go. So we look at cases, but we don’t exclude those cases, but we tend toward the more expensive cases or cases that have higher coupon values.

Over the course of the last ten years, CCC was founded in 1993, we’ve made markets in ten unique certificate settlements. Currently, we’re making a market in the auction houses settlement, which was a settlement against Sotheby’s and Christie’s and we’re making a market
in the Lloyd’s litigation, which, of course, was a settlement against Lloyd's of London.

So if we’ve made markets in ten coupon cases and this is our primary business, why haven’t we made markets in the hundreds and hundreds and hundreds of other coupon cases that have been out there?

Well, to get to the points that I just raised and let me say something first. Coupon redemption is low generally. In other words, there are billions and billions of dollars of coupons that are issued by corporations as marketing tools. The average redemption rate for those is around two percent. So it’s no wonder that class action coupon redemption rates inherently are very low.

But the goal here is to increase those redemption rates, it seems to me so that the class members who are harmed, because naturally the consumers that are being solicited to buy a product by the defendants themselves were not harmed, but in the case of a class action settlement there is presumably a harm to the class and there’s an obligation, it seems to me, by the parties to make sure that the class members, the consumers, can get what they bargained for or what their attorneys bargained for them for.

So what we have found, of course, over time is
that class action coupons do not get redeemed at any higher rates than marketable coupons, especially in the absence of a market maker.

So let me first talk about my first point, notice and process. Naturally, I don’t have to belabor notice after this panel because what was said prior was exactly true. Most notices are very difficult.

There are a couple of other points though. Many cases are claims-made cases. Claims-made cases' redemption rates are very, very low. That’s all there is to it. Little more needs to be said. So if you can avoid a claims-made, and I probably should be careful because I’m going to be giving some defendants some tips, but you should probably keep the claims-rate processes as minimal as possible. It dramatically reduces the redemption rate.

As an example, someone earlier today said there was a certain redemption rate in a case, quoted the redemption rate. Well, they forgot to also mention that there was a claims rate and the claims rate was far, far lower. So therefore, the redemption rate of the class itself was far, far lower.

Also in this process it was mentioned also earlier and I’ll touch on it briefly, reversion cases, of course, benefit the defendant dramatically. So we look and
see if there’s a reversion. If there’s not a reversion
we’re far more tempted than if there is a reversion. If
there’s not a claims we’re far more tempted than if there
is a claims process.

Transferability, of course, is our minimum
threshold. We cannot operate without transferability. If
it is a nontransferable coupon we won’t even approach it.
We may object but we won’t try to make a market in it.

Secondly, with transferability -- transferability
alone is illusory and a lot of people try to make
transferability, they try to lean on transferability.
Well, transferability does not always mean freely
transferable. It can mean restrictive transferability.
That’s naturally very bad or reduces redemption rates if
that’s the goal is to have a high redemption rate, which of
course we believe it should be.

But transferability alone doesn’t do it. You
need somebody there to buy and sell these coupons from the
class members or they simply don’t redeem them. I can cite
numerous cases where redemption rates with transferability
without a market maker are nearly identical to redemption
rates of nontransferable coupons. If there’s not a market
maker they are essentially nontransferable.

So what does a market maker do? We need access
to the class, naturally, and there are various degrees which are better than others as far as access to the class goes. We can be -- in the past we’ve been on the coupon. Our 800 number has been on the coupon. We’ve had our mailing put in with the class mailing. We’ve been on a web site. We’ve had access to the class by getting the list. All of those things are important, but in terms of degree getting access to the class is by far the most important feature for us.

Defendants will argue, well, this is a proprietary list but it’s also a public class action so is this list really proprietary or is it in the public realm? We think it’s in the public realm. Naturally, we need access to the class in order to inform everyone equally of what we’re offering otherwise you’re prejudicing certain members of the class if we can’t reach them.

The other thing we look at is marketability and economics. In other words, how many coupons are chasing what products? If you have a massive amount of coupons being issued and very few products to redeem it against, that’s not a very marketable coupon. The economics are not good.

Marketability also goes to is it easy to buy and sell? Who can we sell it to? What are some of the
processes? Economics would also include what kind of product or service is this good against. Is this a product or service that can be made obsolete quickly? Is this a product or service that is going to be made obsolete quickly? Is there anyone -- well, that gets to the next point. So what we look at is is there a market here for us to sell these, someone to sell these to en masse?

The next point is rules of redemption in reimbursement and Howard touched on this, I thought, well. One of the issues that we have, this is not a securities settlement. People are not receiving cash in the mail. Cash redemption rates aren’t a hundred percent. Cash redemption rates are far below a hundred percent. People don’t open their mail. This was pointed out earlier. People don’t cash these checks.

But this is not a securities class action where cash is being sent out. For the consumer, the class period really begins when they receive the coupon. That’s when they can actually use their award. They can’t use it before.

This aspect is lost, it seems to me, in the process quite often. The rules are rarely laid out ahead of time. They’re almost always deferred or in the past they have been, it’s getting better, but they in the past
were always deferred to the defendant who was also served most often as the administrator.

So what is the defendant’s goal? Well, as was pointed out earlier today, if they can’t get an incremental sale their goal is to squash redemption, period. So if they can control the rules the devil does become in the details.

The devil is found in this case in the details because there is nobody there. There’s no police. There’s nobody there to oversee and enforce these rules. The plaintiffs’ attorneys, by and large, have been paid in cash, have moved on to their next case. The judge isn’t going to proactively oversee the class. They need people to brief them to get issues to them, which brings me to the next issue, which is oversight and enforcement.

Somebody’s got be there to oversee these rules and somebody has to be there to enforce these rules. One of the inherent problems with a certificate settlement is certificates expire. And the legal process is not developed for that.

In other words, if you have a coupon that’s two years in length, as you all know, to brief fully a problem in a case like this in front of a judge can easily take more than two years. Coupon’s expired. So where is the
redress? There is none. So that’s pretty much how we
decide to value certificate settlements.

MR. FINE: Thank you. Before I turn to Deborah I
just want to remind everyone that if you have questions,
Robert is walking around and is picking up the question
cards. Thank you.

Deborah, even if there is clear notice and
efficient markets there are sometimes specific target
audiences that have unique interests such as AARP’s
members. AARP plays a role in class action settlements
both in terms of providing notice to consumers as well as
in filing amicus briefs. Can you discuss both of these
components including describing the two amicus briefs that
you have placed on our web page as your materials?

MS. ZUCKERMAN: Sure. I’d be happy to. I do
need to start out with a disclaimer which I think is
appropriate in an FTC-sponsored event since I’m used to
being in the audience at an outside event where an FTC
speaker always says, I need to say at the outset I’m
speaking -- my views are my own. I don’t necessarily speak
on behalf of AARP or the AARP foundation which is actually
the entity that I work for.

And perhaps more importantly I need to say I
don’t work in membership. If any of you or your relatives
or friends has just turned 50 the membership application did not come from me.

But in my position I have several different roles. I do co-counsel consumer class actions. I do represent -- where I’m representing individuals obviously. I do also represent AARP when I file amicus briefs and then I have as the materials I included indicate represent objectors. They actually were not amicus briefs. We did represent class members who wanted to object to the settlements.

In terms of what role an advocacy group can play in getting the word out it seems as though it’s a simple question but the more I thought about it the more I realized it’s somewhat complicated.

On some level that may be because of AARP and the way AARP operates, which I’ll get into a little bit, but I think even some of those issues can be more generalized to other advocacy groups.

But let me give the short answer first, just by reading a letter to the editor that is in the current bulletin which is sort of the newspaper-type publication that AARP sends out on a monthly basis.

It says, thank you, thank you, thank you. I so appreciated the article in the May 2003 issue regarding the
BuSpar antitrust settlement with Bristol-Myers Squibb Company. My mom who had just died in April took BuSpar from January 1998 through July 1999. I called the phone number in your article, followed the directions and then forgot all about it.

Yesterday I received a check for more than $3,000. What a wonderful surprise. I plan to share the money with my grown kids but they have to promise to be part of AARP in 20 years or so when they qualify. Thank you again and keep up the good work.

So that’s sort of the simple answer that, yes, advocacy groups can play a useful role but part of the problem or the issue, I think, depends on at least again in AARP if I’m co-counsel in a case then obviously I have signed off on the proposed settlement and the notice and I can try and get AARP to publish that notice or information about that notice because I’m supporting the proposed settlement.

But if I’m not in that role then basically all I can try and do is get the word out that there is this proposed settlement in this class action. You should get information about it and then decide what to do. In other words, I don’t represent the class members. I can’t advise them on what they should do whether they should
participate, whether they should opt out, whether they should object, anything of that nature.

The other thing that I think is important at least again in terms of AARP is this woman mentions an article. Sometimes, particularly where my colleagues or I are class counsel, we can ask the bulletin to put in a notice about the settlement.

Now a lot of people’s eyes are going to roll because they always do when I say this. When we do that that’s considered an advertisement and we need to pay the bulletin to run that notice. In this case, it was actually an article about the case and the proposed settlement, which is free. I think it also has a much greater chance of people reading it because it’s an article just like any other as opposed to what looks like an ad.

But there’s a disadvantage there in that while I may have spent time working on this case or my colleagues have and we think it’s really important we have to convince the writers and editors that it’s newsworthy and that our members have something to gain by the publication of this article.

The downside either way is, as I alluded to before, if we’re not class counsel we run the risk of creating the false impression that once people hopefully do
see the information that we’ll be able to help them further
and even if we don’t put in a contact name or phone number
we do end up getting letters and phone calls saying I saw
this. I’ve got more information. What should I do? And
unfortunately again, we’re not really in a position to do
much for them.

Now other organizations may have better avenues
where they can publish this type of information but again,
if they’re not class counsel their role is going to be
somewhat limited.

The other thing, no matter which organization it
is, that I think is really critical and I’m not sure how to
address this, except I would urge counsel in the cases,
particularly where there is a particular type of group
demographically that makes up the class, that you think
ahead in terms of how you might want to get the word out,
because obviously every publication has a publication
schedule.

And in order for the notice, whether it be a
typical kind of box notice or an article to really be
effective it has to get into the publication in a timely
enough fashion that people will be able to see the
information, get whatever additional information they may
need and then take the necessary steps to either make a
claim, opt out, object, whatever they feel is important for them.

But it’s important to keep in mind that again every group has a publication schedule and sometimes it’s months in advance of when it actually is going to hit people’s mailboxes.

MR. FINE: Todd, do you have something you want to interject?

MR. HILSEE: Yeah. I wanted to say that that’s a very common component of class action notice programs, the formal notice programs approved by courts is finding those demographic groups. And we work with the AARP in that regard in putting notices into their publications and putting it into the notice plans asking courts to approve that as part of a notice program but also press releases, press efforts, prepared news articles, outreach to lots of third party groups.

Or a lot of times you may not see it in the types of notice programs that you might perceive to be the normal course of notice programs but these are part of good notice programs all the time. And I think that’s a really important aspect of good notice is the type of outreach to groups like the AARP and, for example, our Synthroid notice program reaching a somewhat older demographic took
advantage of that.

MR. FINE: Great. Well, we have three excellent questions. Unfortunately, we’ll only be able to get to one. I encourage the drafters of the other two to speak with our panelists at some point during a break but I do want to ask this one question.

The question is: Please comment on the role of minimum payments in creating adequate incentive for consumers to bother making a claim. Is anyone aware of any research done showing what constitutes adequate payment to be a tipping point for claims rates? Howard?

MR. YELLIN: Well, not research but we’ve today referred repeatedly to the CD cases and their payment was $13, $13.86 or whatever it was and was received well. So I think that at least as far as cash payment goes on broad-based consumer class actions the threshold is surprisingly low. You wouldn’t think that people would get excited about a $13 check and yet participation has been surprisingly high.

MR. HILSEE: I think participation in these cases has a lot to do with a lot of different factors that go to how important is this to your life? How concerned are you about this issue? Is this important to you? Is it your house? Does it relate to your health? Is it something you
live with daily?

I mean, in a case like Microsoft one of the things that enters into your mind is this an issue that people are concerned about the price they paid for their software? And I’m not certain that they are.

But look, I mean, the response rates come and I want to just take the opportunity to touch on the fact that in the context of court notice programs, the attorneys, and I think there are many situations where attorneys are doing the right thing and trying to do outreach on their own to get claims rates up. And that’s something that doesn’t come out quite often. I wanted to play a spot that --

MR. FINE: Sure. Deborah's going to say one final note and then we’re going to play your spot.

Deborah.

MS. ZUCKERMAN: Just quickly, one point I would like to make and this was something that I think was brought out in the objections that I included in our materials is while I agree that to some degree participation rates have to do with how important this is to you, I think a really big issue that hasn’t been addressed enough, although briefly, is what, if any, claims process there is.

And when I got an e-mail from a friend of mine
about the CD settlement and all I had to do was click on a link and I think put in my name and address and that was basically it, I mean, that was a pretty good way to get $13 as opposed to the objections in the Publishers Clearinghouse settlement that we included in the materials people had to -- and these were the sweepstakes promotions where people bought magazines and other fairly worthless products -- they had to send those products back or they had to sign a sworn affidavit explaining that they hadn’t got any value from the products, that they had given them away as gifts. I mean, I think there are sort of two issues -- let me just say really quickly.

One is, I think the more cumbersome the claims process the harder it is to have an understandable notice. But the other thing is, and maybe it’s a question of sort of not so much semantics but just word usage, claims rate and participation rate I think are two different things.

And in the cases that I’ve been involved in as counsel, we try to do our best not to have a claims process. And to a large extent there is really no reason to. If it’s a situation where the defendant has all the customer information in its computer it knows exactly who made a purchase or opened an account or whatever the situation is during the class period it generally knows
exactly how much they spent. There is really no good
reason to have a claims process other than, frankly, to
reduce the claims rate.

   MR. FINE: Well, why don’t we finish this off.
   Todd, why don’t you show us your final video?

   MR. HILSEE: Well, just to end on a positive
note, I think to say, to show one thing let me show you
first one thing that defendants do in terms of are we
really willing to try to reach people, defendants in this -
- I’m not sure if you can see this -- in the Blockbuster
case the defendants wanted to put the notice and agreed
with us we could put the notice right on the store receipt
and they gave automatic credits of certificates.

Of course, it was on appeal for so long that
we’re just getting started. But we gave out 25 million
notices this way. And I think that shows a willingness to
really try to desire to reach people. From a plaintiffs’
attorneys’ side after final approval, $580 million has been
paid so far in this Masonite siding case and after final
approval, plaintiffs' attorneys are still willing to put,
invest money in reaching more class members because they
think that there’s more people out there. So you can do
this kind of thing within the context of formal notice.

(Whereupon a videotape was played.)
So we’ve been getting thousands of calls a week when that’s been running. The claims rate has been going, went from about 530 million to about 580 million in the last couple or six months.

MR. FINE: Well, we’re going to take a ten-minute break before the next panel but please join me in thanking these five panelists. (Applause.)

(Whereupon, a short recess was taken.)

MS. BAK: If you take your seats I think we’ll start our next panel. I’m Pat Bak. I’m an attorney with the FTC’s Bureau of Consumer Protection Enforcement Division. Welcome. This is Class Action Attorney Fees, something I’m sure some of you have been waiting for. Our goal here is to bring some light to what is sometimes an area of heated rhetoric. So with that let me tell you a little bit about how we are going to structure this.

First, we are going to review some of the latest empirical work that’s been done in area on class action settlements and class action attorney fee awards.

We have Professor Geoffrey Miller and Professor Deborah Hensler with us today. These are two individuals who have done some of the most recent and detailed empirical work in the area. It will help us to understand
what the data actually shows.

Are class action attorney fees rising exponentially as the press would have us believe or is it myth? So we will first turn to them and following their presentation have an open discussion among all our panel members about their findings.

Thereafter, all the panel members are going to engage in examining a number of particularly challenging problems in the area of attorneys fees. First, we’re going to turn to exploring some innovative approaches to appointing, managing and compensating class counsel and certain means by which to ensure that counsel are adequately and reasonably compensated for their work and that the results they obtain are reflected appropriately in their fees and that those fees reflect a market rate of some sort.

Next we’re going to discuss some of the special challenges posed in determining reasonable attorneys' fees in the context of non-pecuniary settlements or settlements where total payment to the class depends on the number of class members who file a claim.

After that we’re going to hear our panelists’ views as to whether they believe the amendments to Rule 23 are going to make any substantial difference.
And finally, we’re going to touch just briefly, because we’ve spent a lot of time on it in other panels, on the value and function of objectors, that is fee objectors in this case, how that process might be better managed to inform a court with an adversarial voice as to the appropriateness of fees.

And then finally, best of all, we’re going to leave some time to actually answer your questions. So please if you see somebody walking up and down the aisles holding up a card, jot down your questions so we’re sure that we’re able to ask it.

So without further ado, I think I’m going to do a little bit of introducing even though I hope you’ll turn to your packets because there’s extensive information on the bios of each of our esteemed panelists.

Professor Geoffrey Miller, who’s going to be presenting his work that he co-authored with a future panelist who will be appearing tomorrow, Ted Eisenberg, is the Stuyvesant and William T. Comfort Professor of Law at NYU.

Prior to joining NYU Geoff was the Kirkland and Ellis professor at the University of Chicago Law School where he also was associate dean, editor of the Journal of Legal Studies, the director of the university’s Law and

For The Record, Inc.  
Suburban Maryland 301-870-8025  
Washington, D.C. 202-833-8503
Economics program. He has extensive background in class actions, having written widely in the area and he also teaches on that subject.

Our next speaker, Deborah Hensler is the John W. Ford Professor of Dispute Resolution at Stanford University Law School. She is the director of the Stanford Center on Conflict and Negotiations. Deborah teaches complex litigation and she’s written extensively on complex litigation, class action litigation, asbestos litigation -- something near and dear to my prior life -- and mass torts.

She is the lead author of Class Action Dilemmas, Pursuing Public Good for Private Gain, and she was the Director of Rand Institute for Public Justice prior to joining the Stanford faculty.

And let me introduce our remaining panel members as well. The Honorable Judge Vaughn Walker is a United States District judge for the Northern District of California. He was appointed to the bench in February of 1990. He was nominated by President Bush and earlier by President Reagan.

Judge Walker is a pioneer in the development of innovative approaches to selection of lead counsel and the ex ante determination of fees, having been the first judge to utilize and to champion the auctioning of class counsel.
Just immediately to his left is Mike Denger. Mike is the antitrust partner at Gibson, Dunn & Crutcher where he co-chairs the firm’s antitrust and trade regulation practice.

Mike has been litigating and handling all manner of antitrust and trade regulation matters for over 30 years. He currently serves on the ABA’s Antitrust Section’s antitrust remedies task force and has previously served on section task forces which have presented reports and recommendations to both the Clinton and Bush administrations.

Howard Langer, immediately to his left, is a partner with the firm of Langer & Grogan in Philadelphia. Howard has litigated large complex commercial and class action cases on behalf of plaintiffs for over 25 years.

He is an adjunct professor at the University of Pennsylvania Law School. He teaches antitrust. He most recently won an approximately $203 million, I believe it was, recovery on behalf of the plaintiff class in the liner board antitrust litigation. He obtained a $60 million fee for plaintiffs’ counsel and high praise from the court for his management of that case.

And last but not least at the very far end, I can barely see him myself, is Lloyd Constantine. He’s the
managing partner of Constantine and Partners. Lloyd was lead counsel in the VISA check MasterMoney antitrust litigation which resulted in a $3.4 billion settlement and historic injunctive relief that benefitted U.S. businesses.

Lloyd has been involved in numerous class action and multistate antitrust litigations over his entire career. He served as assistant attorney general in charge of antitrust enforcement for the State of New York from 1980 to 1991. So with such an esteemed panel I know we want to get down to it so without further delay, Geoff Miller.

MR. MILLER: Thank you Pat. I’ve got a PowerPoint here. When I try to do this with my students I always fail so I’m sure the FTC is more technologically sophisticated.

Well, it's often been observed that class action and especially large-scale, small claim cases are a form of lawyer-driven litigation dominated by entrepreneurial attorneys. Because counsel plays such an overwhelming role in these cases the economic incentives facing counsel are going to be critical. Attorneys’ fees are the fuel of the internal combustion engine that drives modern group litigation.

And because of the pervasive conflicts of
interest between class counsel and the class fees must be set by the court. But how is the court to go about this task of setting fees?

So the ultimate objective a court looks to in deciding on an attorney’s fee is whether the fee is reasonable. That sounds like that’s pretty easy but how do you know what a reasonable fee is? You need some more information than that because reasonableness, in itself, is a pretty amorphous concept.

So the courts have come up with, as many people know, several methodologies for calculating a reasonable fee. One is the percentage approach which emulates the standard contingency fee in a personal injury case, just a percent of the class recovery. Lodestar approach, which emulates the hourly fee, that is reasonable hours put in on the case times a reasonable hourly rate.

More jurisdictions actually use a mixed approach which either permit the trial court to use in his or her discretion, the percentage approach or the lodestar approach, or require that the trial judge compare one to the other, let’s say, award a percentage fee but check it against the lodestar.

And then some jurisdictions just use an unvarnished form of judicial discretion. The judge just
looks at the case and decides what a reasonable fee would be.

Now, because the test is reasonableness it would seem that one important piece of information for assessing a fee is the fees awarded in comparable cases. Just like you’d want to know the comps in a real estate deal you’d want to know the comps in an attorney’s fee-setting context as well.

Traditionally, the comps have been provided by counsel in their briefs but there’s an obvious problem with counsel bringing prior cases to the attention of the judge, namely, that counsel is only going to bring to the attention of the judge cases that benefit them.

So the judge is going to see either only the good cases if it’s a settlement where the fee isn’t in dispute by the defendant or, if it is in dispute, only the outlier cases that are either very high fees or very low fees and the judge isn’t really going to have the ability to make an informed decision based on the range of cases that aren’t in front of the judge.

But luckily today there’s a fairly large amount of empirical information available to help courts in making fee decisions without having to rely on partisan briefing.

So I’m going to present a little bit of that data now in
the brief time we have.

This slide is from a study by the National Economic Research Associates, an economic think tank, and it’s a study of fee awards in settled securities class actions from 1991 to 1996, 434 settlements. And it divides these according to size as you can see.

What is interesting about this is the far right-hand column where you’ll see that -- or the next to far right-hand column if you want the average -- where the fee awards are extremely tightly bunched between about 30 and 32 percent. They really have a very strong result here that fee awards in settled securities class actions are quite tightly bunched together.

This includes fees and expenses as a percent of the settlement. I’ll skip that because of time. Next, what can you tell about fee awards across jurisdictions? Well, this same National Economic Research Associates study looked at fee awards in all of the federal circuits, that is district courts in all of the federal circuits, and divided up the awards across circuits.

And again, you can see from the far right-hand column that there’s a really extraordinarily tight bunching of the awards, that is, they run from about again 30 to about 32, 33 percent across the jurisdictions. So it’s
kind of a remarkable result that in each of these different
circuits the fee awards are just about the same when
calculated as a percent of the recovery.

What about how fees vary over time? Has there
been significant changes along that dimension? This is the
same outfit, NERA, but it’s an update of the study I just
showed you that goes through 1999 and looks at, I guess,
1991 to 1999, so a nine-year period.

And the bottom row is the relevant one there.
You can see that, again, there’s a pretty tight bunching of
the awards. There is an outlier in 1992 where the average
award was 24 percent. But in general, the awards still
stay in that category, that range of 30 to 32 percent. So
this is a fairly close bunching of outcomes across time.
So we have across jurisdictions a close bunching and across
time a close bunching and in the first slide across case
size a close bunching of outcomes.

Now, this information so far is only about
securities class actions, so it might be that we get
different results if we looked at other types of class
actions. So we’re looking now at a Federal Judicial Center
study results, Mr. Willging’s study, and here we can see
that this group of researchers looked at four federal
district courts and they did an in-depth study of the

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
outcomes of cases in the four federal courts.
And again, you can see that even in this area
where the cases are not solely securities cases but they’re
cases of a variety of different types, you get a tight
bunching. Although the percentages in this study are a
little bit lower than in the securities study they range
between about 26 and 31 percent. But still, quite close to
that 30 percent category.
Now, so far the information that I’ve presented
has been based on fairly narrow data sets, either
securities cases only or a relatively small number of cases
in these federal courts.
As you can see on this slide the numbers are
quite small: about 45 cases, something like that. So this
isn’t going to give you a statistically valid picture but
there have been two more recent studies that looked at
quite broad databases so these studies are going to give a
much more comprehensive picture of how fees are actually
awarded in class action cases.
One is the class action reports data. This is a
study of something around 1120 cases, I think exactly 1120
cases that have been reported in that journal. Not a
systematic or comprehensive selection of cases, these are
cases that were selected for being reported in the journal.
But you can see here that we again get fees and costs as a percent of the recovery. And here we do get that bunching between 30 and 32 that we observed in the prior slides until you get to a certain size, that is about $10 million of class recovery.

And once you reach $10 million the percentage fees begin to fall off. So it looks like there’s something of a scale effect playing a role here that didn’t show up in the other studies. It looks like as the size of the recovery goes up the percentage fees that are awarded, at least over certain threshold, begins to go down.

Now, another study was done by myself and Professor Theodore Eisenberg of Cornell University. This study is a comprehensive review of all of the reported decisions in any public reporting media over a ten year period, 1993 to 2002. So any decision that was reported in any of the official or unofficial reporters where we could determine the size of the fee and the size of the class recovery went into this database.

There are two lines here. The dotted line is for common fund cases and you can see it reaches a peak, again, at that area of 30 to 32 percent, around there. So that’s the probability distribution of the fee awards in common fund cases.
It drops off precipitously after about 33 percent and that’s because many of these cases are decided on a percentage basis and courts don’t award percentages much over 33 percent. So that’s why you get the drop-off in the dotted line.

The solid line is fee-shifting cases, such as civil rights cases, and you see this being consistent with what you’d expect because in fee-shifting cases the fee award is not intrinsically tied to the size of the class recovery. And here we can see a whole range of fees including some where the attorney’s fee was 95 percent of the total recovery in the case.

Now, this graph looks into how fee awards vary by type of case because so far we only looked at securities cases and cases generally. And you can see here that this data has been divided up, this is the published opinion data I referred to, divided up into case categories.

And you can see a fairly wide dispersion of fee percentages, the highest percentage being in civil rights cases. Some civil rights cases' fees are awarded on a common fund basis. And there the average is 37 percent. And in tax cases, tax refund cases, 13 percent. So we are beginning to get a dispersion of results in place of that tight bunching that we saw.
Now, lest this be interpreted as meaning that this type of dispersion has a great deal of significance, I should inform you that we tested this result with regression analyses and couldn’t reject the hypothesis that this is just due to chance. But nevertheless, it’s instructive. It seems to be that there are differences going on here.

How about based on the methodology -- okay, this is the same result in the class action reports data. How about based on the methodology? Do attorneys fees vary depending upon whether the fee is calculated on a percentage basis or on a lodestar basis?

The first box at the top is published opinion data. This shows that there is a variance between the two methods of determining fees with fees being somewhat larger when calculated according to the percentage method than when calculated according to the lodestar method, 22 percent versus 17 percent.

The class action reports data, which is the lower box, doesn’t find a significant difference between those two methods and finds a higher average percentage fee in those two cases.

Now, what about scale effects? I mentioned that when we just eyeballed the class action reports data we
tended to observe a scale effect, that is, the fees seemed to go down as a percentage of the recovery as the amount of recovery goes up.

This is all of the different large-scale databases with the results plotted and regression lines drawn through them. Now, this is really a remarkable outcome, I think, a remarkable finding. And what’s remarkable about this finding is that these cases are bunched just extraordinarily tightly around a straight line.

There’s very little deviation here which suggests that what’s really going on, no matter how the courts claim to be assessing the fee, no matter what factors seem to be playing a role, what really goes on in determining a fee is the size of the recovery for the class. That is the single overwhelmingly most important factor that determines the attorney fee.

The size of the recovery explains between 89 and 94 percent of the entire variance of these data sets. So no one expected that. We didn’t expect that. There’s no reason intrinsically to expect that fee-shifting methodology should be the same as common fund cases but they are. This is really to my mind a remarkable outcome. Almost the only thing that ultimately decides the fee is
the size of the class recovery.

Now, what about fee percent as relation to recovery? If there’s a scale effect we’d expect that the fee percent would go down as the class recovery goes up. And as you can see by the negative slope of these lines, we find that to be true. There’s a significant scale effect and the percentage goes down as recovery goes up.

Now, what about effects over time? We saw the NERA data looking at a limited time frame of securities cases. There were effects over time.

This data shows effects over time in the broader data sets, that is, class action reports and the reported cases. The large dotted line is fee-shifting cases. Those look like they go up a little bit but you can see in the two studies of common fund cases there’s virtually no change. That is, there’s virtually no change whatsoever in fee percents as awarded over time.

Now, given the remarkable strength of the relationship between size of the recovery and attorneys’ fees, we might draw the inference that courts could actually receive some help from this by just looking at the size of the recovery in a case and then looking at the mean or average fee percentage that’s awarded in cases of similar type and then using that information to assess
whether the fee is reasonable.

And this simply does this, dividing up the class
action reports data into ten deciles where you get the
average recovery, the mean fee percent and we’ve also
calculated here the standard deviation, which is the simple
measure of variance from a mean for each of these deciles.

The suggestion is that a court might wish to, in
a given case, to check the reasonableness of a fee request
to look at what the average recovery is for cases of this
dimension and then to look at the standard deviations. And
here is a graphic determination of that.

So as long as you’re in some of those solid
lines you’ll be okay. I just have one minute but I’m going
to spend that minute referring to some other results of the
study. The study found when we looked at the regression
analysis, which I haven’t given you, that risk does affect
fee. The higher risk the case, the higher the fee; the
lower the risk, the lower the fee.

We talked about non-pecuniary and coupon
settlements. That’s in our study. We found that non-
pecuniary settlements had no effect whatsoever on the fee,
either if the value of the settlement is included in the
stated value of the recovery or not, no effect either way
on the fee.
We looked at securities cases, pre and post the Private Securities Litigation Reform Act. That statute was widely touted as tending to rein in the class action attorney. One would have thought that it would reduce the fees awarded to class action attorneys. In fact, our study provides some evidence that there is a significant positive effect of PSLRA, that is, plaintiffs' attorneys earning more in these cases than they did before.

We looked at objectors. One of the factors we’re going to talk about is the role of objectors. Objectors had no measurable impact, no statistically significant impact on fees. We looked at settlement classes. These have been challenged. Settlement classes had no statistically measurable impact on fees.

Finally, we looked at federal versus state. I know there’s been a lot of effort in Washington to federalize class actions on the theory that federal courts might do a better job at reining in class counsel than state courts. In fact, our study showed that attorneys' fees in federal courts were statistically significant and larger than attorneys' fees in state court.

So if you want to put more class actions in the federal courts I’m sure the plaintiffs’ bar might be very happy about that fact. Thank you very much.
MS. BAK: Deborah, you’ve examined this issue but from a slightly different approach. Why don’t you explain?

PROF. HENSLER: Well, like Geoff I want to begin by making the -- if it weren’t obvious to you when you walked into the room at the end of a long day of talks the now obvious point that attorney fees are at the core of the controversy over class actions.

But I want to underline that point despite the mundaneness of it because we spent so much of today talking about coupon settlements that I think that might leave you all with the sense that coupon settlements are where it’s at with trying to evaluate the costs and benefits societally of class actions and if we could only get rid of these bad coupon settlements that some people spoke about this morning that we could all stop worrying about class actions.

I think that’s not really true. I think the issue really is what is it that attorneys are achieving for class members and for society in relation to the fees that they’re obtaining. And it's clear to all of us from the press coverage of this issue as well as from cocktail party conversation that fees are perceived by many as outsized compared to the benefits that are provided to classes from class actions.
But the evidence has until very recently been mainly anecdotal and even in these very rich data sets that Geoff has just summarized for us very cogently, much of the statistical data pertain mainly to securities class actions which have long been the subject of very sound and extensive academic research.

And those cases, of course, don’t represent the full landscape of class actions and certainly don’t represent fully the kinds of small-value claim to consider class actions that I take it has driven the Federal Trade Commission’s interest in this subject.

It’s also true that much of the data that’s available including the data we just saw are data that are derived from careful weeding of the characteristics of class action settlements, that is, the settlement as approved by the judge which, of course, as we have heard in the discussion today, may not be the settlement as it is finally experienced by class members.

To find out what happens to class members one needs to get deeper into cases. And this is very difficult and unfortunately very expensive because it’s time-consuming to do and in the study that I led at Rand along with my colleague Nick Pace who’s here and will be speaking tomorrow we chose a case study method a very fine-grained,
 qualitative method to try and understand what had happened
to specific cases.

And we selected ten cases for close analysis
because that’s all we could afford to do. We focused
specifically on small damages, consumer class actions and
also on mass tort class actions because they’ve been
central to the policy controversy over class actions.

This was research that was done in the mid to
late 1990s so we were looking at cases that had been
resolved at the point of our research. Many of them, of
course, were cases that had been filed some years earlier.

One of the things that distinguishes our data
from some of the data that you’ve heard quoted already
today is that we tried to avoid high-profile cases. These
are not the cases generally that were emblazoned in
newspaper headlines bewailing the abuses of class actions.

And in most instances, we actually did not know what the
outcomes of these cases were when we selected them for
research.

There is obviously a question when anybody uses a
small set of cases as I am about to do. We can’t claim
that they’re statically representative. And many people
who have read our book worried about whether we selected
them with a plaintiffs' bias or whether we selected them
with a defense bias.

All I can tell you about that is that people who read our book have claimed we either chose the cases to demonstrate how bad class actions or on the other side critics have accused us of having chosen the cases to demonstrate how good class actions are. So you have to make up your minds for yourselves.

And in the book we describe the cases in great detail as objectively as we can to leave people with the ability to make their own decision about that.

Briefly, I am going to describe these cases. I’m not going tell you in detail but you can see that they are a range of pricing cases, sales practices, variations on alleged violations of business practices. I’m not going to speak about all the mass tort class actions because I don’t think they’re all opposite but I thought I would include in the data I’m about to show you two property damage cases because at some level they could be understood not only as product defect cases, which is the way they were litigated, but as cases where claims were made about the products that were not substantiated.

Now, attorney fees, as we all know, are popularly compared to what individual class members receive. We heard some commentary about that this morning and so I’ve
showed you what would be that comparison. If you looked at
these cases you can see right away that in one of the
cases, the case against Bausch & Lomb, with regard to
contact lenses, that no one actually knows what the class
members got because that information was not required to be
reported to the court and it’s been sealed.

You can also see in the other cases that we’re not, even in this class of consumer class actions we’re not
talking only about cases that are worth $5 or less than
$10, that there are cases here where the value to the
individual was in the thousands of dollars or the hundreds
of dollars. But you can see in the case that I’ve
highlighted, the case against Allstate and Farmers
Insurance Company alleging violations of business practices
and the technique that was used to round charges, the kind
of emblematic case.

Here we have the class counsel fees getting for
total of fees and expenses over $11 million and the
individual policyholder then takes away $5.75. But the
appropriate comparison, of course, is looking at the total
of attorney fees relative to the total class member
benefits because as we’ve been reminded this is aggregate
litigation that would not survive in a court system unless
the cases could be collected.
So the comparison we ought to be looking at is of class counsel fees and expenses to the total compensation fund. And again, you see that in some of these cases we don’t actually know what that amount is, again because a judge did not require that information.

But the key question, it seems to me, thinking about the public policy purpose of class actions when we’re looking at the attorney fee question is how do the attorney fees compare to what the settlement actually achieves. And settlement funds as this chart shows do not always equal the actual benefits to the class.

So here what I’m showing you in the blue bar which you will notice is often quite large is the amount of money on which the judge based the fee award decision and in the green bar I’m showing you the amount of money that was actually paid to the class.

And I just change the chart slightly. If you were looking quickly so that as you look at the first bar, the Robert’s bar, let me go back a minute, that green bar includes about half the value that was alleged for coupons and half the cash value. And here I’m showing you the comparison looking at the cash value.

Now, these cases as you can see have quite dramatically different benefits, so let me show you just
some different versions of this chart so you can see what’s going on in some of the cases where you can’t read the data.

So the Selnick case was a case alleging improper late fees and the Inman case is a case having to do with insurance rates. And again, that’s the case where we don’t know what the settlement fund was supposed to be because the judge didn’t seem to know what it was supposed to be at the time he approved the settlement.

And I’ve also now added onto the chart two huge cases. These are property damage cases. One is the other wood siding case that was going on in the courts at the same time the Masonite case was being prosecuted and the other is a case that may be familiar to you. It’s a case involving polybutylene pipes.

You can see the settlements were very large and you can also see at the time we did the study we had to do some projections but our projections were that those dollar amounts would be fully paid out.

So now we can look at what class counsel fees and expenses look like as a share of both the negotiated and the actual settlement value. And you can see that on this chart that story might look very different depending on whether you’re talking about the negotiated settlement or...
the actual settlement.

Now, I want to point out that there are administrative costs to run these settlements, the costs of getting those notices out. These are all settlement classes. The notice costs are paid by the defendant. That’s on top of the expenses that I showed you on the other chart so I just wanted to give you some sense of what those costs are and what they are as a percent of the total that the defendant paid out.

And the important note in parentheses at the bottom of the chart is in the Rand study we were not able to collect data on defense fees. And so I should remind everybody since we’re focusing so much on plaintiff attorney fees that to the best that we could tell if I had to make a guess based on the fragmentary data we collected I would say defense fees were at least equal to plaintiff attorney fees in these cases.

But as we’ve also already been reminded some benefits of class actions are not included in the settlement fund value and there is the issue of what’s the value of the injunctive relief that may be achieved by the class actions.

In all six of these consumer cases that were represented on the chart there were changes in practice
that we could document in all of the corporations that were associated with the class actions.

Now, in four of those cases we thought, and we described this in detail in the book, that you could make a pretty compelling case that the changes were either the direct effect of the suit or frequently they had been made before the settlement was approved, perhaps in an effort to put the defendant in a better position.

Nonetheless, the threat of a class action suit one can argue is often as important as the actual suit and settlement. So our bottom line was that in four of those cases there were changes that seemed to be the effect of the suits.

In two of the cases it is quite clear that the cases are follow-on cases. They are one of a family of cases, sometimes dozens of cases that were brought across the country alleging the same violation of business practice codes by the same defendant. This is the Nth case that the defendant is paying off. That defendant long made those changes. They may well have made those changes in response to the first suit but they didn’t make it in response to this suit.

We also saw one case where there was legislation although I note that I think reasonable folks might think
that the legislation was passed to protect the corporations that were sued not to protect the consumers, and the product defect cases that we studied were always going on in the context of some kind of product change, removal from the market or often a state AG investigation.

As Geoff’s data indicated, fee regime didn’t seem to matter very much. In every case it seemed to be percentage of fund, whatever was the actual rule in the Circuit. Fees and hours and expenses were often not reported but where they were our calculation showed a wide variation in hourly rates and notice in disbursement procedures clearly matter.

I think this point was made fairly clearly by the previous panel. Clearly when you directly distribute benefits to class members, more class members get paid. All of the current policyholders who were due compensation in the insurance double rounding case received the money that they were due under the settlement. Less than 1 percent, far less than 1 percent of the former policyholders who had to go through a claims process actually collected the money.

And we did also find cases in which the rule was whoever claimed would collect all of the fund rather than having it revert to the defendant and claimants simply got
second, if necessary, pro rata pay-outs until the fund was 
exhausted.

So I’ll close on the point that I do think, as 
Judge Hornby accused me of thinking this morning, that 
judicial attention is necessary and can produce a better 
benefit/cost ratio. More attention to settlement details, 
closer scrutiny of noncash components.

I do believe the fees ought to be awarded 
directly between the real benefits that are actually 
achieved, which can be achieved in some instances by 
periodic payments that have been ordered by some courts and 
finally, I want to close on the note that I think that for 
those of us who are concerned that the class action 
mechanism, which I believe is extremely important in the 
United States as a tool of regulation, can best be 
preserved by making it work right.

Probably the single best thing we could do to 
improve class actions is put all of the features of 
settlements and fees as they are actually taking place 
instead of as they appear on paper on the record. Sunshine 
is a wonderful tool for improving everybody's behavior.

Thank you.

MS. BAK: Thank you. I thought now we’d just 
turn to our panel members for a few minutes of questions
that they might have for Professor Hensler and Professor Miller. Judge Walker?

JUDGE WALKER: Patricia, can I lead off and ask Geoff Miller, it appears to me that the number of cases in your study is fairly small, if you consider the number of class actions generally. You’ve got the NERA data. Those tend to be securities cases; maybe they all are. The class action report data are selected cases. Can you really draw definitive conclusions from a fairly limited data set of this kind?

PROF. MILLER: Well, the numbers are more than adequate to get statistical significance to the study. The NERA data set is 1100 plus cases. Our sample of that was something like 670 during the time frame. We looked at every single decided case in the state or the federal courts that was published, including some of yours, Judge. And that came to 370 cases.

JUDGE WALKER: I won’t ask what you made of those.

PROF. MILLER: You’re quite right that there’s a huge dark mass of sort of dark matter of cases that we did not study and that have not been studied and our results are only good for the other cases if the other cases, if the ones we studied is a fair sample of the total universe.
And we don’t know that — although I’m inferring — that would be the case.

MR. DENER: I guess I have two questions for you, Geoff. One is when we look at the class action percentage awards in various types of cases antitrust, for example, is at 21 and 23 percent and mass torts is lower at 18 percent, how much of the subject matter is really masking the size of the case? In other words, did you run regression analyses by size of case within and correlate that with the subject matter to determine if that may be the driving factor?

PROF. MILLER: Yes. I mean, I’m not the econometrician here. Ted Eisenberg is. But we did control for that. However, when we did do the regression analysis, Mike, as I mentioned we couldn’t reject the hypothesis that the case types had no impact, that the observed differences that are in that table may actually just be a function of chance.

MR. DENER: Let me ask one other question. You mentioned that risk affected the fee award. And I confess that I haven’t read your article in depth but it’s my understanding you tried to assess risk based upon the judge’s comments in the fee award decision. Is that correct?
PROF. MILLER: If the judge made a comment we did that. If it was a case where risk was obviously low, for example, it was a follow-on case to a government prosecution we would code that as a low risk case. So we did both. But mostly we looked at what the judge said about risk.

MR. LANGER: I just wanted to understand from Prof. Hensler’s data, in most of the cases that you just showed us when you did the comparison between the actual recovery and the recovery that was presented it seemed to me but I’m not sure that certainly in the largest of the cases in your study and in most of the cases in the study if you aggregated them actually a very large percent, there was actually a high correlation between the actual amount presented to the court and that which was distributed to class members.

PROF. HENSLER: I would actually describe again underlining that this is a very small set of cases so that we can’t infer what proportion this is in the population that what we see is variation. We see both sides of the continuum. We see the cases in which all of the money was delivered, I believe, because of the processes that were used for delivering the funds and the requirements for reporting that judges imposed.
And we see several cases where a much smaller percentage of the settlement was delivered and in the cases where we see those small percents it's clear that the lawyer is getting a much larger proportion than the 25 to 30 percent that we see in these larger statistical data. In our sample we did see cases where the lawyers were getting 50 percent of the dollars that were delivered.

MR. LANGER: Professor Miller, if I understand your study, it showed that basically in the aggregate that risk was appropriately rewarded but was really a measure of what the lawyers ultimately received was the risk --

UNIDENTIFIED SPEAKER: Can’t hear you.

MR. LANGER: I take it from your study that the lawyers recovery reflected the risk they assumed at the outset to some degree and second that things were working at least they’re supposed to work in the sense that the larger the recovery the smaller the percentage but the larger the reward to the lawyers.

PROF. MILLER: On the latter point that’s exactly right. The award did go up as the award to the lawyers does go up consistently as the recovery goes up although at a decreasing rate and the percentage award to the attorneys once you’re over a certain threshold goes down as the amount of the recovery goes up.
On your first question, yes, we coded cases for normal risk, high risk and low risk, and we got highly statistically significant results. High risk cases generated higher percentage fees and low risk cases generated lower percentage fees as compared to the average case.

MR. LANGER: Can I ask you -- I’m sorry to monopolize the time here but can I ask you one quick question about how you handled the class action study?

PROF. MILLER: Sure.

MR. LANGER: I noticed that basically having just had a very diligent judge who told me that I better study the class action reports and address them when I did my fee petition I also had a chance to study these in detail, but did you find that -- I notice that the first four settlements that are discussed in the class action reports are so vastly larger than any of the others, even in the highest grouping, that is, the first one is for $10 billion, the second one for $3 billion and the third and fourth one both over a billion and the next closest is just about $700 million, if you remove those four largest ones would it have affected the data?

PROF. MILLER: I’m sure it would because the class action reports uses a weighted average whereas we
didn’t use a weighted average. So you’re going to get disproportionate impact of the very, very large cases.

But we didn’t do that but it would affect the data and would probably result in even in the very large cases the average percentage would be higher if you took out those mega, mega, mega-cases.

MS. BAK: Anybody else?

PROF. MILLER: So, Deborah, would you agree that in addition to, you talked about the recovery that the class members got in terms of money, let’s say. You also talked about the recovery they got in terms of the value of an injunction and non-pecuniary recovery.

Would you agree that another element that ought to be taken into account is the sort of general deterrence that can be affected by class action, that is the defendant has to pay and because the defendant has to pay that person or others are less likely to do the bad thing in the future? And if general deterrence is an important feature of class action recoveries is that something that should be calculated in when we look at the value?

PROF. HENSLER: I agree, in principle, that a value of a well functioning liability system including class action system is general deterrence as well as specific deterrence. But I think if a system comes to be
perceived as producing outcomes that bear little or no relationship with the behavior of those who are being sued, then I think that substantially erodes the deterrence ability of the system.

So as it currently stands I would be rather uncomfortable with the notion of judges valuing general deterrence from a case, particularly given the evidence I think that they are not doing a terrific job of valuing the more specific aspects of the case.

But if we could look ahead to a world in which the system is functioning more effectively then I think that that’s an entirely reasonable goal and something we might think of implementing.

MS. BAK: I think we’ve got time for just one.

Judge Walker.

JUDGE WALKER: Well, I just wanted to ask Geoff and Deborah, given that the data you have used, particularly you, Geoff, have not been reported on a consistent basis but you’re attempting to mine from judges’ opinions what the numbers really are, what the relationships really are, do you not have some misgivings about some of the conclusions that you might draw from these data?

And secondly, what you are measuring in any
event, it appears to me, is what judges do, what amounts judges award and circumstances and conditions under which they make these awards. Is the length of the judge’s conscience on these matters really what should determine fee awards and expenses in these cases?

PROF. MILLER: I agree with you that there are definitely obvious problems of methodology looking at judges’ opinions. I’m not sure that they skew the results one way or the other. It could be that you just get a lot more noise but that the means and medians that we observed are pretty accurate.

Your second question, that is, what’s the best methodology raises a very thorny question of how we decide what ought to be the criteria we would use to determine the appropriate fee. And I don’t even think anybody really has come to a satisfactory answer to that.

I would like to know what the private market would do, if there were a private market. Unfortunately, more judges aren’t doing what you’ve done, Judge, and hold an auction for cases that would give us information about what the private market would actually demand for this type of representation.

If we had more auctions, which I would be very much in favor of, we get information on that which would be
extremely valuable. But at the moment we only have the results of three or four auctions to go by and that’s not yet enough of a database to look to. But certainly the auction results would be very valuable information as well.

MS. BAK: That’s a great segue to turning to our next topic which is innovative approaches to appointing, managing and compensating class counsel. And I thought we would start with Judge Walker since you’ve been on the forefront, Your Honor, in the use of class counsel auctioning to more closely approximate market rates for class representation and to avoid some of the associated difficulties with ex post evaluation of fees. Perhaps you could briefly explain the kinds of devices you’ve used in some of your cases and what the results have been.

JUDGE WALKER: Thank you, Patricia. Well, I’ll talk about two. And the first is what has been called judicial auctions and the second is the empowered plaintiff or lead plaintiff model that was ultimately enacted in the private securities litigation format.

And I suppose the moral from the story is that judges shouldn’t read law review articles, including those of Geoff Miller because that really was what gave birth to the auction idea.

It was a contest between lawyers fighting for the
lead counsel position in a class action, a securities class action. It was not a beauty contest; it was an ugly contest as they were throwing all sorts of charges and countercharges against one another and I’d been on the bench for three months at this time and after watching this go on for awhile threw up my hands and said well, why doesn’t somebody make a proposal based upon the fees that are going to be charged?

Needless to say, silence fell on the courtroom and the parties quickly made up and submitted a joint proposal, which needless to say, got my dander up and that’s how we got into auctions in that case.

Actually, Geoff, there have been a few more cases than three. There have been either 14 or 16 and Tom Willging of the FJC has done a review of those. And those of course have been compiled in the Third Circuit task force report.

The so-called auctions that I have run and that I think most judges have run have been an auction in which the lawyers have bid on the amount of the recovery that they’re going to charge in fees. Judge Kaplan, Judge Lou Kaplan in the Southern District of New York hit upon what I think is a very imaginative idea in the auction house cases in which he essentially asked the lawyers to bid on the...
amount of the recovery.

And the scheme he developed was one in which there would be no fees paid on the X amount of recovery and then 25 percent on every dollar recovered thereafter.

When you get into designing a sensible fee regime there are all kinds of problems that come out of the woodwork. Do you have increasing percentages to incentivize the lawyers as Jack Coffee at Columbia recommends? Do you have declining percentages to represent economies of scale, which I rather favor?

Do you have some regime along the lines of Judge Kaplan’s? I don’t know the answers, the correct answer at any rate and I don’t think anybody else does in part because we haven’t had enough experience. I do know this: that these bidding or competitive selecting class counsel is feasible only in a limited number of cases.

And basically what you need are two things. You need cases in which obviously more than one firm is competing to represent the class and that requires that the class be fairly well-defined. You can’t have lawyers competing to represent two disparate classes.

But if you have a situation in which you’ve got a fairly well-defined class, such as usually the case in a securities case, or in follow-on cases that follow a
government investigation or prosecution, then there’s a possibility for competition among the lawyers.

Problems? There are the problems that I mentioned of designing an appropriate regime. There’s a problem because there’s great resistance in the bar to competitive selection.

There’s uncertainty on the part of judges as to how to conduct auctions and there’s a certain awkwardness of judges in this position. Indeed, there’s an awkwardness that Judge Hornby mentioned this morning and judges involved in any fee determination at all.

It’s an irregular part of the judicial process. It’s not the usual adversarial process with established processes that we are accustomed to following. And that makes it problematic but so far no one else has come forward to take on the task. And as Professor Hensler just mentioned, she calls for even greater judicial scrutiny. So she wants us to put us further into the fire.

Then the second approach is the empowered plaintiff or lead plaintiff model. That, too, is something that was born out of a law review article by Elliott Weiss and John Beckerman.

And I tried it in another securities case even before the enactment of the PSLRA. It was one of these
cases in which the lawyers, and very good lawyers both on
the plaintiff side and the defense side, came in shortly
after the complaint was filed with a settlement.

And it appeared to me that that was too soon to
have fully evaluated the case and urged the parties to get
a real member of the class. And ultimately the Colorado
Public Employees Retirement Association came forward and
improved the settlement amount in that case by about a
hundred percent and had hired Hogan & Hartson here in
Washington along with the plaintiffs’ firm that I alluded
to to represent the class and they did an outstanding job.

Obviously, as you know, that model was enacted in
the 1995 amendments to the 33 and 34 acts. It does relieve
the courts of the responsibility of acting as a fiduciary
or purporting to act as a fiduciary. And it also allows
and encourages ex ante fee setting, which I think is very
constructive and useful.

If you’re going to award lawyers for the risk
that they undertake in litigation the best time to measure
that risk and in fact the only time that you can do so
effectively is at the outset of the case. It’s really
impossible to assess risk looking backwards.

So the empowered plaintiff model of the PSLRA
does that. The problem with this approach is that
relatively few investors come forward. Very few real
investors, institutional investors come forward, and I
think with respect to some there is a concern about whether
there is truly an arms-length relationship that exists
between counsel and the lead plaintiff and are we not just
back in the same situation we were prior to the enactment
of the reform act.

So those are the two so-called innovative
approaches that I have had personal experience with. I
think they bear pursuing further, even though it's
obviously very hard to do that with the auction model.

But one point I would like to make in commending
the Commission for undertaking a survey of class actions
and attorney fees in class actions, I hope the Commission
doesn't set its sights only on studying attorney fees in
class actions because this is a problem which confronts the
judiciary in a whole range of cases.

There are about 200 or so federal statutes in
which we are as judges are called upon to award attorney
fees. And we have very, very, very little hard, good
information that is compiled on a consistent basis to allow
us to make those kinds of decisions.

And whatever you say about lawyers, they simply
don't have an interest generally in bringing forward, in
the usual adversarial way, information that we can use to
test fee applications. And so I certainly hope that the
Commission continues its interest in this subject but does
so on an even wider scale than the class action scale.

MS. BAK: Before we go on I just want to remind
all the speakers to speak very directly because our court
reporter unfortunately is having trouble hearing everybody.
So grab your mike and just speak right into it.

Mike Denger, you believe that some of these
auction ideas would be well suited for antitrust cases as
well. Do you want to share some of your thoughts about
that and your plans for this agency?

MR. DENGER: I have no plans.

MS. BAK: No plans. Recommendations then.

MR. DENGER: Recommendations, perhaps. I think
like Judge Walker I would commend the Commission for the
Class Action Fairness Project where it went in and filed
amicus briefs where it believed these were excessive either
given the relief provided to the class or given the
underlying, significant, contributory role of government
enforcement actions.

And I would, particularly given the Commission's
antitrust mandate, as well as its consumer protection
mandate, and given what I think is an imbalance of
information that Judge Walker and the other judges
sometimes have to face if they are to award attorneys' fees
after the fact, the Commission ought to consider a broader
advocacy role particularly in follow-on cases of the type
that Judge Walker was talking about where I think that the
Commission could play a role given its consumer protection
and competition heritage.

Now, I would draw distinctions between two types
of antitrust cases. One is the follow-on cases which I
suggest present very minimal risk to the plaintiffs. Why?
Because a criminal conviction or civil judgment in a
government case is admissible as prima facie evidence of
liability.

The government often develops almost all of the
underlying facts which can be obtained during discovery.
The direct purchaser classes are easy to certify in follow-on cases. There’s joint and several liability and no right
of contribution. You can recover damages, even if the
defendants or even if the plaintiffs were to pass them on
with a markup to the indirect purchasers. And you have
statutory treble damages or statutory punitive damages.

So on these cases, particularly when attorneys' fee awards are based on the size of the recovery, which
means if you get a plaintiff in a big one, you’re in great
I think that there is room for the auction type of procedure at the beginning of the case. I say it for a second reason. I’ve sat in on an awful lot of class actions when there are 40, 50, 60 plaintiffs’ law firms purporting or seeking to represent the class. Some are designated as lead counsel, some liaison counsel, some as members of the steering committee and some on all sorts of other committees but none seem to ever disappear.

And I am concerned that this approach is inconsistent with the Commission's antitrust mission. Remember the antitrust laws apply to lawyers. If this were bidding on a government contracts case you might hear someone say it was inconsistent with the spirit of the antitrust laws.

If we have joint ventures, the Commission’s and the government’s historical enforcement policy has been that you want to have multiple competing ventures seeking to bid so you can have competition. If you have the situation where you have a large number of firms, no matter how you divvy it up, you’re going to have waste and inefficiency.

And I think the Commission could get better representation for the class, fairer representation at a
lower fee in cases where the risk is minimal by coming in and encouraging at the beginning the type of auction procedure that Judge Walker pioneered and Judge Kaplan used in the auction house cases.

I contrast these cases, and Lloyd and I are usually on the opposite sides of everything, so I’m going to break some ground today and be on Lloyd’s side. Lloyd in a case committed 50 percent of the resources of his firm -- if I have the facts wrong he’ll tell me. He usually does -- for a seven-year period.

It wasn’t a lay-down, slam-dunk case following a government investigation. He litigated it out through summary judgment, through expert reports, spent an enormous amount of time and got a heck of a recovery for the class, both in terms of money and in terms of the value of the relief he got on a going-forward basis. I would have given him a hell of a lot more had I been the judge. But I wasn’t.

But that type of case where you have a significant risk incurred by a plaintiff law firm, they develop a tremendous result for the class is a far different set when you follow along behind a government investigation. You have liability determined. You have everybody trying to play one off against the other, and
it’s not hard to develop evidence.

And I shouldn’t probably say this but having been through a lot of litigation, you can have economists to take positions, on almost any amount, on the side of what the damages were to the class. And I probably couldn’t tell you which one I think is right. But there’s plenty of them out there.

So what I suggest in this type of situation, particularly when almost all of them settle, the defendants settle out and say they won’t object above a certain level of fees. The objectors who opt out of the class aren’t in a position -- I mean, the opt-outs aren’t in a position to have standing to object. The named plaintiffs in this case -- I haven’t seen too many of them ever complaining about attorneys' fees.

This is a case where we need to go in and get some relief at the beginning. And I really think it benefits to the class because there’s only so much money to go around and it benefits to all of us because if there are excess costs they’re eventually going to get passed on to you and me as consumers.

So in this particular circumstance, and I lay that out in more detail in the written materials, I think it would be appropriate for the Commission, who is uniquely
positioned, to come in and advocate some sort of ex ante
type procedure in getting counsel to compete among
themselves to represent the classes in these types of
litigation.

MS. BAK: Mike, before I turn ultimately over to
Lloyd at the end to talk about his case a bit, I want to
let Howard take five minutes and then follow up with Lloyd.

Howard, ultimately the Third Circuit concluded
that traditional methods of selecting class counsel with
significant reliance on private ordering and a great deal
of oversight was probably the way to go in most cases.
You’ve just come out of the liner-board litigation where
you were very innovative in adopting some of those
management tools. Why don’t you talk to us a little bit
about that?

MR. LANGER: I did want to just say one thing
though --

MS. BAK: Talk really directly into --

MR. LANGER: While Mike was talking about
antitrust cases I was just glancing down the list in the
class action reports to try and see like how many cases fit
this model of an auction where there would be a follow-on
case.

And what struck me immediately was that all of
the largest settlements in antitrust cases as you go down
the line were in cases that couldn’t in any way be
characterized as follow-on type cases.

The NASDAQ market makers case, the largest here
prior to Lloyd’s case, Lloyd’s case was a case that
preceded the government action. The brand-name
prescription drugs case, which is the next largest, had no
government action. The corrugated container case, the
original one not my case, followed a criminal trial where
the jury was out for three hours and acquitted all of the
defendants. So it’s very, very hard to know what is a
follow-on case.

My own case that I just settled for $202 million,
the FTC brought a very unique, individual invitation-to-
collude action against one defendant and we expanded it to
many others. Was it a follow-on case? I don’t know but we
do know that the district judge found in our case that
nobody wanted to bring the case. We couldn’t find lawyers
to work with us.

MR. DENERG: Then I would applaud you.

MR. LANGER: I know. But what I’m saying --

MR. DENERG: And I would applaud the effort.

MR. LANGER: But what I’m saying is that it’s
very, very hard to know what is a follow-on case and one
would have said that the first corrugated case was a follow-on case but then after the criminal trial did it cease to be a follow-on case when the jury had acquitted? It’s a very, very difficult concept to know exactly what the area is.

Just this morning I was teaching the auctions case. Well, in my textbook they quote the testimony of the people admitting in the criminal case their liability, they met and colluded. But there are very few cases that are really that simple.

In any event, my own view is that more proactive judges and the Third Circuit model, to the extent there was a problem, which I take it from Professor Miller’s study, I’m not sure that there is a problem, be resolved.

The courts to date in the Third Circuit recognize that there’s jurisprudence on how to measure an attorney’s fee award, whether you’re in the Third Circuit where they have seven or eight criteria or you’re in the Eleventh Circuit where they have 11 or 12 criteria but they have criteria that already exist that courts are to apply.

And it’s one of the reasons that the Third Circuit felt that they couldn’t permit auctions within the circuit because they already had a body of laws as to how attorneys' fees would be decided.
But to the extent that I would recommend or think that there were things that courts could do to assist themselves, particularly in terms of the types of settlements that Professor Hensler was showing it would seem to me that there’s nothing to preclude a court, as part of the settlement process, have the parties to the settlement fund such experts as a court would require to analyze a settlement and determine whether the money was actually going to get to the class members or not.

I mean, I thought when I was listening to the prior panel talk about all of the different businesses that had arisen that were ancillary to class actions in order to get class members to file claims that this was really the courts and counsel not doing an appropriate job at that stage.

There shouldn’t be a requirement to have some company out there make sure that people file claims. It should be part of the process in the fee that goes to counsel and in the court’s overseeing of the case that there’s an adequate notice that assures that people file claims. And I think that it’s really a more proactive judiciary in terms of the criteria that they’re applying now that would ameliorate such concerns as have been articulated.
MS. BAK: Lloyd, I thought we’d sort of switch gears as we come to you and talk a little bit about the special challenges of determining reasonable fees in non-pecuniary cases. Yours, of course, had a huge recovery but also significant injunctive relief. And when, Howard, you mentioned there should be greater attention by the judiciary to various standards there what standards do we look to? How do courts evaluate significant injunctive relief?

MR. CONSTANTINE: Well, I can tell you what happened in our case. In our case, Judge Gleeson made a specific finding that the injunction in our case was worth between $25 and $87 billion and he also found that the injunctive relief was much more significant, far more significant, of much greater value to the merchants and consumers of the United States than the record compensatory relief, which was $3.383 billion, which itself was a record and the highest antitrust settlement in history.

He then said, it should affect my decision. It has. I’m not telling you how. I’m not telling you what but it has. And then he went on to make the award that he did.

I’d like to sort of cycle back because I think you can prove everything from our case and you can also
disprove everything from our case because it went on for so
long and it’s still going on. I’ll be working on it for
the next four or five years.

But to get to the bottom line of what I think
about all of this, I think that the best approach is
probably for cases where there is competition to represent
the class because they are follow-on cases because they
follow on a DOJ or state AG or an FTC prosecution of some
sort that I think the auction process, the kind that Judge
Walker and Judge Kaplan have utilized, is probably the best
way to go.

In a situation like our case, which Howard has
said his case was similar to that, where there is no
competition, where you just get hired to do a case. I
don’t consider myself a class action lawyer. I don’t
consider myself a plaintiff’s lawyer or defense lawyer. I
consider myself an antitrust lawyer.

And five companies came to me and they hired me
and they said would you bring a case for us? It was Wal-
Mart, Sears, Circuit City, Safeway and The Limited. And
they just hired a lawyer to do that case.

In that type of case, I think, when a dozen years
later -- and that’s what it was, 12 years later -- a court
has to make a decision on attorneys' fees the best way of

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503

12d-000516
doing that is to go back and try, as best as possible, to
answer two questions. What would a buyer pay for this
case? And what would a rational seller agree to sell his
or her services at?

And I think the closest that I’ve seen to that
kind of analysis comes out of Judge Easterbrook in his
Synthroid decisions, in the two decisions that he wrote in
the Synthroid case.

So let me cycle back to sort of what happened
here and where I think the court -- and I’m not trying to
engender any sympathy. Having been awarded a $220 million
attorneys' fee it’s not a good idea to go before a group of
people and say, hold out your hand and say, look how I was
shortchanged here. That’s not my purpose.

I think the important issue here is what these
cases mean and what they mean about the future and do we
really want to encourage a certain type of important, big
picture forward-looking case. And that’s to me the real
issue. Coming out of a government background, that’s sort
of the way I got into this particular case.

So we recovered $3.4 billion. We got an
injunction which the court valued at somewhere between $25
and $87 billion and had it’s most confident prediction that
it was $70 billion. It was a case that did not follow on a
government prosecution but instead actually spawned a raft of government activity. An FTC investigation followed on us. A DOJ prosecution followed on us and several state AG initiatives followed after our action. And we seeded those things.

In the Second Circuit, Judge Gleeson sat down and said, what am I going to do with this thing? What fee am I going to award you? We put together a fee application. Unfortunately, I didn’t ask for it to be posted on the web site. I will now after the fact.

I’ll ask for three things to be posted. One will be our fee application. One will be Judge Gleeson’s decision, which you can find at 297 F. Supp. 503. And one would be our appellate brief, which I argued in the Second Circuit a couple of weeks ago.

In the meantime, you can get the fee petition and the appellate brief at CPNY.com. They’re on our web site. But in any event, we went to Judge Gleeson. We said okay, you know all about this case. You closely supervised the settlement negotiations in this case. We don’t want to file a specific request for any particular fee. We tried that.

We said we will just set out all of the law, all of the factors, everything we possibly can. We’ll come
forward with a recommendation of John Coffee, of Arthur Miller who was the reporter for the Third Circuit task force, of the chief counsel for the National Consumer Law Center and for Frank Fisher and for Harry First of NYU and you do whatever you want.

The judge come back to us and said, oh, no. You’re not going to lay that on me. You have to ask for a specific amount. We then did our very, very best and we didn’t hold back any cases. There was not a single case that was cited in Judge Gleeson’s decision which we had not given him. We cited everything possible. We came forward with the experts who are considered to be the preeminent experts in the area and we applied for a fee of 18 percent.

We made our fee petition along the Goldberger factors, which are the factors in the Second Circuit. In most circuits you have something like Goldberger, and they’re all pretty much the same. The fact is that the Second Circuit cites our time and labor and magnitude and complexity.

Judge Gleeson made a finding that our case was of enormous complexity, unprecedented complexity and magnitude, 400 depositions, 54 expert reports, over 500 motions, a pretrial record with 230,000 pages of exhibits, 17,000 deposition designations, 730 trial witnesses and I
could go on for a while but those were all Judge Gleeson’s findings. He said the magnitude, complexity, time and labor were beyond recognition.

He said that the case was unprecedented in terms of risk, citing the fact again that this did not follow on but instead seeded government investigations. He said that the result achieved was the highest antitrust settlement in history and the highest settlement ever approved by a federal court on compensatory grounds alone. He made specific findings with respect to the injunctive relief and he said it was very important to encourage future cases like this.

Having done all that, he then awarded a fee of 6.511 percent, which was slightly above one quarter of the average fee that is awarded in the most relevant category here, which was antitrust megafunds settlements, settlements of $100 million. The average fee awarded in those cases was 24.56 percent.

It was interesting that after Judge Gleeson’s decision the liner-board decision came out and I read that and I was, like everybody else, I was impressed by what Howard and his co-counsel had done. And I saw the judge lauding Howard and his firm for being so efficient about doing the case. Only 18 attorneys had done 75 depositions.
Six people in my firm, include myself, did 281 depositions in our case in terms of efficiency.

Why did this happen? And frankly, it doesn’t matter that much to me because the fact of the matter is at a fee of $220 million or a fee at $600 million, it really doesn’t matter too much to my personal life. What this matters is to the future but how did this happen?

I think it happened because the standards in all of these circuits -- it’s called Goldberger in the Second Circuit. It’s called something else in other circuits are nothing but sort of a hodgepodge.

They’re what Judge Easterbrook called a chopped salad. It's anything you want to thrown in, anything you think about it and then there’s this investment of broad discretion to the District Court judge to do at the end of the day whatever he or she wants to do.

And I think Judge Gleeson, who was a great guy, said, you know what? $220 million is enough for anybody. Well, that’s absolutely the case. That’s true. It’s enough for anybody looking backward.

But what about going forward? Would a rational group of lawyers agree to do a case at 6.5 percent looking forward, a case like this, a case which everybody recognized was a very, very low proposition case against
two well-heeled defendants that had never lost an antitrust case backed by 6000 banks and all of their additional counsel? The answer is I don’t think too many groups of lawyers would agree to do that going forward if they knew that at the end of the day there would be 6.5 percent awarded.

And I think the real problem in this decision, if it becomes persuasive to anybody else, is its effect on the future. It’s defined its own category of settlements above a billion or $2 billion. And I think there’s a real problem there.

So what I take away from this whole experience other than a lot of money is a belief in just what I said before. In terms of cases where there’s competition to represent the class something like what Judge Walker and Judge Kaplan have utilized.

In the kind of case that we were involved in, very, very difficult, very, very long, very complex, very risky case, I think the best way for a court to proceed is to simply try to ask that question that Judge Easterbrook asked in Synthroid is what would a rational seller sell his or her services at and what would a rational buyer sell (sic)?

The last thing I’ll tell you is that we actually
had fee agreements in our cases with all of our clients. And those fee agreements would have yielded a fee of over $1 billion, because we just didn’t want to do it, and actually the truth of the matter is because I just didn’t want to do it. It was my decision.

I did not want to take these fee agreements and take them to Judge Gleeson and say okay, five very sophisticated buyers in arm's-length negotiation with equal information agreed to pay us what would yield a fee of over $1 billion. Please enforce that.

I just did not -- I knew this case would be my sort of legacy. This is going to be in my obit. And I did not want in my obit -- I didn’t. I mean, you’re getting -- this is some rare candor here -- I didn’t want that to be the final story here.

So we told Judge Gleeson they existed. We told him that they were way beyond what we were asking for. He understood that. And then we simply didn’t offer them.

MS. BAK: I think we’re going to have to close this. And I apologize for not taking your wonderful questions. I hope you will buttonhole each and every one of these panelists to get some more. But I hope you’ve enjoyed some very personal and interesting information from their experiences. Thank you very much. (Applause.)
MR. FRISCH: We have been called to order. Good afternoon. I know it’s been a long afternoon but I believe that this last presentation of the day is going to be an interesting and challenging hour on the special ethical concerns in class action litigation.

We have a variety of viewpoints and disciplines represented here, lawyers and economist, plaintiff and defendant, and a lot of interesting and difficult issues to cover in a fairly short period of time.

My name is Michael Frisch. I’m the ethics counsel at the Georgetown University Law Center. I also teach a course in professional responsibility at Georgetown.

My panelists, to my immediate left, you’ve already been introduced to Geoffrey Miller from the last panel, NYU Law School. To his left, Brian Wolfman, of Public Citizen. Then farther to the left, Lewis Goldfarb, a partner in the New York office of Hogan & Hartson. To his left, Roberta Liebenberg of the Philadelphia firm, Fine, Kaplan & Black. And to her left, John Johnson, IV, our token economist.

The more extensive biographies of each panelist...
are in your materials. We’re going to start today’s
discussion with Roberta talking about the particular
problems of communicating with absent members in class
action litigation. I’m going to turn it over to Roberta.

MS. LIEBENBERG: Thank you. Courts have long
recognized the potential for abuse that may occur when
there are unsupervised communications with class members.
Courts have broad authority to govern contacts with class
members by either plaintiffs’ counsel or defense counsel
under Rule 23 the Code of Professional Responsibility or
the court’s inherent authority.

Some federal courts have adopted local rules to
govern communications with class members. I want to focus
my remarks this afternoon on several recurring situations
in which ethical issues are raised by communications with
putative class members before class certification.

I’m going to focus on these communications
because it is well settled that once the class is certified
and the time period for opt-outs has expired, class members
are considered to be the clients of class counsel for
purposes of the ethical rules.

Model Rule 4.2 and its code equivalent, 7-104,
prohibits an attorney from discussing the subject matter of
a case with an adverse party that’s represented by counsel
unless the attorney obtains the permission of the opposing
counsel. One of the most common situations in which there
are pre-certification communications is when a defendant
attempts to settle a claim of an individual absent class
member.

The cases in the manual on complex litigation
make it clear that the ethics rules do not prohibit such
settlements so long as the defendant doesn’t utilize any
misleading information in the settlement negotiation.

The cases diverge, however, as to whether or not
the defendant has an affirmative duty to disclose the
existence of the class action at the time the settlement
offer is made.

Courts have found that such disclosure may be
warranted in situations where the defendant has the
potential ability to coerce an individual settlement, such
as in employment or franchise cases. For example, in the
_Bublitz v. DuPont_ case the court found that although there
was no evidence that DuPont’s settlement offers to absent
class members were misleading there was an inherent risk of
coercion because the class was combined of DuPont’s at-will
employees.

The court required DuPont to make its settlement
offer in writing. The written settlement offer had to be
disclosed not only to class counsel and to the court but as well the court required DuPont to serve class counsel with the names and addresses of all the employees to whom the settlement offer was made. Class counsel could then communicate with the class members to advise them of the case and to answer any inquiries.

I also want to talk about ethical issues that may arise when plaintiffs’ counsel communicate with class members. Class counsel can communicate with putative class members before the class to talk about the case so long as their communications are not misleading.

Courts have stepped in, however, when class counsel and in many instances competing class counsel have sent out mass advertisements or mass mailings which contain deceptive information. For example, in the McKesson securities case, a competing class counsel has solicited -- they had lost the bid for lead counsel and they sent out a mass mailing attempting to recruit shareholders to file individual claims and to retain that law firm.

The court found that the solicitation was misleading. One, the solicitation was labeled a notice and it had failed to disclose some of the information in terms of the advantages of participating in a class action.

The court required corrective notice and also

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
required a notice that allowed class members to rescind any of the retention agreements that had been entered into as a result of this solicitation campaign.

I’m now going to just shift focus for a minute to talk about communications after the class has been certified and efforts may be taken by defense counsel, competing class counsel, or even objectors to solicit opt-outs from the class.

Courts have routinely condemned opt-out campaigns. For example, in the Impervious Paint antitrust litigation, the class action which I was one of class counsel, one of the defendants solicited a high percentage of opt-outs from the class by advising them that their continued participation in the class would subject them to onerous legal discovery as well as other legal proceedings. The court invalidated the opt-outs, required corrective notice and also extended the time period for opt-outs.

I think what’s interesting about Impervious Paint is that although the communications were made by the defendant, not defense counsel, the court found that defense counsel had violated 7-104 because they knew about the solicitation campaign in advance and had failed to advise against it.

So in summary, there have been suggestions that
the ethical rules should be revised to specifically address
class actions. In my view the ethical rules are working
well and the situations in which there are improper
communications with class members are really the rare
exception not the norm.

Courts have demonstrated an ability and a
willingness under Rule 23 and under the current ethical
rules to fashion appropriate relief when there has been
misleading communications to class members. Thank you.

MR. FRISCH: Thank you, Roberta. The reference
to 7-104 and to Rule 4.2, 7-104 is the former code
predecessor to the same provision which now is in the model
Rules of Professional Conduct as Rule 4.2.

We’re next going to hear from Brian Wolfman who’s
going to expand on the discussion about ethical issues that
plaintiffs’ counsel faces in class action suits.

MR. WOLFMAN: What I’d like to do is I want to
address this globally because my view as I’ll get to is
that the rules, the ethical rules don’t work very well in a
class action context. So that, to me, when I get a
question that is termed ethical I try to think of it
outside of the box of the ethical rules and think of it
more in terms of what you’re trying to achieve in a class
action.
And so what I want to do really is to address specifically the questions posed by the FTC in organizing this panel. One, do the ethics rules properly apply to issues of class action governance? And two, should we attempt to construct new ethics rules or simply use the principles embodied in Rule 23 in evaluating lawyer conduct in class actions?

And simply put, my answers are as I said, no, the ethics rules don’t generally sensibly apply to matters of class action governance because they weren’t written with the particular problems of class actions in mind. And second, generally speaking, we should use principles developed and to be developed in the future under Rule 23 because it’s that rule by which the class is protected.

And however imperfect it’s not the model rules but Rule 23 that understand or attempts to understand the fundamental differences between representative litigation and individual litigation.

I think others here are going to get into conflicts issues but I want to look at some of the other rules and just explain why they don’t really fit the class action context and why I think when you come on one of these problems you ought to think in terms of class actions.
You know, the fee rule, for instance, the rule on fees is a very basic rule and it says a lawyer’s fee shall be reasonable, but if you look at the cases under that rule, rules are almost never found unreasonable under Rule 1.5 in bipolar individual situations. And the reason is is that it’s assumed that contract between a lawyer and a client generally takes care of the problem.

But, of course, in a class action there’s no meaningful contract at all. The contract with the named plaintiff ought to be ignored, for instance in the typical consumer class and courts sensibly generally ignore it.

Fee setting needs to take into account economies of scale, which of course an ordinary contract 101 contract doesn’t do. So generally you wouldn’t say, for instance, because an individual contingency fee lawyer’s fee of one-third is reasonable, you wouldn’t say that that is reasonable in a class action automatically because that would, in essence, say that the lawyer doesn’t have to share the economies of scale with his clients in the class action. So that’s but one example.

Let’s take a look at another one and say something perhaps that others don’t agree with but there’s a Rule 7.3A. It’s about in-person solicitation. It says among other things it says a lawyer shall not by in-person
or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no previous relationships when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.

Well, whatever you think of that rule, it seems to me to have no application to the class action because we’re not worried about -- if we’re assuming this class is going to go forward as a class action, we’re not worried about, or at least I’m not worried about the class lawyer overreaching with respect to that particular person.

In fact, if it was up to me you could get rid of the typicality requirement altogether and treat the class as a legal entity and ask whether the lawyer’s relationship with that class is sensible and not worry at all about the typicality of the individual representatives’ circumstance.

Another example to my mind is the one that Bobbie mentioned, Rule 4.2 dealing with unrepresented persons. And I’ll use her example, the opt-out campaign. And the basic rule, as we know, is that you ought not to contact someone who’s represented about that matter, that a person you know is already represented.

Now, the reason we might be concerned about a defendant doing that in a class action is because we’re worried the defendant will drag off members of the class.
and destroy the class action. So there’s good reasons for applying the concept and the rule but not for the reason stated in the rule, for other reasons.

In the plaintiffs’ situation -- let me go back to the objectors. If there are objectors that a lawyer solicits to opt out it seems to me that there’s, in many circumstances, nothing wrong with that contact with those objectors. After all, the objectors are going to be bringing forth information concerning the validity of this settlement. And it’s up to the court to determine whether the settlement should stand or fall or the certification should stand or fall or whatever.

So in other words, what we have here is the court interposing most of the types of protections we seek from the rules, not anything about the individual client-lawyer relationship, which is what the ethical rules are based on.

But we rely on the court to interpose rules dealing with conflict of interest, dealing with fees, dealing with solicitation because there is no real lawyer-client relationship in a class action, what the academics call an agency problem that there is this entity out there, the class, that has no relationship with a lawyer.

And we call upon the court to act as that fiduciary. We call upon the court to interpose a series of
rules based on the particular circumstances of the case and
the particular circumstances of class action.

So my view would be as I’ve said that the rules
are not particularly helpful and that any time you get a
situation that presents itself as being ethical take a look
at them and ask yourself what are the differences in class
action? What are the differences between class action and
individual representation and does application fo the rule
make much sense in that circumstance.

MR. FRISCH: Thank you Brian. We’ll next hear
from Lew Goldfarb whose experience is in defending class
actions and he’s going to talk to us about concerns about
ethical violations from the point of view of counsel
defending class actions.

MR. GOLDFARB: Thank you, Michael. And let me
just make a disclaimer. I started my career actually at
the FTC. I’m delighted to be back here and to see the
Commission show such an interest in trying to make sure
that class actions are truly for the benefit of consumers.

But the disclaimer that I want to make is that I
think class actions are a good thing and that the public
benefits from class actions and they do deter bad behavior.
And so I don’t want anyone to construe from my comments
that I believe otherwise.
However, a lot of our points of view depend on the area of class action litigation that we’re involved in. And my area of litigation has been products liability, consumer financial services, pharmaceuticals. And I’m a little jaded from that experience because I will say to you that one of the first questions that comes to mind in handling over 200 class actions over the past 15 years is the fundamental question, when is it truly in a consumer’s interest to serve as named plaintiff in a class action?

I mean, if someone has been injured, if someone has a product that hasn’t worked, isn’t it more in their interest to try to get it resolved through the seller or the manufacturer rather than wait three to five years as a named plaintiff?

And so it leads me to really focus on one of the ethical provisions that I think hasn’t been discussed very often but I think it goes to the core of what class action litigation or at least the areas that I’ve been involved in focus on and that is Rule 1.8G of the conflict of interest rules which state as follows: a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client.

And I would suggest for consideration that in an
enormous number of class actions -- I won’t say the
majority but a significant number of class actions it’s the
lawyer who has the only interest in the class action. In
fact, it’s the lawyer who has really created the class
action and has gone out and pulled in or found clients to
assist in this so-called business venture.

I had an opportunity a few years ago in
representing a client to really have access to the
underbelly, I will say, of the class action industry. My
client was sued along with several other auto manufacturers
by a group of lawyers claiming that the seat backs in all
the vehicles manufactured over the previous five years were
unsafe. They had actually obtained this factual basis for
this from a Federal Register article that was actually
debating whether certain kinds of seat backs were safe or
not.

They went out and filed five class actions within
a period of about two weeks against three or four major
manufacturers and held a press conference and claimed that
their clients were entitled to $5 billion and all the
things that often accompany cases like this, hoping, I
think, to coerce settlements.

And we conducted an investigation and found that
none of the named plaintiffs in these cases ever owned a
vehicle manufactured or sold by our client. And we did what you would expect we would do which was to file dispositive motions early on.

We got these cases dismissed but my client was willing to go beyond that and asked us to research whether there was anything that could be done to deal with lawyers who they believed were abusing the class action process and, lo and behold, found a statute in Pennsylvania called the Dragonetti Act which codifies abusive process and gives it private cause of action to defendants.

And so my client had us bring a lawsuit against the law firm that was behind these class actions. And as the members of the bench who are here today will attest, no judges want to be presiding over a lawsuit between lawyers. I mean, you generally don’t get very far.

And this litigation went on for about a year and a half at tremendous expense to the client but there was real value in it because discovery enabled the client and others on the defendant side to get a bird’s eye view of what really goes on. And we believe, and based on other experience, is indicative of -- I’ll just refer to it as a segment of the bar -- that constitutes the class action industry.

What was discovered, and this is all public

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
information, was that a number of lawyers in a few
different law firms got together and signed a joint venture
agreement. And we got a copy of that document. That
document assigns various roles to the various lawyers and
some of them were to go out and hire an expert.

One of the lawyers was to go out and hire a
plaintiff. That’s the term that was used, hire a
plaintiff, which was done. And unfortunately for some of
the plaintiffs, these are people that had actually, one of
them had actually gone to the law firm with a problem with
his seat, thought he was getting representation and found
out later on in deposition that he was a member, that he
was the named plaintiff in a class action.

There were also documents which showed the
strategy of holding a press conference, holding out some of
the documents in the Federal Register where a government
agency had made certain findings about seat backs and
essentially trying to coerce a settlement as early as
possible.

That was the experience of this group of
defendants. It does demonstrate that there is a segment of
the class action activity which is not in the interests of
consumers, which is really designed to basically constitute
business ventures on the part of the plaintiffs’ lawyers
and I think it’s a pretty clear violation of this section of the code.

So when the FTC staff asks should there be changes to the code, well maybe there should but there should also be greater enforcement of the Code of Professional Responsibility which is something that you don’t get in the courtroom.

And more importantly I will say, and this client also had a bar grievance filed against some of the lawyers who’ve been involved in situations like this, even bar associations, again, we have found are often more protective of lawyers except for those who steal money and engage in criminal acts than they are willing to really apply certain provisions of the code to discipline lawyers. I see the one minute sign up so I’ll stop there. Thank you.

MR. FRISCH: Thank you. I spent 18 years of my life prosecuting lawyers for the state bar and I have to echo the view just expressed there that the rules of professional conduct are woefully underenforced and often enforced in a manner that is self-protective of the profession rather than the public. With that sermon, let’s turn to Geoffrey Miller, NYU Law School, to talk about the conflicts of interest rules and how they intersect with
class actions. Geoff?

PROF. MILLER: Thank you. Given time constraints I’m only going to talk about conflicts among class members as they relate to the ethical obligations of class counsel. So suppose that you have a class where some class members have old claims that are potentially barred by a statute of limitations subject to a discovery rule and others have younger claims that are not even arguably time barred. Can a single attorney represent both segments of the class?

You might think this is an easy question but it’s really not because the segments of the class are differently situated with respect to the strength of their legal claims, the possible legal arguments, the possible factual arguments that might be made on behalf of those legal claims and the allocation of any settlement that might result from settlement bargaining.

Courts have agonized over these problems but have yet to come up with an acceptable methodology for dealing with them. The problem is that the class setting makes application of the ordinary rules on conflicts of interest impossible.

When you have a conflict or potential conflict among clients outside the class setting the usual solution is to seek client consent to the representation. If
informed consent is forthcoming there is usually no problem with going forward but it is impossible to obtain the consent of the class.

The entire structure of the conflicts of interest rules is built around the linchpin of consent and consent is not possible in a class action setting. The ordinary rule of legal ethics is strict. If you don’t have consent in the case of an otherwise disabling conflict you can’t go forward with the representation. If that rule is applied strictly in class cases it would disqualify far too many attorneys.

Now, as Brian said, the solution, ordinary solution, is that in the class cases the court acting on behalf of class members makes the judgment about whether the representation can go forward.

But what standards should the court use to guide its analysis? There aren’t very many articulated standards that are available to courts to help this question. So what I want to do is suggest a standard that the courts might think about, which I call the hypothetical consent approach.

Under this approach, the court should ask in a case of a class conflict whether a reasonable class member would consent to the attorney representing the subparts of
the class. And to exclude the possibility of consent being withheld for strategic considerations or for reasons of self-interest that adversely affect the interest of the class as a whole, we add in the constraint that the reasonable plaintiff not know which segment of the class he or she is in.

So the question the court’s going to ask is would a reasonable plaintiff, who is unaware of the segment of the class in which the reasonable plaintiff happens to find himself or herself in reality, consent to the representation.

What do we mean by reasonable plaintiff? We mean someone who is self-interested with respect to the litigation and not motivated by idiosyncratic considerations such as a wish to have his or her day in court, but not necessarily someone who’s purely financially self-interested. It could be that many class actions also involve important nonfinancial considerations and those would be taken account of.

So to revert to the statute of limitations example the question a judge should ask is this: would a reasonable plaintiff, not knowing whether he or she has a new claim or an old claim, consent to the attorney representing both parts of the class. The considerations
that would be relevant would go the costs and benefits of plural representation as well as the risk-aversion of average class members.

Now, if you apply this hypothetical consent approach, I think the problems really sort of bifurcate into two types. Some problems are ones of allocation among segments of the class. These are not very problematic. As long as the attorney has no self-interest in favoring one segment of the class over another the hypothetical consent approach would allow the representation to proceed in most cases.

After all, the attorney wants to maximize the recovery for the class as a whole and that’s also what the hypothetical plaintiff wants if he or she doesn’t know what role he or she has in the class.

In other cases the attorney does have a self-interest. For example, in asbestos cases attorneys might have an inventory of individual cases that get swept into the overall settlement. Such attorneys might have an incentive to structure the class recovery so as to benefit the inventory plaintiffs.

In such cases the hypothetical consent approach would suggest that the reasonable plaintiff would refuse consent to plural representation because they don’t believe
the attorney has an incentive either to maximize the recovery for the class as a whole or to make a fair allocation of the settlement proceeds.

What are the advantages of the hypothetical consent approach? Well, it really does a better job, it emulates the consent, the actual consent you have in ordinary representation by creating a hypothetical condition rather than a real condition. It maximizes the benefits to the class as a whole. It provides guidance to the judge and it tends to reduce the transactions cost that would otherwise make class action litigation potentially unworkable.

So this is just what I wanted to spend my five minutes suggesting, that this is a possible valuable thought experiment that courts could use to deal with the many and multiple situations where there are fissures in the class in order to assist the courts in assessing whether a single representation can occur with respect to multiple parts of the class.

MR. FRISCH: Thank you, Geoff. Our last panelist today is John H. Johnson, IV, our economist. John, do you want to use the podium and the PowerPoint?

DR. JOHNSON: I’d like to just do it from here.

So well, as you heard several times, I’m the token
economist on the class action ethics panel today and that puts me in a unique situation. It’s not the case that economists are frequently used to testify in class action cases, particularly about the Rule 23 and whether or not the class, there’s common impact, formulaic approaches to damages.

I think sort of the unique positioning is my place on the ethics panel today. And what I want to spend my time on is a discussion of how economists have frequently spoken to the issue of interclass conflict and specifically focus on a few examples.

From an ethical perspective, the existence and assessment of whether conflicts exist amongst class members clearly can pose ethical dilemmas for attorneys. Where economists have begun to play in is actually using economic theory to sort of delineate are there actual conflicts.

I think a nice summary of where this fits in comes from the liner-board antitrust litigation. The adequacy of the class representative is dependant on satisfying two factors.

First, that the plaintiffs’ attorney is competent to conduct the class action and second that the class representatives do not have interests antagonistic to the class.
I want to be clear as an economist I have nothing to say about the competence of attorneys. That’s not my role. But where I do think economics has been very useful is at least delineating whether the interests are antagonistic to the class.

Now, how might this play out in terms of economics? Well, first, economics is in part the study of the allocation of scarce resources and so markets, in fact, are mechanisms for allocating goods between consumers services. So oftentimes we study and use economic theory to delineate competing incentives.

Second, we often find that economic factors such as economic market definition can provide structure and guidance as to the potential impact of a defendant’s actions in class litigation. It’s also the case that the basis of many damage estimates are different types of economic analysis and an understanding of the assumptions and how those estimates are come about will also sort of identify conflict.

And finally, economics provides quite a bit of guidance on valuation. How do we capture considerations such as current versus future claims, expected value, those types of issues.

I’ve selected sort of two cases to illustrate the
potential conflict issues and how economics actually can be
illustrative. I purposely chose two cases that I had no
direct involvement in but some of our panelists have so I’m
sure they’ll chime in when the time is appropriate. One
example is a settlement class in a product liability case
and the second is a class in a monopolization/antitrust
matter.

So the first case is the General Motors
Corporation pickup truck fuel tank products litigation.
And basically, in this case class members were purchasers
of certain mid- and full-size General Motors pickup trucks
which because of the location of the fuel tanks were
vulnerable to fires in collisions. There were a number of
issues raised in this litigation. I just want to focus
only on the interclass conflict issue.

So basically, to summarize the settlement terms
very crudely the settlement agreement provided for members
of the settlement class to receive thousand-dollar coupons
redeemable to the purchase of any new GMC truck or
Chevrolet light-duty truck. The coupons could be
transferred to other family members and there were some
other aspects to the settlement as well, but that’s the

Where the interclass conflict came about was that
there were two sort of distinct types of truck owners. The first were individual owners and the second, what were called fleet owners, groups that owned a number of trucks, for example, the court cited government agencies as an example of fleet owners.

So ultimately the question the court raised was, given the structure of the settlement could the class representatives, who were all individual owners, have been acting in the best interest of the members?

Specifically, it’s another quote, the fleet owners will never enjoy the benefits of the settlement terms such as the interhousehold transfer option intended specifically for the benefit of the individual owner.

Now, from an economic standpoint several factors stand out that might illustrate this type of conflict. First, economics would point to the likely differences in purchase decisions by these two groups of customers. Second, it would talk to the differences in the intended uses of the vehicles.

Third, it would talk to the differences in the methods for potential recovery by these two groups and fourth, it would talk to differences in the value of the settlement to each group.

Now, I’ll loop around at the end to discuss sort
of solutions to interclass conflict but let me give the second example. The second example is a more recent case 3M v. Bradburn. 3M is a case where the product at issue is transparent tape.

In the precursor to the class action, 3M was found guilty of unlawful maintenance of a monopoly, basically as a result of bundled rebate programs. And so in the class action a class was proposed to persons directly purchasing from the defendant invisible and transparent tape.

So the class representative, in this case Bradburn, had purchased transparent tape exclusively from 3M. Plaintiffs proposed damage theory was that of an overcharge, basically because of monopolization the prices had been elevated and therefore there would be a simple overcharge theory.

Where the court took issue was the fact that within the class was a second group of large retailers who had also purchased what was called private label tape. And these would be customers like if I had bought tape then I resold it as Johnson Tape that would be private label tape if I was reselling the tape.

And this group of class members could be viewed as in direct competition with 3M. As a result, how would
that group of class members approach the damage issue?
Well, there would actually be a claim that the
monopolization actually could have depressed market shares.
In other words, they were in direct competition and so as a
result there would be a lost profits claim.

So the conflict there was that the class
representative would be arguing about overcharge theory but
in fact the other group of class representatives actually
would have a different theory entirely based on the market
shares.

So how would economics be useful in this context?
Well, first, the relative positioning of the class members
in the market would be clear. Second, the economic impact
and harm potentially caused by the defendant’s actions and
third, the alternate theories underlying damage recovery
for the class members.

I think I should be clear about two points.
First, existence of interclass conflict is very fact-
specific and depends on the economic circumstances. This
is not any kind of one-size-fits-all issue. Always have to
deal with the economics very carefully. And second, the
courts have provided some remedies for overcoming
interclass conflict and so I think should definitely talk
about those.
I think the best summary is in the VISA/MasterMoney antitrust litigation where when issues of interclass conflict were raised the court proposed the following remedies. First, you could bifurcate the liability and damages phases of the trial. Second, you could decertify the class after the liability phase or third, you could create subclasses.

In terms of what had happened in the two cases I described in the pickup trucks case, basically, there was a refiling in Louisiana after and the terms of the settlement were broadened in several ways that seemed to resolve the antagonism between the class members.

In the second, in the Bradburn case actually, just two weeks ago, the court ruled again based on a new class and the new class was limited only to those people who had purchased private -- I’m sorry, excluded all those who purchased private label type, which left the class only members that would pursue an overcharge theory and not a monopolization or a market share theory. Thank you.

MR. FRISCH: Thank you, John. I would ask if any of the panelists have additional comments they would like to make in light of the other comments that have been made? Brian first then Lew.

MR. WOLFMAN: I think Lew’s presentation is very
interesting because it presents a situation that on its face appears extremely unsavory, the conduct of the lawyers appears highly improper. And I don’t want to speak to that particular situation because I don’t know it but let’s assume -- I’m sorry. I’ll speak up.

Let’s assume, for instance, that there was this type of aggressive solicitation of individuals to bring a consumer antitrust class action and the purpose was to meet this requirement in the law that we have a named plaintiff.

But the difficulty I have with automatically condemning that is that the court is going to sit there ultimately to protect the thousands of other people in the case, not the particular named plaintiff.

Now, as I say if it were up to me I think there are rational arguments to eliminating the named plaintiff requirement. I understand there may be standing problems in the current law, serious problems of typicality and so forth in the current law but it seems to me that Lew’s problem is, the question really is do we want to be enforcing those kinds of rights aggressively?

And again, I’m not speaking to the situation. There may have been no rights to enforce there. But it seems to me that ethical rules about solicitation just don’t say anything about whether we want that conduct to
occur.

MR. FRISCH: Lew?

MR. GOLDFARB: I just had a quick question for Bobbie, actually, with regard to communications to putative class members. They’re not class members obviously until the class is certified but very often a defendant upon being served with a class action sometimes plaintiffs’ lawyers actually do find problems with products and services and it’s often in a defendant’s interest to take some action before the case even goes very far, maybe even turn it into a catalyst case.

Under your interpretation of the rules for communicating with putative class members before a class is certified obviously what’s your view on whether a company can simply go out and do something for class members, I mean, just affirmatively make contact with class members and take some action that may actually moot out the underlying class action?

MS. LIEBENBERG: Well, I think the case law is clear that the defendant can go ahead and initiate these types of settlement proposals with putative class members. I think where there is some dispute in terms of is it an employee/employer relationship. Could it be seen as a potential for coercion like the DuPont case.
But it is clear under the ethics rules that because the class, the putative class members, are considered unrepresented that defense counsel can have contacts with those putative class members so long as there’s no misleading or false information.

I mean, it seems to me that where you see these abuses in the case law is where there’s been some type of misleading information, failing to tell somebody that if they sign this release that they’re going to be giving away all of their rights in a class action in certain circumstances where you almost have a duty to disclose.

MR. FRISCH: And there are separate ethics rules that deal with misleading, dishonest conduct, things of that nature, totally separate and apart from the question of communication with a class member.

MS. LIEBENBERG: I would just add that it’s a tricky situation I think for defense counsel just for that very reason because under 4.1 you have to be careful that you’re not giving legal advice. And that is a fine line to draw.

MR. FRISCH: Right. The ethical rule there says that one cannot give a nonclient legal advice except the advice to secure counsel, I think, is how that rule reads.

One of the questions that we have really touched
upon throughout the presentations and I would ask if
anybody wants to expand upon their views with respect to
it, is whether there ought to be special ethics rules with
respect to class actions or should we, as Brian has
indicated, just depend upon the non-enforcement of the
rules we already have? (Laughter.)

Let’s start with the question of solicitation
which -- now, first, the solicitation rules among the
states vary greatly. The District of Columbia is the most
solicitation-friendly jurisdiction in the country and Iowa
is the solicitation gulag. Can we craft a special rule for
that particular area that would vindicate the interests
that the ethics rules are designed to vindicate and yet
still allow class action lawyers to operate in a sensible
way to achieve the ends a class action should achieve?
Lew, you want to start with that one?

MR. GOLDFARB: Yeah. Let me just speak to that
because whether it’s crafting a special new rule or
interpreting the existing rules that provide some
restrictions on solicitation I think what has happened, and
just as an example, the rules allow you to send a
communication out or make contact with an individual with
whom you’ve had a prior professional relationship.
And on its face that looks to be pretty innocuous
but what has happened in the class action context is that you have lawyers who are one of a couple dozen plaintiffs’ lawyers in a massive class action where there are hundreds of thousands or maybe even a million class members. And each one of those lawyers construes every one of those class members as their clients, people with whom they have a professional relationship.

And so what then follows from that is they will send a communication out having nothing to do with the original underlying litigation. This happens in the asbestos area where they will send a communication out and ask whether you own a particular motor vehicle or whether you’ve used a particular pharmaceutical and if you have would you like to be a member of the class. I don’t think the professional rules were intended to allow for that kind of communication and yet that is happening all over and it is really a problem, I think.

MS. LIEBENBERG: I’d like to respond, too.

MR. FRISCH: Brian then Roberta.

MR. WOLFMAN: Let me just ask though, I mean, why isn’t the question -- and let me just say to Mike, I don’t represent plaintiffs. I generally represent objectives and we try to argue the ethical rules because they’re the current, I’m big on ethical enforcement but I’m saying just
sort of ideally why isn’t the question in that circumstance the degree of enforcement society wants of the rules? Why are we focused on the named plaintiff in a class action?

It doesn’t seem to me to be what class action is about. After all, in the ethical rules we’re worried about overreaching between the lawyer and that particular person but in the class action we’re asking whether the class as a whole ought to be represented in enforcing this public right. I just don’t understand why the question is should we try to enforce every wrong out there or not. And that seems to me the question for society, not whether the ethical rules.

MR. GOLDFARB: Brian, the underlying premise of your question is that the class action has legitimacy and that what we should really be focusing on is that class members should maybe get some relief regardless of how the named plaintiff is approached.

MR. WOLFMAN: No, Lew. I’m not saying that. Maybe the class action is not legitimate but that’s the question not whether we should do it through the ethical rule. The question is how much public enforcement do we want through private attorneys general. Maybe we’ll decide that we want none and we want to do it through regulators but it doesn’t seem to me that looking to the rule answers
MS. LIEBENBERG: Well, it seems there has been commentary that, for example, in the antitrust cases where you’re really acting as a private attorney general that really that is the model. And answering your question, Brian, that you do away with the named plaintiff because in essence you are acting as the private attorney general supplementing government enforcement.

It seems to me however that you have to distinguish between the types of cases. If you just look at Lloyd Constantine's case where the named plaintiffs were Wal-Mart, Sears, I forgot who else were the other named plaintiffs.

MR. FRISCH: Entities in need of great protection.

MS. LIEBENBERG: Yes, yes. It seems to me that they are, in fact, controlling the litigation. They are having an impact in terms of the types of information that is given to a lawyer. And so I think you can’t make these broad-brush types of analyses because the types of class actions vary so much.

And I just want to respond one minute to Lew’s comments about maybe a class member doesn’t want to wait three to five years and they’d rather go through the
process of dealing with the defendant.

In my experience, most of the consumer cases that we have represented are aggrieved individuals who have come into our office because they have not been able to get satisfaction from the defendant. And if the defendant had done a better job, they probably wouldn’t have come in to see me.

MR. GOLDFARB: Can I just make one comment about this notion of private attorney general? Maybe this will sound like heresy here but do we really need 100,000 lawyers running around the country serving as private attorneys general? I mean, we’ve seen this run amok in California where everyone in the state can be a private attorney general and sue on behalf of people that haven’t even used products or have no harm whatsoever.

I mean, I think it’s gotten totally out of hand and what has happened in a major segment of these cases is that what just happened in the case that I described which is the lawyers set up these ventures to create class actions. They really don’t care that much how much the public is really being protected. They want to come up with some theory that may be viable, that maybe a court will buy into and maybe find some product is defective even though it has not caused any harm up to that point in time.
And so it really has, from my experience, gotten abused and that’s why maybe the ethical rules are the vehicle through which we should rein some of this activity in.

MS. LIEBENBERG: I would mention that the cases are very clear that where there is abuses the courts have been ready and willing to sanction lawyers. In the Cobell v. Norton case, for example, the judge referred the attorneys the defense counsel, actually it was government counsel, to the D.C. Disciplinary Board. And I think that was also true in the Kleiner case. So you do see courts when there are abuses taking remedial action.

MR. WOLFMAN: I think that both the points Bobbie and Lew make are well taken and I think they’re consistent with my point. For instance, concerns of the type Bobbie raised caused, for whatever you think of it, Congress to decide that the named plaintiff in many or most securities actions had to be the person with the largest stake, or ought, presumptively, would be the person with the largest stake whereas, Lew, the point you raise may get into the California Supreme Court to start interpreting the private attorney general law there more stringently, which they have, or the legislature could repeal it.

But my point is that in both instances I think
it’s a very indirect way to go about it to go through the ethical rules instead of asking what should our public policy be as a substantive matter. It seems to me it doesn’t have to do with the relationship between one lawyer and one particular client when you have classes of 100,000 people.

MR. WOLFMAN: But who enforces public policy? I mean, you asked the question --

MR. GOLDFARB: Maybe it should just be regulators. But --

MR. WOLFMAN: The FTC -- should the FTC be doing more in the area of class action oversight?

MR. GOLDFARB: The market.

MR. FRISCH: Geoff?

PROF. MILLER: I was just going to say -- no. I forgot there’s a market out there.

MR. FRISCH: One of the recurrent claims of abuse in the class action area is that it's really the financial interests of the lawyers that predominate and often the clients don’t get much if anything at all. Is there anything that can be done in the ethics rules that could alleviate that problem or is it really an imaginary problem? Does anyone have any comment on that?

MS. LIEBENBERG: Well, it seems to me that the
way the Rule 23 has been set up so that the court has supervision over what type of fee an attorney gets and it seems to me that the ethical rules are ill-equipped to really handle that kind of issue.

Another area in which there seems to be this tension in the ethical rules is where you have a conflict between the named class representative and perhaps other members of the class over a settlement.

And I think one of the -- as Judge Adams said in a concurring opinion in corn derivatives, you just can’t mechanically apply the ethics rules to Rule 23. And I really think I would commend it because I think it is really an appropriate analysis of how the interplay between the ethics rules and Rule 23. And where we’ve seen that there needs to change the Federal Rules Advisory Committee has come up with ways to change the class action rules where there needed to be perceived change.

MR. FRISCH: Well, that’s exactly right. The traditional ethics formulation is that the client absolutely controls the settlement and what do you do with multiple clients and varied interests? Is it sufficient to simply depend upon a court to, in effect, substitute for the client under those circumstances?

Well, I’ve raised a lot of interesting questions.
I’m sure there are no definitive answers and I’m sure each
and every one of you join me in thinking our panelists for
a very provocative and thoughtful presentation.

(Applause.)

(Whereupon, the workshop recessed
at 5:30 p.m.)

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: P024210
CASE TITLE: PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS
DATE: SEPTEMBER 13, 2004

I HEREBY CERTIFY that the transcript contained herein
is a full and accurate transcript of the tapes transcribed
by me on the above cause before the FEDERAL TRADE
COMMISSION to the best of my knowledge and belief.

DATED: SEPTEMBER 27, 2004

____________________________
DEBORAH TURNER

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for

For The Record, Inc.
Suburban Maryland 301-870-8025
Washington, D.C. 202-833-8503
accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE
Thank for the kind introduction, Dr. Frankel.

It's a pleasure to be here with you and participate with Judge Braden.

As a representative of the legal community - I must express my pleasure at spending time today with so many folks whose careers are dedicated to seeking truth and advancing the human condition.

As we all know, that's not exactly how the legal profession has come to be seen in the eyes of many - even within our own profession.

There is the story about two lawyers who went through a contentious case - and even hate the legal profession - came to distrust each other, and the judge understood it - just exasperated by it all.

At one point during trial, one of the attorneys couldn't contain himself and, in open court shouted "You are a cheat!" to his opponent.

"And you're a liar!", bellowed the opposition.

Banging his gavel loudly, the judge interjected, "Now that both attorneys have been identified for the record, let's get on with the case."
And so it is that the legal profession has a less than stellar reputation among many.

From where I sit, that is a very sad thing because — devoted my career to trying cases.

And — Bad apples aside —

I continue to see the legal profession as a noble calling, one that is dedicated, much like yours to seeking truth and advancing the human condition.

Devoted my career to trying cases.

In speaking today, want to share with you my concern that what has happened to my profession in the eyes of so many does not happen to yours as well.

What do I mean?

Want to talk a bit about the role of expert witnesses — and the role of science and medicine in the court room; its use and misuse.
At one point or another in your career, you are likely to be asked, given your qualifications, to participate as an expert witness in a court proceeding.

Many of your colleagues make very good livelihoods providing expert testimony.

Others supplement their income from universities with lucrative practices in providing such testimony.

And there are many good reasons to participate in the legal process beyond the obvious financial rewards.

As our society becomes increasingly more complex and technologically advanced, courts and jurors increasingly NEED the assistance of expert witnesses.

Experts like yourselves provide a critical function in the truth-finding process.
Ensuring that justice is done in individual cases

And the best apply to participate in some aspect of legal process well Pose highly interesting issues that will intrigue some of you --

ranging from the balancing of the social costs and benefits associated

with design of consumer products --

- SW roll over protection vs fun to drive.
- Toaster that does cause fire vs too expensive

to finding the proper balance in antitrust law between allowing free

competition and protecting against monopolistic abuse

- Oligopoly concentration three majors anticompetitive

and ascertaining the right line between compensating for medical

malpractice in individual cases while not so draining the resources of

doctors that no one wishes to enter the profession

- Do we cap awards or not?

Frankly, our legal system NEEDS your expertise in resolving these and many

other issues confronting our society today:

Surfing Brovey article of 2: E&B said long ago - the age of

chivalry is dead. "The aged, sophists +

We will need it all the more in the future. Ever more complicated and difficult

issues associated with science are sure to emerge over the span of your careers.

+ Technology
Like for example how should our legal regime analyze and resolve the profound ethical and technological issues associated with advances in medicine - ranging from cloning new life to treatment and prolongation at the end of life?

While I encourage you to become involved with the legal system to help us reach rational and compassionate answers to these and other important questions – while I think it is inevitable that science will continue to influence law and legal proceedings more and more – I also want to issue something of a warning.

If you do not guard carefully your professional and personal standards of intellectual honesty and integrity you will quickly find yourself and your professions in a similar state of disrepute as my profession finds itself today in the eyes of far too many people.

And, frankly, there is reason for concern.
Take this exchange – an injured plaintiff suing for tort damages being questioned by his own lawyer on direct examination

By Plaintiff's Attorney: What doctor treated you for the injuries you sustained while at work?

By Plaintiff: Dr. Johnson.

Plaintiff's Attorney: And what kind of physician is Dr. Johnson?

Plaintiff: Well, I'm not sure, but I do remember that you said he was a good plaintiff's doctor.

No one wants to be Dr. Johnson.
But the problem is hardly isolated.

In another case, a leading PHD economist disclosed in his written report that he was being paid $400 per hour. By the time of trial, he reported that he had worked 350 hours. That’s $140,000 in fees.

A lot, but not extraordinary given the magnitude of the case.

In writing his expert report in the case — The witness failed to mention in his report, however, that he also received a “finders fee” from a consulting firm that helped him perform his economic analysis.

Embarrassed at trial to be forced to reveal to the jury that he had received another $150,000 from this finder’s fee that he failed to disclose in his report.

How does that make him — and really his entire profession – look?
Or how about a famous professor who represented that he held an MBA from Harvard (Business School) under-oath, when it was later revealed that he held a Master's in Public Administration from the Harvard (Kennedy School of Gov't).

Some might consider that a peccadillo – but it is enough to tarnish a career for life.

Or how about the expert accountant of a major accounting firm who testified that a hospital was not viable as an ongoing business at trial only to be confronted by a report done by others in his firm done for the federal government saying that the firm was unable to assess the viability of the hospital?

Q: Isn't it true that without doing a financial projection you can't render a formal opinion on the viability [of the hospital]?

A: I can have an expert opinion on what the outcome of the hospital would have been...

(Read "even 1/3")
But later the lawyer hands the firm's prior opinion to the fed' govt

Q: If you could turn to page 2 of the document. "It is imp't to note that we have not performed a financial projection of any kind ....and therefore are unable to render a formal opinion as to the [viability of the hospital]? That was true when your company said it?

And after some haggling, eventually the witness admits that the disclaimed "was part of the deliverable to the client"
Why do I share these unpleasant war stories?

Two reasons.

First, no one wants to see you or your professions suffer from disrepute in the eyes of the public.

Be rigidly professional in all your dealings in the legal system.

Don’t overstate your credentials or understate your compensation when asked.

Don’t be induced into taking a position you don’t believe is supported by the scientific evidence.

Don’t oversell your conclusions or “mold” them to suit a client.

Don’t ignore or suppress important caveats or limitation in your testimony.
before a jury. Admit readily the limitations of your findings.

Do your homework before rendering a professional opinion in court to the same extent as you would before you publish a piece in a professional journal.

Jurors and judges deserve the same standard of care.

Beware of the temptation of falling into working for one "side" or the other – becoming someone who works strictly for the plaintiff or defense side.

In short, if you bring the same humility, care, and forthrightness to any legal work you take on as you do to your scientific work you will be well served.
But there's a second reason I tell some of these war stories.

Beyond my concern for you, I want to consider more broadly the problem of what my former law partner, Peter Huber, has called "junk science."

Peter, an MIT PHD and former professor there before going to law school, illustrated the point in this way in his book "Galileo's Revenge"

"So here it is, Mr Professional Witness USA. He works alone or in partnership with a handful of others. He advertises. His clients gradually learn that they can't risk going without him, for the opposition will surely hire his mirror-image clone from the other referral agency. He is neat but not dapper, respectable but not pompous, mature but not senile. ... He sees himself as a team player who helps with trial preparation, assists in the examination of opposing witnesses, advises on new areas of inquiry. He has honed strong, adversarial instincts . . . he can earn hundreds of dollars an
hour... Where have we seen this character before? In his employer’s office. He is the spit and image of a trial lawyer."

And let me give you an example of the sort of science that has been allowed in our courtrooms.

Suppose a stock price declines after the disclosure of a fraud.

But the stock market independently declines at the same time due to general market forces.

For years, many courts allowed experts to “battle it out” before juries in deciding whether or not to find liability – regardless of whether or not an expert could point to any evidence showing that the stock’s decline was CAUSED by stock-specific news or general market forces.

Give you concrete example from a recent case before the Supreme Court. That’s involved in while still in private practice.
On Feb 24, 1998, a pharmaceutical co. announced a revenue shortfall for the following year – unrelated to any alleged fraud.

The next day, the company’s shares dropped from $39 to $21 – a 47% decline.

NINE months later, the company announced that the FDA had declined to approve its product – an announcement that plaintiffs contend constituted the first public disclosure of a fraud designed to cover up the problems associated with the company’s product.

Following this disclosure of the alleged fraud, the price dropped only $2 1/2 per share.

Plaintiffs and their experts never sought damages based on this small price decline. Rather they, demanded damages based on the 47% decline NINE months BEFORE the fraud was disclosed on unrelated news.
Only this last Term did the Supreme Court finally resolve this issue, holding - perhaps not surprisingly - that the plaintiff and his or her expert must come forward with SOME evidence showing that the price decline was not caused by general market forces! But by the public disclosure of the alleged fraud.

What I am getting at here is that as you enter your profession – with so many opportunities before you – you also bear an interest and a responsibility to ensure that

your professions are not abused

That members of your professional societies police their own

And the ethics of your professional societies are enforced

In short –

That "junk science" by your colleagues is not permitted go without scrutiny

Now...

To be sure, the legal system has to weed out real from junk science.
And courts have done much in this regard in recent years.

With the Supreme Court in a line of cases associated with Daubert, setting forth new requirements regarding the use of science in the court room.

But frankly judges and lawyers cannot achieve this alone.

Just as we need you to help us understand the complex and difficult questions that arise in litigation,

We ALSO need scientists to help us monitor and scrutinize themselves to ensure that what we use is QUALITY science, not junk science.

Your professions are, after all in the best position to separate quality from the junk science.

Some professional societies are doing this now.

But as science enters the court room more every day, this issue will grow in importance and the role of you and your professional societies will become more important to ensure that the public continues to hold your professions in the high esteem they enjoy today.

I encourage you to participate in that process. It is in your prof's interest, your widest, and, most aptly, the public's interest.