

JUDGE NEIL M. GORSUCH  
SENATE JUDICIARY COMMITTEE  
QUESTIONNAIRE

**APPENDIX 12(d)**  
Speeches

## OF LIONS AND BEARS, JUDGES AND LEGISLATORS, AND THE LEGACY OF JUSTICE SCALIA\*

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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*

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† Judge, United States Court of Appeals, Tenth Circuit. I am deeply grateful to my outstanding current clerks, Alex Harris, Stefan Hasselblad, Jordan Moran, and Allison Turbiville, and to so many of my former clerks for their insightful comments on prior drafts.

*Interpretation*<sup>1</sup> and *Reading Law*<sup>2</sup> 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.”<sup>3</sup>

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.<sup>4</sup> And as Justice Kagan acknowledged in her Scalia Lecture at Harvard Law School last year, “we’re all textualists now.”<sup>5</sup> 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?”<sup>6</sup>—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”

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).
  2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).
  3. Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005).
  4. *See* SCALIA, *supra* note 1, at 13.
  5. Justice Elena Kagan, The Scalia Lecture at Harvard Law School (Nov. 18, 2015).
  6. *Id.*

because he “taught” (or really reminded) “everybody how to do statutory interpretation differently.”<sup>7</sup> 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*<sup>8</sup>—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.”<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.”<sup>13</sup> 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

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7. *Id.*

8. 136 S. Ct. 958 (2016).

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).

12. *Lockhart*, 136 S. Ct. at 969 (Kagan, J., dissenting).

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.”<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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].”<sup>17</sup>

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

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14. Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37.
  15. Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)). See generally RICHARD A. POSNER, *REFLECTIONS ON JUDGING* (2013); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).
  16. Laurence H. Tribe, *The Scalia Myth*, N.Y. REV. BOOKS DAILY (Feb. 27, 2016, 11:01 AM), <http://www.nybooks.com/daily/2016/02/27/the-scalia-myth/> [<https://perma.cc/3VYM-DLAN>].
  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.

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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.”<sup>18</sup> 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[]”<sup>19</sup> and the “judicial Power,”<sup>20</sup> 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

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18. See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 10–11 (7th ed. 2015).

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.<sup>21</sup>

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.<sup>22</sup> One that calls for neutral arbiters, not elected representatives. One that employs not utility calculi but analogies to past precedents to resolve current disputes.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> As Blackstone explained, the job of the judge in a government of separated powers is not to “make” or “new-model” the law.<sup>26</sup> Or as Hamilton later echoed, it is for the judiciary to exercise

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21. *See generally* THE FEDERALIST NO. 44 (James Madison); THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).
  22. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221–24 (1995); THE FEDERALIST NO. 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).
  25. *See* John Finnis, *Judicial Power: Past, Present and Future*, Address Before the Policy Exchange (Oct. 20, 2015), <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/> [<https://perma.cc/4TVA-BFNP>]; Michael H. McGinley, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).
  26. 3 WILLIAM BLACKSTONE, COMMENTARIES \*327.

“neither FORCE nor WILL, but merely judgment.”<sup>27</sup> Or again, as Marshall put it, it is for the judiciary to say (only) “what the law is.”<sup>28</sup>

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.<sup>29</sup> 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?

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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.

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27. THE FEDERALIST NO. 78 (Alexander Hamilton).

28. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

29. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 11–12 (1996) (emphasis added).

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.<sup>30</sup> 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?<sup>31</sup> 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<sup>32</sup>—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.<sup>33</sup>

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30. See THE FEDERALIST NO. 47 (James Madison); THE FEDERALIST NOS. 79, 81 (Alexander Hamilton); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990–91, 1031–34 (2006); Kevin Mooney, *Supreme Court Justice Scalia: Constitution, Not Bill of Rights, Makes Us Free*, 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.’”).

31. See Barkow, *supra* note 30, at 1033.

32. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; see also Barkow, *supra* note 30, at 1012–14; THE FEDERALIST NO. 84 (Alexander Hamilton).

33. See *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.<sup>34</sup> 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.<sup>35</sup> 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 "ha[s] every thing to fear from [the] union" of the judicial and legislative powers.<sup>36</sup> Blackstone painted an even grimmer

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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 BRACON, *DE LEGIBUS ET CONSUECUDINIBUS 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).
35. *See, e.g.*, *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam) (declining to overrule *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), due to the reliance interests built up around that decision); *see also Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1149–51 (10th Cir. 2016) (Gorsuch, J., concurring); BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (forthcoming).
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.”<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> Another seemed to suggest the Attorney General could overlook this past transgression and adjust his residency status immediately.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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

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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).

39. 8 U.S.C. § 1182(a)(9)(C).

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).

42. *In re Briones*, 24 I. & N. Dec. 355, 370–71 (B.I.A. 2007).

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.<sup>43</sup> 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.<sup>44</sup> 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).<sup>45</sup>

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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

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

44. See *In re De Niz Robles*, No. A074 577 772, 2014 WL 3889484, at \*4 (B.I.A. July 11, 2014).

45. Jamie Jackson, *Court of King James*, THE GUARDIAN (Apr. 19, 2008, 8:01 PM), <http://www.theguardian.com/sport/2008/apr/20/ussport.news> [https://perma.cc/WB87-Z26V].

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.<sup>46</sup> 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.<sup>47</sup> 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?<sup>48</sup> Or that, even among the small sliver of cases that make it so far, over 95% are resolved unanimously by the courts of appeals?<sup>49</sup> 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?<sup>50</sup> The fact is, over 360,000 cases are filed every year in our federal courts.<sup>51</sup> Yet in the Supreme Court,

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46. *See generally* RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

47. "First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments." *The Sotomayor Nomination, Part II*, The Federalist Soc'y Online Debate Series (July 13, 2009) (remarks of Professor Louis M. Seidman), <http://www.fed-soc.org/publications/detail/the-sotomayor-nomination-part-ii> [<https://perma.cc/B245-DBXS>].

48. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 tbl.1 (2004).

49. JONATHAN M. COHEN, *INSIDE APPELLATE COURTS* 102 (2002).

50. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 817 & fig.A-1 (2015).

51. United States Courts, *Federal Judicial Caseload Statistics 2015* tbls. C & D (2015), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> [<https://perma.cc/792A-5VK2>].

a Justice voices dissent in only about 50 cases per year.<sup>52</sup> 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.<sup>53</sup>

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 peeking 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

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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).

53. *See generally* SCALIA, *supra* note 1, at 45–46; David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1800–01 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)).

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.”<sup>54</sup>

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.”<sup>55</sup> 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.<sup>56</sup> In just this way, it seems to me that

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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 . . .”).

55. *See* Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1034 & n.59 (2011).

56. *See generally* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 111–18, 422–23 (2d ed. 2011) (discussing the incommensurability of social goods); JOSEPH RAZ, THE MORALITY OF FREEDOM 321–66 (1986) (same).

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.<sup>57</sup>

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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.<sup>58</sup> 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

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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?

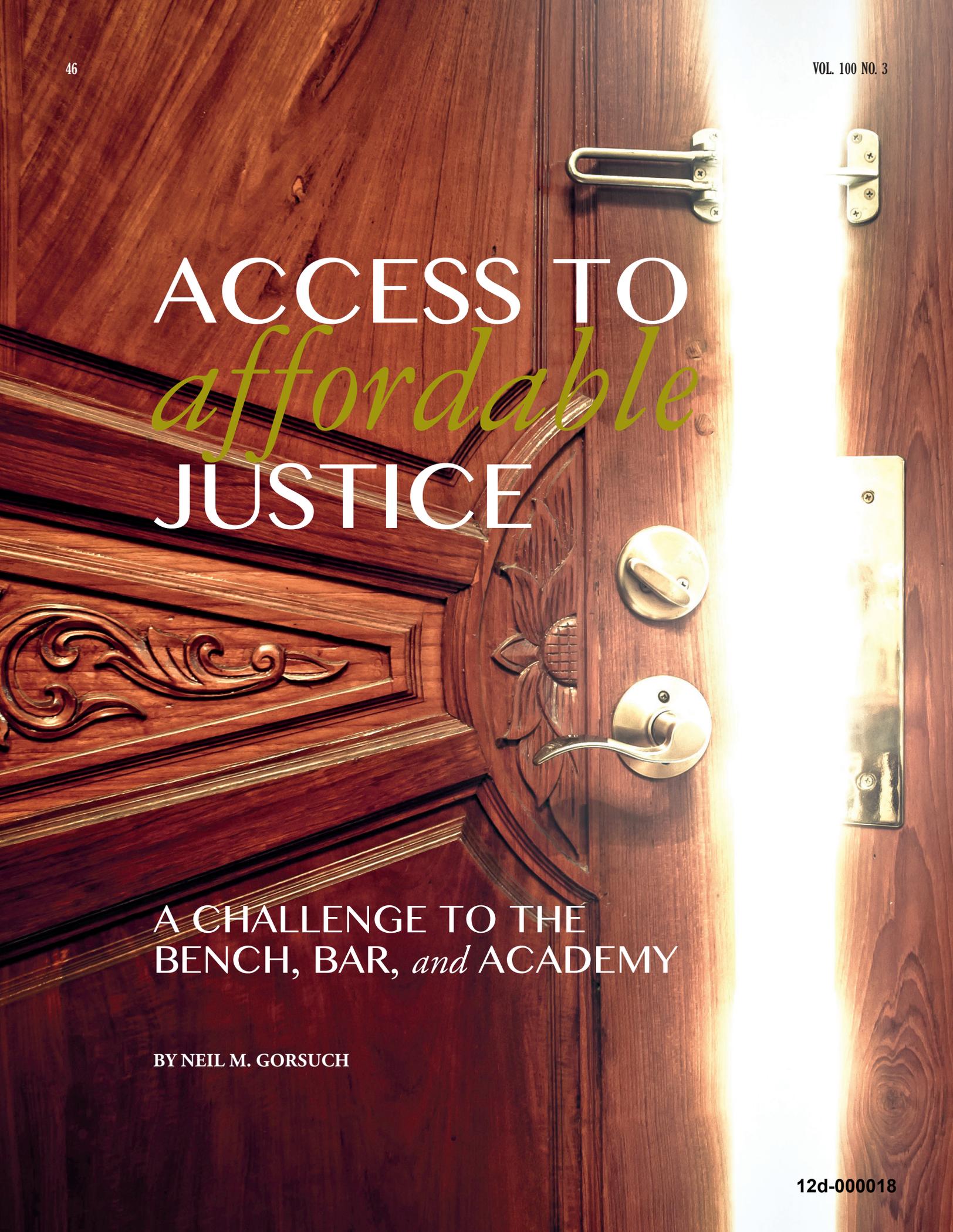
58. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

Burke called the “cold neutrality of an impartial judge.”<sup>59</sup> 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.<sup>60</sup> 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.”<sup>61</sup> 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.

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59. Edmund Burke, *Preface to the Address of M. Brissot to His Constituents*, in 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801).
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.’”).
61. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).



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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

**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.<sup>4</sup> 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.<sup>5</sup> 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.”<sup>6</sup> More than a few thoughtful people have wondered if these sorts of sweeping and opaque restrictions may be subject to constitutional challenge on vagueness,<sup>7</sup> First Amendment,<sup>8</sup> or due process grounds.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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

**THIS PAPER WAS ORIGINALLY PRESENTED** at the United Kingdom-United States Legal Exchange in London, England, in September 2015. The Exchange, sponsored by the American College of Trial Lawyers, originated in 1971, when Chief Justice Burger suggested that the College provide a forum for discussion about matters of common interest to judges in the United Kingdom and the United States. Since then, there have been ten exchanges, involving members of the highest courts of both countries, as well as leading appellate and trial judges. A small number of practitioners from each country are invited to present the views of the Bar.

As a result of the exchanges, participants have implemented improvements in their respective legal systems. For example, past participants have credited the exchanges with a significant role in the establishment of the Inns of Court movement in the United States and the first use of written briefs in the appellate courts of Great Britain. Lord Harry Woolf, the former Chief Justice of England and Wales, publicly acknowledged the influence of the Exchanges in a 1998 report, *Access to Justice*, which formed the basis for sweeping procedural changes in the British legal system.

had violated Texas UPL regulations (though, happily, a result the legislature later effectively undid).<sup>12</sup> Similarly, when LegalZoom entered the market in North Carolina, the state bar declared its operations illegal,<sup>13</sup> a declaration that eventually induced the company to settle and promise to revise some of its business practices.<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The fact is nonlawyers already perform — and have long performed — many kinds of work traditionally and simultaneously performed by lawyers.<sup>18</sup> Nonlawyers prepare tax returns and give tax advice.<sup>19</sup> They regularly negotiate with and argue cases before the Internal Revenue Service.<sup>20</sup> They prepare patent applications and otherwise advocate on behalf of inventors before the Patent & Trademark Office.<sup>21</sup> 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 numbers of lower- and middle-class clients.

Some states are currently experimenting with intriguing possibilities. California now licenses “legal document assistants” who may help consumers before certain tribunals.<sup>22</sup> Colorado permits nonlawyers to represent claimants in unemployment proceedings.<sup>23</sup> And Washington

allows legal technicians to assist clients in domestic relations cases provided they meet certain requirements — like obtaining an associate’s degree, passing an exam, completing 3,000 hours of supervised paralegal work, and taking certain legal courses.<sup>24</sup> The ABA itself recently partnered with one of LegalZoom’s competitors, Rocket Lawyer, to help the association’s members connect with potential clients online, in the process seemingly granting its imprimatur to a company that some argue engages in the unauthorized practice of law.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup> 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.”<sup>29</sup> 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.<sup>30</sup> Indeed, studies there show that the best predictor of quality appears to be “specialization, not professional status.”<sup>31</sup>

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.<sup>32</sup> And surely many lay persons, 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

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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.”<sup>33</sup> 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 ▶

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ADMINISTRATION.**

investors might be willing to accept a lower return on their money” than lawyers shielded by Rule 5.4.<sup>34</sup>

Rule 5.4 bears a curious history. After thoroughly studying the issue, the commission that created the first draft of the model rules back in 1982 suggested that lawyers should be allowed to work in firms owned or managed by nonlawyers.<sup>35</sup> But this suggestion was defeated in the ABA House of Delegates and replaced by the present rule effectively preventing nonlawyers from acquiring “any interest” in a law firm.<sup>36</sup> Since then, ABA committees have repeatedly proposed changes to Rule 5.4 but every proposal has, like the first, gone down to defeat in the House of Delegates.<sup>37</sup> Most recently, in 2009 an ABA commission supported serious consideration of three alternatives to the rule.<sup>38</sup> The most modest option would have (1) required a firm

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.<sup>39</sup> 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.<sup>40</sup> And the third and final option would have done away with all three requirements and permitted firms to offer both legal and nonlegal services.<sup>41</sup>

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007.<sup>42</sup> In the first two years of the program, 386 so-called “alternative business structures” (ABSs) were established.<sup>43</sup> 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,<sup>44</sup> 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.<sup>45</sup>

Of course, supporters of the current ABA ban contend that allowing nonlawyers to participate in legal practice might influence lawyers’ professional judgment.<sup>46</sup> 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.<sup>47</sup> We allow in-house counsel to work for corporations

where they must answer to executives but require them sometimes to make noisy withdrawals.<sup>48</sup> 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.<sup>49</sup> 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.”<sup>50</sup> 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.<sup>51</sup> After years of study, the federal rules committees recently advanced a package of amendments (the “Duke Package”) seeking to address the problem.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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-

tees are contemplating pilot projects to test both in the federal system.

**Early and Firm Trial Dates.** A RAND study of the federal judicial system in the 1990s found (perhaps to no litigator's surprise) that setting a firm and early trial date is the single "most important" thing a court can do to reduce time to disposition.<sup>55</sup> 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.<sup>56</sup> Studies of recent experiments in Oregon, Colorado, and other state court systems have shown, as well, that firm and early trial dates contribute to reducing litigation costs and increasing client and lawyer satisfaction.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

Naturally, the possibility of mandating the practice of setting early and firm trial dates will raise some legitimate concerns.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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).<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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."<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> In pushing states to adopt this requirement, the ABA emphasized that legal education must develop in students a mind attuned to the common law<sup>75</sup> — 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<sup>76</sup> — 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.<sup>77</sup> 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.<sup>78</sup> President Obama, himself a Harvard-trained lawyer, has promoted this concept.<sup>79</sup>

Consider that in the United Kingdom the legal education market is a good deal more heterogeneous than ours.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> (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,<sup>84</sup> and full-time faculty must teach “substantially all” of a student's first-year courses, even if adjuncts would prove just as good.<sup>85</sup> 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.<sup>86</sup> Meanwhile, if professors have any sort of ongoing relationship with a law firm or business, a presumption arises that they are not full-time.<sup>87</sup> And if an American law school wants to offer something other than a traditional JD program,

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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.<sup>88</sup> Then, too, there are the restrictions on the number of credits a student may take at any given time,<sup>89</sup> and the rule that no more than a third of credit hours can be earned for study or activity outside the United States.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup> 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.<sup>93</sup> Others defend the current system by citing familiar consumer-protection concerns.<sup>94</sup> And others still point out that the third year offers opportunities to take elective courses in specialty areas of the law.<sup>95</sup>

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. Commendably, 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.<sup>96</sup> And true to its word, the ABA's section on legal education has begun relaxing at least some of its more extraordinary accreditation requirements.<sup>97</sup> 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.<sup>98</sup> 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?

<sup>1</sup> Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743, 745 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> 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).

<sup>4</sup> See, e.g., John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 963–71 (2009); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 503 (1995).

<sup>5</sup> DEBORAH RHODE, ACCESS TO JUSTICE 87–88 (2004); see also Michael Lewis, *Faking It: The Internet Revolution Has Nothing to Do with the Nasdaq*, N.Y. TIMES (July 15, 2001), <http://www.nytimes.com/2001/07/15/magazine/15INTERNET.html>.

<sup>6</sup> See, e.g., GA. CODE ANN. § 15-19-50 (defining the practice of law as “representing litigants in court”); Office of Disciplinary Counsel, *Rules of the Bd. on the Unauthorized Practice of Law*, DEL. COURTS, <http://courts.delaware.gov/odc/uplr.aspx> (last visited May 20, 2016) (prohibiting nonlawyers from “engag-

- ing in an activity which has traditionally been performed exclusively by persons authorized to practice law”).
- <sup>7</sup> See, e.g., Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergency of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 722 n.35 (2007).
- <sup>8</sup> See, e.g., *Great W. Cities, Inc. v. Binstein*, 476 F. Supp. 827, 834–35 (N.D. Ill. 1979) (extending constitutional protections to lay advice and assistance); *Hopper v. City of Madison*, 256 N.W.2d 139, 144–45 (Wis. 1977) (same).
- <sup>9</sup> *Ky. State Bar Ass’n v. Tussey*, 476 S.W.2d 177, 180–81 (Ky. 1972).
- <sup>10</sup> Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1234 (2014).
- <sup>11</sup> See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A 3:97CV-2859H, 1999 WL 47235, at \*1 (N.D. Tex. Jan. 22, 1999).
- <sup>12</sup> *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (per curiam).
- <sup>13</sup> *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at \*2 (N.C. Super. Ct. Aug. 27, 2012).
- <sup>14</sup> *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 WL 6441853, at \*1 (N.C. Super. Ct. Oct. 22, 2015).
- <sup>15</sup> 20 U.S.C. § 1415(h)(1).
- <sup>16</sup> See *In re Arons*, 756 A.2d 867, 873 (Del. 2000).
- <sup>17</sup> See generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).
- <sup>18</sup> See generally Herbert M. Kritzer, *The Future Role of “Law Workers”: Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002); Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY’S L.J. 891 (2009).
- <sup>19</sup> Indeed, the practice is so well recognized that Congress has codified an accountant-client evidentiary privilege. See 26 U.S.C. § 7525(a).
- <sup>20</sup> 31 C.F.R. § 10.3 (governing practice before the Internal Revenue Service); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 570–71 (2005).
- <sup>21</sup> 37 C.F.R. §§ 11.5-.6 (governing patent agent registration and practice).
- <sup>22</sup> CAL. BUS. & PROF. CODE § 6400(c)-(d).
- <sup>23</sup> *Unauthorized Practice of Law Comm. v. Emp’rs Unity, Inc.*, 716 P.2d 460 (Colo. 1986); Rhode, *supra* note 10, at 1244.
- <sup>24</sup> See Debra Cassens Weiss, *Seven People Pass Test to Become Nation’s First Legal Technicians*, ABA J. (June 2, 2015, 5:45 AM), [http://www.abajournal.com/news/article/seven\\_people\\_pass\\_test\\_to\\_become\\_nations\\_first\\_legal\\_technicians](http://www.abajournal.com/news/article/seven_people_pass_test_to_become_nations_first_legal_technicians); *Legal Technician Program FAQs*, Wash. St. Bar Association, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-FAQs> (last visited May 20, 2016).
- <sup>25</sup> Jennifer Smith, *Online Legal Services Company to Team Up with American Bar Association*, WALL ST. J. LAW BLOG (Aug. 11, 2014 10:44 AM), <http://blogs.wsj.com/law/2014/08/11/online-legal-services-company-to-team-up-with-american-bar-association/>; Jennifer Smith, *LegalZoom Gets in the Ring with Rocket Lawyer*, WALL ST. J. LAW BLOG (NOV. 28, 2012 5:27 PM), [HTTP://BLOGS.WSJ.COM/LAW/2012/11/28/LEGALZOOM-GETS-IN-THE-RING-WITH-ROCKET-LAWYER/](http://blogs.wsj.com/law/2012/11/28/legalzoom-gets-in-the-ring-with-rocket-lawyer/).
- <sup>26</sup> Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1016 (1998).
- <sup>27</sup> Rhode, *supra* note 10, at 1235.
- <sup>28</sup> RHODE, *supra* note 5, at 89.
- <sup>29</sup> Letter from the Office of Policy Planning, Fed. Trade Comm’n to Carl E. Testo, Counsel, Rules Comm. of the Superior Court (Conn.) at 2 (May 17, 2007), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-mr-carl-e-testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-mr-carl-e-testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf).
- <sup>30</sup> Richard Moorhead, Avrom Sherr & Alan Paterson, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & SOC’Y REV. 765, 775, 788–89 (2003).
- <sup>31</sup> *Id.* at 795.
- <sup>32</sup> See, e.g., Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2764–65 (2014).
- <sup>33</sup> Deirdre Fernandes, *More Relying on Walmart for Financial Services*, BOS. GLOBE (July 10, 2014), <https://www.bostonglobe.com/business/2014/07/09/walmart-isn-bank-but-consumers-are-choosing-its-financial-services/0oJtrqVK-l8OXTuQ3SBtrSI/story.html>; see also Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 197 (2014).
- <sup>34</sup> Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 266–68 (1985).
- <sup>35</sup> Memorandum from the ABA Comm’n on Ethics 20/20 Working Grp. on Alt. Bus. Structures to ABA Entities, Courts, Bar Ass’ns (state, local, specialty and international), Law Schools, and Individuals 4–5 (Apr. 5, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/abs\\_issues\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf).
- <sup>36</sup> *Id.*
- <sup>37</sup> See *id.* at 5–7; Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 584–96 (1989).
- <sup>38</sup> Memorandum from the ABA Comm’n on Ethics 20/20 Working Grp. on Alt. Bus. Structures, *supra* note 35, at 17.
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.* at 17–18.
- <sup>41</sup> *Id.* at 18.
- <sup>42</sup> Sydney M. Cone, III, *International Legal Practice Involving England and New York Following Adoption of the United Kingdom Legal Services Act 2007*, 28 N.W. J. INT’L L. & BUS. 415, 424–25 (2008).
- <sup>43</sup> Laura Snyder, *Does the UK 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](http://www.abajournal.com/mobile/mag_article/does_the_uk_know_something_we_dont_about_alternative_business_structures).
- <sup>44</sup> James Peters, *Pandora’s Box or Panacea? Lessons from the U.K.’s Liberalization of Law Firm Ownership*, FORBES (Nov. 13, 2014, 1:02 PM), <http://www.forbes.com/sites/danielfisher/2014/11/13/pandoras-box-or-panacea-lessons-from-the-u-k-s-liberalization-of-law-firm-ownership/>.
- <sup>45</sup> See, e.g., Justin Schiff, *The Changing Nature of the Law Firm: Amending Model Rule 5.4 to Allow for Alternative Business Structures Resulting in Nonlawyer Ownership of Law Firms*, 42 CAP. U. L. REV. 1009, 1022–23 (2014).
- <sup>46</sup> See, e.g., Daniel J. McAuliffe, *Degrading the Core Values of the Profession*, ARIZ. ATT’Y, Oct. 2011, at 32, 33.
- <sup>47</sup> 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).
- <sup>48</sup> Y. Nicole Montgomery, *The Ethical Challenges Facing In-House Counsel*, HOUS. LAW., Dec. 2011, at 20, 21.
- <sup>49</sup> See ABA Model Rules of Professional Conduct, Rule 1.10(a)(2) (adopted 2009).
- <sup>50</sup> FED. R. CIV. P. I.
- <sup>51</sup> Gorsuch, *supra* note 1, at 745.
- <sup>52</sup> Zoe Tillman, *Civil Rules Guidelines Questioned*, NAT. L.J., (Jan. 4, 2016), <http://www.nationallawjournal.com/id=1202746130280/Civil-Rules-Guidelines-Questioned?slreturn=20160425123659>.
- <sup>53</sup> See generally Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, DEFENSE COUNSEL J., Oct. 2015, at 375.
- <sup>54</sup> See generally INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A SUMMARY OF SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS AROUND THE COUNTRY (2015).
- <sup>55</sup> JAMES S. KAKALIK ET AL., INST. FOR CIVIL

JUSTICE, RAND, MR-800-ICJ, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 14 (1996).

<sup>56</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS & PROMISE 10 (2015).

<sup>57</sup> See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE OREGON COURTS 10–11, 21–22 (2010); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE 5, 12–13 (2014); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES 16 (2014); EMERY G. LEE III & THOMAS E. WILLING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE 7 (2010).

<sup>58</sup> See A REPORT ON PROGRESS & PROMISE, *supra* note 56, at 9–10; AM. COL. OF TRIAL LAW. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 19–20 (2009); NATIONAL CENTER FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE TRIAL COURTS 9 (2011).

<sup>59</sup> A REPORT ON PROGRESS & PROMISE, *supra* note 56, at 10.

<sup>60</sup> Robert M. Tata & Wendy C. McGraw, *What Litigators Must Know About Va.'s 'Rocket Docket'*, LAW360 (Mar. 18, 2013, 12:24 PM), <http://www.law360.com/articles/423669/what-litigators-must-know-about-va-s-rocket-docket>; Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 257 (1997).

<sup>61</sup> The discussion in this paragraph draws on a number of sources. See, e.g., Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631 (2015); James L. Ryan, *Should Illinois Adopt the Federal Courts' Mandatory Disclosure Requirements for Civil Cases?*, 25 DCBA Brief 26 (2013); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) — 'Much Ado About Nothing?'*, 46 HASTINGS L.J. 679, 733–35 (1995).

<sup>62</sup> See *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 431 (1993).

<sup>63</sup> *Id.* at 510–12 (Scalia, J., dissenting).

<sup>64</sup> See FED. R. CIV. P. 26(A)(1)(A)(ii).

<sup>65</sup> 16 A.R.S., R. of Civ. P., Rule 26.1; Andrew D. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*, 43 ARIZ. ST. L.J. 461, 469–72 (2011). The discussion in this paragraph is sourced from Justice Hurwitz's article.

<sup>66</sup> MOMENTUM FOR CHANGE, *supra* note 57, at 4, 16, 29.

<sup>67</sup> CIVIL JUSTICE INITIATIVE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE

IN THE UTAH DISTRICT COURTS 13, 24–25, 37 (2015).

<sup>68</sup> FEDERAL JUDICIAL CTR., REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 2–3 (2015).

<sup>69</sup> Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 181 (2012).

<sup>70</sup> James E. Moliterno, *And Now a Crisis in Legal Education*, 44 SETON HALL L. REV. 1069, 1074–76 (2014).

<sup>71</sup> *Id.*

<sup>72</sup> Letter from Abraham Lincoln to William H. Grigsby (Aug. 3, 1858).

<sup>73</sup> See BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 25–26 (2012); Deborah Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 446 (2013).

<sup>74</sup> See TAMANAHA, *supra* note 73, at 25.

<sup>75</sup> 45 Ann. Rep. A.B.A. 684 (1921).

<sup>76</sup> *Id.*

<sup>77</sup> AM. BAR ASS'N, WORKING PAPER TASK FORCE ON THE FUTURE OF LEGAL EDUCATION 2 (2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/aba\\_task\\_force\\_working\\_paper\\_august\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf).

<sup>78</sup> Rhode, *supra* note 73, at 456.

<sup>79</sup> Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, N.Y. TIMES: DEALBOOK (Aug. 23, 2013, 5:31 PM), <http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three>.

<sup>80</sup> Information in this paragraph is drawn from Adam Beach, *How to Qualify as a Lawyer in England and Wales*, INT'L BAR ASS'N, [http://www.ibanet.org/PPID/Constituent/Student\\_Committee/qualify\\_lawyer\\_EnglandWales.aspx](http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_EnglandWales.aspx).

<sup>81</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015–2016, at 1–2 (2015), [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html); Moliterno, *supra* note 70, at 1074.

<sup>82</sup> ABA STANDARDS FOR LAW SCHOOLS 2015–2016, *supra* note 81, at 40.

<sup>83</sup> *Id.* at 136.

<sup>84</sup> *Id.* at 29–30.

<sup>85</sup> *Id.* at 121.

<sup>86</sup> *Id.* at 119–21.

<sup>87</sup> *Id.* at 121.

<sup>88</sup> *Id.* at 23.

<sup>89</sup> *Id.* at 21.

<sup>90</sup> *Id.* at 20.

<sup>91</sup> *Id.* at 18–19.

<sup>92</sup> See, e.g., AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS (2014), [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html).

<sup>93</sup> Antonin Scalia, Associate Justice, U.S. Supreme Court, Commencement Address at William & Mary Law School: Reflections on the Future of the Legal Academy 2 (May 11, 2014), <https://law.wm.edu/news/stories/2014/documents-2014/2014WMC-CommencementSpeech.pdf>.

<sup>94</sup> See Rhode, *supra* note 73, at 446.

<sup>95</sup> See Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 237 (2001).

<sup>96</sup> See generally ABA WORKING PAPER, *supra* note 77.

<sup>97</sup> See generally Memorandum from Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Am. Bar Ass'n to Deans of ABA-Approved Law Sch. et al. (Aug. 12, 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/july2015council-opensessionmaterials/2015\\_august\\_notice\\_of\\_revisions\\_to\\_standards.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/july2015council-opensessionmaterials/2015_august_notice_of_revisions_to_standards.pdf); Memorandum from The Hon. Rebecca White Berch, Council Chairperson & Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Am. Bar Ass'n to Interested Persons and Entities (Dec. 11, 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20151211\\_notice\\_and\\_comment.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20151211_notice_and_comment.pdf).

<sup>98</sup> CLIFFORD WINSTON ET AL., FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 74 (2011).



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BEYOND TEXTUALISM: WHY ORIGINALIST THEORY MUST  
APPLY GENERAL PRINCIPLES OF INTERPRETATION TO  
CONSTITUTIONAL LAW  
*Richard A. Epstein*.....705

TEXTUALISM AND THE BILL OF RIGHTS  
*Nadine Strossen*.....721

TEXTUALISM AND *DISTRICT OF COLUMBIA V. HELLER*  
*Eugene Volokh*.....729

THE LIMITS OF TEXTUALISM IN INTERPRETING THE  
CONFRONTATION CLAUSE  
*Stephanos Bibas*.....737

**THIRTEENTH ANNUAL BARBARA K. OLSON  
MEMORIAL LECTURE**

LAW'S IRONY  
*Hon. Neil M. Gorsuch*.....743

**ARTICLES**

BULK METADATA COLLECTION: STATUTORY  
AND CONSTITUTIONAL CONSIDERATIONS  
*Laura K. Donohue*.....757

**12d-000028**

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

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# 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:

[I]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.<sup>1</sup>

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-

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\* 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.

1. CHARLES DICKENS, *BLEAK HOUSE* 4 (Wordsworth Editions 1993) (1853).

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

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."<sup>3</sup> Goethe left the practice of law in disgust after witnessing thousands of aging cases waiting vainly for resolution in the courts of his time.<sup>4</sup> Demosthenes plied similar complaints 2000 years ago.<sup>5</sup> 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.<sup>6</sup> 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.").

5. See DEMOSTHENES, *The Oration Against Midias*, in THE ORATIONS OF DEMOSTHENES AGAINST LEPTINES, MIDIAS, ANDROTON, AND ARISTOCRATES 59, 103–04 (Charles Rann Kennedy trans., London, George Bell & Sons 1877).

6. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 & n.4 (1998).

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.<sup>7</sup>

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?<sup>8</sup> Or concerned when seventy percent also say attorneys use discovery costs as a threat to force settlements that *aren't* based on the merits?<sup>9</sup> 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*.<sup>10</sup> An average employee sends or receives over one hundred every day.<sup>11</sup> That doesn't begin to account for the billions of instant messages shooting

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7. See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737–39 (1939).

8. See INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM at A-6 (2008), available at [http://iaals.du.edu/images/wygwam/documents/publications/Interim\\_Report\\_Final\\_for\\_web.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf), [http://perma.cc/6VD6-7Y93].

9. *Id.* at A-4.

10. RADICATI GROUP, EMAIL STATISTICS REPORT, 2012-2016, at 3 (2012), <http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf>, [http://perma.cc/WG3V-KETX].

11. RADICATI GROUP, EMAIL STATISTICS REPORT, 2011-2015, at 3 (2011), <http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf>, [http://perma.cc/9CX9-2A27].

around the globe.<sup>12</sup> This isn't a world the writers of the discovery rules could have imagined in 1938—no matter how “modern” they were.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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

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12. CTIA-THE WIRELESS ASSOC., CTIA'S WIRELESS INDUSTRY INDICES: SEMI-ANNUAL DATA SURVEY RESULTS, A COMPREHENSIVE REPORT FROM CTIA ANALYZING THE U.S. WIRELESS INDUSTRY, YEAR-END 2012 RESULTS (2013), <http://www.ctia.org/resource-library/facts-and-infographics/archive/us-text-messages-sms>, [http://perma.cc/5V6F-GRNM].

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. 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, 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. See *id.*; FED. R. CIV. P. 34 Advisory Committee's Note (1970). About the same time photocopies became relatively inexpensive. See DAVID OWEN, COPIES IN SECONDS 9–10 (2004). One can't help but wonder if the timing was merely coincidental.

14. See Sheryl Gay Stolberg, *Administering Fund, a Master Mediator*, N.Y. TIMES, (June 16, 2010), available at <http://www.nytimes.com/2010/06/17/us/17feinberg.html>, [http://perma.cc/BB3L-VCYV].

15. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 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.”).

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."<sup>16</sup> 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,<sup>17</sup> most added in the last few decades.<sup>18</sup> And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years.<sup>19</sup> 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.<sup>20</sup>

When he led the Senate Judiciary Committee, Joe Biden worried that we have assumed a tendency to "federalize everything that walks, talks, and moves."<sup>21</sup> 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."<sup>22</sup> Businessmen who import lobster tails in plas-

16. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. LEGAL MEMORANDUM (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>, [http://perma.cc/TS2X-SEK2] (explaining that there were at least 4450 federal crimes as of 2007).

18. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7-8 (1998).

19. See Baker, *supra* note 17, at 1.

20. See *id.* at 2, 4.

21. Dan Freedman, *FBI Criticizes Trend Toward "Federalizing": Agents Don't Want to Be Street Cops*, HOUS. CHRON., Dec. 19, 1993, at A2.

22. 18 U.S.C. § 711a (2006).

tic bags rather than cardboard boxes can be brought up on charges.<sup>23</sup> Mattress sellers who remove that little tag: yes, they're probably federal criminals too.<sup>24</sup> 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.<sup>25</sup> Others still suggest prosecutorial discretion can help with the problem.<sup>26</sup>

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?<sup>27</sup>

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).

24. Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533, 1610 & n.264 (1997).

25. E.g., Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 *J. CRIM. L. & CRIMINOLOGY* 725, 783–84 (2012).

26. See Erik Luna, *Prosecutorial Decriminalization*, 102 *J. CRIM. L. & CRIMINOLOGY* 785, 791 (2012).

27. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2–5 (2011).

form their conduct to it.<sup>28</sup> 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.

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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).<sup>29</sup> Their libraries must include microform printing equipment.<sup>30</sup> They must provide extensive tenure guarantees.<sup>31</sup> They invite trouble if their student-faculty ratio reaches 30:1,<sup>32</sup> 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).<sup>33</sup>

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.<sup>34</sup> 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

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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.").

29. See AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2013–2014, at 46, available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf), [http://perma.cc/ET6G-HYEU].

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.<sup>35</sup> 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.<sup>36</sup>

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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 skills. 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.<sup>37</sup> 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."<sup>38</sup>

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

35. See Adam Beach, *How to qualify as a lawyer in England and Wales*, INT'L BAR ASS'N, [http://www.ibanet.org/PPID/Constituent/Student\\_Committee/qualify\\_lawyer\\_EnglandWales.aspx](http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_EnglandWales.aspx), [<http://perma.cc/E7F2-5UV7>] (last visited Mar. 18, 2014).

36. As the American Bar Association has recently started to do, at least to some degree. See 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://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf), [<http://perma.cc/HE9X-S574>].

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

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.”<sup>39</sup> Warn that behind their “benign beige facade[s]” lurk “crimson partisan[s].”<sup>40</sup> Even law professors venture to the microphones to express “complete[] disgust[]” and accuse them of “perjur[y]” and “intellectual vacuity.”<sup>41</sup> 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.”<sup>42</sup> Now, how’s that for a profession-

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39. Maureen Dowd, *Men in Black*, N.Y. TIMES, April 3, 2012, <http://www.nytimes.com/2012/04/04/opinion/dowd-men-in-black.html>, [<http://perma.cc/9NXA-ZLV6>].

40. *Id.*

41. Louis Michael Seidman & Wendy Long, *The Sotomayor Nomination, Part II* (July 13, 2009), available at <http://www.fed-soc.org/debates/dbtid.30/default.asp>, [<http://perma.cc/9ZSG-HQFD>].

42. See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (1983) (emphasis added).

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.”<sup>43</sup> 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?<sup>44</sup> 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.<sup>45</sup>

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

43. EDMUND BURKE, *Preface to the Address of M. Brissot to His Constituents*, in 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801).

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).

45. See Lewis F. Powell, Jr., *Foreword* to GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* xii (1994) (quoting Learned Hand).

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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

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

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46. See *Dolan v. United States*, 130 S. Ct. 2533, 2533 (2010).

47. See Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 (2010).

48. PAMELA C. CORLEY ET AL., *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* 96 (2013).

49. Frank H. Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 S. CT. REV. 389, 392-93; Kurt G. Kastorf, *A more divisive, political U.S. Supreme Court? Think again*, CHRISTIAN SCI. MONITOR, June 25, 2012, <http://www.csmonitor.com/Commentary/Opinion/2012/0625/A-more-divisive-political-US-Supreme-Court-Think-again>, [<http://perma.cc/9TFU-PE8M>].

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,<sup>50</sup> or similar disagreements between Justices Scalia and Thomas about the degree of deference due precedent.<sup>51</sup> Debates like these are hugely consequential. But they are disputes of legal judgment, not 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 collegiate panels where we listen to and learn from one another; the discipline of writing reason-giving opinions; and the possibility 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.

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50. Compare *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (suggesting the rule of lenity applies because the defendant's reading of the statutory language is "eminently debatable"), and *Muscarello v. United States*, 524 U.S. 125, 148 (1998) (Ginsburg, J., dissenting) (invoking the rule of lenity because of ambiguity in the criminal statute), with *United States v. R.L.C.*, 503 U.S. 291, 311 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("[T]he rule [of lenity] is not triggered merely because a statute appears textually ambiguous 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.").

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 original 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 *stare decisis* to the stability of our Nation's legal system. But *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))).

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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.”<sup>52</sup> As, in fact, they pretty much did.<sup>53</sup>

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

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52. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2 (emphasis added).

53. For an account of the rebellion and its victims, see ALEXANDER L. KAUFMAN, *THE HISTORICAL LITERATURE OF THE JACK CADE REBELLION 199–202* (2009).

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.

UNIVERSITY OF COLORADO LAW SCHOOL  
COMMENCEMENT 2012  
Neil M. Gorsuch\*

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

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\* 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.

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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.

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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.*

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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.

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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.

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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 promis[ing] them lots and lots of money.*"

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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.

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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!*

**LAW DAY SPEECH 2012**  
**ROSWELL, NEW MEXICO**  
APRIL 26, 2012

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, touselled, 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. Heroes 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.

Harvard Law School

April 4, 2012

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 backyard 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.

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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.

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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?

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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.

IAALS  
Denver, Colorado  
December 2011

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.”<sup>1</sup> 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.

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<sup>1</sup> Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984).

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.<sup>2</sup> 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.<sup>2</sup> Second,

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<sup>2</sup> Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998).

<sup>2</sup> See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737-38 (1939); William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure be More Effective than Discovery*, 74 JUDICATURE 178, 178 (1991) ("When the framers of the Federal Rules of Civil Procedure drafted the discovery rules more than 50 years ago, their purpose was to bring about the just, speedy and inexpensive determination of every action.

(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.<sup>3</sup>

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?<sup>4</sup> 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

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<sup>2</sup>(...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.”

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

<sup>4</sup> Inst. for the Advancement of the Am. Legal Sys., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 9 (2011).

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>5</sup> Inst. for the Advancement of the Am. Legal Sys., *supra* note 4, at 9.

<sup>6</sup> Gene J. Koprowski, *Instant Messaging Grew by Nearly 20 Percent in 2005*, TechNewsWorld (Nov. 10, 2005), <http://www.technewsworld.com/story/47270.html>.

<sup>7</sup> Inst. for the Advancement of the Am. Legal Sys., *ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES* 29 n.2 (2008).

employment and consumer contract cases.<sup>8</sup> Now we're seeing it move into Class Actions.<sup>9</sup> 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.<sup>10</sup>

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?

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<sup>8</sup> Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 897-98 (2004).

<sup>9</sup> See Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence,* 48 HOUS. L. REV. 457, 500 (2011) ("As of January 14, 2011, AAA was administering over 300 class action arbitrations.").

<sup>10</sup> John Gastil et al., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

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."<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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

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<sup>11</sup> Model Rule of Prof'l Conduct R. 1.3[1] cmt. (2004) (emphasis added).

<sup>12</sup> See *Stitching Mayflower Mountain Founds v. Park City*, No. 11-4017, 2011 WL 4839054, at \*2 (10th Cir. Oct. 13, 2011) (unpublished) (collecting cases).

<sup>13</sup> See James S. Kakalik, et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 623 (1998).

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.<sup>14</sup>

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

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<sup>14</sup> Douglas Adams, THE ULTIMATE HITCHHIKER'S GUIDE TO THE GALAXY (1979).

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>11</sup>

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

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<sup>15</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 701-709 (1998).

<sup>16</sup> 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>

<sup>11</sup> *See generally* Heather Russel Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799 (1998).

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.<sup>12</sup>

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<sup>12</sup> *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**

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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

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\* 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 Yelderian 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.<sup>1</sup> 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

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<sup>1</sup> *University College Record* (2010), 15(3): 19–27.

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

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.<sup>2</sup> 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

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<sup>2</sup> *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.<sup>3</sup> The same holds true when it comes to accessory liability.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> But it remains a fact that the nature of liability (punitive damages, for example) is generally more expansive and serious for what

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<sup>3</sup> 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.

<sup>4</sup> 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.).

<sup>5</sup> *Bailey*, 444 US at 405.

<sup>6</sup> *Restatement (Second) of Torts* (1965), §8A.

tort law deems an *intentional* wrong than for wrongs involving only lesser *mens rea*.<sup>7</sup>

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.<sup>8</sup> To explain why this is so, Judge Posner asks us to consider the case of *Bird v Holbrook*<sup>9</sup>—a chestnut that

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<sup>7</sup> See, e.g. Keeton et al., *Prosser and Keeton on the Law of Torts* §8.

<sup>8</sup> Posner, *Economic Analysis of Law* 260–5.

<sup>9</sup> (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.’<sup>10</sup> 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.<sup>11</sup> 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.’<sup>12</sup> 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

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<sup>9</sup>(...continued)  
the focus of his discussion of intentional torts in his textbook. Posner, ‘Killing or Wounding to Protect a Property Interest’, at 209; Posner, *Economic Analysis of Law* 260–5.

<sup>10</sup> 4 Bing at 631, 130 ER at 912.

<sup>11</sup> *Ibid.* at 632, 130 ER at 912.

<sup>12</sup> *Ibid.*, 130 ER at 913.

summer house and so he went to collect it.<sup>13</sup> 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.<sup>14</sup>

When his case for damages eventually made it to court, the English bench found the garden owner liable.<sup>15</sup> The court did so on the basis that it is unacceptable (at least without notice, it said) for anyone to maim others *intentionally* simply for picking tulips.<sup>16</sup> The *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 *already* picked his flowers as he was someone *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 [intentionally] inflicted for a supposed offence, at the discretion of an individual, without the intervention of a judicial sentence, is a

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<sup>13</sup> *Ibid.* at 633, 130 ER at 913.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* at 640–6, 130 ER at 916–18.

mere act of revenge.’<sup>17</sup>

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.’<sup>18</sup> 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.<sup>19</sup> 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).’<sup>20</sup> 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

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<sup>17</sup> *Ibid.* at 636; 130 ER at 914.

<sup>18</sup> Posner, ‘Killing or Wounding to Protect a Property Interest’, at 209.

<sup>19</sup> *Ibid.* at 214–16.

<sup>20</sup> *Ibid.* at 210.

economic cost-benefit analysis.<sup>21</sup> 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.’<sup>22</sup>

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.<sup>23</sup>

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,

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<sup>21</sup> Posner, *Economic Analysis of Law* 295.

<sup>22</sup> *Ibid.* at 206.

<sup>23</sup> *Ibid.*

much as American law typically does in tort.<sup>24</sup>

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.<sup>25</sup>

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

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<sup>24</sup> Williams, ‘Oblique Intention’; Williams, *Textbook of Criminal Law* 84–7; Williams, *The Mental Element in Crime* 52–3.

<sup>25</sup> Williams, *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.'<sup>26</sup>

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 un hoped-for harm is just an inherent cost associated with

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<sup>26</sup> 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'?<sup>27</sup> Can't one 'choose and intend to do what is utterly repugnant to one's dominant feelings'?<sup>28</sup> 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?<sup>29</sup> 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

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<sup>27</sup> *CEJF* II.10, at 174 (emphasis added).

<sup>28</sup> *Ibid.* at 175.

<sup>29</sup> *CEJF* IV.16, at 342.

end.<sup>30</sup> 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’?<sup>31</sup> 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?<sup>32</sup> 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

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<sup>30</sup> *Ibid.* at 345.

<sup>31</sup> *CEJF* II.10, at 185.

<sup>32</sup> *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.<sup>33</sup>

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.'<sup>34</sup> 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.'<sup>35</sup> 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

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<sup>33</sup> *Ibid.* at 183 (emphases added).

<sup>34</sup> Model Penal Code §2.02, Comment 2 n. 6 (quoting National Commission on Reform of the Federal Criminal Laws, *Working Papers* 1: 124).

<sup>35</sup> *Giles v California*, 554 US 353, 368 (2008).

elsewhere that the intent-knowledge distinction lacks force.<sup>36</sup> 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*.<sup>37</sup> 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.<sup>38</sup> 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,

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<sup>36</sup> Williams, 'Oblique Intention', at 435–8.

<sup>37</sup> *CEJF* II.10, at 194.

<sup>38</sup> Holmes, *The Common Law* 3.

[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.<sup>39</sup>

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.'<sup>40</sup> 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.'<sup>41</sup> 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 *intends* to harm another person, Finnis encourages us to remember,

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<sup>39</sup> *CEJF* IV.16, at 347.

<sup>40</sup> Pound, 'Introduction', at xxxvi–vii.

<sup>41</sup> *Morissette v US*, 342 US 246, 250 (1952).

‘[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.’<sup>42</sup> People, no less than material, become means to another’s end. To analyze *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 *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 *choose* or *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 . . . *dignity* . . . as an equal.’<sup>43</sup> It recognizes that ‘to choose harm is the paradigmatic wrong; the exemplary instance of denial of right.’<sup>44</sup> It stands as a bulwark against those who would allow the human individual to become nothing more than another commodity to

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<sup>42</sup> *CEJF* IV.16, at 347–8; Kant, *Groundwork for the Metaphysics of Morals* 46–8.

<sup>43</sup> *CEJF* IV.16, at 349.

<sup>44</sup> *Ibid.* at 349–50.

be used up in aid of another's (or others') ends.<sup>45</sup>

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 *mens rea* may suffice to establish liability for the same completed offense.<sup>46</sup> And even when criminal liability attaches to the primary criminal offenders on a lesser *mens rea* showing, proof of intent is typically required to hold liable those only tangentially involved with the illegal enterprise as accessories.<sup>47</sup> 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 *only* if a *choice to do wrong* is present.<sup>48</sup> In this way, attention to the defendant's intent can help address and prevent what

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<sup>45</sup> *Ibid.*

<sup>46</sup> *See supra* note 3.

<sup>47</sup> *See supra* note 4.

<sup>48</sup> *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.’<sup>49</sup> 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.’<sup>50</sup> 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

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<sup>49</sup> *US v Falcone*, 109 F 2d 579, 581 (2d Cir. 1940) (Hand, J.).

<sup>50</sup> 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.<sup>51</sup> 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

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<sup>51</sup> 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?<sup>52</sup> 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?<sup>53</sup>

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

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<sup>52</sup> *Ibid.* chs. 4, 9 (discussing Williams's theory, among others).

<sup>53</sup> 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.<sup>54</sup> 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?<sup>55</sup> Might existing law do more to protect equality than the would-be authors of its demise might wish to admit?<sup>56</sup> 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

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<sup>54</sup> Gorsuch, *Future of Assisted Suicide and Euthanasia* 160 (discussing Posner, *Aging and Old Age* 241).

<sup>55</sup> *Ibid.* chs. 7–9.

<sup>56</sup> 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.<sup>57</sup>

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 *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 *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.

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<sup>57</sup> Gorsuch, *The Future of Assisted Suicide and Euthanasia* ch. 9 (discussing Singer, *Practical Ethics*).

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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 YOU S - 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.<sup>1</sup> 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.

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<sup>1</sup> 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  
CONTRADICTION IN TERMS. OR ONE MIGHT WONDER WHETHER IT  
HAS COME TO MEAN ONLY THIS: DO IN YOUR OPPONENT BEFORE HE  
CAN DO IN YOU.<sup>2</sup>

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

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<sup>2</sup> 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.<sup>3</sup> WHAT THE STUDENT LEARNS ABOUT ETHICS IN THE WORKPLACE TENDS TO OVERSHADOW WHATEVER IS TAUGHT IN THE CLASSROOM.

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<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

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<sup>4</sup> 548

<sup>5</sup> Monroe Freedman

MANY JOKES NOTWITHSTANDING). SAYING “BUT MY CLIENT MADE ME DO IT” DOESN’T MEAN WE *ALWAYS* ESCAPE MORAL CULPABILITY FOR OUR ACTIONS.<sup>6</sup> 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.

\* \* \*

WHEN MY STUDENTS RAISE THEIR “CLIENT MADE ME DO IT” HIRED GUN VIEW OF THE LAWYER’S ROLE, I ASK THEM ABOUT THE AFTERMATH OF WORLD WAR II WHEN CERTAIN NAZI WAR CRIMINALS SOUGHT TO DEFEND THEIR ACTIONS ON THE BASIS THAT THEIR SUPERIORS MADE THEM DO IT. THE NUREMBERG PRINCIPLES AND CHARTER GOVERNING THE CONDUCT OF THE NAZI WAR TRIALS REJECTED THIS DEFENSE, EXPLAINING THAT “THE FACT THAT THE

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<sup>6</sup> 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.”<sup>7</sup>

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?<sup>8</sup> 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.

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<sup>7</sup> Charter quoted *id.*

<sup>8</sup> 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

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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.<sup>9</sup> THE LAWYER, ON THIS VISION, OWES HIS OR HER CLIENT'S WISHES NO PARTICULAR DEFERENCE BECAUSE SOCIETY'S INTERESTS OUTWEIGH THE INDIVIDUAL'S.

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<sup>9</sup> 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.<sup>10</sup> 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

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<sup>10</sup> 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.

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IN AN EFFORT TO CAPTURE THIS BALANCE OF DUTIES,  
CHARLES FRIED ONCE FAMOUSLY<sup>11</sup> 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

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<sup>11</sup> 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

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.<sup>12</sup> 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.<sup>13</sup>

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<sup>12</sup> reference to Aristotle discussion of true friendship see condlin 254 et seq

<sup>13</sup> 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.

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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.<sup>14</sup> 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.

BY CONTRAST, FRIED CONDEMNS WHAT HE TERMS PERSONAL HARMS – WRONGS A LAWYER DOES BY HIS PERSON TO THE PERSON OF ANOTHER THAT ARE *BEYOND* WHAT IS SANCTIONED BY THE LEGAL INSTITUTION. THESE ARE THINGS A LAWYER SHOULD NOT DO

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<sup>14</sup> 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 CONFESS 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?<sup>15</sup> 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

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<sup>15</sup> 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.

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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.<sup>16</sup>

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<sup>16</sup> 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

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<sup>16</sup>(...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 INFLECTING 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 HARBOR 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.<sup>17</sup>

CONSIDER AS WELL THE FUGITIVE SLAVE LAW EXAMPLE. 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.

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<sup>17</sup> 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.<sup>18</sup> SAYING THAT THE CLIENT MADE ME DO IT ISN'T A TOTAL ANSWER TO THE QUESTION OF LEGAL ETHICS.

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<sup>18</sup> 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

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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-WINDED 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?

AT THE END OF THE DAY, THOUGH, 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....

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*?

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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.<sup>19</sup> 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

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<sup>19</sup> Lerman Schrag suggestion

TOMBSTONE OF A LAWYER WHO TODAY IS FAR LESS WELL-KNOWN.<sup>20</sup>  
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 --

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.

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<sup>20</sup> 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.

(How) Do Judges Think?  
12/11/09 Draft  
Judge Holloway Lecture - Oklahoma City, Oklahoma  
Federal Bar Association

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

adjudication 250-51]

But, right off the bat, how is that for an endorsement of an approach to judging? The most Judge Posner can say about it is that it's, quote, "not completely insane." Now, that's not exactly a ringing endorsement, is it? After all, Robin Williams isn't *completely* insane, but even though I live in Boulder I still wouldn't trust Mork from Ork to run the country.

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, Neeeiilll, 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

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 DWORKIN 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.

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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 *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. THERE IS NO HELPFUL SCHOLARSHIP OUT THERE AT ALL. THERE IS SOME STUFF THAT DESCRIBES THE EXISTENCE OF THE CIRCUIT SPLIT. GREAT. VERY HELPFUL. 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 “AFFIRM” OR “REVERSE.” BUT AS ONE OF MY COLLEAGUES LIKES TO SAY, THIS JOB IS LIKE BEING IN THE ENGINE ROOM OF A LARGE SHIP. YOU WAKE UP IN THE MORNING TO A PILE OF COAL.

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 & KEETON 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,

TOO.

\* \* \*

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 CONFESS 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, AMBITIOUS 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 OVERTHROW 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 YOU]

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.

University of Denver Law School  
January 31, 2008

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 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.

\* \* \*

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.

MARSHALL SCHOLAR GATHERING  
Denver, Colorado  
DEC. 5, 2007

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 BE 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 QUITESSENTIALLY ENGLISH.

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

STONE STAIR CASE, 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.

\* \* \*

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!

**Remarks to the American College of Trial  
Lawyers, Judicial Fellows  
October 12, 2007  
Denver, Colorado**

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.

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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.

**A Brief Reply to Raymond Tallis on the Legalization  
of Assisted Suicide and Euthanasia  
Remarks to the National Lawyers Association  
Denver, Colorado**

**Sept. 10, 2007**

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 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 Russell, 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 Eugenic 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 teenagers.

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 health 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?

\* \* \*

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.

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OFFICIAL TRANSCRIPT PROCEEDINGS

PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

A WORKSHOP PRESENTED BY:

THE FEDERAL TRADE COMMISSION AND

THE GEORGETOWN JOURNAL OF LEGAL ETHICS

September 13, 2004

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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

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P R O C E E D I N G S

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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

1 building. It's the tall black building over there. So we  
2 all check in and make sure everyone's safe.

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

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

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

22 We would also like everyone to thank Hogan &  
23 Hartson; Paul, Weiss, Rifkin; Wharton & Garrison; Mayer,  
24 Brown and Rowe; O'Melveny and Myers; and Gibson, Dunn &

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

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

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

16 Now, this comes as no surprise to me because I  
17 believe that all antitrust lawyers, whether they know it or  
18 not secretly want to be consumer protection lawyers. And  
19 why not? After all, it's the stuff that vividly directly  
20 and personally affects all of us. And I think it just has  
21 to be more fun than figuring out whether paper cups or  
22 Styrofoam cups are in the same market. So that's my take  
23 on consumer protection and antitrust. And with that,  
24 Chairman Majoras. (Applause.)

1                   CHAIRMAN MAJORAS: Good morning and welcome to  
2 the Federal Trade Commission's workshop on Protecting  
3 Consumer Interests in Class Actions. I'd like to extend a  
4 special welcome to our fellow enforcers with the states and  
5 I'd also like to recognize our distinguished members of the  
6 judiciary who are here with us today.

7                   The Honorable Diane Wood, Circuit Court of  
8 Appeals judge for the Seventh Circuit; the Honorable Brock  
9 Hornby, U.S. District Court judge for the District of  
10 Maine; the Honorable Vaughn Walker, U.S. District Court  
11 judge for the Northern District of California; the  
12 Honorable Lee Rosenthal, U.S. District Court judge for the  
13 Southern District of Texas; and the Honorable Ann Yahner,  
14 Administrative Law judge for the District of Columbia,  
15 Office of Administrative Hearings. We're very grateful for  
16 your participation in our workshop.

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

24                   I am particularly pleased to open this workshop,

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1 my first as FTC Chairman. As most of you know and as  
2 Elaine has reminded us, I am an antitrust lawyer and I've  
3 long understood that the goal of antitrust is to protect  
4 and enhance consumer welfare.

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

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

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

23           Under the leadership of my predecessor, former  
24 Chairman Tim Muris, the Commission sought to address these

1 concerns by initiating the Class Action Fairness Project.  
2 The goal of that project was simple: to ensure that when  
3 consumers have meritorious claims they get meaningful, not  
4 illusory, relief.

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

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

17 Since the FTC began the project many observers  
18 have asked why the FTC is involved in the consumer class  
19 action area at all. Contrary to what some may have  
20 concluded, the FTC is not opposed to class actions.  
21 Rather, the FTC is interested in consumer class actions and  
22 in particular consumer class action settlements because  
23 they raise issues that are at the core of the FTC's  
24 consumer protection mission.

1           In fact, in recent years we have seen numerous  
2 consumer class actions related to cases that the FTC has  
3 already brought and in some instances we've worked closely  
4 with class attorneys to obtain effective relief for  
5 consumers.

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

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

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

22           In our first panel today, we'll specifically  
23 address this type of relief and provide an opportunity to  
24 discuss these issues in a broader context than an

1 individual case may allow.

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

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

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

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

21 Our panels over the next two days will address  
22 the question of attorneys' fees and how consumer class  
23 actions can fairly compensate lawyers while protecting  
24 consumers. In other panels we'll address equally important

1 issues such as special ethics concerns which is  
2 particularly apt considering our cosponsor, the Georgetown  
3 Journal of Legal Ethics.

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

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

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

22 Other interested parties may be also finding it  
23 difficult to obtain this information and we would like to  
24 talk about that.

1           Second, we would like to solicit feedback on the  
2           amicus component of our project. To date, the FTC  
3           settlement objections have focused particularly on two  
4           issues: coupon settlements and excessive attorneys' fees.  
5           The Commission's briefs have also raised to a lesser degree  
6           such issues as insufficiently clear notices, burdensome  
7           claims procedures and so-called piggyback class actions.

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

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

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

22          And we hope that this workshop will provoke  
23          discussion about how we can use our research resources to  
24          bear on important questions.

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1           And finally, looking beyond the limited role of  
2           our own agency, we would like the panels to explore  
3           opportunities for more effective coordination among all of  
4           the parties involved in the class action process.

5           More participation and especially parallel  
6           participation by states and private attorneys may be  
7           helpful in some cases. And we hope that the workshop will  
8           provide an opportunity for all entities to discuss the  
9           fundamental issue of coordination.

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

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

22           And now I will turn this over to John Delacourt  
23           to begin our first panel. Thank you again for being here.  
24           (Applause.)

1 MR. DELACOURT: Thank you, Chairman Majoras. I  
2 think we're ready to begin. Our first panel this morning  
3 is on the use of coupon compensation and other non-  
4 pecuniary relief in class action settlements.

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

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

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

20 In that case, the defendant was alleged to have  
21 made deceptive representations regarding its voice mail  
22 service and proposed to settle the case by offering to  
23 class members coupons for one free month of speed-dial  
24 service.

1           FTC staff objected to this arrangement, however,  
2           noting that among other problems, after the initial free  
3           month, class members that took advantage of this offer  
4           would be enrolled in a speed dial program on a continuing  
5           basis at the full subscription rate unless they took active  
6           steps to cancel the service. In other words, the proposed  
7           settlement was more akin to a promotional gimmick than to a  
8           genuine effort to provide injured consumers with relief.

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

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

22          Though the use of many of these coupons was  
23          mutually exclusive, for example, if you're a do-it-  
24          yourselfer you don't have any need for H&R Block tax

1 preparation services, class counsel proposed to base its  
2 fee on the total value of all of the coupons. That factor  
3 as well as various flaws with the coupons themselves  
4 ultimately triggered an FTC objection.

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

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

17 While I can't claim to have any particular  
18 knowledge of an official consensus on the settlement, my  
19 own anecdotal experience was that the cash component was  
20 very well received. I spoke with a number of acquaintances  
21 just in the ordinary course of things who indicated that  
22 they thought the claims procedure was very easy. You could  
23 file online. They were happy with the fact that they  
24 received their compensation right away and many of them

1 were actually amazed that they received a check. That had  
2 not been their experience in other cases.

3 So though the checks were relatively small, in  
4 the range of \$13 to \$16, they were very happy to receive a  
5 check. So that was the cash component which received high  
6 marks all around.

7 The noncash component, that is, the 5.6 million  
8 CDs that were distributed to public libraries, was another  
9 story. That portion of the settlement continues to be  
10 subject to criticism.

11 In a recent news story, for example, an official  
12 from the Milwaukee public library described some of the CDs  
13 that his institution received. Among the take for the  
14 settlement are the following: not one but 104 copies of  
15 Will Smith's "Willennium.

16 For those of you who are not Will Smith's fans,  
17 there are also 188 copies of the Michael Bolton classic,  
18 "Timeless". And finally, there were 1,235 copies of  
19 Whitney Houston's 1991 recording of the national anthem.  
20 So I can only conclude that the defendants must have  
21 regarded this particular single as an underappreciated  
22 work.

23 So anyways, subsequent reporting on this portion  
24 of the settlement revealed that in fact Milwaukee's

1 experience was not an anomaly, that in Virginia, for  
2 example, they received 1600 copies of the Whitney Houston  
3 single and in Maryland they received 1200 copies.

4 Adding insult to injury, defendants valued this  
5 noncash component of the settlement at almost \$76 million.  
6 So that was more than the \$67 million in cash.  
7 Furthermore, this \$76 million figure was incorporated into  
8 the total settlement value from which class counsel's  
9 attorney fee was ultimately derived.

10 So clearly, there is room for improvement with  
11 respect to coupon compensation in class action settlements  
12 and for that I will ask the assistance of the panelists.

13 Before I begin, however, I should raise one final  
14 issue and that is that we will be taking questions today.  
15 I believe there are 3 x 5 index cards included in the  
16 folders that you received this morning, so if you have a  
17 question, please write it down on the card and get the  
18 attention of an FTC staff person and they will make sure  
19 that those cards are passed to the front so that I can read  
20 and pass them on to the panelists.

21 So with that out of the way, I will turn to our  
22 first panelist, Professor Christopher Leslie, immediately  
23 to my left. Professor Leslie is an Associate Professor of  
24 Law at Chicago Kent College of Law. His current research

1 focuses on antitrust and business law as well as class  
2 actions.

3 In particular, I would like to commend to you his  
4 article, "A Market-based Approach to Coupon Settlements in  
5 Antitrust and Consumer Class action Litigation," which was  
6 published in the UCLA Law Review and recently, because of  
7 our program, was also added to the FTC's web site.  
8 Professor Leslie.

9 PROF. LESLIE: I would like John and his  
10 colleagues at the FTC for holding this important workshop  
11 and for inviting me to participate.

12 Like most private litigation the primary purposes  
13 of class action litigation are to compensate individuals  
14 for their injuries and to deter misconduct by disgorging  
15 ill-gotten gains. The success of any class action lawsuit  
16 should be evaluated based primarily on whether or not it  
17 achieves one or both of these goals.

18 Also like most private litigation, most class  
19 action litigation settles. However, unlike private  
20 litigation, class action settlements run a significant risk  
21 of collusion between opposing counsel. This is  
22 particularly the case with coupon settlements.

23 When the class members are paid in coupons, each  
24 class member will have one of four outcomes. First, the

1 class member might not use the settlement coupon at all.  
2 This nonuse outcome results in the class member receiving  
3 nothing of value from the settlement. There is no  
4 compensation. Similarly, the defendant pays out nothing to  
5 that class member and there is no disgorgement.

6 Second, the class member could use the coupon  
7 because the settlement coupon induced her to make a  
8 purchase that she otherwise would not have made. This  
9 induced purchase outcome occurs when the class member makes  
10 a purchase with her settlement coupon simply to avoid the  
11 feeling of getting nothing from the settlement.

12 The defendant is actually in a better position in  
13 this scenario because it makes a sale that it otherwise  
14 wouldn't have made and gets that additional marginal  
15 profit. The settlement coupon operates as a promotional  
16 coupon. This is the antithesis of disgorgement.

17 Third, the class member could use her coupon for  
18 a purchase that she was planning to make anyway. This  
19 noninduced purchase outcome shows that settlement coupons  
20 are not inherently worthless. The class member who uses  
21 the coupon for a planned purchase receives, in essence, a  
22 payment equivalent to the face value of the coupon. The  
23 defendant loses money if that purchase would have taken  
24 place without the settlement coupon. Thus, there is some

1 level of both compensation and disgorgement.

2 Fourth and finally, the class member could  
3 transfer the settlement coupon to a third party who uses  
4 it. This transferred use outcome is a variant of the third  
5 only someone other than the class member is redeeming the  
6 coupon making a noninduced purchase. The class member  
7 receives value if she sells that settlement coupon to the  
8 person who eventually uses it.

9 Because defendants prefer outcomes where the  
10 class member either does not use the coupon, and thus the  
11 defendant pays nothing, or the class member uses the coupon  
12 for an induced purchase and thus the defendant earns  
13 additional revenue, defendants often structure settlement  
14 coupons to increase the probability of one of these first  
15 two outcomes occurring.

16 Defendants do this by imposing often one of five  
17 common restrictions in settlement coupons. First, there  
18 are limits on transferability. Settlement coupons are  
19 sometimes nontransferable. In some cases, they limit  
20 transfers of the coupon to within households or they limit  
21 the number of times that the coupon can be transferred. Or  
22 they reduced the value of the coupon if it is transferred  
23 to a nonclass member.

24 All of these transfer restrictions reduce the

1 value of the settlement coupon and reduce the probability  
2 of the settlement coupon ever being used.

3 Second, short settlement coupon expiration dates  
4 reduce the probability of use. Settlement expiration dates  
5 can be as short as a few months, such as the 120 days in  
6 the Cuisinart case.

7 This is particularly a problem with durable goods  
8 where class counsel and defendants had proposed settlement  
9 coupons in heavy trucks where the consumers had to use the  
10 coupons within 15 months even though the trucks they had  
11 bought to qualify for class membership would last a lot  
12 longer than that.

13 Third, restrictions on coupon aggregation reduce  
14 the value of settlement coupons. Coupon aggregation would  
15 allow class members to combine settlement coupons with  
16 other available discounts or to combine multiple settlement  
17 coupons in a single purchase. Defendants commonly  
18 structure settlement coupons to preclude both types of  
19 aggregation. This negates the value of the settlement  
20 coupon.

21 For example, in the recent Schneider v. Citicorp  
22 mortgage case, the proposed settlement coupon was for \$100  
23 and could not be aggregated with any other discounts. Yet,  
24 a \$500 discount was widely available. Thus any class

1 member who actually used the coupon would be foregoing a  
2 \$400 net discount available to everybody who was not a  
3 member of the class.

4 Fourth, redemption restrictions are common. Some  
5 class action settlements have involved class members  
6 receiving multiple coupons that can only be redeemed over  
7 time in specific intervals. For example, one settlement  
8 provided each class member with 40 coupons that could only  
9 be used once a quarter over the next ten years.

10 Fifth and finally, product restrictions are  
11 common. For example, in the Cuisinart settlement the  
12 settlement coupons could be used for anything except food  
13 processors.

14 In the much-hyped antitrust airlines litigation,  
15 the coupons to be redeemed for discounts on airlines  
16 couldn't be used during blackout dates, such as Christmas,  
17 Thanksgiving, holidays, i.e., when people would actually  
18 want to use the discounts.

19 The net effect of these restrictions is low  
20 redemption rates of settlement coupons, as low as 3  
21 percent, 1 percent, and in one famous case, 0.002 percent  
22 redemption rates.

23 Besides these restrictions, other problems with  
24 settlement coupons include that most settlement coupons

1 require the class member to continue doing business with  
2 the very defendant in order to receive any compensation.

3 Also, defendants can set settlement coupon values  
4 so that the defendant still makes a profit on each sale in  
5 which the class members redeem settlement coupons.

6 The Haese v. H&R Block case that John referred to  
7 is typical here when after the settlement was announced H&R  
8 issued a press release that assured people that the  
9 settlement really wouldn't do anything because they were  
10 going to make money on every sale that involved a  
11 settlement coupon.

12 Finally, there is the risk that defendants can  
13 negate the value of settlement coupons either by increasing  
14 the price of their product or by reducing the quality.

15 The class action system is designed with three  
16 potential safeguards to prevent these inadequate  
17 settlements.

18 First, the class counsel is supposed to negotiate  
19 a settlement in the best interest of the class. Second,  
20 class members are given the opportunity to object to any  
21 proposed settlement and third, the proposed settlement must  
22 be approved by a judge who determines whether it is fair,  
23 adequate and reasonable.

24 Unfortunately, evidence suggests that the

1       safeguards may fail in the context of coupon settlements.  
2       First, because of agency cost, class counsel may pursue  
3       their own interests instead of those of the class. Because  
4       the class counsel are paid in cash, often based on a  
5       percentage of the face value of the settlement coupons, the  
6       class counsel may maximize their attorney fees by  
7       negotiating a coupon settlement even if that settlement  
8       provides little real value to the class.

9                 Defendants have a strong incentive to laden  
10       settlement coupons with restrictions that increase the  
11       probability of either the nonuse outcome or the induced  
12       purchase outcome. And the class counsel have insufficient  
13       incentive to prevent this so long as the aggregate face  
14       value of the coupons is high and the class counsel is being  
15       paid in cash.

16                Rational defendants will be willing to pay higher  
17       attorney fees in exchange for class counsel agreeing to  
18       allow restrictions on settlement coupons. Unfortunately,  
19       the interests of the defendant and the class counsel are  
20       more aligned at this point than the interest of the class  
21       counsel and the class members.

22                Second, class members appear ill-equipped to  
23       monitor the class counsel and to protect their own  
24       interests. The class counsel controls the relevant

1 information. Notices of the proposed settlement are often  
2 opaque and the terms of the coupon settlements are often  
3 too confusing to understand. In some cases, class members  
4 have thought that they were the ones being sued instead of  
5 they were the ones being offered the coupons.

6 Many judges appear unreceptive to class member  
7 objections as well. Furthermore, given the low stakes for  
8 each individual class member it is perfectly rational for  
9 class members to remain silent even if they think the  
10 coupon settlement is not worth anything.

11 Third, with a few notable exceptions reviewing  
12 judges may be loath to reject proposed coupon settlements.  
13 Some judges treat the face value of coupons as their true  
14 value even though this is not the case.

15 Judges cannot be faulted. It is exceedingly  
16 difficult to calculate the true value of settlement  
17 coupons, especially when they are laden with restrictions.  
18 Add to that both the defense counsel and the class counsel  
19 are singing the praises of the coupon settlement.

20 Systemic pressures also play a role here. The  
21 judge must accept or reject a proposed settlement in its  
22 entirety and there is some level of traditional deference  
23 to class counsel who, after all, is there to protect the  
24 interests of the class. All of these make it difficult for

1 a judge to reject a coupon settlement.

2 In sum, despite the safeguards in place to  
3 protect class members, the problem remains that class  
4 action litigation is often settled with settlement coupons  
5 that are largely worthless.

6 In my scholarship, I have discussed potential  
7 responses to this, including banning settlement coupons,  
8 restructuring them, imposing minimum redemption rates and  
9 even having the class counsel paid with the exact same  
10 currency as the class. Thus, the class counsel would  
11 receive coupons if the class does.

12 In this forum I would like to consider two new  
13 potential solutions. First, collecting greater data so  
14 that we can study the problem and get a better  
15 understanding of what restrictions are imposed on  
16 settlement coupons and the effects of these restrictions.  
17 And second, encouraging greater FTC intervention and  
18 fairness hearings to evaluate coupon-based settlements,  
19 including having the FTC receive notice of all proposed  
20 settlements, especially those that involve coupons. And I  
21 will save the discussion of those for the group discussion,  
22 which I am very much looking forward to.

23 MR. DELACOURT: Thank you very much, Professor  
24 Leslie. Our next panelist is Judge Brock Hornby. Judge

1 Hornby is a United States District judge for the District  
2 of Maine. He has dealt with class action issues  
3 extensively from the bench and most recently has presided  
4 over the much-maligned MDL music CD cases, although I must  
5 note that I was very happy with the cash component as well  
6 as the new motor vehicle Canadian export antitrust  
7 litigation. Judge Hornby.

8 JUDGE HORNBY: Thank you. Good morning. I'm  
9 here on the panel to give you the judge's perspective. I  
10 hope you find it helpful but remember what George Burns  
11 said. He said, I was married by a judge. I should have  
12 asked for a jury.

13 Many of the positions that you're going to hear  
14 on this panel and at this conference are what I call  
15 political with a small P. They represent substantive  
16 policy preferences about how money or goods should be  
17 distributed among plaintiff class members, defendants,  
18 lawyers and others. And typically, they either endorse or  
19 they bemoan class actions or class action lawyers.

20 Well, as the judge on this panel I'm not going to  
21 take a position on those issues. Instead, I'm going to  
22 speak from a judge's perspective and try to tell you what a  
23 judge looks for when he or she is presented with a proposed  
24 settlement involving coupons or other nonmonetary relief.

1 I'm also going to talk about some of the baggage  
2 that a judge brings to the task because I think many of you  
3 have an unrealistic expectation of what we judges are  
4 capable of. In fact, I'm reminded of the psychiatric  
5 evaluation that I commissioned for a defendant whose  
6 competence was in question for trial and the Bureau of  
7 Prisons psychiatrist at the customary interview was asking  
8 him what the role was of all the various participants in  
9 the courtroom. And when it came to the judge his response  
10 was, and this is a direct quote, the role of a judge was  
11 "takes the facts presented to him and makes everybody  
12 happy, justice or something."

13 I think some of you think that's what judges are  
14 capable of. We're not. Remember first that American  
15 judges are accustomed to resolving disputes in an adversary  
16 system. Originally, we were umpires. When a judge is  
17 called upon to decide a case or a conflict we're trained to  
18 do so by applying legal rules, attempting to limit our  
19 individual value preferences.

20 Yet, over the last 25 years we have become case  
21 managers and we've learned to manage litigation and settle  
22 cases but even there we start from an adversarial  
23 perspective. For us, a good settlement in the typical case  
24 is one that first and foremost makes the lawsuit go away, a

1 settlement that will stick, not come unglued.

2           If we suggest an appropriate settle amount in  
3 such cases we come up with a number not by determining  
4 what's good for the plaintiffs or what the defendant ought  
5 to pay but by asking what's the overall financial exposure  
6 of the defendant in a collectible judgment? In other  
7 words, what amount could the plaintiff actually put in his  
8 or her pocket after a trial and an appeal and then we  
9 discount it by the risk of losing the case and the  
10 transaction costs of getting there, things like legal fees,  
11 expert fees, administrative downtime, things like that.

12           In encouraging the parties to settle a typical  
13 case we're merely trying to bring the particular dispute to  
14 a conclusion. We're not expressing a viewpoint about  
15 litigation or justice or particular kinds of litigation or  
16 settlement categories.

17           And then suddenly we're told that things are  
18 different in settling a class action, that there judges are  
19 fiduciaries for the entire class. It's a catchy label but  
20 it's dangerously misleading as a description of what trial  
21 judges are able to do.

22           Lawyers are fiduciaries. Trust officers are  
23 fiduciaries. Certain kinds of agents are fiduciaries.  
24 Fiduciaries have a duty of loyalty to a particular client

1 that supercedes other obligations. In fulfilling their  
2 role they go out and investigate on their own. They  
3 acquire an expertise. They hire professionals to do work  
4 for them. They follow certain standards and they are sued  
5 when they fail.

6 That's not what most judges do for a living. In  
7 fact, some of you suggested a judge should turn down a  
8 coupon settlement even though it might have a small benefit  
9 to the class, should turn it down for institutional reasons  
10 or so that other class actions might be better in the  
11 future. A fiduciary could not do that.

12 So what does a so-called fiduciary judge do when  
13 he or she is presented with a proposed settlement in a  
14 class action? All the lawyers, the adversaries with whom  
15 he's accustomed to deal, are lined up on the same side  
16 defending the settlement.

17 The judge wonders, how am I to evaluate this  
18 proposed settlement? Should I accept what they say or  
19 should I independently gather evidence? Shall I subpoena  
20 witnesses or documents? Shall I commission experts to  
21 conduct independent studies at substantial expense?

22 If I want assistance or advice I can't just pick  
23 up the phone and call a professor I know. That would  
24 probably be unethical. I can only consult a colleague or

1 law clerks who, like me, are trained only in law.

2 In other words, the judge who's faced with a  
3 class action settlement is more than ordinarily anxious.  
4 Now, Judge Posner of the Seventh Circuit suggested a dozen  
5 years ago that perhaps a different model is needed. He  
6 said, and I'm quoting, "Judges in our system are geared to  
7 adversary proceedings. If we're asked to do nonadversary  
8 things we need different procedures."

9 In class actions -- Judge Posner was speaking of  
10 attorney fee requests -- lawyers are not like adversaries  
11 in litigation. They are like artists requesting a grant  
12 from the National Endowment for the Arts. Grant-making  
13 organizations establish nonadversarial methods for  
14 screening applications. Perhaps we need something like  
15 that for cases like this, the case he was referring to.

16 I suggest that Judge Posner hit upon a much  
17 broader problem than attorney fee requests. His  
18 observation applies to class action settlements in general.  
19 It applies to consent decrees proposed by the parties in  
20 government-initiated litigation like environmental  
21 lawsuits. And it applies to other instances where the  
22 adversarial systems no longer work.

23 I've not seen a good response to his observation.  
24 I can assure you that I've not seen judicial education that

1 focuses on this unique role for a judge, and most judges do  
2 not get a steady diet of these kinds of cases so as to  
3 become self-taught.

4 So what does the anxious judge actually do in  
5 this context where he's asked to make a decision without  
6 legal rules and with no parties arguing the pros and cons?  
7 We don't like to subpoena witnesses. If we do we may  
8 prejudice our ability to try the case later. We look for  
9 some kind of checklist of items against which to measure  
10 the application for settlement approval.

11 It may not actually tell us where to come out on  
12 a question but it gives some comfort that we're engaging in  
13 a rational assessment that can be defended. So perhaps  
14 instinctively we are behaving somewhat like a grant-making  
15 organization that promulgates criteria and measures  
16 applications against them. But I'm sure we could learn or  
17 be taught a lot more about improving those techniques.

18 What does a judge do in particular when presented  
19 with a settlement involving coupons and other nonmonetary  
20 relief? First, we look to the Rule 23 language and the  
21 case law and they both tell us that neither device is  
22 absolutely prohibited.

23 And that's appropriate. Never say never. There  
24 are limited cases where these devices can add value to

1 everyone's benefit but they are certainly greeted now with  
2 emphatic skepticism by judges given all the public and  
3 appellate criticism. After all, with or without life  
4 tenure we don't like to be publicly criticized. We live in  
5 communities just like all of you do.

6 So we look for additional factors or criteria  
7 against which to measure the proposed coupons or cy pres  
8 relief. We look carefully at what the appellate courts say  
9 about them too because we don't like being reversed on  
10 appeal.

11 I've summarized in my outline that's online what  
12 the cases and commentators say are the important factors  
13 and other panelists refer to them as well. I'm not going  
14 to list them all here. If necessary, during the discussion  
15 we can talk about them but most judges, most federal judges  
16 will consider each of these factors. So if you are  
17 supporting or opposing a proposed settlement you'd be well  
18 advised to take them into account as well.

19 Just a comment about the valuation problem. A  
20 judge is hard pressed to put a dollar value on coupons or  
21 alternative relief but remember that what Professor Leslie  
22 has called noise in his written remarks is already present,  
23 that a judge already has to do a lot of guessing in  
24 evaluating even a straight dollar settlement of a class

1 action.

2 After all, we don't see all the discovery  
3 materials. We don't see the witnesses' performance at  
4 deposition. We don't know which witnesses are available or  
5 unavailable for trial. We don't know what the weaknesses  
6 are in the expert's opinion. We haven't seen the e-mails  
7 and the documents.

8 We can make a pretty good assessment of the  
9 status of the law but on the facts we have to make an  
10 informed guess or go by instinct. Coupons and cy pres just  
11 add more uncertainty to the uncertainty that's already  
12 there in that context.

13 Greater FTC involvement as an amicus or perhaps  
14 as an intervener would certainly be welcomed by most judges  
15 that I know as consistent with the adversarial universe  
16 that we're accustomed to. In other words, the FTC's  
17 presence presenting evidence and argument to the Court  
18 would restore some of the balance currently lacking.

19 It would also be a useful antidote to a growing  
20 unease some of us have about the role of objectors,  
21 professional objectors who first appear and then they  
22 disappear, perhaps being bought off, we're told, or perhaps  
23 pressing a narrow or broader political or policy objective.

24 The FTC role would be somewhat like the role of

1 state attorney generals who prosecute civil lawsuits in  
2 some of our courts although I realize that some of you here  
3 are distinctly unenthusiastic even about their role.

4 But there is also this other risk that if the FTC  
5 intervenes or files an amicus more than occasionally to  
6 attack coupon settlements will there be an inference that  
7 its failure to do so is somehow tacit approval? I just  
8 raise that question.

9 In conclusion, let me say that unlike the Rand  
10 study authors of a few years ago, the class action one, an  
11 excellent analysis that you ought to read if you haven't  
12 done so, but I do not volunteer judges as the solution to  
13 what some of you call the class action problem. We're not  
14 ombudsmen. We're not trained for it. We are not  
15 information gathering judges like are civil law  
16 counterparts. We're not trained for that either. We will  
17 do our best but you won't be satisfied.

18 Remember, the public, Congress, the legislatures  
19 are not even satisfied with how we sentence criminals.  
20 We've been doing that for hundreds of years and we can't  
21 get that right. So if you think that we're going to do  
22 better in this more open-ended job of settling class  
23 actions, I think we need to think again. Thank you.

24 MR. DELACOURT: Thank you, Judge Hornby. Our

1 next panelist, as some of you may have noticed, is a last  
2 minute replacement. We had originally scheduled Steven  
3 Hantler from DaimlerChrysler but now we have in his stead  
4 Leah Lorber.

5 Leah is of counsel in the public policy group in  
6 the Washington, D.C. office of Shook, Hardy & Bacon. And I  
7 also have a note here that she was named a legal reform  
8 champion by the America Tort Reform Association in 2004.  
9 Leah.

10 MS. LORBER: Thanks. I wanted to first thank the  
11 Federal Trade Commission and the Georgetown Journal of  
12 Legal Ethics for having this symposium. I also wanted to  
13 thank Steve Hantler for getting sick so I could show up and  
14 talk at it, although I think he'll get well pretty quickly  
15 and I'd like to refer everybody to his remarks that are  
16 online.

17 I'm glad that John described to you my background  
18 a little bit so you have some context for my remarks. I'm  
19 a defense attorney. I've done public policy tort reform  
20 work for the last five years so I take a pretty predictable  
21 approach.

22 I think that coupon settlements create a perverse  
23 incentive for over-lawyering. They waste litigant and  
24 court resources to no real consumer benefit. Attorneys

1 bring them so they can get high fee awards and some courts,  
2 particularly in state courts -- just so Judge Hornby  
3 doesn't get mad at me -- know that companies will settle  
4 class actions rather than litigate them. So I think it  
5 encourages courts to certify weak cases.

6 Basically, what I wanted to do was tell you about  
7 some of my favorite coupon settlement stories today.  
8 Professor Leslie had already talked a little bit about the  
9 airline price-fixing case in the early 1990s. This is a  
10 case where a number of different airlines were sued for  
11 price-fixing because they used a consumer-accessible  
12 database in order to track ticket prices.

13 The settlement resulted in \$408 million in  
14 discount airline tickets and \$50 million in attorneys fees  
15 and administrative costs. The reason I like this one is  
16 this is the first time I'd ever heard of a class action  
17 lawsuit.

18 I was right out of college in a very low-paying  
19 job and I had a long-distance boyfriend. We flew back and  
20 forth constantly. I had huge credit card bills because I  
21 couldn't afford to pay them off and I thought I was going  
22 to get some money to pay off my debt.

23 Well, when the settlement was announced, it  
24 wasn't worth anything to me as a consumer. There were

1 blackout dates. I couldn't combine the discounts with any  
2 kind of other ticket discounts and at most it was good for  
3 10 percent off a flight.

4 The critics, including some of the counsel for  
5 the objectors, said that this was a promotional scheme to  
6 induce travelers to fly and a deal worked out so  
7 plaintiffs' lawyers could collect fees of up to \$1400 an  
8 hour.

9 Some of the other coupon class settlement cases  
10 that I've been interested in reading about include the case  
11 against the makers of Cheerios. In this case, General  
12 Mills was sued because pesticides approved for use on other  
13 grains other than oats had come into contact with the oat  
14 grains for Cheerios. The plaintiffs' counsel admitted that  
15 nobody had been hurt. The lawyers got \$1.35 million in  
16 fees and class members got a coupon for a free box of  
17 Cheerios, if they had kept their grocery store receipt  
18 proving that they had bought one in the first place.

19 A similar case was the Poland Springs case.  
20 Poland Springs was sued for allegedly selling bottled water  
21 that was not pure. The lawyers got \$1.75 million in fees  
22 and the class got more bottled water.

23 These can go on and on. The earmarks of coupon  
24 settlements that cause the problems for us is basically

1 that as these stories show, the consumers don't get value  
2 and the plaintiffs' lawyers do. Often, consumers have to  
3 buy more of the product or service in order to get some  
4 benefit from the coupon settlement in the first place.

5 Several people today have already talked about  
6 the H&R Block case. H&R Block was sued for allegedly  
7 taking kickbacks from a bank that issued loans to H&R  
8 Block's tax preparation customers. The lawyers got \$49  
9 million and the class got up to \$45 per year in coupons for  
10 tax software and planning materials. To get the benefit of  
11 a \$20 coupon to run your tax return preparations the  
12 typical plaintiff would have to spend \$102.

13 Other cases include a suit against Blockbuster  
14 Video for inflated overdue video fees where the class got a  
15 dollar off of future coupon (sic) rentals. In a case  
16 against a computer manufacturer for allegedly  
17 misrepresenting the size of the computer monitor the class  
18 got \$13 rebates on new computers and monitors or \$6 in  
19 cash.

20 A lot of times these lawsuits aren't necessary in  
21 the first place. Sometimes, we believe that they are just  
22 cooked up by plaintiffs' lawyers who want to make a big  
23 fee. A Florida trial judge has called coupon settlement  
24 cases the class action equivalent to squeegee boys who at

1 urban intersection splash water on your windshield, wipe it  
2 off and then expect to get paid for it. They create the  
3 problem; they provide the solution and you really don't get  
4 any benefit.

5 In other cases defendants have already acted to  
6 resolve the problems and the settlement provides no  
7 additional value to the class. One example is the Intel  
8 Corporation case. Intel found a minor computer chip flaw  
9 that created about once in every 9 billion random division  
10 operations there was a small error. Intel created a  
11 program for its consumers to see if their computer indeed  
12 had that flaw, expanded its toll-free hotline for inquiries  
13 and offered free lifetime replacements.

14 When Intel publicized this problem and the  
15 solution widely, 13 class actions were filed. Plaintiffs'  
16 lawyers took in \$4.3 million and the plaintiffs' class got  
17 nothing more than what was already going on by Intel, its  
18 continuation of existing company solutions.

19 Also in coupon settlements courts too often don't  
20 make sure that the settlements don't mean something. This  
21 has been getting a lot better since the coupon settlement  
22 problem has been publicized but there is still too much  
23 availability for plaintiffs' attorneys to be litigation  
24 tourists and forum shop their cases around to what the

1 American Tort Reform Association has called judicial hell  
2 holes and what some prominent plaintiffs' attorneys have  
3 called magic jurisdictions where plaintiffs are always  
4 going to win regardless of what the facts and the law might  
5 be.

6           There is going to be some discussion, I'm sure,  
7 today about what can be done. A couple of solutions that  
8 have come up in the materials or in our past reading have  
9 been creating a secondary market for the coupons, which we  
10 don't think tends to work. Some of the studies have shown  
11 that the coupons actually have to be worth \$250 in order  
12 for the consumers to get a benefit on the secondary market.

13           Another solution has been to share the class  
14 award with charities and government, and this is kind of a  
15 feel-good resolution but it doesn't really do anything if  
16 it's not very carefully scrutinized and also may be an  
17 incentive for courts to certify more class actions if they  
18 know that the public is going to benefit.

19           Good solutions include when the parties and  
20 courts make sure that the settlement actually means  
21 something. I think one of Lisa's cases that she discussed  
22 was the Mercedes-Benz suit in which it was alleged that  
23 Mercedes had failed to warn their customers about using  
24 nonsynthetic motor oils in the engine in their cars because

1 the suit said that this could cause engine wear.

2 The settlement that was reached was targeted at  
3 the problem. The consumers got a \$35 coupon for an oil  
4 change and they got revised warranty protections that said  
5 if you have a problem you can take your car in and we'll  
6 fix it.

7 Another way to resolve these problems is to have  
8 defendants fight, not settle, frivolous lawsuits. There  
9 was a case in Illinois involving a Jeep Cherokee where  
10 there were allegations of excessive engine noise at idle in  
11 the SUVs. The suit was filed after one of the named  
12 plaintiffs got buyer's remorse and wanted to have his car  
13 upgraded to a V-8 engine. The second named plaintiff had  
14 135,000 miles on his vehicle when he said that it was  
15 defective and the third named plaintiff was just afraid  
16 that her car would develop the problem. The court  
17 certified the class as a nationwide class but found that  
18 the plaintiffs were unable to prove their case and entered  
19 judgment for the defendant.

20 In sum, I think there are a number of different  
21 solutions that will be discussed today but we encourage  
22 very close scrutiny of coupon settlements and fighting  
23 lawsuits where they're frivolous. Thank you.

24 MR. DELACOURT: Thank you very much, Leah, and

1 thank you in particular for pinch-hitting at the last  
2 second. Our next panelist is Lisa Mezzetti. Lisa is a  
3 partner with Cohen Milstein where she works exclusively on  
4 consumer litigation and securities regulation matters. In  
5 that capacity she has had the opportunity to serve as lead  
6 counsel or principal attorney in dozens of class actions.  
7 Lisa.

8 MS. MEZZETTI: Thank you. I am a plaintiff's  
9 class action attorney and I feel compelled --

10 UNIDENTIFIED SPEAKER: Yay.

11 MS. MEZZETTI: Thank you. And I feel compelled to  
12 note that when I walked in the door this morning I was five  
13 foot, three inches tall and I'm going to keep track of how  
14 short I am when I leave this table.

15 One other thought that I want to open with is  
16 that I was interested to see in one of the academic papers  
17 prepared for today's workshop that only 24 percent or so of  
18 class actions lead to settlements. The rest of them go  
19 through the judicial process and they are dismissed or they  
20 go to trial.

21 An earlier academic report indicated that a very  
22 small percentage of those settlements, in the single digit  
23 percentages, actually provide only coupon benefits. So I'm  
24 not sure, truth be told, why there is such an emphasis on

1 coupon settlements because, in fact, there is a long list  
2 of the benefits that are given to class members in today's  
3 settlements.

4 The list includes and is not limited to  
5 injunctive relief, changes in corporate day-to-day  
6 operations, changes in corporate structure and governance,  
7 credit programs to give automatic credits to the class  
8 members, settlement research funds, coupons for free  
9 products, coupons for discounts, charitable contributions  
10 at the election of a class member if they choose not to  
11 take a coupon, ADR processes for claims if class members  
12 choose not to settle, monitoring programs, cy pres funds.  
13 The list does not end there.

14 So an emphasis on only one part of all of those  
15 benefits would seem to ignore at least three points. All  
16 nonmonetary benefits provide a value and we have to look at  
17 them all. All of them allow for the very important  
18 adjudication of class members' rights, rights that then  
19 lead to the return of damages. And they also allow for the  
20 recognition that there is no settlement that does not  
21 change behavior prospectively for the better.

22 All of that, I think, brings value from the class  
23 actions and for every class action that can be listed here  
24 as a bad class action, I could, but I don't have anywhere

1 near the amount of time I need, I could list all the good  
2 class actions.

3 The laundry list also allows class members  
4 choices. They choose their value so they're showing us  
5 that they think there is value in some parts of this buffet  
6 of choices that they are given.

7 And in addition, this choice, this list also  
8 acknowledges what the Supreme Court recognized in 1980,  
9 that the opportunity given to class members is of value  
10 even if they choose not to avail themselves of it in the  
11 Boeing Corp. case.

12 So I think we have to focus on all of the values.  
13 And as I noted, the laundry list includes the very valuable  
14 injunctive relief. Now, my written paper for the workshop  
15 talks a lot about changes in corporate structure and  
16 changes in day-to-day operations.

17 And these include for corporate structure new  
18 management positions, education committees, the requirement  
19 that certain issues raised by line workers are reviewed by  
20 executive committees, independent executive committees.

21 Day-to-day operations can also be changed, geared  
22 specifically to the class action allegations. So, for  
23 example, in a credit card case we arranged for, where the  
24 credit card company was alleged to have charged fees

1       inappropriately and too quickly and charged products to  
2       class members when they didn't know that they were being  
3       purchased, we were able to get 12 changes, right down to  
4       the script used for the telemarketing.

5               The jurisdiction was maintained by the court.  
6       Reports were given to the court to confirm that the changes  
7       were made. And some people can wave their arms and say,  
8       well, but they're only temporary. How many years of  
9       changes did you get?

10              But I submit that first off, it's possible that  
11       it can be permanent and if it is not permanent then either  
12       -- if illegal actions occur -- then another class action  
13       can be brought and should be brought in certain  
14       circumstances or more specifically, government agencies  
15       like the FTC can step in and make sure that the appropriate  
16       actions are taken long term, or longer term than the class  
17       action attorneys have brought about.

18              I also want to note that these changes in  
19       corporations and these laundry lists of benefits came about  
20       because settlements with nonmonetary benefits have changed  
21       over the years.

22              In the 1980s when these started, these coupons  
23       were the very essence of the definition of coupons. Here's  
24       a piece of paper. You get a free product or you get a

1 discount. You won't have to pay your bill this month, Mr.  
2 Businessman, because you have a coupon.

3 They changed. There's no question. Sometimes  
4 businesses wanted to use this for business generation.  
5 Sometimes, in large part what happened was the economies of  
6 the country changed. Because there were hundreds of  
7 thousands of class members in a case or because there were  
8 hundreds of millions of dollars of damages, each individual  
9 coupon became less valuable in and of itself.

10 So criticisms, whether they were valid or not,  
11 grew and the parties to class actions, the plaintiffs, the  
12 defendants and the courts all listened and learned and we  
13 changed class actions. We changed coupon settlements.

14 We put secondary markets in. We have minimum  
15 distributions. We have cy pres funds. We have coupons for  
16 only certain types of products, less-expensive products  
17 that we know the individual is going to buy like the music  
18 club CDs cases. The settlements are bolstered by the  
19 laundry list but they are also bolstered by these changes.  
20 So the process moves and the process grows.

21 And looking back at old settlements does not  
22 necessarily mean that they are all bad. Indeed, I believe  
23 and I've seen and I think I have never personally been  
24 involved in a bad settlement. That just gets weeded out.

1 Criticisms are lodged and the system works.

2 The courts put pressure on the parties or the  
3 objectors and the FTC whether government or private  
4 objectors put pressures on the parties, usually on the  
5 defendant, truth be told, to make a settlement better. I  
6 have had settlements become better after they were  
7 disapproved. Bad settlements that are never approved are  
8 weeded out by the system and I don't think we should lose  
9 sight of that.

10 Even with all of this, however, I do want to say  
11 that we shouldn't run from coupon settlements. We  
12 shouldn't run from redemption rates, which seems to be a  
13 very big concern for the FTC and for a lot of different  
14 critics.

15 And indeed, already plaintiffs and defendants and  
16 courts do not run from them. Courts already discount the  
17 value of the face of the coupons when they are valuing  
18 settlements and they grant fees on the lower amount.

19 Courts also, especially in the recent past, the  
20 last three to five years, courts demand reports on  
21 redemption rates. This has happened significantly in the  
22 Microsoft case where redemption rates will be reported not  
23 only to the court but to a newspaper in the local area.  
24 And although defendants are sometimes hesitant they're now

1 changing because the courts and the objectors are requiring  
2 this.

3 So although I believe compiling these types of  
4 statistics is already occurring and a special process for  
5 it, such as Professor Leslie talks about, is probably not  
6 necessary, if we are going to do it, then I think we have  
7 to do it on an even and fair ground.

8 Every class action settlement is different based  
9 on the class members, based on the coupon, the product, the  
10 terms, whether there's a secondary market, whether separate  
11 terms, separate contracts can be negotiated with class  
12 members. And that actually happened in the airline  
13 antitrust case where the businesses that received the very  
14 large bulk of those coupons used those coupons to a very  
15 high percentage of, I believe, over 85 percent.

16 The thought of using redemption rates and  
17 statistics from one class action to determine whether  
18 another class action is valid is, I think, wrought with  
19 problems unless we recognize the differences among the  
20 class actions and among the coupons because looking at a  
21 settlement value in hindsight without all the facts will  
22 always result in an unfair analysis.

23 Thus, I believe we cannot lose sight of the total  
24 value of these settlements, of all of the benefits. We

1 shouldn't lose sight of the value of coupons and their  
2 redemption rates. And I think we should maintain a correct  
3 focus on recognizing all of the values of the different  
4 types of benefits and the restrictions and the protections  
5 that are already in place for these settlements. Thank  
6 you.

7 MR. DELACOURT: Thank you, Lisa. Our next  
8 panelist is Phillip Proger. Phil is a partner with Jones  
9 Day where he serves as coordinator of the firm's government  
10 regulation group. His practice, which focuses on antitrust  
11 matters before the U.S. and international enforcement  
12 agencies, as well as antitrust litigation, has given him  
13 frequent exposure to both the litigation and settlement of  
14 so-called follow-on class actions. Phil.

15 MR. PROGER: Thank you. I'm going to try and be  
16 brief because I think it would be good to get to some  
17 questions and the panelists ahead of me have been excellent  
18 and covered a lot of the territory. I do want to thank the  
19 FTC for holding this.

20 I guess I come at this a little bit differently.  
21 One, I think a lot of the problems we're talking about here  
22 are problems inherent in class action litigation and not  
23 inherent with noncash settlements. And I want to be clear,  
24 when I think about this I'm not thinking about just

1 coupons. I'm thinking about the broad array of noncash  
2 settlements.

3 I start with one sort of basic theme which is a  
4 lot of the criticism on cash settlements are that they  
5 bring very little value to the individual class member.  
6 And that strikes me as kind of an odd thought when class  
7 actions, in essence, in many cases, are designed to allow  
8 people who have had very small individual injuries to  
9 aggregate them so you can overall as a society redress the  
10 problem.

11 So why are we surprised now that individual class  
12 recovery is relatively small? And Lisa, I thought, makes a  
13 good point when you say that we -- and I think this is the  
14 point you were trying to make -- that we're undervaluing  
15 injunctive relief. I think injunctive relief in a lot of  
16 these cases is very powerful.

17 I will say that I think in some cases we ought to  
18 have the courage to just have injunctive relief. I think  
19 too often we throw in noninjunctive, noncash parts to  
20 frankly dress it up so it can be settled. Class actions  
21 are very difficult to settle. There's a lot of divergent  
22 interests involved in the settlement. And while some  
23 people say that the defense counsel and the plaintiffs'  
24 counsel have similar interests, I'm not sure that's really

1 true.

2 A, the plaintiffs' counsel often have very  
3 diverse interests as has been pointed out when it comes to  
4 fees with defense counsel. In some cases that are  
5 vertical, defense counsel have very divergent issues.  
6 There are, frankly, lawyers who specialize in objecting to  
7 these cases and can bring an adversarial position to them  
8 so these are very, very difficult cases to settle.

9 And one of the things I'd like us all to think  
10 about is there is a societal value in settlement. You  
11 know, Your Honor, when you made the remark that as a judge  
12 what you think about is making the case go away as a  
13 defense lawyer reminded me of Renee Zellweger's comment in  
14 Jerry Maguire, "You had me with hello." We're trying to  
15 now make a case go away.

16 And one of the other problems with this is a  
17 fundamental premise -- well, look, class actions are  
18 neutral in the sense of what they do. The problem is with  
19 the case itself. If it's a meritorious case and a  
20 meritorious case where the individual harm is so small that  
21 it would have never made any sense to bring it in the first  
22 place, Rule 23 is a very good idea.

23 The problem is there are also cases where,  
24 frankly, there are no real meritorious individual claims

1 but the sheer weight of the size does produce an  
2 extortionary effect on the defendants who are not willing  
3 to bear the risk of going to litigate what they believe to  
4 be dubious claims but because of the sheer size the risk  
5 could virtually put them out of business.

6 So what does noncash do in this situation? Well,  
7 it provides some ability to deal with the divergent risks  
8 and their assessments. The plaintiffs assess their risks  
9 of litigation and the value of the settlement. The  
10 defendants do the same and often there is a large  
11 difference between those assessments.

12 What noncash permits the parties to do, and if we  
13 view settling these cases as having a societal value, what  
14 noncash does is often allow them to bridge those  
15 differences so that the plaintiffs feel that they are  
16 getting more value for the class. The defendants, frankly,  
17 feel that they're providing a lower cost.

18 I don't think you have to have this exclusively.  
19 You can combine injunctive, cash and noncash into  
20 settlements. You can include cy pres. But I think to try  
21 and criticize noncash and think about excluding it would,  
22 in fact, make the class action process even more difficult  
23 than it is.

24 The last thing I would just say on this is, with

1 all due respect to the courts, that I do think that there  
2 has to be some system within the process, maybe the parties  
3 at the court's direction retain as you do in mediation a  
4 master or someone like that.

5 But I think that we have to do a more aggressive  
6 job at really sorting out through the judicial process the  
7 adequacy of the settlement, keeping in mind the various  
8 factors that have been discussed here today.

9 But I would hope that as we deal with the  
10 difficulties of Rule 23 and its administration that we not  
11 limit to the parties in the litigation creativity in  
12 settling the class while at the same time retaining a  
13 vigorous standard of review for that settlement as to the  
14 consumers. Thank you.

15 MR. DELACOURT: Thank you very much, Phil. Our  
16 final panelist is Paul Kamenar. Paul is Senior Executive  
17 Counsel of the Washington Legal Foundation. WLF has a very  
18 active class action amicus program and has filed objections  
19 to class action settlements, most recently in the MDL music  
20 CD case, the magazine antitrust litigation and the Ninth  
21 Circuit's Microsoft case. Paul is also Clinical Professor  
22 of Law at the George Mason University School of Law. Paul.

23 MR. KAMENAR: Thank you, John. I want to also  
24 thank the FTC and the Georgetown Journal of Legal Ethics

1 for sponsoring this. We are a public interest law and  
2 policy center here in Washington, D.C. and we not only file  
3 amicus but we also file actual objections on behalf of many  
4 class members.

5 Our focus, though, is on fighting what we think  
6 are excessive attorneys' fees where class members get very  
7 little if anything but the attorneys reap millions because  
8 in a typical common fund case for every dollar that doesn't  
9 go to the attorneys that's an extra dollar that does go to  
10 the class members.

11 The Washington Post, I think, aptly characterized  
12 the class action system as "an extortion racket that needs  
13 to be fixed." And Leah described some of the examples of  
14 some of these abusive class actions.

15 Other chronic problems we see with the class  
16 action will be on later panels probably today are the  
17 adequacy of the notice, the class administrator's claim  
18 that oh, 90 percent of the class members received notice  
19 about the lawsuit but these are notices buried in the back  
20 pages of newspapers and magazines.

21 I'd like to say that they really say that 90  
22 percent are exposed to the notice, not actually receive it.  
23 And like I say, being exposed to these notices are like  
24 being exposed to carbon monoxide. You don't know about it

1       until it's too late. And it is too late to object or opt  
2       out of these settlements and you only have like a week or  
3       two to do that.

4               I'd like to discuss briefly a couple of pros and  
5       cons of some of the relief in the form of coupons, cy pres  
6       and tie it in a little bit to attorneys' fees. Generally  
7       thinking, money does seem preferable to coupons but if a  
8       coupon is for a consumer product you normally regularly  
9       buy, a \$20 coupon may be more valuable to the consumer than  
10      its cash equivalent of, say, \$10.

11              In other words, if it's a hundred percent markup  
12      that the company is giving they would settle for the \$10  
13      cash. You might say, well, I'd rather have the \$20 coupon  
14      because if I only get \$10 cash and have to buy a \$20  
15      product I have to come up with another 10 bucks in cash to  
16      do that.

17              I'd like to discuss briefly two cases to  
18      illustrate this phenomenon. One is the CD case you've  
19      already talked about and another one is one that we're in  
20      litigation right now. Actually, Phil is representing the  
21      defendant and that's the cosmetics settlement case that  
22      involves not providing coupons but for providing actual  
23      sample size or bigger cosmetics to those who purchased what  
24      are called high-end cosmetics from the department stores,

1 Estee Lauder, Clinique, Lancome over the years.

2 And there you're not getting a coupon but you are  
3 going to get the opportunity to get an actual cosmetic  
4 product that's valued between \$18 and \$25.

5 On the CD case, one little thing on background  
6 about that briefly that John didn't mention. Actually, the  
7 FTC got a settlement against the compact disc industry on  
8 May 10th, 2000, an injunction, a consent decree.

9 And amazingly, that same day, the first of 52  
10 class action suits were filed by the plaintiffs' attorneys.  
11 Well, obviously, there's no coincidence what was going on  
12 there.

13 That CD case actually involved two cases, one  
14 involving those who purchased the CDs through the CD club  
15 and they got vouchers that Judge Hornby, I think, alluded  
16 to which are 75 percent off the CD and then those who  
17 purchased the CDs at retail stores, there you got a check  
18 in the mail, as John indicated, and I think the check was  
19 for approximately \$13.80. And basically the class members  
20 were fairly happy with that.

21 But what is interesting there is that you had a  
22 cash fund of \$67 million depending upon pro rata how many  
23 people registered to get the claim. So if 67 people  
24 registered to get the claim everyone would get \$1 million

1 out of the \$67 million fund.

2 As it turned out, there was also a clause in the  
3 settlement agreement that said if too many people filed a  
4 claim such that each person would get less than \$5 the  
5 whole entire \$67 million would be transferred over to the  
6 cy pres fund. So there was kind of a game going on here  
7 and as it turned out, four million people did register and  
8 pro rata into \$67 million each got a check for \$13.80.

9 We objected on behalf of several class members.  
10 The cy pres also, we objected about the evaluation. Of  
11 course, the defendant and the plaintiffs' attorney wanted  
12 to blow up the value of the CDs, the Michael Bolton CDs,  
13 the Whitney Houston CDs to around \$17.38 apiece. We said,  
14 look that's got to be discounted considerably. I think  
15 Judge Hornby did discount them to about 20 percent off of  
16 that.

17 Now, if you look at that case and compare it to  
18 the cosmetic case that we're in court about now, as I said,  
19 it proposes to provide up to the class size is 38 million  
20 women who bought cosmetics over the last ten years and the  
21 settlement now allows you to get an opportunity but not a  
22 guarantee to show up at a department store one week in  
23 January in the middle of winter and pick up your product  
24 that you may not even use but -- and it's only when

1 supplies last, so you're not even guaranteed actually  
2 getting anything there.

3 Now, Phil argued and I kind of agree, that this  
4 suit was a meritless lawsuit. The plaintiffs' own expert  
5 said they only had about a 7 percent chance of winning this  
6 antitrust case. So the question is from the defense point  
7 of view, well, this is the best we can do. This is what  
8 the case is worth.

9 But from the consumer point of view you had this  
10 problem. So we objected in that case saying perhaps maybe  
11 the consumers might rather have a coupon where they could  
12 go in within a six-month period, redeem it as a voucher  
13 towards cosmetics they actually purchase as opposed to  
14 waiting in line as the plaintiffs' attorney said, there's  
15 going to be a stampede at the stores during this one-week  
16 period to get your free cosmetics and then you might not  
17 even get a guarantee that you'll get anything.

18 I understand that during the settlement  
19 negotiations one of the cosmetics companies was amenable to  
20 the coupons but interestingly, the plaintiffs' attorney  
21 said no, we don't want to have coupons because the courts  
22 won't like it and they said if we give you cash you're only  
23 going to get a 15-cents check. I don't know where he came  
24 up with that number, either.

1           But it seems to me that what was really going on  
2 here was that the plaintiffs' attorneys would like to have  
3 this product, which is valued at \$175 million at retail in  
4 order to tell the court, gee, our attorney fee request of  
5 only \$24 million is only like about 15 percent of this \$175  
6 million product fund and therefore that is within the  
7 ballpark of the 15 to 25 percent range.

8           However, if that product was reduced to an actual  
9 cash value, let's say the \$175 million worth of cosmetics  
10 is really only worth \$25 million in cold cash to the  
11 company, let's discount the cosmetics some 80 percent,  
12 well, the attorneys are asking for about \$25 million.  
13 Obviously, their fee would look too high if they took cash  
14 in that case, even though the consumer might want that \$25  
15 million. If you have two million filed claims they'll get  
16 \$12 checks. That may be preferable.

17           Solutions. How do we control this? Well, there  
18 was some talk about having special masters, waiting until  
19 the fee is redeemed -- I mean, the coupons are redeemed  
20 before the fees are paid.

21           One actual example that the courts are using is  
22 paying the attorneys' fees in coupons. A couple of quick  
23 cases. One where a securities settlement ended in both  
24 cash and stock and the court said that if counsel, quote,

1 expressed faith and confidence in the value of the  
2 settlement for their clients it's not unreasonable to  
3 require them to some extent to stand equally with  
4 plaintiffs in sharing the distribution in kind and awarded  
5 part of the fee in stock warrants. The airline travel case  
6 awarded \$200,000 in nontransferable credit to the law firm  
7 for air travel. They do a lot traveling so I guess they  
8 could use it. A cruise line case, the court in Florida  
9 awarded a chunk of the attorneys' fees in these vouchers  
10 for cruise line trips.

11 And finally, with respect to statutory solutions  
12 you have in Texas for the first time, any case filed after  
13 September 1, 2003, in Texas, a class action case, says in a  
14 class action if any portion of the benefits recovered for  
15 the class are in the form of coupons or other noncash  
16 common benefits, the attorneys' fees awarded in the action  
17 must be in cash and noncash amounts in the same proportion  
18 as the recovery for the class.

19 And currently before Congress is the Class Action  
20 Fairness Act of 2004 and a couple of provisions there  
21 require that the fees, quote, attributable to the award of  
22 coupons shall be based upon the value the class members of  
23 the coupons that are redeemed and therefore there's some  
24 kind of a check there in order to determine whether the

1 fees should be reasonable. And certainly courts can do  
2 that by waiting until the coupons are redeemed.

3 Another is to use the lodestar fee where you look  
4 at the lodestar rate, the hourly rate that the attorneys  
5 are making rather than a percentage of this overinflated  
6 coupon settlement.

7 In conclusion, courts should carefully scrutinize  
8 all these class action cases, paying particular attention  
9 to settlements that provide for coupons and other  
10 nonmonetary relief to ensure that the settlement is fair,  
11 reasonable and adequate. And courts should also ensure  
12 that attorneys' fees in coupon cases are not excessive,  
13 perhaps unless the special master, as Phil mentioned, in  
14 fact, there is a special master in the cosmetic case right  
15 now, and to make sure that the fees are not greater than  
16 the lodestar amount. Thank you.

17 MR. DELACOURT: Okay. Paul, thanks very much.  
18 And I'd like to thank all the panelists for staying within  
19 their time. Thanks to that we do have a good bit of time  
20 here for questions and answers.

21 I'd like to start off with a first question that  
22 ties back to Chairman Majoras' introductory remarks. She  
23 mentioned that one of the big purposes of this workshop, we  
24 have kind of a general objective of informing ourselves

1 about the class action mechanism and what are the issues  
2 and what can we do to improve the class action mechanism.

3 But a more specific objective is what can the FTC  
4 do? Which of these problems can be addressed by the FTC  
5 and specifically for this panel, what can the FTC do about  
6 some of the problems with coupon compensation and non-  
7 pecuniary relief that we've identified?

8 So I guess I would break that down into two more  
9 specific questions. One is the way we've addressed this  
10 problem so far is by filing a series of amicus briefs. And  
11 my question would be are there certain types of coupon  
12 compensation settlements that should raise red flags, that  
13 we should be particularly concerned about and focus on?

14 And second, should we be taking other steps?  
15 Should we be looking beyond the amicus filings we've been  
16 doing and look to other ways of remedying the problem?  
17 Chris, would you like to start off?

18 PROF. LESLIE: Sure. It seems to me what you  
19 look for for red flags are the restrictions that you see on  
20 many settlement coupons. So you look for  
21 nontransferability. That's a huge red flag. You look if  
22 there are product restrictions. You look if there is an  
23 expiration date that seems relatively short, especially if  
24 it's a durable product.

1           But I think more importantly what we need is more  
2 data. We've got a lot of anecdotal data of coupon  
3 settlements that don't look so good. We've got some  
4 anecdotal data of coupon settlements that were fine. What  
5 we don't have is any systematic collection of data whereby  
6 we can actually look coupon by coupon and see what  
7 redemption rates are and try to get a sense of what are the  
8 restrictions in settlement coupons that are associated with  
9 low redemption rates so we can have an empirical basis for  
10 figuring out what the real red flags are.

11           Currently, there's no requirement that there be  
12 reporting of redemption rates or the coupons. And it seems  
13 to me that that's the first step so that we can  
14 systematically understand settlement coupons and try to  
15 separate the good from the bad.

16           MR. DELACOURT: Do any of the panelists have  
17 thoughts on that? Phil?

18           MR. PROGER: Well, I think first and foremost,  
19 you can do what you're doing, having a workshop like this  
20 and commenting in amicus in certain cases I think it's very  
21 important.

22           I think one thing you could do, and I think that  
23 this workshop starts that process, is to take a step back  
24 and try and think through what the problem is and try and

1 properly analyze what the problem is.

2 With all due respect to those who want to look at  
3 redemption rates, transferability, counsel taking it, they  
4 may be appropriate. I'm not saying they're not but I'm not  
5 sure that we're really focusing on the cause. I think we  
6 may be focusing on a very small part of the effect, the  
7 end.

8 And I think we need to look at the more  
9 fundamental questions under the system whether there is  
10 adequacy, reasonableness and fairness in this process and  
11 whether or not consumers are being protected. And to go  
12 back to a point I made earlier, whether we maybe should be  
13 looking at less what did this consumer receive in this case  
14 and more what was the overall relief to society? What was  
15 the injunctive relief? What was the cy pres? And what  
16 were the benefits from that?

17 MR. DELACOURT: Lisa, do you have a comment?

18 MS. MEZZETTI: I don't agree with everything  
19 you're saying but the plaintiffs' side is not going to run  
20 away from that any faster than the defense side. So  
21 looking at those types of analyses are probably not a bad  
22 thing and the FTC may be, maybe with other groups, the  
23 right entity to do those types of analyses.

24 I do agree with Chris that looking at coupon-only

1 settlements and looking at the restrictions on those  
2 coupons is very important. I have already said using each  
3 coupon settlement as an example for the next, I think, is  
4 very dangerous.

5 If we're going to collect this data we have to do  
6 it very carefully and judges and the FTC and anyone else,  
7 academics who are going to use it in addition to the  
8 parties and the courts need to know that there has to be  
9 some true version of comparison among the cases.

10 Having said that however, it will show why  
11 certain coupons are used dramatically. And I want to make  
12 a correction to one misstatement I made during my remarks.  
13 I talked about the airline coupon settlement and the  
14 percentages used there. What I should have said is that is  
15 an example of businesses using coupons.

16 And the statistics that I've read indicate that  
17 indeed when businesses are the class members well over 80  
18 percent, the number I quoted, are used, not necessarily in  
19 just the airlines case but in business class member cases  
20 in general.

21 In a good consumer case, one where a coupon  
22 allowed -- although litigation was involved with only one  
23 product, the coupon allowed purchase of any product in any  
24 store in a nationwide department store, over 99 percent of

1 the coupons were used.

2 So there are coupons out there that get used and  
3 getting data on why, I agree, is a good idea. But we need  
4 to compare apples to apples all the way through,  
5 historically.

6 MR. DELACOURT: Paul, did you have a comment?

7 MR. KAMENAR: Well, I think that in terms of  
8 trying to get this information I suggested in my written  
9 comments that all class actions be filed or registered on  
10 an FTC web site.

11 Right now, many class actions have their own web  
12 site but I daresay everybody in this room is a class member  
13 of two or three class actions and you don't even know about  
14 it. You don't have the time to surf the web and go through  
15 every product you purchased, gee, am I a member of a class  
16 action?

17 On Saturday I got in the mail, some of you may  
18 have a notice, in a case dealing with life insurance and  
19 typically it's in this microprint of 40 pages and so forth  
20 right here. The point size is about 7-point or 8-point.  
21 But the point I'm trying to make is if the FTC had a web  
22 site where all the web sites of the class actions were  
23 there with a hotlink to those cases, everybody would at  
24 least have better notice.

1           Number two, since the attorneys and the parties  
2           have to file those things and are required to file on their  
3           own web site for that case that, too, can then be available  
4           to everyone to monitor what is going.

5           And finally, the judges should require that the  
6           fees don't be paid until the coupons are redeemed. If  
7           there's a 99 percent redemption rate like Lisa mentioned,  
8           great. You attorneys did a good job of getting good  
9           coupons. If the redemption rate is less than 1 percent  
10          because of the restrictions, why should the attorneys get  
11          the value of the whole amount?

12          So that kind of information, I think, should be  
13          on a centralized web site so that way for academics,  
14          practitioners, objectors we have a way to find this rather  
15          than have a hit-or-miss system.

16          MR. DELACOURT: Judge Hornby.

17          JUDGE HORNBY: I think the more the FTC can be  
18          involved in the actual litigation as an amicus or otherwise  
19          the better because at least from the judicial point of view  
20          we think we know whom you represent just like we do for  
21          state attorneys general. We're less certain often in terms  
22          of objectors. We're not sure of the parties when they've  
23          settled who the presenting -- if they have an FTC role is a  
24          great help to the judge who's reviewing a proposed

1 settlement.

2 MR. DELACOURT: All right. I'm going to turn now  
3 to a question from the audience. This one was submitted.  
4 The question is, if baseless class actions are filed, why  
5 don't defendants take a principled stand and fight them  
6 with motions to dismiss, et cetera instead of settling to  
7 save litigation costs? In other words, don't pay the guy  
8 with the squeegee.

9 So I take that one as being directed to the  
10 defense bar. So maybe, Phil, if you want to take the lead  
11 on that and then others can chime in?

12 MR. PROGER: Actually, not particularly. Well,  
13 look, I mean, I understand the point but you have to deal  
14 with reality in life and the defendants aren't the only  
15 ones in sole control of the situation. In the case that  
16 Paul mentioned the cases were filed in state court. There  
17 is under the state court procedure the equivalent of an  
18 MDL.

19 The judge is a very competent, intelligent person  
20 but from the very beginning she told one, the panel, that  
21 she didn't want the case; two, she had never tried a class  
22 action; three, she had never had a competition case.

23 Before discovery was commenced the court ordered  
24 the parties into mediation, ordered the parties to retain a

1 mediation expert which the parties did from one of the  
2 firms that provided an individual who is a former state  
3 court judge. Mediation lasted 18 months and there was  
4 enormous pressure, frankly, on both plaintiffs and  
5 defendants to settle the matter, the court made it very,  
6 very clear.

7 A principled approach, frankly, would have cost  
8 more than a settlement. A principled approach would have  
9 cost consumers more than the settlement. And at least in  
10 my view the case had no merit and the plaintiffs have been  
11 fairly forthright in the settlement review, which by the  
12 way, there are numerous objectors including 13 state  
13 attorney generals. And so this is fairly vigorously  
14 contested.

15 I think, again, when we start isolating the  
16 particularities of an individual settlement and we do so  
17 without the context of the value and the merit of the  
18 underlying claim you get into dangerous territory.

19 There is, however, injunctive relief and the  
20 injunctive relief, I believe, is very beneficial to  
21 consumers and plaintiffs' counsel are entitled to some  
22 benefit for taking on a difficult case and bringing the  
23 case home where overall, I believe, consumers benefit from  
24 the injunctive relief.

1           But I don't think defendants always have the  
2           ability to decide to go forward and just contest it. By  
3           the way, there were motions to dismiss. There were summary  
4           judgment motions. They haven't been ruled upon.

5           MR. DELACOURT: Does anybody else have a comment  
6           on that one? Professor Leslie?

7           PROF. LESLIE: I'd like to focus on this  
8           injunctive relief notion because it seems to me it's a  
9           little bit of a red herring at a certain level, that when  
10          the class counsels say look at what we're bringing, it's  
11          injunctive relief and we'd like these high attorneys fees  
12          they try to justify it by saying but we're also bringing  
13          all these coupons and look at the face value of the coupons  
14          are so high.

15          And then when you say but the coupons aren't  
16          worth very much money, the response is yeah, but we're  
17          getting injunctive relief, too. They're bouncing back and  
18          forth between them.

19          The coupons often are worthless such as in the  
20          case of Schneider v. Citicorp Mortgage, which is just going  
21          down right now where the settlement coupons are the ones  
22          that are for \$100 but you can't aggregate it so you can't  
23          use the \$500 coupon that's available. To use it you have  
24          to get a new mortgage or refinance your mortgage within two

1 years, which would require a great loss of money because  
2 you'd have to refinance at a higher rate in order to use  
3 the coupon. The coupons are nontransferable at a public  
4 sale.

5 So the response might be yeah, but there's  
6 injunctive relief, too. The injunctive relief that the  
7 attorneys are trying to justify their attorneys' fees on  
8 are if HUD adopts a new rule, Citicorp will follow it. And  
9 actually, at court the judge asked, what do you understand  
10 -- to the defense counsel -- what do you understand that  
11 the provisions of the settlement require your client to do  
12 that they otherwise don't have to do? The response?  
13 Nothing.

14 So I just want to make sure that we're not buying  
15 this notion of there's coupons and injunctive relief  
16 because it's possible that neither one of them gives a  
17 whole lot of value to the class and we still run the risk  
18 that the settlement coupons have a high face value that's  
19 being used to justify higher attorneys' fees than are  
20 warranted.

21 MR. DELACOURT: Leah, did you have a comment on  
22 that?

23 MS. LORBER: I wanted to follow up on the  
24 injunctive relief argument a little bit. I think there is

1 a basic policy controversy over whether or not you want  
2 plaintiffs' lawyers in class action lawsuits setting policy  
3 and regulating businesses or if you want the government  
4 agencies who are trained in doing the regulation and are  
5 familiar with the information that is needed to regulate  
6 the companies and the industries doing the regulation.

7 A lot of the class action lawsuit settlements or  
8 if there's a jury award this all comes up in an adversarial  
9 process where there's very little opportunity to collect  
10 all the information that you need to make a good public  
11 policy decision about what's best for the country as  
12 opposed just to what's best for the particular litigants  
13 and the attorneys on both sides and the company in the  
14 particular case.

15 Also, you get, and this I'm sure is going to be  
16 discussed at length tomorrow but you can get contradictory  
17 results if you've got class action versus state attorney  
18 general regulation versus government agency regulation. So  
19 I can see that injunctive relief is appealing in some cases  
20 but I don't think it's a blanket panacea for everything.

21 And just to follow up really quickly about the  
22 companies why don't they settle -- or excuse me, why don't  
23 they fight the cases instead of settling them, we wish the  
24 companies would not just because they would pay us to

1 litigate them but also because you're just encouraging more  
2 and more lawsuits to happen if you're going to settle stuff  
3 that isn't worth a suit in the first place.

4 I mean, you look at Madison County, Illinois,  
5 where there's this huge class action lawsuit industry going  
6 on and there's just this little industry there where the  
7 defense attorneys are charging what they charge in New York  
8 and D.C. to litigate things in rural Illinois and it's just  
9 encouraging the growth of a problem.

10 MR. DELACOURT: If we could have one comment from  
11 Judge Hornby and then one from Paul, we'll wrap up on this  
12 question.

13 JUDGE HORNBY: It is important to distinguish  
14 between distaste for attorneys' fees and distaste for the  
15 small amount of a settlement or distaste for injunctive  
16 relief.

17 Typically, we get them altogether and so we're  
18 unhappy because there's coupons plus attorneys' fees or  
19 small settlement plus attorneys' fees but as I think it was  
20 Phil Proger pointed out the whole point of class actions is  
21 to permit the small claims to be brought. It's a separate  
22 question from the attorney fee issue. Even an individual  
23 can get injunctive relief, may or may not get attorneys'  
24 fees. That too, is a separate issue. I think it's

1 important not to collapse these in our discussion.

2 MR. DELACOURT: Paul?

3 MR. KAMENAR: Yeah, just briefly, I think  
4 actually, Your Honor, with all due respect, I think there  
5 is a connection there to collapse the two because the fees  
6 are such that they are able to get higher fees for very  
7 little value to the class.

8 Just one case in the paper on Saturday, the  
9 Halliburton securities class action case, federal judge  
10 there in Texas rejected the settlement. You would get up  
11 to 62 cents for each hundred shares of stock you own.  
12 That's less than half a cent a share.

13 And one of the lead plaintiffs said, we don't  
14 want this proposal. And it quoted their attorney saying,  
15 "It conferred no benefit on anyone but the lawyers. We're  
16 not going to become poster children of the ridiculous  
17 settlement." So this is what Leah was kind of saying is,  
18 "hey, just say no."

19 One final thing was an injunctive case was the In  
20 Re Magazine Antitrust Litigation case. Magazine prices  
21 were being too high on your subscriptions. There was just  
22 an injunction only, not even a free magazine. And the  
23 court there in the Southern District of New York this year,  
24 earlier this year said, look, you just got an injunctive

1 relief that was minor.

2 It didn't provide a substantial benefit on the  
3 class and therefore you attorneys when you're trying to use  
4 what's called a common-benefit system as opposed to a  
5 common fund where you get your fees since there was no  
6 substantial benefit, your fees are hereby denied entirely.

7 And we think judges should start cracking down on  
8 this and that might prevent some of these kind of worthless  
9 results for consumers.

10 MR. DELACOURT: I'm going to take the moderator's  
11 prerogative now and combine two questions. Both of them  
12 will be directed to Judge Hornby. To what extent in the  
13 approval process does the court have access to a neutral  
14 economic report evaluating the settlement, especially the  
15 nonmonetary aspects it contains?

16 And a related question is why don't judges more  
17 often appoint experts under Federal Rule of Evidence 706 to  
18 assist in valuing coupons and other nonmonetary benefits in  
19 a class settlement?

20 JUDGE HORNBY: Well, those are related.  
21 Automatically, you don't have any access. In other words,  
22 it's not presented to you just off the bat by definition  
23 because instead you're being presented with expert reports  
24 that have been put together by the plaintiffs' or the

1 defendant's lawyers.

2           There is appointing authority under Rule 706 and  
3 I note that the 2004 edition of the Complex Litigation  
4 Manual suggests that courts may have the authority to  
5 appoint a special master to help evaluate settlements.

6           I think you have to remember the context in which  
7 these things come up. The litigation has been pending  
8 usually for several years and the court is presented with a  
9 complex settlement proposal that is defended by the lawyers  
10 in written submissions that are both legal argument and  
11 probably affidavits and analyses of various sorts.

12           Hearing is held. If the court is to appoint its  
13 own special expert there has to be a procedure set up for  
14 first finding an independent expert. That having been done  
15 then new studies have got to be undertaken, perhaps  
16 empirical studies or whatever. There will be expense  
17 involved and there will be delay and so we're probably  
18 talking about a very considerable delay period after the  
19 litigation has already been pending for a long while.

20           So all of a judge's instincts are to the  
21 contrary, maybe not correctly so, but they're to the  
22 contrary in the sense of here is a lawsuit that's been  
23 pending. It's time to resolve it. If I now have to  
24 consult with the parties about getting an independent

1 expert how long will that take? How long will the expert  
2 take? We probably ought to do it more but bear in mind it  
3 will mean these things will take even longer to resolve  
4 before the consumer does get a payback.

5 There have been efforts made. Justice Breyer's  
6 been involved, I know, with setting up panels of  
7 independent experts that courts can select from. Probably  
8 that ought to be given more attention. The money will come  
9 out, of course, of the proceeds that are involved as to  
10 what takes place because courts don't have any independent  
11 authority on their own to pay such fees but we ought to do  
12 it more, probably.

13 MR. DELACOURT: Lisa, did you have a comment on  
14 that?

15 MS. MEZZETTI: The expense of these types of  
16 masters is always a concern because the court system cannot  
17 accept, probably, the expert costs, and imposing it on the  
18 parties means that, in fact, you're imposing it on the  
19 class members.

20 It does not mean, however, that it shouldn't be  
21 used and in the appropriate case I have seen it used very  
22 well. And in that circumstance it was another example of  
23 the system working because the court said I need more  
24 information and I need some analysis, not unlike the

1 analysis that Professor Leslie is looking for on data and  
2 information. It's part of the system working.

3 And, in fact, I noted that Paul started his last  
4 comment about a settlement that you found unacceptable by  
5 noting that the court found it unacceptable and did not  
6 approve the settlement. So the system works and it works  
7 for coupon settlements and it works based on data and it  
8 works based on all of the information provided to the  
9 court.

10 And as a plaintiffs' counsel I doubt that Phil  
11 will disagree with me. I can tell you this: when a court  
12 asks me for information I get it and I give it to the  
13 court. So everything that the judge has talked about is  
14 true in terms of delay and cost but it doesn't mean that in  
15 the right case it shouldn't be done.

16 MR. DELACOURT: I think we have time for one more  
17 question if everyone can give a relatively quick response  
18 to this one. It's actually one of the more challenging  
19 issues that the FTC faces when we are evaluating a  
20 settlement, a coupon settlement and trying to determine  
21 whether we should file an amicus objection or not.

22 And the question is when you face a case where  
23 the underlying harm is questionable or maybe it's very  
24 minimal and the coupon that is proposed by way of relief

1 also provides minimal relief, is that a situation that we  
2 should be concerned about or is that appropriate? Do  
3 claims of low value merit coupons of low value as a  
4 solution or is there a problem with approval of such  
5 settlements going forward? Judge Hornby?

6 JUDGE HORNBY: I think it's important to  
7 distinguish between small injury and small likelihood of  
8 injury. Just because an injury is small doesn't mean it  
9 doesn't deserve redress. The principle of our system is  
10 that every injury does get some kind of redress. But if  
11 it's a small likelihood of injury then you're weighing the  
12 frivolous versus the meritorious lawsuit and that ought to  
13 pay an important role.

14 MR. DELACOURT: Phil?

15 MR. PROGER: I think that's a very good point and  
16 I think one of the problems we have in class actions for  
17 the courts and the parties is that often there's no easy  
18 way to separate that out and there's no efficient way to do  
19 it.

20 And so when we talk about these settlements and  
21 we talk about the benefits, it is an adversarial system  
22 between the defendants and the plaintiffs and the objectors  
23 and the opt-outs and the court.

24 Hopefully -- I don't know if I'd go as far as

1       you, Lisa, to say the system is working. As a matter of  
2       fact, I'd probably say it's not but in this process there  
3       certainly is the mechanism to try and reach what is a fair  
4       resolution.

5                I want to add one other thing from the parties'  
6       standpoint. We need to understand that parties in  
7       litigation should have the right to settle the cases and to  
8       now put an additional burden on them beyond what Rule 23  
9       provides of more litigation, more proof on some of these  
10      issues, I think, is going to create more expense, more  
11      problems.

12               Maybe we need more vigorous use of masters.  
13      Maybe what we need to do is in some state courts you know  
14      that only certain judges handle complex cases. Maybe in  
15      the judicial system, federally and state, we can get judges  
16      who are interested in this area and want to do only class  
17      actions. I don't know. I don't know if that's a good  
18      solution but I hope we don't leave this area without  
19      keeping in mind that the parties do have a right to settle  
20      their cases.

21               MR. DELACOURT: Okay. Everyone wants a taste of  
22      this one. Leah, what do you think?

23               MS. LORBER: Just real quickly, at first glance  
24      it sounds like a good idea: frivolous claims get coupons

1 that aren't worth much but to get there you have incredibly  
2 huge transaction costs, large defense costs, large  
3 imposition on the court's time. You're slowing claims of  
4 people who are legitimately injured who may have to be  
5 backed up behind these class action suits that are taking a  
6 while. Even if they settle, they're still taking several  
7 years again in court, taking the court's attention and  
8 resources.

9 In turn, these large transaction costs turn into  
10 things like increased consumer prices, decisions to pull  
11 products from the market because they're being the target  
12 of class action lawsuits, the loss of money that would go  
13 into R&D, all kinds of things that have an effect on  
14 society. So overall, I would say it sounds like a good  
15 idea or a cute idea but it's not something that I'd be in  
16 favor of.

17 MR. DELACOURT: Lisa and then Paul and if you  
18 could keep it brief, please.

19 MS. MEZZETTI: I agree with Phil that the  
20 parties, because of the professionalism of their counsel,  
21 will always seek appropriate results. When parties are not  
22 acting professionally then those settlements get weeded  
23 out.

24 So given the judge's distinction between a

1 frivolous claim and a small injury, and recognizing that  
2 the parties are seeking to equitably and appropriately  
3 reach a resolution with the help of the court, I think we  
4 can reach good settlements and sometimes those are small  
5 coupons.

6 MR. DELACOURT: Okay, Phil, you get the last word  
7 -- I'm sorry, Paul.

8 MR. KAMENAR: Just briefly, I mean with respect  
9 to small claims there used to be a principle in the law, de  
10 minimis non curat lex, the law does not consider itself  
11 with trifles. The class action takes that principle and  
12 discards it and now makes these little trifles to be class  
13 actions.

14 With respect to the merits of the case,  
15 meritorious cases, I think judges should look at these very  
16 carefully. As Phil said in the cosmetics case, there were  
17 motions for summary judgment that were pending. The  
18 plaintiffs' attorneys said, their own expert said that we  
19 only have a 7 percent chance of winning.

20 The court should decide those motions right off  
21 the bat rather than forcing the defendants to settle these  
22 things where the attorneys, sad to say, or for the  
23 plaintiffs they like to say, they get all the money out of  
24 this and the consumers get very little.

1 MR. DELACOURT: Okay. Well, thank you very much  
2 to everyone. (Applause.) And we're going to be taking a  
3 short break right now and we'll reconvene at 11:00 for a  
4 panel on insuring that settlements are fair, reasonable and  
5 adequate.

6 (Whereupon, a short recess was  
7 taken.)

8 MR. FRISBY: My name is Robert Frisby. I'm an  
9 Assistant Director in the FTC's Bureau of Consumer  
10 Protection, Division of Enforcement and I'll be moderating  
11 our second panel of the day which is on tools for ensuring  
12 that settlements are fair, reasonable and adequate.

13 We plan to cover the role of third-party  
14 objectors and amicus filers as well as the impact of the  
15 Rule 23 amendment allowing parties to appeal orders  
16 granting or denying class certification, the recent Rule 23  
17 amendment addressing second opt-outs and the more general  
18 question of whether bad cases lead to bad settlements and  
19 the implications of this.

20 Finally, we'll close with a discussion of some  
21 common fund case issues involving the practice of  
22 determining class counsel fees separate and apart from the  
23 common fund.

24 We have assembled a very distinguished group of

1 panelists for today's panel number two, including the  
2 Honorable Diane Wood of the United States Court of Appeals  
3 for the Seventh Circuit in Chicago; the Honorable Ann  
4 Yahner, Administrative Law Judge in the District of  
5 Columbia Office of Administrative Hearings; Professor  
6 Samuel Issacharoff, Harold R. Medina professor in  
7 procedural jurisprudence, Columbia Law school; Brian  
8 Anderson, a partner at O'Melveny & Myers; Neil Gorsuch, a  
9 partner in Kellogg, Huber, Hansen, Todd & Evans; and  
10 finally Arthur Bryant, executive director of the Trial  
11 Lawyers for Public Justice.

12           You will find much more detailed information  
13 about the panelists in your workshop folders and on the  
14 Commission's workshop web page. We plan to spend about 60  
15 minutes talking about the issues of the panel and then  
16 we'll spend about ten minutes or so on questions from the  
17 audience.

18           If you all have a question, please write it down  
19 on one of the cards in your folder and hold it up so that  
20 our staff can collect the cards and we'll make sure we ask  
21 as many of those questions as we can at the end of the  
22 panel.

23           As I said, our first sub-topic of the panel will  
24 be the role of third-party objectors and amicus filers and,

1 Arthur, would you mind starting off with some background  
2 discussion about the role of objectors and some of the  
3 value they provide and costs they may impose?

4 MR. BRYANT: I'd be happy to. First, let me say  
5 that I have an assigned role at this particular workshop.  
6 I actually have been class counsel in a wide range of class  
7 actions. I've actually consulted with and advised  
8 defendants in some class actions but just about eight years  
9 ago we launched a special project to object to class action  
10 settlements that we thought were abusive. So I've been  
11 assigned the role here of representing objectors.

12 I will say that it is true that before we started  
13 objecting to class action settlements I did not have an eye  
14 patch, I did not need a cane, and you can draw your own  
15 conclusions from that. It was a meeting of plaintiffs' and  
16 defense counsel that I attended.

17 I will say that part of what the role of  
18 objectors and amici becomes very important in class action  
19 settlements because of some structural problems in the way  
20 class actions are structured. And let me mention three in  
21 particular.

22 The first is that when you settle a class action,  
23 of course, the really fair, reasonable, adequate settlement  
24 should be an appropriate discounting of your likelihood of

1 success when you go to trial. That's not just true in  
2 class actions but in all litigation. It's sort of what  
3 could we get if we get to trial discounted by the  
4 reasonable likelihood of that and the value of the case.

5 One structural problem that affects some  
6 settlements in class actions -- and I have to say at the  
7 outset here, of course, I don't know exactly how the FTC  
8 defines consumer class actions and how it determines which  
9 those are. So I may be talking about some that don't  
10 involve that.

11 I'm thinking of the Bridgestone/Firestone  
12 litigation. But the Bridgestone/Firestone litigation is  
13 sort of the prime example of this structural problem which  
14 is the Seventh Circuit came out and said you cannot certify  
15 this case as a class action for litigation purposes  
16 anywhere in nation. And then the case was settled as a  
17 class action nationally in Texas state court.

18 The structural problem with that is of course the  
19 plaintiffs' counsel don't really have the full threat of  
20 what they could get if they went to trial if everyone knows  
21 they can't ever go to trial. And that was the problem in  
22 that litigation. But it's also a problem that's  
23 increasingly coming up much more, frankly, in mass tort and  
24 large consumer class actions than the cases where small

1 dollar amounts are involved.

2 The second structural problem that sort of cries  
3 out for the need for often objectors and amici is, as the  
4 judge on the last panel talked about, when we come in it is  
5 that the deal has already been reached. The plaintiffs'  
6 counsel and the defense counsel are going to the judge, who  
7 often is thinking, I just want to get this off my docket,  
8 and saying we've got a deal. We're all happy. You should  
9 be happy. We can go home.

10 And we are the ones who come in and say, now just  
11 hold on and everything, which explains the joyous reaction  
12 of all the parties to our arrival. And the role we play  
13 there is in some ways helpful to what Judge Hornby, I  
14 think, was talking about is the third structural problem.

15 And this is something I hope the FTC and the  
16 Federal Judicial Center, among others, would address is  
17 that many judges aren't prepared to play the role of the  
18 fiduciary and evaluate the class action. They may not have  
19 even had a class action in front of them. So I mean this  
20 presentation, this panel is entitled "Tools for Ensuring  
21 that Settlements are Fair, Reasonable and Adequate."  
22 Objectors are one such tool. I've been called a tool by a  
23 lot of people but that's a little different. (Laughter.)

24 Now, the amici and the objectors can play that

1 role, but you have to understand, when we go in the deal's  
2 already done. The only question is whether it's going to  
3 be approved and often it is not only a case that the judge  
4 is looking to get rid of but almost always, and there's a  
5 couple of exceptions, it's a case where the judge has  
6 already reviewed the proposed settlement, approved it  
7 preliminarily as being within the range a reasonable person  
8 could approve finally, and ordered notice out to the class.  
9 That's usually how we found out about it.

10 So the judge is already partly committed to the  
11 settlement in addition to the parties being very committed  
12 to the settlement. And we are viewed as problematic  
13 troublemakers. And at the same time there are some very  
14 important roles that objectors can play.

15 First, obviously, we can focus the judge's  
16 attention on problems in the settlement that neither the  
17 plaintiffs' nor the defense counsel want to call the  
18 judge's attention because they want this thing approved.

19 Second, we can force the settling parties to  
20 therefore justify these weaknesses in the settlement or not  
21 but at least try to justify them.

22 And third, we can therefore either prompt an  
23 improvement in the settlement's terms of the refusal to  
24 approve a settlement, and the settlement is disapproved and

1 the case goes back to litigation.

2 Now, I will say I was asked to talk a little bit  
3 at the start about costs and benefits of objectors and so I  
4 told you the benefits. The costs, in terms of amici, I  
5 think the costs are relatively minimal. I mean, it's a  
6 little time. You have to read their brief, consider the  
7 arguments, the settling parties respond to the argument  
8 perhaps in the brief but there's not a lengthy delay caused  
9 or anything by amici.

10 In terms of objectors, however, well, we not only  
11 can delay the resolution but because we can act in some  
12 respects like parties and most particularly we can seek  
13 discovery, we can challenge the proceedings in the way  
14 they're being structured and what's being done and we can  
15 appeal we can dramatically delay the resolution of the  
16 case.

17 Our impact on the timing can be dramatic and we  
18 also can cost the defendant or the class counsel or both a  
19 significant amount of money. And that really gets to what  
20 I think is a real problem. I will say it's our goal when  
21 we get in there, there are some settlements where we're  
22 just looking to kill the deal, because, for example, I'll  
23 give you one that's in Mississippi right now.

24 There's a Federal District Court in Mississippi

1 where there's a proposed settlement. The terms of the  
2 settlement are, and I'm not going into the dollars amounts  
3 because from our perspective they're interesting but don't  
4 really matter to this point, the terms of the settlement  
5 are everybody in the settlement, in the class gets  
6 compensatory -- an amount of money that they categorize as  
7 a settlement of compensatory damages and an amount as  
8 settlement -- I'm sorry, amount of money they characterize  
9 as punitive damages.

10 Anybody who opts out is free to seek compensatory  
11 damages but is not free to seek punitive damages and  
12 because they opted out of their compensatory damages is not  
13 allowed to get a portion of the punitive damages  
14 settlement. So structurally it's just wacky and we're  
15 objecting to that.

16 There's another settlement, for example, right  
17 now in Maryland we objected to successfully six months ago.  
18 It ended up with the deal being \$108,000 total to the  
19 class, \$13 million to class counsel. We objected, the  
20 settlement was disapproved.

21 We are now going back in because they've  
22 negotiated and they've reached a new deal. The class will  
23 get \$12.5 million -- that's a lot better than \$108,000 --  
24 but the key part of the negotiations were class counsel has

1 the right to still recover \$12.5 million themselves for  
2 getting this \$12.5 million for the class.

3 Now, I will say, even there, the dynamics you  
4 have to understand is we are fighting both Bell Atlantic's  
5 counsel who favored the first settlement and favored the  
6 second settlement and the class counsel who, of course,  
7 favored each of the settlements that would get them \$12.5  
8 or \$13 million. And we are the ones, as well as some  
9 others, who are causing trouble.

10 And yes, we have already in that case, for  
11 example, cost the defendants an increase in payout from  
12 \$108,000 to \$12.5 million minimum. So if we are successful  
13 we end up costing them money not so much for our fees  
14 because we rarely seek fees but much more for paying the  
15 class.

16 But also, we will cost class counsel fees because  
17 even in this litigation as just one example, because we are  
18 objecting to them getting a 50 percent fee in the entire  
19 class action, another \$12.5 million. And if we succeed the  
20 class will get much more and they will get much less or the  
21 settlement won't be approved.

22 The problem is, and I think it's a serious  
23 problem, I can't just paint objectors as these pure, lily-  
24 white people doing just the public's good because there

1 really are, to overstate the extremes, two different kinds  
2 of objectors.

3 There are a set of objectors that really are  
4 motivated by a desire to improve the settlement for the  
5 class, to protect the class members from having an unfair  
6 deal made. But there is another type of objector and there  
7 is a type of objector that understands that if they hold up  
8 this deal they can get paid off to go away, period.

9 I first heard the term of them being called  
10 professional objectors and I took it a little personally.  
11 What am I? An amateur? (Laughter.) But their motive is  
12 dramatically different. They're looking to get paid to go  
13 away. And I will tell you as class counsel in cases we've  
14 had to deal with people like that.

15 And the most dramatic example I had of this  
16 problem -- well, I was going to say there are two types  
17 objectors -- and none of them announce that they're the  
18 second type. Right? They all pretend to be, and some of  
19 them probably are in their heads even though I think  
20 they're not, people out just to make a better deal for the  
21 class.

22 But I will tell you sort of where an example of a  
23 real education took place. We went down to object to a  
24 proposed class action settlement in Mississippi Federal

1 court before, actually, a judge who's now become famous,  
2 Judge Pickering.

3 And the settlement provided, basically it was for  
4 people who were in mobile homes, primarily, on forced-  
5 placed insurance. I don't remember the precise dollar  
6 amounts but let's say the claims were worth a couple of  
7 thousand dollars per person. No one was going to sue  
8 individually except for maybe punitive damages to  
9 Mississippi.

10 And the settlement provided that each class  
11 member get, let's say, \$500 or \$1,000 per person and that  
12 it was no opt-out as to punitive damages. You could not  
13 opt out and seek punitive damages separately. You got  
14 \$1,000; that was the end of it.

15 And so we went down to object and we appear  
16 before Judge Pickering. We have three clients, class  
17 members who had mobile homes and were treated like this.  
18 And he calls a conference a week before the fairness  
19 hearing, the final fairness hearing.

20 And our lawyer goes in and the judge walks in and  
21 he says, now, listen, I have to tell you, this is my very  
22 first class action settlement. And I've been thinking  
23 about this and there are only three people objecting and I  
24 can't tell the defendants to settle those individual claims

1 but it seems to me if those three people were satisfied as  
2 to their recoveries this case would be much easier to  
3 approve because there would be no objectors at all.

4 And I am not making this up. You know, I'm  
5 sitting up here in Washington, D.C. having sent our lawyer  
6 down there and the defendants put enough money on the table  
7 that these three, poor African-American clients who live in  
8 mobile homes, you know, they're talking about over \$100,000  
9 total for three people on a settlement that would pay a  
10 thousand bucks apiece if they stay in the class and they  
11 buy out the case at the judge's urging, in some respects.

12 And then another settlement within six months  
13 along very similar lines is struck in front of Judge  
14 Pickering. And this time I fly down and I walk in the room  
15 -- literally, I go in the courthouse and there's about 40  
16 lawyers sitting out in the courtroom and I'm waiting for  
17 the judge.

18 And the judge's law clerk comes out to see me and  
19 she says the judge would like to meet with you and counsel.  
20 And I said okay, and I started up and she walks me back in  
21 and nobody else gets up. I said, well, what about the  
22 other counsel? She says, oh, they've been in there with  
23 him for the last half an hour.

24 And I get in there and he says, look, the deal

1 has been improved dramatically as a result of your  
2 objections. Here's the new settlement but it still didn't  
3 let anybody opt out. And you know last time you guys were  
4 here your clients got paid off and everybody went away.

5 And I've decided that's a mistake because all it  
6 does is it encourages people who are looking to get bought  
7 off -- meaning me -- to come back again and again. And  
8 I've decided that's a mistake and it's not going to happen  
9 again.

10 And I said to him, thank you, so much. We're not  
11 looking to get bought off. We want a better deal for the  
12 class. We were so angry the last time that we waived the  
13 fee we could have gotten from our clients. And he sat back  
14 and said, would you repeat that last part?

15 And I explained again. He said, I've never heard  
16 of a lawyer waiving a fee in a class action. What are you  
17 talking about? And I explained to him about the  
18 organization.

19 He said, well, you're a very different sort of  
20 person. Your organization is very different than the way  
21 you've been painted to be by these other guys who painted  
22 me as a professional objector. And we ended up finally  
23 getting the whole deal corrected.

24 It was actually written up by Rand. In the Rand

1 book of class actions we're the only group, both talked  
2 about for a case we prosecuted and for a case we objected  
3 to.

4 But I will say that there's no way to parse out  
5 which kind of objector is which kind of objector for  
6 certain. And so the solution, I think, to that, there's  
7 really two. One is you've got to focus on the content of  
8 the objections. It doesn't matter who they're coming from.  
9 Ultimately, they're either valid or they're not valid and  
10 the judge has to look at them.

11 Second is, I think the federal rules changes that  
12 have gone into effect should help prevent the buyout  
13 objectors and expose them and help a judge stop them from  
14 getting paid off to go away in some respects.

15 MR. FRISBY: Thank you, Arthur. Why don't we  
16 move on to Judge Yahner? Would you like to weigh in on  
17 this subject?

18 JUDGE YAHNER: Sure. I should make clear that  
19 I'm weighing in as an ex plaintiffs' lawyer, not as a  
20 judge. I litigated antitrust class action cases as a  
21 plaintiff for nigh on 20 years and that's the basis of  
22 experience I'm speaking from.

23 I partially agree with Arthur and partially  
24 disagree. I think it's very important, just as the first

1 panel showed, to distinguish among class actions. I  
2 believe that class actions are not as a group bad things.  
3 There can be bad subsets of class actions but the purpose  
4 that a class action was designed to meet is generally met.

5 And giving Arthur the benefit of the doubt, I  
6 will contend that there are good objectors and that they  
7 all should not be tarred with the same brush but the  
8 presence of objectors can cause a whole lot of problems  
9 both from a practical and a philosophical point of view.

10 I think that if an objector comes in with the  
11 idea as Arthur said to look to kill the deal then it's not  
12 helpful. Looking to kill the deal is a kind of blanket  
13 condemnation of what has happened during the course of the  
14 litigation and the settlement process which may be an  
15 appropriate outcome but isn't really helpful to the  
16 parties.

17 I think having third-party objectors come in does  
18 impose considerable costs on the litigants and as a  
19 consequence class members see their recovery pushed down  
20 the line. It can run up costs. There is a possibility of  
21 extortion, to put it bluntly. There are people who go  
22 around the country and object to class action settlements.  
23 They are generally well-known and it is still generally  
24 very difficult to deal with them because they can impose

1 costs on the process.

2 And I don't think that there are any courts that  
3 have really said Mr. So-and-so, we know how you've operated  
4 in the past and therefore we're not going to hear the kind  
5 of objections you're raising in this case.

6 I think that a third-party objector can raise  
7 legitimate issues that have gotten lost in the adversarial  
8 process. I think they can bring in points of view from  
9 different class members that are helpful, and one of the  
10 objectives of a useful objector should be not kill the deal  
11 but if this has to go back to a negotiating table, what can  
12 be done to deal with the problem that we've identified?

13 Just their presence, however, can make reasonable  
14 compromises very difficult because to justify their  
15 presence many times they have to be able to say we killed  
16 the deal or we killed 50 percent of the deal or this is the  
17 reason why we're here and either we should be compensated  
18 for it or we should get a good press release for it. So  
19 they complicate the dynamic of the negotiations that have  
20 been going on.

21 I think generally if it is a public-interest  
22 group, if it is a state government, if it is a federal  
23 entity they come in with a higher degree of respect.  
24 That's appropriate, but I think that litigants usually look

1 at state and federal interveners and objectors with  
2 somewhat of a jaundiced eye because they may be coming into  
3 a particular piece of litigation with a policy objective  
4 that may not be appropriate to work out in the context of a  
5 particular class action.

6 I'm not going to say that this could be the  
7 Federal Trade Commission since we are sitting here in its  
8 building but I think it's important that if an agency is  
9 pursuing a policy objective that it be careful about the  
10 case that it gets involved in to make the point. So just  
11 like all class actions aren't bad I think all objectors are  
12 not bad and some can be very useful.

13 MR. FRISBY: Thank you very much. Why don't we  
14 hear now from someone who's represented the defense side?  
15 Brian, would you care to weigh in?

16 MR. ANDERSON: Well, I've gotten some class  
17 action settlements approved. I've gotten some class action  
18 settlements rejected. I've won some class actions and I've  
19 lost some class actions so I think in the course of my  
20 defense career I've seen this from many different angles.

21 When a client wants me to negotiate and obtain  
22 approval of a class action settlement the client is looking  
23 for two things. First, it's looking for compromise. A  
24 settlement is, by definition, a compromise, which means

1 that the plaintiffs are not going to get everything that  
2 they think they should have gotten had they successfully  
3 pursued the lawsuit to the very end.

4 And the second thing the client is looking for is  
5 finality, a termination of the cost and the disruption  
6 associated with high-stakes litigation.

7 Into that arena comes the objector. And I agree  
8 with both of the panelists that there are good objectors  
9 and bad objectors and you cannot just look at their name  
10 tag and determine before they have spoken whether they are  
11 a productive source of third-party information to help the  
12 judge keep me honest and the class counsel honest or  
13 whether they are motivated by some personal agenda that is  
14 inconsistent with what the purpose of a class action  
15 settlement ought to be.

16 Interest group objectors, like the Trial Lawyers  
17 for Public Justice or the Washington Legal Foundation, or  
18 potentially a government agency, can quite often provide  
19 the judge with a useful, appropriate perspective and,  
20 frankly, keep the lawyers honest so they can be a  
21 productive role in the settlement implementation process  
22 even if they do drag out the process and make life  
23 uncomfortable for the lawyers who are pursuing the  
24 settlement.

1           Conversely, if the interest group is one that  
2           does not believe in compromising the issue that is being  
3           litigated, they are a destructive force. And so, if they  
4           are an interest group that believes that the only fair  
5           settlement is one that involves complete capitulation by  
6           the defendant, they are acting inconsistently with the  
7           purpose of a settlement in the first place.

8           Other lawyers who have a financial interest in  
9           killing the settlement, either because they are  
10          professional objectors or as is often the case when we have  
11          multiple class actions filed around the country on the same  
12          issue, are lawyers who are prosecuting other lawsuits and  
13          they have been left out of the settlement tent, often  
14          because their fee demands were exorbitant, come in and try  
15          to kill the settlement in one of two ways: either get the  
16          judge to order exhaustive discovery of the settling  
17          parties, which is tantamount to having to litigate the  
18          lawsuit in order to get it settled, which is not what  
19          you're trying to accomplish when you're settling.

20          Or they are taking the position that if you will  
21          kill the settlement and let me pursue my class action in  
22          some other court I will get more recovery. That, too, is  
23          inconsistent with the notion of a settlement.

24          So you can't trust the hat that the objector is

1 wearing. You do, as a judge, I think, have to listen very  
2 carefully to the nature of the objection that is being made  
3 and try to promptly make a decision whether this is  
4 somebody who's bringing a productive point to the table or  
5 simply being mischievous.

6 MR. FRISBY: Thanks very much. Let's turn now to  
7 Neil and perhaps you could also address the point made by  
8 the two previous panelists about the role of amicus filers  
9 like the FTC in particular.

10 MR. GORSUCH: Sure. I come at this from someone  
11 who's litigated all three sides of this awful triangle  
12 we've discussed: plaintiffs, defendants and objectors. I  
13 should make that clear.

14 I think what's underlying all of this and has not  
15 yet been fully explained is that in the normal adversarial  
16 process the parties have strong interests against one  
17 another and give the judge the benefit of that adversarial  
18 interaction.

19 When it comes to class action settlements, that  
20 disappears or at least it can be diminished significantly.  
21 You have on the one hand defendants who want to buy peace  
22 and the threat of certification can mean the destruction of  
23 their companies. They have to buy peace even sometimes of  
24 what some folks would consider less than fully meritorious

1 claims.

2 The other side of the triangle -- and to buy  
3 peace they don't care how that money gets split up. They  
4 don't care whether it goes all to the attorneys, whether it  
5 goes to class members or how the settlement is structured.  
6 They are indifferent to that.

7 And that's an important structural difference  
8 between the normal private litigation scenario that most  
9 judges see from day to day and assume is going on where the  
10 parties are clashing and the class action settlement arena.

11 On the other hand, plaintiffs' lawyers, who  
12 frequently don't have to report to their clients in a  
13 meaningful way that normally exists in private litigation,  
14 have no particular interest to structure the settlement to  
15 favor the class as opposed to them. That's the incentive  
16 problem that you find in the class action litigation arena,  
17 I think. And how you correct it is an interesting problem.

18 As to objectors, there is, in my mind, there is  
19 no question that they can serve a useful role though there  
20 are professional objectors, no doubt. One example of this  
21 is what the FTC is doing and has been doing for some years  
22 and under the initiative of this particular leadership, and  
23 you can go online and look at the cases that they have, in  
24 fact, pursued.

1           Some astonishing results, including situations  
2 where class members were going to receive telephone  
3 services that they had never subscribed to at an additional  
4 cost. And they could only get out of those additional  
5 services by later asking to be removed. But in the interim  
6 they were going to be charged for them. This is an  
7 astonishing settlement and I encourage you to go look at  
8 it.

9           The problem that the FTC confronts and that  
10 legitimate objectors, excluding some we've represented,  
11 CalPERS, Council of Institutional Investors, is that they  
12 have absolutely no notice of what is going on until after  
13 it's often too late.

14           Class members get notice sometimes with three to  
15 four weeks before the class settlement hearing, the final  
16 class settlement hearing. Arthur's talked about the  
17 preliminary one that's already done by the time objectors  
18 hear about the case.

19           So you have four weeks to put together an  
20 analysis of a case. Who amongst us has done that on a  
21 regular basis? It's like a PI hearing or a TRO hearing.  
22 It's extraordinarily difficult. You don't have an  
23 opportunity to conduct any discovery and so you walk into  
24 court really handicapped. Four weeks of notice and you

1 have no opportunity to put together any evidence or often  
2 present it.

3 Nonetheless, the statistics are telling. In the  
4 Devlin v. Scadelletti case where we represented the Council  
5 of Institutional Investors we looked at 30 years worth of  
6 history of nonparty objector appeals and we found that  
7 fully 32 percent of the cases in which nonparty objectors  
8 had participated were reversed. This compares with about a  
9 12 percent reversal rate of average civil litigation. So  
10 the participation of objectors proves itself by the  
11 statistics.

12 The FTC has proposed a rule amendment to Rule 23,  
13 which I think is too modest. Under that proposal they  
14 would require litigants to notify the FTC or the  
15 appropriate governmental agency of any class settlement  
16 that's about to occur involving a case where the government  
17 has an ongoing investigation.

18 So if the FTC has already initiated an  
19 enforcement proceeding against the company and the  
20 plaintiffs' lawyers are merely piggybacking on that, the  
21 FTC wants to know about it in order to see whether the  
22 settlement that's going to be achieved for the class is  
23 fair and reasonable or whether it's winding up just  
24 benefitting plaintiffs' counsel and defense.

1 I think this is too modest because it limits the  
2 notice to cases where the government is already active.  
3 Why isn't government being notified of cases where it  
4 hasn't acted yet but perhaps should?

5 I would also just note that the FTC so far has  
6 limited its activities to consumer class actions. I'm not  
7 sure how it defines consumer class actions either but one  
8 has to ask, why stop there? What about mass tort cases?  
9 What about securities cases? I think it's a useful  
10 function that they can serve and should be expanded.

11 MR. FRISBY: Great. Thank you very much. Could  
12 we turn now to Professor Issacharoff?

13 PROF. ISSACHAROFF: I think what this discussion  
14 shows is that it's very hard to categorically assess  
15 objectors under a one-size-fits-all model. We can look at  
16 the Supreme Court cases of Amchem and Ortiz, the leading  
17 class action cases of the last decade and you can say that  
18 both of them were the result of objectors who litigated  
19 successfully all the way through the Supreme Court.

20 At the same time, anybody who has been in a  
21 courtroom in a significant class action settlement knows  
22 that there is a predictable group of characters who will  
23 show up in every case with standard pleadings only  
24 sometimes adjusted for the facts of the particular case who

1 seek a payment to go away.

2 And the parties being both friends of the deal  
3 have an incentive to pay them to go away. And very often  
4 they come into the courtroom and the first question they  
5 ask is how much can I get. And everybody knows that that's  
6 what they're there for.

7 So the question is how can we differentiate  
8 between these two groups? How can we do so in a way that  
9 protects consumers. And let's be frank about this. When  
10 parties know that they will face professional objectors  
11 they have to withhold some of the funds that would be  
12 potentially available for settlement and for payment of the  
13 class in order to pay off extortionate amounts. So there  
14 is a transaction cost associated with this. There is a  
15 drag on the system.

16 I think the key point to remember in this is the  
17 point that Judge Hornby made in the first panel which is it  
18 is very difficult to assess the bona fides of a settlement  
19 unless one has full information about the record.

20 Courts are poorly positioned to retry the case,  
21 to go through the discovery that has been had, to appoint  
22 masters, to get into all the internal workings on an ex  
23 poste basis, which is increasingly what objectors push us  
24 to, to assess the merits of the settlement as the

1 settlement is structured.

2 I think we have to go back to first principles  
3 and to go to the Amchem insight which is are there  
4 structural assurances of fairness in the way that this was  
5 done? I think it is important to tell courts that the only  
6 way that they can judge the bona fides of a settlement is  
7 on an ex ante perspective.

8 Are the incentives of class counsel properly  
9 aligned with those of the class? Is there an incentive to  
10 litigate this as fully as possible? A lot of this is going  
11 to turn on the way the fees are structured because that's  
12 what disciplines the class.

13 I think it is a mistake to say we don't like this  
14 provision; we don't like that provision. We think the  
15 settlement could be improved because very often those  
16 settlements, if they are the product of arm's length  
17 negotiation, were a compromise. And of course it doesn't  
18 give everyone everything they want.

19 One final last small point. Arthur has a  
20 philosophical objection to punitives not being available in  
21 every single case. That is a fine point of principle. I  
22 happen to think that punitives do have to be resolved once  
23 and for all basically and what the procedural structure is.

24 That is a very complicated question. That's a

1 legitimate position for an objector to take in a case  
2 because that's a position saying you should not be able to  
3 close out certain kinds of third-party claims going into  
4 the future.

5 That is very different from what one sees in the  
6 bulk of these class action settlement objections where you  
7 get microscopic tweaking of the settlement so that you  
8 have, as the objector, a hook to get in there to demand  
9 some kind of fees to be paid off.

10 And if you look at these cases it may be that  
11 after the fact the objectors do succeed but in most  
12 instances there is a cosmetic change to the settlement with  
13 a dollar figure attached to it.

14 MR. FRISBY: Thanks very much. Why don't we  
15 finish off with Judge Wood? I'm sure we'd all like to hear  
16 more about how objectors and amicus filers can do a better  
17 job for the ultimate decision-makers such as yourself.

18 JUDGE WOOD: Thank you. It's a real pleasure to  
19 be here and I do appreciate the opportunity. I'm going to  
20 speak very briefly separately about amici and objectors  
21 because from my point of view at least they present quite  
22 different issues.

23 In general, for any kind of case, whether it's a  
24 class action case, whether it's an antitrust case, any kind

1 of case where we might expect you see amicus briefs we  
2 really in the Seventh Circuit anyway ask one question,  
3 which is, are you going to add anything to our  
4 understanding of this case before us that we have not  
5 already gotten from the briefs of the parties?

6 And sometimes the answer is a very easy yes. You  
7 discover that somebody comes in with a perspective on the  
8 legal issue before us that we would not have expected to  
9 see from the parties and it's plain that it's really  
10 helpful.

11 Sometimes the answer is equally obviously no. I  
12 have seen cases where there's Party A and Party B. Party A  
13 is the appellant; B's the appellee, and let's say the  
14 appellant comes in with, well, five amicus briefs come in  
15 from organizations purportedly trying to come in as amici  
16 and then you look at who's writing the brief and it's the  
17 same lawyer as filed the brief for the appellant.

18 Well, I'm sorry, that really doesn't advance the  
19 ball for us. It's a waste of time and frankly we are not  
20 in want of reading material, to put it mildly. So we ask  
21 that question: what are you adding? I think there's a  
22 special consideration if it's a governmental party, whether  
23 it's the FTC, whether it's a state attorney general's  
24 office.

1           In that instance you at least have a presumption  
2           that there is a public interest motivation for coming in  
3           with this brief and interest in letting us know what the  
4           position of someone with broad-based responsibility for a  
5           particular area is.

6           So I'm not saying we wouldn't take -- of course  
7           we'd take an amicus brief from a governmental authority but  
8           the question is how much weight would it carry with us.  
9           Unless you rebut that presumption for us we're very  
10          interested in the point of view of the governmental  
11          parties.

12          So in terms of amicus briefs you can see actual  
13          specific Seventh Circuit opinions on the criteria that we  
14          apply. We probably turn down more amicus briefs than any  
15          other court of appeals but that's because of this failure  
16          to add anything to the set of information that we already  
17          have. And we will also similarly reject an amicus brief if  
18          somebody else has already come in and made the point.

19          When I'm motions judge and I'm on the motions  
20          panel, and that's what this comes before, I look at the  
21          other briefs that have been filed and I look at this and I  
22          say is this something I want to inflict on my colleagues as  
23          more reading material or is it already covered? And I make  
24          the call that way. And that is in fact laid out in

1 published opinions that we have.

2 In terms of objectors, I see it as quite  
3 differently, as a somewhat different problem anyway. Let  
4 me preface this remark by sharing with you an experience I  
5 had a couple of years ago when I went to France at the  
6 invitation of the State Department to participate in a  
7 seminar that their highest court, the Cour de Cassation,  
8 was having on the common law system.

9 And the panel they had invited me to participate  
10 in was on what they called roughly translated third-party  
11 interveners. So I, you know, got ready and actually took  
12 more than the usual care because I had to do this in  
13 French, which was a bit of an intimidating challenge for  
14 me. But anyway I was looking at third-party interveners,  
15 les tier intervenent. If you speak French that's what they  
16 called it.

17 It turned out they meant unnamed members of  
18 classes. Very interesting conceptual difference. They saw  
19 unnamed members of classes as much more in the box of third  
20 parties who are involved in cases than they did direct  
21 parties, which takes me to this point.

22 When we are thinking about the role of objectors,  
23 in a sense what we're doing is we're checking on the  
24 validity of the class certification to begin with. Have

1 we, in fact, got before us the right parties? Are the  
2 parties representing the class normally a plaintiff class  
3 really speaking for everybody who is out there?

4 And, of course, if the 23A process has happened  
5 the way it's supposed to, the answer ought to be yes. But  
6 we find out from the objectors whether there are below-the-  
7 surface differences of opinion about the commonality of the  
8 class and we certainly can find out whether the attorneys  
9 as representing the class properly, all of the things that  
10 we've been through in 23A. I think that's part of the  
11 insight that lay behind the choice in this recent amendment  
12 to Rule 23 to have the second stage opt-out.

13 And I suppose from my point of view the question  
14 of objectors really is a merits question. I don't really  
15 care if they come in every day or if they come in only on  
16 occasion. I want to know what they're saying. And even  
17 the professional objectors may now and then hit on a  
18 meritorious point. Fine. If they have, then we'll listen  
19 to it.

20 I know it's a costly matter but the fact is  
21 people have the right to point out different things to the  
22 courts and we don't want to approve settlements if, in  
23 fact, they are not a reasonable compromise. That doesn't  
24 mean it has to have every last thing that the plaintiff

1 class would have wanted had they litigated to conclusion.  
2 We know that. But we have rejected settlements, even at  
3 the Court of Appeals level, that we thought were not fairly  
4 representative.

5 MR. FRISBY: Thanks very much. I know we could  
6 spend a lot more time on this subject but we are running a  
7 little behind schedule so I think we'll move on to the next  
8 topic, which is whether bad cases lead to bad settlements.

9 But before going into that I thought we could  
10 spend just a few minutes on some recent amendments to Rule  
11 23 starting with the older amendment providing for the  
12 appeal of orders granting or denying class certification.  
13 And Brian, would you mind starting off on that with a  
14 little introduction?

15 MR. ANDERSON: Sure. Rule 23F had its fifth  
16 birthday last December. Before December of 1998 there were  
17 18 published decisions by Federal Courts of Appeal on an  
18 interlocutory basis reviewing orders that either granted or  
19 denied class certification over a ten-year period. So that  
20 was about two decisions per year.

21 Basically, it was very, very difficult to get an  
22 interlocutory appeal of an order by a District Court  
23 certifying or refusing to certify a class action. And that  
24 was because the only ways you could get into the appellate

1 system on an interlocutory basis was through a Section 1292  
2 certification or a writ of mandamus, both of which are very  
3 difficult.

4 This led to a lack of robust appellate court  
5 guidance to Federal District Courts regarding the standards  
6 that they should apply when entertaining class  
7 certification motions. And because many state courts look  
8 to the federal system for guidance about how to handle  
9 class certification motions, the lack of federal appellate  
10 guidance trickled down to the state courts.

11 And so as a result you had trial court decisions  
12 standing for virtually any proposition that a proponent or  
13 an opponent of a class classification motion might want to  
14 advance.

15 The federal courts decided that this was an  
16 unhealthy regime and it would be a good thing to develop a  
17 more robust body of case law concerning class certification  
18 standards and so Rule 23F was enacted in December of 1998.

19 Earlier this year I published an article in which  
20 I went back looking through LEXIS at published orders  
21 resulting from Rule 23F petitions. And that article was  
22 published by the Washington Legal Foundation. You could  
23 either pick up a copy out in the lobby or get it on its web  
24 site.

1           Bottom line, what we did is look at the use of  
2           the rule in the five years after its enactment and we found  
3           the following: Rule 23F has led to a fourfold increase in  
4           the number of published appellate court decisions at the  
5           federal level concerning the grant or denial of class  
6           certification. There had been 44 appellate decisions in  
7           five years or roughly nine per year. Contrast that again  
8           with 18 rulings in a ten-year period or two per year.

9           During the first five years the circuits, at  
10          least according to the published decisions that we found,  
11          were quite generous in granting requests by litigants for  
12          interlocutory review of class classification orders.  
13          Eighty percent of the time those petitions were granted.

14          Six of the circuits granted every one of the  
15          petitions that were submitted and 11 of the 12 circuits  
16          granted at least one petition. So you've got 11 of the 12  
17          circuits now with at least one class certification ruling  
18          in the last five years.

19          Defendants who are challenging class  
20          certification orders have filed roughly twice as many  
21          requests for interlocutory review as have plaintiffs who  
22          are challenging the denial of class certification but  
23          courts have been even handed as between plaintiffs and  
24          defendants in terms of the percentage of the petitions that

1 they grant.

2 At the end of the day expanded interlocutory  
3 review of classification of rulings has benefitted  
4 defendants more than plaintiffs but both sides have  
5 benefitted from the tool.

6 Defendants have won 70 percent of the  
7 interlocutory appeals that have occurred over the last five  
8 years, either because they obtained a reversal of a trial  
9 court order certifying a class or they sustained a trial  
10 court order denying class certification. Plaintiffs, of  
11 course, have won 30 percent of the time either by winning  
12 affirmance of a class certification order or reversing the  
13 denial of class certification motion.

14 The most common outcome in these 44 cases in the  
15 last five years has been reversals of class certification  
16 orders. That has occurred 26 times but there have been  
17 nine decisions affirming class certification, five  
18 affirmances of orders denying class certification and four  
19 rulings reversing the denial of class certification, if you  
20 can keep up with all those double negatives.

21 Interestingly, the Fifth Circuit, the Seventh  
22 Circuit and the Eleventh Circuit have been at the center of  
23 the appellate action on this issue. Fully 28 of the 44  
24 published cases have emanated from those circuits.

1           And in those circuits which are thought by some  
2           to be marginally more defense-oriented than plaintiffs  
3           oriented on these issues it is true that defendants have  
4           won 22 of those 28 cases in the three circuits. Plaintiffs  
5           have at least one victory in each of the three circuits.

6           So bottom line, Rule 23F has certainly led to a  
7           larger flow of appellate guidance on class actions. I  
8           think this has been to the benefit of district court judges  
9           as well as practitioners and certainly state court  
10          practitioners as well.

11          My hunch is that over time the rate of petition  
12          approval will decline as circuit courts perceive the issues  
13          to have been largely resolved and perceive that there are  
14          fewer newer issues coming down the pike. But I certainly  
15          hope that circuit court judges will use the tool to take  
16          interlocutory appeals of clearly problematic orders either  
17          way or to resolve new issues that come down the pike.

18          MR. FRISBY: Thanks. Judge Wood, would you mind  
19          telling us a little bit about the procedural issues in your  
20          circuit and your views on this?

21          JUDGE WOOD: Sure. Well, just mechanically, the  
22          way a 23F petition is handled in the Seventh Circuit is  
23          that the petition comes in and it's handled in precisely  
24          the same way a 1292B motion might be handled or any other

1 thing other than a full-blown appeal of either -- and I'm  
2 including in full-blown appeals anything that one is  
3 entitled to appeal either from a final judgment or a  
4 preliminary injunction, namely, it goes first to a motions  
5 panel.

6 We have just rotating motions panels, an  
7 extremely rigid rotation that we set out a year in advance  
8 so it's always clear whether you're on the motions panel or  
9 not and exactly who presides over it. So they'll present  
10 the 23F petition to us. The motions panel will consider,  
11 one judge at a time, whether this particular effort to  
12 bring an interlocutory appeal is worth taking and we'll  
13 just vote informally one at a time.

14 Obviously, the real question is which ones should  
15 we take? In which instances should we deviate from the  
16 rule that we normally don't want to hear an interlocutory  
17 appeal? There is so much that is not developed about the  
18 case at a rather early stage when many class certification  
19 orders come along that interlocutory appeals are disfavored  
20 in that sense.

21 The other point I would make is that if somebody  
22 has erroneously denied class certification there is only  
23 one person whose rights are going to be affected by that,  
24 not to say that that isn't important for that person,

1 especially if it's a \$15 case and it may go away, but that  
2 will take me in a minute to what the standards are anyway  
3 for 23F.

4 There's no preclusion effect on the other members  
5 of the class if it really is going to be a good class.  
6 There's a self-correction built into the system because  
7 someone else is probably out there with the same class  
8 action.

9 So the costs of making a mistake in some  
10 instances are addressable unless we are in one of the areas  
11 where we would take it. You know that in the Seventh  
12 Circuit the leading case is Blair against Equifax in which  
13 we'll look on one side or the other whether the class  
14 certification decision is really a surrogate for the whole  
15 case. Is it the death knell of the plaintiffs' case not to  
16 be able to have the class? Is it a loss to the company  
17 case on the defendant's side if there is a class? So one  
18 side or the other of that coin.

19 So either one of those we try to pick up and see  
20 if those are the cases where this really is, in effect, the  
21 whole case. And that is an instance in which we would  
22 grant the 23F petition.

23 The third category that's outlined in Blair talks  
24 about unsettled questions getting more appellate law on the

1 issue. And I just want to spend one second saying what is  
2 the issue. We have tried at least to focus on points  
3 specific to class actions rather than to the extended  
4 distinguishable points specific to the underlying  
5 litigation.

6 So we're not going to be as taken with the  
7 question whether there is some underlying merits issue.  
8 Maybe you think that the plaintiffs' theory is frivolous  
9 anyway or maybe you think something about the merits. The  
10 point of 23F is to clarify class action law issues such as  
11 what kinds of choice of law rules.

12 That was one of the things in the  
13 Bridgestone/Firestone case that the court pointed out. Is  
14 this going to be suitable for a class from that point of  
15 view? The precision of the class definition process if  
16 there's anything general you can say about how closely  
17 interests should be aligned for someone to be in the same  
18 class.

19 How many common issues? Is one enough if it's a  
20 big issue, a dispositive issue? What about issues of law,  
21 issues of fact? What are you doing with subclasses? How  
22 much do you want to rely on ancillary procedures to resolve  
23 issues that are not in that common issue box? Anything  
24 like that which is a class action specific thing would be

1 something that would seemingly justify taking this on a 23F  
2 basis.

3 So at least in terms of the way we try to think  
4 about 23F it's not just a quick and early look at the  
5 merits of the case. It's really does this case qualify as  
6 a class action or should it be handled in individual  
7 litigation?

8 The only final thing I want to say is just to  
9 cross reference over to another debate that's raging in the  
10 federal courts of appeals, namely, published and  
11 precedential decisions.

12 The vast majority of our rulings on 23F motions  
13 are not published. It just happens quietly in the chambers  
14 of the judges and we normally don't take them so you're  
15 going to have a distorted view of what's going on if you're  
16 looking only at the published opinions.

17 MR. FRISBY: Thank you. Judge Yahner, any  
18 downside to these appeals that we should be thinking about?

19 JUDGE YAHNER: Yeah. I think to use a technical  
20 term they're a real pain in the neck. I think in many ways  
21 the Rule 23F phenomenon is like the Daubert or Daubert case  
22 phenomenon, that when that case came down there was a sense  
23 of now we're going to see these motions in every case down  
24 the pike. And that happened for awhile.

1           And very frivolous Daubert motions were filed and  
2           I think very frivolous Rule 23F motions have been filed.  
3           As the courts deal with them there will be an established  
4           set of opinions that will discourage some nonsensical or  
5           frivolous motions but there are some people who are always  
6           going to do it as a litigation tactic because it ups the  
7           ante and puts plaintiffs through one more hoop of showing  
8           that they're serious about the litigation. So I think at  
9           times they're very meritorious; at other times they're not  
10          and over the course of time these things will shake out.

11           MR. FRISBY: Thank you. We need to move on to  
12          the second opt-out issue fairly soon but do the rest of the  
13          panelists want to say anything quickly about this topic?

14           MR. GORSUCH: Robert, just one thing and it also  
15          applies to the second opt-out rule. Whatever you think of  
16          them as changes to the federal rules I think it bears  
17          asking to what extent they're actually going to impose a  
18          restraint or a constraint on the settlement process, given  
19          that in fact so many of these cases often in the securities  
20          area I'm thinking of particularly are settled before the  
21          class is ever certified. The deal is done.

22           So having an interlocutory appeal for a class  
23          certification hearing that hasn't happened doesn't impose,  
24          I think, one might argue, a heck of a lot of constraint on

1 the parties in terms of how they craft their settlement.

2 MR. FRISBY: Why don't we move on now to the  
3 second opt-out issue. The recent amendment to Rule 23  
4 authorizes courts to reject settlements that do not provide  
5 members with a second opt-out opportunity. Professor,  
6 would you like to start off on this one?

7 PROF. ISSACHAROFF: Well, this is actually a  
8 pretty easy one. I think that this rule has had no effect  
9 whatsoever. And I think that's for two different reasons.  
10 Actually, there's a third which I'll start with which is  
11 the empirical one. As best I can tell it's never been  
12 used.

13 It's hard to get the data to make sure you have  
14 all the cases covered but I have not seen any decision in  
15 which a second opt-out has gone out as a result of the new  
16 rule. And I think that is true for two reasons, one  
17 conceptual and one practical.

18 The first is, the conceptual one is that, as we  
19 saw the Supreme Court address in Amchem, it is very often  
20 not enough protection for individual class members to  
21 simply be given the right to opt out.

22 There are all sorts of structural reasons why  
23 class members don't opt out. It may not be worth their  
24 while. They may not know they're members of the class.

1 They may not understand the full implications of what the  
2 class action gives them or what effect it might have on  
3 them so giving them two chances to do this when they  
4 haven't opted out the first time is unlikely, in my view,  
5 to get a lot of correction back into the system.

6 But the second reason is more of a practical one  
7 which is that, as Neil just said, the overwhelming number  
8 of class actions after some initial discovery where the  
9 merits discovery invariably gets infused in part into the  
10 class question discovery the cases will settle prior to the  
11 certification process. And so the first notice to the  
12 class will be the notice of the class settlement and  
13 therefore this second opt-out is not triggered.

14 In those cases in which a class is certified for  
15 litigation purposes which is the only time you could have a  
16 second opt-out unless the strange experience of the Seventh  
17 Circuit recently where you have a first settlement rejected  
18 and then a second settlement, leave that aside because the  
19 rule really doesn't address that, in cases where you have a  
20 litigation class settle and then there is the question  
21 potentially of a second notice after settlement something  
22 has happened in between.

23 And that's what Brian was just addressing. We  
24 have Rule 23F. These cases get appealed and the uptake

1 rates in the court, from as best we can tell on  
2 certifications for litigation purposes, is very high, which  
3 means that before any notice has gone out the courts of  
4 appeal are willing to entertain the certification order.

5 Now, it's true, as Judge Wood says, that the  
6 formal law in most circuits, including the Seventh Circuit,  
7 is that the courts will take up only the certification  
8 decision and not the merits on Rule 23F.

9 It is also true as the Seventh Circuit has  
10 written by Judge Posner that it's really hard to tell the  
11 difference between the two in a whole lot of these cases.  
12 So the parties will infuse the certification decision with  
13 a great deal of the merits of the underlying controversy,  
14 which means that an appellate decision on the certification  
15 question, whether it's upheld or reversed, will heavily  
16 inform the parties as to what the likely litigated  
17 prospects of the case will be.

18 As a result parties will settle on the basis of  
19 that information obtained through the 23F appeal. That is  
20 why I think we have no cases where there is this two-track  
21 process. So I think that, sure, give people more  
22 information, give them more of a chance. This is a  
23 proposal that my colleague Jack Coffee came up with  
24 originally. In practice I think it's had very little

1 bearing.

2 MR. FRISBY: Thank you. Arthur, what do you  
3 think about this issue?

4 MR. BRYANT: Well, I generally agree with the  
5 professor's comments. I want to distinguish, though, there  
6 is one set of cases or type of class action where a second  
7 opt-out becomes very important and they are not ones where  
8 they were litigated.

9 And that is some kind of mass tort settlements,  
10 particularly where you're talking about toxic torts and  
11 exposure to a chemical that can, over time, cause different  
12 injuries. One example is the Fen-Phen litigation is where  
13 there was a second opt-out, actually more than that, in the  
14 settlement agreement itself.

15 They reached a settlement, said here's what you  
16 get but if it turns out you have another illness three  
17 years from now or whatever the time is that you didn't have  
18 at the time the settlement first went through, then you  
19 have a new right to opt out and there are certain  
20 limitations on that right.

21 And actually, there are settlements that at least  
22 I've seen in the proposed fashion have that even further  
23 where they were not litigated -- I mean, at the start they  
24 were but the opt-outs were built in because we were talking

1 about a mass tort exposure where the injuries change over  
2 time. And I think it's a great addition in that respect.  
3 Otherwise, I agree entirely.

4 MR. FRISBY: Thanks. Does anyone else want to  
5 add anything quickly on this topic before I move on?

6 MR. BRYANT: I just wanted to add one thing about  
7 this and the other topics. I just think it needs to be  
8 flagged at this program which is at least up to now the  
9 percentage of class actions that we are talking about is  
10 minuscule in the big picture, that is, coupon settlements  
11 was the first panel.

12 The statistics you showed us you'll hear later  
13 from the reporters the number of cases that have objectors  
14 or amici is actually, at least according to the statistics,  
15 a very small percentage. The Rule 23F cases, the second  
16 opt-out cases is a very small percentage.

17 And I think it's critically important that the  
18 FTC does want to do something to make class actions fairer  
19 for consumers but I'm very concerned that the eye is not on  
20 the real ball here and that we're looking at tiny little  
21 pieces here and there.

22 I'd raised in a conference call at some point  
23 when we get to this and I'll just flag a couple of places  
24 and I don't know if this is the right time or not but you

1 told me to raise it so I will.

2 MR. FRISBY: Could we save those until closer to  
3 the end --

4 MR. BRYANT: Sure. Be happy to.

5 MR. FRISBY: So I can get to the other topics?  
6 But that is a great segue to our next topic which is to  
7 what extent bad cases lead to bad settlements and this  
8 topic came up very vividly in the first panel.

9 What happens when there's a case that may not be  
10 very strong but the parties want to settle it? What are  
11 the implications and what do we do about it? Brian, do you  
12 want to start off on that one?

13 MR. ANDERSON: Well, I think bad cases absolutely  
14 make bad settlements. I think every day there are class  
15 actions filed that I would call junk lawsuits that complain  
16 about the world as it is and will always be an attempt to  
17 exploit that situation to justify a lawsuit, that exploit a  
18 situation where the company has made a mistake, often has  
19 rectified that mistake and then the plaintiffs' bar seeks  
20 to exploit that mistake by filing one or often multiple  
21 lawsuits over the same issue.

22 The defendant then has a decision to make. In a  
23 perfect world the defendant would vigorously contest that  
24 lawsuit, explain its conduct, explain why there is no good

1 public interest to be served by spending lawyers fees and  
2 employee time litigating this issue and in a perfect world  
3 judges would quickly spot these lawsuits for what they are  
4 and dismiss them properly.

5           Unfortunately, we don't live in a perfect world.  
6 Companies that are faced with these kind of class action  
7 lawsuits have to recognize that even if they think they're  
8 frivolous the plaintiffs' bar has the ability to impose  
9 great cost and great disruption on the company's processes  
10 by subjecting its senior management to depositions, by  
11 requesting huge amounts of document and computer discovery  
12 and it is often in the company's short-term economic  
13 interest to pay off the plaintiffs' lawyers, provide  
14 something to the class members even if they have not really  
15 been injured in order to make the lawsuit go away.

16           And it is also regrettably true that not all  
17 judges spot junk lawsuits quickly and get rid of them.  
18 Plaintiffs' lawyers have become quite adept at filing class  
19 actions in these so-called magnet courts, often state  
20 courts, often where there is a very close relationship  
21 between the elected state court judge and the plaintiffs'  
22 lawyer who brought the case and it is, as a practical  
23 matter, impossible for the defendant to get rid of even the  
24 most frivolous lawsuit.

1           Those are the kinds of cases where you get these  
2 kinds of coupon settlements, where the class members did  
3 not get anything of value and the plaintiffs' lawyers got  
4 millions or tens of millions or even hundreds of millions  
5 of dollars of attorneys' fees.

6           Now, are those settlements ipso facto unfair? In  
7 a sense they are not because if the class members really  
8 were not injured by the conduct at issue or they don't care  
9 about the issue that is being litigated they weren't  
10 injured, the settlement isn't giving them much, why is that  
11 unfair?

12           But in the long run it is unfair because these  
13 kinds of junk lawsuits, if encouraged through settlements  
14 that reward the plaintiffs' lawyers richly for bringing  
15 them, impose a litigation tax upon our economy. The cost  
16 in fees and the cost in coupons and the cost in overhead  
17 litigating and then settling these cases ultimately gets  
18 built into the price of every product and every service  
19 that is sold that is subjected to one of these class  
20 actions.

21           And to the extent that these class actions make  
22 corporations risk-averse, make corporations not want to  
23 admit a mistake and correct the mistake because they know  
24 that they are going to get hit with class actions

1 thereafter we, in the long run, I think, harm the public  
2 interest by rewarding these kinds of lawsuits with these  
3 kinds of settlements.

4 MR. FRISBY: Thank you very much. Judge Yahner,  
5 would you like to respond to that? I suspect you might  
6 have some disagreement with --

7 JUDGE YAHNER: I'm sorry. I just can't control  
8 myself. I think we have to work from the presumption that  
9 lawyers are ethical and even plaintiffs' lawyers are  
10 ethical and they don't walk around filing junk lawsuits day  
11 in and day out.

12 I think you can just as easily say, for example,  
13 in the antitrust area, that there's a big problem because  
14 companies get together and fix prices. And if they didn't  
15 do what they did then we wouldn't have an issue about  
16 antitrust price-fixing cases.

17 I don't think that the coupon junk lawsuits  
18 scenario that you're painting is a typical scenario. I  
19 don't think that there are a lot of bad cases out there  
20 that we have to worry about where we don't already have  
21 some very good tools built into the system to deal with it.

22 We just as well have very good cases that are  
23 litigated without fees for years and years against  
24 defendants who are in my mind as a plaintiffs' lawyer

1 clearly culpable but they're not going to give up.

2 I mean, you can exaggerate on either side of this  
3 and I think that it is better to look at solutions when we  
4 come more to the middle scenario of what are the vast  
5 majority of cases like. And thank you for my rant.

6 MR. FRISBY: Thank you very much. I do want to  
7 spend some time on the last topic and the Q and As from the  
8 audience but does anyone else want to chime in on this last  
9 part of the topic before we move on?

10 MR. GORSUCH: Very briefly, Robert, I just want  
11 to say I think both points of view have their merits but I  
12 think it's hard to say that there is no merit to the view  
13 that we are overincentivizing certain of these suits.

14 To take just an example, since the passage of the  
15 PSLRA in the securities context in 1995 over 2000  
16 securities fraud suits have been brought on a class action  
17 basis. Only 1 percent have gone to trial.

18 The incentives to settle these things by  
19 defendants cannot be underestimated. You're essentially  
20 risking your company, staking it on the outcome of a single  
21 jury verdict. You're going to settle even cases -- you  
22 have a strong incentive to settle even cases that may lack  
23 merit. And that's a fundamental structural feature of the  
24 system that I don't think we can overlook if we want to

1 make settlements fairer.

2 MR. FRISBY: Anyone else with a last comment on  
3 that? If not, let's move on to our final subtopic, the  
4 common-fund issue. Here we're interested in the practice  
5 in common-fund cases of negotiating attorney fees separate  
6 and apart from the common fund. Professor, would you like  
7 to start off on this one, please?

8 PROF. ISSACHAROFF: Yes. One quick comment. The  
9 latest data indicate that roughly about 2 percent, maybe  
10 even a little less, of the cases filed in federal court go  
11 to trial. So if the data are going to set up the  
12 presumption that all class actions are presumptively  
13 frivolous then we should carry that forward and say all  
14 litigation is presumptively frivolous and try to  
15 disincentivize that. On the --

16 MR. BRYANT: Neil and Brian may want to speak to  
17 that.

18 PROF. ISSACHAROFF: The issue that's here, very  
19 quickly, is should we require class counsel to negotiate  
20 their fees separately from the common fund in cases where  
21 the recovery is not on a statutory fee basis but on a  
22 common fund basis?

23 And the law on this has gone back and forth from  
24 a presumption that it should always be done differently,

1 separately to a recognition that it's likely to be handled  
2 all at once to a redirection toward a requirement, more or  
3 less, in many courts that there be a two-stage discussion  
4 on this issue.

5 I think that is a high point of formalism that  
6 sophisticated parties know has no meaning. It has no  
7 meaning first of all as an economic matter because as both  
8 Neil and Brian have mentioned, in the past companies want  
9 two things out of these cases. They want peace and they  
10 want to know what the price is.

11 And you can split the price up into 14 parts or  
12 two parts or one part but at some point you're in the Yogi  
13 Bera scenario of wanting your pizza cut in six slices  
14 rather than eight because you're not that hungry.

15 Everybody understands that it's the bottom-line  
16 figure and all sophisticated parties in the room recognize  
17 that. And so if you say we're going to negotiate the fee  
18 secondly, subject to court approval, the parties understand  
19 that a certain amount has to be withheld from the initial  
20 offer in order to cover that. And so there's a great deal  
21 of formalism to that.

22 The second reason is that it's again an attempt  
23 to regulate how class counsel performed ex poste. And I  
24 think that we should really be trying to get courts to look

1 more carefully at what the incentives of the parties were  
2 in the litigation as they approach the certification  
3 decision, as they took on the lawsuit in the form that  
4 their compensation will be tied to the recovery of the  
5 plaintiffs' compensation, will be tied to the recovery of  
6 the plaintiff class.

7 Attempts to flyspeck the actual terms of the  
8 settlement and the question of how the negotiations were  
9 conducted in a very ritualized, formalized way, I think,  
10 are going to be unavailing ultimately.

11 MR. FRISBY: Thank you. Neil, would you want to  
12 respond to that? Also I'm curious if you have any views  
13 about the potential problem posed by calculating attorney  
14 fees based on common funds where the class does not end up  
15 getting very much of the common fund?

16 MR. GORSUCH: Well, there's a recent case that  
17 kind of illustrates that. It involved AT&T and Lucent and  
18 they settled a class action lawsuit setting up a \$300  
19 million fund. It sounds like a lot of money. The  
20 plaintiffs' lawyers took \$80 million of it. And then of  
21 course you had to wait to see who was going to actually  
22 claim on the fund.

23 And at the end of the day they found out class  
24 members found the fund so unattractive that they redeemed

1       only \$8 million worth of the fund.  So plaintiffs'  
2       lawyers were rewarded with literally ten times the amount  
3       the class recovered.  I think something has to be done  
4       about that.

5               Now, what do you do?  One, it seems to me that  
6       judges all too often fail to take account of redemption  
7       rates or whether there's a cy pres aspect to the award  
8       which they could do to see if the money is actually going  
9       to be redeemed by class members or put to some sort of  
10      public purpose that's identifiable and concrete so that  
11      money's actually going to be spent other than by the  
12      defendant's and the plaintiffs' lawyers.

13              Second thing, I do think it's valuable to  
14      consider taking the fee award separate from and after the  
15      settlement process approval.  And the reason there is,  
16      again, the incentive structure behind class settlement.

17              If defendants normally don't care how the money,  
18      settlement fund is allocated one way to make them care is  
19      if it comes more directly out of their pockets and they can  
20      scrutinize bills and they have an adversarial incentive to  
21      reduce the bill rather than having it all lumped in as part  
22      of the overall common fund.

23              Plaintiffs' lawyers submit their hours and rates  
24      and the judge is left to scrutinize it himself without the

1 benefit of defendant's commentary. If you put it outside  
2 the process defendants have something to say about it.

3 MR. FRISBY: Thanks very much. I'm afraid we're  
4 out of time and I apologize to those who submitted  
5 questions and Arthur for not getting to your issues but  
6 perhaps those with questions can bring them up to the panel  
7 during the break or at the first start of the lunch break.  
8 And thank you all very much for participating and sharing  
9 your insightful views about this topic. (Applause.)

10 (Whereupon, a lunch recess was  
11 taken.)

12

13

14

15

**AFTERNOON SESSION**

16

**(1:48 p.m.)**

17

18 MR. FINE: My name is Adam Fine and I'm an  
19 attorney with the Bureau of Consumer Protection's Division  
20 of Enforcement and I'd love to welcome everyone back from  
21 lunch. If this is the first program that you're attending  
22 today, welcome. So far it's been an exciting program and  
23 we're looking forward to an excellent panel.

24

24 This panel discussion focuses on clear notices,  
claims administration and market makers. The format of

1 this panel is going to be that of a moderated guided  
2 discussion and we have a lot of time at the end of the  
3 panel question-and-answer period for your questions. And  
4 that should be the final ten minutes or so.

5 One thing I do want to note, a housekeeping  
6 reminder that the materials that people have alluded to in  
7 earlier panels plus materials by these panelists are posted  
8 on the FTC's web site in the workshop web page. So please  
9 take a look and print those out and you will see a lot of  
10 the main components of what we've discussed some of these  
11 panelists have addressed.

12 And with that it is my pleasure to introduce the  
13 following panelists all of whom bring different  
14 perspectives and experiences regarding the topics at hand.  
15 Immediately to my left is Todd Hilsee. Todd is the  
16 president of Hilsoft Notifications and is regarded by  
17 courts and practitioners as one of the leading class action  
18 notice experts.

19 Bob Niemec is a senior researcher and project  
20 director at the Federal Judicial Center. Howard Yellen is  
21 the CEO of the Settlement Recovery Center, a leader in fund  
22 recovery from class actions.

23 James Tharin is the CEO of Chicago Clearing  
24 Corp., the preeminent market maker of class action

1 certificates and in-kind settlement awards and Deborah  
2 Zuckerman is a senior litigation attorney at the AARP  
3 Foundation.

4 And with that we're going to get started. First,  
5 Bob, let me start with you. The Federal Judicial Center  
6 has been spearheading a class action notice project for  
7 some time now. Can you provide some background of the  
8 project's goals and objectives?

9 MR. NIEMEC: Sure. I'd be very happy to, Adam.  
10 First of all, let me apologize that I'm going to be  
11 speaking pretty much in this direction because I understand  
12 that there's a transcription that will be done based on a  
13 tape recording and if I deviate too much from side to side  
14 apparently the tape cannot pick up my voice. So I'm not  
15 ignoring those people who are on either end.

16 I'd be very happy to describe our project. It  
17 started with a request from the Advisory Committee on Civil  
18 Rules, which for those of you who are not familiar with the  
19 committee process in the federal judiciary, that's an  
20 advisory committee of the Judicial Conference, which is  
21 like the board of directors that runs the federal judiciary  
22 made up, of course, of federal judges on that Judicial  
23 Conference.

24 So there was within the Advisory Committee on

1 Civil Rules a subcommittee on class actions that had been  
2 looking at lots of different areas of class actions  
3 generally. And one thing in particular was that they were  
4 looking at a rule change, a change to Rule 23, which is the  
5 civil rule that governs class actions.

6 And that rule change, which eventually was  
7 approved by that Advisory Committee and all the way up the  
8 process in the judicial branch so that it's now effective  
9 as of December 1, 2003, that rule required plain language  
10 notices.

11 More particularly, it said that class action  
12 notices, quote, must concisely and clearly state in plain,  
13 easily-understood language, close quote -- and then I  
14 paraphrase the rest of it -- specific information about the  
15 nature and terms of the class action and how it might  
16 affect potential class members' rights.

17 Given that that was the rule that was being  
18 considered and it looked very likely that it would be  
19 approved, the subcommittee on class actions asked us to  
20 take a stab at drafting what we would consider and experts  
21 would consider to be plain language notices.

22 And we did that and I just want to give a little  
23 advertisement here for the Federal Judicial Center. You  
24 can go to our web site. We don't get any rewards for each

1 of your hits or anything like that when you go to the site  
2 but I think you might find it interesting to look at the  
3 notices that I'm talking about here and we might talk about  
4 a little bit more. I know we're pressed for time.

5 If you got to [www.fjc.gov](http://www.fjc.gov), that's FJC standing  
6 for Federal Judicial Center, you will see on the homepage,  
7 on the first page in the lefthand column there's a link  
8 called Class Action Notices Page. Pretty straightforward.

9 And if you click on that you'll see a description  
10 of the process that we went through to devise these  
11 illustrative class action notices and you'll see notices  
12 themselves.

13 And I can go into more detail on that as time  
14 allows later. But they're in three different areas:  
15 securities, products liability, and employment and they  
16 cover notices of certification and settlement. And they  
17 include full notices, publication notices and also  
18 information to include on envelopes for the eye-catching  
19 part of this process.

20 MR. FINE: In a few minutes, actually, Todd  
21 Hilsee's PowerPoint presentation is going to show examples  
22 of both good and bad notices. But before we turn to that,  
23 Bob, let me ask you another question. During the process  
24 when FJC was involved in drafting plain language notices

1 did you guys conduct studies, have focus groups to see the  
2 effects that plain language notices could have in  
3 increasing redemption rates?

4 MR. NIEMEC: Yes, we did. And I'll describe that  
5 very briefly and, Adam, tell me when you think that it's  
6 time to move on to Todd because I certainly don't want to  
7 take too much time because I could probably talk for this  
8 entire hour that's allocated to us about this process.

9 Focus groups was just one of the research methods  
10 that we used to determine what might best be the format and  
11 the wording of a plain language notice. But I do want to  
12 very briefly thank those who without their assistance and  
13 their work and their taking on a major role in this project  
14 this project could not have been done. And those include  
15 in no particular order my colleague at the Federal Judicial  
16 Center, Tom Willging; also Shannon Wheatman who was a  
17 colleague at the Federal Judicial Center but she got hired  
18 away by Hilsoft in the process; Todd Hilsee from Hilsoft;  
19 and also a professor from the United States -- from the  
20 University of Texas law school in Austin. Forget the  
21 United States. Which is in the United States. Terry  
22 LeClerc.

23 They were very helpful in this process and  
24 brought different types of skills to the table and we were

1 able to come up with these notices.

2 We also hired an expert who helped us with our  
3 focus groups that we wanted to hold. The expert helped us  
4 with the methodology but also more importantly was the  
5 moderator during these focus groups because that takes some  
6 very special talents.

7 And we did them in Baltimore, Maryland. We did  
8 four separate focus groups on two different types of class  
9 action notices. And there, of course, was a selection  
10 process. We went through a professional facility where  
11 they assisted in the selection of a diverse group of  
12 participants and it was fascinating to see what they did.

13 We showed them what our then preliminary drafts  
14 of the plain language notices were. We gave them a summary  
15 notice and we gave them a more detailed notice. Again,  
16 this was in the securities area and the asbestos products  
17 liability area and we got their feedback.

18 And we found -- I'll just try to summarize a  
19 little bit of what we found because that whole process  
20 itself is a long one, which if you're interested in that  
21 you'll find the text describing that process again on our  
22 web site on the Class Action Notices Page.

23 We found that the notices even in that  
24 preliminary stage, and they've been much improved since by

1 many other methods that we used, appear to succeed  
2 primarily as a result of the following elements: the  
3 nonlegal plain language throughout the notices in the  
4 summary form and in the full notice form. We also had  
5 claims forms attached to the notices and we color-coded  
6 them and we did some very interesting things.

7           There was a benefit from the concise opening page  
8 that makes very specific points that are important up  
9 front. We had a detailed table of contents that, of  
10 course, was keyed to the section headings for each of the  
11 sections.

12           We used a question and answer format for the  
13 table of contents listing and the section headings which  
14 proved to be very valuable to the focus group people.

15           We also had a summary chart or table of the most  
16 important information including dates by which certain  
17 things needed to be done and we had the color-coded  
18 response forms. And again, you can see those notices on  
19 the web site.

20           MR. FINE: Thank you, Bob. Howard, do you have  
21 something you want to add?

22           MR. YELLIN: Yeah. A very quick question, Bob.  
23 Has there been any subsequent empirical work done where one  
24 of the advantages of notices as in a direct mail context is

1 being able to do a split test? Has anyone taken on a  
2 single case and sent out one form of notice as opposed to a  
3 purportedly better form of notice and compared the response  
4 rates among the recipients?

5 MR. NIEMEC: Yes. We did that. It's a very good  
6 question. It's difficult to do such empirical research  
7 because we didn't want to deal with a live case because  
8 then you would have a denial of due process if you gave one  
9 notice to one portion of the class and another notice to  
10 another portion.

11 So Shannon Wheatman devised a survey on the  
12 Internet because also survey research is very expensive and  
13 we have a limited budget and limited time, and we did have  
14 a comparison notice, which was the best of the securities  
15 notices that we could find that were out there in the sets  
16 of notices that we looked at, and gave that to a portion of  
17 the sample and then the other portion received our at that  
18 point still preliminary plain language notices that at that  
19 point had benefitted from the focus group. And we did find  
20 significant increase in comprehension and understandability  
21 for the plain language notices.

22 MR. FINE: Thank you. Todd, let's now turn to  
23 you. Certainly, and as your paper that's posted on our web  
24 site points out, obviously a critical issue is not just

1 writing notices in plain language but also making sure that  
2 notice is received by all or at least a very high  
3 percentage of the class. Can you tell us what additional  
4 changes you think the courts and counsel need to make to  
5 address this ongoing problem?

6 MR. HILSEE: Yes. Well, first, what was so  
7 wonderful about working with the Federal Judicial Center on  
8 the illustrative notices was a recognition that despite the  
9 rules speaking to clear, concise plain language, they  
10 really wanted to do the types of things with notices that  
11 we were championing and talking about for years.

12 And when I talk to the Advisory Committee -- when  
13 I spoke to the Advisory Committee on Civil Rules I said  
14 plain language is awesome. It's great. Nobody should be  
15 against it. Nobody was against it but before you can have  
16 a positive effect from plain language you actually have to  
17 reach people with the notice. You have to get it to them,  
18 in front of them. And then once you've accomplished that,  
19 they have to notice it.

20 And so you should have notices that are designed  
21 to be noticed. And they liked that idea. So working with  
22 Bob and Tom and Shannon was tremendous and Terry because we  
23 could do those types of things. And you'll see that in the  
24 illustrative notices that are at the FJCs web site.

1           I have always approached class action notice  
2       development from the perspective that the main issue is --  
3       and I think the standards are not new, they just haven't  
4       been followed as well as they should have been for years  
5       because I think that due process has always, in the class  
6       action notice context, required that the people doing the  
7       notice programs do the notices and issue them, disseminate  
8       them in a way that you would do if you really wanted to  
9       inform someone.

10           And having worked in this field in so many cases  
11       and I see the arguments back and forth and obviously the  
12       Mullane case from 1950 which is a significant due process  
13       case on notice says exactly that. It says when notice is a  
14       person's due, process which is a mere gesture is not due  
15       process and means employed must be such as one desirous of  
16       actually informing the absentee.

17           And it goes on to say the notice should be  
18       reasonably calculated to inform. And so you actually have  
19       to want to do a good job is really where it comes from.

20           And I will tell you that I get phone calls a  
21       couple of times a week, a month, what's the least we can  
22       get away with? We want to do the minimum amount of notice  
23       that will get us the best notice practicable.

24           And there's some kind of non sequitur there. We

1 don't think the judge will require us to do more than X.  
2 Or we don't anticipate objectors so we're not sure the  
3 notice needs to be -- we're not worried that much about the  
4 notice.

5 I think the problem with these sentiments is that  
6 they seem to me in violation of due process. If you really  
7 wanted to inform someone would you put out a notice in fine  
8 print if you really wanted to tell them about a settlement,  
9 about their rights, about being able to file a claim, get  
10 the benefits? No, you wouldn't.

11 And if you really took to heart the fact that you  
12 should be reasonably calculated, what about the fact that  
13 in the communications field, and we brought this to the  
14 field way back in the late '80s, actually in the case that  
15 was mentioned this morning, Domestic Air, which became  
16 famous for coupon issues, but on a notice front, the issue  
17 was how do we know this notice program is going to actually  
18 reach people?

19 And there's a long-standing science in the field  
20 of communications advertising that we can figure it out.  
21 We can say, based on this universe of class members we can  
22 figure out the net effect of different methods of notice  
23 whether it be mailing, publication, media because the  
24 data's there.

1           The audience data is there on who's reading these  
2 things and we can figure out what percentage of a class is  
3 reached. It's used by 95 percent of all advertising media  
4 departments that figure this stuff out. It is used in 3000  
5 different agencies in hundreds of countries. It's been so  
6 for years.

7           The Audit Bureau of Circulations' data has been  
8 around since 1914. MRI data, which is audience data, which  
9 tells us how many people are you going to reach with this  
10 campaign against targeted demographics, which we can often  
11 get down to matching up with specific settlement classes.  
12 We can figure out of prescription drug takers what percent  
13 are going to read this mixture of outreach methodology.

14           Now that data's there. I think courts need to  
15 know it and I think when they're presented it in the  
16 context of class action, when they're given this evidence  
17 whether a point during the litigation, preliminary  
18 approval, when they get from us the detailed notice plans  
19 saying this is why this plan is good.

20           I think if they saw that from a lot of plans  
21 where you see a notice, it gets mentioned this morning,  
22 notices are all alike. They get slugged in the back of the  
23 paper. Somebody slugs it in the USA Today and lets the  
24 judge think that, hey, you know, this is a national paper.

1 It's the biggest national paper. It's out there for all  
2 the world to see. Surely, it's good enough notice.

3 But you can crunch the numbers and it's pretty  
4 easy to see that that's going to reach about 3 percent of  
5 your class and 97 percent will have had no opportunity at  
6 all, let alone come in at the end and be able to file a  
7 claim from that.

8 MR. FINE: And how easy is it to get data-  
9 specific information for a particular class? How long does  
10 that take and what are the costs?

11 MR. HILSEE: Well, you get what you get from the  
12 parties and the defendant has a lot of information in terms  
13 of its mailing list and such. But in terms of the data  
14 available there's secondary source data for media vehicles  
15 for sure that we have readily accessible that other  
16 professionals do.

17 And it's not a time-consuming process. It's done  
18 -- when we work with the parties we do it in a matter of  
19 weeks in preparing for submission of a sophisticated notice  
20 program. It can be done in a fairly short time frame.

21 MR. FINE: Do you do that with all of your notice  
22 programs or is it case specific?

23 MR. HILSEE: We do it with all of our notice  
24 programs. I think the courts need to have the information

1 available. We provide a detailed analysis of why the  
2 program we're recommending is going to be effective and we  
3 show the forms of notices and design not just the words but  
4 design them so that they are visible and noticeable. And  
5 that's sort of a no-cost issue really.

6 And oftentimes, we can find a way of reaching  
7 more people that is even cheaper than the parties might  
8 think is otherwise not affordable.

9 MR. FINE: Well, let's now turn to your  
10 PowerPoint presentation, if you want to start that up.

11 MR. HILSEE: I am going to give you some examples  
12 of what we still see, quite frankly. And I brought a stack  
13 of these with me. These are the types of things we see on  
14 a daily basis.

15 I mean, this one, I think, is intending to reach  
16 people who bought a certain insurance policy. And it  
17 starts off with notice of class action certification and  
18 settlement hearing thereon. And nowhere in the notice is  
19 it mentioned what you can get from the settlement. And I  
20 think a mention of the claims process is buried way down at  
21 the back end. I mean, it goes through a lengthy  
22 description of the settlement hearing to begin with.

23 Another one. I mean, these things, we see them  
24 every day not just in the newspaper. Here's one, this one

1 sort of in the left-hand side at the top you can sort of  
2 see the print that's even smaller, way smaller than the  
3 print in the bomb scare story, that is to reach, believe it  
4 or not, juveniles who smoked cigarettes.

5 And so it's not hard to figure out that they're  
6 not big newspaper readers to begin with and number two,  
7 that they're not going to read this fine print notice and  
8 there's nothing to call itself to their attention, to a  
9 notice like this in the mail with blocks and blocks of  
10 strung-together, all-capitals type when every single  
11 marketing or advertising or communications person will tell  
12 you that people don't read long strings of all capital  
13 type.

14 That belongs in legal pleadings for a courtroom,  
15 not to mailers where you're not sure what it is. I mean,  
16 there's a lot of statistics on junk mail. The volume of  
17 junk mail is extraordinary. The Postal Service documents  
18 it. Even the Postal Service survey says that 86 percent of  
19 people don't open or read all the mail that they get that  
20 they perceive to be junk mail. They're looking for a  
21 reason to throw it in the trash.

22 This notice would -- we got this and we don't  
23 have a Sears account. Okay? So right away you're thinking  
24 I don't have a Sears account. This is obviously a pitch.

1 And so it turned out it was notice. We save them because  
2 I'm in the notice business but otherwise I can't imagine a  
3 lot of people would.

4 The differences sometimes are pretty obvious.  
5 I'm going to click to this slide. Here's a notice we did  
6 in a case involving Progressive Auto Insurance that settled  
7 a case that we put in some things like a bold headline that  
8 said, and you'll see this in the model notices that Bob's  
9 talking about, we put in a headline: if you bought  
10 Progressive Insurance you could get benefits.

11 We put a claim form right in the notice,  
12 published it, mailed it and all the nine yards. We got  
13 680,000 claims in this case and there's -- just to see if I  
14 can go backwards here -- compare that to this which is a  
15 similar type of case when what's different? I mean,  
16 there's nothing to stand out. It arguably has a claim  
17 form. It has a headline that I have trouble reading here  
18 but it's somewhat similar and this makes all the  
19 difference.

20 Although it may seem like to some parties the  
21 notice, how you do it, what it looks like is sort of the  
22 last piece of the pie, it's critical. I don't know what  
23 response that other case will get or did get but you can  
24 see a headline, simple words, subheads, organize things,

1 claim form, fairly short, easy to fill out, response  
2 mechanisms.

3 You can focus notices on different types of class  
4 members. When we had the Hospital Corporation of America  
5 settle billing practices case we focused notices on the  
6 entities as well as consumers. And if you could see a  
7 notice that gets mailed to entities we actually mailed a  
8 summary notice so they would be more likely to actually  
9 take the time to read a brief message about it.

10 The outside of the envelope told them why they  
11 should read it, not like a Sears notice. It says exactly  
12 and the backside of it says -- you could read this -- this  
13 comes from an example case that we used in an ABA seminar  
14 last year for a prescription drug. These types of  
15 techniques on the outside of these envelopes are in and  
16 have been supported by and in the model notices at the FJC  
17 site.

18 Some other cases, Synthroid marketing litigation.  
19 If you bought it you may have a claim. We're telling  
20 people, this many claimants; this is what your payment  
21 could be. Here's the phone number. About 800,000 women  
22 came forward and filed claims in that case.

23 In the Swiss Banks case is an example of what  
24 courts will do and let professionals be creative and do the

1 right thing to really try to get notice. We went out all  
2 over the world. Other groups of experts along with us did  
3 a great job at different parts of the notices. We did the  
4 advertising all over the world in 36 different languages.  
5 We figure out what language people are most likely to read,  
6 what the best ways to reach them. We put clip-out forms in  
7 here.

8 Others on our team went to -- and with me went to  
9 countries in the former Soviet Union, figured how we could  
10 put a notice in a food package to go out to poor  
11 communities in Belarus.

12 Courts can look for this kind of stuff and within  
13 each case is different, obviously, what can be afforded and  
14 what can be done but there's creative ways you can get and  
15 here's a graphic that helps you, the purchaser of a Cooper  
16 tire determine whether they're in the settlement.

17 For the International Organization Migration  
18 compensation for victims of Nazi persecution with imagery  
19 and many courts are approving photographs and the model  
20 notices themselves suggest you can even use photographs in  
21 a legal notice to capture people's attention, help them  
22 understand whether they're affected that they may be part  
23 of it.

24 An interesting case I wanted to tell you is

1 Thompson v. MetLife, which is a race-based pricing  
2 litigation, one of the largest insurers, obviously a number  
3 of the insurance companies are involved in these cases  
4 involving whether they charged African-Americans too much,  
5 basically.

6           And one of the interesting points about this case  
7 is when this went to preliminary approval in the Southern  
8 District of New York, Judge Baer actually did, at  
9 preliminary approval, say I want to have an independent  
10 review panel look at this settlement, look at whether it's  
11 right, whether the settlement notice procedures are right.

12           We actually reviewed our extensive notice efforts  
13 with an independent reviewer before he granted preliminary  
14 approval, which this morning was suggested maybe that's  
15 never been done, but we looked at the best ways to reach  
16 people.

17           It wasn't just sending it out, which of course we  
18 mailed it to everyone we could, but of course in a  
19 noticeable, clear fashion we also did newspapers, African-  
20 American newspapers, reached out on urban radio stations  
21 and other mass media including a television. You can do  
22 this kind of thing. (Whereupon, a videotape was played.)

23           So that gives you an example of some of the  
24 things you could do. During maybe some of the other

1 questions I want to show that Masonite spot.

2 MR. FINE: Sure. I think we'll do that at the  
3 end should we have some time. Next I'd like to turn to  
4 Howard Yellin. Howard, there are certain types of class  
5 actions that despite counsels' best efforts for whatever  
6 reason class members have trouble with participation. What  
7 services does the Settlement Recovery Center offer?

8 MR. YELLIN: Well, class participation is really  
9 sort of in many cases the seamy underbelly of the class  
10 action system. This morning references were made to the  
11 Lucent/AT&T case where \$8 million representing about 2.5  
12 percent of the available claimants participated. Someone  
13 referenced the case where there was .0025 percent  
14 participation.

15 There is an intrinsic problem, I believe, which  
16 is that once a case receives preliminary approval there is  
17 no party involved whose financial interests are directly  
18 aligned with the plaintiffs, with the class of plaintiffs,  
19 to actually participate in the settlement except in those  
20 cases, of course, where counsels' fees are tied to ultimate  
21 participation, which we support.

22 Settlement Recovery Center works for individuals,  
23 for businesses, for securities entities, for nonprofits in  
24 many cases in an attempt to drive participation in a

1 settlement. And bottom line, that is our job is to get  
2 people to participate in settlement.

3 In a sense, we pick up where Todd leaves off with  
4 official notice. And notice is so deeply rooted in notions  
5 of substantive due process that while I certainly applaud  
6 the work that Todd has done and I think it's really  
7 meaningful and tremendously effective in driving more  
8 members to participate in classes, we still know that in  
9 broad class actions, a 30 or 40 percent participation rate  
10 would be tremendous.

11 So the way that we work is clients come to  
12 Settlement Recovery Center through our outreach programs  
13 and we help them participate in the class. It's as simple  
14 as that. In some cases where there are a significant  
15 number of individual claimants involved this may involve  
16 actual advertising on our part.

17 We've been working extensively on the Microsoft  
18 litigation around the country. We're working actively in  
19 six of the states that settled and have run a substantial  
20 number of radio spots, of TV spots. We have done extensive  
21 earned media PR work and have gotten tremendous publicity  
22 for the cases.

23 The advantage we have, of course, as compared  
24 with Todd is that while we have an obligation to be honest

1 and truthful and fair and transparent in our communication  
2 with our audience, we don't have to run it by plaintiffs'  
3 counsel. We don't have to run it by defense counsel. We  
4 don't have to run it by the judge.

5 We are, in effect, a marketing agency. The way  
6 that we work is we sign up clients. We collect a fee,  
7 typically a contingency fee, that's paid only on the back  
8 end, only based upon the amount that an entity recovers.  
9 And we have seen really tremendous effects. I'll just give  
10 you an example.

11 In California, where we are involved in the  
12 Microsoft claims cases, we have brought in claims totaling  
13 at this point approaching, I should say, about half a  
14 million claims that have come in through us out of a total  
15 of just over ten million potential claimants and I believe  
16 about two million actual claimants. So we represent about  
17 a quarter of the class that is actually participating in  
18 the settlement.

19 In Florida, where we have not been active because  
20 of the nature of the settlement and the structure of it,  
21 the claims rate is languishing at an incredibly low number  
22 and at this point the case appears virtually to be on hold  
23 because participation is so low.

24 MR. FINE: Why would an individual use you for

1 one class action? Why wouldn't they just file the claim  
2 form themselves?

3 MR. YELLIN: Well, there are a couple of answers  
4 to that. We are moving toward sort of a subscription model  
5 where both individuals and companies can sort of  
6 participate through us and any potential claim that they're  
7 entitled to, sort of giving folks an opportunity to -- I  
8 apologize Todd -- to substantially ignore the notice that  
9 they get and know that we're going to keep them  
10 affirmatively informed of what they may be entitled to.

11 The challenge, of course, I think implicit in  
12 your question is what about in the CD cases where someone  
13 is going to receive \$14 or in the Microsoft case if an  
14 individual is claiming just a hundred bucks? And there  
15 what we've looked for are novel ways of aggregating, and I  
16 think this will tie into James' work as well, aggregating  
17 claimants in positive ways to encourage them to  
18 participate.

19 Specifically, we have a program called Donate  
20 Direct and how that works is we sign up nonprofits to be  
21 the beneficial recipients of folks' claims under  
22 settlements. And then they use their connections to their  
23 membership to get folks to participate in the settlement  
24 and then donate their recovery back to the nonprofit.

1           MR. FINE: Certainly in securities class action  
2 cases it's easier to monitor them just based on what  
3 Stanford has done and what others have done. In consumer  
4 class actions, certainly the FTC and others that we have  
5 spoken with have found it difficult to monitor class action  
6 settlements and oftentimes we hear about a settlement after  
7 it's already been approved and perhaps the claims period  
8 has ended. How do you monitor that to make sure that you  
9 service your clients' needs?

10           MR. YELLIN: That certainly is a challenge. We  
11 do a lot of independent research. We have a number of  
12 folks who do nothing but scan public databases, the  
13 Internet, LEXIS-NEXIS, West Law, all over the place,  
14 obviously the Stanford site, for progress on cases and  
15 trying to track them.

16           We call courts frequently. When we hear a rumor  
17 of actions we try to stay as involved as possible. We do  
18 have one secret weapon, though, which is we have clients.  
19 We have subscribers. And frequently we hear about cases  
20 through our clients. They receive the notice and they pass  
21 it on to us. And if we've missed it, it's a great way for  
22 us to know about a case and then dig in and see what we can  
23 do for our clients in that regard.

24           MR. FINE: So in part a business client would

1 hire you to find out about class actions they don't know  
2 about but also for class action settlements that they do  
3 know about just so they don't have to do the administrative  
4 aspect of filing it and they basically say you guys take  
5 care of it for us. Is that right?

6 MR. YELLIN: That's exactly right. It's a  
7 fundamental outsource kind of thing. There's no company  
8 that has a chief officer responsible for claims filing, or  
9 not one that I've found. The cases very obviously, there  
10 are cases where clearly the value that we can add is de  
11 minimis. If all that's involved is filling out a simple  
12 form and your membership in the class is predetermined and  
13 what you're going to recover in the class is predetermined,  
14 all that we can do is make sure that that is filed by the  
15 claimant.

16 In other cases, certainly the Microsoft cases are  
17 good examples, all securities cases where you have to  
18 analyze substantial trading data, I know that we may see  
19 Todd's Masonite ad although we were not involved in  
20 Masonite cases, folks needed help in the Masonite cases to  
21 determine whether they had the right products, what their  
22 extent of damage was, et cetera.

23 So the value add that we bring varies really  
24 substantially based on the type of case. But that's fine.

1 I mean, at the end of the day, the simple reality is that  
2 even in the simplest cases, even when we look at notice  
3 like Todd showed us that was really tremendously clear and  
4 there's a simple form for people to fill out at the bottom,  
5 the claims rates are still tremendously low and everyone  
6 who we get to sign up who would not otherwise is one more  
7 member of the class who is benefitting from the settlement.  
8 And that, frankly, is our mission in a nutshell.

9 MR. FINE: Okay. I think that's a good segue now  
10 to James Tharin who is the CEO of Chicago Clearing Corp.  
11 James, basically let me ask you this question. What do you  
12 look for in a coupon settlement in deciding whether Chicago  
13 Clearing Corp. should get involved as the market maker and  
14 can you provide a couple of examples of your involvement?

15 MR. THARIN: Yeah. Thank you, Adam. I'd also  
16 like to thank the FTC for inviting Chicago Clearing  
17 Corporation here. Naturally we're a strange fit when there  
18 are a bunch of academics and attorneys since we are an  
19 entrepreneurial organization that buys and sells coupons  
20 for profit, and of course we're not afraid to admit that.

21 When we look at a settlement to value it, to  
22 determine if we're indeed going to make a market in the  
23 settlement there are five or six basic tenets that we look  
24 at.

1           First, of course, we look at the notice and the  
2           claims process. We look at the transferability of the  
3           coupon. We look at market maker access to the class, the  
4           marketability or economics of the case, the rules of  
5           redemption in reimbursement and the oversight and  
6           enforcement that exists in the case.

7           We also, of course, take note of who the players  
8           are, who the plaintiffs' attorneys are, who the defense  
9           attorney are, who the defendants are and what court it's in  
10          to make a determination of whether we can figure out a way  
11          to buy and sell these coupons from class members.

12          The threshold issue for us, initially, is who can  
13          we buy these from? Who can we sell them to and what's the  
14          spread and what's the transaction cost in between?

15          So naturally, lower-priced coupons are more  
16          difficult for us because they present certain hurdles as  
17          far as transaction costs go. So we look at cases, but we  
18          don't exclude those cases, but we tend toward the more  
19          expensive cases or cases that have higher coupon values.

20          Over the course of the last ten years, CCC was  
21          founded in 1993, we've made markets in ten unique  
22          certificate settlements. Currently, we're making a market  
23          in the auction houses settlement, which was a settlement  
24          against Sotheby's and Christie's and we're making a market

1 in the Lloyd's litigation, which, of course, was a  
2 settlement against Lloyd's of London.

3 So if we've made markets in ten coupon cases and  
4 this is our primary business, why haven't we made markets  
5 in the hundreds and hundreds and hundreds of other coupon  
6 cases that have been out there?

7 Well, to get to the points that I just raised and  
8 let me say something first. Coupon redemption is low  
9 generally. In other words, there are billions and billions  
10 of dollars of coupons that are issued by corporations as  
11 marketing tools. The average redemption rate for those is  
12 around two percent. So it's no wonder that class action  
13 coupon redemption rates inherently are very low.

14 But the goal here is to increase those redemption  
15 rates, it seems to me so that the class members who are  
16 harmed, because naturally the consumers that are being  
17 solicited to buy a product by the defendants themselves  
18 were not harmed, but in the case of a class action  
19 settlement there is presumably a harm to the class and  
20 there's an obligation, it seems to me, by the parties to  
21 make sure that the class members, the consumers, can get  
22 what they bargained for or what their attorneys bargained  
23 for them for.

24 So what we have found, of course, over time is

1 that class action coupons do not get redeemed at any higher  
2 rates than marketable coupons, especially in the absence of  
3 a market maker.

4 So let me first talk about my first point, notice  
5 and process. Naturally, I don't have to belabor notice  
6 after this panel because what was said prior was exactly  
7 true. Most notices are very difficult.

8 There are a couple of other points though. Many  
9 cases are claims-made cases. Claims-made cases' redemption  
10 rates are very, very low. That's all there is to it.  
11 Little more needs to be said. So if you can avoid a  
12 claims-made, and I probably should be careful because I'm  
13 going to be giving some defendants some tips, but you  
14 should probably keep the claims-rate processes as minimal  
15 as possible. It dramatically reduces the redemption rate.

16 As an example, someone earlier today said there  
17 was a certain redemption rate in a case, quoted the  
18 redemption rate. Well, they forgot to also mention that  
19 there was a claims rate and the claims rate was far, far  
20 lower. So therefore, the redemption rate of the class  
21 itself was far, far lower.

22 Also in this process it was mentioned also  
23 earlier and I'll touch on it briefly, reversion cases, of  
24 course, benefit the defendant dramatically. So we look and

1 see if there's a reversion. If there's not a reversion  
2 we're far more tempted than if there is a reversion. If  
3 there's not a claims we're far more tempted than if there  
4 is a claims process.

5 Transferability, of course, is our minimum  
6 threshold. We cannot operate without transferability. If  
7 it is a nontransferable coupon we won't even approach it.  
8 We may object but we won't try to make a market in it.

9 Secondly, with transferability -- transferability  
10 alone is illusory and a lot of people try to make  
11 transferability, they try to lean on transferability.  
12 Well, transferability does not always mean freely  
13 transferable. It can mean restrictive transferability.  
14 That's naturally very bad or reduces redemption rates if  
15 that's the goal is to have a high redemption rate, which of  
16 course we believe it should be.

17 But transferability alone doesn't do it. You  
18 need somebody there to buy and sell these coupons from the  
19 class members or they simply don't redeem them. I can cite  
20 numerous cases where redemption rates with transferability  
21 without a market maker are nearly identical to redemption  
22 rates of nontransferable coupons. If there's not a market  
23 maker they are essentially nontransferable.

24 So what does a market maker do? We need access

1 to the class, naturally, and there are various degrees  
2 which are better than others as far as access to the class  
3 goes. We can be -- in the past we've been on the coupon.  
4 Our 800 number has been on the coupon. We've had our  
5 mailing put in with the class mailing. We've been on a web  
6 site. We've had access to the class by getting the list.  
7 All of those things are important, but in terms of degree  
8 getting access to the class is by far the most important  
9 feature for us.

10 Defendants will argue, well, this is a  
11 proprietary list but it's also a public class action so is  
12 this list really proprietary or is it in the public realm?  
13 We think it's in the public realm. Naturally, we need  
14 access to the class in order to inform everyone equally of  
15 what we're offering otherwise you're prejudicing certain  
16 members of the class if we can't reach them.

17 The other thing we look at is marketability and  
18 economics. In other words, how many coupons are chasing  
19 what products? If you have a massive amount of coupons  
20 being issued and very few products to redeem it against,  
21 that's not a very marketable coupon. The economics are not  
22 good.

23 Marketability also goes to is it easy to buy and  
24 sell? Who can we sell it to? What are some of the

1 processes? Economics would also include what kind of  
2 product or service is this good against. Is this a product  
3 or service that can be made obsolete quickly? Is this a  
4 product or service that is going to be made obsolete  
5 quickly? Is there anyone -- well, that gets to the next  
6 point. So what we look at is is there a market here for us  
7 to sell these, someone to sell these to en masse?

8 The next point is rules of redemption in  
9 reimbursement and Howard touched on this, I thought, well.  
10 One of the issues that we have, this is not a securities  
11 settlement. People are not receiving cash in the mail.  
12 Cash redemption rates aren't a hundred percent. Cash  
13 redemption rates are far below a hundred percent. People  
14 don't open their mail. This was pointed out earlier.  
15 People don't cash these checks.

16 But this is not a securities class action where  
17 cash is being sent out. For the consumer, the class period  
18 really begins when they receive the coupon. That's when  
19 they can actually use their award. They can't use it  
20 before.

21 This aspect is lost, it seems to me, in the  
22 process quite often. The rules are rarely laid out ahead  
23 of time. They're almost always deferred or in the past  
24 they have been, it's getting better, but they in the past

1 were always deferred to the defendant who was also served  
2 most often as the administrator.

3 So what is the defendant's goal? Well, as was  
4 pointed out earlier today, if they can't get an incremental  
5 sale their goal is to squash redemption, period. So if  
6 they can control the rules the devil does become in the  
7 details.

8 The devil is found in this case in the details  
9 because there is nobody there. There's no police. There's  
10 nobody there to oversee and enforce these rules. The  
11 plaintiffs' attorneys, by and large, have been paid in  
12 cash, have moved on to their next case. The judge isn't  
13 going to proactively oversee the class. They need people  
14 to brief them to get issues to them, which brings me to the  
15 next issue, which is oversight and enforcement.

16 Somebody's got be there to oversee these rules  
17 and somebody has to be there to enforce these rules. One  
18 of the inherent problems with a certificate settlement is  
19 certificates expire. And the legal process is not  
20 developed for that.

21 In other words, if you have a coupon that's two  
22 years in length, as you all know, to brief fully a problem  
23 in a case like this in front of a judge can easily take  
24 more than two years. Coupon's expired. So where is the

1 redress? There is none. So that's pretty much how we  
2 decide to value certificate settlements.

3 MR. FINE: Thank you. Before I turn to Deborah I  
4 just want to remind everyone that if you have questions,  
5 Robert is walking around and is picking up the question  
6 cards. Thank you.

7 Deborah, even if there is clear notice and  
8 efficient markets there are sometimes specific target  
9 audiences that have unique interests such as AARP's  
10 members. AARP plays a role in class action settlements  
11 both in terms of providing notice to consumers as well as  
12 in filing amicus briefs. Can you discuss both of these  
13 components including describing the two amicus briefs that  
14 you have placed on our web page as your materials?

15 MS. ZUCKERMAN: Sure. I'd be happy to. I do  
16 need to start out with a disclaimer which I think is  
17 appropriate in an FTC-sponsored event since I'm used to  
18 being in the audience at an outside event where an FTC  
19 speaker always says, I need to say at the outset I'm  
20 speaking -- my views are my own. I don't necessarily speak  
21 on behalf of AARP or the AARP foundation which is actually  
22 the entity that I work for.

23 And perhaps more importantly I need to say I  
24 don't work in membership. If any of you or your relatives

1 or friends has just turned 50 the membership application  
2 did not come from me.

3 But in my position I have several different  
4 roles. I do co-counsel consumer class actions. I do  
5 represent -- where I'm representing individuals obviously.  
6 I do also represent AARP when I file amicus briefs and then  
7 I have as the materials I included indicate represent  
8 objectors. They actually were not amicus briefs. We did  
9 represent class members who wanted to object to the  
10 settlements.

11 In terms of what role an advocacy group can play  
12 in getting the word out it seems as though it's a simple  
13 question but the more I thought about it the more I  
14 realized it's somewhat complicated.

15 On some level that may be because of AARP and the  
16 way AARP operates, which I'll get into a little bit, but I  
17 think even some of those issues can be more generalized to  
18 other advocacy groups.

19 But let me give the short answer first, just by  
20 reading a letter to the editor that is in the current  
21 bulletin which is sort of the newspaper-type publication  
22 that AARP sends out on a monthly basis.

23 It says, thank you, thank you, thank you. I so  
24 appreciated the article in the May 2003 issue regarding the

1 BuSpar antitrust settlement with Bristol-Myers Squibb  
2 Company. My mom who had just died in April took BuSpar  
3 from January 1998 through July 1999. I called the phone  
4 number in your article, followed the directions and then  
5 forgot all about it.

6 Yesterday I received a check for more than  
7 \$3,000. What a wonderful surprise. I plan to share the  
8 money with my grown kids but they have to promise to be  
9 part of AARP in 20 years or so when they qualify. Thank  
10 you again and keep up the good work.

11 So that's sort of the simple answer that, yes,  
12 advocacy groups can play a useful role but part of the  
13 problem or the issue, I think, depends on at least again in  
14 AARP if I'm co-counsel in a case then obviously I have  
15 signed off on the proposed settlement and the notice and I  
16 can try and get AARP to publish that notice or information  
17 about that notice because I'm supporting the proposed  
18 settlement.

19 But if I'm not in that role then basically all I  
20 can try and do is get the word out that there is this  
21 proposed settlement in this class action. You should get  
22 information about it and then decide what to do. In other  
23 words, I don't represent the class members. I can't advise  
24 them on what they should do whether they should

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1 participate, whether they should opt out, whether they  
2 should object, anything of that nature.

3 The other thing that I think is important at  
4 least again in terms of AARP is this woman mentions an  
5 article. Sometimes, particularly where my colleagues or I  
6 are class counsel, we can ask the bulletin to put in a  
7 notice about the settlement.

8 Now a lot of people's eyes are going to roll  
9 because they always do when I say this. When we do that  
10 that's considered an advertisement and we need to pay the  
11 bulletin to run that notice. In this case, it was actually  
12 an article about the case and the proposed settlement,  
13 which is free. I think it also has a much greater chance  
14 of people reading it because it's an article just like any  
15 other as opposed to what looks like an ad.

16 But there's a disadvantage there in that while I  
17 may have spent time working on this case or my colleagues  
18 have and we think it's really important we have to convince  
19 the writers and editors that it's newsworthy and that our  
20 members have something to gain by the publication of this  
21 article.

22 The downside either way is, as I alluded to  
23 before, if we're not class counsel we run the risk of  
24 creating the false impression that once people hopefully do

1 see the information that we'll be able to help them further  
2 and even if we don't put in a contact name or phone number  
3 we do end up getting letters and phone calls saying I saw  
4 this. I've got more information. What should I do? And  
5 unfortunately again, we're not really in a position to do  
6 much for them.

7 Now other organizations may have better avenues  
8 where they can publish this type of information but again,  
9 if they're not class counsel their role is going to be  
10 somewhat limited.

11 The other thing, no matter which organization it  
12 is, that I think is really critical and I'm not sure how to  
13 address this, except I would urge counsel in the cases,  
14 particularly where there is a particular type of group  
15 demographically that makes up the class, that you think  
16 ahead in terms of how you might want to get the word out,  
17 because obviously every publication has a publication  
18 schedule.

19 And in order for the notice, whether it be a  
20 typical kind of box notice or an article to really be  
21 effective it has to get into the publication in a timely  
22 enough fashion that people will be able to see the  
23 information, get whatever additional information they may  
24 need and then take the necessary steps to either make a

1 claim, opt out, object, whatever they feel is important for  
2 them.

3 But it's important to keep in mind that again  
4 every group has a publication schedule and sometimes it's  
5 months in advance of when it actually is going to hit  
6 people's mailboxes.

7 MR. FINE: Todd, do you have something you want  
8 to interject?

9 MR. HILSEE: Yeah. I wanted to say that that's a  
10 very common component of class action notice programs, the  
11 formal notice programs approved by courts is finding those  
12 demographic groups. And we work with the AARP in that  
13 regard in putting notices into their publications and  
14 putting it into the notice plans asking courts to approve  
15 that as part of a notice program but also press releases,  
16 press efforts, prepared news articles, outreach to lots of  
17 third party groups.

18 Or a lot of times you may not see it in the types  
19 of notice programs that you might perceive to be the normal  
20 course of notice programs but these are part of good notice  
21 programs all the time. And I think that's a really  
22 important aspect of good notice is the type of outreach to  
23 groups like the AARP and, for example, our Synthroid notice  
24 program reaching a somewhat older demographic took

1 advantage of that.

2 MR. FINE: Great. Well, we have three excellent  
3 questions. Unfortunately, we'll only be able to get to  
4 one. I encourage the drafters of the other two to speak  
5 with our panelists at some point during a break but I do  
6 want to ask this one question.

7 The question is: Please comment on the role of  
8 minimum payments in creating adequate incentive for  
9 consumers to bother making a claim. Is anyone aware of any  
10 research done showing what constitutes adequate payment to  
11 be a tipping point for claims rates? Howard?

12 MR. YELLIN: Well, not research but we've today  
13 referred repeatedly to the CD cases and their payment was  
14 \$13, \$13.86 or whatever it was and was received well. So I  
15 think that at least as far as cash payment goes on broad-  
16 based consumer class actions the threshold is surprisingly  
17 low. You wouldn't think that people would get excited  
18 about a \$13 check and yet participation has been  
19 surprisingly high.

20 MR. HILSEE: I think participation in these cases  
21 has a lot to do with a lot of different factors that go to  
22 how important is this to your life? How concerned are you  
23 about this issue? Is this important to you? Is it your  
24 house? Does it relate to your health? Is it something you

1 live with daily?

2 I mean, in a case like Microsoft one of the  
3 things that enters into your mind is this an issue that  
4 people are concerned about the price they paid for their  
5 software? And I'm not certain that they are.

6 But look, I mean, the response rates come and I  
7 want to just take the opportunity to touch on the fact that  
8 in the context of court notice programs, the attorneys, and  
9 I think there are many situations where attorneys are doing  
10 the right thing and trying to do outreach on their own to  
11 get claims rates up. And that's something that doesn't  
12 come out quite often. I wanted to play a spot that --

13 MR. FINE: Sure. Deborah's going to say one  
14 final note and then we're going to play your spot.  
15 Deborah.

16 MS. ZUCKERMAN: Just quickly, one point I would  
17 like to make and this was something that I think was  
18 brought out in the objections that I included in our  
19 materials is while I agree that to some degree  
20 participation rates have to do with how important this is  
21 to you, I think a really big issue that hasn't been  
22 addressed enough, although briefly, is what, if any, claims  
23 process there is.

24 And when I got an e-mail from a friend of mine

1 about the CD settlement and all I had to do was click on a  
2 link and I think put in my name and address and that was  
3 basically it, I mean, that was a pretty good way to get \$13  
4 as opposed to the objections in the Publishers  
5 Clearinghouse settlement that we included in the materials  
6 people had to -- and these were the sweepstakes promotions  
7 where people bought magazines and other fairly worthless  
8 products -- they had to send those products back or they  
9 had to sign a sworn affidavit explaining that they hadn't  
10 got any value from the products, that they had given them  
11 away as gifts. I mean, I think there are sort of two  
12 issues -- let me just say really quickly.

13 One is, I think the more cumbersome the claims  
14 process the harder it is to have an understandable notice.  
15 But the other thing is, and maybe it's a question of sort  
16 of not so much semantics but just word usage, claims rate  
17 and participation rate I think are two different things.

18 And in the cases that I've been involved in as  
19 counsel, we try to do our best not to have a claims  
20 process. And to a large extent there is really no reason  
21 to. If it's a situation where the defendant has all the  
22 customer information in its computer it knows exactly who  
23 made a purchase or opened an account or whatever the  
24 situation is during the class period it generally knows

1 exactly how much they spent. There is really no good  
2 reason to have a claims process other than, frankly, to  
3 reduce the claims rate.

4 MR. FINE: Well, why don't we finish this off.  
5 Todd, why don't you show us your final video?

6 MR. HILSEE: Well, just to end on a positive  
7 note, I think to say, to show one thing let me show you  
8 first one thing that defendants do in terms of are we  
9 really willing to try to reach people, defendants in this -  
10 - I'm not sure if you can see this -- in the Blockbuster  
11 case the defendants wanted to put the notice and agreed  
12 with us we could put the notice right on the store receipt  
13 and they gave automatic credits of certificates.

14 Of course, it was on appeal for so long that  
15 we're just getting started. But we gave out 25 million  
16 notices this way. And I think that shows a willingness to  
17 really try to desire to reach people. From a plaintiffs'  
18 attorneys' side after final approval, \$580 million has been  
19 paid so far in this Masonite siding case and after final  
20 approval, plaintiffs' attorneys are still willing to put,  
21 invest money in reaching more class members because they  
22 think that there's more people out there. So you can do  
23 this kind of thing within the context of formal notice.  
24 (Whereupon a videotape was played.)

1           So we've been getting thousands of calls a week  
2 when that's been running. The claims rate has been going,  
3 went from about 530 million to about 580 million in the  
4 last couple or six months.

5           MR. FINE: Well, we're going to take a ten-minute  
6 break before the next panel but please join me in thanking  
7 these five panelists. (Applause.)

8   **(Whereupon, a short recess was**  
9   **taken.)**

10           MS. BAK: If you take your seats I think we'll  
11 start our next panel. I'm Pat Bak. I'm an attorney with  
12 the FTC's Bureau of Consumer Protection Enforcement  
13 Division. Welcome. This is Class Action Attorney Fees,  
14 something I'm sure some of you have been waiting for. Our  
15 goal here is to bring some light to what is sometimes an  
16 area of heated rhetoric. So with that let me tell you a  
17 little bit about how we are going to structure this.

18           First, we are going to review some of the latest  
19 empirical work that's been done in area on class action  
20 settlements and class action attorney fee awards.

21           We have Professor Geoffrey Miller and Professor  
22 Deborah Hensler with us today. These are two individuals  
23 who have done some of the most recent and detailed  
24 empirical work in the area. It will help us to understand

1 what the data actually shows.

2 Are class action attorney fees rising  
3 exponentially as the press would have us believe or is it  
4 myth? So we will first turn to them and following their  
5 presentation have an open discussion among all our panel  
6 members about their findings.

7 Thereafter, all the panel members are going to  
8 engage in examining a number of particularly challenging  
9 problems in the area of attorneys fees. First, we're going  
10 to turn to exploring some innovative approaches to  
11 appointing, managing and compensating class counsel and  
12 certain means by which to ensure that counsel are  
13 adequately and reasonably compensated for their work and  
14 that the results they obtain are reflected appropriately in  
15 their fees and that those fees reflect a market rate of  
16 some sort.

17 Next we're going to discuss some of the special  
18 challenges posed in determining reasonable attorneys' fees  
19 in the context of non-pecuniary settlements or settlements  
20 where total payment to the class depends on the number of  
21 class members who file a claim.

22 After that we're going to hear our panelists'  
23 views as to whether they believe the amendments to Rule 23  
24 are going to make any substantial difference.

1           And finally, we're going to touch just briefly,  
2           because we've spent a lot of time on it in other panels, on  
3           the value and function of objectors, that is fee objectors  
4           in this case, how that process might be better managed to  
5           inform a court with an adversarial voice as to the  
6           appropriateness of fees.

7           And then finally, best of all, we're going to  
8           leave some time to actually answer your questions. So  
9           please if you see somebody walking up and down the aisles  
10          holding up a card, jot down your questions so we're sure  
11          that we're able to ask it.

12          So without further ado, I think I'm going to do a  
13          little bit of introducing even though I hope you'll turn to  
14          your packets because there's extensive information on the  
15          bios of each of our esteemed panelists.

16          Professor Geoffrey Miller, who's going to be  
17          presenting his work that he co-authored with a future  
18          panelist who will be appearing tomorrow, Ted Eisenberg, is  
19          the Stuyvesant and William T. Comfort Professor of Law at  
20          NYU.

21          Prior to joining NYU Geoff was the Kirkland and  
22          Ellis professor at the University of Chicago Law School  
23          where he also was associate dean, editor of the Journal of  
24          Legal Studies, the director of the university's Law and

1 Economics program. He has extensive background in class  
2 actions, having written widely in the area and he also  
3 teaches on that subject.

4 Our next speaker, Deborah Hensler is the John W.  
5 Ford Professor of Dispute Resolution at Stanford University  
6 Law School. She is the director of the Stanford Center on  
7 Conflict and Negotiations. Deborah teaches complex  
8 litigation and she's written extensively on complex  
9 litigation, class action litigation, asbestos litigation --  
10 something near and dear to my prior life -- and mass torts.

11 She is the lead author of Class Action Dilemmas,  
12 Pursuing Public Good for Private Gain, and she was the  
13 Director of Rand Institute for Public Justice prior to  
14 joining the Stanford faculty.

15 And let me introduce our remaining panel members  
16 as well. The Honorable Judge Vaughn Walker is a United  
17 States District judge for the Northern District of  
18 California. He was appointed to the bench in February of  
19 1990. He was nominated by President Bush and earlier by  
20 President Reagan.

21 Judge Walker is a pioneer in the development of  
22 innovative approaches to selection of lead counsel and the  
23 ex ante determination of fees, having been the first judge  
24 to utilize and to champion the auctioning of class counsel.

1                   Just immediately to his left is Mike Denger.  
2                   Mike is the antitrust partner at Gibson, Dunn & Crutcher  
3                   where he co-chairs the firm's antitrust and trade  
4                   regulation practice.

5                   Mike has been litigating and handling all manner  
6                   of antitrust and trade regulation matters for over 30  
7                   years. He currently serves on the ABA's Antitrust  
8                   Section's antitrust remedies task force and has previously  
9                   served on section task forces which have presented reports  
10                  and recommendations to both the Clinton and Bush  
11                  administrations.

12                  Howard Langer, immediately to his left, is a  
13                  partner with the firm of Langer & Grogan in Philadelphia.  
14                  Howard has litigated large complex commercial and class  
15                  action cases on behalf of plaintiffs for over 25 years.

16                  He is an adjunct professor at the University of  
17                  Pennsylvania Law School. He teaches antitrust. He most  
18                  recently won an approximately \$203 million, I believe it  
19                  was, recovery on behalf of the plaintiff class in the liner  
20                  board antitrust litigation. He obtained a \$60 million fee  
21                  for plaintiffs' counsel and high praise from the court for  
22                  his management of that case.

23                  And last but not least at the very far end, I can  
24                  barely see him myself, is Lloyd Constantine. He's the

1 managing partner of Constantine and Partners. Lloyd was  
2 lead counsel in the VISA check MasterMoney antitrust  
3 litigation which resulted in a \$3.4 billion settlement and  
4 historic injunctive relief that benefitted U.S. businesses.

5 Lloyd has been involved in numerous class action  
6 and multistate antitrust litigations over his entire  
7 career. He served as assistant attorney general in charge  
8 of antitrust enforcement for the State of New York from  
9 1980 to 1991. So with such an esteemed panel I know we  
10 want to get down to it so without further delay, Geoff  
11 Miller.

12 MR. MILLER: Thank you Pat. I've got a  
13 PowerPoint here. When I try to do this with my students I  
14 always fail so I'm sure the FTC is more technologically  
15 sophisticated.

16 Well, it's often been observed that class action  
17 and especially large-scale, small claim cases are a form of  
18 lawyer-driven litigation dominated by entrepreneurial  
19 attorneys. Because counsel plays such an overwhelming role  
20 in these cases the economic incentives facing counsel are  
21 going to be critical. Attorneys' fees are the fuel of the  
22 internal combustion engine that drives modern group  
23 litigation.

24 And because of the pervasive conflicts of

1 interest between class counsel and the class fees must be  
2 set by the court. But how is the court to go about this  
3 task of setting fees?

4 So the ultimate objective a court looks to in  
5 deciding on an attorney's fee is whether the fee is  
6 reasonable. That sounds like that's pretty easy but how do  
7 you know what a reasonable fee is? You need some more  
8 information than that because reasonableness, in itself, is  
9 a pretty amorphous concept.

10 So the courts have come up with, as many people  
11 know, several methodologies for calculating a reasonable  
12 fee. One is the percentage approach which emulates the  
13 standard contingency fee in a personal injury case, just a  
14 percent of the class recovery. Lodestar approach, which  
15 emulates the hourly fee, that is reasonable hours put in on  
16 the case times a reasonable hourly rate.

17 More jurisdictions actually use a mixed approach  
18 which either permit the trial court to use in his or her  
19 discretion, the percentage approach or the lodestar  
20 approach, or require that the trial judge compare one to  
21 the other, let's say, award a percentage fee but check it  
22 against the lodestar.

23 And then some jurisdictions just use an  
24 unvarnished form of judicial discretion. The judge just

1 looks at the case and decides what a reasonable fee would  
2 be.

3 Now, because the test is reasonableness it would  
4 seem that one important piece of information for assessing  
5 a fee is the fees awarded in comparable cases. Just like  
6 you'd want to know the comps in a real estate deal you'd  
7 want to know the comps in an attorney's fee-setting context  
8 as well.

9 Traditionally, the comps have been provided by  
10 counsel in their briefs but there's an obvious problem with  
11 counsel bringing prior cases to the attention of the judge,  
12 namely, that counsel is only going to bring to the  
13 attention of the judge cases that benefit them.

14 So the judge is going to see either only the good  
15 cases if it's a settlement where the fee isn't in dispute  
16 by the defendant or, if it is in dispute, only the outlier  
17 cases that are either very high fees or very low fees and  
18 the judge isn't really going to have the ability to make an  
19 informed decision based on the range of cases that aren't  
20 in front of the judge.

21 But luckily today there's a fairly large amount  
22 of empirical information available to help courts in making  
23 fee decisions without having to rely on partisan briefing.  
24 So I'm going to present a little bit of that data now in

1 the brief time we have.

2 This slide is from a study by the National  
3 Economic Research Associates, an economic think tank, and  
4 it's a study of fee awards in settled securities class  
5 actions from 1991 to 1996, 434 settlements. And it divides  
6 these according to size as you can see.

7 What is interesting about this is the far right-  
8 hand column where you'll see that -- or the next to far  
9 right-hand column if you want the average -- where the fee  
10 awards are extremely tightly bunched between about 30 and  
11 32 percent. They really have a very strong result here  
12 that fee awards in settled securities class actions are  
13 quite tightly bunched together.

14 This includes fees and expenses as a percent of  
15 the settlement. I'll skip that because of time. Next,  
16 what can you tell about fee awards across jurisdictions?  
17 Well, this same National Economic Research Associates study  
18 looked at fee awards in all of the federal circuits, that  
19 is district courts in all of the federal circuits, and  
20 divided up the awards across circuits.

21 And again, you can see from the far right-hand  
22 column that there's a really extraordinarily tight bunching  
23 of the awards, that is, they run from about again 30 to  
24 about 32, 33 percent across the jurisdictions. So it's

1 kind of a remarkable result that in each of these different  
2 circuits the fee awards are just about the same when  
3 calculated as a percent of the recovery.

4 What about how fees vary over time? Has there  
5 been significant changes along that dimension? This is the  
6 same outfit, NERA, but it's an update of the study I just  
7 showed you that goes through 1999 and looks at, I guess,  
8 1991 to 1999, so a nine-year period.

9 And the bottom row is the relevant one there.  
10 You can see that, again, there's a pretty tight bunching of  
11 the awards. There is an outlier in 1992 where the average  
12 award was 24 percent. But in general, the awards still  
13 stay in that category, that range of 30 to 32 percent. So  
14 this is a fairly close bunching of outcomes across time.  
15 So we have across jurisdictions a close bunching and across  
16 time a close bunching and in the first slide across case  
17 size a close bunching of outcomes.

18 Now, this information so far is only about  
19 securities class actions, so it might be that we get  
20 different results if we looked at other types of class  
21 actions. So we're looking now at a Federal Judicial Center  
22 study results, Mr. Willging's study, and here we can see  
23 that this group of researchers looked at four federal  
24 district courts and they did an in-depth study of the

1 outcomes of cases in the four federal courts.

2 And again, you can see that even in this area  
3 where the cases are not solely securities cases but they're  
4 cases of a variety of different types, you get a tight  
5 bunching. Although the percentages in this study are a  
6 little bit lower than in the securities study they range  
7 between about 26 and 31 percent. But still, quite close to  
8 that 30 percent category.

9 Now, so far the information that I've presented  
10 has been based on fairly narrow data sets, either  
11 securities cases only or a relatively small number of cases  
12 in these federal courts.

13 As you can see on this slide the numbers are  
14 quite small: about 45 cases, something like that. So this  
15 isn't going to give you a statistically valid picture but  
16 there have been two more recent studies that looked at  
17 quite broad databases so these studies are going to give a  
18 much more comprehensive picture of how fees are actually  
19 awarded in class action cases.

20 One is the class action reports data. This is a  
21 study of something around 1120 cases, I think exactly 1120  
22 cases that have been reported in that journal. Not a  
23 systematic or comprehensive selection of cases, these are  
24 cases that were selected for being reported in the journal.

1           But you can see here that we again get fees and  
2 costs as a percent of the recovery. And here we do get  
3 that bunching between 30 and 32 that we observed in the  
4 prior slides until you get to a certain size, that is about  
5 \$10 million of class recovery.

6           And once you reach \$10 million the percentage  
7 fees begin to fall off. So it looks like there's something  
8 of a scale effect playing a role here that didn't show up  
9 in the other studies. It looks like as the size of the  
10 recovery goes up the percentage fees that are awarded, at  
11 least over certain threshold, begins to go down.

12           Now, another study was done by myself and  
13 Professor Theodore Eisenberg of Cornell University. This  
14 study is a comprehensive review of all of the reported  
15 decisions in any public reporting media over a ten year  
16 period, 1993 to 2002. So any decision that was reported in  
17 any of the official or unofficial reporters where we could  
18 determine the size of the fee and the size of the class  
19 recovery went into this database.

20           There are two lines here. The dotted line is for  
21 common fund cases and you can see it reaches a peak, again,  
22 at that area of 30 to 32 percent, around there. So that's  
23 the probability distribution of the fee awards in common  
24 fund cases.

1           It drops off precipitously after about 33 percent  
2           and that's because many of these cases are decided on a  
3           percentage basis and courts don't award percentages much  
4           over 33 percent. So that's why you get the drop-off in the  
5           dotted line.

6           The solid line is fee-shifting cases, such as  
7           civil rights cases, and you see this being consistent with  
8           what you'd expect because in fee-shifting cases the fee  
9           award is not intrinsically tied to the size of the class  
10          recovery. And here we can see a whole range of fees  
11          including some where the attorney's fee was 95 percent of  
12          the total recovery in the case.

13          Now, this graph looks into how fee awards vary by  
14          type of case because so far we only looked at securities  
15          cases and cases generally. And you can see here that this  
16          data has been divided up, this is the published opinion  
17          data I referred to, divided up into case categories.

18          And you can see a fairly wide dispersion of fee  
19          percentages, the highest percentage being in civil rights  
20          cases. Some civil rights cases' fees are awarded on a  
21          common fund basis. And there the average is 37 percent.  
22          And in tax cases, tax refund cases, 13 percent. So we are  
23          beginning to get a dispersion of results in place of that  
24          tight bunching that we saw.

1                   Now, lest this be interpreted as meaning that  
2                   this type of dispersion has a great deal of significance, I  
3                   should inform you that we tested this result with  
4                   regression analyses and couldn't reject the hypothesis that  
5                   this is just due to chance. But nevertheless, it's  
6                   instructive. It seems to be that there are differences  
7                   going on here.

8                   How about based on the methodology -- okay, this  
9                   is the same result in the class action reports data. How  
10                  about based on the methodology? Do attorneys fees vary  
11                  depending upon whether the fee is calculated on a  
12                  percentage basis or on a lodestar basis?

13                  The first box at the top is published opinion  
14                  data. This shows that there is a variance between the two  
15                  methods of determining fees with fees being somewhat larger  
16                  when calculated according to the percentage method than  
17                  when calculated according to the lodestar method, 22  
18                  percent versus 17 percent.

19                  The class action reports data, which is the lower  
20                  box, doesn't find a significant difference between those  
21                  two methods and finds a higher average percentage fee in  
22                  those two cases.

23                  Now, what about scale effects? I mentioned that  
24                  when we just eyeballed the class action reports data we

1 tended to observe a scale effect, that is, the fees seemed  
2 to go down as a percentage of the recovery as the amount of  
3 recovery goes up.

4 This is all of the different large-scale  
5 databases with the results plotted and regression lines  
6 drawn through them. Now, this is really a remarkable  
7 outcome, I think, a remarkable finding. And what's  
8 remarkable about this finding is that these cases are  
9 bunched just extraordinarily tightly around a straight  
10 line.

11 There's very little deviation here which suggests  
12 that what's really going on, no matter how the courts claim  
13 to be assessing the fee, no matter what factors seem to be  
14 playing a role, what really goes on in determining a fee is  
15 the size of the recovery for the class. That is the single  
16 overwhelmingly most important factor that determines the  
17 attorney fee.

18 The size of the recovery explains between 89 and  
19 94 percent of the entire variance of these data sets. So  
20 no one expected that. We didn't expect that. There's no  
21 reason intrinsically to expect that fee-shifting  
22 methodology should be the same as common fund cases but  
23 they are. This is really to my mind a remarkable outcome.  
24 Almost the only thing that ultimately decides the fee is

1 the size of the class recovery.

2 Now, what about fee percent as relation to  
3 recovery? If there's a scale effect we'd expect that the  
4 fee percent would go down as the class recovery goes up.  
5 And as you can see by the negative slope of these lines, we  
6 find that to be true. There's a significant scale effect  
7 and the percentage goes down as recovery goes up.

8 Now, what about effects over time? We saw the  
9 NERA data looking at a limited time frame of securities  
10 cases. There were effects over time.

11 This data shows effects over time in the broader  
12 data sets, that is, class action reports and the reported  
13 cases. The large dotted line is fee-shifting cases. Those  
14 look like they go up a little bit but you can see in the  
15 two studies of common fund cases there's virtually no  
16 change. That is, there's virtually no change whatsoever in  
17 fee percents as awarded over time.

18 Now, given the remarkable strength of the  
19 relationship between size of the recovery and attorneys'  
20 fees, we might draw the inference that courts could  
21 actually receive some help from this by just looking at the  
22 size of the recovery in a case and then looking at the mean  
23 or average fee percentage that's awarded in cases of  
24 similar type and then using that information to assess

1       whether the fee is reasonable.

2                   And this simply does this, dividing up the class  
3       action reports data into ten deciles where you get the  
4       average recovery, the mean fee percent and we've also  
5       calculated here the standard deviation, which is the simple  
6       measure of variance from a mean for each of these deciles.

7                   The suggestion is that a court might wish to, in  
8       a given case, to check the reasonableness of a fee request  
9       to look at what the average recovery is for cases of this  
10      dimension and then to look at the standard deviations. And  
11      here is a graphic determination of that.

12                   So as long as you're in some of those solid  
13      lines you'll be okay. I just have one minute but I'm going  
14      to spend that minute referring to some other results of the  
15      study. The study found when we looked at the regression  
16      analysis, which I haven't given you, that risk does affect  
17      fee. The higher risk the case, the higher the fee; the  
18      lower the risk, the lower the fee.

19                   We talked about non-pecuniary and coupon  
20      settlements. That's in our study. We found that non-  
21      pecuniary settlements had no effect whatsoever on the fee,  
22      either if the value of the settlement is included in the  
23      stated value of the recovery or not, no effect either way  
24      on the fee.

1           We looked at securities cases, pre and post the  
2 Private Securities Litigation Reform Act. That statute was  
3 widely touted as tending to rein in the class action  
4 attorney. One would have thought that it would reduce the  
5 fees awarded to class action attorneys. In fact, our study  
6 provides some evidence that there is a significant positive  
7 effect of PSLRA, that is, plaintiffs' attorneys earning  
8 more in these cases than they did before.

9           We looked at objectors. One of the factors we're  
10 going to talk about is the role of objectors. Objectors  
11 had no measurable impact, no statistically significant  
12 impact on fees. We looked at settlement classes. These  
13 have been challenged. Settlement classes had no  
14 statistically measurable impact on fees.

15           Finally, we looked at federal versus state. I  
16 know there's been a lot of effort in Washington to  
17 federalize class actions on the theory that federal courts  
18 might do a better job at reining in class counsel than  
19 state courts. In fact, our study showed that attorneys'  
20 fees in federal courts were statistically significant and  
21 larger than attorneys' fees in state court.

22           So if you want to put more class actions in the  
23 federal courts I'm sure the plaintiffs' bar might be very  
24 happy about that fact. Thank you very much.

1 MS. BAK: Deborah, you've examined this issue but  
2 from a slightly different approach. Why don't you explain?

3 PROF. HENSLER: Well, like Geoff I want to begin  
4 by making the -- if it weren't obvious to you when you  
5 walked into the room at the end of a long day of talks the  
6 now obvious point that attorney fees are at the core of the  
7 controversy over class actions.

8 But I want to underline that point despite the  
9 mundaneness of it because we spent so much of today talking  
10 about coupon settlements that I think that might leave you  
11 all with the sense that coupon settlements are where it's  
12 at with trying to evaluate the costs and benefits  
13 societally of class actions and if we could only get rid of  
14 these bad coupon settlements that some people spoke about  
15 this morning that we could all stop worrying about class  
16 actions.

17 I think that's not really true. I think the  
18 issue really is what is it that attorneys are achieving for  
19 class members and for society in relation to the fees that  
20 they're obtaining. And it's clear to all of us from the  
21 press coverage of this issue as well as from cocktail party  
22 conversation that fees are perceived by many as outsized  
23 compared to the benefits that are provided to classes from  
24 class actions.

1           But the evidence has until very recently been  
2           mainly anecdotal and even in these very rich data sets that  
3           Geoff has just summarized for us very cogently, much of the  
4           statistical data pertain mainly to securities class actions  
5           which have long been the subject of very sound and  
6           extensive academic research.

7           And those cases, of course, don't represent the  
8           full landscape of class actions and certainly don't  
9           represent fully the kinds of small-value claim to consider  
10          class actions that I take it has driven the Federal Trade  
11          Commission's interest in this subject.

12          It's also true that much of the data that's  
13          available including the data we just saw are data that are  
14          derived from careful weeding of the characteristics of  
15          class action settlements, that is, the settlement as  
16          approved by the judge which, of course, as we have heard in  
17          the discussion today, may not be the settlement as it is  
18          finally experienced by class members.

19          To find out what happens to class members one  
20          needs to get deeper into cases. And this is very difficult  
21          and unfortunately very expensive because it's time-  
22          consuming to do and in the study that I led at Rand along  
23          with my colleague Nick Pace who's here and will be speaking  
24          tomorrow we chose a case study method a very fine-grained,

1 qualitative method to try and understand what had happened  
2 to specific cases.

3 And we selected ten cases for close analysis  
4 because that's all we could afford to do. We focused  
5 specifically on small damages, consumer class actions and  
6 also on mass tort class actions because they've been  
7 central to the policy controversy over class actions.

8 This was research that was done in the mid to  
9 late 1990s so we were looking at cases that had been  
10 resolved at the point of our research. Many of them, of  
11 course, were cases that had been filed some years earlier.

12 One of the things that distinguishes our data  
13 from some of the data that you've heard quoted already  
14 today is that we tried to avoid high-profile cases. These  
15 are not the cases generally that were emblazoned in  
16 newspaper headlines bemoaning the abuses of class actions.  
17 And in most instances, we actually did not know what the  
18 outcomes of these cases were when we selected them for  
19 research.

20 There is obviously a question when anybody uses a  
21 small set of cases as I am about to do. We can't claim  
22 that they're statically representative. And many people  
23 who have read our book worried about whether we selected  
24 them with a plaintiffs' bias or whether we selected them

1 with a defense bias.

2 All I can tell you about that is that people who  
3 read our book have claimed we either chose the cases to  
4 demonstrate how bad class actions or on the other side  
5 critics have accused us of having chosen the cases to  
6 demonstrate how good class actions are. So you have to  
7 make up your minds for yourselves.

8 And in the book we describe the cases in great  
9 detail as objectively as we can to leave people with the  
10 ability to make their own decision about that.

11 Briefly, I am going to describe these cases. I'm  
12 not going tell you in detail but you can see that they are  
13 a range of pricing cases, sales practices, variations on  
14 alleged violations of business practices. I'm not going to  
15 speak about all the mass tort class actions because I don't  
16 think they're all opposite but I thought I would include in  
17 the data I'm about to show you two property damage cases  
18 because at some level they could be understood not only as  
19 product defect cases, which is the way they were litigated,  
20 but as cases where claims were made about the products that  
21 were not substantiated.

22 Now, attorney fees, as we all know, are popularly  
23 compared to what individual class members receive. We  
24 heard some commentary about that this morning and so I've

1 showed you what would be that comparison. If you looked at  
2 these cases you can see right away that in one of the  
3 cases, the case against Bausch & Lomb, with regard to  
4 contact lenses, that no one actually knows what the class  
5 members got because that information was not required to be  
6 reported to the court and it's been sealed.

7 You can also see in the other cases that we're  
8 not, even in this class of consumer class actions we're not  
9 talking only about cases that are worth \$5 or less than  
10 \$10, that there are cases here where the value to the  
11 individual was in the thousands of dollars or the hundreds  
12 of dollars. But you can see in the case that I've  
13 highlighted, the case against Allstate and Farmers  
14 Insurance Company alleging violations of business practices  
15 and the technique that was used to round charges, the kind  
16 of emblematic case.

17 Here we have the class counsel fees getting for  
18 total of fees and expenses over \$11 million and the  
19 individual policyholder then takes away \$5.75. But the  
20 appropriate comparison, of course, is looking at the total  
21 of attorney fees relative to the total class member  
22 benefits because as we've been reminded this is aggregate  
23 litigation that would not survive in a court system unless  
24 the cases could be collected.

1           So the comparison we ought to be looking at is of  
2 class counsel fees and expenses to the total compensation  
3 fund. And again, you see that in some of these cases we  
4 don't actually know what that amount is, again because a  
5 judge did not require that information.

6           But the key question, it seems to me, thinking  
7 about the public policy purpose of class actions when we're  
8 looking at the attorney fee question is how do the attorney  
9 fees compare to what the settlement actually achieves. And  
10 settlement funds as this chart shows do not always equal  
11 the actual benefits to the class.

12           So here what I'm showing you in the blue bar  
13 which you will notice is often quite large is the amount of  
14 money on which the judge based the fee award decision and  
15 in the green bar I'm showing you the amount of money that  
16 was actually paid to the class.

17           And I just change the chart slightly. If you  
18 were looking quickly so that as you look at the first bar,  
19 the Robert's bar, let me go back a minute, that green bar  
20 includes about half the value that was alleged for coupons  
21 and half the cash value. And here I'm showing you the  
22 comparison looking at the cash value.

23           Now, these cases as you can see have quite  
24 dramatically different benefits, so let me show you just

1 some different versions of this chart so you can see what's  
2 going on in some of the cases where you can't read the  
3 data.

4 So the Selnick case was a case alleging improper  
5 late fees and the Inman case is a case having to do with  
6 insurance rates. And again, that's the case where we don't  
7 know what the settlement fund was supposed to be because  
8 the judge didn't seem to know what it was supposed to be at  
9 the time he approved the settlement.

10 And I've also now added onto the chart two huge  
11 cases. These are property damage cases. One is the other  
12 wood siding case that was going on in the courts at the  
13 same time the Masonite case was being prosecuted and the  
14 other is a case that may be familiar to you. It's a case  
15 involving polybutylene pipes.

16 You can see the settlements were very large and  
17 you can also see at the time we did the study we had to do  
18 some projections but our projections were that those dollar  
19 amounts would be fully paid out.

20 So now we can look at what class counsel fees and  
21 expenses look like as a share of both the negotiated and  
22 the actual settlement value. And you can see that on this  
23 chart that story might look very different depending on  
24 whether you're talking about the negotiated settlement or

1 the actual settlement.

2 Now, I want to point out that there are  
3 administrative costs to run these settlements, the costs of  
4 getting those notices out. These are all settlement  
5 classes. The notice costs are paid by the defendant.  
6 That's on top of the expenses that I showed you on the  
7 other chart so I just wanted to give you some sense of what  
8 those costs are and what they are as a percent of the total  
9 that the defendant paid out.

10 And the important note in parentheses at the  
11 bottom of the chart is in the Rand study we were not able  
12 to collect data on defense fees. And so I should remind  
13 everybody since we're focusing so much on plaintiff  
14 attorney fees that to the best that we could tell if I had  
15 to make a guess based on the fragmentary data we collected  
16 I would say defense fees were at least equal to plaintiff  
17 attorney fees in these cases.

18 But as we've also already been reminded some  
19 benefits of class actions are not included in the  
20 settlement fund value and there is the issue of what's the  
21 value of the injunctive relief that may be achieved by the  
22 class actions.

23 In all six of these consumer cases that were  
24 represented on the chart there were changes in practice

1 that we could document in all of the corporations that were  
2 associated with the class actions.

3 Now, in four of those cases we thought, and we  
4 described this in detail in the book, that you could make a  
5 pretty compelling case that the changes were either the  
6 direct effect of the suit or frequently they had been made  
7 before the settlement was approved, perhaps in an effort to  
8 put the defendant in a better position.

9 Nonetheless, the threat of a class action suit  
10 one can argue is often as important as the actual suit and  
11 settlement. So our bottom line was that in four of those  
12 cases there were changes that seemed to be the effect of  
13 the suits.

14 In two of the cases it is quite clear that the  
15 cases are follow-on cases. They are one of a family of  
16 cases, sometimes dozens of cases that were brought across  
17 the country alleging the same violation of business  
18 practice codes by the same defendant. This is the Nth case  
19 that the defendant is paying off. That defendant long made  
20 those changes. They may well have made those changes in  
21 response to the first suit but they didn't make it in  
22 response to this suit.

23 We also saw one case where there was legislation  
24 although I note that I think reasonable folks might think

1 that the legislation was passed to protect the corporations  
2 that were sued not to protect the consumers, and the  
3 product defect cases that we studied were always going on  
4 in the context of some kind of product change, removal from  
5 the market or often a state AG investigation.

6 As Geoff's data indicated, fee regime didn't seem  
7 to matter very much. In every case it seemed to be  
8 percentage of fund, whatever was the actual rule in the  
9 Circuit. Fees and hours and expenses were often not  
10 reported but where they were our calculation showed a wide  
11 variation in hourly rates and notice in disbursement  
12 procedures clearly matter.

13 I think this point was made fairly clearly by the  
14 previous panel. Clearly when you directly distribute  
15 benefits to class members, more class members get paid.  
16 All of the current policyholders who were due compensation  
17 in the insurance double rounding case received the money  
18 that they were due under the settlement. Less than 1  
19 percent, far less than 1 percent of the former  
20 policyholders who had to go through a claims process  
21 actually collected the money.

22 And we did also find cases in which the rule was  
23 whoever claimed would collect all of the fund rather than  
24 having it revert to the defendant and claimants simply got

1 second, if necessary, pro rata pay-outs until the fund was  
2 exhausted.

3 So I'll close on the point that I do think, as  
4 Judge Hornby accused me of thinking this morning, that  
5 judicial attention is necessary and can produce a better  
6 benefit/cost ratio. More attention to settlement details,  
7 closer scrutiny of noncash components.

8 I do believe the fees ought to be awarded  
9 directly between the real benefits that are actually  
10 achieved, which can be achieved in some instances by  
11 periodic payments that have been ordered by some courts and  
12 finally, I want to close on the note that I think that for  
13 those of us who are concerned that the class action  
14 mechanism, which I believe is extremely important in the  
15 United States as a tool of regulation, can best be  
16 preserved by making it work right.

17 Probably the single best thing we could do to  
18 improve class actions is put all of the features of  
19 settlements and fees as they are actually taking place  
20 instead of as they appear on paper on the record. Sunshine  
21 is a wonderful tool for improving everybody's behavior.  
22 Thank you.

23 MS. BAK: Thank you. I thought now we'd just  
24 turn to our panel members for a few minutes of questions

1 that they might have for Professor Hensler and Professor  
2 Miller. Judge Walker?

3 JUDGE WALKER: Patricia, can I lead off and ask  
4 Geoff Miller, it appears to me that the number of cases in  
5 your study is fairly small, if you consider the number of  
6 class actions generally. You've got the NERA data. Those  
7 tend to be securities cases; maybe they all are. The class  
8 action report data are selected cases. Can you really draw  
9 definitive conclusions from a fairly limited data set of  
10 this kind?

11 PROF. MILLER: Well, the numbers are more than  
12 adequate to get statistical significance to the study. The  
13 NERA data set is 1100 plus cases. Our sample of that was  
14 something like 670 during the time frame. We looked at  
15 every single decided case in the state or the federal  
16 courts that was published, including some of yours, Judge.  
17 And that came to 370 cases.

18 JUDGE WALKER: I won't ask what you made of  
19 those.

20 PROF. MILLER: You're quite right that there's a  
21 huge dark mass of sort of dark matter of cases that we did  
22 not study and that have not been studied and our results  
23 are only good for the other cases if the other cases, if  
24 the ones we studied is a fair sample of the total universe.

1 And we don't know that -- although I'm inferring -- that  
2 that would be the case.

3 MR. DENGER: I guess I have two questions for  
4 you, Geoff. One is when we look at the class action  
5 percentage awards in various types of cases antitrust, for  
6 example, is at 21 and 23 percent and mass torts is lower at  
7 18 percent, how much of the subject matter is really  
8 masking the size of the case? In other words, did you run  
9 regression analyses by size of case within and correlate  
10 that with the subject matter to determine if that may be  
11 the driving factor?

12 PROF. MILLER: Yes. I mean, I'm not the  
13 econometrician here. Ted Eisenberg is. But we did control  
14 for that. However, when we did do the regression analysis,  
15 Mike, as I mentioned we couldn't reject the hypothesis that  
16 the case types had no impact, that the observed differences  
17 that are in that table may actually just be a function of  
18 chance.

19 MR. DENGER: Let me ask one other question. You  
20 mentioned that risk affected the fee award. And I confess  
21 that I haven't read your article in depth but it's my  
22 understanding you tried to assess risk based upon the  
23 judge's comments in the fee award decision. Is that  
24 correct?

1           PROF. MILLER:  If the judge made a comment we did  
2           that.  If it was a case where risk was obviously low, for  
3           example, it was a follow-on case to a government  
4           prosecution we would code that as a low risk case.  So we  
5           did both.  But mostly we looked at what the judge said  
6           about risk.

7           MR. LANGER:  I just wanted to understand from  
8           Prof. Hensler's data, in most of the cases that you just  
9           showed us when you did the comparison between the actual  
10          recovery and the recovery that was presented it seemed to  
11          me but I'm not sure that certainly in the largest of the  
12          cases in your study and in most of the cases in the study  
13          if you aggregated them actually a very large percent, there  
14          was actually a high correlation between the actual amount  
15          presented to the court and that which was distributed to  
16          class members.

17          PROF. HENSLER:  I would actually describe again  
18          underlining that this is a very small set of cases so that  
19          we can't infer what proportion this is in the population  
20          that what we see is variation.  We see both sides of the  
21          continuum.  We see the cases in which all of the money was  
22          delivered, I believe, because of the processes that were  
23          used for delivering the funds and the requirements for  
24          reporting that judges imposed.

1           And we see several cases where a much smaller  
2 percentage of the settlement was delivered and in the cases  
3 where we see those small percents it's clear that the  
4 lawyer is getting a much larger proportion than the 25 to  
5 30 percent that we see in these larger statistical data.  
6 In our sample we did see cases where the lawyers were  
7 getting 50 percent of the dollars that were delivered.

8           MR. LANGER: Professor Miller, if I understand  
9 your study, it showed that basically in the aggregate that  
10 risk was appropriately rewarded but was really a measure of  
11 what the lawyers ultimately received was the risk --

12           UNIDENTIFIED SPEAKER: Can't hear you.

13           MR. LANGER: I take it from your study that the  
14 lawyers recovery reflected the risk they assumed at the  
15 outset to some degree and second that things were working  
16 at least they're supposed to work in the sense that the  
17 larger the recovery the smaller the percentage but the  
18 larger the reward to the lawyers.

19           PROF. MILLER: On the latter point that's exactly  
20 right. The award did go up as the award to the lawyers  
21 does go up consistently as the recovery goes up although at  
22 a decreasing rate and the percentage award to the attorneys  
23 once you're over a certain threshold goes down as the  
24 amount of the recovery goes up.

1           On your first question, yes, we coded cases for  
2 normal risk, high risk and low risk, and we got highly  
3 statistically significant results. High risk cases  
4 generated higher percentage fees and low risk cases  
5 generated lower percentage fees as compared to the average  
6 case.

7           MR. LANGER: Can I ask you -- I'm sorry to  
8 monopolize the time here but can I ask you one quick  
9 question about how you handled the class action study?

10          PROF. MILLER: Sure.

11          MR. LANGER: I noticed that basically having just  
12 had a very diligent judge who told me that I better study  
13 the class action reports and address them when I did my fee  
14 petition I also had a chance to study these in detail, but  
15 did you find that -- I notice that the first four  
16 settlements that are discussed in the class action reports  
17 are so vastly larger than any of the others, even in the  
18 highest grouping, that is, the first one is for \$10  
19 billion, the second one for \$3 billion and the third and  
20 fourth one both over a billion and the next closest is just  
21 about \$700 million, if you remove those four largest ones  
22 would it have affected the data?

23          PROF. MILLER: I'm sure it would because the  
24 class action reports uses a weighted average whereas we

1 didn't use a weighted average. So you're going to get  
2 disproportionate impact of the very, very large cases.

3 But we didn't do that but it would affect the  
4 data and would probably result in even in the very large  
5 cases the average percentage would be higher if you took  
6 out those mega, mega, mega-cases.

7 MS. BAK: Anybody else?

8 PROF. MILLER: So, Deborah, would you agree that  
9 in addition to, you talked about the recovery that the  
10 class members got in terms of money, let's say. You also  
11 talked about the recovery they got in terms of the value of  
12 an injunction and non-pecuniary recovery.

13 Would you agree that another element that ought  
14 to be taken into account is the sort of general deterrence  
15 that can be affected by class action, that is the defendant  
16 has to pay and because the defendant has to pay that person  
17 or others are less likely to do the bad thing in the  
18 future? And if general deterrence is an important feature  
19 of class action recoveries is that something that should be  
20 calculated in when we look at the value?

21 PROF. HENSLER: I agree, in principle, that a  
22 value of a well functioning liability system including  
23 class action system is general deterrence as well as  
24 specific deterrence. But I think if a system comes to be

1 perceived as producing outcomes that bear little or no  
2 relationship with the behavior of those who are being sued,  
3 then I think that substantially erodes the deterrence  
4 ability of the system.

5 So as it currently stands I would be rather  
6 uncomfortable with the notion of judges valuing general  
7 deterrence from a case, particularly given the evidence I  
8 think that they are not doing a terrific job of valuing the  
9 more specific aspects of the case.

10 But if we could look ahead to a world in which  
11 the system is functioning more effectively then I think  
12 that that's an entirely reasonable goal and something we  
13 might think of implementing.

14 MS. BAK: I think we've got time for just one.  
15 Judge Walker.

16 JUDGE WALKER: Well, I just wanted to ask Geoff  
17 and Deborah, given that the data you have used,  
18 particularly you, Geoff, have not been reported on a  
19 consistent basis but you're attempting to mine from judges'  
20 opinions what the numbers really are, what the  
21 relationships really are, do you not have some misgivings  
22 about some of the conclusions that you might draw from  
23 these data?

24 And secondly, what you are measuring in any

1 event, it appears to me, is what judges do, what amounts  
2 judges award and circumstances and conditions under which  
3 they make these awards. Is the length of the judge's  
4 conscience on these matters really what should determine  
5 fee awards and expenses in these cases?

6 PROF. MILLER: I agree with you that there are  
7 definitely obvious problems of methodology looking at  
8 judges' opinions. I'm not sure that they skew the results  
9 one way or the other. It could be that you just get a lot  
10 more noise but that the means and medians that we observed  
11 are pretty accurate.

12 Your second question, that is, what's the best  
13 methodology raises a very thorny question of how we decide  
14 what ought to be the criteria we would use to determine the  
15 appropriate fee. And I don't even think anybody really has  
16 come to a satisfactory answer to that.

17 I would like to know what the private market  
18 would do, if there were a private market. Unfortunately,  
19 more judges aren't doing what you've done, Judge, and hold  
20 an auction for cases that would give us information about  
21 what the private market would actually demand for this type  
22 of representation.

23 If we had more auctions, which I would be very  
24 much in favor of, we get information on that which would be

1 extremely valuable. But at the moment we only have the  
2 results of three or four auctions to go by and that's not  
3 yet enough of a database to look to. But certainly the  
4 auction results would be very valuable information as well.

5 MS. BAK: That's a great segue to turning to our  
6 next topic which is innovative approaches to appointing,  
7 managing and compensating class counsel. And I thought we  
8 would start with Judge Walker since you've been on the  
9 forefront, Your Honor, in the use of class counsel  
10 auctioning to more closely approximate market rates for  
11 class representation and to avoid some of the associated  
12 difficulties with ex poste evaluation of fees. Perhaps you  
13 could briefly explain the kinds of devices you've used in  
14 some of your cases and what the results have been.

15 JUDGE WALKER: Thank you, Patricia. Well, I'll  
16 talk about two. And the first is what has been called  
17 judicial auctions and the second is the empowered plaintiff  
18 or lead plaintiff model that was ultimately enacted in the  
19 private securities litigation format.

20 And I suppose the moral from the story is that  
21 judges shouldn't read law review articles, including those  
22 of Geoff Miller because that really was what gave birth to  
23 the auction idea.

24 It was a contest between lawyers fighting for the

1 lead counsel position in a class action, a securities class  
2 action. It was not a beauty contest; it was an ugly  
3 contest as they were throwing all sorts of charges and  
4 countercharges against one another and I'd been on the  
5 bench for three months at this time and after watching this  
6 go on for awhile threw up my hands and said well, why  
7 doesn't somebody make a proposal based upon the fees that  
8 are going to be charged?

9           Needless to say, silence fell on the courtroom  
10 and the parties quickly made up and submitted a joint  
11 proposal, which needless to say, got my dander up and  
12 that's how we got into auctions in that case.

13           Actually, Geoff, there have been a few more cases  
14 than three. There have been either 14 or 16 and Tom  
15 Willging of the FJC has done a review of those. And those  
16 of course have been compiled in the Third Circuit task  
17 force report.

18           The so-called auctions that I have run and that I  
19 think most judges have run have been an auction in which  
20 the lawyers have bid on the amount of the recovery that  
21 they're going to charge in fees. Judge Kaplan, Judge Lou  
22 Kaplan in the Southern District of New York hit upon what I  
23 think is a very imaginative idea in the auction house cases  
24 in which he essentially asked the lawyers to bid on the

1 amount of the recovery.

2 And the scheme he developed was one in which  
3 there would be no fees paid on the X amount of recovery and  
4 then 25 percent on every dollar recovered thereafter.

5 When you get into designing a sensible fee regime  
6 there are all kinds of problems that come out of the  
7 woodwork. Do you have increasing percentages to  
8 incentivize the lawyers as Jack Coffee at Columbia  
9 recommends? Do you have declining percentages to represent  
10 economies of scale, which I rather favor?

11 Do you have some regime along the lines of Judge  
12 Kaplan's? I don't know the answers, the correct answer at  
13 any rate and I don't think anybody else does in part  
14 because we haven't had enough experience. I do know this:  
15 that these bidding or competitive selecting class counsel  
16 is feasible only in a limited number of cases.

17 And basically what you need are two things. You  
18 need cases in which obviously more than one firm is  
19 competing to represent the class and that requires that the  
20 class be fairly well-defined. You can't have lawyers  
21 competing to represent two disparate classes.

22 But if you have a situation in which you've got a  
23 fairly well-defined class, such as usually the case in a  
24 securities case, or in follow-on cases that follow a

1 government investigation or prosecution, then there's a  
2 possibility for competition among the lawyers.

3 Problems? There are the problems that I  
4 mentioned of designing an appropriate regime. There's a  
5 problem because there's great resistance in the bar to  
6 competitive selection.

7 There's uncertainty on the part of judges as to  
8 how to conduct auctions and there's a certain awkwardness  
9 of judges in this position. Indeed, there's an awkwardness  
10 that Judge Hornby mentioned this morning and judges  
11 involved in any fee determination at all.

12 It's an irregular part of the judicial process.  
13 It's not the usual adversarial process with established  
14 processes that we are accustomed to following. And that  
15 makes it problematic but so far no one else has come  
16 forward to take on the task. And as Professor Hensler just  
17 mentioned, she calls for even greater judicial scrutiny.  
18 So she wants us to put us further into the fire.

19 Then the second approach is the empowered  
20 plaintiff or lead plaintiff model. That, too, is something  
21 that was born out of a law review article by Elliott Weiss  
22 and John Beckerman.

23 And I tried it in another securities case even  
24 before the enactment of the PSLRA. It was one of these

1 cases in which the lawyers, and very good lawyers both on  
2 the plaintiff side and the defense side, came in shortly  
3 after the complaint was filed with a settlement.

4 And it appeared to me that that was too soon to  
5 have fully evaluated the case and urged the parties to get  
6 a real member of the class. And ultimately the Colorado  
7 Public Employees Retirement Association came forward and  
8 improved the settlement amount in that case by about a  
9 hundred percent and had hired Hogan & Hartson here in  
10 Washington along with the plaintiffs' firm that I alluded  
11 to to represent the class and they did an outstanding job.

12 Obviously, as you know, that model was enacted in  
13 the 1995 amendments to the 33 and 34 acts. It does relieve  
14 the courts of the responsibility of acting as a fiduciary  
15 or purporting to act as a fiduciary. And it also allows  
16 and encourages ex ante fee setting, which I think is very  
17 constructive and useful.

18 If you're going to award lawyers for the risk  
19 that they undertake in litigation the best time to measure  
20 that risk and in fact the only time that you can do so  
21 effectively is at the outset of the case. It's really  
22 impossible to assess risk looking backwards.

23 So the empowered plaintiff model of the PSLRA  
24 does that. The problem with this approach is that

1 relatively few investors come forward. Very few real  
2 investors, institutional investors come forward, and I  
3 think with respect to some there is a concern about whether  
4 there is truly an arms-length relationship that exists  
5 between counsel and the lead plaintiff and are we not just  
6 back in the same situation we were prior to the enactment  
7 of the reform act.

8           So those are the two so-called innovative  
9 approaches that I have had personal experience with. I  
10 think they bear pursuing further, even though it's  
11 obviously very hard to do that with the auction model.

12           But one point I would like to make in commending  
13 the Commission for undertaking a survey of class actions  
14 and attorney fees in class actions, I hope the Commission  
15 doesn't set its sights only on studying attorney fees in  
16 class actions because this is a problem which confronts the  
17 judiciary in a whole range of cases.

18           There are about 200 or so federal statutes in  
19 which we as judges are called upon to award attorney  
20 fees. And we have very, very, very little hard, good  
21 information that is compiled on a consistent basis to allow  
22 us to make those kinds of decisions.

23           And whatever you say about lawyers, they simply  
24 don't have an interest generally in bringing forward, in

1 the usual adversarial way, information that we can use to  
2 test fee applications. And so I certainly hope that the  
3 Commission continues its interest in this subject but does  
4 so on an even wider scale than the class action scale.

5 MS. BAK: Before we go on I just want to remind  
6 all the speakers to speak very directly because our court  
7 reporter unfortunately is having trouble hearing everybody.  
8 So grab your mike and just speak right into it.

9 Mike Denger, you believe that some of these  
10 auction ideas would be well suited for antitrust cases as  
11 well. Do you want to share some of your thoughts about  
12 that and your plans for this agency?

13 MR. DENGER: I have no plans.

14 MS. BAK: No plans. Recommendations then.

15 MR. DENGER: Recommendations, perhaps. I think  
16 like Judge Walker I would commend the Commission for the  
17 Class Action Fairness Project where it went in and filed  
18 amicus briefs where it believed these were excessive either  
19 given the relief provided to the class or given the  
20 underlying, significant, contributory role of government  
21 enforcement actions.

22 And I would, particularly given the Commission's  
23 antitrust mandate, as well as its consumer protection  
24 mandate, and given what I think is an imbalance of

1 information that Judge Walker and the other judges  
2 sometimes have to face if they are to award attorneys' fees  
3 after the fact, the Commission ought to consider a broader  
4 advocacy role particularly in follow-on cases of the type  
5 that Judge Walker was talking about where I think that the  
6 Commission could play a role given its consumer protection  
7 and competition heritage.

8 Now, I would draw distinctions between two types  
9 of antitrust cases. One is the follow-on cases which I  
10 suggest present very minimal risk to the plaintiffs. Why?  
11 Because a criminal conviction or civil judgment in a  
12 government case is admissible as prima facie evidence of  
13 liability.

14 The government often develops almost all of the  
15 underlying facts which can be obtained during discovery.  
16 The direct purchaser classes are easy to certify in follow-  
17 on cases. There's joint and several liability and no right  
18 of contribution. You can recover damages, even if the  
19 defendants or even if the plaintiffs were to pass them on  
20 with a markup to the indirect purchasers. And you have  
21 statutory treble damages or statutory punitive damages.

22 So on these cases, particularly when attorneys'  
23 fee awards are based on the size of the recovery, which  
24 means if you get a plaintiff in a big one, you're in great

1 shape.

2 I think that there is room for the auction type  
3 of procedure at the beginning of the case. I say it for a  
4 second reason. I've sat in on an awful lot of class  
5 actions when there are 40, 50, 60 plaintiffs' law firms  
6 purporting or seeking to represent the class. Some are  
7 designated as lead counsel, some liaison counsel, some as  
8 members of the steering committee and some on all sorts of  
9 other committees but none seem to ever disappear.

10 And I am concerned that this approach is  
11 inconsistent with the Commission's antitrust mission.  
12 Remember the antitrust laws apply to lawyers. If this were  
13 bidding on a government contracts case you might hear  
14 someone say it was inconsistent with the spirit of the  
15 antitrust laws.

16 If we have joint ventures, the Commission's and  
17 the government's historical enforcement policy has been  
18 that you want to have multiple competing ventures seeking  
19 to bid so you can have competition. If you have the  
20 situation where you have a large number of firms, no matter  
21 how you divvy it up, you're going to have waste and  
22 inefficiency.

23 And I think the Commission could get better  
24 representation for the class, fairer representation at a

1 lower fee in cases where the risk is minimal by coming in  
2 and encouraging at the beginning the type of auction  
3 procedure that Judge Walker pioneered and Judge Kaplan used  
4 in the auction house cases.

5 I contrast these cases, and Lloyd and I are  
6 usually on the opposite sides of everything, so I'm going  
7 to break some ground today and be on Lloyd's side. Lloyd  
8 in a case committed 50 percent of the resources of his firm  
9 -- if I have the facts wrong he'll tell me. He usually  
10 does -- for a seven-year period.

11 It wasn't a lay-down, slam-dunk case following a  
12 government investigation. He litigated it out through  
13 summary judgment, through expert reports, spent an enormous  
14 amount of time and got a heck of a recovery for the class,  
15 both in terms of money and in terms of the value of the  
16 relief he got on a going-forward basis. I would have given  
17 him a hell of a lot more had I been the judge. But I  
18 wasn't.

19 But that type of case where you have a  
20 significant risk incurred by a plaintiff law firm, they  
21 develop a tremendous result for the class is a far  
22 different set when you follow along behind a government  
23 investigation. You have liability determined. You have  
24 everybody trying to play one off against the other, and

1 it's not hard to develop evidence.

2 And I shouldn't probably say this but having been  
3 through a lot of litigation, you can have economists to  
4 take positions, on almost any amount, on the side of what  
5 the damages were to the class. And I probably couldn't  
6 tell you which one I think is right. But there's plenty of  
7 them out there.

8 So what I suggest in this type of situation,  
9 particularly when almost all of them settle, the defendants  
10 settle out and say they won't object above a certain level  
11 of fees. The objectors who opt out of the class aren't in  
12 a position -- I mean, the opt-outs aren't in a position to  
13 have standing to object. The named plaintiffs in this case  
14 -- I haven't seen too many of them ever complaining about  
15 attorneys' fees.

16 This is a case where we need to go in and get  
17 some relief at the beginning. And I really think it  
18 benefits to the class because there's only so much money to  
19 go around and it benefits to all of us because if there are  
20 excess costs they're eventually going to get passed on to  
21 you and me as consumers.

22 So in this particular circumstance, and I lay  
23 that out in more detail in the written materials, I think  
24 it would be appropriate for the Commission, who is uniquely

1 positioned, to come in and advocate some sort of ex ante  
2 type procedure in getting counsel to compete among  
3 themselves to represent the classes in these types of  
4 litigation.

5 MS. BAK: Mike, before I turn ultimately over to  
6 Lloyd at the end to talk about his case a bit, I want to  
7 let Howard take five minutes and then follow up with Lloyd.

8 Howard, ultimately the Third Circuit concluded  
9 that traditional methods of selecting class counsel with  
10 significant reliance on private ordering and a great deal  
11 of oversight was probably the way to go in most cases.  
12 You've just come out of the liner-board litigation where  
13 you were very innovative in adopting some of those  
14 management tools. Why don't you talk to us a little bit  
15 about that?

16 MR. LANGER: I did want to just say one thing  
17 though --

18 MS. BAK: Talk really directly into --

19 MR. LANGER: While Mike was talking about  
20 antitrust cases I was just glancing down the list in the  
21 class action reports to try and see like how many cases fit  
22 this model of an auction where there would be a follow-on  
23 case.

24 And what struck me immediately was that all of

1 the largest settlements in antitrust cases as you go down  
2 the line were in cases that couldn't in any way be  
3 characterized as follow-on type cases.

4 The NASDAQ market makers case, the largest here  
5 prior to Lloyd's case, Lloyd's case was a case that  
6 preceded the government action. The brand-name  
7 prescription drugs case, which is the next largest, had no  
8 government action. The corrugated container case, the  
9 original one not my case, followed a criminal trial where  
10 the jury was out for three hours and acquitted all of the  
11 defendants. So it's very, very hard to know what is a  
12 follow-on case.

13 My own case that I just settled for \$202 million,  
14 the FTC brought a very unique, individual invitation-to-  
15 collude action against one defendant and we expanded it to  
16 many others. Was it a follow-on case? I don't know but we  
17 do know that the district judge found in our case that  
18 nobody wanted to bring the case. We couldn't find lawyers  
19 to work with us.

20 MR. DENGGER: Then I would applaud you.

21 MR. LANGER: I know. But what I'm saying --

22 MR. DENGGER: And I would applaud the effort.

23 MR. LANGER: But what I'm saying is that it's  
24 very, very hard to know what is a follow-on case and one

1 would have said that the first corrugated case was a  
2 follow-on case but then after the criminal trial did it  
3 cease to be a follow-on case when the jury had acquitted?  
4 It's a very, very difficult concept to know exactly what  
5 the area is.

6 Just this morning I was teaching the auctions  
7 case. Well, in my textbook they quote the testimony of the  
8 people admitting in the criminal case their liability, they  
9 met and colluded. But there are very few cases that are  
10 really that simple.

11 In any event, my own view is that more proactive  
12 judges and the Third Circuit model, to the extent there was  
13 a problem, which I take it from Professor Miller's study,  
14 I'm not sure that there is a problem, be resolved.

15 The courts to date in the Third Circuit recognize  
16 that there's jurisprudence on how to measure an attorney's  
17 fee award, whether you're in the Third Circuit where they  
18 have seven or eight criteria or you're in the Eleventh  
19 Circuit where they have 11 or 12 criteria but they have  
20 criteria that already exist that courts are to apply.

21 And it's one of the reasons that the Third  
22 Circuit felt that they couldn't permit auctions within the  
23 circuit because they already had a body of laws as to how  
24 attorneys' fees would be decided.

1           But to the extent that I would recommend or think  
2           that there were things that courts could do to assist  
3           themselves, particularly in terms of the types of  
4           settlements that Professor Hensler was showing it would  
5           seem to me that there's nothing to preclude a court, as  
6           part of the settlement process, have the parties to the  
7           settlement fund such experts as a court would require to  
8           analyze a settlement and determine whether the money was  
9           actually going to get to the class members or not.

10           I mean, I thought when I was listening to the  
11           prior panel talk about all of the different businesses that  
12           had arisen that were ancillary to class actions in order to  
13           get class members to file claims that this was really the  
14           courts and counsel not doing an appropriate job at that  
15           stage.

16           There shouldn't be a requirement to have some  
17           company out there make sure that people file claims. It  
18           should be part of the process in the fee that goes to  
19           counsel and in the court's overseeing of the case that  
20           there's an adequate notice that assures that people file  
21           claims. And I think that it's really a more proactive  
22           judiciary in terms of the criteria that they're applying  
23           now that would ameliorate such concerns as have been  
24           articulated.

1 MS. BAK: Lloyd, I thought we'd sort of switch  
2 gears as we come to you and talk a little bit about the  
3 special challenges of determining reasonable fees in non-  
4 pecuniary cases. Yours, of course, had a huge recovery but  
5 also significant injunctive relief. And when, Howard, you  
6 mentioned there should be greater attention by the  
7 judiciary to various standards there what standards do we  
8 look to? How do courts evaluate significant injunctive  
9 relief?

10 MR. CONSTANTINE: Well, I can tell you what  
11 happened in our case. In our case, Judge Gleeson made a  
12 specific finding that the injunction in our case was worth  
13 between \$25 and \$87 billion and he also found that the  
14 injunctive relief was much more significant, far more  
15 significant, of much greater value to the merchants and  
16 consumers of the United States than the record compensatory  
17 relief, which was \$3.383 billion, which itself was a record  
18 and the highest antitrust settlement in history.

19 He then said, it should affect my decision. It  
20 has. I'm not telling you how. I'm not telling you what  
21 but it has. And then he went on to make the award that he  
22 did.

23 I'd like to sort of cycle back because I think  
24 you can prove everything from our case and you can also

1 disprove everything from our case because it went on for so  
2 long and it's still going on. I'll be working on it for  
3 the next four or five years.

4 But to get to the bottom line of what I think  
5 about all of this, I think that the best approach is  
6 probably for cases where there is competition to represent  
7 the class because they are follow-on cases because they  
8 follow on a DOJ or state AG or an FTC prosecution of some  
9 sort that I think the auction process, the kind that Judge  
10 Walker and Judge Kaplan have utilized, is probably the best  
11 way to go.

12 In a situation like our case, which Howard has  
13 said his case was similar to that, where there is no  
14 competition, where you just get hired to do a case. I  
15 don't consider myself a class action lawyer. I don't  
16 consider myself a plaintiff's lawyer or defense lawyer. I  
17 consider myself an antitrust lawyer.

18 And five companies came to me and they hired me  
19 and they said would you bring a case for us? It was Wal-  
20 Mart, Sears, Circuit City, Safeway and The Limited. And  
21 they just hired a lawyer to do that case.

22 In that type of case, I think, when a dozen years  
23 later -- and that's what it was, 12 years later -- a court  
24 has to make a decision on attorneys' fees the best way of

1 doing that is to go back and try, as best as possible, to  
2 answer two questions. What would a buyer pay for this  
3 case? And what would a rational seller agree to sell his  
4 or her services at?

5 And I think the closest that I've seen to that  
6 kind of analysis comes out of Judge Easterbrook in his  
7 Synthroid decisions, in the two decisions that he wrote in  
8 the Synthroid case.

9 So let me cycle back to sort of what happened  
10 here and where I think the court -- and I'm not trying to  
11 engender any sympathy. Having been awarded a \$220 million  
12 attorneys' fee it's not a good idea to go before a group of  
13 people and say, hold out your hand and say, look how I was  
14 shortchanged here. That's not my purpose.

15 I think the important issue here is what these  
16 cases mean and what they mean about the future and do we  
17 really want to encourage a certain type of important, big  
18 picture forward-looking case. And that's to me the real  
19 issue. Coming out of a government background, that's sort  
20 of the way I got into this particular case.

21 So we recovered \$3.4 billion. We got an  
22 injunction which the court valued at somewhere between \$25  
23 and \$87 billion and had it's most confident prediction that  
24 it was \$70 billion. It was a case that did not follow on a

1 government prosecution but instead actually spawned a raft  
2 of government activity. An FTC investigation followed on  
3 us. A DOJ prosecution followed on us and several state AG  
4 initiatives followed after our action. And we seeded those  
5 things.

6 In the Second Circuit, Judge Gleeson sat down and  
7 said, what am I going to do with this thing? What fee am I  
8 going to award you? We put together a fee application.  
9 Unfortunately, I didn't ask for it to be posted on the web  
10 site. I will now after the fact.

11 I'll ask for three things to be posted. One will  
12 be our fee application. One will be Judge Gleeson's  
13 decision, which you can find at 297 F. Supp. 503. And one  
14 would be our appellate brief, which I argued in the Second  
15 Circuit a couple of weeks ago.

16 In the meantime, you can get the fee petition and  
17 the appellate brief at CPNY.com. They're on our web site.  
18 But in any event, we went to Judge Gleeson. We said okay,  
19 you know all about this case. You closely supervised the  
20 settlement negotiations in this case. We don't want to  
21 file a specific request for any particular fee. We tried  
22 that.

23 We said we will just set out all of the law, all  
24 of the factors, everything we possibly can. We'll come

1 forward with a recommendation of John Coffee, of Arthur  
2 Miller who was the reporter for the Third Circuit task  
3 force, of the chief counsel for the National Consumer Law  
4 Center and for Frank Fisher and for Harry First of NYU and  
5 you do whatever you want.

6 The judge come back to us and said, oh, no.  
7 You're not going to lay that on me. You have to ask for a  
8 specific amount. We then did our very, very best and we  
9 didn't hold back any cases. There was not a single case  
10 that was cited in Judge Gleeson's decision which we had not  
11 given him. We cited everything possible. We came forward  
12 with the experts who are considered to be the preeminent  
13 experts in the area and we applied for a fee of 18 percent.

14 We made our fee petition along the Goldberger  
15 factors, which are the factors in the Second Circuit. In  
16 most circuits you have something like Goldberger, and  
17 they're all pretty much the same. The fact is that the  
18 Second Circuit cites our time and labor and magnitude and  
19 complexity.

20 Judge Gleeson made a finding that our case was of  
21 enormous complexity, unprecedented complexity and  
22 magnitude, 400 depositions, 54 expert reports, over 500  
23 motions, a pretrial record with 230,000 pages of exhibits,  
24 17,000 deposition designations, 730 trial witnesses and I

1 could go on for a while but those were all Judge Gleeson's  
2 findings. He said the magnitude, complexity, time and  
3 labor were beyond recognition.

4 He said that the case was unprecedented in terms  
5 of risk, citing the fact again that this did not follow on  
6 but instead seeded government investigations. He said that  
7 the result achieved was the highest antitrust settlement in  
8 history and the highest settlement ever approved by a  
9 federal court on compensatory grounds alone. He made  
10 specific findings with respect to the injunctive relief and  
11 he said it was very important to encourage future cases  
12 like this.

13 Having done all that, he then awarded a fee of  
14 6.511 percent, which was slightly above one quarter of the  
15 average fee that is awarded in the most relevant category  
16 here, which was antitrust megafunds settlements,  
17 settlements of \$100 million. The average fee awarded in  
18 those cases was 24.56 percent.

19 It was interesting that after Judge Gleeson's  
20 decision the liner-board decision came out and I read that  
21 and I was, like everybody else, I was impressed by what  
22 Howard and his co-counsel had done. And I saw the judge  
23 lauding Howard and his firm for being so efficient about  
24 doing the case. Only 18 attorneys had done 75 depositions.

1 Six people in my firm, include myself, did 281 depositions  
2 in our case in terms of efficiency.

3 Why did this happen? And frankly, it doesn't  
4 matter that much to me because the fact of the matter is at  
5 a fee of \$220 million or a fee at \$600 million, it really  
6 doesn't matter too much to my personal life. What this  
7 matters is to the future but how did this happen?

8 I think it happened because the standards in all  
9 of these circuits -- it's called Goldberger in the Second  
10 Circuit. It's called something else in other circuits are  
11 nothing but sort of a hodgepodge.

12 They're what Judge Easterbrook called a chopped  
13 salad. It's anything you want to throw in, anything you  
14 think about it and then there's this investment of broad  
15 discretion to the District Court judge to do at the end of  
16 the day whatever he or she wants to do.

17 And I think Judge Gleeson, who was a great guy,  
18 said, you know what? \$220 million is enough for anybody.  
19 Well, that's absolutely the case. That's true. It's  
20 enough for anybody looking backward.

21 But what about going forward? Would a rational  
22 group of lawyers agree to do a case at 6.5 percent looking  
23 forward, a case like this, a case which everybody  
24 recognized was a very, very low proposition case against

1 two well-heeled defendants that had never lost an antitrust  
2 case backed by 6000 banks and all of their additional  
3 counsel? The answer is I don't think too many groups of  
4 lawyers would agree to do that going forward if they knew  
5 that at the end of the day there would be 6.5 percent  
6 awarded.

7 And I think the real problem in this decision, if  
8 it becomes persuasive to anybody else, is its effect on the  
9 future. It's defined its own category of settlements above  
10 a billion or \$2 billion. And I think there's a real  
11 problem there.

12 So what I take away from this whole experience  
13 other than a lot of money is a belief in just what I said  
14 before. In terms of cases where there's competition to  
15 represent the class something like what Judge Walker and  
16 Judge Kaplan have utilized.

17 In the kind of case that we were involved in,  
18 very, very difficult, very, very long, very complex, very  
19 risky case, I think the best way for a court to proceed is  
20 to simply try to ask that question that Judge Easterbrook  
21 asked in Synthroid is what would a rational seller sell his  
22 or her services at and what would a rational buyer sell  
23 (sic)?

24 The last thing I'll tell you is that we actually

1 had fee agreements in our cases with all of our clients.  
2 And those fee agreements would have yielded a fee of over  
3 \$1 billion, because we just didn't want to do it, and  
4 actually the truth of the matter is because I just didn't  
5 want to do it. It was my decision.

6 I did not want to take these fee agreements and  
7 take them to Judge Gleeson and say okay, five very  
8 sophisticated buyers in arm's-length negotiation with equal  
9 information agreed to pay us what would yield a fee of over  
10 \$1 billion. Please enforce that.

11 I just did not -- I knew this case would be my  
12 sort of legacy. This is going to be in my obit. And I did  
13 not want in my obit -- I didn't. I mean, you're getting --  
14 this is some rare candor here -- I didn't want that to be  
15 the final story here.

16 So we told Judge Gleeson they existed. We told  
17 him that they were way beyond what we were asking for. He  
18 understood that. And then we simply didn't offer them.

19 MS. BAK: I think we're going to have to close  
20 this. And I apologize for not taking your wonderful  
21 questions. I hope you will buttonhole each and every one  
22 of these panelists to get some more. But I hope you've  
23 enjoyed some very personal and interesting information from  
24 their experiences. Thank you very much. (Applause.)

1                                   (Whereupon, a short recess was  
2                                   taken.)

3                   MR. FRISCH: We have been called to order. Good  
4                   afternoon. I know it's been a long afternoon but I believe  
5                   that this last presentation of the day is going to be an  
6                   interesting and challenging hour on the special ethical  
7                   concerns in class action litigation.

8                   We have a variety of viewpoints and disciplines  
9                   represented here, lawyers and economist, plaintiff and  
10                  defendant, and a lot of interesting and difficult issues to  
11                  cover in a fairly short period of time.

12                  My name is Michael Frisch. I'm the ethics  
13                  counsel at the Georgetown University Law Center. I also  
14                  teach a course in professional responsibility at  
15                  Georgetown.

16                  My panelists, to my immediate left, you've  
17                  already been introduced to Geoffrey Miller from the last  
18                  panel, NYU Law School. To his left, Brian Wolfman, of  
19                  Public Citizen. Then farther to the left, Lewis Goldfarb,  
20                  a partner in the New York office of Hogan & Hartson. To  
21                  his left, Roberta Liebenberg of the Philadelphia firm,  
22                  Fine, Kaplan & Black. And to her left, John Johnson, IV,  
23                  our token economist.

24                  The more extensive biographies of each panelist

1 are in your materials. We're going to start today's  
2 discussion with Roberta talking about the particular  
3 problems of communicating with absent members in class  
4 action litigation. I'm going to turn it over to Roberta.

5 MS. LIEBENBERG: Thank you. Courts have long  
6 recognized the potential for abuse that may occur when  
7 there are unsupervised communications with class members.  
8 Courts have broad authority to govern contacts with class  
9 members by either plaintiffs' counsel or defense counsel  
10 under Rule 23 the Code of Professional Responsibility or  
11 the court's inherent authority.

12 Some federal courts have adopted local rules to  
13 govern communications with class members. I want to focus  
14 my remarks this afternoon on several recurring situations  
15 in which ethical issues are raised by communications with  
16 putative class members before class certification.

17 I'm going to focus on these communications  
18 because it is well settled that once the class is certified  
19 and the time period for opt-outs has expired, class members  
20 are considered to be the clients of class counsel for  
21 purposes of the ethical rules.

22 Model Rule 4.2 and its code equivalent, 7-104,  
23 prohibits an attorney from discussing the subject matter of  
24 a case with an adverse party that's represented by counsel

1 unless the attorney obtains the permission of the opposing  
2 counsel. One of the most common situations in which there  
3 are pre-certification communications is when a defendant  
4 attempts to settle a claim of an individual absent class  
5 member.

6 The cases in the manual on complex litigation  
7 make it clear that the ethics rules do not prohibit such  
8 settlements so long as the defendant doesn't utilize any  
9 misleading information in the settlement negotiation.

10 The cases diverge, however, as to whether or not  
11 the defendant has an affirmative duty to disclose the  
12 existence of the class action at the time the settlement  
13 offer is made.

14 Courts have found that such disclosure may be  
15 warranted in situations where the defendant has the  
16 potential ability to coerce an individual settlement, such  
17 as in employment or franchise cases. For example, in the  
18 Bublitz v. DuPont case the court found that although there  
19 was no evidence that DuPont's settlement offers to absent  
20 class members were misleading there was an inherent risk of  
21 coercion because the class was combined of DuPont's at-will  
22 employees.

23 The court required DuPont to make its settlement  
24 offer in writing. The written settlement offer had to be

1 disclosed not only to class counsel and to the court but as  
2 well the court required DuPont to serve class counsel with  
3 the names and addresses of all the employees to whom the  
4 settlement offer was made. Class counsel could then  
5 communicate with the class members to advise them of the  
6 case and to answer an inquiries.

7 I also want to talk about ethical issues that may  
8 arise when plaintiffs' counsel communicate with class  
9 members. Class counsel can communicate with putative class  
10 members before the class to talk about the case so long as  
11 their communications are not misleading.

12 Courts have stepped in, however, when class  
13 counsel and in many instances competing class counsel have  
14 sent out mass advertisements or mass mailings which contain  
15 deceptive information. For example, in the McKesson  
16 securities case, a competing class counsel has solicited --  
17 they had lost the bid for lead counsel and they sent out a  
18 mass mailing attempting to recruit shareholders to file  
19 individual claims and to retain that law firm.

20 The court found that the solicitation was  
21 misleading. One, the solicitation was labeled a notice and  
22 it had failed to disclose some of the information in terms  
23 of the advantages of participating in a class action.

24 The court required corrective notice and also

1 required a notice that allowed class members to rescind any  
2 of the retention agreements that had been entered into as a  
3 result of this solicitation campaign.

4 I'm now going to just shift focus for a minute to  
5 talk about communications after the class has been  
6 certified and efforts may be taken by defense counsel,  
7 competing class counsel, or even objectors to solicit opt-  
8 outs from the class.

9 Courts have routinely condemned opt-out  
10 campaigns. For example, in the Impervious Paint antitrust  
11 litigation, the class action which I was one of class  
12 counsel, one of the defendants solicited a high percentage  
13 of opt-outs from the class by advising them that their  
14 continued participation in the class would subject them to  
15 onerous legal discovery as well as other legal proceedings.  
16 The court invalidated the opt-outs, required corrective  
17 notice and also extended the time period for opt-outs.

18 I think what's interesting about Impervious Paint  
19 is that although the communications were made by the  
20 defendant, not defense counsel, the court found that  
21 defense counsel had violated 7-104 because they knew about  
22 the solicitation campaign in advance and had failed to  
23 advise against it.

24 So in summary, there have been suggestions that

1 the ethical rules should be revised to specifically address  
2 class actions. In my view the ethical rules are working  
3 well and the situations in which there are improper  
4 communications with class members are really the rare  
5 exception not the norm.

6 Courts have demonstrated an ability and a  
7 willingness under Rule 23 and under the current ethical  
8 rules to fashion appropriate relief when there has been  
9 misleading communications to class members. Thank you.

10 MR. FRISCH: Thank you, Roberta. The reference  
11 to 7-104 and to Rule 4.2, 7-104 is the former code  
12 predecessor to the same provision which now is in the model  
13 Rules of Professional Conduct as Rule 4.2.

14 We're next going to hear from Brian Wolfman who's  
15 going to expand on the discussion about ethical issues that  
16 plaintiffs' counsel faces in class action suits.

17 MR. WOLFMAN: What I'd like to do is I want to  
18 address this globally because my view as I'll get to is  
19 that the rules, the ethical rules don't work very well in a  
20 class action context. So that, to me, when I get a  
21 question that is termed ethical I try to think of it  
22 outside of the box of the ethical rules and think of it  
23 more in terms of what you're trying to achieve in a class  
24 action.

1           And so what I want to do really is to address  
2 specifically the questions posed by the FTC in organizing  
3 this panel. One, do the ethics rules properly apply to  
4 issues of class action governance? And two, should we  
5 attempt to construct new ethics rules or simply use the  
6 principles embodied in Rule 23 in evaluating lawyer conduct  
7 in class actions?

8           And simply put, my answers are as I said, no, the  
9 ethics rules don't generally sensibly apply to matters of  
10 class action governance because they weren't written with  
11 the particular problems of class actions in mind. And  
12 second, generally speaking, we should use principles  
13 developed and to be developed in the future under Rule 23  
14 because it's that rule by which the class is protected.

15           And however imperfect it's not the model rules  
16 but Rule 23 that understand or attempts to understand the  
17 fundamental differences between representative litigation  
18 and individual litigation.

19           I think others here are going to get into  
20 conflicts issues but I want to look at some of the other  
21 rules and just explain why they don't really fit the class  
22 action context and why I think when you come on one of  
23 these problems you ought to think in terms of class  
24 actions.

1           You know, the fee rule, for instance, the rule on  
2 fees is a very basic rule and it says a lawyer's fee shall  
3 be reasonable, but if you look at the cases under that  
4 rule, rules are almost never found unreasonable under Rule  
5 1.5 in bipolar individual situations. And the reason is is  
6 that it's assumed that contract between a lawyer and a  
7 client generally takes care of the problem.

8           But, of course, in a class action there's no  
9 meaningful contract at all. The contract with the named  
10 plaintiff ought to be ignored, for instance in the typical  
11 consumer class and courts sensibly generally ignore it.

12           Fee setting needs to take into account economies  
13 of scale, which of course an ordinary contract 101 contract  
14 doesn't do. So generally you wouldn't say, for instance,  
15 because an individual contingency fee lawyer's fee of one-  
16 third is reasonable, you wouldn't say that that is  
17 reasonable in a class action automatically because that  
18 would, in essence, say that the lawyer doesn't have to  
19 share the economies of scale with his clients in the class  
20 action. So that's but one example.

21           Let's take a look at another one and say  
22 something perhaps that others don't agree with but there's  
23 a Rule 7.3A. It's about in-person solicitation. It says  
24 among other things it says a lawyer shall not by in-person

1 or live telephone contact solicit professional employment  
2 from a prospective client with whom the lawyer has no  
3 previous relationships when a significant motive for the  
4 lawyer's doing so is the lawyer's pecuniary gain.

5 Well, whatever you think of that rule, it seems  
6 to me to have no application to the class action because  
7 we're not worried about -- if we're assuming this class is  
8 going to go forward as a class action, we're not worried  
9 about, or at least I'm not worried about the class lawyer  
10 overreaching with respect to that particular person.

11 In fact, if it was up to me you could get rid of  
12 the typicality requirement altogether and treat the class  
13 as a legal entity and ask whether the lawyer's relationship  
14 with that class is sensible and not worry at all about the  
15 typicality of the individual representatives' circumstance.

16 Another example to my mind is the one that Bobbie  
17 mentioned, Rule 4.2 dealing with unrepresented persons.  
18 And I'll use her example, the opt-out campaign. And the  
19 basic rule, as we know, is that you ought not to contact  
20 someone who's represented about that matter, that a person  
21 you know is already represented.

22 Now, the reason we might be concerned about a  
23 defendant doing that in a class action is because we're  
24 worried the defendant will drag off members of the class

1 and destroy the class action. So there's good reasons for  
2 applying the concept and the rule but not for the reason  
3 stated in the rule, for other reasons.

4 In the plaintiffs' situation -- let me go back to  
5 the objectors. If there are objectors that a lawyer  
6 solicits to opt out it seems to me that there's, in many  
7 circumstances, nothing wrong with that contact with those  
8 objectors. After all, the objectors are going to be  
9 bringing forth information concerning the validity of this  
10 settlement. And it's up to the court to determine whether  
11 the settlement should stand or fall or the certification  
12 should stand or fall or whatever.

13 So in other words, what we have here is the court  
14 interposing most of the types of protections we seek from  
15 the rules, not anything about the individual client-lawyer  
16 relationship, which is what the ethical rules are based on.

17 But we rely on the court to interpose rules  
18 dealing with conflict of interest, dealing with fees,  
19 dealing with solicitation because there is no real lawyer-  
20 client relationship in a class action, what the academics  
21 call an agency problem that there is this entity out there,  
22 the class, that has no relationship with a lawyer.

23 And we call upon the court to act as that  
24 fiduciary. We call upon the court to interpose a series of

1 rules based on the particular circumstances of the case and  
2 the particular circumstances of class action.

3 So my view would be as I've said that the rules  
4 are not particularly helpful and that any time you get a  
5 situation that presents itself as being ethical take a look  
6 at them and ask yourself what are the differences in class  
7 action? What are the differences between class action and  
8 individual representation and does application fo the rule  
9 make much sense in that circumstance.

10 MR. FRISCH: Thank you Brian. We'll next hear  
11 from Lew Goldfarb whose experience is in defending class  
12 actions and he's going to talk to us about concerns about  
13 ethical violations from the point of view of counsel  
14 defending class actions.

15 MR. GOLDFARB: Thank you, Michael. And let me  
16 just make a disclaimer. I started my career actually at  
17 the FTC. I'm delighted to be back here and to see the  
18 Commission show such an interest in trying to make sure  
19 that class actions are truly for the benefit of consumers.

20 But the disclaimer that I want to make is that I  
21 think class actions are a good thing and that the public  
22 benefits from class actions and they do deter bad behavior.  
23 And so I don't want anyone to construe from my comments  
24 that I believe otherwise.

1           However, a lot of our points of view depend on  
2           the area of class action litigation that we're involved in.  
3           And my area of litigation has been products liability,  
4           consumer financial services, pharmaceuticals. And I'm a  
5           little jaded from that experience because I will say to you  
6           that one of the first questions that comes to mind in  
7           handling over 200 class actions over the past 15 years is  
8           the fundamental question, when is it truly in a consumer's  
9           interest to serve as named plaintiff in a class action?

10           I mean, if someone has been injured, if someone  
11           has a product that hasn't worked, isn't it more in their  
12           interest to try to get it resolved through the seller or  
13           the manufacturer rather than wait three to five years as a  
14           named plaintiff?

15           And so it leads me to really focus on one of the  
16           ethical provisions that I think hasn't been discussed very  
17           often but I think it goes to the core of what class action  
18           litigation or at least the areas that I've been involved in  
19           focus on and that is Rule 1.8G of the conflict of interest  
20           rules which state as follows: a lawyer shall not acquire a  
21           proprietary interest in the cause of action or subject  
22           matter of the litigation the lawyer is conducting for the  
23           client.

24           And I would suggest for consideration that in an

1 enormous number of class actions -- I won't say the  
2 majority but a significant number of class actions it's the  
3 lawyer who has the only interest in the class action. In  
4 fact, it's the lawyer who has really created the class  
5 action and has gone out and pulled in or found clients to  
6 assist in this so-called business venture.

7 I had an opportunity a few years ago in  
8 representing a client to really have access to the  
9 underbelly, I will say, of the class action industry. My  
10 client was sued along with several other auto manufacturers  
11 by a group of lawyers claiming that the seat backs in all  
12 the vehicles manufactured over the previous five years were  
13 unsafe. They had actually obtained this factual basis for  
14 this from a Federal Register article that was actually  
15 debating whether certain kinds of seat backs were safe or  
16 not.

17 They went out and filed five class actions within  
18 a period of about two weeks against three or four major  
19 manufacturers and held a press conference and claimed that  
20 their clients were entitled to \$5 billion and all the  
21 things that often accompany cases like this, hoping, I  
22 think, to coerce settlements.

23 And we conducted an investigation and found that  
24 none of the named plaintiffs in these cases ever owned a

1 vehicle manufactured or sold by our client. And we did  
2 what you would expect we would do which was to file  
3 dispositive motions early on.

4 We got these cases dismissed but my client was  
5 willing to go beyond that and asked us to research whether  
6 there was anything that could be done to deal with lawyers  
7 who they believed were abusing the class action process  
8 and, lo and behold, found a statute in Pennsylvania called  
9 the Dragonetti Act which codifies abusive process and gives  
10 it private cause of action to defendants.

11 And so my client had us bring a lawsuit against  
12 the law firm that was behind these class actions. And as  
13 the members of the bench who are here today will attest, no  
14 judges want to be presiding over a lawsuit between lawyers.  
15 I mean, you generally don't get very far.

16 And this litigation went on for about a year and  
17 a half at tremendous expense to the client but there was  
18 real value in it because discovery enabled the client and  
19 others on the defendant side to get a bird's eye view of  
20 what really goes on. And we believe, and based on other  
21 experience, is indicative of -- I'll just refer to it as a  
22 segment of the bar -- that constitutes the class action  
23 industry.

24 What was discovered, and this is all public

1 information, was that a number of lawyers in a few  
2 different law firms got together and signed a joint venture  
3 agreement. And we got a copy of that document. That  
4 document assigns various roles to the various lawyers and  
5 some of them were to go out and hire an expert.

6 One of the lawyers was to go out and hire a  
7 plaintiff. That's the term that was used, hire a  
8 plaintiff, which was done. And unfortunately for some of  
9 the plaintiffs, these are people that had actually, one of  
10 them had actually gone to the law firm with a problem with  
11 his seat, thought he was getting representation and found  
12 out later on in deposition that he was a member, that he  
13 was the named plaintiff in a class action.

14 There were also documents which showed the  
15 strategy of holding a press conference, holding out some of  
16 the documents in the Federal Register where a government  
17 agency had made certain findings about seat backs and  
18 essentially trying to coerce a settlement as early as  
19 possible.

20 That was the experience of this group of  
21 defendants. It does demonstrate that there is a segment of  
22 the class action activity which is not in the interests of  
23 consumers, which is really designed to basically constitute  
24 business ventures on the part of the plaintiffs' lawyers

1 and I think it's a pretty clear violation of this section  
2 of the code.

3 So when the FTC staff asks should there be  
4 changes to the code, well maybe there should but there  
5 should also be greater enforcement of the Code of  
6 Professional Responsibility which is something that you  
7 don't get in the courtroom.

8 And more importantly I will say, and this client  
9 also had a bar grievance filed against some of the lawyers  
10 who've been involved in situations like this, even bar  
11 associations, again, we have found are often more  
12 protective of lawyers except for those who steal money and  
13 engage in criminal acts than they are willing to really  
14 apply certain provisions of the code to discipline lawyers.  
15 I see the one minute sign up so I'll stop there. Thank  
16 you.

17 MR. FRISCH: Thank you. I spent 18 years of my  
18 life prosecuting lawyers for the state bar and I have to  
19 echo the view just expressed there that the rules of  
20 professional conduct are woefully underenforced and often  
21 enforced in a manner that is self-protective of the  
22 profession rather than the public. With that sermon, let's  
23 turn to Geoffrey Miller, NYU Law School, to talk about the  
24 conflicts of interest rules and how they intersect with

1 class actions. Geoff?

2 PROF. MILLER: Thank you. Given time constraints  
3 I'm only going to talk about conflicts among class members  
4 as they relate to the ethical obligations of class counsel.  
5 So suppose that you have a class where some class members  
6 have old claims that are potentially barred by a statute of  
7 limitations subject to a discovery rule and others have  
8 younger claims that are not even arguably time barred. Can  
9 a single attorney represent both segments of the class?

10 You might think this is an easy question but it's  
11 really not because the segments of the class are  
12 differently situated with respect to the strength of their  
13 legal claims, the possible legal arguments, the possible  
14 factual arguments that might be made on behalf of those  
15 legal claims and the allocation of any settlement that  
16 might result from settlement bargaining.

17 Courts have agonized over these problems but have  
18 yet to come up with an acceptable methodology for dealing  
19 with them. The problem is that the class setting makes  
20 application of the ordinary rules on conflicts of interest  
21 impossible.

22 When you have a conflict or potential conflict  
23 among clients outside the class setting the usual solution  
24 is to seek client consent to the representation. If

1 informed consent is forthcoming there is usually no problem  
2 with going forward but it is impossible to obtain the  
3 consent of the class.

4 The entire structure of the conflicts of interest  
5 rules is built around the linchpin of consent and consent  
6 is not possible in a class action setting. The ordinary  
7 rule of legal ethics is strict. If you don't have consent  
8 in the case of an otherwise disabling conflict you can't go  
9 forward with the representation. If that rule is applied  
10 strictly in class cases it would disqualify far too many  
11 attorneys.

12 Now, as Brian said, the solution, ordinary  
13 solution, is that in the class cases the court acting on  
14 behalf of class members makes the judgment about whether  
15 the representation can go forward.

16 But what standards should the court use to guide  
17 its analysis? There aren't very many articulated standards  
18 that are available to courts to help this question. So  
19 what I want to do is suggest a standard that the courts  
20 might think about, which I call the hypothetical consent  
21 approach.

22 Under this approach, the court should ask in a  
23 case of a class conflict whether a reasonable class member  
24 would consent to the attorney representing the subparts of

1 the class. And to exclude the possibility of consent being  
2 withheld for strategic considerations or for reasons of  
3 self-interest that adversely affect the interest of the  
4 class as a whole, we add in the constraint that the  
5 reasonable plaintiff not know which segment of the class he  
6 or she is in.

7 So the question the court's going to ask is would  
8 a reasonable plaintiff, who is unaware of the segment of  
9 the class in which the reasonable plaintiff happens to find  
10 himself or herself in reality, consent to the  
11 representation.

12 What do we mean by reasonable plaintiff? We mean  
13 someone who is self-interested with respect to the  
14 litigation and not motivated by idiosyncratic  
15 considerations such as a wish to have his or her day in  
16 court, but not necessarily someone who's purely financially  
17 self-interested. It could be that many class actions also  
18 involve important nonfinancial considerations and those  
19 would be taken account of.

20 So to revert to the statute of limitations  
21 example the question a judge should ask is this: would a  
22 reasonable plaintiff, not knowing whether he or she has a  
23 new claim or an old claim, consent to the attorney  
24 representing both parts of the class. The considerations

1 that would be relevant would go the costs and benefits of  
2 plural representation as well as the risk-aversion of  
3 average class members.

4 Now, if you apply this hypothetical consent  
5 approach, I think the problems really sort of bifurcate  
6 into two types. Some problems are ones of allocation among  
7 segments of the class. These are not very problematic. As  
8 long as the attorney has no self-interest in favoring one  
9 segment of the class over another the hypothetical consent  
10 approach would allow the representation to proceed in most  
11 cases.

12 After all, the attorney wants to maximize the  
13 recovery for the class as a whole and that's also what the  
14 hypothetical plaintiff wants if he or she doesn't know what  
15 role he or she has in the class.

16 In other cases the attorney does have a self-  
17 interest. For example, in asbestos cases attorneys might  
18 have an inventory of individual cases that get swept into  
19 the overall settlement. Such attorneys might have an  
20 incentive to structure the class recovery so as to benefit  
21 the inventory plaintiffs.

22 In such cases the hypothetical consent approach  
23 would suggest that the reasonable plaintiff would refuse  
24 consent to plural representation because they don't believe

1 the attorney has an incentive either to maximize the  
2 recovery for the class as a whole or to make a fair  
3 allocation of the settlement proceeds.

4 What are the advantages of the hypothetical  
5 consent approach? Well, it really does a better job, it  
6 emulates the consent, the actual consent you have in  
7 ordinary representation by creating a hypothetical  
8 condition rather than a real condition. It maximizes the  
9 benefits to the class as a whole. It provides guidance to  
10 the judge and it tends to reduce the transactions cost that  
11 would otherwise make class action litigation potentially  
12 unworkable.

13 So this is just what I wanted to spend my five  
14 minutes suggesting, that this is a possible valuable  
15 thought experiment that courts could use to deal with the  
16 many and multiple situations where there are fissures in  
17 the class in order to assist the courts in assessing  
18 whether a single representation can occur with respect to  
19 multiple parts of the class.

20 MR. FRISCH: Thank you, Geoff. Our last panelist  
21 today is John H. Johnson, IV, our economist. John, do you  
22 want to use the podium and the PowerPoint?

23 DR. JOHNSON: I'd like to just do it from here.  
24 So well, as you heard several times, I'm the token

1 economist on the class action ethics panel today and that  
2 puts me in a unique situation. It's not the case that  
3 economists are frequently used to testify in class action  
4 cases, particularly about the Rule 23 and whether or not  
5 the class, there's common impact, formulaic approaches to  
6 damages.

7 I think sort of the unique positioning is my  
8 place on the ethics panel today. And what I want to spend  
9 my time on is a discussion of how economists have  
10 frequently spoken to the issue of interclass conflict and  
11 specifically focus on a few examples.

12 From an ethical perspective, the existence and  
13 assessment of whether conflicts exist amongst class members  
14 clearly can pose ethical dilemmas for attorneys. Where  
15 economists have begun to play in is actually using economic  
16 theory to sort of delineate are there actual conflicts.

17 I think a nice summary of where this fits in  
18 comes from the liner-board antitrust litigation. The  
19 adequacy of the class representative is dependant on  
20 satisfying two factors.

21 First, that the plaintiffs' attorney is competent  
22 to conduct the class action and second that the class  
23 representatives do not have interests antagonistic to the  
24 class.

1           I want to be clear as an economist I have nothing  
2 to say about the competence of attorneys. That's not my  
3 role. But where I do think economics has been very useful  
4 is at least delineating whether the interests are  
5 antagonistic to the class.

6           Now, how might this play out in terms of  
7 economics? Well, first, economics is in part the study of  
8 the allocation of scarce resources and so markets, in fact,  
9 are mechanisms for allocating goods between consumers  
10 services. So oftentimes we study and use economic theory  
11 to delineate competing incentives.

12           Second, we often find that economic factors such  
13 as economic market definition can provide structure and  
14 guidance as to the potential impact of a defendant's  
15 actions in class litigation. It's also the case that the  
16 basis of many damage estimates are different types of  
17 economic analysis and an understanding of the assumptions  
18 and how those estimates are come about will also sort of  
19 identify conflict.

20           And finally, economics provides quite a bit of  
21 guidance on valuation. How do we capture considerations  
22 such as current versus future claims, expected value, those  
23 types of issues.

24           I've selected sort of two cases to illustrate the

1 potential conflict issues and how economics actually can be  
2 illustrative. I purposely chose two cases that I had no  
3 direct involvement in but some of our panelists have so I'm  
4 sure they'll chime in when the time is appropriate. One  
5 example is a settlement class in a product liability case  
6 and the second is a class in a monopolization/antitrust  
7 matter.

8           So the first case is the General Motors  
9 Corporation pickup truck fuel tank products litigation.  
10 And basically, in this case class members were purchasers  
11 of certain mid- and full-size General Motors pickup trucks  
12 which because of the location of the fuel tanks were  
13 vulnerable to fires in collisions. There were a number of  
14 issues raised in this litigation. I just want to focus  
15 only on the interclass conflict issue.

16           So basically, to summarize the settlement terms  
17 very crudely the settlement agreement provided for members  
18 of the settlement class to receive thousand-dollar coupons  
19 redeemable to the purchase of any new GMC truck or  
20 Chevrolet light-duty truck. The coupons could be  
21 transferred to other family members and there were some  
22 other aspects to the settlement as well, but that's the  
23 crux of the issue for highlighting the conflicts.

24           Where the interclass conflict came about was that

1 there were two sort of distinct types of truck owners. The  
2 first were individual owners and the second, what were  
3 called fleet owners, groups that owned a number of trucks,  
4 for example, the court cited government agencies as an  
5 example of fleet owners.

6 So ultimately the question the court raised was,  
7 given the structure of the settlement could the class  
8 representatives, who were all individual owners, have been  
9 acting in the best interest of the members?

10 Specifically, it's another quote, the fleet  
11 owners will never enjoy the benefits of the settlement  
12 terms such as the interhousehold transfer option intended  
13 specifically for the benefit of the individual owner.

14 Now, from an economic standpoint several factors  
15 stand out that might illustrate this type of conflict.  
16 First, economics would point to the likely differences in  
17 purchase decisions by these two groups of customers.  
18 Second, it would talk to the differences in the intended  
19 uses of the vehicles.

20 Third, it would talk to the differences in the  
21 methods for potential recovery by these two groups and  
22 fourth, it would talk to differences in the value of the  
23 settlement to each group.

24 Now, I'll loop around at the end to discuss sort

1 of solutions to interclass conflict but let me give the  
2 second example. The second example is a more recent case  
3 3M v. Bradburn. 3M is a case where the product at issue is  
4 transparent tape.

5 In the precursor to the class action, 3M was  
6 found guilty of unlawful maintenance of a monopoly,  
7 basically as a result of bundled rebate programs. And so  
8 in the class action a class was proposed to persons  
9 directly purchasing from the defendant invisible and  
10 transparent tape.

11 So the class representative, in this case  
12 Bradburn, had purchased transparent tape exclusively from  
13 3M. Plaintiffs proposed damage theory was that of an  
14 overcharge, basically because of monopolization the prices  
15 had been elevated and therefore there would be a simple  
16 overcharge theory.

17 Where the court took issue was the fact that  
18 within the class was a second group of large retailers who  
19 had also purchased what was called private label tape. And  
20 these would be customers like if I had bought tape then I  
21 resold it as Johnson Tape that would be private label tape  
22 if I was reselling the tape.

23 And this group of class members could be viewed  
24 as in direct competition with 3M. As a result, how would

1 that group of class members approach the damage issue?

2 Well, there would actually be a claim that the

3 monopolization actually could have depressed market shares.

4 In other words, they were in direct competition and so as a

5 result there would be a lost profits claim.

6 So the conflict there was that the class

7 representative would be arguing about overcharge theory but

8 in fact the other group of class representatives actually

9 would have a different theory entirely based on the market

10 shares.

11 So how would economics be useful in this context?

12 Well, first, the relative positioning of the class members

13 in the market would be clear. Second, the economic impact

14 and harm potentially caused by the defendant's actions and

15 third, the alternate theories underlying damage recovery

16 for the class members.

17 I think I should be clear about two points.

18 First, existence of interclass conflict is very fact-

19 specific and depends on the economic circumstances. This

20 is not any kind of one-size-fits-all issue. Always have to

21 deal with the economics very carefully. And second, the

22 courts have provided some remedies for overcoming

23 interclass conflict and so I think should definitely talk

24 about those.

1 I think the best summary is in the  
2 VISA/MasterMoney antitrust litigation where when issues of  
3 interclass conflict were raised the court proposed the  
4 following remedies. First, you could bifurcate the  
5 liability and damages phases of the trial. Second, you  
6 could decertify the class after the liability phase or  
7 third, you could create subclasses.

8 In terms of what had happened in the two cases I  
9 described in the pickup trucks case, basically, there was a  
10 refiling in Louisiana after and the terms of the settlement  
11 were broadened in several ways that seemed to resolve the  
12 antagonism between the class members.

13 In the second, in the Bradburn case actually,  
14 just two weeks ago, the court ruled again based on a new  
15 class and the new class was limited only to those people  
16 who had purchased private -- I'm sorry, excluded all those  
17 who purchased private label type, which left the class only  
18 members that would pursue an overcharge theory and not a  
19 monopolization or a market share theory. Thank you.

20 MR. FRISCH: Thank you, John. I would ask if any  
21 of the panelists have additional comments they would like  
22 to make in light of the other comments that have been made?  
23 Brian first then Lew.

24 MR. WOLFMAN: I think Lew's presentation is very

1 interesting because it presents a situation that on its  
2 face appears extremely unsavory, the conduct of the lawyers  
3 appears highly improper. And I don't want to speak to that  
4 particular situation because I don't know it but let's  
5 assume -- I'm sorry. I'll speak up.

6 Let's assume, for instance, that there was this  
7 type of aggressive solicitation of individuals to bring a  
8 consumer antitrust class action and the purpose was to meet  
9 this requirement in the law that we have a named plaintiff.

10 But the difficulty I have with automatically  
11 condemning that is that the court is going to sit there  
12 ultimately to protect the thousands of other people in the  
13 case, not the particular named plaintiff.

14 Now, as I say if it were up to me I think there  
15 are rational arguments to eliminating the named plaintiff  
16 requirement. I understand there may be standing problems  
17 in the current law, serious problems of typicality and so  
18 forth in the current law but it seems to me that Lew's  
19 problem is, the question really is do we want to be  
20 enforcing those kinds of rights aggressively?

21 And again, I'm not speaking to the situation.  
22 There may have been no rights to enforce there. But it  
23 seems to me that ethical rules about solicitation just  
24 don't say anything about whether we want that conduct to

1 occur.

2 MR. FRISCH: Lew?

3 MR. GOLDFARB: I just had a quick question for  
4 Bobbie, actually, with regard to communications to putative  
5 class members. They're not class members obviously until  
6 the class is certified but very often a defendant upon  
7 being served with a class action sometimes plaintiffs'  
8 lawyers actually do find problems with products and  
9 services and it's often in a defendant's interest to take  
10 some action before the case even goes very far, maybe even  
11 turn it into a catalyst case.

12 Under your interpretation of the rules for  
13 communicating with putative class members before a class is  
14 certified obviously what's your view on whether a company  
15 can simply go out and do something for class members, I  
16 mean, just affirmatively make contact with class members  
17 and take some action that may actually moot out the  
18 underlying class action?

19 MS. LIEBENBERG: Well, I think the case law is  
20 clear that the defendant can go ahead and initiate these  
21 types of settlement proposals with putative class members.  
22 I think where there is some dispute in terms of is it an  
23 employee/employer relationship. Could it be seen as a  
24 potential for coercion like the DuPont case.

1           But it is clear under the ethics rules that  
2           because the class, the putative class members, are  
3           considered unrepresented that defense counsel can have  
4           contacts with those putative class members so long as  
5           there's no misleading or false information.

6           I mean, it seems to me that where you see these  
7           abuses in the case law is where there's been some type of  
8           misleading information, failing to tell somebody that if  
9           they sign this release that they're going to be giving away  
10          all of their rights in a class action in certain  
11          circumstances where you almost have a duty to disclose.

12          MR. FRISCH: And there are separate ethics rules  
13          that deal with misleading, dishonest conduct, things of  
14          that nature, totally separate and apart from the question  
15          of communication with a class member.

16          MS. LIEBENBERG: I would just add that it's a  
17          tricky situation I think for defense counsel just for that  
18          very reason because under 4.1 you have to be careful that  
19          you're not giving legal advice. And that is a fine line to  
20          draw.

21          MR. FRISCH: Right. The ethical rule there says  
22          that one cannot give a nonclient legal advice except the  
23          advice to secure counsel, I think, is how that rule reads.

24          One of the questions that we have really touched

1 upon throughout the presentations and I would ask if  
2 anybody wants to expand upon their views with respect to  
3 it, is whether there ought to be special ethics rules with  
4 respect to class actions or should we, as Brian has  
5 indicated, just depend upon the non-enforcement of the  
6 rules we already have? (Laughter.)

7           Let's start with the question of solicitation  
8 which -- now, first, the solicitation rules among the  
9 states vary greatly. The District of Columbia is the most  
10 solicitation-friendly jurisdiction in the country and Iowa  
11 is the solicitation gulag. Can we craft a special rule for  
12 that particular area that would vindicate the interests  
13 that the ethics rules are designed to vindicate and yet  
14 still allow class action lawyers to operate in a sensible  
15 way to achieve the ends a class action should achieve?  
16 Lew, you want to start with that one?

17           MR. GOLDFARB: Yeah. Let me just speak to that  
18 because whether it's crafting a special new rule or  
19 interpreting the existing rules that provide some  
20 restrictions on solicitation I think what has happened, and  
21 just as an example, the rules allow you to send a  
22 communication out or make contact with an individual with  
23 whom you've had a prior professional relationship.

24           And on its face that looks to be pretty innocuous

1 but what has happened in the class action context is that  
2 you have lawyers who are one of a couple dozen plaintiffs'  
3 lawyers in a massive class action where there are hundreds  
4 of thousands or maybe even a million class members. And  
5 each one of those lawyers construes every one of those  
6 class members as their clients, people with whom they have  
7 a professional relationship.

8 And so what then follows from that is they will  
9 send a communication out having nothing to do with the  
10 original underlying litigation. This happens in the  
11 asbestos area where they will send a communication out and  
12 ask whether you own a particular motor vehicle or whether  
13 you've used a particular pharmaceutical and if you have  
14 would you like to be a member of the class. I don't think  
15 the professional rules were intended to allow for that kind  
16 of communication and yet that is happening all over and it  
17 is really a problem, I think.

18 MS. LIEBENBERG: I'd like to respond, too.

19 MR. FRISCH: Brian then Roberta.

20 MR. WOLFMAN: Let me just ask though, I mean, why  
21 isn't the question -- and let me just say to Mike, I don't  
22 represent plaintiffs. I generally represent objectives and  
23 we try to argue the ethical rules because they're the  
24 current, I'm big on ethical enforcement but I'm saying just

1 sort of ideally why isn't the question in that circumstance  
2 the degree of enforcement society wants of the rules? Why  
3 are we focused on the named plaintiff in a class action?

4 It doesn't seem to me to be what class action is  
5 about. After all, in the ethical rules we're worried about  
6 overreaching between the lawyer and that particular person  
7 but in the class action we're asking whether the class as a  
8 whole ought to be represented in enforcing this public  
9 right. I just don't understand why the question is should  
10 we try to enforce every wrong out there or not. And that  
11 seems to me the question for society, not whether the  
12 ethical rules.

13 MR. GOLDFARB: Brian, the underlying premise of  
14 your question is that the class action has legitimacy and  
15 that what we should really be focusing on is that class  
16 members should maybe get some relief regardless of how the  
17 named plaintiff is approached.

18 MR. WOLFMAN: No, Lew. I'm not saying that.  
19 Maybe the class action is not legitimate but that's the  
20 question not whether we should do it through the ethical  
21 rule. The question is how much public enforcement do we  
22 want through private attorneys general. Maybe we'll decide  
23 that we want none and we want to do it through regulators  
24 but it doesn't seem to me that looking to the rule answers

1 that question one way or the other.

2 MS. LIEBENBERG: Well, it seems there has been  
3 commentary that, for example, in the antitrust cases where  
4 you're really acting as a private attorney general that  
5 really that is the model. And answering your question,  
6 Brian, that you do away with the named plaintiff because in  
7 essence you are acting as the private attorney general  
8 supplementing government enforcement.

9 It seems to me however that you have to  
10 distinguish between the types of cases. If you just look  
11 at Lloyd Constantine's case where the named plaintiffs were  
12 Wal-Mart, Sears, I forgot who else were the other named  
13 plaintiffs.

14 MR. FRISCH: Entities in need of great  
15 protection.

16 MS. LIEBENBERG: Yes, yes. It seems to me that  
17 they are, in fact, controlling the litigation. They are  
18 having an impact in terms of the types of information that  
19 is given to a lawyer. And so I think you can't make these  
20 broad-brush types of analyses because the types of class  
21 actions vary so much.

22 And I just want to respond one minute to Lew's  
23 comments about maybe a class member doesn't want to wait  
24 three to five years and they'd rather go through the

1 process of dealing with the defendant.

2 In my experience, most of the consumer cases that  
3 we have represented are aggrieved individuals who have come  
4 into our office because they have not been able to get  
5 satisfaction from the defendant. And if the defendant had  
6 done a better job, they probably wouldn't have come in to  
7 see me.

8 MR. GOLDFARB: Can I just make one comment about  
9 this notion of private attorney general? Maybe this will  
10 sound like heresy here but do we really need 100,000  
11 lawyers running around the country serving as private  
12 attorneys general? I mean, we've seen this run amok in  
13 California where everyone in the state can be a private  
14 attorney general and sue on behalf of people that haven't  
15 even used products or have no harm whatsoever.

16 I mean, I think it's gotten totally out of hand  
17 and what has happened in a major segment of these cases is  
18 that what just happened in the case that I described which  
19 is the lawyers set up these ventures to create class  
20 actions. They really don't care that much how much the  
21 public is really being protected. They want to come up  
22 with some theory that may be viable, that maybe a court  
23 will buy into and maybe find some product is defective even  
24 though it has not caused any harm up to that point in time.

1           And so it really has, from my experience, gotten  
2           abused and that's why maybe the ethical rules are the  
3           vehicle through which we should rein some of this activity  
4           in.

5           MS. LIEBENBERG: I would mention that the cases  
6           are very clear that where there is abuses the courts have  
7           been ready and willing to sanction lawyers. In the Cobell  
8           v. Norton case, for example, the judge referred the  
9           attorneys the defense counsel, actually it was government  
10          counsel, to the D.C. Disciplinary Board. And I think that  
11          was also true in the Kleiner case. So you do see courts  
12          when there are abuses taking remedial action.

13          MR. WOLFMAN: I think that both the points Bobbie  
14          and Lew make are well taken and I think they're consistent  
15          with my point. For instance, concerns of the type Bobbie  
16          raised caused, for whatever you think of it, Congress to  
17          decide that the named plaintiff in many or most securities  
18          actions had to be the person with the largest stake, or  
19          ought, presumptively, would be the person with the largest  
20          stake whereas, Lew, the point you raise may get into the  
21          California Supreme Court to start interpreting the private  
22          attorney general law there more stringently, which they  
23          have, or the legislature could repeal it.

24          But my point is that in both instances I think

1 it's a very indirect way to go about it to go through the  
2 ethical rules instead of asking what should our public  
3 policy be as a substantive matter. It seems to me it  
4 doesn't have to do with the relationship between one lawyer  
5 and one particular client when you have classes of 100,000  
6 people.

7 MR. WOLFMAN: But who enforces public policy? I  
8 mean, you asked the question --

9 MR. GOLDFARB: Maybe it should just be  
10 regulators. But --

11 MR. WOLFMAN: The FTC -- should the FTC be doing  
12 more in the area of class action oversight?

13 MR. GOLDFARB: The market.

14 MR. FRISCH: Geoff?

15 PROF. MILLER: I was just going to say -- no. I  
16 forgot there's a market out there.

17 MR. FRISCH: One of the recurrent claims of abuse  
18 in the class action area is that it's really the financial  
19 interests of the lawyers that predominate and often the  
20 clients don't get much if anything at all. Is there  
21 anything that can be done in the ethics rules that could  
22 alleviate that problem or is it really an imaginary  
23 problem? Does anyone have any comment on that?

24 MS. LIEBENBERG: Well, it seems to me that the

1 way the Rule 23 has been set up has been set up so that the  
2 court has supervision over what type of fee an attorney  
3 gets and it seems to me that the ethical rules are ill-  
4 equipped to really handle that kind of issue.

5 Another area in which there seems to be this  
6 tension in the ethical rules is where you have a conflict  
7 between the named class representative and perhaps other  
8 members of the class over a settlement.

9 And I think one of the -- as Judge Adams said in  
10 a concurring opinion in corn derivatives, you just can't  
11 mechanically apply the ethics rules to Rule 23. And I  
12 really think I would commend it because I think it is  
13 really an appropriate analysis of how the interplay between  
14 the ethics rules and Rule 23. And where we've seen that  
15 there needs to change the Federal Rules Advisory Committee  
16 has come up with ways to change the class action rules  
17 where there needed to be perceived change.

18 MR. FRISCH: Well, that's exactly right. The  
19 traditional ethics formulation is that the client  
20 absolutely controls the settlement and what do you do with  
21 multiple clients and varied interests? Is it sufficient to  
22 simply depend upon a court to, in effect, substitute for  
23 the client under those circumstances?

24 Well, I've raised a lot of interesting questions.

1 I'm sure there are no definitive answers an I'm sure each  
2 and every one of you join me in thinking our panelists for  
3 a very provocative and thoughtful presentation.

4 (Applause.)

5 (Whereupon, the workshop recessed  
6 at 5:30 p.m.)

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8  
9 C E R T I F I C A T I O N O F R E P O R T E R

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12 CASE TITLE: PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

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1 accuracy in spelling, hyphenation, punctuation and format.

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SARA J. VANCE

Thank for the kind introduction, DR. FRANKEL.

It's a pleasure to be here with you and participate with Judge Braden.

*Perspective of trial lawyer to spend time ~~with~~ before judge.*

As a representative of the legal community - I must express my <sup>particular</sup> 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 - <sup>sadly</sup> even within <sup>the legal</sup> our own profession. *itself*

There is the story about two lawyers who went through v. contentious case - came to distrust <sup>and even hate</sup> each other <sup>the</sup> and judge understandably <sup>became</sup> 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~~ 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, <sup>not expertise</sup> 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 will  
Pose highly interesting issues that will intrigue some of you--

~~posing~~  
~~well~~

scientific + social

ranging from the balancing the social costs and benefits associated  
with design of consumer products --

- SW roll over protection v. fun to drive.
- toasters that don't cause fire & too expensive

to finding the proper balance in antitrust law between allowing free  
competition and protecting against monopolistic abuse

- ~~At the~~ Many concentration thru merge efficient  
or anti competitive

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 w not?

Frankly, our legal system NEEDS your expertise in resolving these and many

other issues confronting our society today, <sup>and the legal profession.</sup>

Justice Brandeis article 12: EB said long ago 'the age of  
chivalry is dead.' The age of sophists +  
calculators --

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 <sup>perhaps he  
meant lawyers  
+ expert w them</sup>

4  
+ technology

is upon us.  
And the glow

95129-000568  
+ the... head barriers'

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?

• cloning new life?  
• stem cells?  
• use of med technology ~~to~~ to prolong life  
of near its end?

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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.

*No solidarity too ~~much~~ <sup>sure</sup> ~~much~~ ~~little~~*  
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.

*see you as any member of the med profession  
become*

*that is his own  
the lawyer*

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.

~~the magnitude of the case~~ 3 yr nationwide  
arbitrated  
trial  
+ complexity

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.

• hardly but not finders fee or “kickback”

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 <sup>(which is what he wanted to say)</sup> (Business School) under oath, when it was later revealed that he held a Master's in Public Administration from the Harvard <sup>(which was wanted by)</sup> (Kennedy School of Govt.)

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 <sup>said</sup> 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 is would have been.... (even w/o)

But later the lawyer hands the <sup>witness his own</sup> 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<sup>d</sup>  
"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.

*be tempted to*  
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. <sup>Disclose fully</sup> 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, <sup>objectivity</sup> and forthrightness to any legal work you take on as you do to your scientific work you will be well served.

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But there's a second reason I tell some of these war stories.

*In addition to*  
*introducing*  
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 <sup>regularly</sup> 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 *was 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 <sup>by co execs that way</sup> 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, <sup>calculated</sup> 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 ~~the~~ public disclosure of  
the alleged fraud*

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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

*That*  
And the ethics of your professional societies are enforced

*In short –*

That “junk science” by your colleagues is not permitted go without scrutiny

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*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.

- peer review
  - testable/verifiable
  - ~~connected facts of case~~
  - closely related set of actual facts of case
- vetting before goes to jury

But frankly judges and lawyers cannot achieve this alone. address the probs. of junk science 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~~ <sup>shoddy</sup> 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  
you interest  
and, ultimately, the public's interest