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Provocative, Human, Eclectic

In This Issue:

From the Editor.....2
In his article, "Bad Legal Advice and The Role of Academics," co-editor Jamie Bernard discusses a fascinating debate in the Stanford Law Review between Professor William H. Simon of Columbia and Professor Bruce Green of Fordham.

Developments: Thanksgiving Luncheon.....4
Bennette Kramer reports on the Thanksgiving Luncheon and the award of the Emory Buckner Medal to New York City Corporation Counsel Michael Cardozo.

In the Courts: High Noon in the Garden of Good and Evil.....6
In this article, Steve Edwards explores the implications of the decision by Southern District Judge Jed Rakoff to reject a proposed $285 million settlement between the SEC and Citigroup.

Legal History: Myron Taylor's Mission to Save Germany's Jews.....11
Evan Stewart tells the story of Myron C. Taylor's effort, on behalf of President Franklin D. Roosevelt, to deal with the deepening crisis of Jewish refugees attempting to flee the persecution of Hitler's Nazi regime.

Second Circuit Decisions: Pay to Play?.....16
Here, Charlie Platt explores the Second Circuit's decision in *Ognibene v. Parkes*, confirming that limitations on campaign contributions to prevent the potential perception of corruption do not violate the First Amendment.

In the Courts: Connecticut's Support Court.....17
Jim Glasser attends a "Support Court" meeting in New Haven federal district court, where the mission is "to provide support and structure to participants who struggle with drug and alcohol addiction to assist them in achieving lifelong sobriety."

Personal History: Starting a School in Harlem.....21
Pete Eikenberry explains how the Children's Storefront began – and has prospered – over the past 40 years.

From the Editor

Bad Legal Advice and The Role of Academics

By James L. Bernard

In the course of researching an article on a recent Second Circuit decision involving the on-going ethical and legal problems faced by Leeds, Morelli & Brown, I came across a fascinating debate in the *Stanford Law Review* between Professor William H. Simon of Columbia and Professor Bruce Green of Fordham.

Professor Simon is concerned about bad legal advice and what he sees as a rise in the giving, and asking, for bad legal advice. In a typical situation – drafting a will, forming a corporation or handling a litigation – clients want, to say the obvious, good legal advice. So what drives clients to seek bad legal advice and what drives lawyers to give it? Referring to Enron, recent tax shelter litigations and the torture memos, Professor Simon posits that the clients "were happy [with the bad legal advice] because the advice made it easier for them to do things they wanted to do – overstate income on financial statements, underpay taxes, or torture people." Bad legal advice becomes the "get out of jail free" card if you will. Professor Simon is, however, most concerned about a somewhat smaller class of bad-advice-giving lawyers: Academics.

Simon's Criticism

There is a particular convergence of concerns that leads Professor Simon to focus his considerable criticism on academics. For one thing, this sort of opinion giving immunity, when provided by an academic, has the appearance of impartiality and academic rigor when in fact it can be just as partial as any other "hired gun" lawyer's advice. In addition, when a lawyer gives bad legal advice to a client who wants good legal advice, traditional mechanisms exist to prevent such conduct (e.g., malpractice litigation). But when a lawyer gives bad legal advice to a client who wants bad advice, there is often another "victim" who does not have the same ability, legal or otherwise, to hold a lawyer accountable. That victim is often the public at large.

So what particularly troubles Professor Simon is when academics use the quasi-public nature of their positions, or at least the prestige and honor of their positions, for dubious private gain. He believes that when academics "express views in their academic roles, the norms of the academy require that they speak sincerely and disinterestedly.... The norms of the academy regard openness and transparency as an essential guarantee of the reliability of a scholar's views." But when academics give the sort of bad legal advice that troubles Professor Simon, more often than not their opinions are not publicly available. This creates a contradiction that is at the heart of Professor Simon's critique: "[The academic] invokes the authority of her role and institution as emblems of both acuity and impartiality; yet she forswears the norms of openness that the academic world regards as essential to such claims."

What particularly troubles Professor Simon is when academics use the quasi-public nature of their positions, or at least the prestige and honor of their positions, for dubious private gain.

The solution, in Professor Simon's view, is not to bar the practice, but rather to make it more transparent. That is, to subject these private academic opinions to greater public scrutiny. He believes that the practice of giving advice should be subject to heightened duties of candor, disclosure and accountability similar to, if not greater than, the duties imposed by the IRS on lawyers who issue formal tax opinions. Confidentiality agreements, which shield a private opinion from peer review, should thus be avoided. And, perhaps most provocatively, he proposes a means of breaking through what I will call the "ivory wall of silence," or the practice of academics not subjecting their peers to criticism

and scrutiny so as not to disturb the "gravy train" of paying academics for their opinions. To be sure, academics will criticize each other's work in law reviews and journals, but for some reason that practice does not appear to extend into this mostly private sphere of providing private opinions. Professor Simon's solution is to impose upon academics who provide these opinions additional disclosure obligations, and then let other academics play an important role in "shaming" those who provide bad legal advice.

Green's View

Enter Professor Bruce Green. To some extent, he has a difficult position to advance, further hampered, perhaps, by the fact that one of the case studies Professor Simon uses to illustrate his points concerns ethics opinions in a litigation given by three academics, including Professor Green (more on that in my next article). So putting aside the personal issues, how can more disclosure be a bad thing? What could be so wrong, especially for an academic, about subjecting one's work, even if for private clients, to additional scrutiny and review? Isn't that what the academy is all about, transparency and critical review? If the IRS requires those giving formal tax opinions to be subject to a high degree of disclosure and scrutiny, why would it be a bad thing to impose those same requirements on academics?

Professor Green challenges both the existence and nature of the perceived problem that Professor Simon identifies, as well as Professor Simon's proposed solutions. To begin with, is there really a market for "bad" legal advice, and is the market so large that we should be changing our standard and recognized norms of regulating the behavior of attorneys to deal with this particular problem? More to the point, as Professor Green notes, it seems that Professor Simon is saying that he knows bad advice when he sees it, but against what standard should such a judgment be made? It is not enough to say the advice is bad just because it turns out to be wrong and controversial. Professor Green also believes that Professor Simon "overstates the risk" that third parties detrimentally rely on bad advice.

More to the core point of the proposed solution, the existing framework, Professor Green posits, is already sufficiently robust to deal with bad legal advice proffered by academics. Discipline, malpractice and possible judicial criticism – all of these deterrents – Professor Green reasons, are sufficient to deter the conduct Professor Simon abhors. Professor Simon also does not explain why lawyers, already subject to a panoply of ethics and other rules, would be less likely to give bad advice under his enhanced rules. Under the current framework, according to Professor Green, "[a]n expert who cultivated a reputation for telling clients what they want to hear would not have much credibility with regulators or other members of the relevant legal or professional community, and his advice would therefore have little value to a sophisticated client seeking to influence knowledgeable third parties." And, finally, there is the problem of reconciling the enhanced transparency regime that Professor Simon proposes with confidentiality obligations and concerns. Why should some clients not be permitted to have the benefit of private and confidential opinions when others can?

An Open Issue

Provocative articles have a unique way of shining a light on something that makes you wonder why no one raised the issue before. Professor Simon's article certainly did that. It does not matter much whether you think his proposed solutions are workable or not, or even whether the problem he identifies is much of one. The point really is that the role academics play in this arena is not often written about or considered in such great detail. And it should be. When Professor Simon shines this light on his own profession and calls into question how it operates, that is a healthy thing in and of itself. Clients, adversaries and judges all benefit from thinking about, or re-thinking, the role of academics in litigation and private advice giving. My personal instinct is that Professor Green is probably right, we do not need additional reforms and another layer

of some regulatory framework to address the issues Professor Simon rightly identifies, or at least I am not convinced that if we had such an additional layer, it would make much of a difference. But we are all better off having been sensitized to the issues. Indeed, what's noticeable about the examples Professor Simon chose, putting aside whether you think the advice at issue in those examples was "bad," is that so many of us are aware of the legal work that played such a significant role in Enron, the tax shelter cases and the torture memos. If the goal is greater transparency and heightened academic review, that seems to have already been achieved. Next issue I'm going to turn to a relatively more obscure example raised by Professor Simon – the litigation in the Second Circuit concerning Leeds, Morelli & Brown – and try to shine some additional light on that particular controversy.

Developments

Council Honors City Corporation Counsel Cardozo

By Bennette D. Kramer

Federal Bar Council Thanksgiving Luncheon Chair Loretta Lynch, U.S. Attorney for the Eastern District, called the attendees at the Thanksgiving Luncheon to order and then, following lunch, introduced Robert Fiske, Chair of the Council Nominating Committee. Fiske introduced newly elected officers and members of the boards of the Federal Bar Council and Federal Bar Foundation.

Frank Wohl, President of the Federal Bar Council, thanked Fiske for taking the time to chair the Nominating Committee and Loretta Lynch for chairing the luncheon. He also thanked those responsible for organizing the luncheon, particularly the Federal Bar Council staff.

Wohl then introduced Michael Cardozo, Corporation Counsel for New York City, and presented him with the Emory Buckner Medal. Wohl noted that Cardozo had a 34 year career at Proskauer Rose before becoming Corporation Counsel. During his time at Proskauer, Cardozo had an extraordinary record of public service, including serving as President of the City Bar Association from 1996 to 1998, chairing the Fund for Modern Courts and serving as Counsel to Governor Hugh Carey's Task Force on Court Reform.

As Corporation Counsel, Cardozo leads a public law office with about 650 staff attorneys and about 100 pro bono lawyers. The Corporation Counsel's office handles a docket of over 90,000 matters. Wohl praised Cardozo as a great leader and lawyer with extraordinary skill, extreme dedication and excellent judgment. He has recruited, trained and retained talented attorneys who reflect his emphasis on gender and racial diversity. Wohl described some of the major achievements of Cardozo's tenure as Corporation Counsel, noting, specifically, efforts in the area of gun control. Wohl read a letter from Mayor Bloomberg praising Cardozo's service as the longest-serving Corporation Counsel in the city's history and congratulating him on receiving the Emory Buckner Award.

Cardozo Speaks

In accepting the award, Cardozo expressed heartfelt gratitude for the honor. He noted that he had been attending the Thanksgiving Luncheon for over



Michael Cardozo

40 years and was humbled to be included among the distinguished recipients of the award. Cardozo began by acknowledging Mayor Bloomberg, the attorneys in his office and his family without whom he said he would never have won the award.

Cardozo focused his remarks on the importance of public service. First, he pointed to troubling recent developments in the legal profession:

(1) the large number of unemployed lawyers in the United States with New York having the largest number of surplus lawyers;
(2) the rising demand for legal services for the poor;
(3) budget cutbacks resulting in fewer lawyers in government law offices;
(4) diminishing opportunities for junior lawyers to gain training and experience; and
(5) decreasing satisfaction levels among mid-level associates in law firms.

At the same time, he noted, the public has diminished confidence in law firms and the legal profession.

Cardozo focused his remarks on the importance of public service.

Cardozo's suggested solution to these problems is to put recent graduates and dissatisfied associates to work as pro bono attorneys. He noted that Emory Buckner trained junior attorneys by placing real responsibility upon them at the earliest stage and holding them accountable for their performance. Cardozo uses this "sink or swim" approach in the Corporation Counsel's office by giving junior lawyers immediate hands-on experience. For the mutual benefit of private firm associates, Cardozo suggested expansion of the already-existing partnership between the Corporation Counsel's office and law firms to provide needed manpower for the office and experience for the associates. Similarly, he recommended that deferred attorneys and recently graduated unemployed lawyers spend time with the Corporation Counsel to gain experience and provide desperately needed support for the office. Although Cardozo acknowledged that these suggestions may not be the solution to all challenges faced by the profession, they would certainly benefit both the public sector and the lawyers involved.

Cardozo thanked the Federal Bar Council for the honor and wished everyone a Happy Thanksgiving.

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In the Courts

High Noon in the Garden of Good and Evil

By Steven M. Edwards

No one would ever accuse Southern District Judge Jed Rakoff of being timid. In *U.S. v. Quiones*, 205 F.Supp.2d 256 (S.D.N.Y.), *rev'd,* 313 F.3d 49 (2002), Judge Rakoff found the death penalty unconstitutional notwithstanding the Supreme Court's consistent holdings since 1976 that the death penalty presents no Eighth Amendment problem. In Judge Rakoff's view, the Supreme Court overlooked the need to consider evolving standards of justice under the Due Process clause.

It should come as no surprise, therefore, that Judge Rakoff has challenged the conventional wisdom with respect to settlements. Settlements often are considered to be a good thing. The judicial system would collapse were it not for settlements. With federal judges having an average caseload of more than 300 matters and the ability to try no more than 15 civil cases a year, something has to happen to the other cases. As a result, federal judges typically encourage settlements – and they don't ask too many questions about the details.



Moynihan Courthouse

The problem with this is the general public does not find that to be very satisfying. Particularly in cases of great public interest, they want to know who was right and who was wrong. In the Garden of Good and Evil, the good guys should win and the bad guys should be punished.

Rakoff's Opinion

Judge Rakoff was obviously concerned about this when he recently rejected a settlement between Citigroup Global Markets Inc. ("Citigroup") and the SEC in a case involving subprime mortgages. On October 19, 2011, the SEC filed a complaint accusing Citigroup of violating Sections 17(a)(2) and (3) of the Securities Act of 1933, a statute that does not require scienter. According to the complaint, in 2007 – as the market for mortgage-backed securities was weakening – Citigroup created a fund that securitized approximately $1 billion in mortgages. Citigroup told investors that a third party, an affiliate of Credit Suisse, would choose the assets to be included in the portfolio. In fact, according to the complaint, Citigroup played a role in choosing approximately half of the assets, while simultaneously taking a short position on those assets. At the end of the day, when the assets turned out to be bad, Citigroup realized a profit of approximately $160 million while investors lost more than $700 million.

The complaint was accompanied by a consent judgment: (1) enjoining Citigroup from committing future violations of the securities laws; (2) requiring Citigroup to disgorge $160 million in profit plus $30 million in interest, and to pay a civil penalty of $95 million; and (3) requiring Citigroup to undertake certain internal measures

designed to prevent a recurrence of securities fraud. The consent judgment explicitly recited that Citigroup consented to its entry "[w]ithout admitting or denying the allegations of the complaint…." The consent judgment also stated that the SEC "may" decide to distribute the proceeds of the settlement, which totaled $285 million, to injured investors.

On October 27, 2011, Judge Rakoff issued an order posing a series of questions to the parties including:

(1) Why should he issue a judgment in a case in which the SEC alleges serious fraud but the defendant neither admits nor denies fraud?
(2) Is there an overriding public interest in determining whether the SEC's charges are true?
(3) How many contempt proceedings has the SEC brought in the last decade as a result of violations of injunctions prohibiting future violations of the securities laws? and
(4) Why did the SEC decide to charge negligence as opposed to intentional fraud?

In its written answers to the questions, Citigroup noted that the settlement was the product of a multi-year investigation in which the SEC reviewed over 30 million pages of documents and took testimony from a number of current and former employees. Citigroup also emphasized that the investors were among the most sophisticated commercial players in the global financial markets; it was necessary for Citigroup to take a short position in order for the credit default swap that supported the investment to work; the offering documents stated that Citigroup may be expected to have interests adverse to the investors (the SEC's complaint was that those disclosures were not detailed enough); and it was important for Citigroup to obtain a result that did not have collateral estoppel consequences for pending class actions brought on behalf of investors. The SEC argued that the public interest was not at issue – a court should approve a settlement unless it is unfair, inadequate or unreasonable. Quoting from the D.C. Circuit's decision in the *Microsoft* case, the SEC stressed that a district court should not "reach beyond the complaint to evaluate claims that the government did not make and…inquire as to why they were not made."

On November 9, 2011, the parties appeared before Judge Rakoff for a hearing. After remarking "I'm delighted to have you all," he proceeded to rake the SEC's lawyer over the coals. He pointed out that the SEC's position that a court should not consider the public interest before approving a consent judgment was inconsistent with the position taken by the SEC in a number of other cases and was inconsistent with the position the SEC had taken in this case when it filed its memorandum in support of the settlement before the case had been assigned to any judge. Judge Rakoff also pointed out that in the last 10 years the SEC has not brought any contempt proceedings against any large institutions even though they have repeatedly failed to comply with previous injunctions not to violate the securities laws, including twice in the case of Citigroup.

It was not surprising, therefore, that Judge Rakoff rejected the proposed Citigroup settlement in an Opinion and Order dated November 28, 2011, and ordered the parties to be ready for trial on July 16, 2011. Relying on his own decision in *SEC v. Bank of America Corp.,* 653 F. Supp. 2d 507 (S.D.N.Y. 2009), in which he initially rejected a settlement but later approved it when the terms were improved, Judge Rakoff ruled that a court must find that a consent judgment involving an injunction is in the public interest before endorsing it. He distinguished settlements with government agencies from settlements with private parties, stating, "Purely private parties can settle a case without ever agreeing to the facts... [b]ut when a public agency asks a court to become its partner in enforcement ... the court, and the public, need some knowledge of what the underlying facts are; otherwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public interest."

Judge Rakoff took particular exception to the SEC's "long standing policy" of allowing de-

fendants to enter into consent judgments without admitting or denying the underlying allegations because it deprives a court of even the most minimal assurance that the proposed injunctive relief has any basis in fact. He suggested that Citigroup clearly contested the factual allegations in the complaint and would continue to do so in any parallel private litigation. Judge Rakoff also took a shot at the SEC's insistence on a provision precluding defendants from denying the facts in the media, noting that this "gag order" raised potential First Amendment problems.

In addition, Judge Rakoff observed that "a consent judgment that does not involve any admissions and that results in only very modest penalties is ... frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies." Judge Rakoff recognized that defendants enter into settlements in order to avoid findings of fact that might have a collateral impact on private litigation, and there is nothing wrong with that in the abstract. In his view, however, this tilts the system very heavily in favor of defendants: "If the allegations of the Complaint are true, this is a very good deal for Citigroup; and, even if they are untrue, it is a mild and modest cost of doing business."

Throughout the opinion, Judge Rakoff alternates between the view that the relief in this case is inadequate and the view that there are insufficient facts to determine whether or not it is inadequate. In a lengthy footnote, Judge Rakoff suggests that the Citigroup settlement is less favorable to the government than the settlement in *SEC v. Goldman, Sachs & Co.,* where the SEC required Goldman to pay $535 million and admit to wrongdoing. In their submissions responding to Judge Rakoff's questions, Citigroup and the SEC attempted to distinguish the *Goldman* case on the ground that it involved scienter, and Citigroup suggested that the *Goldman* settlement may have been too harsh given the precarious condition of the banking sector and the 24 percent decline in Goldman's stock price after the settlement was announced.

While acknowledging that courts should give substantial deference to the judgments of administrative agencies, Judge Rakoff stresses that a court "must still exercise a modicum of independent judgment in determining whether the requested deployment of its injunctive powers will serve, or disserve the public interest." According to Judge Rakoff, "Anything less would not only violate the constitutional doctrine of separation of powers but would undermine the independence that is the indispensable attribute of the federal judiciary." Therefore, he purports to give the "fullest deference" to the SEC's views, but concludes that because the proposed consent judgment is not supported by any proven or acknowledged facts, it "is neither reasonable, nor fair, nor adequate, nor in the public interest."

Judge Rakoff concludes his opinion by stating that "[a]n application of judicial power that does not rest on facts is worse than mindless ... it serves no lawful or moral purpose and is simply an engine of oppression." He observes that "in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth." And then he points the finger squarely at the SEC, stating that "the SEC, of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances."

Judge Rakoff's decision was met with almost universal praise from the media. *The New York Times* commended Judge Rakoff for his courage and stated, "Until investigations and prosecutions by the SEC and other federal agencies bring real exposure and real punishment, bankers are unlikely to change their attitudes of behavior, and they will keep putting the whole country at risk of another financial meltdown." It's fair to say that others, particularly lawyers who litigate with the SEC, did not necessarily share the *Times*' point of view.

The issue is headed for the Second Circuit (the parties have appealed) and may have been

decided by the time this article is published. Nevertheless, we thought it would be useful to discuss some of the actual legal issues, since the popular press rarely provides that level of detail.

What is the Proper Standard?

Whether the public interest is a factor that a court should consider before approving a consent judgment is a matter of some debate between the SEC and Judge Rakoff. The SEC takes the position that the public interest is not part of the applicable standard of judicial review. Judge Rakoff takes the position that it is always a factor, and it is implicit in the analysis of fairness, adequacy and reasonableness in any event.

It is well-established that courts should consider the public interest in deciding whether to grant injunctive relief, particularly a permanent injunction. It is usually a limiting factor, however. Where an injunction harms innocent members of the public, less stringent or perhaps no relief is more appropriate. Here, Judge Rakoff wants to use the public interest as a basis for potentially imposing more stringent relief, an unusual application of the principle.

If the public interest standard requires a court to impose what it believes to be the most appropriate relief, as opposed to operating as a limiting factor, then Judge Rakoff's decision could have far-reaching consequences. The public interest standard at issue in the *Citigroup* case is not mandated by a special statutory provision; it is the common law standard that is applicable in any case. There is no reason why Judge Rakoff's reasoning should not govern settlements in every case in which a court order is sought.

How Much Deference Should the Court Give the SEC?

The SEC takes the position that if the public interest is a factor, the court should defer to the SEC's judgment on how the public interest can best be served. Judge Rakoff repeatedly states that he is giving the SEC's judgment "full deference," but then he disagrees with it. According to Judge Rakoff, any other result would be inconsistent with the principle of separation of powers and would make the court a mere tool of an administrative agency.

An argument can be made that this flies in the face of the well-established principle that courts should defer to the judgments of administrative agencies. But we are not talking here about a gap in legislation, a delegation of authority or a rule making with notice and an opportunity to be heard. We are talking about the kind of agency judgment that is entitled to respect proportional to its ability to persuade, which in turn (according to the cases) depends on the thoroughness evident in its consideration, the validity of its reasoning and its consistency with other judgments.

Judge Rakoff may have a point, therefore, when he complains that the SEC has not given him enough information to evaluate its determination that the proposed consent judgment is in the public interest. In Judge Rakoff's view, the court is more than a passive player in this exercise. If the SEC wants to ask the judicial branch to provide relief that it is not able to provide on its own, then it must give the court enough information to enable it to make an independent judgment that the relief is appropriate.

Nevertheless, an argument can be made that Judge Rakoff steps over the line when he suggests that the SEC may have undercharged the case. Whether Citigroup should have been charged with negligence or fraud would seem to be a uniquely prosecutorial decision. For a court to become so involved in evaluating the strengths and weaknesses of a case that it, in effect, reserves the right to redraft the complaint, not only violates the principle of separation of powers, it threatens to enmesh the court in the trade-offs, thoughts and mental impressions that are at the heart of an attorney's work product.

What is the Public Interest?

The public interest is a nice concept, but it is not defined in any applicable law. The Tunney Act requires courts to consider the public interest before approving settlements in government antitrust cases, and numerous courts have expressed difficulty with the vagueness of this principle. Some courts have also suggested the Tunney Act might be uncon-

stitutional if it requires courts to review the decision-making process of the government in deciding whether to settle.

An argument can be made that Judge Rakoff has invented his own definition of the public interest, but if the Second Circuit substitutes its definition for Judge Rakoff's, it will be doing the same thing. Judges traditionally have broad discretion to determine what is in the public interest, and the Second Circuit could decide that uniformity among judges is not required. Alternatively, the Second Circuit could decide that Judge Rakoff's order is not appealable and let the process play out at the district court level, deferring the need to address the issues presented by Judge Rakoff's decision until there has been some experience dealing with the practical consequences of it in the real world.

The Second Circuit could also decide that the SEC is correct when it says that the public interest standard is subsumed in the more concrete requirements of adequacy, fairness and reasonableness. Otherwise, the public interest standard is open-ended. Perhaps that is why Judge Rakoff found that the proposed consent judgment is neither fair, nor adequate, nor reasonable, in addition to being contrary to the public interest. This chessboard has many moving pieces.

Must Defendants Admit the Allegations?

This is where the rubber meets the road. Judge Rakoff takes issue with the standard language in SEC settlements that the defendant neither admits nor denies the allegations of the complaint. In Judge Rakoff's view, the defendant should admit the allegations of the complaint or go to trial, so the public knows what really happened. That is what happens in criminal cases, where a defendant pleading guilty is required to "allocute," or admit, the facts that justify the plea.

This begs the question: why do we distinguish between criminal and civil cases? Criminal prosecutions are usually reserved for conduct that is unambiguously bad. In civil cases, there is a lot more room for nuance. I have always been amazed that after 40 years of practicing law, primarily as defense counsel in civil cases, none of my clients has engaged in any wrongdoing – or at least there have been sufficient extenuating circumstances to justify a finding of no liability.

Judge Rakoff was obviously troubled by what he saw as a disconnect between the allegations of the complaint and the ultimate relief. The complaint alleged facts that sounded like fraud, but the SEC only charged Citigroup with negligence. The SEC claimed that investors suffered more than $700 million in losses, but Citigroup was only required to pay a fraction of that amount.

In Judge Rakoff's view, there is a public interest in knowing the truth. If Citigroup actually did the things alleged in the complaint, it should be required to admit it because that will make it easier for investors to recover their losses. If Citigroup did not do those things, they shouldn't be alleged in the complaint. Judge Rakoff is concerned about the integrity of the process – and he may be right.

What About the Practical Consequences?

Notwithstanding the lofty principles involved, the Second Circuit may be more concerned about the practical consequences of this case. If Judge Rakoff's "Brave New World" is the law, there will be fewer settlements. If there are fewer settlements, the consequences could be significant.

The SEC is already one of the most overworked and understaffed agencies in the government. Many people attribute much of the blame for the financial crisis to the fact that the SEC simply did not have sufficient resources to stay on top of things. If the SEC is required to take more cases to trial, it may drown. Other agencies may drown too. Consent judgments play a major role in the enforcement efforts of many agencies.

Furthermore, if Judge Rakoff's approach applies to all civil cases, and there is no logical reason why it should not, the impact may be even more dramatic. Judge Rakoff implicitly recognizes this by suggesting in a footnote that courts should not retain jurisdiction to enforce settlements between private parties.

This does not solve the problem, since it only postpones the day of reckoning to a subsequent case – assuming, at some point, private parties are entitled to seek injunctive relief.

In many cases, the decision to settle is the product of a cost-benefit analysis. If defendants are required to admit the allegations of the complaint in order to get a court to approve the settlement, that will eliminate the benefit of avoiding collateral estoppel and completely change the math. The result will be more trials.

This will have a significant impact on the courts. Civil justice delay and expense are already a serious problem. If there are more trials, lawyers may have more fun, but the overall quality of justice may decline.

Judge Rakoff has a good point. He recognizes that the justice system is supposed to serve the public, and right now the public is very dissatisfied with the quality of the product it receives. It wants to know who was right and who was wrong, and it wants wrongdoers to be punished. Many people are very frustrated by what they see as a classic under the table deal in which they had to pay for the consequences of the financial crisis but none of the people who actually caused it were held accountable.

The problem is that people want a Cadillac system of justice but are only willing to pay Volkswagen prices. We could have a system in which more cases go to trial, but that would require significantly more judges, courtrooms and people who are paid to bring and try the cases. We are a long way from that. So long as our infrastructure stays the same, our methods for resolving cases will have to stay the same or be adjusted to permit more cases to be resolved without trials. There is little headroom to go in the other direction.

Editor's note: Jordan Estes assisted in the preparation of this article.

Legal History

Myron Taylor's Mission to Save Germany's Jews from Hitler

By C. Evan Stewart

Having concluded one of the most successful business careers of the 20th Century (*see Cornell Law Forum* (Summer/Fall 2006)), Myron C. Taylor resigned as Chairman and Chief Executive Officer of United States Steel Corporation on April 5, 1938. He hoped to enter what he termed a "sabbatical period of life," but it was not to be. Later that same month, his friend, Franklin D. Roosevelt, called on him to deal with the deepening crisis of Jewish refugees attempting to flee the persecution of Hitler's Nazi regime. Taylor agreed to take on that challenge, and the President appointed him "Ambassador Extraordinary and Plenipotentiary."

Roosevelt, at the suggestion of his Undersecretary of State, Sumner Welles, had come up with a proposal for an international conference on refugee issues. Thirty-two countries were issued invitations (Germany and Russia were not invited; Italy refused to attend). Taylor's first order of business was to represent the United States at the conference.

Held in Evian, France (because the Swiss refused to hold it in Geneva for fear of upsetting Germany), the conference went on for 10 days. Its first official act was to designate a chairman – Taylor was promptly selected, and he proved to be a popular figure with the delegates.

Ultimately, the Evian Conference floundered on substance. The reason lay in its basic, and flawed, structural design. One of the established ground rules was that no nation state was expected or would be asked to receive a greater number of immigrants than was permitted under its own laws. Furthermore, the parochial agendas of various countries quickly came to the fore. Thus, for example, Britain forbade any mention of Palestine in connection with refugee relocation. Australia espoused that it had no "racial problem" and was "not desirous of importing one." Incredibly, several Central American nations issued a joint statement that they would accept "no traders or intellectuals."

Faced with these built-in barriers, the only success Taylor had at the Evian Conference was the creation of the Intergovernmental Committee on Refugees – an on-

going, international mechanism to deal with this formidable problem. The ICR was based in London, with Taylor as the U.S. representative and Vice Chairman; George Rublee, a senior partner at the Covington & Burling law firm, was appointed as its director.

Two Challenges

Taylor and Rublee faced two challenges right off the bat: attempting to negotiate with Hitler's government a rational method by which to allow emigration; and, finding an appropriate place or places for resettlement of the refugees. As to the first challenge, initial feelers looked to be promising as it was agreed that Rublee would travel to Berlin to meet with Hermann Goering and Walter Frank, Germany's Minister for National Economy. That trip was cancelled, however, after a young Polish Jew assassinated a German diplomat in Paris in November of 1938, an action that set off a frenzy of violent Nazi reprisals (later known as Kristallnacht – the "Night of Broken Glass") against the Jews who remained trapped in Germany.



Myron Taylor

FDR recalled the U.S. Ambassador to Germany in protest, but ordered that efforts be continued to try to reach some form of reconciliation. Those efforts bore fruit insofar as Goering, who had been given responsibility by Hitler for the Jewish expulsion, committed to sending Hjalmar Schacht, president of the Reichsbank and also head of the German Ministry of Economics, to meet with Rublee in London. Schacht reported that Germany planned to expel 150,000 Jews over the next five years, but in an "orderly" fashion. The expulsion would be paid for by confiscated Jewish property, and through the financial wherewithal of "international Jewry."

Taylor was encouraged by this German initiative (as were FDR and Welles), and he sought ways to move the ball forward. Responding to Mussolini's copy-cat decree to expel all Jews from Italy, Taylor travelled to Rome in early 1939 to meet with church officials (including the future Pope Pius XII, then Cardinal Pacelli), as well as political figures (including Mussolini and his son-in-law Count Ciano). As later described by Taylor:

> I enquired if influence could be brought to bear in some way on the Italian Government – not to cancel the decrees in expelling the Jews, not to retreat, which is a difficult thing for a politician to do, but to so modify the decree that each such case would be determined on its merits, and avoid a mass exodus by bringing about a personal and individual study of each case, following generously in deciding these cases and disturbing the Jewish people as little as possible. The result was that they were never expelled from Italy. With that influence brought to bear on Ciano and the influence on Mussolini, whom I had known during his best period when he used to come to Florence and I dined with him, the decree was so modified and was never enforced at all.

On that same trip, Princess Helene (then Queen Mother of the King of Romania and daughter of

the former King of Greece) contacted Taylor. The Princess knew that Taylor had previously gotten a number of Italian Jews she knew out of Italy and to America, and told Taylor that she and her family were "all very much interested in the refugee problem you are working on." Visiting the Princess at her villa was Hitler's doctor, and she arranged for Taylor to meet with him. Taylor laid out a précis for how the orderly emigration of German Jews could work and gave him a copy of the ICR's plan (*see* postscript *infra*). Hitler's doctor encouraged Taylor to "get your plan to Goering," who was on vacation with his wife at San Reno, just over the French border.

Taylor and his wife drove up to Monte Carlo with Hitler's doctor and his wife, and then invited the Goerings to a nearby estate (the Villa Anabel – named after Mrs. Taylor) that the Taylors had donated to graduates of the music department of the American Academy in Rome. Goering agreed to meet Taylor at the border – "he did not want to go into France." The night before that meeting, Taylor received a telephone message that Goering had received the ICR's "informal memorandum [presumably from Hitler's doctor] and was going back to Berlin" and that while Goering "was rather agreeable to [the plan, he] had to discuss it with Hitler."

This then led to an invitation for Rublee to meet Goering in Berlin. Goering at that point offered to moderate the terms of the deal Schacht had proposed – he was willing to forgo the cash barter; German Jews permitted to leave could take one-third of their resources with them, with one-third for the German government, and the remainder to be put in trust for those émigrés with no resources. Goering also proposed that once the 150,000 "able-bodied" Jews had emigrated, their dependents would be allowed to join them; moreover, the Nazi regime would be amenable to working with international organizations to facilitate the process.

That development seemed to justify Taylor's original optimism. He later recollected that everything "was all ready and agreed upon by both Goering and Hitler," and Welles wrote to FDR that it was "better than we hoped for." But these were false hopes, and for two fundamental reasons. The first was the onrush of World War II in Europe. In March, Hitler took over Czechoslovakia; and in September, Poland was invaded, which triggered the outbreak of formal hostilities. In Taylor's words, "we failed because of the war coming on just at the moment of success."

But there was an even more fundamental problem that Taylor perhaps did not fully appreciate: U.S. policymakers had never figured out the answer to the ICR's second challenge, to find a home for the refugees. As Secretary Henry Morgenthau had cogently put it, in cutting off FDR's ruminating about financing the relocation from "the thousand richest Jews in the United States"—"Mr. President, before you talk about money you have to have a plan [where to put the refugees]."

As to a "place," the history of what was being considered is of some interest. Palestine was the logical place for the refugees to resettle. But an insurmountable obstacle lay in the way: Great Britain. Although the British government had committed itself to a Jewish homeland in Palestine during World War I, by the 1920s the importance of Middle East oil and having unfettered access to India supplanted that commitment. As FDR expressed to Morgenthau, "[t]he whole problem is England."

With Palestine out as a solution, overtures were made to nations in Latin and South America, as well as Africa. Those proved either unworkable or were rejected out of hand. FDR initially thought he might persuade Portugal to commit one of its African colonies, but ultimately the Portuguese Foreign Minister to the United States persuaded the State Department from even formally raising the subject with his government.

In desperation, Sumner Welles had suggested that Mindanao, the second largest island in the Philippines archipelago, be considered. At first, both FDR and Manuel Quezon, the Philippine President, approved the proposal in concept. But with growing tensions between the U.S. and Japan over natural resources and geopolitical influence in Southeast Asia, as well as Quezon cooling to the idea, this idea became still-born. It is interesting to contemplate

how different geopolitical issues might be today if the Mindanao plan had reached fruition.

With World War II having commenced and the Nazi curtain drawn over virtually all of the European continent, any substantial or substantive progress by the ICR in effectuating the emigration of refugees effectively came to a halt. As Welles later wrote, "notwithstanding the tireless work of … Myron Taylor, the final results amounted to little more than zero." Taylor's role thereafter in attempting to help European Jews, as well as assisting refugees in Italy during and after the war, is well documented in a different post: the President's "Ambassador Extraordinary" to Pope Pius XII.

Postscript

What follows is the ICR plan, as, in Taylor's words, it was "agreed upon by both Goering and Hitler":

It has been ascertained that Germany is disposed to adopt a policy which will in every way facilitate and encourage the organized emigration of Jews. A program along the lines hereinafter outlined will be put into effect when Germany is satisfied that countries of immigration are disposed to receive currently Jews from Germany in conformity with this program. If the program is put into effect – and its implementation will be greatly facilitated by an improvement in the international atmosphere – the emigration will take place in a uniform and orderly manner.

I. Organization of Emigration

ONE. This program relates exclusively to Jews of German nationality or stateless Jews in Germany. The term "Jew" where used in this memorandum as provided by the Nuremberg laws means the following:

(1) A Jew is a person who has three of four Jewish grandparents. A grandparent is deemed to be a Jew if he or she embraced the Jewish faith;

(2) A person is also deemed to be a Jew who has two Jewish grandparents and who on September 16, 1935, was of the Jewish faith or thereafter embraced the Jewish faith; or who has two Jewish grandparents and on September 16, 1935, was married to a Jew of thereafter married a Jew.

TWO. There are approximately 600,000 Jews remaining in Germany, including Austria and the Sudetenland, at the present time. Of this number, 150,000 are classed as wage earners; the remainder are primarily the old and infirm who for that reason are not included in this program of emigration.

THREE. The wage earner category shall consist of all men and single women between the ages of 15 and 45, who are individually capable of earning a living and are otherwise fit for emigration.

FOUR. The dependent category shall consist of the immediate families of the wage earners, excluding the old (persons over 45 years of age) and the unfit.

FIVE. The wage earner category shall emigrate first, in annual contingents over a period of three years not to exceed a maximum of five years.

SIX. All persons from the wage earner category as defined above shall be admitted by the receiving governments in accordance with their established immigration laws and practices.

SEVEN. The practical work of organizing emigration shall be carried out with the participation of Bureaus representing the Jewish organizations of Germany under the control of a Commissioner designated by the German Government.

EIGHT. The Bureau organizing the work of emigration may be assisted by foreign experts representing outside private organizations concerned with immigration and enjoying the confidence of receiving governments, on condition that these experts are agreeable to the German Government.

NINE. Passports shall be furnished to persons emigrating from Germany under this arrangement. Stateless persons in Germany shall be furnished with suitable papers for emigration.

TEN. Conditions which have led to the retention of Jews, other than persons detained for reasons of public safety, in camps should automatically disappear if

a program of organized emigration is put into effect.

ELEVEN. Facilities shall be granted for the retraining of wage earners for emigration, notably in agricultural retraining centers but also in artisan schools. Retraining shall be encouraged.

TWELVE. Emigration of persons in the dependent category shall take place when the wage earners are established and able to receive them.

II. Position of Persons Remaining In Germany and of Those Awaiting Emigration

THIRTEEN. A definite method has not as yet been found for caring for old persons and persons unfit for emigration, who are not included in this program and who will be allowed to finish their days in Germany. It is the intention on Germany's part to assure that these persons and persons awaiting emigration may live tranquilly, unless some extraordinary circumstance should occur. There is no intention to segregate the Jews. They may circulate freely. Persons fit for work shall be given the opportunity of employment so as to earn their living; Jews employed in the same establishment as Aryans will, however, be separated from Aryan workers. Generally, in order to provide for adequate administration of the program, centralization of control over Jewish affairs is contemplated.

FOURTEEN. The support and maintenance of the persons referred to in paragraph thirteen above, who are not able to earn their own living, will be financed in the first instance from Jewish property in Germany apart from that portion thereof to be set aside in the trust fund (hereinafter described), and from the income from this trust fund. If the above resources do not suffice, there will be provided for these persons decent conditions of existence from the material standpoint in accordance with prevailing practices relating to the public relief of destitute persons generally. There will be no recourse to sources outside Germany for the support and maintenance of these persons.

III. Financing of Emigration

FIFTEEN. In order to finance the emigration contemplated by the program, a trust fund shall be established in a specific amount to be ascertained but at all events in an amount not less than 25% of the existing Jewish wealth in Germany, which, if transfer possibilities are found, will represent a material increase over the present rates of transfer. At the present time the remaining Jewish wealth in Germany is in the hands of its individual owners; it has not yet been decided how the requisite amount thereof will be set aside in the trust fund.

SIXTEEN. The trust properties shall be held by a corporation administered by three trustees. Two of the trustees shall be of German nationality. The third trustee shall be of foreign nationality and recognized standing.

SEVENTEEN. The principal of the trust may be used to purchase equipment for emigrants of the wage earner category and (subject to cartel agreements) capital goods for the development of settlement projects and for traveling and freight expenses of the emigrants in Germany and on German boats, all in connection with this program of emigration. It is contemplated that an outside purchasing agency will be established to effect all purchases out of the fund, to maintain contact with the German authorities and generally to handle all problems arising outside of Germany in connection with the transfer of the fund. The types of goods which, in accordance with prevailing practice in Germany, are computed to contain no imported raw material or a relatively small percentage thereof; or, alternatively, no restrictions will be imposed if arrangements can be made to pay to Germany in foreign exchange a portion of the aggregate price of goods purchased which represents the computed value (on an over-all percentage basis to be agreed upon) of the imported raw material content of such goods. Arrangements shall be made to secure the exemption of goods purchased out of the fund from the scope of clearing, compensation and payment arrangements in force between Germany and the respective countries into which such goods are imported. Assurances shall be required of the purchasing agency that the goods purchased will not be disposed of otherwise than for the purpose of

equipping emigrants or for the development of settlement projects. It is the intention to facilitate the purchase out of the fund of such goods of the requisite types and in adequate volume to meet the current emigration needs. The prices to be paid shall not be in excess of inland prices for goods or services of a similar character and quality.

EIGHTEEN. The Haavarah method of transfer shall be permitted to operate within its traditional sphere. The Haavarah purchases are to be paid for out of the trust fund.

NINETEEN. The principal of the trust fund, except to the extent that it is used for the purposes above referred to, shall be eligible for transfer whenever a change in conditions may render transfer possible or whenever arrangements to that end can be made, whether by way of agreed schemes for additional exports or otherwise.

TWENTY. Goods purchased out of the trust fund may be exported free of all taxes or other payments, and emigrants may take with them, free of all taxes, levies, contributions or similar exactions, their personal effects (with the exception of jewelry, precious metals, objets d'art, and with the exception of goods of special value recently acquired with a view to emigration, household goods, tools and equipment for use in their trades or professions, owned or which may be acquired by them in a reasonable amount for personal use).

TWENTY-ONE. No flight tax or exaction of a similar nature shall be levied against Jews emigrating in accordance with this program.

Second Circuit Decisions

"Pay to Play" Rules Do Not Violate First Amendment

By Charles C. Platt

The Second Circuit's recent decision in *Ognibene v. Parkes* confirms that limitations on campaign contributions to prevent the potential perception of corruption do not violate the First Amendment. The circuit court acknowledged that "the judiciary owes special deference to legislative determinations regarding campaign contribution restrictions," and upheld as a result New York City's recent "pay to play" rules that significantly limit contributions by those "doing business" with the city.

Specifically, the city's new campaign finance rules reduce the amount that defined individuals (such as lobbyists, franchisees and contractors with "high value business transactions") can contribute to city officials' campaigns. The rules also deny public "matching funds" for those contributions, and extend prohibitions on those contributions not just to corporations but to partnerships, LLCs and LLPs.

The city recognized that there is "nothing intrinsically wrong with [campaign] contributions from those doing business with the [c]ity…." However, "the ability of such individuals to contribute could create a perception, regardless of whether the perception is accurate, that such individuals have a higher level of access to the City's elected officials." The city's enhanced campaign restrictions were designed to "eradicate this perception and reduce the appearance of undue influence associated with contributions."

The plaintiffs in the case included New York City voters, aspiring candidates, a business owner and lobbyists. They challenged

The Second Circuit's decision is a forceful reminder that, while there is still considerable legal debate regarding some campaign finance rules, such as those that limit independent expenditures by political action groups, our government is permitted to impose fairly stringent limits on campaign contributions to address even the potential perception of corruption.

these "pay to play" rules on a number of grounds. Among them was the argument that the city's existing campaign contribution limits had adequately responded to the actual "pay to play" scandals in the 1980s, and that further limits were impermissible without new evidence of corruption under the Second Circuit's 2010 decision in *Green Party of Conn. v. Garfield.* The circuit court rejected this argument, writing that this determination "is a matter of policy better suited for the legislature" and that there was "no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures." In the Second Circuit's view, the city's new rules were supported by studies showing that, even recently, people doing business with the city were more likely to make large contributions (particularly to incumbents) and showing that there was still an overall "public perception of corruption." This evidence, according to the Second Circuit, was adequate because it was "somewhere between a concrete showing of actual *quid pro quo* corruption and the sort of 'mere conjecture' that the Supreme Court has deemed out of bounds."

Plaintiffs further asserted that the Supreme Court's recent decision in *Citizens United v. Federal Election Commission* prohibits, on First Amendment grounds, all contribution limits based on the source's identity, and that the city's rules identifying certain contributors are therefore constitutionally impermissible. The Second Circuit disagreed, stating that "*Citizens United* has no impact on the issues before us" because it only held that "the government cannot prohibit independent *expenditures* in support of a political candidate based on the source's identity." (Emphasis added.) *Citizens United* did not prohibit limitations of campaign *contributions* based on their source. Indeed, the Supreme Court in that decision "expressly confirmed the validity of contribution limits, noting that they most effectively address the legitimate governmental interest … preventing actual or perceived corruption."

Plaintiffs next argued that the city's limitations on campaign contributions are overbroad because they bar legitimate as well as corrupt contributions. The Second Circuit noted that it was "difficult to isolate suspect contributions," and that in any event the limitations were tailored to apply only to those who are seeking some benefit from the city. Although the limitations are under-inclusive because they do not apply to labor unions and neighborhood organizations, the Second Circuit thought that was permissible because, among other things, those groups contribute far less to city officials than others doing business with the city, based on recent data.

Finally, the plaintiffs challenged the "no matching funds" section of the new pay to play rules, arguing in part that these limitations violate the First Amendment based on the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*. The Second Circuit held that the *Bennett* case was not controlling because it invalidated a law that triggered public matching funds based on a privately financed candidate's level of expenditures. It did not address matching limits on contributions that were designed to address the perception of corruption, as was the case here.

The Second Circuit's decision is a forceful reminder that, while there is still considerable legal debate regarding some campaign finance rules, such as those that limit independent expenditures by political action groups, our government is permitted to impose fairly stringent limits on campaign contributions to address even the potential perception of corruption.

In the Courts

Connecticut's Support Court

By James I. Glasser

Support Court meetings are held in the New Haven federal courthouse on Thursday afternoons each week. I arrived early at Judge Janet Arterton's courtroom. Individual voir dire was being conducted for a capital case that was about to begin. The prosecutor asked whether a prospective juror would have difficulty voting in favor of the death penalty if the evidence sup-

ported such a punishment. The defendant on trial, Azibo Aquart, was charged with bludgeoning to death three individuals whose hands and legs were bound with duct tape at the time of the murders. The dispute that resulted in the murders was allegedly a disagreement over drug turf.

Fifteen minutes later, I observed a meeting in Judge Arterton's chambers of probation officers, federal public defenders and an Assistant U.S. Attorney, with Judge Arterton presiding. The subject of this meeting was also drugs, but the difference could not have been more stark. Judge Arterton was asking specific questions about the progress, achievements and accomplishments (or lack thereof) of six individuals who had volunteered to participate in a program known as "Support Court." Probation officers gave detailed reports about each participant, and defense counsel and the prosecutor, in response, provided suggestions and input. Judge Arterton was informed in detail about the addictions and life circumstances confronting each of the individuals participating in Support Court and was focused, laser-like, on addressing issues experienced by and confronting each of the participants under her charge. After running through events of the past week, Judge Arterton asked the "support team" how they felt Dr. Howard Blue was received at the last meeting. Dr. Blue, of Dixwell Newhallville Community Mental Health Services, had spoken at the last meeting about the psychological and physiological impact of different drugs on the human body. Dr. Blue, among other things, explained the release of dopamine and its physiological impact.

Judge Arterton also asked about an assignment she had given Support Court participants – to visit the New Haven British Art Museum on a docent led tour. Paul Thomas, a veteran federal public defender, shared that one participant, upon viewing a 16th Century landscape painting, inquired "Who would pay anything for this?" When the same individual viewed a Rubenesque nude, he was heard to remark, "Now that's what I call art!" Thomas, and the others who accompanied the participants on the tour, declared the assignment a great success. Judge Arterton explained to me that the museum assignment was meant to accomplish several goals. One, to let the participants know that there are comfortable places within walking distance of downtown New Haven where they are welcome, that do not cost a dime, and where they can enjoy experiences beyond their comfort zone. The assignment was also designed to demonstrate that many other things besides drugs can generate dopamine and that the pleasure senses can be excited by a broad array of stimulants having nothing whatever to do with drugs.



New Haven Federal Courthouse

An Idea Borne of Frustration

Judge Stefan Underhill is the progenitor of the Support Court in the District of Connecticut. Connecticut was the seventh federal court in the United States to implement a so-called "drug court" program. Two years later, there are now approximately 33 such courts around the country. The impetus for Judge Underhill's involvement was his mounting frustration over handling countless petitions to violate terms of supervised release owing to continued drug use. Judge Underhill was frustrated by sending individuals to jail who were suffering from a disease – addiction. He was convinced that something more constructive than incarceration should be available to address this recurring issue. Since initiating the Support Court, Judge Underhill has been buoyed and invigorated by doing something positive for a self-selected group of offenders who need help if they are going to have a second chance in life. Support Court provides Judge Underhill, and the other Connecticut judges participating in the program, the opportunity and unique vantage to help and watch people overcome the odds and succeed despite significant obstacles.

When asked how his involvement in the program came about, Judge Underhill explained that his involvement in the program occurred after he attended a sentencing conference a number of years ago where drug courts were discussed. He recalled seeing the presenter at the airport and chasing him down to further discuss the mechanics, hurdles, and impediments to instituting a drug court. That discussion led to his investigation of the existing programs around the country. He visited jurisdictions that had successfully implemented drug courts and conducted research on the variations and permutations of such programs. Once he completed his due diligence, Judge Underhill presented the idea of establishing a drug support court to his judicial colleagues in Connecticut and to the U.S. Probation Office. Both were receptive to the idea and, after approximately a year of gestation, the alternative court program was born. The judges eschewed the moniker "drug court" in favor of "Support Court." The name conveys the concept of the provision of support, and positive and negative reinforcement, to help individuals who are committed to being drug free achieve that goal. The program has been in place for more than two years and according to all participants the rewards are well-worth the considerable efforts involved. There are now three Support Court sites in Connecticut: Bridgeport, presided over by Judge Underhill, New Haven, presided over by Judge Arterton, and Hartford, presided over by Judge Vanessa Bryant.

The mission of the Support Court is simple: "to provide support and structure to participants who struggle with drug and alcohol addiction to assist them in achieving lifelong sobriety." To accomplish that goal the Support Court assists participants with treatment, employment, and educational resources. The Support Court Judge addresses participants' behavior through meaningful incentives and timely sanctions and by treating participants with dignity and respect, and empowering them to lead law abiding lives.

The Program

The Support Court is currently exclusively a post-conviction program available to offenders serving terms of supervised release. Each participant must be accepted into and be committed to the program. Judge Underhill requires that prospective participants observe one or more Support Court sessions to make certain they understand and appreciate the rigors of the program. Prospective participants are screened by the support team and the final determination for acceptance into the program is made by the Support Court Judge. Participation in the program is completely voluntary – offenders must want to participate.

The program is designed as a one year program and is divided into four phases. The first phase is two months and requires participants to prepare a written statement of goals, to be drug tested twice each week, to appear at weekly court sessions, and to expect a home visit from a probation officer at least once each week. To advance to the second

phase, participants must remain drug free for at least 30 days. The second phase lasts three months and is similar to the first phase with slightly less frequent drug testing and slightly reduced reporting requirements. Participants must participate in a GED or job readiness program and weekly Support Court sessions. To advance to the next phase, participants must remain drug free for at least 60 days.

The third phase has similar requirements but reduced reporting and drug testing requirements. It is anticipated that by this phase participants will be enrolled in school or employed and therefore reporting requirements are slightly relaxed. To advance to the fourth and final stage participants must remain drug free for at least 90 days and must be engaged in full-time employment or education. The fourth and final phase lasts four months and includes periodic drug testing, Support Court sessions, and requires participants to prepare a written life plan as well as a transition plan for graduating from Support Court. To graduate from the program, participants must remain drug free for five consecutive months.

Generally, a Probation Officer, a public defender, a prosecutor, a paralegal and a treatment provider attend each session. Prior to every Support Court meeting the team meets to discuss the progress, or lack thereof, of each participant over the preceding period. One of the features of the Support Court is immediate consequences for negative behaviors and immediate positive reinforcement for positive behaviors. Negative behaviors can be sanctioned through mandated community service or a day or two in the lock up. Positive behaviors are rewarded through small rewards including gift cards, movie tickets and more subtle but equally effective reinforcement consisting of public recognition of achievements and even encouraged applause for accomplishments from co-participants.

The program is difficult. It requires tremendous commitment from both the participants and from the support team. Probation officers involved in the program are volunteers. The assignment involves added work including authoring weekly progress reports, intense supervision, home field visits, attendance at weekly meetings and constant monitoring of the Support Court participants. All participants do not successfully complete the program. A number of participants start the program but drop out, some have been returned to jail following violations of supervised release, some have become discouraged and quit, and a small percentage have successfully completed the program and have been rewarded by the shortening or termination of their supervised release.

Federal Defender Paul Thomas observed that he believes the Support Court has been an eye opener for the judges. The close weekly supervision allows the court to witness firsthand the many complications in the lives of the participants that makes what are mundane chores to most, difficult undertakings to those with addictions. Mr. Thomas remarked that sentencing frequently focuses primarily on the crime and the criminal history. Although so-called 3553 factors are raised, a judge generally sees a one dimensional portrait of the person standing before the court. The Support Court weekly program gives the court an opportunity to get to know each individual – their personality, strengths, weaknesses and foibles are on display weekly. In many instances participants are recently out of prison and are not quite homeless but have no permanent residence, are estranged from families and children, lack resources and have a track record of failure. They do not have the life coping skills that many take for granted. Many participants lack basic organizational skills, transportation, education, and job training. Mr. Thomas believes the first-hand exposure to these challenges has been informative for the Support Court judges.

Judge Underhill provided examples of several individuals he encountered through the program that impressed him. One was the participant who committed to attending 90 narcotics anonymous or alcoholics anonymous course sessions in 90 days. The participant completed his goal and, by the last session, was completely committed to sobriety. He became a leader in the program, helping others to achieve their goals. Judge Underhill observed

that part of the success of the program is the peer-to-peer counseling that takes place and the encouragement that those who are doing well in the program offer to those who are struggling. Debbie Palmieri, the supervising Probation Officer for the program remarked that the offender participants both support each other and "call each other out" when one of their members is not trying hard enough or showing the proper conviction to power through setbacks.

Judge Underhill was moved by one participant, who had been in and out of jail, was estranged from her family and whose addiction was driving her into a downward spiral. By the time this woman finished the Support Court program, she had a job, her employer was thrilled with her performance, she had secured her own apartment and had been reunited with her children and was actively participating in family counseling. Judge Underhill remarked that the Support Court team had done an amazing job, and observing and participating in the successful outcome was incredibly rewarding. This particular Support Court participant, although graduated from the program, has come back regularly to Support Court to speak to others and encourage those who have been given the same opportunity she had.

For Judge Underhill, the most rewarding aspect of his participation in Support Court is participating in graduation ceremonies. It's the moment when folks who have been struggling, and typically do not have a lot to cheer about or celebrate, become the center of attention with their positive achievements publicly recognized and applauded.

Judge Arterton and Judge Underhill both said that they have witnessed many slips, falls, disappointments, frustrations and failures along the road. Only a small minority of participants make it through the program. The judges both observed that for those who make it through the program the reward is particularly sweet and gratifying. Of the 43 persons accepted into the program to date, only 8 have successfully completed it; an additional 20 participants are currently in the program.

Personal History

How to Start a School in Harlem

By Pete Eikenberry

In 1970, after the heady experience of running for Congress, having my picture in *Time* magazine and being on the TV evening news, I had to find a job. My successful adversary in the congressional race, John Rooney, a 26 year incumbent, is supposed to have said once that, "There is no prize for second place in American politics." I had no problem getting interviews because everyone knew about me, but most potential employees just wanted to talk politics. I also had another problem: I knew I could win if I ran again since I had come so close and I would now be able to raise much more than the $35,000 that we spent on the campaign.

Thus, if a potential employer actually was interested in employing me, he (there were no "she" hiring partners in 1970) inevitably asked whether I intended to run again. Initially, I always tried to hedge my bet by saying I would never run again without the permission of my employer. In so doing, I flunked the interviews, until I met Roger Milgrim who was senior partner of the fledging law firm Milgrim, Thomajan & Jacobs. Roger was in his early thirties and younger than I. He explained that no one would want to ever be put in a position of saying no to me if I wanted to run. He said no one would hire me unless I promised never to run again. Roger did not offer me a job, but I took his advice. I got an associate's position at the now long defunct law firm of Spear & Hill. After that did not work out, I got a job at Seward & Kissel, where I had very good work and great mentoring from the litigation partner Gene Souther.

Yet, I was a restless associate. Something like, "how are you going to keep them down on the farm once they have seen Paree." Thus, with $20,000 working capital we borrowed from Citibank, my friend, Burt Peterson (whom I met on a basketball court in Brooklyn) and I started a law firm. On our first day in business, January 2, 1973, Hal Fales, then senior partner of White & Case, referred the general coun-

sel of McDonnell Douglas to me and I undertook a small matter. The Knoedler Art Gallery (which recently closed) had scratched a three dimensional photograph loaned to it by McDonnell Douglas. I sent a demand letter, and by about January 10, I had a check back in the mail from the Gallery. Over the next dozen or so years I enjoyed the continuing confidence of McDonnell Douglas in a series of cases I handled in New York. More importantly, I commenced a still existing 35-year relationship with the Children's Storefront School in Harlem.

In the 1970s, McDonnell Douglas had a suite of offices in the Chrysler Building staffed by one Dorothy Quinn who typed letters, ordered theatre tickets, and made hotel and restaurant reservations for visiting McDonnell Douglas officials from St. Louis and their contacts in New York. She asked me if I would come to a meeting with the Children's Storefront School Board since it needed a young lawyer to secure their Section 501(c)(3) tax exempt certification from the IRS. I was a litigator and had no idea of how to go about it but the Children's Storefront seemed like a good cause and McDonnell Douglas was a client.

Thus, I attended a board meeting to meet the board and the headmaster. The meeting was held in an ill-lighted room in a church near Gramercy Park. The board president was not in attendance (he rarely attended thereafter) and there were no more than five people in the room including headmaster Ned O'Gorman, a poet of note. The people attending were treasurer Landon Thomas who was Executive Vice President of Fiduciary Trust, and three or four women including Dorothy Quinn, and one Mary O'Hearn, who some months later agreed to be "acting" president.



Children's Storefront

They informed me that the school's storefront had burned, that they had no hope of replacing it and that Ned's salary has not been paid for two months. They operated by Ned picking up several young children each day from their homes and conducting outdoor activities or museum tours with them. Their first question to me was, "Should we continue?" With the exception of Dorothy, I had never seen these people before and their circumstances did, indeed, look bleak. However, I could not tell them to quit. Rather, I said that they had a headmaster dedicated to the school, they had a board that met on a regular basis, they had an appealing cause and there were people, including some rather famous ones, who had contributed to the support of the school.

They determined not to dissolve, and I somehow secured their requested 501(c)(3). I don't know how, and I certainly have never tried to do it again. I also became a board member. I had some organizational experience and over time, I recommended that they find a chair who would show up for meetings, formulate a budget, make required employee deductions from Ned's salary and ask their funders for more than $50 or $100. As a young man, I was flattered when they followed my advice. After I again stated after a year or two that we needed a real president, Landon Thomas invited Elsie Aidinoff to a meeting. Before the meeting was over, to her surprise, she was elected president. Under her leadership, the Children's Storefront became a real school.

It is hard to recall all of the great experiences I have had in the last 35 years. Ned was a tireless promoter of the school and outrageously forward in his approaches to people. He recruited the renowned anthropologist Margaret Mead to the board and, at her first meeting, I had a disagreement with her. I went home and told Sue that I was embarrassed. Mead was such an icon that I felt honored to be in the same room with her. How could I ever disagree with her about anything? Ned also recruited Isaac Stern, the violinist, on an elevator who agreed to perform at a benefit. With Ned as headmaster, we had other benefits over the years featuring Roberta Flack, Aretha Franklin, Ashford & Simpson, etc. I remember a benefit at Lincoln Center where Ned had invited eight or 10 of America's finest poets and novelists to read their poetry. As beat poet Alan Ginsberg commenced to read, a well dressed, rather heavy-set, late middle aged woman rose to loudly exclaim, "Shame Alan Ginsberg! Shame Alan Ginsberg!," as she pointed her finger and her fully extended arm dramatically at Ginsberg.

As headmaster, Ned was more of a poet than an administrator and at some point there was a transition from our founding headmaster. Yet, he had some inspired moments. On one occasion, he said we are going to start a first grade, and after that we will add a grade a year. The board members agreed and some way we managed, starting from the base of our nursery program, to expand the school to add eight grades in eight years. In our early years, we were, of course, illegal and the state tried to close us down one opening day. My friend Richard Huffman brought an order to show cause, kept us open and worked out some kind of a deal.

Thirty-five years later, the Children's Storefront is a fine state-accredited free private school for nursery through the eighth grade. We admit on a lottery basis without regard to academic strength. Over 90 percent of our students graduate from high school as opposed to about 50 percent of the Harlem community public school students. The school owns three renovated buildings and one being renovated on 129th Street. It has a modest mid-seven figure endowment, 174 students, a staff of 53, a budget of $4.2 million and does both placement and follow through for its students. I had a peak experience at a benefit a few years ago: after I had first read the *Tempest,* I discussed Iago with one of our graduates, who was by then a college graduate.

Having been a successful advisor as a board member, I advised against Elsie teaching in the school during her presidency, and I advised Chris LaSala against becoming temporary headmaster when she was president. Both ignored my advice, and the school has been the better for it from the insight they gained doing "hands on." Although in many respects the school has been built under the magnificent board leadership of non-lawyers including Elsie Aidinoff, Chris LaSala, Anne Rivers, Mildred Jones, Michael Stubbs and Bob Rylee, there have been lawyers who have made very significant contributions including Bill Campbell, George Grumbach, and John MacKerron. George, a retired Cleary Gottlieb partner, has for years headed the nominating committee where he has taken the lead in board recruitment and fills the role of august advisor. John MacKerron, a partner at Orrick Herrington & Sutcliff, recently led the search committee through which we recruited our current wonderful school head, Wendy Reynoso. Bill, George and John and I have not had much experience in school administration, but our being in the "judgment business" has permitted us to contribute to the development of this rare jewel of a school on East 129th Street. Although I have had many treasured clients and been privileged to handle many interesting and challenging matters, the client relationship I initially had with the Children's Storefront has led to the most satisfactory relationship I have gained in the practice of law (excepting, of course, some very important personal friendships). If you think any one of us Storefront board members really knew what we were doing in attempting to start a school in Harlem, I can inform you that you are very mistaken.

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