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Provocative, Human, Eclectic

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From the President

First Decade Party and Thurgood Marshall Award

By Vilia B. Hayes



Two wonderful things about the Federal Bar Council are our First Decade Committee and the Council's commitment to promoting public service. Both will be front and center at this year's First Decade Committee Summer Kick-Off Party at which the Federal Bar Council also will award its second Thurgood Marshall Award. The First Decade Committee summer event has been held for years overlooking the water and attracted many First Decaders, law clerks, and summer associates, as well as members of the judiciary and more senior members of the Council. This year, the First Decade Committee, chaired by Christopher M. Colorado, will hold the event on June 25, 2015 at Battery Gardens in Battery Park overlooking the Statue of Liberty.

In addition to the wonderful conviviality, drinks, and sumptuous hors d'oeuvres (and, one hopes, a wonderful summer outdoor evening), this year we will be awarding the Thurgood Marshall Award to two people whose *pro bono* work the Council is proud to recognize. The Federal Bar Council received over a dozen nominations for the Thurgood Marshall Award and any one of the nominees would have been a wonderful awardee. The two recipients of the award will be recognized at the June 25 event. The courts and agencies in the Second Circuit are truly fortunate in having such a wealth of talent devoted to public service.

This year we will be awarding the Thurgood Marshall Award to two people whose *pro bono* work the Council is proud to recognize.

Matthew Benjamin

The first awardee is Matthew Benjamin, a 2006 graduate from New York University School of Law and a litigation associate at Gibson, Dunn & Crutcher. He was nominated for the Thurgood Marshall Award by the Honorable Dora L. Irizarry and also recommended by the Honorable John Gleeson and an Eastern District of New York senior probation officer for his efforts in connection with the provision of *pro bono* legal services to participants in the Alternative to Incarceration and post-conviction drug re-entry program of the U.S. District Court for the Eastern District of New York. Because of his interest in sentencing and alternatives to incarceration, he was drawn to learn more about the Eastern District's program. Once he did, he began to volunteer to provide civil *pro bono* services to the participants in the program and he soon persuaded his colleagues at Gibson Dunn to volunteer as well. By all accounts, he has played an integral role in the success of the Eastern District's programs, which help defendants turn their lives around.

Steven J. Kolleeny

The second award is being given posthumously to Steven J. Kolleeny, who was special counsel at Skadden, Arps, Slate, Meagher & Flom. Mr. Kolleeny headed Skadden's Asylum Program for over 25 years. He personally represented 30 to 40 people and supervised about 300 cases taken on by other Skadden attorneys. Mr. Kolleeny, with assistance from the *pro bono* organizations he worked with, established himself as Skadden's in-house expert on Asylum, which meant he vetted and supervised cases and empowered Skadden's Asylum Program. This has become a model for our law firm asylum projects.

I encourage all of you to join us on June 25 for a great party

with the First Decade Committee and to join us in honoring these two pro bono leaders. For more information and to register, go to: http://www.federalbarcouncil.org/vg/core/events/eventdetails.aspx?meeting=HH15.

A Life in the Law

Robert B. Fiske, Jr.

By Steven M. Edwards

In the early 1990s, I worked on a trial with Bob Fiske in Florida. At dinner one night, one of the Davis Polk associates commented that she had read an article in *The New York Times* about people over 60 playing rollerblade hockey, which she thought was ridiculous. With an expression of innocence, as well as a hint of surprise, which reflected his self-effacing personality, Bob responded, "I'm 60 and I play ice hockey, and I rollerblade too."

At 84, Bob Fiske no longer plays ice hockey, but he still has a regular tennis game and enjoys biking and cross-country skiing. He claims to be retired, but he comes into the office regularly to help younger lawyers with brief writing and oral argument and to work on a *pro bono* case or two.

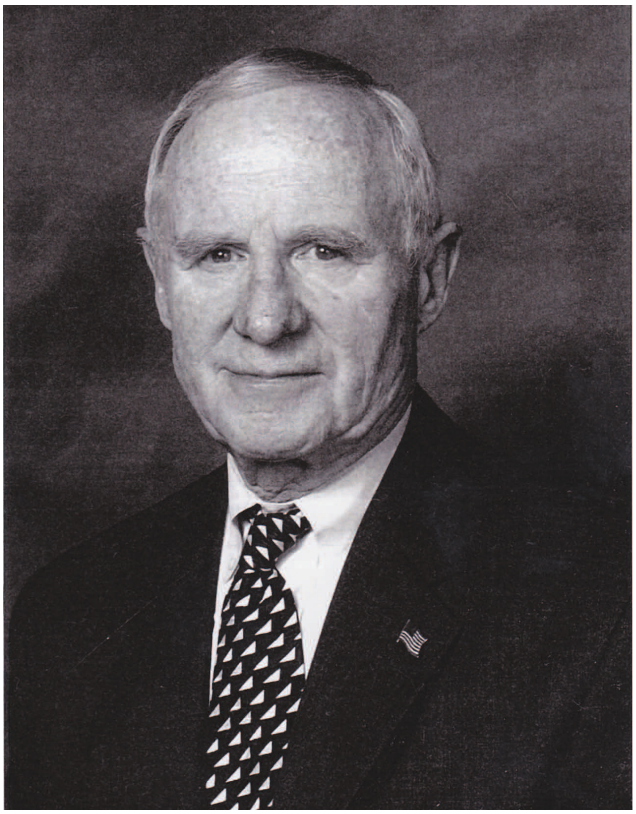
Bob Fiske is an extraordinary lawyer and a terrific person. He would undoubtedly be on many lists as one of the best lawyers of his generation. He was an associate at Davis Polk from 1955 to 1957; an Assistant U.S. Attorney from 1957 to 1961; an associate and then a partner at Davis Polk from 1961 to 1976; the U.S. Attorney for the Southern District of New York from 1976 to 1980; returned to Davis Polk as a partner from 1980 to 1994; served as the Whitewater Independent Counsel in 1994; and then returned to Davis Polk in late 1994, where he spent the rest of his career, stepping down as an active partner at age 80. During that long and distinguished career, he prosecuted many famous cases, he defended many famous cases, both civil and criminal, and he was president of the American College of Trial Lawyers, chair of the American Bar Association Committee on Federal Judiciary, and served on many committees and panels. He was also president of the Federal Bar Council and a recipient of its Emory Buckner and Whitney North Seymour awards.

Bob has written a book about his life, called "Prosecutor, Defender, Counselor." We sat down with him recently to discuss the book and his career.

Bob originally set out to write the book for family and friends, but a number of people heard about it and encouraged him to publish it for a broader audience. After giving it some thought, Bob felt that it would be good to write something that might resonate with younger lawyers, showing them the virtues of a life that combines a career in private practice with public service. Here are some of the highlights.

Mentors

Bob is the consummate mentor, and in our discussion – as well as in the book – he described some of the mentors that influenced him. One of those was J. Edward Lumbard, who took over the U.S. Attorney's Office in 1953. At



Bob Fiske

the time, the office had become somewhat "lackluster" and appointments required the support of local politicians to get the job. Some AUSAs even maintained private practices while working as part-time prosecutors.

Lumbard fired about 45 of the 50 lawyers in the office and hired a group of talented and highly motivated young lawyers, bringing the office back to the way it had been under Emory Buckner – and as it has continued ever since. Bob participated in the first summer program of the office and caught the bug that led to a long and rewarding career as a prosecutor. During that summer, Bob worked on a narcotics case against a major drug dealer named Tony DeAngelo under the tutelage of Fred Nathan. Bob says, "no one could have asked for a better experience." Bob wrote memos, participated in witness interviews and sat through a two-week trial that resulted in a conviction – the first victory of many in a distinguished career, although Bob was only an observer.

Another great mentor for Bob was Hazard Gillespie, whom he worked for at both Davis Polk and as an AUSA when Gillespie was U.S. Attorney. Bob credits Gillespie with teaching him legal skills and trial advocacy; he recalls Gillespie telling him that "the most important part of a brief is the statement of facts; write that convincingly and you are 90 percent there, because if the judge thinks you should win, he will find the legal principles to support your position." Gillespie also taught him the importance in oral argument of "going for the jugular," and how to be an aggressive and effective advocate while being courteous and civil to adversaries.

A third mentor was Lawrence Walsh, whom he described as an "out of the box" thinker before anyone even knew what that meant. Walsh taught Bob to step back from the case and look at it the way an objective trier of fact would look at it. He also taught Bob the importance of bringing out the bad facts – and dealing with them the best way you can – before an opponent does.

Although not exactly a mentor, Bob also mentioned Whitney North Seymour Sr. as a person who made an enormous impression on him. When he was a first year associate at Davis Polk, Bob went to a meeting at which Seymour, a giant of the bar, was present along with many other lawyers. Bob introduced himself to Seymour, and Seymour said, "I'll tell you what; I'll call you Bob if you call me Whit." At a subsequent meeting, again with many lawyers, Seymour greeted him by saying: "Hi, Bob." Bob thought it was extraordinary that this person, who was one of the leading members of the bar, would make the effort to remember the name of a junior associate from another firm.

That episode had a profound impact on Bob. In our discussion, Bob observed that legal skills are important, but it is also important to treat people fairly and with respect. "If you do that, you develop a positive reputation that can lead to professional success." Bob's career is a compelling illustration of that.

Davis Polk: 1955-57

After joining Davis Polk in 1955, Bob's first case was defending his friend Bill Donaldson, who later became chair of both the New York Stock Exchange and the SEC. Donaldson was working as an assistant for G. Herbert Walker, the grandfather of George Herbert Walker Bush, but an important part of his job was chauffeuring Walker in his car. Donaldson had gotten a speeding ticket – a conviction would cause him to lose his chauffeur's license and maybe his job – so Bob's storied career as a trial lawyer got its start in Bronx Traffic Court. Bucking the conventional wisdom, Bob put his client on the stand and the judge acquitted him. Donaldson showed his appreciation by writing a letter to the managing partner of Davis Polk on the letterhead of his company, telling the managing partner that Bob was a rising star. The managing partner apparently did not realize that Donaldson was a lowly assistant and was very impressed. Bob's career had gotten off to a good start.

Bob went on to do work for longtime Davis Polk clients J.P. Morgan and Esso, predecessor to Exxon. The Esso case was an antitrust case, and Bob spent many hours reviewing documents. It is not surprising, therefore, that when Second Circuit Judge Lum-

bard called in 1957 and told Bob he should go to the U.S. Attorney's Office, Bob took his advice.

U.S. Attorney's Office: 1957-61

Bob had a trial in his first month at the U.S. Attorney's Office, a forgery case before the legendary Judge Edward Weinfeld. Some people said Judge Weinfeld was like the Old Testament God, both in appearance and the intimidating impact he had on young lawyers. Judge Weinfeld criticized Bob for "overtrying" the case, but Bob won and remembers the lessons he learned from Judge Weinfeld to this day.

Bob's first big case at the U.S. Attorney's Office involved the re-trial of Henry "the Dutchman" Grunewald, a Washington influence peddler who had been involved in a tax fixing scandal during the Truman administration. The case had come back to the office after a Supreme Court reversal of the original conviction. The first trial – in which Bob was second chair – resulted in a hung jury, and the second trial, in which he was lead counsel, resulted in an acquittal. Bob was devastated, but he took some solace in an invitation to visit chambers from the trial judge, Judge Edward Dimock, who told Bob he had done a great job and had won in a vote of the judge's law clerks.

Shortly after that, Bob's mentor at Davis Polk, Hazard Gillespie, became U.S. Attorney and appointed Bob Assistant Chief of the Criminal Division and later head of the Organized Crime and Racketeering Section. Bob went on to try several major cases, including the conviction of organized crime figure John Dioguardi, or "Johnny Dio," who had conspired to throw acid in the face of labor columnist Victor Riesel. Bob's cases made headlines in the New York papers, convincing him that trading document review for the U.S. Attorney's Office was a good choice.

Back to Davis Polk: 1961-76

John F. Kennedy was elected President in 1961, so it was back to Davis Polk for Hazard Gillespie and Bob (Bob has always considered himself to be a moderate Republican). As luck would have it, Bob's first assignment was to work on a major document production, but it was kind of a test to determine whether his heady experience as an AUSA would make it difficult to return to the mundane practice of law. Bob is not one to shy away from rolling up his sleeves and getting his hands dirty, so he easily passed the test and soon became a partner, working on a wide variety of cases that took him all over the country, including the electrical equipment antitrust cases, the Texas Gulf Sulphur insider trading case, the thalidomide cases, the tobacco price-fixing cases, the cholesterol drug cases, and a suit against the New York Stock Exchange and the American Stock Exchange for objecting to

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the trading of listed stocks on the NASDAQ market. The enormous breadth of Bob's experience stood him in good stead.

U.S. Attorney: 1976-80

With the support of Harold "Ace" Tyler, who had been a federal judge and then became Deputy Attorney General, Bob became the U.S. Attorney for the Southern District in 1976. When he arrived at the office, he was struck by the extraordinary quality of the team inherited from his predecessor. He made up his mind that he would be a hands-on manager and show his staff that he really cared about them – not just in terms of their work as AUSAs, but about their futures after they left the office. He thought it was very important to stand by his people even when they made a mistake. He also thought – like Judge Lumbard – that trying cases personally was an important part of leadership.

One of his major cases was the trial of Leroy "Nicky" Barnes. Nicky Barnes was a Harlem drug dealer, known as "Mr. Untouchable" because he had been acquitted four times in prosecutions at the state level. A team of AUSAs – including Tom Sear, Bob Mazur, and now federal judge Denise Cote – had been preparing the case for trial, but in June 1977 the cover story of *The New York Times* Sunday magazine featured a picture of an arrogantly posed Barnes with the caption: "The Police Say He May Be Harlem's Biggest Drug Dealer, But Can They Prove It?" President Jimmy Carter saw the article and told Attorney General Griffin Bell that he thought it was the most important case in the country because if the government couldn't put someone like this away, there was something wrong with the administration of justice. That led Bell to reach out to Bob, who decided that he should join the trial team.

The trial lasted three months, and included an anonymous jury, which had never been done before. A number of the government's witnesses – who were cooperators – had serious credibility problems, but the government was able to overcome that by sequencing the witnesses very carefully so their testimony fit together and made sense. The government won and Barnes was sentenced to life without parole, but Barnes later decided to become a cooperator and entered the witness protection program after serving 20 years in prison. There were movies, documentaries, and television shows about the case, including an interview with Mike Wallace on *60 Minutes*. Bob was a media star, although he is the last person who would aspire to that goal.

Another case that Bob tried involved Anthony Scotto, who was president of the longshoremen's union. Scotto had been accused of taking bribes from companies doing business on the waterfront. The evidence of payments was clear, but Scotto claimed that he was collecting money for various political candidates. Scotto's lawyer called as character witnesses a number of well-known politicians, including former New York City Mayors Robert Wagner and John Lindsay and the sitting New York State Governor Hugh Carey, all of whom Scotto had supported in political campaigns. The result was a guilty verdict and the further enhancement of Bob's reputation.

Bob explained that a U.S. Attorney can only do a lengthy trial if he has talented leaders of the Criminal and Civil Divisions to run the office (except for matters dealt with in the evenings or on weekends). Bob was grateful that he had such leadership. One of his great skills is knowing how to delegate while exercising the right level of supervision and control, and inspiring people to do their best.

Bob was U.S. Attorney for only four years, but the impact he had on that office makes it seem as if it was longer than that. Among the things that Bob takes great pride in are the subsequent accomplishments of the people who worked with him in that office – both in public service and in the private sector.

Davis Polk: 1980-94

Three Mile Island

Upon returning to Davis Polk in 1980, Bob became one of the leading litigators in the United States for both civil and criminal cases. One of his most important cases was the Three Mile Island case, where Bob represented Babcock and Wilcox, the company that designed a nuclear power plant that suffered an accident

that almost resulted in a meltdown of the nuclear core. The case required Bob and his team to learn everything they ever wanted to know but were afraid to ask about nuclear power plants.

One of the things Bob had to deal with in the case was a very bad document. A Babcock and Wilcox engineer had written a memo warning that an accident like this could happen and urging that utility operators be given special instructions, which were never issued. Bob's strategy was to go on the offensive and take advantage of a Pennsylvania rule that if a plaintiff was 50 percent contributorily negligent, that would bar recovery. Bob demonstrated that the plaintiff had falsified reports, which if truthful, would have required shutting down the plant, and had done a poor job of running the plant generally. In addition, he was able to impeach the plant operators with transcripts of Nuclear Regulatory Commission recordings, where the recordings had been made shortly after the accident and had been discovered by his team shortly before trial. The plaintiff tried to call an expert to explain the actions of its operators, but the judge said, "I don't need an expert witness in stupidity."

In the third month of trial, the plaintiff approached Babcock and Wilcox about settlement. The plaintiff agreed to drop its $2 billion claim in return for an option for future supplies with discounts, which, if exercised, would have been profitable for Babcock and Wilcox, and which the plaintiff never took advantage of. Among the lessons of the case were the importance of thorough preparation; litigating on the offensive; the benefits of a "zone defense," where each player on the team has a discrete area of expertise; and the advantage of saving some of the best evidence for trial, (not using it in depositions) so you can surprise witnesses on the witness stand.

Upon returning to Davis Polk in 1980, Bob became one of the leading litigators in the United States for both civil and criminal cases. One of his most important cases was the Three Mile Island case.

USFL v. NFL

Bob followed up the Three Mile Island case with *U.S. Football League v. National Football League*, where Bob was co-counsel representing the National Football League. The claim was that the NFL had monopolized professional football by preventing the USFL from getting television contracts for the fall. The jury found liability but awarded damages of only one dollar. According to Bob, when the verdict was announced, John Mara, the son of New York Giants owner Wellington Mara, seated in the audience next to Donald Trump, the owner of one of the USFL teams, turned to Trump and handed him a dollar bill.

The ABA Judiciary Committee

During this period, Bob had time to run a marathon and serve as chair of the ABA's Judiciary Committee. The committee was responsible for reviewing and expressing an opinion on the qualifications of persons nominated for federal judgeships. While Bob was chair, the committee found unqualified several conservative candidates for courts of appeals. That provoked a storm of protests from conservative groups, who felt the decisions had been made on the basis of ideology.

Bob's term on the committee ended in August 1987, but he agreed to stay on in an unofficial, non-voting capacity while the committee reviewed the nomination of Robert Bork to the Supreme Court, which was very controversial. The committee rated Bork "well qualified," but four members dissented, finding him "not qualified" because of judicial temperament. This created another firestorm. Bob had previously been on the committee when it had unanimously found Bork to be "exceptionally well qualified" when Bork was nominated for the D.C. Circuit, and expressed his support for Bork in the meeting on the Supreme Court evaluation, but he was one of the people who were subjected to criticism by conservatives when the Senate

Judiciary Committee refused to approve the nomination.

This criticism continued to haunt Bob when Attorney General Richard Thornburgh picked him to be Deputy Attorney General during the first President Bush's administration. This engendered another storm of protest from the right, and Bob was forced to withdraw his nomination. President Bush wrote Bob a letter in which he expressed his distress at what Bob had been through and said, "Sometimes public life is great and rewarding – sometimes it is ugly and unkind." Bob appreciated the letter but accepted the result and moved on with his life, acknowledging that sometimes the ugly and unkind come with politics.

United States v. Brown

In 1989, Bob was called upon to represent David Brown, a former Cravath associate who had become chief executive officer of General Development Corporation ("GDC"), the largest real estate developer in Florida. Brown had received advice from Cravath that GDC's sales practices were lawful, but the U.S. Attorney's Office in Miami disagreed. The government indicted the company, which pled guilty and went into bankruptcy, and the four top executives, who went to trial.

In the ensuing 10 month trial, advice of counsel was a major part of the defense, but the trial judge severely restricted the evidence, including an opinion from a Florida court in a civil case that agreed with the advice that Cravath had given. In the end, Brown was acquitted on 72 substantive counts of mail fraud and wire fraud but convicted on one count of conspiracy. He was sentenced to five years in jail, and both the trial judge and the Eleventh Circuit denied release pending appeal.

President Bush wrote Bob a letter in which he expressed his distress at what Bob had been through and said, "Sometimes public life is great and rewarding – sometimes it is ugly and unkind."

The appeal was argued three years later, and the presiding judge repeatedly asked the government, "Where is the crime?" Not receiving a satisfactory explanation, the presiding judge stated at the end of the argument that he would entertain another application for release pending appeal, which was granted the next day. Several months later the decision came down reversing the convictions and dismissing the indictments on the ground that no crime had been committed. Bob calls the day of the argument on appeal "one of the most gratifying days of my legal career." The prosecutors urged the Solicitor General to file a certiorari petition, but he refused to do so.

Independent Counsel: January to August 1994

In January 1994, with the Independent Counsel Act having expired, Attorney General Janet Reno appointed Bob to be the Independent Counsel to investigate the Whitewater controversy and the death of Vincent Foster. Bob assembled a team that included Rusty Hardin, who later gained considerable attention as the lawyer for Arthur Andersen in the Enron scandal and his representation of Roger Clemens in his perjury trial. Early on, Hardin succeeded in obtaining a guilty plea and cooperation from David Hale, a Little Rock municipal judge and operator of a Small Business Administration company that had loaned money to Susan McDougal, whose husband had invested with the Clintons in the Whitewater development. This led to an expanded investigation and, eventually, a request to take the testimony under oath of President Clinton and the First Lady, Hillary Rodham Clinton. The depositions were read to the grand jury, so their contents are secret, but Bob did reveal that his first question was, "You are the President of the United States?" – a question he acknowledged made that deposition pretty unique.

In June 1994, the Independent Counsel statute was re-enacted, which meant that the Independent Counsel court had to revisit the appointment of the Independent Counsel. Much to Bob's disappointment, the court appointed Kenneth Starr. Bob was not to-

tally surprised because there had been criticism from conservatives that he was not aggressive enough, but Bob points out that in the eight short months he had the job, he and his team had assembled enough facts to lead to eight indictments against 11 people, including Associate Attorney General Webster Hubbell and Arkansas Governor Jim Guy Tucker. All of the indictments subsequently were brought by Ken Starr and all of the defendants were convicted. When we asked Bob whether he would have taken the investigation in the direction that Starr ultimately pursued, he responded by saying, "I have never commented on any aspect of Ken Starr's investigation," reflecting another Bob Fiske characteristic – he is always discreet.

Davis Polk: 1994 to the Present

Judge McBryde

After the Whitewater episode, Bob returned to Davis Polk where he was soon thrust into one of the most interesting assignments of his career – the investigation of Judge John McBryde, a federal judge in Ft. Worth, Texas. Judge McBryde had been accused of abusing lawyers who appeared in front of him, holding one prosecutor in contempt, castigating lawyers for not settling cases, and excoriating the clerk of the court for conduct he deemed not respectful. The Fifth Circuit Judicial Council retained Bob to defend it against a mandamus petition filed by Judge McBryde and to investigate his conduct generally. The investigation resulted in a report and recommendation that led to a public sanction and an order barring Judge McBryde from taking any new cases for a year – described in a court opinion as the most extreme sanctions ever imposed on a federal judge since the underlying law was enacted. Judge McBryde challenged the merits, and the constitutionality, of these actions, but those challenges were rejected, both administratively and in a District of Columbia decision that was upheld on appeal by the D.C. Court of Appeals.

Alfred Taubman

The McBryde investigation was followed by numerous cases and investigations, including a commission that recommended an increase in judicial salaries in the State of New York, but the next big case for Bob was *United States v. Alfred Taubman*. Taubman was the billionaire founder of a shopping center empire who eventually gained control of Sotheby's. While serving as chairman of Sotheby's, Taubman was accused of engaging in a price-fixing conspiracy with Sir Anthony Tennant, the chairman of Christie's. The case ended in a guilty verdict, making it one of the few cases that Bob has ever lost. Bob noted that "the book is not just about the winners."

Madoff and the Mets

During the next 10 years, Bob was involved in a number of high profile matters, including several cases successfully litigated for the principal owners of the Mets, such as a suit to obtain 100 percent ownership, a suit permitting them to start their own network, and, finally, a successful defense of the claim made against them in connection with the bankruptcy of the brokerage firm owned by Bernie Madoff. Those cases, as well as others, demonstrated something everybody knew throughout Bob's long career: If you are in trouble and can hire any lawyer in the world, Bob Fiske is the person to call.

A Magnificent Time

Notwithstanding his extraordinary achievements, Bob discusses them with humility and grace. Part of his strength is his credibility, and his credibility comes from an innate sense that he has no hidden agenda and just wants to help. Bob also approaches life and the law with an enthusiasm that is hard to match. His book is replete with the stories of his cases, and each case is an adventure that he obviously enjoyed. As he says in the closing sentence of his book, "It's been a magnificent time, and it still is."

Editor's Note: Laura Sayler assisted in the preparation of this article.

Interested in joining the Federal Bar Council's book, theatre, food and wine, or outdoor activities Affinity Group?

Contact Margie Berman @ mberman@krantzberman.com.

From the Editor

Eastern District of New York's 150th Anniversary Celebration

By Bennette D. Kramer



On March 16, 2015, the Eastern District of New York celebrated its 150th anniversary. The judges of the Eastern District were joined by Supreme Court Justices Ruth Bader Ginsburg and Sonia Sotomayor to celebrate the anniversary.

In 1865, President Abraham Lincoln signed the bill establishing the Eastern District in the middle of the Civil War. The Southern District had been around for 75 years by that time, and it had covered the Eastern District area.

My own history with the Eastern District goes back to 1972 when my former husband and I moved to Brooklyn so he could clerk for Judge Orrin Judd. Fast forward 15 years and in 1987 I returned to the Eastern District courthouse to clerk for Judge Thomas Platt. Since my clerkship, I have been involved with the court as a director of the Eastern District Civil Litigation Fund and as counsel in a number of cases pending in the district. I have a great fondness for the court and the judges who sit on it.

Court History

After the presentation of colors by the U.S. Marine Corps and a singing of the Star Spangled Banner by Rosalie Sullivan, Chief Judge Carol Bagley Amon provided some court history. She said that the first judge was Judge Charles L. Benedict, who served alone from March 9, 1865 until January 1, 1897. There was only one judgeship until 1910 and no courthouse until the judges moved into the post office in 1912. In 1919, President Theodore Roosevelt visited to participate in swearing in new citizens. Judge Amon listed the judges who had died since the 125th anniversary celebration.

Judge Amon also noted that Judge Henry Bramwell, who assumed the bench in 1974, was the first African American judge on the court and that Judge Reena Raggi, now a circuit court judge, became the first woman on the court in 1987. Judge Amon thanked Judge Roslynn Mauskopf for organizing the celebration.

Justice Ginsburg's Remarks

Supreme Court Justice Ruth Bader Ginsburg spoke next. Justice Ginsburg noted that after the Eastern District was established, it had no home of its own and if it needed help it could call on the Southern District. Now, it is one of the largest district courts in the country with 14 active judges and 15 senior judges. When he was chief judge, Judge Jack B. Weinstein was under pressure to split the court, but the Central Islip courthouse was built instead. Justice Ginsburg, who had been Judge Weinstein's student at Columbia Law School, said that only seven judges in the country had served longer than Judge Weinstein, who has served for 48 years and is still actively serving. When Justice Ginsburg clerked in the Southern District from 1951 to 1953, there were no women on the bench; now the majority of Eastern District active judges are women.

Justice Ginsburg said that the Pro Bono Panel and the Eastern District Civil Litigation Fund provide access to justice.

From Admiralty to Today

Alan Vinegrad, former Eastern District U.S. Attorney, spoke as president of the Eastern District Association. He noted that five judges of the Eastern District had served in World War II. Also, Justice Ginsburg was born in Brooklyn, and Justice Sotomayor had lived in Brooklyn. Vinegrad talked about the breadth of Eastern District cases and explained that the first Eastern District cases had been admiralty cases.

Judge Weinstein talked about the Eastern District in the past

and present. He explained that the court was established in the midst of the Civil War to deal with admiralty problems arising from the blockade of the South, which was enforced by ships built in the Brooklyn Navy Yard. The Spanish-American War was the beginning of this country's intervention abroad. During World Wars I and II the district was a major arsenal and on September 11 many Brooklyn firefighters were killed trying to save people from the fires. September 11 was the start of the court's call to deal with the dangerous new terrorism.

The court serves the world and the community by admitting thousands as new citizens each year, helping people with special needs through the Willowbrook case, and protecting the world against law breakers and overreaching government. Judge Weinstein also recognized the members of the bar who help the court, including the Civil Litigation Committee and the Civil Litigation Fund – one helps to create local rules and the other with social help programs for needy litigants. He also recognized volunteer mediators and special masters. Judge Weinstein pointed to powerful protective laws enacted during his lifetime, enforced by the court, that are designed to protect against discrimination, support workers' rights and equality of voting powers, and provide a strong social welfare net.

Judge Weinstein finished with an affectionate nod to his colleagues, whom he said work with a continuing desire to provide the rule of law to all the people in the district. He lauded the respect the judges of the district have for one another and the people who work with the court in programs that have become benchmarks throughout the country such as pretrial services and probation and treatment programs. Judge Weinstein has an obvious and enduring love for the court.

Developments

Sam Seymour Receives Whitney North Seymour Award at Council's Winter Meeting

By Bennette D. Kramer



The Federal Bar Council held its annual Winter Bench and Bar Conference at the Casa de Campo Resort in the Dominican Republic from February 14 through February 21, 2015. John P. Coffey chaired the meeting and Second Circuit Judge Richard C. Wesley headed the Planning Committee. Council President Vilia Hayes presented the Whitney North Seymour Award for excellence in public service by a private practitioner to Samuel Seymour, Whitney North Seymour's grandson. Sam thanked Vilia for the introduction and then talked about his grandfather (called "Whit").

"Whit" Seymour

Sam talked about Whit's upbringing in the Midwest in modest circumstances. Whit's father had started out as a lawyer in New York but dropped out to become a painter, novelist, and itinerant history lecturer. Whit worked his way through the University of Wisconsin and then attended Columbia Law School. He then became a pillar of the New York bar and a preeminent New York figure.

Whit Seymour was Sam Seymour's role model. Sam considered Whit the preeminent New York litigator and bar leader of the day, who contributed to public service and the public interest while he practiced law at Simpson Thacher & Bartlett. Whit served as president of the American Bar Association, the New York City Bar (as did Sam), and the American College of Trial Lawyers. He also was active in numerous other organizations. Most important to Sam, however, were Whit's integrity, courtesy, kindness, respect for others, and professionalism. Whit practiced law as a zealous and tough advocate who never attacked his opponent directly, using charm and

humor to win everyone over.

Sam knew Whit growing up as a generous and playful grandfather who loved his time with his seven grandchildren. One of Sam's fondest memories of him came from the day Sam was admitted to practice in the Southern District of New York. He asked Whit to move his admission. When they arrived at Foley Square they found that Judge Charles Brieant was presiding over admissions. Judge Brieant invited Whit to speak to the newly admitted lawyers. Whit welcomed the new lawyers and talked about Judge Learned Hand's 50 years on the district court. The celebration of Judge Hand's 50 years on the bench included a public event at the courthouse followed by a small dinner at the Century Club. Chief Justice Earl Warren and Associate Justices Felix Frankfurter and John Marshall Harlan II attended, along with the Attorney General. Charles C. Burlingham, a leading lawyer in New York who was just about to turn 101, attended the dinner and lamented that he had not met anyone new. Sadly, Whit's appearance before Judge Brieant was his last court appearance, as he died two months later.

Sam believes that Whit would thrive in today's changed profession because he stood for integrity, service to clients, absolute candor to the court, public service, and the strength and collegiality of the organized bar. He believes Whit would applaud the work of the Federal Bar Council.

Developments

The Winter Bench & Bar Programs

By Bennette D. Kramer and Steven M. Edwards

This articles describes the programs presented at the Winter Bench and Bar Conference.

Internal Investigations

Southern District Judge Valerie Caproni led a panel on internal investigations. After providing an overview, she noted that this subject was of special interest to her because she had served as Deputy General Counsel of Northrop Grumman, with responsibility for internal investigations among other things. She began the discussion with a simple question: Why are we talking about this?

David O'Neill of Debevoise & Plimpton responded that the name of the game today is to get ahead of a problem and report it to the government before the government discovers the problem on its own. Sullivan & Cromwell's Karen Seymour emphasized a company's interest in remediating, observing that we have an "uber cooperation model" today. Frank Wohl of Lankler, Siffert & Wohl suggested that the advantages of essentially conducting the government's investigation for it may differ depending on whether the client is an individual or the company. Judge Caproni added that when the client is a government contractor, a proactive approach can help to avoid debarment.

The panel discussed a series of videotaped hypotheticals, the first of which featured Wohl's partner John Siffert as a whistleblower calling into a confidential hotline. Whenever this happens, the question is whether to follow up with an internal investigation. Seymour acknowledged that every call to a hotline cannot give rise to an internal investigation, but where there could be a serious problem it is a mistake to let sleeping dogs lie – especially where high level executives could be involved. Richard Strassberg of Goodwin Procter described whistleblowers as "the next boom industry" because of the recoveries available in *qui tam* actions, and he suggested that in most cases it is beneficial to the company if the whistleblower has counsel for the company to deal with.

The panelists agreed that it is generally a good idea to start an internal investigation with a narrow focus and then see where it leads. There should be an engagement letter that specifies any limitations, but it is important to follow-up on leads that are developed because a lawyer can be sued for malpractice or breach of fiduciary duty if there is a problem that the internal investigation did not uncover. In some cases, the scope of the investigation can be defined by the scope of the subpoena if one is served.

While normal outside counsel can conduct an internal investigation, that might not be prudent if that counsel had some contact

with the underlying facts. The key is credibility with the regulators. It is also important for one person to be in charge of the investigation; an investigation should not be guided by a committee.

One issue that frequently arises is who in the company should have his or her own counsel. Seymour noted that the government generally will tell you whether an individual needs counsel, and it is often possible to use pool counsel for lower level employees. Strassberg stated that joint defense agreements are generally a good idea so long as they do not restrict the company's ability to share information with the government, and it is standard practice to obtain an undertaking to repay any fees advanced to individual counsel if there is a finding of wrongdoing. Actual clawbacks are rare, but it has happened – Goldman Sachs' demand that Rajat Gupta return his fees is a recent example.

It is the government's current policy not to require a waiver of the privilege in a plea agreement, but the government nevertheless will require extensive disclosure of facts if the company wants to get credit. O'Neill observed that sometimes this results in the disclosure of facts obtained in an investigation under circumstances covered by the attorney-client privilege. When that happens, it is best to disclose only the facts without disclosing the underlying materials such as interview memoranda. Wohl observed that the key problem is maintaining the privilege in follow on civil litigation. Selective waiver is an option, but Strassberg cautioned that selective waiver does not work in most cases, although there have been a small number of cases that have recognized a common interest privilege between the government and the company. In most cases, private litigants have been very successful in getting investigation materials.

The Religious Freedom Restoration Act

Judge Brian M. Cogan of the Eastern District of New York chaired a panel including Noel J. Francisco of Jones Day, Professor Mark L. Movsesian of St. John's University School of Law, and Federal Bar President-Elect David R. Schaefer of Brenner Saltzman & Wallman that discussed the Religious Freedom Restoration Act and the cases decided under the Act.

Professor Movsesian provided an overview of the history of religious freedom and the law, the Act, and *Burwell v. Hobby Lobby Stores, Inc.*, decided by the Supreme Court in 2014. He explained that any analysis of a statute requires a balancing of the government's interest and the burden on the individual's First Amendment right to free exercise of religion. Under the Act, the government must have a compelling interest to impose any burden on the free exercise of religion and must use the least restrictive means to further that interest. The Act does not apply to states, only the federal government. The majority of individual states have enacted statutes that include the compelling interest test.

In *Hobby Lobby*, the Court addressed the contraceptive mandate in the Affordable Care Act. The Court, with Justice Samuel A. Alito writing for the 5-4 majority, held:

1. for-profit, closely-held corporations are persons who can exercise religion;
2. the mandate burdened exercise of religion by requiring employers to pay for drugs or face economic consequences; and
3. the provision that the government would pay for the contraceptives, if the employer objected on religious grounds, was not the least restrictive means of furthering the government's interest.

Next, Steven Edwards and Steven Hyman gave a mock argument on a hypothetical situation involving a publicly traded corporation, the Family Medical Leave Act, and a request for leave for a sex change operation. David Schaefer noted that before *Hobby Lobby*, the Act was used to protect minorities, such as doctors who did not want to perform abortions. Now, corporations are making claims. People see the Act as an opportunity to protect those who do not like same sex marriage.

Noel Francisco stated that the issue in *Hobby Lobby* was not the requirement of having to pay money, but the moral objection

to signing the exemption form because they are forced to act in violation of their beliefs. Schaefer said that you have to look at the burden on third parties, *i.e.*, the women who may not get contraceptive coverage. Francisco agreed that the unanswered question in *Hobby Lobby* was the rights of employees who were entitled to receive benefits under the Act against the rights of corporations to exercise religious freedom. He said that the majority understood that this was an issue that would have to be dealt with in the future.

Privacy Revisited

Balancing the interests of enforcement priorities and privacy was the subject of the next panel, chaired by Southern District Judge Richard Sullivan. Judge Sullivan reviewed the law on searches incident to arrest leading up to the Supreme Court's recent decision in *Riley v. California.* Prior to *Riley,* warrantless searches generally were permissible if they were incident to an arrest. In *Riley,* a unanimous Court ruled that a cellphone search requires a warrant, even if it is incident to arrest. The amount of private information stored on cellphones prompted the Court to depart from past precedent in this area.

Georgetown Professor Marc Rotenberg explained the technology involved and noted that technology is always ahead of the law but the law catches up. In *Olmstead v. United States,* Justice Brandeis focused on the expectation of privacy for telephone conversations which, in his view, resulted in the need for a warrant to conduct a wiretap. He analogized it to a letter in a sealed envelope. *Riley* simply brought *Olmstead* into the modern age.

Travis LeBlanc of the Federal Communications Commission, who was on the losing side in *Riley,* acknowledged that getting a warrant is not very challenging. The difficult part is extracting the data, and it is very important to make sure the data is not erased before it is extracted. One issue that came up in *Riley* was remote wiping. One solution is to use a radio-frequency shielded bag to impound the phone while the warrant is being sought.

The panel also discussed these issues in the light of *United States v. Jones,* where the Supreme Court ruled that the attachment of a GPS to a car was a search under the Fourth Amendment that could require a warrant. In the digital age, the Supreme Court seems to be more interested in protecting privacy interests than before. The panel discussed the implication of these rulings on the so-called "third party waiver" doctrine articulated by the Court in *Katz v. United States,* where the Court ruled that there is no Fourth Amendment interest once the information is given to a third party, as in a banking transaction. David Howard of Microsoft suggested that a distinction can be made between content and metadata, and a warrant should not be required for metadata.

Luke Dembosky of the Justice Department noted that the government prefers to use subpoenas rather than warrants. A subpoena is a much quicker and easier way to gather data when you are dealing with issues like a hacker gaining access to a million computers. A subpoena also may permit the government to seize a physical object even though it has not yet found evidence of a crime.

Rotenberg believes that the Court may cut back on the third party waiver doctrine. All panelists agreed that it would be good for Congress to pass new laws to deal with this area, but LeBlanc pointed out that it takes five or six years to pass a law and technology generally changes in that period of time. Rotenberg, who has been involved in drafting statutes, believes that the key is to focus on the data in question as opposed to the technology that delivers it.

The panel also talked about hackers. LeBlanc explained that there are two types of hackers: individuals and countries. The FCC focuses on the consumer protection angle and encourages companies to think in advance about data breaches. Howard emphasized that every company needs to be concerned about this because they have a responsibility to protect their customers from data breaches. Rotenberg believes that companies collect too much data, which then makes it more difficult to protect. He thinks that there should be federal legislation in this area, although he does not think it should pre-

empt the field. The federal legislation should establish a baseline, which the states should be able to modify and improve. LeBlanc cited California as a good example of what states can do.

The Downfall of Secret Foreign Banking

Judge Michael P. Shea of the District of Connecticut introduced the panel and provided some background on Swiss banking secrecy. Judge Shea commented that Swiss bank secrecy laws have long roots and were key to thwarting Nazi efforts to seize money belonging to German Jews. In 2001, the United States, through the Qualified Intermediary Program, began seeking the records of U.S. account holders from certain Swiss banks, including UBS. In February 2009, UBS admitted to aiding and abetting tax evasion and turned over the names of thousands of account holders. The U.S. then criminally prosecuted U.S. taxpayers and set up the voluntary disclosure program offering amnesty.

In 2013, Wegelin & Co. pled guilty and paid $20 million in restitution plus forfeiture. Wegelin & Co. was founded in 1741, did not have any U.S. branches, but used a Connecticut bank to transfer money. As part of its guilty plea, Wegelin admitted it knew its conduct was wrong, but it believed it would not be prosecuted because it had no U.S. branch and its conduct was lawful in Switzerland. Following its criminal conviction, Wegelin collapsed. After August 2013, Swiss banks could enter into the Justice Department's non-prosecution program as long as they did not break U.S. law in the future.

A series of skits illustrated the efforts of American citizens to escape detection of their Swiss accounts and subsequent efforts by the government to obtain disclosure of those accounts. Following the first skit segment, Sharon McCarthy of Kostelanetz & Fink noted that in opening his account in 1980 an American citizen had lied about his nationality, used a Panamanian corporation to open the account, had all account-related mail held by the bank, and failed to report the account on his tax returns. Dr. Cedric Chapuis of Bärr & Karrer in Geneva, Switzerland, stated that the Swiss banker had violated Swiss law because he failed to ask about the origin of the funds and the gold bars used were suspicious assets. The fact that this person was evading taxes in the U.S. and France was not his concern and was not against Swiss law. Kathryn Keneally of DLA Piper, formerly Assistant Attorney General for the Tax Division of the U.S. Department of Justice, said that it was unclear whether the Swiss banker had broken U.S. law by facilitating U.S. tax evasion because willfulness is required for both conspiracy and facilitating tax evasion.

In the next skit segment, the account holder received a letter from the Swiss bank telling him that his name would be turned over to the U.S. government. Amy Walsh of Morvillo LLP said that the account holder could do nothing and wait for the IRS to find him or enter the voluntary disclosure program and cooperate with the IRS, including disclosing the facilitator in Switzerland. Because the account holder's nondisclosure was willful, he would not be eligible for the lowest penalty. Instead, he would have to pay a 20 percent penalty along with a 27.5 percent FBAR (Report of Foreign Bank and Financial Accounts) penalty on the year with the highest balance. Chapuis said that from the Swiss point of view the U.S. program to determine the identity of account holders was compatible with Swiss law. The Department of Justice sought the account information and the client name through a treaty request. The bank gave notice to the account holder before complying with the treaty request. Keneally said that by statute any U.S. person who challenges the U.S. treaty request must report such an application to the DOJ.

As of July 2014, the FBAR penalties rose to 50 percent for U.S. individuals with accounts in certain banks that were cooperating or under investigation. Chapuis said that cooperation created problems for the Swiss banks that have confidentiality obligations under Swiss law, which makes it a criminal offense to cooperate with foreign authorities. Because the U.S. and European authorities have put pressure on Switzerland, the Swiss have had to adapt. Chapuis believes

that rogue bankers pushed clients and created a situation in which the whole industry has suffered. Keneally said that 14 Swiss banks already were under criminal investigation and the number is increasing. It is clear that the Swiss government and the banks just want the investigation to end.

Fraud on the Market

Judge Edgardo Ramos of the Southern District of New York chaired a panel on the efficient market theory in securities class actions, which was the subject of the recent Supreme Court decision in *Haliburton Co. v. Erica P. John Fund.* In *Haliburton*, the Court declined to overrule *Basic v. Levinson*, which endorsed the fraud on the market theory, but it held that a defendant may rebut the presumption of reliance by showing that an alleged misrepresentation did not impact a stock's price. Judge Ramos kicked off the discussion with a review of Rule 23 and the requirement that common issues must predominate over individual issues for a class to be certified.

Bob Giuffra of Sullivan & Cromwell discussed the statutory framework surrounding the efficient market theory. When Congress passed the securities laws, it created a private right of action for cases brought under §11 and §18(a). The courts then created an implied private right of action permitting suits to be brought under §10(b) and incorporated economics into the analysis by adopting the fraud on the market theory, which creates a presumption that stock purchasers rely on the integrity of the price in an efficient market and, therefore, individual reliance need not be shown. This enables plaintiffs in securities suits to satisfy the predominance requirement in Rule 23. Giuffra questioned whether it is good policy for courts to create these theories, which have given rise to a huge class action business, in the absence of congressional action.

Kristin Feitzinger of Cornerstone Research described the economic theory underlying the fraud on the market presumption. In securities cases, experts generally conduct a time and events study in which they attempt to determine whether there is a statistically significant relationship between news about a company and movements in the stock price. If there is, then it is assumed that all information is reflected in the stock price, and that price will be inflated if the information includes a misrepresentation. An investor who relies on the integrity of the price will be misled by the misrepresentation even though that investor actually may not have seen it. Feitzinger observed that the efficient market theory may be flawed because it assumes that a market is either efficient or not efficient, and economic literature suggests that this is not a binary question. Giuffra added that dark pools and computerized trading have made markets less efficient.

Donald Hall of Kaplan Fox & Kilsheimer disagreed with this and argued that everyone relies on the integrity of the price and assumes that it has not been affected by fraudulent information. He also pointed out that Congress had an opportunity to do away with the fraud on the market theory when it passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The PSLRA imposed other restrictions, as a result of which more than 50 percent of securities class actions are dismissed, but Congress did not alter the basic approach to class certification under Rule 23 or the fraud on the market theory.

The Pentagon Papers Case

The program started with a reenactment of the 1971 Pentagon Papers case, following the case from the district court through the Supreme Court decision. After the reenactment, Judge Paul A. Crotty of the Southern District of New York, Neal K. Katyal of Hogan Lovells US, and the Honorable Robert S. Smith, a retired Associate Judge of the New York Court of Appeals and now associated with Friedman, Kaplan, Seiler & Adelman, discussed issues relating to secrecy and national security, focusing on the release by Wikileaks of national security information. Judge Smith said that the people who release information can be regarded as whistleblowers and traitors at the same time. Treason is defined by the Constitution as providing aid and comfort to the enemy – neither Daniel Ells-

berg in connection with the Pentagon Papers nor Snowden and Manning in connection with the Wikileaks release fit the definition of traitor. Katyal explained the difference between Manning and Snowden on the one hand and Ellsberg on the other. Manning and Snowden made a wholesale document dump heedless of the harm to the U.S, while it would be hard to make a case in connection with the Pentagon Papers that the U.S. was harmed. Both Ellsberg and Manning were challenging authority and each had signed an agreement not to disclose classified information. As a result of the Wikileaks disclosures, the government will tighten access to information and less information will flow.

The case of the air marshal who disclosed that the TSA had cancelled all air marshal flights is an example of the government's effort to stop release of sensitive (rather than classified) information. The Supreme Court, protecting the whistleblower, held that the Department of Homeland Security could not make up its own rules regarding sensitive information. However, there is no whistleblower protection for government employees like Ellsberg and Manning who disclose classified information.

Judge Smith explained that there is a difference between the government employee who steals classified information and a person who disseminates such information. The disseminating entity is treated more favorably, but the prior restraint cases do not apply to a source with a government contract. Katyal stated that a journalist who induces the disclosure of classified information falls under the Espionage Act as opposed to a journalist who just publishes information that has been given to him or her. Wikileaks may be different because its dump of information served no journalistic function and there was no good faith effort to distinguish between harmful and non-harmful material as Ellsberg and *The New York Times* tried to do with the Pentagon Papers.

Conversation with Justice Alito

On the last day of the programs, Second Circuit Judge Richard Wesley sat down for an informal conversation with Supreme Court Justice Samuel A. Alito, Jr. (with an audience of 150 people watching). Justice Alito observed that the Court has a particular way of doing things and there are many traditions. "It is like a Thanksgiving dinner that never ends."

Justice Alito was led to a career in the law by his passion for debate, which began in junior high school. They would start with a national topic, which would be debated all year. This gave the students an opportunity to argue both sides of the issue, which Justice Alito found to be a "fascinating" experience.

Justice Alito went to Princeton and then to Yale Law School. After law school, he clerked for Third Circuit Judge Leonard Garth in Newark, which triggered a desire to work for the U.S. Attorney's office and ultimately become a judge. Justice Alito realized that ambition, working first as an Assistant U.S. Attorney in Newark and later becoming the U.S. Attorney and, ultimately, a Third Circuit judge.

When President George H.W. Bush nominated Justice Alito to the Supreme Court in 1990 he was surprised because, after the interview, he thought he would be rejected. Among Justice Alito's favorite cases are the Free Exercise cases under the Religious Freedom Restoration Act, including a case decided earlier this year in which the Court ruled that a prison could not prohibit a Muslim from wearing a beard. His least favorite cases are the asylum cases, which he finds very troubling because they come down to a credibility determination that can have a substantial impact on a person's life.

Among Justice Alito's favorite times on the bench were the brown bag lunches on Fridays when he was on the Third Circuit. Justice Alito's office was in Newark, so he often ate with the district court judges who sat in that courthouse. According to Justice Alito, they would sit around and complain about things that the Third Circuit had done. They would also predict whether he was going to be reversed by the Supreme Court, at times with embarrassing accuracy, Justice Alito said.

Justice Alito thinks it is important to recognize that the circuit courts and the Supreme

Court have different perspectives. The primary job of a court of appeals is to decide concrete cases. The Supreme Court does not take cases for the purpose of error correction; it takes cases for the purpose of deciding important issues of law.

Justice Altio says that when he was on the Third Circuit, he yearned for advocates who really understood the law. That is no longer an issue on the Supreme Court. The Supreme Court not only sees the best advocates in the country, but they receive a lot of *amicus* briefs, which Justice Alito finds very helpful because they provide context.

Justice Alito is not in the certiorari pool, where cases are divided up among clerks to make recommendations on which petitions to grant. Justice Alito's clerks review every certiorari petition, although they do not write memos on each one. Justice Alito feels that this approach provides an opportunity for him to take a second look, and it is a way of making sure that nothing slips through the cracks.

Justice Alito acknowledges that the number of cases decided by the Court each year has gone down, and he says that no one is really sure why that is the case. No one has ever suggested to him that there is a limit on the number of cases that the Court should hear. If anything, the Justices would like to have more cases.

Justice Alito noted that in petitioning for certiorari, the way the questions are framed is very important. When a question goes on for pages and has too many facts, it is unlikely that the petition will qualify. When the questions are too sparse, that is not helpful either. It is important to find a happy medium, in Justice Alito's view.

Justice Alito hires his own clerks and does not involve his existing clerks in that process at all. He describes his approach as "impressionistic." He is not necessarily interested in hiring someone who was first in his class. He is more interested in hiring good writers. Justice Alito observed that undergraduate education these days does not have the emphasis on writing that it once had. He relies heavily on the application letter, which can be very revealing. He gives less credence to writing samples, which he assumes are heavily edited.

Justice Alito described the atmosphere on the Court as very collegial. He observed that one of the most difficult things is determining how far to go along with an opinion he is not comfortable with. Consensus is important, but it is also important to reach a clear decision. Justice Alito generally does not write a separate opinion unless he really has something to say. Justice Alito will rely heavily on his clerks when he writes a majority opinion because he is speaking for the Court, but he usually writes dissents and concurrences himself because they are more personal statements.

Justice Alito views himself as a textualist, and he thinks there is a trend toward textualism on the Court. "Language is more important today than it was in the 1970s," in his view. Justice Alito acknowledges that sometimes there is purposeful ambiguity, which he thinks is unfortunate and an abdication of legislative responsibility. He told a story about a conversation with a bill drafter, where he told the bill drafter he had struggled over the meaning of slightly different words in a complicated bill. The bill drafter responded: "Oh, we meant the same thing, we just got tired of using the same word." Being a Justice of the Supreme Court is probably not easy, but one gets the impression that Justice Alito is thoroughly enjoying it.

Supreme Court Review

Judge Wesley also moderated a discussion of Supreme Court cases from this term with Miguel A. Estrada of Gibson, Dunn & Crutcher and Neal Katyal of Hogan Lovells US.

First, Katyal described trends and data in Supreme Court practice. Estrada then reviewed criminal cases. In *North Carolina v. Heien*, the Court held (8-1) that a police officer's reasonable mistake of law giving rise to reasonable suspicion may justify a traffic stop under the Fourth Amendment. The car was stopped because one of the brake lights was out and a subsequent search uncovered drugs. In North Carolina, cars are only required to have one brake light, but the court ruled the officer's mistake

of law was reasonable. In *Yates v. United States*, Yates was charged with throwing undersized fish overboard to prevent the government from seizing them, falsely stating that all the undersized fish measured at sea were aboard and violating the Sarbanes-Oxley Act by destroying a "tangible object" with the intent to obstruct the investigation. Estrada said that the Supreme Court had tried to bury the case, and Justice Scalia asked if there were any adults at the Justice Department. Following the conference, on February 26, the Supreme Court reversed Yates' conviction, holding that fish were not "tangible objects" under Sarbanes-Oxley.

Katyal provided insight into two First Amendment cases undecided at the time. In *Elonis v. United States* an estranged husband was convicted of posting rap lyrics about killing his ex-wife and an FBI agent who had visited him at home. He was charged with transmission of a communication containing threats to injure a person, was convicted, and the Third Circuit affirmed, holding that 18 U.S.C. § 875(c) incorporates a "reasonable person" standard and does not require proof of subjective intent. *Reed v. Town of Gilbert* involves a town ordinance regulating signs. Petitioner The Good News Community Church's sign directing people to its church services violated the ordinance, and the question before the Court is whether the town's lack of discriminatory motive and content-neutral municipal sign ordinance comported with the First Amendment.

Estrada talked about *King v. Burwell*, the case challenging federal tax-credit subsidies for health insurance paid to individuals purchasing health care from exchanges established by the federal government. The language of the statute provides for the tax credit to be paid to individuals enrolled in an exchange established by a state. According to Estrada, the goal of the lawsuits is to bring down the Affordable Care Act. The primary issue is whether a federal exchange is an exchange set up by a state. Katyal described the case as a real fight between statutory purists and the policy people looking at the real purpose of the statute.

Finally, Katyal and Estrada examined the same sex marriage cases. Katyal noted that the issue has moved very fast and the Court will consider four cases from the Sixth Circuit. The Supreme Court and other courts have been moving steadily in one direction and now will have to decide whether, under the Fourteenth Amendment, states have to issue marriage licenses to two people of the same sex and whether the Fourth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. In connection with the refusal of the Court to stay the federal judge's order to Alabama to issue marriage licenses to same sex couples, Justice Clarence Thomas dissented and said that the Court had already made up its mind.

Legal History

The Trials of Clement Vallandigham

By C. Evan Stewart



Clement Vallandigham is a figure lost to history. Even to many American historians, he rates – at most – a footnote. But Vallandigham was an important political figure during the Civil War era (albeit not in a positive vein), and his trials during that time period provide us with important (and interesting) lessons.

His Early Political Career

Born and raised in Ohio, Vallandigham briefly practiced law in Dayton before being elected to the Ohio legislature in 1845. Losing races for a variety of elective posts thereafter, he tried again in 1856, running for Congress, but he was narrowly defeated. Claiming illegal voting, Vallandigham challenged the result before the House of Representatives and was successful (he was seated on the penultimate day of the congressional term). Vallandigham was re-elected in

both 1858 and 1860. In that latter year, the Ohio congressman also labored hard to elect Stephen Douglas to the presidency, believing that Douglas's doctrine of "popular sovereignty" was the only way out of the growing sectional conflict over the expansion of slavery. Indeed, he prophesied that if the Democratic Party could not unite behind and elect Douglas, "the result will be the disruption of the Union, and one of the bloodiest civil wars on record, the magnitude of which no man can estimate."

After Lincoln's election, Vallandigham made various attempts to find ways to prevent what he had prophesied. For example, he traveled to Richmond to urge Virginians not to follow South Carolina out of the Union. Later, in February 1861, he gave a speech in the House of Representatives entitled "The Great American Revolution"; in it he blamed the "belligerent" Republican Party for the sectional crisis and proposed three Constitutional amendments as a means to avoid civil war: a 13th amendment that would divide the country into four sections – North, South, West, and Pacific (a majority of the electorate from each section would be required to elect the President); a 14th amendment that would address the issue of secession (no state could secede unless all of the states in its geographical section approved); and a 15th amendment that would guarantee equal rights to all citizens in the territories (thereby authorizing popular sovereignty and enabling slave owners to bring their "property" anywhere they chose to do so). Those proposals garnered Vallandigham a lot of publicity, most of it highly negative (the proposals were "pure and simple treason"; he was "the biggest fool in America"; perhaps he believed "the hair of the dog would cure his bite"; etc.). With his (and others') proposals for compromise proving unworkable as the polarized debate became even more hardened, Lincoln was inaugurated as President on March 4, 1861.

After the firing upon Fort Sumter, Douglas pledged his support to his long term rival, Lincoln, and urged Northern Democrats to follow his lead: "There are but two parties, the party of patriots and the party of traitors. We belong to the first." Shortly thereafter, Douglas was felled by



Engraved portrait of Clement Vallandigham by Henry Howe, courtesy of the Ohio History Connection.

typhoid and he died on June 3, 1861. Vallandigham did not wait for his political patron to die, however, before parting ways.

From his home in Dayton (Congress was not in session), Vallandigham publicly blamed the war on Lincoln and opposed the North's attempting to coerce the seceding states to rejoin the Union by military force: "It is too late for anything except peaceful separation." These well circulated sentiments were quickly branded as "dastardly treason," and Vallandigham was soon the most hated member of Congress. Not dissuaded, when Congress was back in session by the summer of 1861, Vallandigham introduced seven resolutions in the House, seeking to censure Lincoln for a host of "unconstitutional acts." They went nowhere. Another resolution, seeking a "Convention of the States" at which "all controversies" would be addressed, also went nowhere. By now, many subscribed to the view of one of Vallandigham's former, close friends: "He is more than a Judas; he is a damned traitor!"

Vallandigham, however, thought he was right and refused to budge. And when the second session of the 37th Congress convened in December 1861, he put his foot down on the pedal.

Initially, he tried to make political hay by criticizing Lincoln's defusing of a foreign policy crisis with England (done to discourage England from recognizing the Confederacy as a legitimate nation state under international law). Then, he proposed legislation to arrest and imprison Lincoln if the President were to continue to arbitrarily arrest people considered to be hurting the war effort. Warning that "[w]e are in the throes of revolution," Vallandigham also fought various efforts aimed at the emancipation of slaves and the abolition of slavery.

Leader of the Copperheads

Although viciously attacked by many in Congress (around this time the term "Copperhead" came into the political lexicon; it was used against Vallandigham and his fellow peace Democrats; it is not only a snake in the grass, but a poisonous one to boot), Dayton's congressman lined up 35 fellow Democratic representatives behind his pro-peace, anti-administration screed and he wrote to ex-President Franklin Pierce that he believed his efforts would pay off at the polls in 1862.

Unfortunately for Vallandigham two things made his own prospects for re-election in that year not optimal. First, the Ohio legislature (dominated by Republicans) re-drew his district, adding a large swatch of Republican votes (and he had won in 1860 by only 134 votes). Second, his Republican opponent was Robert Schenck, a Union general wounded at Second Bull Run whom Lincoln himself had personally recruited to run against the hated Copperhead. The incumbent fought as best he could, whipping up a virulent, race-baiting vision: "The Constitution as it is, the Union as it was, and the N[***] where they are." But it was not enough. In an election year where the Democratic Party made strong gains across the North, Vallandigham went down to defeat by more than 600 votes.

The Republicans, with little else to boast, rejoiced in his electoral downfall:

> … that pimp of Jeff. Davis and standing disgrace to his State, Clem Vallandigham, is laid out cold and stark in the embrace of political death…. He is dead, dead, dead – and a loyal people will bury him so deep in the mire of his own infamy, that the stench from his putrid carcass will never offend the nostrils of good men, nor the recollection of his treason and perfidy tarnish the fair name of the State he has long misrepresented and dishonored.

But Vallandigham, believing it was only gerrymandering that defeated him, was unbowed. In fact, he was emboldened by the Democrats' general electoral successes, and undertook something of a victory lap of speaking engagements before Northern, war-weary audiences. This experience would soon lead him to a constitutional confrontation that ultimately the U.S. Supreme Court would have to pass on.

With his congressional career over, Vallandigham turned his sights on the Ohio governor's seat. Facing opposition from within his party, he devised a somewhat unusual strategy: to

become a martyr to the war effort. Major General Ambrose Burnside, the War Department's commander of the Department of Ohio, had issued General Orders, No. 38, on April 13, 1863; that document (with a supplemental order issued a week later) boldly declared that anyone "declaring sympathies for the enemy" would be arrested, tried as a spy or traitor by a military tribunal, and if convicted put to death. On May 1, 1863, Vallandigham, speaking for almost two hours before a large audience assembled to celebrate the democracy of Knox County (and knowing Burnside's agents were present and taking detailed notes), not only directly attacked Burnside and his attempts to stifle free speech, but also decried "King Lincoln" and urged his listeners to use the "ballot box" to dethrone him. Four days later, at two a.m., Vallandigham was arrested (forcibly) at his Dayton home, leaving behind his "sobbing, hysterical wife."

A Military Trial

To his supporters, Vallandigham was indeed a martyr, falsely "kidnapped" by "cowardly, scoundrelly abolitionists." And a number of them rioted and burned down the *Dayton Journal*, which was the local Republican paper. Nonetheless, Burnside went ahead with a military trial on May 7 before eight Union officers. With Vallandigham protesting the authority of the tribunal and declining to have counsel represent him, the trial went forward and the specific charges were laid out against him; they included:

- he had called the conflict "a wicked, cruel, and unnecessary war";
- he had called the conflict "a war not being waged for the preservation of the Union";
- he had called the conflict "a war for the purpose of crushing out liberty and erecting a despotism";
- he had called the conflict "a war for the freedom of the blacks, and the enslavement of the whites";
- he had called General Orders, No. 38 "a base usurpation of arbitrary authority," urging his listeners to disobey the directive;
- he had vowed "to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government."

Asked how he pleaded to these charges, Vallandigham tried to filibuster; the presiding officer cut him off and entered a "Not Guilty" plea.

After a brisk two day trial, the inevitable guilty verdict was rendered. But what to do with the treasonous, former congressman? Rejecting execution, the penalty was determined that he be "placed in dire confinement in some fortress of the United States, … there to be kept during the [duration] of the war."

On May 11, former Ohio Senator George Pugh moved for a writ of *habeas corpus* on Vallandigham's behalf in the U.S. District Court for the Southern District of Ohio. Judge Humphrey Leavitt denied the motion; basically ignoring Chief Justice Taney's decision in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (sitting as a federal circuit judge, Taney held that only Congress could suspend *habeas corpus*), Leavitt ruled that the arrest and trial were validly conducted pursuant to the President's authority as commander-in-chief.

Exile

Although Burnside swiftly chose a suitable prison (Fort Warren) for Vallandigham, the political heat this brou-ha-ha generated caused Lincoln to intervene. The President, who considered the Copperhead leader to be a "wily agitator" (but, who also, in the words of his Secretary of the Navy, "regret[ted] what ha[d] been done" by Burnside), came up with an inspired thought: he ordered Vallandigham out of the Union and (with safe passage) deported him into the hands of the Confederate army.

Not surprisingly, the Southern states did not want Vallandigham (he publicly declared himself "a prisoner of war"); and after he bounced back and forth between a number of Dixie states, the Copperhead was allowed to board a ship that evaded the Union blockade and made its way to Bermuda. From there, Vallandigham was able to get to

Canada.

While on his odyssey, Vallandigham's machinations seem to pay off. On June 11, the delegates to the Ohio Democratic State Convention voted 411 to 11 to nominate the former congressman to run for governor. Once he reached Canada, Vallandigham formally accepted his party's nomination. He campaigned *in abstentia*, with prominent Ohio Democrats trekking instead to visit the candidate in Canada.

On October 13, 1863, the citizens of Ohio went to the polls. Vallandigham's opponent was John Brough, a pro-war Democrat who ran on the Republican sponsored Union ticket. Vallandigham lost by a landslide – 288,374 to 187,492. In his diary, Secretary of the Navy Gideon Welles reported on Lincoln's reaction the following day:

> I stopped in to see and congratulate the President, who is in good spirits and greatly relieved from the depression of yesterday. He told me he had more anxiety in regards to the election results of yesterday than he had in 1860 when he was chosen. He could not, he said, have believed four years ago, that one genuine American would, or could be induced to vote for such a man as Vallandigham, yet he has been made the candidate of a large party – their representative man, and has received a vote that is a discredit to the country. The President showed a great deal of emotion as he dwelt on this subject, and his regrets were sincere.

One important lesson Lincoln and his Republican Party operatives learned from this experience for 1864 was the importance of the soldier vote, which broke approximately 95 percent for Brough. The governor-elect subsequently visited Lincoln at the White House and expressed regret he had not won by a greater margin. Lincoln later remarked that he was reminded of a "man who had been greatly annoyed by an ugly dog [and] took a club and knocked the dog on the head and killed him; but he still continued to whack the animal, when a passer-by cried out to him, 'Why, what are you about, man? Don't you see the dog is dead? Where is the use of beating him now?' 'Yes,' replied the man, whacking away at the dog, 'I know he is dead, but I wanted to teach the mean dog that there is *punishment after death*.' Poor Val was dead before the election, but Brough wanted to keep on whacking him, as the man did the dog, after death."



Photo of Clement Vallandigham attributed to Mathew B. Brady. Collection of the U.S. House of Representatives.

In the meantime, Vallandigham's legal challenge to his prosecution continued, with ex-senator Pugh applying for a writ of certiorari to the U.S. Supreme Court. On January 22, 1864, the Court heard argument on the application (although Chief Justice Taney was too ill to attend). Less than a month later, on February 15, 1864, a unanimous Court (per Justice James Wayne) re-

jected the arguments put forward by Vallandigham's counsel (*Ex Parte Vallandigham*, 68 U.S. (1 Wal.) 243 (1864)). The Court determined that it did not have the power to "originate a writ of certiorari to review … the proceedings of a military commission." Because it ruled on jurisdictional grounds, the Court took no position on whether Vallandigham's arrest, trial, and sentence were illegal. No mention was made of Chief Justice Taney's prior *Merryman* decision; in fact, Taney was listed as being in favor of the outcome (although he confided to friends that he was despondent over the future of the Court and the Constitution). Public opinion on the Court's ruling was predictably mixed: the Republicans were pleased, the Copperheads were not.

The 1864 Election

Undeterred, Vallandigham was determined to play a key role in the 1864 presidential race, hoping to defeat Lincoln and put in his place a successor committed to peace. To assist him, his Ohio friends snuck him across the border and back into Ohio, where he attended the Third District Democracy's Convention on June 15, 1864; he was chosen as a delegate to the party's National Convention in Chicago. The Lincoln Administration learned of the Copperhead's return to the United States and his growing political visibility. Concerned that any action by the government would only help to promote Vallandigham's popularity, Lincoln decided to do nothing. That hands-off policy allowed Vallandigham to travel to Chicago in August and play a critical role in the drafting and adoption of a "peace plank" in his party's platform; it proclaimed that the war was a failure and "immediate efforts [must] be made for a cessation of hostilities, with a view to an ultimate convention of the States, or other peaceable means, to the end that, at the earliest practicable moment." When the party's nominee, General George McClellan formally accepted the nomination, however, he repudiated the "peace plank": "I could not look in the face of my gallant comrades of the army and navy, who have survived so many bloody battles, and tell them that their labors and the sacrifices of so many of our slain and wounded brethren had been in vain; that we had abandoned that Union for which we have so often periled our lives."

This exposed schism between the two wings of the Democratic Party, together with an improving economy and a surge in Union victories on the battlefield (*e.g.*, Atlanta), took away any chance of McClellan prevailing. In November, Lincoln won re-election easily.

After the War

With the North victorious six months later, one would think that Vallandigham would have finally packed it in and retreated from public life with dispatch. But he did not. He publicly (and repeatedly) advocated an easy peace with the South, with no vindictive acts to be taken against individuals; he also argued against the emancipated peoples receiving full political and social rights. In addition, Vallandigham, with visions of political rehabilitation, plotted to become one of Ohio's U.S. Senators; but those efforts did not work out as he had hoped. He was drafted in 1868 to run against Robert Schenck again for his old congressional seat. "Waving the bloody shirt," the Republicans made the contest a choice between patriotism and treason. Patriotism won, although Vallandigham did run ahead of the national ticket.

He still had politics in his veins and had not given up hope of someday getting to the Senate, but Vallandigham had to earn a living. In December 1869, he started a law firm with Daniel Haynes, a prominent local jurist. In short order, the firm prospered.

In 1871, Vallandigham took over the defense of a man charged with murder. He was attempting to prove that the victim had in fact accidentally shot himself, and during a break in the trial Vallandigham showed his colleagues how he would demonstrate this before the jury. Unfortunately, he chose to pick up a loaded pistol. Pressing it close to his body and pulling the trigger, Vallandigham cried out: "My God, I've shot myself!" Twelve hours later, he died; he was 50 years old.

Postscript

The definitive biography of Vallandigham is by Frank L. Kl-

ement, *The Limits of Dissent: Clement Vallandigham and the Civil War* (Kentucky 1970). The best single volume biography of Lincoln is David H. Donald's *Lincoln* (Simon & Schuster 1995); the best multi-volume biography of Lincoln is Michael Burlingame's *Abraham Lincoln: A Life* (John Hopkins 2008). The seminal work on the Democratic Party during this period in American History is by Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (W.W. Norton 1977).

Trademark Law

U.S. Supreme Court's Trademark Trial and Appeal Board Ruling

By Jason Jones



The U.S. Supreme Court recently held in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015), that a decision of the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office ("TTAB") on the issue of likelihood of confusion may preclude a federal court from reaching a contrary conclusion on the issue in a subsequent infringement action. But the key word in the previous sentence is *may* – not must – and the Supreme Court went out of its way to explain that "for a great many registration decisions" from the TTAB, "issue preclusion obviously will not apply."

Although the decision has set the trademark bar abuzz, it should not be news to practitioners in the Second Circuit, since the Second Circuit has long recognized that in certain circumstances a decision by the TTAB could have preclusive effect in later federal court litigation.

The Case

The facts of the *B&B Hardware* case are relatively straightforward. The plaintiff, B&B Hardware, owned a federal registration for the mark SEALTIGHT for metal fasteners used in the aerospace industry. Meanwhile, the defendant, Hargis Industries, used the mark SEALTITE for metal fasteners in the construction industry and applied for federal registration of SEALTITE. B&B opposed registration of SEALTITE in the TTAB and, after trial, the TTAB concluded that SEALTITE was confusingly similar to SEALTIGHT and could not be registered. Hargis did not exercise its statutory right to appeal the TTAB's decision to the U.S. Court of Appeals for the Federal Circuit or a federal district court.

B&B also sued Hargis for infringement in federal district court, claiming that Hargis' use of SEALTITE infringed B&B's rights in SEALTIGHT. In light of the TTAB's finding of a likelihood of confusion, B&B argued to the district court that the TTAB's decision precluded Hargis from arguing there was no likelihood of confusion. The district court, however, refused to give preclusive effect to the TTAB's determination and, ultimately, a jury sided with Hargis, finding no likelihood of confusion.

B&B appealed to the Eighth Circuit, but it affirmed, holding that because the TTAB looks to different factors than do federal courts in making likelihood of confusion determinations, a federal court should never give preclusive effect to a TTAB decision on the likelihood of confusion issue. The Supreme Court granted *certiorari* and reversed.

The Court's Decision

The Supreme Court analyzed whether the TTAB actually applies the same likelihood of confusion standard as district courts since the TTAB "typically analyzes the marks, goods and channels of trade only as set forth in the application and the opposer's registration, regardless of whether the actual usage of the marks by the parties differs." This was a closely watched facet of the case, as it is well-established that the TTAB does not typically look to

the real world use of the marks made by the parties, while marketplace conditions are critical to the likelihood of confusion analysis of district courts in infringement actions. The Supreme Court acknowledged this difference, but held that this difference did not require a per se rule that TTAB decisions can never be entitled to issue preclusion. Rather, the Court explained that this was just "a reason not to apply issue preclusion in some or even many cases."

The Court, therefore, concluded that, "[I]f the TTAB does not consider the marketplace usage of the parties' marks, the TTAB's decision should have no later preclusive effect in a suit where actual usage in the marketplace is the paramount issue." But the Court explained that the reverse is also true, stating that: "So long as the other ordinary elements of issue preclusion are met, *when the usages adjudicated by the TTAB are materially the same as those before the district court*, issue preclusion should apply." (Emphasis added.)

The Second Circuit has long recognized that in certain circumstances a decision by the TTAB could have preclusive effect in later federal court litigation.

In the Second Circuit

As stated above, the Second Circuit has long recognized the principles announced by the Supreme Court in *B&B Hardware*. Specifically, in *Levy v. Kosher Overseas Ass'n of Am., Inc*., 104 F.3d 38 (2d Cir. 1997), the Second Circuit was presented with the question of whether a district court was required to give preclusive effect to a TTAB decision finding a likelihood of confusion between two marks in a subsequent infringement litigation concerning the same marks. The Second Circuit rejected such a *per se* rule. Instead, the Second Circuit explained that "the standards governing likelihood of confusion in [the TTAB] ... can be different than the likelihood of confusion standard applicable in trademark infringement actions in a district court" because likelihood of confusion in the TTAB is determined based solely on the marks and goods as they are listed in the at-issue application and registration and not based on "actual usage" in the marketplace. Thus, the Second Circuit in *Levy* held that a decision of the TTAB on likelihood of confusion is entitled to preclusive effect only "where the [TTAB] has indeed compared conflicting marks in their entire marketplace context."

As such, trademark litigators in the Second Circuit have for years already considered the possible preclusive effect of TTAB decisions in counseling clients about the costs and benefits of instituting TTAB and federal court proceedings. The Supreme Court's holding in *B&B Hardware* simply takes the rule already applied in the Second Circuit and makes it a nationwide rule.

Essay

Freaking Legal Economics

By Steven M. Edwards



Freakonomics is a great book. It uses economic theory to explain some of the mysteries of modern life. I am not an economist, but I thought it would be interesting to undertake an amateur economic analysis of the legal business in an effort to understand how it works, including why some lawyers make more money than others, why law firms employ particular business models, and the role that clients play in law firm economics.

A Strange Business

The law is a strange business. There are many lawyers who can't get jobs, and yet there are

many clients who can't get lawyers. You would think that if supply exceeds demand, all of these people could find each other.

If supply exceeds demand, you would also think that prices and profits would be very low. In the economic model of perfect competition, prices are bid down to economic cost – economic cost roughly being actual costs plus a sufficient return to incentivize people to enter the business to begin with, as opposed to doing something else. Wheat farmers are often given as an example of this. There are so many wheat farmers in the United States, and the competition is so intense, that the price is bid down to economic cost. If a wheat farmer raises his price even a small amount above economic cost, there will be another wheat farmer who is prepared to sell at economic cost.

The law business is very different. Even though the supply of lawyers exceeds the demand for their services in the overall market, there are some lawyers who charge astronomical prices and make astronomical profits. In the recently released American Lawyer 100, the average profits per partner in 2014 were $1.5 million, and ranged from $495,000 at the low end to $5.5 million at the top. What is more, the average profits per partner have risen about 400 percent in the last 30 years, a period in which the consumer price index rose about 130 percent.

It seems clear that legal services are not a homogeneous product. Wheat is a homogeneous product – a bushel of wheat is a bushel of wheat. Lawyers, by contrast, differ markedly in terms of quality and skills. In addition, legal work differs significantly in terms of complexity and risk. At one end of the spectrum, the work is fairly routine and repetitive, and the risk of getting a bad result is relatively low. At the other end of the spectrum, the work is difficult and complex, and the cost of a bad result can be high.

A Continuum

The legal market can be viewed as a continuum, with commodity work at one end of the spectrum and complex work at the other. Most firms have a mix of commodity and complex work, but firms at the low end of the profits per partner scale tend to do more commodity work, and firms at the high end tend to do more complex work. In addition, the service at the commodity end is a homogeneous service in the sense that there are a lot of people who can do it, and the service at the complex end is more heterogeneous and unique in the sense that there are relatively few people who can do it. In other words, in that segment of the market, demand exceeds supply.

As is the case in most markets with homogeneous products, like wheat, the competition for commodity work is fierce and the prices and profits are low. In markets with heterogeneous products, like the market for fine art, prices and profits tend to be high, even though those markets can be competitive too. It seems likely that the firms at the top of the American Lawyer 100 in terms of profits per partner are making gobs of money because they are offering something unique. Clients understand that there are differences in lawyers from a qualitative standpoint. If they treat lawyers as fungible for purposes of complex work, they may get bad results.

What this means is that clients are willing to pay for quality, or what they perceive to be quality. The reality is that it is very difficult for clients, even sophisticated clients, to judge quality. Unless a client goes through the process that a judge goes through in deciding an issue, which includes looking at the evidence and reading the cases, it is hard to tell whether one brief is better than another or whether one lawyer is more capable than another. In judging quality, it seems likely that clients give results in other matters considerable weight. Clients infer that a lawyer or law firm with good results in other matters must be doing high quality work. In a nutshell, they have a good reputation. What clients are really buying when they pay for legal services, therefore, is reputation.

Reputation is hard to come by, and it takes time to create. Reputation is also important because clients prefer to make choices that they view as safe. If something goes wrong or the result is bad, the general counsel wants to be able to tell the board that he or she hired the best. These factors may explain why there is relatively little move-

ment into and out of the top ranks of the American Lawyer 100 – in the last 10 years, only five of the names in the top 25 firms in terms of profits per partner have changed. Reputation can be what economists call a "barrier to entry" in the legal business. Many of the law firms in the American Lawyer 100 have been there a long time and will stay there unless they do something that harms their reputation or otherwise suffer a financial setback.

Niche Strategies

There nevertheless has been some movement into and out of the American Lawyer 100. A number of firms have been very successful pursuing niche strategies and then expanding from there to build a strong base. Skadden and Wachtel focused on proxy fights in the 1970s and then took on hostile takeovers in the 1980s because the established firms thought that work was beneath them. They quickly grew into two of the most successful firms in the world – in 2014, Wachtel was first in profits per partner and Skadden was thirteenth. More recently, Quinn Emanuel focused on litigation and was willing to do plaintiffs' work, and it is now second on the American Lawyer profits per partner list.

Some firms have gone head-to-head against the established firms and have advanced based on reputation alone. David Boies was a well-known litigator when he started Boies Schiller, but he decided he could enhance his reputation further by agreeing to handle the Microsoft case for the government for a reported $140 an hour. He won the case and now his firm is twelfth in the American Lawyer 100 in terms of profits per partner. Paul Weiss has been relentless in its pursuit of quality and reputation, hiring the best law school graduates and bringing in laterals like Ted Wells, Mark Pomerantz, and Beth Wilkinson. Paul Weiss is now third in the American Lawyer 100 in terms of profits per partner.

Some notable firms have exited the market. Donovan Leisure was regarded as one of the best litigation firms in the country, but it could not survive a bad outcome that tarnished its reputation. Howrey collapsed when it expanded too quickly as the market contracted in the wake of the financial crisis of 2008. Dewey LeBeouf grew its practice by offering lateral partners guarantees, borrowing heavily to cover those guarantees and then imploding when it could not service the debt.

Originations

There are 26 firms in the American Lawyer 100 with profits per partner of more than $2 million. It is interesting that 20 of those firms are either headquartered in New York or have their largest office in New York. It is also interesting that a significant number of those firms pursue business models where compensation is either lockstep or based on factors other than originations, while the business models of the firms farther down on the list tend to be based on originations. Why is that?

For firms at the top of the list, the name of the game is to keep their clients by providing great service and maintaining their reputation for high quality legal work. The lockstep business model works for them because it encourages partners to stay with the firm since they will make more money the longer they stay. It also incentivizes them to share the work because a firm with a lockstep business model will make more money if everyone is busy.

For firms farther down on the list, which obviously would like to move up on the list, the name of the game is to increase revenue by encouraging business generation. An originations business model encourages business generation. For those firms, the ability to generate business may be more important than sheer legal skill – although the two are not mutually exclusive and, indeed, they may be related – and lateral hiring is an important component of their strategy.

This strategy is not without its shortcomings. Firms that grow through lateral hiring often find themselves in situations where they are paying the laterals too much money, so they must cut costs to maintain profitability. The best way to achieve that is to eliminate the most costly partners who generate the least business and replace them with less costly partners or associates. The originations business model can also discourage sharing. All other

things being equal, partners in an originations environment will make more money if they keep matters for themselves and staff them with associates, as opposed to handing the matters over to other partners in order to keep them productive. As a result, some partners become expendable, and there is a lot of movement into and out of those firms.

That is not to say that everything is rosy in the lockstep firms. Partners in those firms often become unhappy if they feel that their contributions, relative to their peers, are not recognized. They may demand adjustments or become the prime targets of originations-based firms that are looking for laterals, although very few actually leave. Lockstep firms may lose clients if partners, who are entitled to receive a certain level of compensation no matter what they do, become lazy or fail to do a good job. As a result, there may be a level of mistrust and concern about whether everyone is carrying their weight in a lockstep firm.

The lockstep model is also hard on associates. The model works best if the associate to partner ratio is high, so it is important to minimize the number of associates who are invited to become partners. Furthermore, the firm does not want the associates to take the clients with them when they leave, so decisions on partnership are traditionally made before the associates are capable of doing that – generally after seven or eight years.

Firms farther down on the American Lawyer profits per partner list typically have lower associate to partner ratios. In the past, those firms tried to compete for associates by convincing law school graduates that it would be easier for them to make partner even though their profits per partner were lower than the most profitable firms. More recently, with the emphasis on business generation, it has become harder to make partner, and originations-based firms are taking longer to make the partnership decision.

The Hybrid System

As the profession has evolved, many firms have adopted a hybrid system, with elements of both business generation and factors other than business generation in their compensation formulas, including the idea of creating a "star system" of highly compensated partners to service the firm's clients. Interestingly enough, a completely unscientific survey suggests that firms moving up in the world will sometimes incorporate factors other than business generation into their compensation systems, presumably to keep assets in place, while firms that feel they are slipping will embrace originations. In addition, many firms are employing lawyers as counsel, senior attorneys, or contract attorneys, suggesting that there is less concern that they will walk off with the firm's clients, which in turn makes it easier to maintain the firm's business while making fewer partners.

As a result, lawyers are consumed with uncertainty even though profitability in the American Lawyer 100 appears to be relatively stable compared, for example, to the profitability of the Fortune 100. That is pretty extraordinary when one considers the capital costs of law firms compared to major companies, further demonstrating that reputation can be a barrier to entry. The willingness of firms to keep lawyers on for more than 10 years without making them partner suggests that those firms see little risk that those lawyers will jump ship and form their own firms, taking the clients with them.

The Impact of Clients

Recent trends with clients have added to the mix. Clients are up in arms over legal costs and are coming down hard on lawyers in an effort to lower their costs. They are attempting to create competitive bidding wars by sending out RFPs; they are establishing "panels" of law firms that are willing to work at lower rates; and they are demanding alternative fee arrangements such as fixed fees and blended rates. One wonders whether this will have any real impact in the long run.

As noted above, clients are willing to pay higher prices for higher quality work. The ability of some firms to deliver high quality work (recognizing that quality may actually be the perception of quality as inferred from reputation) gives them what economists call market power – *i.e.* the ability to charge a price above economic cost. Even though those firms

have market power, competition in their market segment – what some economists call monopolistic competition – may be intense. If economic theory is correct, that competition should result in a market price, and changing the unit of measurement should not cause a significant change in the overall wealth transfer from clients to lawyers for legal services. Whether you charge by the bushel or the pound, unless there are economies of scale or savings in transaction costs, the cost of wheat should be the same. The same should also hold true for a heterogeneous product like legal services, assuming market forces are operating and firms are not engaging in price fixing.

Alternative Fee Arrangements

Alternative fee arrangements may yield transitory savings as firms opportunistically take advantage of the new regime. For example, firms with low utilization rates will try to keep their lawyers busy by offering special deals; firms may be willing to offer special pricing for commodity work, while continuing to do complex work for standard rates. But firms will continue to take advantage of whatever market power they have to obtain total payments from clients that are commensurate with the quality of work they perform. Legal costs will continue to go up because the amount of legal regulation is increasing and the work is becoming more complex. This is why profits per partner in the American Lawyer 100 continue to rise notwithstanding alternative fee arrangements, which have been in existence for some time.

There is also some risk for clients in the alternative fee approach. After an initial period of adjustment, smart firms will use their market power to calibrate alternative fee arrangements in a way that protects them from the downside. Clients may end up paying more for work done on a fixed fee basis than they would if they paid hourly rates. Law firms may assign more junior lawyers to matters where there are blended rates in order to minimize opportunity costs. Alternative fee arrangements also make the market more heterogeneous. Comparison shopping is more difficult when products are priced in different ways. It may be very difficult to determine whether a fixed fee is more economical than an hourly rate when the controlling factors are the duration and complexity of the case, which are often difficult to predict.

When you think of it, the hourly rate is an elegant way of measuring the value of legal services because clients pay for exactly the amount of time and experience level that they get. In the days of Abraham Lincoln, most matters were handled on a fixed fee basis. At the outset of a case, the lawyer got a retainer, which he kept even if he got a quick result. The hourly rate was considered to be an improvement that protected the client by requiring it to pay only for the time actually spent and protected the lawyer by ensuring that the lawyer was appropriately compensated even if the matter took more time than originally anticipated. With alternative fee arrangements, there is a risk of overpayment or underpayment. Rational law firms will use their market power to avoid underpayment if they can.

Hourly rates make some clients uncomfortable because they are concerned about padding and overbilling. A busy lawyer has no incentive to do that. If anything, a busy lawyer has every incentive to do the work as efficiently as possible and then move on to the next matter because that will increase the lawyer's base of clients and enhance the lawyer's reputation for doing good work. A lawyer who is less busy may have some incentive to take more time than is necessary on a matter, but alternative fee arrangements are a somewhat blunt instrument for dealing with the problem. A far better solution is simply to change lawyers, which clients do all the time.

I predict that, after a period of experimentation with alternative fee arrangements, clients will return to hourly rates. (In the meantime, I am perfectly happy to explore alternative fee arrangements and readily admit that I may be wrong about them.) If I am right, the emphasis will shift back to hourly rates and savings from discounts on standard hourly rates. Law firms may react by increasing the discounts while also increasing the standard hourly rates, turning the standard hourly rate into a list price. But at the end

of the day, the market price will be the market price, regardless of the unit of measurement.

Costs Will Increase

If legislatures pass more laws, regulators adopt more regulations and courts recognize more legal rights, clients' legal costs will increase. As more lawyers enter the profession, they will look for new and inventive ways to earn a living, increasing clients' costs. One is reminded of the Abraham Lincoln story of the town with one lawyer who could barely earn a living, but things changed when a second lawyer moved into town and they both became very wealthy. That was great for the lawyers, but probably not so great for the clients. Consumers are never happy about escalating costs, so I'm sure that clients will continue to be frustrated about their ever-increasing legal spend.

The pressure from clients, the emphasis on business generation, and lateral hiring and firing have created an atmosphere of fear, uncertainty, and doubt throughout the legal community. Many lawyers that I know are absolutely miserable even though they are making more money than they ever dreamed they would. They complain that the practice of law has turned into a crass business that is no longer as professional or collegial as it once was. This is a complaint that I first heard more than 40 years ago when I started practicing law. Maybe things were different in the days of Abraham Lincoln. I don't know.

The important thing to remember is that people in the legal profession haven't really changed over the years – suddenly becoming nasty, brutish, and short (or at least short tempered). They are simply rational economic actors who are responding to market forces. They always have been. It is market forces that have changed, and they are likely to continue to change in the future. It helps to understand the economic conditions that create this environment, even if it does not make it any more pleasant.

Essay

Judges and Lawyers "Making a Difference"

By Pete Eikenberry



As advocates, we litigators work with the huffings and puffings of the justice system. Yet, as Justice Sotomayor observed in a letter on March 4, 2010, "I tell many people that justice is accomplished not only in the courtroom, but in the struggles of many to effect change outside the courtroom." Lawyers often take responsibility to advocate justice outside the courtroom by speaking out or otherwise working to "make a difference."

Writing in the *Georgetown Journal of Legal Ethics*, Second Circuit Judge Robert Katzmann stated:

> My subject is a pressing one, the unmet legal needs of immigrants … too often immigrants are deprived of adequate legal representation, essential if they and their families are to live openly and with security. This failure should be a concern for all of us committed to the fair and efficient administration of justice. My views are shaped by experience as a judge on the U.S. Court of Appeals for the Second Circuit.… I write, I should emphasize in an individual capacity, not as an official representative of my Court.
>
> In our legal system … [t]he lawyer's function is grounded in role morality, the notion that special obligations attach to certain roles- in the lawyer's case, to serve justice.

Thereafter, Judge Katzmann brought together a study group whose members, under his leadership, *inter alia*, have ensured representation for every detained New York City resident facing deportation. Recently another judge, Jed Rakoff of the Southern Dis-

trict, also spoke out for justice in his "individual capacity" writing in the *New York Review of Books*:

> In many respects, the people of the United States can be proud of the progress we have made over the past half-century in promoting racial equality. More haltingly, we have also made some progress in our treatment of the poor and disadvantaged. But the big, glaring exception to both these improvements is how we treat those guilty of crimes. Basically, we treat them like dirt. And while this treatment is mandated by the legislature, it is we judges who mete it out. Unless we judges make more effort to speak out against this inhumanity, how can we call ourselves instruments of justice?

Judges Katzmann and Rakoff felt responsibility for the deficiencies in achieving justice in the U.S. of different classes of individuals. They spoke out without waiting for an appropriate case to come before them. As lawyers, we have been trained as advocates for our clients, yet our training also permits us to recognize that justice is often missing in the lives of whole classes of people even in our democratic system. Thus, perhaps, do we have some special, or at least moral, obligation to live, in part, a life dedicated to justice and to eliminating its obvious flaws?

As for judges speaking out (in the context of a court proceeding) I read with interest the recent Second Circuit opinion authored by Judge Gerard Lynch declaring a data collection scheme of the government illegal. The court observed:

> The very notion of an individual's expectation of privacy may seem quaint in a world in which technology makes it possible for individuals and businesses (to say nothing of the government) to observe acts of individuals once regarded as protected from public view. On the other hand, rules that permit the government to obtain records and other information that consumers have shared with businesses without a warrant seem much more threatening as the extent of such information grows.
>
> ***
>
> [T]he bulk collection of data as to essentially the entire population of the United States, something inconceivable before the advent of high-speed computers, permits the development of a government database with a potential for invasions of privacy unimaginable in the past.
>
> ***
>
> Because we conclude that the challenged program was not authorized by the statute on which the government bases its claim of legal authority, we need not and do not reach these weighty constitutional issues. The seriousness of the constitutional concerns, however, has some bearing on what we hold today, and on the consequences of that holding.

Although the court deferred to prospective congressional action to remedy the constitutional issues, it did address those issues in detail. Should the Congress not "do the right thing" in extending or replacing the law, the court still will have jurisdiction of appeals from the district court to which it remanded the action. It appears that the court is prepared to do justice on the constitutional issues if the legislative process does not allay its concerns. The court was, perhaps, bold in the cause of justice in going beyond what was required to determine the action.

As lawyers, we do not subject ourselves to fatal consequences for speaking out for justice, yet Abraham Lincoln, lawyer and President, did. Lincoln gave his last speech in 1865 – 150 years ago – two weeks after Appomattox and addressed black suffrage:

> We all agree that the seceded States, so called, are out of their proper relation with the Union; and that the sole object of the government, civil and military, in regard to those States is to again get them into that proper practical relation.
>
> ***
>
> The amount of constituency, so to speak, on which the new Louisiana government rests; would be more satisfactory to all, if it contained fifty, thirty

> or even twenty thousand, instead of only about twelve thousand, as it does. It is unsatisfactory to some that the elective franchise is not given to the colored man. I would myself prefer that it were now conferred on the very intelligent, and on those who serve our cause as soldiers.

In the audience John Wilkes Booth observed to a fellow conspirator "that means n[***] citizenship … that is the last speech he will ever make." Three days later Lincoln was dead by Booth's hand.

As lawyers, we have been trained as advocates for our clients, yet our training also permits us to recognize that justice is often missing in the lives of whole classes of people even in our democratic system.

A Fair and Just System

Speaking out is, of course, not the only way to "make a difference." In our area of the country, we have the example of powerful lawyers who did not merely write a check, serve on a board, or do some *pro bono*, but who stepped forward proactively to attempt insure that all of us practice law in as fair and just system as possible. As an associate, Orison Marden organized other associates in large firms all over the city to annually collect funds for the Legal Aid Society. The late Schulte Roth & Zabel partner, Brooks Burdette, was determined to be the best board member ever for the Lawyers' Committee for Civil Rights under Law. Justice entrepreneur Michael Posner founded the NGO now known as Human Rights First and has participated in at least dozens of human rights missions abroad. Judge Denny Chin and his wife, Cadwalader partner Kathy Chin, spend their vacations developing scripts for which they arrange public presentations depicting the effects of the prejudices in American society against Asian immigrant populations. In 1992, Barry Scheck and Peter Neufeld founded the Innocence Project committed to exonerating innocent people through the use of DNA testing. Its efforts have resulted in the freeing of over 300 innocent people with new Innocence Project chapters addressing other justice issues as well.

As lawyers, we are "citizen soldiers" for justice (as my friend Chip Grey once remarked) and by our advocacy training we are able to give leadership to correcting injustice. There may not be a duty for lawyers to work towards resolution of the great issues of the day, as Judge Morris Lasker suggested in accepting the Council's Learned Hand Award in 1989, but we will be a more just nation as more of us do.

From the Archives

Pauli Murray: Fighting for Her Rights

By Molly Guptill Manning



Everyone goes to law school for a reason. Some seek wealth and prestige. Others look to law as a way to serve their civic duty. And there are still others, like Pauli Murray, who are driven to the law to battle injustices experienced first-hand. Growing up in Durham, North Carolina, during the 1910s and 20s, Murray attended segregated schools and understood what race discrimination was from a young age. She also understood that she needed to do something about it.

After earning a bachelor's degree at Hunter College, Murray briefly worked as a teacher in New York. Although she felt pressure to return to her family, Murray resisted leaving Manhattan because

of her "increasing inability to endure the system of segregation," especially when it came to public transportation. "The bus," she explained, "was the quintessence of the segregation evil, because ... [t]he intimacy of the bus interior permitted the public humiliation of black people to be carried out in the presence of privileged white spectators, who witnessed our shame in silence and indifference." However, Murray's sense of obligation to challenge the system she so despised prompted her to apply to the graduate program at the University of North Carolina at Chapel Hill – a school considered to be "liberal" – to study sociology and race relations. She was rejected – "members of your race are not admitted to the University," the letter stated. Furious, Murray wrote letters to the university administrators, President Franklin D. Roosevelt and Mrs. Roosevelt, and the NAACP. Her correspondence to the NAACP was referred to then-assistant special counsel, Thurgood Marshall, who took an active interest in Murray's plight. Murray had also attracted the attention of Eleanor Roosevelt, who responded to Murray's passionate letter; the two became lifelong friends. The university was unyielding.

The Odell Waller Case

Murray's rejection from the University of North Carolina only fueled her desire to change racially discriminatory policies. After being arrested and jailed in 1940 for refusing to sit in the back of a segregated bus, Murray became involved in the Workers' Defense League (which paid a fine to obtain her release from prison). One of Murray's first assignments was to raise funds for the defense of Odell Waller, an African-American who had been arrested after he shot and killed his white landlord, Oscar Davis. Murray learned that Davis had taken Waller's share of the wheat crop they had jointly planted, and the shooting occurred when Waller approached Davis – who was known to carry a gun – to ask for his portion of the wheat crop (which was one bag of wheat for every three going to Davis). According to Waller, Davis refused to give him any wheat, and "r[an] his hand in his pocket like he was going to pull out something," which prompted Waller to reach for his pistol and shoot Davis, believing Davis was about to shoot him.

Waller's attorney moved to dismiss the indictment on the ground that the grand jury had been selected from a list composed exclusively of poll tax payers, in violation of Waller's constitutional right to stand trial before a jury of his peers. The motion was denied. Waller was tried by an all-white jury of 10 farmers, one businessman, and one carpenter. Within two weeks, Waller was indicted, tried, convicted of first-degree intentional murder, and sentenced to death.

Murray worked to raise awareness of Waller's case and money to appeal his conviction, with the goal of having Waller's sentence reduced to life imprisonment. Murray visited Waller as he sat on death row, and after speaking with him, Murray felt certain that Waller formed no intent to kill Davis; he had a split-second reaction to a threatening movement by an angry man who was known to carry a weapon. Believing Waller was guilty of manslaughter, not firstdegree murder, Murray tirelessly campaigned on Waller's behalf—traveling through countless states—and secured more than $3,000 in donations. At one of Murray's speeches, Dr. Leon Ransom, of Howard Law School, and Thurgood Marshall, of the NAACP, were among those in the audience. Dr. Ransom, a recruiter for Howard, was so impressed that he encouraged Murray to apply to law school.

Murray watched as Waller's conviction was affirmed on appeal, his collateral challenges were denied, and the Governor of Virginia refused to commute his sentence. On July 2, 1942, Waller was executed. Believing Waller's execution was fueled by race rather than reason, Murray applied to Howard Law School "with the single-minded intention of destroying Jim Crow."

Meeting Jane Crow

In the 1940s, attending law school was something men did. Murray was one of two women in her entire law school class (until the other woman dropped out). Believing race discrimination was her chief enemy, Murray was surprised when one of her professors stated "in his opening remarks

that he really didn't know why women came to law school, but that since we were there the men would have to put up with us." To Murray's horror, the classroom erupted with laughter. And thus Murray discovered "the twin evil of discriminatory sex bias," which she dubbed "Jane Crow." Upon graduating, Murray noted that she had "entered law school preoccupied with the racial struggle and [was] single-mindedly bent upon becoming a civil rights attorney, but [she] graduated an unabashed feminist as well."

This spirit was only strengthened when, in 1944, Murray decided to apply for the Rosenwald Fellowship to fund her anticipated studies at Harvard Law School. To her delight, Murray was selected for the fellowship, but when she applied for admission to Harvard Law School, she was rejected because she was "'not of the sex entitled to be admitted to Harvard Law School.'" Murray fought Harvard's policy "by typewriter," noting in her letters that "[w]omen are practicing before the Supreme Court, they have become judges and good lawyers, [and] they are represented on the President's Cabinet." Murray sent a copy of her letter to Eleanor Roosevelt and was amazed to learn that President Roosevelt was moved to write the president of Harvard University on Murray's behalf. Unfortunately, Murray learned that it would "take more than one of [Harvard's] most illustrious graduates to overturn a three hundred-year tradition of male exclusiveness."

Practicing in New York and Beyond

Once Murray began to practice, she found that there were few job opportunities for an African-American woman in the 1940s in the field of law. After clerking – a position described by Murray as the lowliest in the profession – in two small law firms, Murray decided to open her own firm. Perhaps the most gratifying work she encountered in her solo practice was a research project for the Women's Division of the Methodist Church, which asked Murray to write a report on race laws in the United States. The final product became Murray's first published book, *State's Laws on Race and Color*.

In the 1950s, Murray joined Paul, Weiss, Rifkind, Wharton & Garrison, but, after two women left the firm, she became the "solitary female on the legal staff in the New York office." A sense of alienation weighed heavily on Murray, for she "was neither 'my girl' – a condescending reference to a female secretary – nor fully accepted as 'one of the boys.'" As she worked with different associates and partners, Murray made a name for herself and earned the respect of her coworkers. In time, Murray felt accepted amongst the attorneys at the firm, and when she left Paul Weiss, she was grateful for "having been tested by the most exacting standards of the legal profession." Murray went on to teach law at the Ghana Law School, in Accra, Africa, and later Brandeis University.

Over the years, Murray never forgot why she went to law school: to bring change to the world. And, although she did not always meet success when or how she had hoped, change did come. Despite Murray's rejection from the University of North Carolina based on her race, the university admitted its first African-American student in 1951. Although she was rejected based on her sex, Harvard Law School began to accept women in 1947. In 1954, Thurgood Marshall and other counsel for the NAACP successfully argued in *Brown v. Board of Education*, 347 U.S. 483 (1954), that "separate but equal" was inherently unequal (it is said that part of the NAACP's brief was based on a piece that Murray had written on why *Plessy v. Ferguson*, 163 U.S. 537 (1896), should be overturned). And, in 1966, the Supreme Court, in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), held that a state could not condition the right to vote on the payment of a poll tax. Murray stated that, with Harper, "[t]hose who remembered Odell Waller felt that his cause had at last been vindicated."

Author's Note: Works consulted for this article include *Pauli Murray: The Autobiography of a Black Activist, Feminist, Lawyer, Priest, and Poet* (previously published under the title *Song in a Weary Throat*) and *The New York Times*.

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