Litigation & Professional Responsibility: Is Overlawyering Overtaking Democracy?

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Welcome everyone. We’re going to get started. I’m David Schizer, the Dean of Columbia Law School. I’m here to moderate the panel, and our panel’s title is, of course, “Is Overlawyering Overtaking Democracy?”

Now, as the moderator I get to ask questions, and I’m going to start with a question of the audience. My question is, aside from me, how many people here have seen Jerry Seinfeld’s new animated movie, Bee Movie? I’ve a six-year-old daughter, which explains why I did—okay, a couple of people. For the rest of the audience’s benefit, I should tell you the premise of the movie is that a bee—Jerry Seinfeld—a bee brings a lawsuit against the humans to keep them from taking the honey.

Quite amusingly, there are some unintended and very bad consequences of this lawsuit. But there’s a line in the movie that I wanted to share with you because the bee has a co-counsel, and the co-counsel is a mosquito. And the mosquito in asserting that he is in fact a lawyer says, “Well, I already was a bloodsucking parasite, and all I needed was this briefcase.” So, this taps into that popular perception that our profession does some harm, as well as some good. And the truth, as I’m sure we can all agree, about the good: Lawyers are obviously essential, will work for liberty. We also are important in ensuring economic growth. We police the separation of powers, enforce contracts.

I mean all that stuff is familiar, but I suspect that we would also agree that there are aspects of our legal system that are unfortunate and that we would love to change. I’ll give one example that I heard about that certainly bothered me. One of our graduates of Columbia has been defending securities class actions for years, and he got a call from a very well-known plaintiffs’ lawyer who said—I’m making up the name—I wanted to ask you about the Jones complaint. My friend says, well, the Jones complaint? I haven’t seen that one yet. And he says, well,
think we should settle it, but the fact is I haven’t written it yet. Anyway, it’s not
really supposed to work that way. There are issues about strike suits, about the
high cost of litigation, about economic activity moving offshore because of the
litigation climate, and of course about overzealous regulation.

Now, if I formulated at this level of abstraction the fact that our system does
good things but that it has problems, I suspect that everyone in the room and
everyone on the panel might well agree with me. But once we look at specific
policy questions, specific issues, then obviously there’s not going to be a
consensus, and I’m predicting a very lively panel because I think we have a
wonderfully gifted group and a range of views. So, the moderator’s job is a very
easy one. What I get to do is introduce them to you, and they are a truly, truly
terrific panel.

I’m going to introduce them in alphabetical order because they’re speaking in
alphabetical order. Our first panelist is Professor Theodore Eisenberg. Ted is one
of the leading academic experts on empirical analysis of law, and much of his
work is focused on various aspects of our litigation system, whether it’s punitive
damages, victim impact evidence, capital juries, biases for and against litigants,
and the chances of success on appeal. Now, he studied these issues in different
contexts, contexts as variable as civil rights, bankruptcy and capital cases.

Ted is joined by his fellow panelist Walter Olson. Walter is a senior fellow at
the Manhattan Institute. He’s written three books on the U.S. litigation system.
They’re called *The Litigation Explosion, The Excuse Factory*, and *The Rule of
Lawyers*. He also runs a website that many of you may have seen, called
overlawyered.com, and it’s actually one of the oldest blogs on law that’s around.

Victor Schwartz is our next panelist. Victor is a partner in the DC office of
Shook, Hardy & Bacon. He chairs its public policy group, which integrates
litigation, government affairs and public relations. He’s a leading expert on
product liability, and in fact he helped to draft the Uniform Product Liability Act
and the Risk Retention Act. He was the chairman of the federal Interagency Task
Force on Product Liability at the Department of Commerce, and he’s also the
co-author of something academics like me know quite well, I think the most
widely used torts casebook, Prosser, Wade & Schwartz. Victor, by the way, is also
former dean of the University of Cincinnati College of Law, and I can’t resist
telling you that he is also a Columbia Law School graduate.

This brings me, then, to our final panelist, who is also a Columbia Law School
graduate, David Vladeck, who is a professor at Georgetown Law Center. David is
a former director of the Public Citizen Litigation Group, which is a well-known
public interest law firm. At Georgetown, he directs the Institute for Public
Representation, which is a clinical law program, and he is also the Director of
their Center on Health Regulation and Governance.

So, it is my pleasure to welcome our panelists. Please join me in welcoming
them.

Ted, let’s start with you.
First, I’m not a graduate of Columbia Law School, but I have spoken there. So maybe that’s good enough—and I’m available for honorary degrees, should you want to unify the panel in some way.

My talk is really about data, what I’ve come to see about the tort system generally and the perceptions of overlawyering and what the data seem to show about it, not in any particular case but in the aggregate, sort of at the level of whether we need national or even very dramatic state reform. I want to mention three results based on data having nothing to do with me necessarily, but they come from three pretty respectable and diverse sources. One is the Rand Institute for Civil Justice. They published an article in 2004 in a journal I edit, the *Journal of Empirical Legal Studies*. They looked at a forty-year time series of data, which was probably the longest time series of tort data we have in the United States. These data are limited geographically. But what they found was no real increase in awards over forty years.¹

We put that next to the Bureau of Justice Statistics data for forty-five of America’s largest counties. They’ve been studying, since 1992, trials—jury trials in particular—and have found really no increase in the amount of awards since 1992 with follow-up in 1996 and 2001, and they’re continuing to work on it for 2005. These data should be available in 2008. Again, the median award in a tort case is about $30,000, and that hasn’t changed much over time.

We follow that up with the National Center for State Courts, which is the leading clearinghouse of information about state courts. And what they’ve done, which is very difficult, is to try and get some uniformity in the way in which states report cases; just simple case counting, even like the number of tort cases filed. And what the National Center data pretty consistently show over the last ten or twenty years is absolutely no real increase in tort filings.

So we have no increase in filings, we have no increase in awards, and yet we have, I think, consistent claims from the business community that the tort system is out of control and that juries in particular are a threat to their businesses because of the high variance in jury awards and the like. And over the years I’ve sort of wondered, you know, our businesses are pretty smart. Do they really not know what’s going on? You know, it’s perfectly respectable to lobby for tort reform on the grounds that it will cost us less money, and why not? I want lower taxes too. But in general, do they really not know what’s going on, or do they just want to get some advantage like the rest of us?

And so, I think I’ve begun to get some information that might help reconcile it, and that’s the burden of what I’m putting up on the screen today, and that’s an article by Jeff Miller at NYU Law School and me on how businesses actually

behave when they contract with each other. So, we looked at the Securities Exchange Commission EDGAR database, searched, actually read the dispute resolution clauses in 2,800 contracts, and we coded, I think, two key things. One is, did they contract out of the legal system by opting for arbitration? And two is, if they didn’t contract out of the legal system by opting for arbitration, did they at least mutually agree to avoid those high-risk, crazy juries? So, if a lot of the rhetoric was true, I believe that one would predict that we would consistently see businesses tend to opt out of the legal system altogether because they don’t really trust the judges either. Or two, opt out of at least in jury trials because those are the particularly risky ones.

So, what you see up there is simply the larger project that we’re reading systematically, the dispute resolution clauses. The DePaul Law Review article already published gives the result for attrition clauses. And what we found there, to our surprise, was for these big, publicly held, sophisticated American corporations, they ex ante contracted for arbitration exactly 11 percent of the time. That is, 90 percent of their contracts did not ex ante agree to arbitration. That’s in sharp distinction to, perhaps if you look at your cell phone contract or your credit card contract, where you’ll probably find 100 percent requiring you to arbitrate and avoid class sessions.

Today’s story is about perceptions of juries and what we find, and so you can read down the list of perceptions: Juries aren’t competent; they’re unpredictable; they are prone to give absurdly high rewards even in business against business—you might remember Texaco Pennzoil’s $11 billion award—so you risk the company when you go before a jury. They considered extralegal factors, and they’re just expensive to begin with. So we should really be avoiding these. So, we predicted that large, sophisticated businesses, when we could actually get at their contracts, not the ex post litigation when we can actually get at their contracts, would tend to show waivers of jury trial and clauses requiring arbitration. The DePaul article addresses the arbitration issue.

We coded twelve categories of contracts on the data coming from the Securities and Exchange Commission’s 8-K filings. There are a lot of contracts up there, so this is a six- or seven-months time slice in 2002. It would be nice to do more, but with 2,800, I think we’re getting a reasonable picture of what’s going on, although of course things could vary over time. You can’t generalize from particular time slices.

Here are the basic results. Perhaps the most important line is the bottom line. It is the total at row the bottom, which suggests that of our 2,800 contracts, 19.9

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percent—that would be the second numerical column—waived jury trial. If you count arbitration clauses as effective waivers of jury trial, then that’s the second pair of, the last pair of columns, then we would have a total of 29 percent of contracts avoiding juries. I’m not sure it’s correct to count arbitration clauses as being particularly fearful of juries since they’re also fleeing judges as well as juries. But at least we have, I’d say the cleanest number is the 20 percent, but you can make of it what you will when we throw in the arbitration clauses.

So, we try to explore the waiver pattern. I would refer you to the full article in the journal to get all the details. But we tried to say, well, what explains the pattern of waivers across cases, across the contracts? And I think it’s important, we’re studying ex ante behavior of big, sophisticated parties not the ex post litigation behavior when disputes have gone badly. So, we thought maybe contract standardization might help explain it. That is, is the contract just a form you mark up? You’re the associate in the law firm; you’re told, draft a new contract. What do you ask for? Show me the last deal; I’ll change the names. And by not changing more I’ll probably make a mistake, but at least I’ll be doing what the last guy did.

We looked at choice of forum clauses. We looked at international contract status. Was a party to the contract a non-US entity? And we looked at several other things. One is a measure of contract standardization, and simply—our crude measure of standardization is the choice of law. And what you can see is that in some categories of contracts—for example mergers, the second in from the upper left—in some categories of contracts, New York law is completely dominant. That’s also the subject of another article we’re doing. In pooling service agreements, these sorts of fairly sophisticated financial things, New York law dominates. In underwriting agreements, New York law dominates. In security agreements, New York law dominates. And generally, the story of choice of law for large public firms is New York.

It’s interesting, large corporations tend to incorporate in Delaware, but the law they tend to choose in about 50 percent of their contracts is New York law, and we’re trying to see whether that measure of standardization actually forecasts particular clauses, such as rates of arbitration, embracement and rates of jury trial waiver.

In this graph, on the left-hand side—standardization does help explain the pattern of arbitration clauses. That is, in low-standardization contracts you see a relatively high rate of arbitration clauses. In high-standardization contracts you see a very low rate of arbitration clauses. That might have something to do with

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the theory of when arbitrators are most appropriate or not, but that’s sort of
beyond the scope of today’s talk. The pattern is less clear on the right side, which
deals with jury trial waivers. That is, we don’t find contracts standardization as
measured by choice of law really doing a good job of helping to ascertain when
jury trials would be waived.

What we do find is—and there’s really one line in here that is, I think, critical
although it’s varied—we do find a very high correlation between whether a
contract specified a forum, and you might expect that all the time, but you don’t
actually see it all the time in these contracts. We found a very high association
between whether a contract specified a forum, a choice of forum for litigation,
and whether there was a jury trial waiver. And it’s the fourth row up from the
bottom labeled in the left-hand column “no forum specified.” That actually
accounted for more than half the contracts. In 1,700 of the contracts, no forum
was specified, and in the overwhelming majority of those there was no jury trial
waiver. So, the contract that did not go to the detailed level of specifying a forum
also did not address jury trial waivers, and that may be some insight into what’s
going on with the lawyers drafting the contracts, or their clients. One would think
with these large sophisticated firms, publicly held ones, that the clients actually
have input. It’s not just a sort of lawyer driving the system, but one can’t be sure.

We tried to see whether things varied by the presence of a non-U.S. party. That
is, non-U.S. parties might be particularly fearful of American juries and might
bargain even harder to waive jury trials. But we didn’t find any significant effect
or any significant effect whatsoever when we had domestic parties, pure domestic
parties and then also international parties as also some part of the contract. We
found jury trial waiver in about 20 percent. I should add, with arbitration clauses
we did find a difference. We found arbitration clauses present in about 20 percent
of the contracts when there was a non-U.S. party, compared to about 10 percent
when there was a U.S. party.

This next slide is simply an effort—some of you may be familiar with the
Chamber of Commerce annual ranking of legal systems, and we’re trying to get a
handle on whether that perception helped drive the rate of jury trial waivers.
There’s a modest association, not terribly strong, and one has to be suspicious
about these sorts of state-level aggregated data sets. But at least the Chamber
supplied something about the business community’s perceptions that we could
test with their behavior with respect to jury trials. So, the X-axis is the Chamber
of Commerce rank of the fairness of the jury system in the state, and the Y-axis is
the waiver clause rate, jury trial waiver clause rate. And you see there’s sort of a
mild slope, lower left, upper right, but it’s hardly a very tight fit. Things are pretty
much all over the place.

We tried to look at jury trial waiver rates and the queue for trial, that is how
long you have to wait for a trial within a place, and we didn’t find that very
helpful. This line is, if anything, the opposite, and Illinois is a big outlier here, and
that’s Cook County in this case.
So there are two levels of bottom line for me. One is, are corporate lawyers focusing on jury trial waivers, or are they just overlooking this seemingly key thing if avoiding juries were such an important things as we’re often told in reform proposals? And then I guess the other bottom line I’m sort of beginning to take away is, the Rand data, the Bureau of Justice Statistics data, and the National Center for State Courts data—all of which suggest for the last twenty or thirty or forty years, no tort system in crisis—are actually quite consistent with the way businesses are actually behaving. That is, they’re not opting out of the legal system by fleeing to arbitration. They’re not opting out of jury trials by ex ante contractually waiving them.

So, I think our businesses do know what’s going on, and it suggests to me that tort reform they regard tort reform as fine. It’s like tax lobbying. We can get lower costs if we can pay less in judgments, but it’s not really born of a deep-seated fear of either our litigation system or of our juries.

Thank you.

DAVID M. SCHIZER (MODERATOR)

Thank you, Ted. Our format is that we will ask each of our speakers to speak for about 10 minutes, and then after that we will open it up for questions. Our next speaker is Walter Olson.

WALTER K. OLSON (PANELIST)

Thank you, Dean Schizer.

My topic this morning is, is Europe “Americanizing” its legal system? And, almost every day you see another news story suggesting that, yes, this is happening. In England, if you turn on late-night TV you’re apt to see ads with catchy jingles promoting litigation, saying where there’s blame, there’s a claim. And England and even Germany have legalized what we might call champerty; third parties advancing money to litigants to finance their lawsuits.

France and indeed many countries in Europe are considering introducing class actions or have already done so. Just this April, Shell oil announced a $400 million investor settlement which was ballyhooed as “the first pan-European settlement of the securities fraud case.” It was done with European investors but organized by an American plaintiff’s lead firm. Germany may be legalizing lawyers’ contingency fees. A survey by the Economist magazine found that nearly half of executive and lawyer respondents felt that contingency fees were on their way in, in Europe, where they had mostly been illegal.

In Canada—which I know is not actually part of Europe geographically but which counts as part of Europe for most of these issues of legal classification—they have already liberalized class actions and they are getting a lot more of them in some familiar areas like employment law, where the Financial Post reports
Canada as experiencing a boom in wage-hour, discrimination and harassment suits—does that sound familiar?—against employers. In Ontario, there are proposals to liberalize the awarding of punitive damages against employers. Punitive damages have been pretty rare and pretty low in Canada up to now.

So, we’ve all seen the stories like this, and it is very easy to jump to the conclusion that we have here a big, established trend which is going to go on. And it fits, in fact, the frame of mind that many of us are approaching this with. I think, for many conservatives in the room here, there’s probably a predisposition to believe bad news from Europe. Wouldn’t you know that they would pick up on one of our bad social trends; first to pop, and now this. How typical of modern Europeans to take one of the social advantages they did have and toss it out the window.

At the same time, those who would disagree with many of the underlying premises are also predisposed that—that is, admirers of our legal system here who believe that by and large it’s just ducky.

The people in the leadership of the American Bar Association are also apt to treat this as an unstoppable and a definite trend. If you are a leader in the ABA, for example, you’ve probably been totally mystified at what these strange foreign countries were doing for the last few centuries anyway in their legal systems.

How are you even supposed to run a legal system without contingency fees or class actions? Why is there all this stress on making outcomes of cases uniform and predictable? What’s with that? Why are damages so low in these countries, as almost everyone agrees that they are? What’s with this “loser pays” thing? It’s almost as if they don’t want you to file a suit that’s going to lose. Why is the core of judges so professionalized, so removed from politics, so removed from ideologies, so timid in the way that they defer to legislatures as to what the law should be? Why are they expected to be smart but not creative in these other legal systems? And why are lawyers given so much less scope to do things like discovery? Well, as I say, in the view of many opinion leaders in the American legal system, this is a series of baffling questions to which the answer can only be that these are backward systems, historical accidents, and they’ve never really had a chance to think about the superiority of the American system. And once they do think about it, they will, of course, adopt our way of doing things.

Well, I’m not going to deny that there is some genuine trend here, but I would like to express a bit of a contrarian view and strike three themes in particular. First, the politics of these issues are very much different abroad than they are here, and the political influence of lawyers as an organized body of self-interest is much less in these other countries. It is keenly felt in every one of these countries, so far as I can see, that they do not want to end up with America’s problems, and they have no intention of giving up crucial features of their system.

I’d point out that the pressure to Americanize—we read the stories typically from English-speaking countries, and that is where the pressure to Americanize is, in fact, strongest. I call it the curse of the common language. Our lawyers are
flying over there in delegations with the trial lawyers and bar associations generally, evangelizing sometimes for the American way of litigation.

It starts in law school. A Canadian lawyer told me that they are studying law at a Canadian school. You go to the library, and there are, of course, a few Canadian law journals here and there, but there are row after row and stack after stack of American law reviews, and inevitably you read them, and inevitably they come to seem less than crazy. And this is not by and large happening so much in Asia or in continental Europe, but it is happening in many of the English speaking countries.

Secondly, we tend to exaggerate the extent to which Great Britain is our polar opposite. We think, oh, well, they're totally anti-litigation, and they have entirely different approach. From the standpoint of the most of the rest of the world this is not so. England is viewed as more of a hybrid between the American way of doing things and the rest of the world way, and this was true even before the recent trends. The European Patent Office earlier this year gathered information on the relative costs of litigation across Europe. It disclosed to litigate a small- to medium-size cattle case in England costs between three and ten times as much as the same case in Germany or the Netherlands. Sir Hugh Lade attributes the gap to the English system’s attachments to “lengthy cross examination and oral argument and, above all else, disclosure of documents.”

So, you had a system that was already closer to the American than many of its rivals and has become still closer recently. In England, and indeed all of the countries where changes have been in the offing, there has been a huge national debate. In Britain, you have a great deal of public opinion and bench opinion which is dead set against Americanization. You have a series of decisions by the British judiciary upholding very eloquently principles like assumption of risk, declining the invitation to adopt liberal American damage theories on things like the right to sue over asymptomatic fear of future illness.

Earlier this month in the London Times there was an article by their columnist Michael Harman about proposals to introduce class-action procedure, and he—I’ll just quote a few phrases here—he said that the perceived evils of the U.S. model were on everyone’s mind and that there was a pretty universal consensus that in order to avoid those evils, Europe was going to keep its costs, follow the event principles; it was going to avoid things like damage multiples, triple damages and punitive damages.

In France, the Sarkozy government has been introducing legislation to provide for class actions, and there was an interesting quote from a leader or a spokesman for a leading French consumer group which was strongly in favor of introducing class actions, but Mr. Cedric Rousseau hastened to add, “We don’t want an American law with its excesses. No contingency fees for lawyers or elected judges and jury trials. It would be a series of brakes on abuses with professional judges.” Again, that’s one of the advocates of the legislation. And I think we’ll be waiting for a long time for American consumer groups to use language like that.
Once you turn beyond the U.K. and a few of the continental countries, you begin to see not just a debate about whether to move in the American direction but also some other trends. And many of you in the room here I know are familiar with the long-standing system in effect in New Zealand, where they have effectively national accident insurance, and they take huge numbers of personal industry disputes completely out of the legal system in favor of social insurance. Well, that system, many of you practicing lawyers will be glad to know, has not spread to other countries. It remains pretty much sui generis for New Zealand.

What is showing some signs of spreading, though, is the somewhat more moderate idea known as scheduled damages. This is very familiar to those who have practiced in continental European systems, and it basically is the idea behind our worker's comp, that is that they should come up with a range of payments for particular injuries—broken arms, legs, and so forth—and apply them not just to workplace injuries but to auto accidents and accidents in general.

A couple of years ago, Ireland—which had been, as you can imagine, very close to the English system in the way it approached a lot of these issues—decided on a very radical change, the sort of radical change that one seldom sees in the tort systems. Ireland decided to adopt scheduled damages, and I will read just a couple of sentences about what it did. "Henceforth, the compensation value of a broken arm or leg, aside from lost wages and other economic damages, will be determined with reference to a schedule or table known as the Quantum, which will serve as an indicated settlement figure. The Quantum damages will retain some flexibility to account for the details of particular injuries and injured persons, but they are intended to be set at the same average level as the Irish courts are currently handing out for each variety of serious injury. The difference is that there will be no occasion, or at least less of an occasion, for dueling attorneys to argue damages afresh in each case in hopes of getting something higher or lower than the norm." This is tragic, of course, if you are in the business of litigating cases. It takes away, in a great many cases, the opportunity to have much of an argument over damages, and it just leaves you with liability.

Canada—Canada is our closest system, and it has been liberalizing, yes, and yet the things that it is doing don't always make it into American papers. Relatively few Americans seem to be aware that in Canada they had their tort reform thirty years ago. According to my colleague Michael Cross from George Mason University School of Law, who is from Quebec originally, he says appeals courts revise damage awards from lower courts for uniformity, not the same standard that American appeals courts do. In the 1970s, Canada Supreme Court peremptorily announced it would no longer tolerate huge differences in non-economic damages, that is pain and suffering, so it was going to put a lid on them of $100,000. It's adjusted that for inflation, but it's still in effect.

And finally, Australia, Australia in many ways was the most American-like in its litigation. It had very high rates of it. There was an enormous national debate, and I believe every state in Australia enacted very strong liability rules; so strong
that there was an enormous outcry from the legal profession because lawyers were being laid off left and right. A whole floor of a Sydney office building was emptied out. You could see right through it from one window to the other because of all the layoffs of lawyers. And New South Wales Bar Association President Ian Harrison warned that up to a third of barristers could lose their jobs. Well, what do you think the Premier of New South Wales Bob Carr said? He said, "Tough."

The Premier gave the lawyers short thrift, saying he’d rather see money going to workers than lining legal eagles’ pockets. "Australia would have been put out of work if we hadn’t performed the tort laws and reined in the culture of litigation in New South Wales," he said. I will close by noting that that popular premier, Bob Carr, is an ornament of the Labor Party. Things are very different over there.

Thanks.

DAVID M. SCHIZER (MODERATOR)

Walter, thank you. Our next speaker is Victor Schwartz.

VICTOR E. SCHWARTZ (PANELIST)

The Dean asked if we wanted to sit or stand. But if you’re 5'5'', it doesn’t really make much difference.

I want to thank the Federalist Society and David Ray; they have really made this very good. You’ll see and you’ll hear the professor who follows me, some of his views will be different from my own. The Federalist Society is always balanced with their speakers, and you’ll see in this morning’s paper there is a new group—actually it started about five years ago—called the American Constitutional Society. In this very place, they had me at the first meeting. So, I didn’t mind that, but outside they had this truck with very soft tomatoes and a plaintiff’s lawyer selling them. It said, "Schwartz speaks at ten." I mean, that was just a little—the Dean and I had something in common. He was the youngest dean, I believe, in the history of Columbia, and I was thirty-two when I was Dean at Cincinnati, and all of the faculty were older than I am. And I learned a life’s lesson forever. To this day, I can deal with cranky people. I mean it’s just a great opportunity to be a young dean.

I’d just say off the top right in the beginning, Professor Eisenberg’s works are really great works. The data always tends to show a lot of what the tort reformers say is not true. Some of us call it data rape.

But it tends to be that way. But we don’t really—the American Tort Reform Association, if you look at our website, actor.org, or the Institute for Legal Reform, we’ve never, in years, criticized juries. That may come as a surprise to you. Judges, yes—we do have our “Judicial Hellholes” report. We find the judges that really are unfair. We look at the legal system, not at the juries. I did plaintiffs’ work for fourteen years. I like juries. I think there is a little bit of a problem when
they’re not given good rules or atmospheres in which to conduct objective judgments.

This morning I’m just going to talk a little bit about the new personal injury lawyer path to expand liability. I have an outline. If any of you are interested in any of these trends, contact me; contact ATLA. But these are the trends that at least I see. We study very much what the plaintiffs’ lawyers are doing. I have great respect for them. I did it. They have a terrific leader now in Jon Haber. He’s the best leader, I think, now they call it AAJ has ever had. One of the areas is to expand the growing link between personal injury lawyers and public officials, sometimes state attorneys general, sometimes persons in lower hierarchy in the states, and how contingency lawyers bring cases on behalf of the public.

Some say it’s a good idea. They save money. There is a contingency fee. It doesn’t come out of state coffers. Others are more concerned because some of the delegations to these personal injury lawyers are almost complete. The Rhode Island Paint Litigation, for example, is literally run by a plaintiffs’ firm, and plaintiffs’ lawyers. I was one. Their allegiance is not necessarily to the public at large but to expand tort law as much as possible, get as high a verdict is possible, and that’s their position. Does the delegation become just abdication of responsibilities? We think it does. They think it doesn’t. But it’s certainly a trend and it’s going to expand. Whether it’s guns or drugs or other things, you’re going to see more and more in the next five years, state attorney generals handing over power to enforce their tort part to personal injury lawyers.

They are seeking, and it’s been this way for a long time—nothing wrong with it—to expand liability in the courts by changing fundamental doctrines. How many people are lawyers here? A lot of them. Well, you know from law school there was something called public nuisance. Actually, it’s in the back of my casebook. Most people never get to it. But it’s an arcane tort, and it was used to stop activity that was harmful to the public at large. If somebody put a big log across Connecticut Avenue or they dumped junk in water, well, it was a good tort—it is one—to stop that and get injunctions against it. But now, the fundamentals of public nuisance, at least our friends in the plaintiffs’ bar, are trying to change it so it becomes a money damage vehicle to get money, not stop activity; to expand private rights to sue; to call things nuisance that really work; to empower state attorney generals to bring actions to recover under Medicaid for a whole variety of things that never were before. It’s a trend. It’s going to expand. We’ve written articles about it, but it’s a vehicle for change. Is it good? We’ll see in our society.

For over twenty years there have been things called consumer protection acts. I never really was familiar with them until about five years ago. I thought they were public issues, and they generally are, but now they are used as private ways to sue. And they are written so loosely that in this town—all of you know who live here—a judge was able to prolong a case for two years seeking millions of dollars because he left his pants at the dry cleaner, and they forgot to bring them
back. These laws require no reliance. These laws in many states don’t require that somebody is injured, and while they say “consumer,” I think they are a trend that is inexcusable in its content.

In the United States Congress, people representing the public plaintiffs’ bar are looking for ways to expand their right to sue. Again, no problem with it, but I would alert you to it. In the CPSC—the Consumer Product Safety Act reauthorization in the Senate—read it and you’ll see in one of the pages, guess who’s going to enforce the CPSC? Fifty-one different state attorney generals with no supervision whatsoever—so if they decide something is defective, let’s go do it. The CPSC can intervene, but they have a very small staff and I don’t think they can monitor fifty-one state attorney generals. I think it’s brilliant in terms of what the plaintiffs’ lawyers are doing.

They also, in federal legislation and state too, are trying to seed what are called implied causes of action, and the lawyers in this room would know what they are. It’s a regulatory rule that on its face just regulates, but they formulate it in a way so a court may later say that there is a new right to sue. Restaurants have to show what trans fat is; if they don’t, there’s a penalty. But if you create a private cause of action, somebody whose triglycerides were elevated because of these trans fats could have a right to sue. I think there should be transparency. I think if some legislature is going to create a new right to sue, they should say it. But that’s not really current law, and trends in that direction are right. They are seeking also to end all preemption. That is all right, but I think when something is heavily, heavily regulated in a proper manner, bringing a tort suit contrary to that is not sound public policy.

Since I started teaching torts a long time ago, and we did our first edition of the casebook in 1976, the mantra of plaintiffs’ lawyers—and I said it was true and still believe it to an extent—is the development of law should be by judges. That’s tort law. And that was always the mantra of the plaintiffs’ bar. But in the past elections a number of state legislatures have fallen under dominance of the trial lawyers, which is okay. But they are now using the legislature at the state level to expand rights to sue, to create brand-new rights to sue, and because law is so arcane these things are not always understood. Wrongful death actions not for mothers or fathers are children, but for cousins; expanding consumer protection acts that have requirements that say you have to rely on what you’ve seen; a lot of other trends, and also to undermine or change current tort reform.

A lot of tort reform does work. In Mississippi, in Texas, medical liability reform was put in place, and insurance rates have fallen a lot. Doctor and medical services are more available. I respect the work of Professor Eisenberg, but if you spoke to persons in rural Mississippi who couldn’t have access to medicine because of high medical liability costs, they don’t read the empirical journal. They just know that they don’t have access to medicine. Tort reforms have come in. They’ve done some good. The efforts are now there to repeal them.

I just would say in conclusion that these trends are all worth looking at. They
are a concern to me. They may be of concern to you. The plaintiffs’ bar can make very sound reasons why they think they’re in the interest of democracy. I really don’t think they are, and I thank you for your time.

DAVID M. SCHIZER (MODERATOR)

Thank you, Victor. Our final speaker is Professor David Vladeck.

DAVID C. VLADECK (PANELIST)

Good morning. I want to thank the Federalist Society for inviting me and for bringing me together again with my good friend Vic Schwartz. Every time Vic says he is “concerned” I feel good. It is just wonderful to listen to his litany of “concerns” about the tort system.

I was invited, think, to be the contrarian here, so I would like to start by explaining why I think this panel has been misnamed. The problem is not overlawyering; the real question is whether underlawyering is undermining democracy. If my view, the answer is “yes.” If one looks at the trends in our legal profession, the truth is that most Americans have no access to legal services, cannot afford them, and this trend of under-service is accelerating, not slowing down. According to the Legal Services Corporation, the American Bar Association, and everyone else who has looked at the question, 90 percent or more of the legal service needs of people who are not poor but are not rich are not being met in the United States. That is the sobering fact.

When I went to law school, most lawyers who graduated ended up serving the people. We ended up representing people. That’s no longer the case. If one looks at the demographic shifts in the profession, the majority of lawyers now go to institutions that represent corporations, not individuals, and this under-service is accelerating with cutbacks in legal services, in reductions in public funding for legal aid, and in declining pro bono service by lawyer. I think the profession has reached a point where there has been a fundamental breakdown in our ability to provide legal services for many, many Americans.

Consider the call from Second Circuit Judge Robert Katzmann, who, along with his Second Circuit colleagues, are facing a tidal wave of immigration cases

(as is the Ninth Circuit). Judge Katzmann recently addressed the Association of the Bar of the City of New York to explain why the dearth of lawyers representing immigrants was resulting in the denial of immigrants’ rights. Judge Katzmann noted that nearly two-thirds of these immigrants are unrepresented in immigration courts.9 As a result, by the time they get to the Court of Appeals, their cases are often hopeless. Why? When these cases go before the Court of Appeals, the court is “largely constrained to defer to the agency’s ruling,” which is based on record compiled before the agency.10 Unrepresented immigrants cannot be counted on to assemble a record, to present the right arguments, and to avoid prejudicial filings. They are then caught up in a deportation nightmare that might have been avoided. Because of the lack of legal services, immigrants often face deportation—often with devastating consequences to their families—simply because there are no lawyers on hand to help. So, the idea that we are suffering from overlawyering depends on where one sits. If one sits in the corporate board room, there is no shortage of lawyers. If one sits anywhere else, unless he or she has a contingency fee case, he or she is going to have a difficult time getting a lawyer.

Making this trend worse—and here, Victor and I are going to cross swords a bit—is what I consider to be the acceleration of door-closing devices that deny justice by keeping people out of court. Victor talked about preemption. Well, let’s talk about preemption. In the last six years, this administration, by regulatory fiat, has announced broad preemption of liability claims for virtually every consumer product that is regulated by the federal government.11 Vic wants transparency? There has been none of that. These were not preemption decisions made as part of a formal rulemakings. The agency simply announces, in a preamble to a final rule, often having nothing to do with preemption, that going forward, for example, all failure to warn claims with respect to pharmaceuticals will be preempted, notwithstanding the fact that is no preemption provision in the Food and Drug Act relating to pharmaceuticals and tort law and FDA regulation have co-existed since the agency’s founding.12

The National Highway Traffic Safety Administration is in the midst of rulemaking on seven different issues. In each rulemaking notice, NHTSA claims that, “going forward, our rule will preempt state tort law.” This is the largest wholesale revision to consumer product tort law that I think has taken place since the development of strict liability, yet it is taking place in a non-transparent way.

10. Id. at 7.
And if it succeeds—we’ll know that down the road when the courts start to review these claims—we may see a wholesale revision of our tort law, not accomplished by Congress, not fashioned by courts, but achieved through regulatory fiat.

There are other factors as well that I think are making it more difficult for ordinary Americans to get legal services. The data show, and Professor Eisenberg is right, the rate of tort cases both in state and federal courts has been stable over the last fifteen or twenty years. Now, there needs to be an asterisk next to that statement because, during that time, the courts have been flooded with asbestos cases, and if one controls for asbestos, that is, take asbestos cases out of the mix, there has really been a decline in those kinds of cases even though the population of the United States has grown by about 20 percent in that time. So, is there an increase in tort litigation? I think the answer plainly is no. And if one controls for asbestos litigation, then the answer is certainly no.

Let me turn to some of Professor Olson’s comments because I think instead of the Americanization of European law, what we ought to consider is the Anglicization of the American legal system. Our legal system was founded on the English system, but the English legal system has addressed the issue of under-service to ordinary people in ways that the American bar ought to at least take a look at. For example, in the United States, 90 to 95 percent of people who go to legal services organizations with a viable claim and qualify for legal services because they meet the very low thresholds of income eligibility are turned away. Why? Not because they don’t have a viable legal claim, they generally do; and not because they’re ineligible, they generally qualify. They are turned away simply because legal services providers do not have the capacity to address their needs.

In England, someone in their situation would have access to counsel; they would go to a private lawyer, and the private lawyer would be paid for by the state. There is virtually universal access to legal services by the poor. Now, some people might complain that that places too great a burden on the government. Maybe it does, maybe it doesn’t. Who is to place a value on someone else’s legal claims. But at least in terms of access to justice, the English are far ahead of us.

In terms of contingency fee cases, the English have addressed the problem in a way that may make more sense than our approach. The English have not yet approved contingency fee cases, but it is now permitted for English lawyers to use runners to directly solicit clients. That practice is still forbidden (at least in theory) here. If a lawyer brazenly went up to solicit a potentially fee-paying client, that would be a violation of the disciplinary rules, and nobody here who practices law would do that, or at least do that in any public way. In England, there are people with clipboards on the sidewalks signing up people for litigation. That is the ninth circle of Hell for Victor Schwartz.

But it gives people access to the legal system. One might argue that England still has the loser pay system, and the possibility that a plaintiff might bear the
defendant’s legal cost is a powerful deterrent against litigation. But the English rule has been moderated to a large extent because there are now insurance systems that permit people who think they have viable claims to go to insurers and essentially buy insurance. This would be, of course, unethical and impossible in the United States, but there are risk-spreading devices available elsewhere that enable people who would otherwise be frozen out of the legal system to participate.

Now, I’m not suggesting we adopt any of these proposals wholesale. I, too, do not want to see people standing on the street corner with clipboards signing people up for lawsuits. On the other hand, we have reached a point where we need some kind of breakthrough on the provision of civil legal aid to Americans. We need a civil Gideon. It is simply hard to imagine that we have a million lawyers in the United States, but most Americans, unless they are fairly well off, cannot afford basic legal services. That seems to me intolerable.

I have been told I got to wrap up. Let me just say one last word. I think that there are all sorts of frictions in the joints in the way the American legal system works. I think we need to have a conversation about how to improve access of justice, how to improve quality of justice, how to make these decisions in a more transparent way. Take preemption as an example. I agree that if Congress decides that a heavily regulated product ought to be insulated from tort law, that is Congress’s decision to make. I do not have a problem with making that decision in an open and transparent way, nor do I have any problem with the common law system working the way it always has, which is letting judges and litigants fight it out.

I am very troubled by this new trend of preemption by regulatory fiat. These are statutes that, by and large, do not contain preemption provisions, or in the case of the National Highway Traffic Safety Act, contain savings clauses, and the idea that a regulatory agency can, in the face of contrary congressional direction, simply declare that its regulatory acts are going to have a preemptive effect, I find deeply troubling.

Thank you so much.

DAVID M. SCHIZER (MODERATOR)

I promised you a lively panel. I think we delivered on that promise, and we would love to buy two questions. If you’re near a microphone and can ask it that way, that would be even better, so—yes?

AUDIENCE PARTICIPANT

Ted Frank. I’d like to possibly point out some agreement between Victor and David, and that is, over the last twenty or thirty years we’ve seen the number of lawyers increase, the number of corporate lawyers increase, the number of
corporate litigators increase, their billing rates increase, and that can’t be because the number of tort cases or the volume of tort litigation is going down. It’s because it’s becoming more important to have $500-an-hour lawyers, or more expensive lawyers, looking at these cases because of the billion-dollar consequences of litigation. And perhaps if there were some more constraints on that, the amount of American resources devoted to litigation would be going down, and there would be more access to justice because lawyers wouldn’t be priced out of the market by the need for corporations to bid for these lawyer services.

DAVID C. VLADECK (PANELIST)

The only point I would make is, and I would be interested in Professor Eisenberg’s view, my sense is that to the extent there’ve been dramatic increases in litigation, it is corporate versus corporate litigation, not tort litigation. And so, many of these $500 an hour lawyers are involved in very complex litigation, but pitting one big company against the other.

VICTOR E. SCHWARTZ (PANELIST)

I would say, and this is not directly related to your question, Ted, but some of the speakers were saying that the amount of litigation has remained the same. And in my practice, I just think that that’s a figure that is not really the one to watch. In my experience in the past twenty years, the number of settlements has grown astronomically. I mean, last week there were 65,000 cases pending against Merck. Today, there may not be any because they were settled in a $4.5 billion settlement. So, just to look at what actually goes to trial is not really looking at the system as I know it. The numbers are there in litigation, but in settlements you can’t find those numbers. And more and more, I see defendants are more interested in settling because of the cost of litigation and risks of exposure.

THEODORE EISENBERG (PANELIST)

That just doesn’t wash. The number of tort filings is down. Trials are way down. But the number of tort filings is down, and it’s very dangerous, Victor, to generalize from your personal experience.

VICTOR E. SCHWARTZ (PANELIST)

I never found it dangerous.

DAVID C. VLADECK (PANELIST)

Let me say one word about class-action. Victor was very unhappy with class actions, but the only pharmaceutical cases that are class actions are pharmaceuti-
cal cases that settle. And let's not forget that it's often the defendant who wants a class-action case because what they want to do—there's nothing wrong with this—but they want to buy res judicata as broadly as they can, as inexpensively as they can. And Merck obviously was very well represented; very able lawyers. They obviously made a judgment, an economic judgment that it was going to cost them less over time to settle, I forget how many cases it was that were wrapped up in this class-action rather than go in the other direction. But notice that Pfizer, which is facing the same kind of litigation with its COX-2 inhibitors, is taking a very different approach.

VICTOR E. SCHWARTZ (PANELIST)

I want to hear other questions, but the Merck settlement was not a class-action settlement. Just so everybody here knows, it's a settlement of individual cases one by one, just so no one is confused about it.

DAVID C. VLADECK (PANELIST)

No, but there was the Vioxx class action that included thousands of claims, which was settled along with everything else.

AUDIENCE PARTICIPANT

I have a question for Theodore Eisenberg.

THEODORE EISENBERG (PANELIST)

Yes.

AUDIENCE PARTICIPANT

Yes, I have a question for Theodore Eisenberg. As I understand it, you studied bilateral contracts by large, sophisticated commercial entities and determined that only a low percentage of those included either jury waiver clauses or arbitration clauses. You concluded, therefore, that the legal system can't be too dysfunctional, at least not with respect to this kind of claim. I'm wondering, though, since you mentioned that arbitration clauses are almost ubiquitous in various types of consumer contracts, whether that very high instance of arbitration clauses in those kinds of contracts suggest that in fact the legal system is in crisis with respect to consumer contracts.

THEODORE EISENBERG (PANELIST)

It's hard to generalize from what we did to the consumer contracts because we didn't study them. I'm actually doing a study now. I think you could interpret it as
a crisis in terms of millions and millions of consumers suing their phone companies for the one-dollar overbilling they get each month, but I think what’s pretty clearly going on with the arbitration clauses in consumer contracts is it’s simply an anti-class-action device, or more generally an anti-aggregate litigation device because no one’s going to actually sue their cell phone company over the little ripoff they get each month if the phone company miscalculates the bill or it systematically cheats everyone a little bit. So, what the phone companies fear and the credit card companies fear is aggregate litigation, and the way to avoid that is through arbitration clauses that ban class action activity. So I don’t think there was a whole swarm of suits against phone companies by individuals. It’s only class actions that they’re fearful of, and that’s why they put it in.

I think Merck is a really good illustration of the big question that should trouble you whether you’re conservative or liberal or whatever. If the bottom line is plaintiffs’ attorneys are doing too much and we should leave this to the government, we really have to ask, “Where is the government with respect to Merck and Vioxx?” This is a company that published an article in the New England Journal of Medicine that left out three heart attacks so they could say that there was no statistically significant increased risk of heart attack on Vioxx. Well, the science has subsequently proven that completely wrong. Someone lied, cheated, or stole their way into misrepresenting that data. The New England Journal of Medicine published, in the polite phrasing of science, an “expression of concern” about the omitted heart attacks. And where is the government?

It’s true, it’s not so great that the plaintiffs’ lawyers may be the ones doing this, but there are no Merck executives in jail from the Vioxx behavior. Where is the consideration of indictments for the deaths of the people who died from the drug? The drugs was a known killer, and it was put on the market without adequate warning.

VICTOR SCHWARTZ (PANELIST)

Hey, Ted, you like the jury system. Twelve jurors who heard all that stuff in full context found for Merck. And I don’t want do debate the Merck cases, but I think it is—to this audience, I wouldn’t look at it that way when twelve jurors who heard all the evidence found for Merck. And I think getting into a one-sided defamation of a company in this audience is just not a good idea.

WALTER K. OLSON (PANELIST)

Let me throw in, tying in with one of Professor Vladeck’s, themes, the British legal aid system examined Vioxx claims and decided that they were not viable and it would not go forward on behalf of British patients. It turned out to be a very accurate assessment of the weakness of litigation, as we now know, seeing that Merck is buying its way out so cheaply from the cases.
I’d like to throw in a remark or two also about commercial litigation because maybe it’s not a tension between Professor Vladeck’s comments about how the real litigation is business versus business and Professor Eisenberg’s findings that business isn’t all that worried these days about business versus business litigation. One way to square the circle might be that the most intense and expensive areas of business to business litigation might be of the non-contractual cases. It might be intellectual property. It might be antitrust or unfair competition claims. So, maybe that’s why commercial litigation is perceived as intense and yet cannot be contracted out from.

But I would say, just from having watched things since at least as far back as the Texaco Pennzoil case, that for quite a while people were worried. You had all of these Texas plaintiffs’ lawyers running around saying Texaco Pennzoil and the three or four similar things that John O’Quinn did in Texas are just the start, and before long we’re going to do to commercial litigation exactly what we’ve done to product liability. And that produced a panic for a few years. And then they realized that, in fact, lawyers weren’t very good at replicating that, and state courts were not very interested in providing them with more thought.

What I take from Professor Eisenberg’s very interesting study is that as a patriotic New Yorker, I’m glad that the New York courts are considered good for commercial contract litigation. I think that’s been true for a century or so. And you know, the more New York prays, the better. I would not, however, rush to take comfort if I were, let’s say, a doctor in New York.

AUDIENCE PARTICIPANT

This is a question for Professor Eisenberg. I wonder if he could comment on what may be a trend, and depending on how the U.S. Supreme Court rules in the Hall Street case that was argued a few years ago about the provisions for enhanced judicial review that have been occurring in arbitration contracts that provide for arbitration but then allow for judicial review for legal error, whether that was studied in your study and what effect that might have if the Supreme Court says that’s okay under the Federal Arbitration Act.

THEODORE EISENBERG (PANELIST)

I’m not as familiar with the details of the arbitration issue in the case. Arbitration gets, I think, too much credit and too much blame for a lot. Arbitration, at least in the employment context, may—I mean if you accept what Mr. Vladeck said, that the average person can’t get a lawyer for the average claim, it may be that arbitration is a way in which you can get dispute resolution at a reasonable expense, and it may actually have a role to play. Studies I’ve done suggest that plaintiffs don’t always lose in arbitration, that there are some fair arbitrators out there, and that plaintiffs can win in arbitration perhaps as much as
litigation. The problem is cost, and I'm not sure the word is in yet on whether arbitration is actually less expensive or more expensive.

I think arbitration at its best is very good, but at its worst, you know, is just a way of cutting off access to court because people know you'll never arbitrate.

AUDIENCE PARTICIPANT

Professor Vladeck, I had a proposal. I was kind of interested in what you think about this. This would be a return to the free market, where if we rewind 100 years where we didn't have virtually every state requiring a three-year law degree for entry to the bar, we had more the model of the patent bar where you could take this exacting exam, and then you've also got the option, if you'd like higher rates, of going and pursuing a legal education, or you could do a one-, two-, or three-year degree.

As someone who just spent $100,000 and three years of time when I could've been working on a law degree, you know, the idea—I can't even afford to give someone a rate that would be considered accessible. And at the same time, the idea that if I go do some pro bono work in criminal defense for a week or year, that's going to be doing any kind of service to the public versus what they could get if they could hire someone who only had to spend one year in law school, that's a better arrangement seems kind of ludicrous. And I'm curious about how you would respond to that type of a system.

DAVID C. VLADECK (PANELIST)

I have to be very careful. My Dean is just sitting down—I cannot come out against formal legal education.

When I went to law school, which was back at the end of the Pleistocene era, there were many states in which you could read for the bar and take the bar, and I know lawyers who are practicing in Washington, DC today who did that, who are quite able lawyers. So I agree that law school as a barrier to entry is not necessarily something that I think is necessarily a good idea. So reading for the bar would be fine with me, as long as you pass the bar exam. I'm not sure it would be fine with Dean Schizer.

AUDIENCE PARTICIPANT

I enjoyed the discussion of the relative merits of the American and the European legal systems. One subject that none of you touched on, which I, in over thirty years of practicing law and having had the opportunity to take some wonderful trips to other countries, observed is that we are the only country in the Western industrial world that does not require mandatory apprenticeships as a condition of practicing law.

Now, law school is a wonderful thing, but I can tell you that most of the bad
lawyering and frivolous lawsuits and the problems that create the public perception that the problems with our profession come from young lawyers who, you know, are heavy with student loans. They hang out a shingle. They advertise. They don’t know the first thing about how to evaluate a case, and I’d like your comments on this because in California we’re trying to start a movement to emulate the British Inns of Court and to bring about a mandatory requirement to emulate the medical profession, to require that more than just graduating from law school, it should be a prerequisite to represent clients in litigation.

DAVID C. VLADECK (PANELIST)

The Carnegie Commission has just issued a report that I think is sending shockwaves through law schools; because it takes pretty much the same view that you do, that when students graduate from law school, they are not at all trained to actually be lawyers. And so one of the proposals that the Carnegie Commission has made is that law schools try to re-orient their curriculum to make sure that students, before they leave, have something akin to what you are describing, that is, some kind of structured, supervised opportunity to actually engage in the practice of law. I think our school is taking a very hard look at trying to provide students with those opportunities, not as clinical opportunities, but externships and other forms of classroom-based, formal skills training. I think your views are very much in sync with those who have taken a look at legal education. I’d be curious to hear Dean Schizer’s views on this topic.

DAVID M. SCHIZER (MODERATOR)

I think that legal education at its best is supposed to prepare people for the practice of law—wow, a shocking assertion. And yet, there is a growing divide between legal academy and the practice, and it’s something that we really all ought to care about, and I think it’s something that we ought to address at the nation’s law schools. My own thought is that clinics are an important part of it. Experiential learning is an important part of it. But it also gets to the way we teach people—a slight aggression.

This panel is about litigation. I’m more of a transactional lawyer myself. I remember my first experience as a practicing lawyer at a law firm. I was asked to mark up a stock purchase agreement, and I said to the associate who’d had asked me to do it, “I’d be happy to do it, but I have two questions: What’s a stock purchase agreement, and when you say mark it up, what do you mean?”

Aside from that, I was flawlessly prepared. And one of my own personal missions as a member of our faculty at Columbia and as Dean is to try to broaden the way we educate lawyers. I teach a class on deals, where we actually do Socratic conversations about stock purchase agreements. I think the students really like it, and I learn a lot from them.
I’m not as convinced that there is sort of a one-size-fits-all answer for every young lawyer and that it would necessarily look exactly the way you’re suggesting, but I think the spirit of what you’re saying is a point well taken.

THEODORE EISENBERG (PANELIST)

I think there’s also a tension between law schools’ sort of internal reputation among other good schools and sort of very specific hands-on training of individual lawyers. We tend to get our prestige from, in the exaggerated phrase, pointy-headed intellectualism that’s of no relevance to anyone else, but that’s a slight exaggeration. We don’t tend to get, within the law school world, prestige from training lawyers very well. We tend to get it from academic articles—some practical, some not—but tend to get it from academic articles. The actual high-quality training of lawyers is something we are not competing on in some deep sense. That is, our reputations don’t rise or fall nearly as much on that as they might.

But there’s the cost there. I think high quality individualized training of lawyers is expensive, and so you might have to double or triple high-quality faculties to produce sort of no net change in the degree of good scholarship being produced and to add the fact of very good lawyering, which I’m sorry to say may drive up the cost of legal education because right now we’re really cheap in some sense. We’re cheap for the universities because I can stand there in front of a hundred students and train them, at least to the degree we train them. If I’m a doctor, I have to get individual with each of them and actually teach them how to do something, and it’s very expensive.

WALTER K. OLSON (PANELIST)

I think this issue ties in with the greater inclination of other countries’ legal systems to try to create peer pressure among lawyers, as well as from the bench where lawyers feel that they’re more under scrutiny by their peers. A residency system or apprenticeship or Inns of Court, or call it what you will, will probably increase the degree to which lawyers feel under scrutiny by their peers as well as—you know, one good way to become an ethical lawyer is just to practice under an ethical lawyer and see how the decisions are resolved.

VICTOR E. SCHWARTZ (PANELIST)

One time when I was teaching at a law school, I was teaching kids how to settle cases. It was a small section. And another faculty—this is true—went to the Dean and told on me, that I was hurting the reputation of the law school. So when the Dean and spoke to me, I said, you know, he should think more broadly. I was hurting the reputation of the law school because I was there, not just—
DAVID M. SCHIZER (MODERATOR)

Yes.

AUDIENCE PARTICIPANT

On your last point, the Vanderbilt University Law School is developing a bridge between practice and academic experience as well.

A short comment and question. Professor Vladeck, if you believe that there is not a de facto solicitation practice in the plaintiffs' personal injury bar in the United States, you just don't understand that industry. But my question—after thirty years in litigation and following these subjects, I would conclude that the broad-based tort reform initiative in this country has largely been a failure. George Bush made that a plank in his campaign platform in 2000, as you know; major legislation of tort reform.

However, over the last quarter-century, I think you see some rather significant incremental reforms in litigation that mirror some of the planks of the tort reform movement. One is the increase and move toward mediation and arbitration, and in many jurisdictions it becomes mandatory, such as my own in Illinois. Another is developments reflected in the Daubert decision in which there's a real concern about junk science, which was in proliferation probably a quarter-century ago. But now, the federal courts provide a process for limiting what expert opinion comes in. A third is in looking at the length of litigation. The Eastern District of Virginia here just across the river has what's called the "Rocket Docket." I think I'm going to be a victim of that this year. Cases go to trial within nine months after filing.

So, would you share the opinion that there have been many significant incremental changes in the litigation system in this country that has had an impact on this litigation explosion?

Thank you.

DAVID C. VLADECK (PANELIST)

Well, I agree that some of those changes are important. But I do not think that tort "reform" has failed, if one measures success as insulating business from litigation or liability. For instance, Congress passed the General Aviation Recovery Act to revive the general aviation industry in the U.S. Maybe that was the right decision. Both Cessna and Piper had closed or were close to shutting their doors. Ten years later companies are thriving; providing 20,000 or so high-paying jobs. Congress recently passed the Class Action Fairness Act (CAFA). Now, federal courts have interstate class cases; state courts have state cases. The business community lobbied hard for CAFA So those are two instances in which the tort reformers can claim victory. Obviously, I'm no fan of CAFA, but for those on Victor's side of the debate, these are two successes.
THEODORE EISENBERG (PANELIST)

I think I agree with—I'm not sure that legislative program has been quite as successful as tort reform would hope, but I think overwhelmingly—it's hard to measure, but I think tort reform has been a huge success for the defense over the last twenty or twenty-five years, not so much because of individual reforms but because of the—depending on your point of view—education or brainwashing of America. That is, we have been told over and over again—why isn't this panel called “Overlawyering in the Face of a Decline in Lawsuits”—we're told over and over again that we are in crisis, and I think people have internalized it. We have Judicial Hellholes, by our data virgin, Victor Schwartz—we have these labels thrown around. And so, people have really internalized it. It's really tough to win a case, and I think tort reform has been an enormous success.

DAVID C. VLAD ECK (PANELIST)

Let me just quickly add, I agree with that, that tort “reform” has had a huge bite. And if you just look at the flat line of aggregate damage ones, if you measure the success or failure of tort reform by payouts, I think you'd have to say tort reform has been successful. And please be assured, I have no illusions about solicitation in personal injury cases or in any other form of litigation. My only point was in the United States, it is still inappropriate, at least if you read the Code. In England, it is no-holds-barred.

WALTER K. OLSON (PANELIST)

I wish we could measure the success or failure of these things better. My own inclination is to look for data streams. We are capturing actual payouts that include settlements rather than just things that reach verdict, which are a tiny percentage of that, and we don't have very good data streams on most of the areas like product liability. The numbers are about as good as anywhere on an area like medical malpractice. And there, it doesn't quite bear out either side's case. Payouts seem to been very fairly level in recent years after having increased enormously twenty years ago or so.

In product liability, yes, we can get at some things like asbestos, which continues, so far as I can see, to go up and up and up. But that doesn't mean the pharmaceutical cases are not also producing lots of money. We just don't have as good numbers on it.

AUDIENCE PARTICIPANT

Thank you.

AUDIENCE PARTICIPANT

Hi. I was just wondering, Mr. Eisenberg, you spoke about rent seeking
behavior among corporations and kind of—

THEODORE EISENBERG (PANELIST)

What kind of behavior?

AUDIENCE PARTICIPANT

Rent seeking, trying to reduce their costs by pushing tort reform. And Mr. Schwartz, you spoke about the plaintiff’s bar and opposing this in seeking to increase their revenue. But what about the defense bar? It seems like they’re some of the most powerful organizations in the legal community, and it seems like their incentives match up largely with the plaintiff’s bar in terms of the more work that exists, the more work they do as well. What’s their role been, and you know, what should their role be in this debate?

THEODORE EISENBERG (PANELIST)

Well, first, I think you’re right. I’ll use the currency of anecdote. One of my plaintiffs’ lawyer acquaintances was given some trouble in the southern state by some defense lawyers who were hassling him, and the way they punished that defense lawyer was to drop his client from the lawsuit.

And that type of troublesome litigation behavior ceased in the next case. But I think the defense side—well, you know, if they go by the rules of the game, vigorously defend their clients, and in some cases they use no holds barred litigation, I think, yes, their interests join the plaintiffs in the sense that they get paid more in litigation. But I think some of the excess costs of litigation are in fact because of agency problems with defense firms. There are lots of agency problems addressed on the plaintiffs’ side, but they’re huge on the defense side, and you bill by the hour, and you’re not overseen closely, and there are insurance companies paying the costs rather than the client itself. There are huge overcosts, I think, overruns in what defense firms are paid, although it’s very hard to get inside the data.

WALTER K. OLSON (PANELIST)

You’ve touched on one of my pet topics. I had the discussion and my last book, The Rules Lawyers of the Defense Research Institute, which quietly but regularly sends witnesses to testify against measures that would scale back the liability of their own clients on the defense side. And some very fun memos came to light during a couple of California initiative campaigns. California, as you know, has had several runs of business trying to limit auto crash cases and others. And the Association of Southern California Defense Counsel sent out an urgent emergency memo saying we have to stop this. There’s not going to be any auto defense
business for us if this sort of thing passes. Please join with our plaintiffs' brethren to make sure this stops. You know, it was all pretty shameless. After the memos appeared in the newspaper, no one apologized. No one changed what they were doing.

VICTOR E. SCHWARTZ (PANELIST)

One summer at Kansas City—our firm, Shook, Hardy & Bacon headquarters is there, and the firm is litigators. We have this little public policy group that deals with tort reform, but we're five lawyers in a 600-person firm. And a summer associate said, Victor, isn't what you do putting the rest of the firm out of business? I thought that was a good little question, while the chairman of the firm was there. But to some extent, the answer is it does reduce the cost of litigation. It does mean fewer billable hours. And I agree with Walter. In general, the defense bar per se is not—has not—been active in civil justice reform. The spearhead has been more the companies themselves and organizations that support and work with those companies.

There have been exceptions, and there are defense lawyers that have worked very hard for civil justice reform regardless of whatever individual consequence there might be on their rates. Attorney General Thornburgh would be an example of that.

AUDIENCE PARTICIPANT

Thank you.

AUDIENCE PARTICIPANT

I had a question for Professor Eisenberg. Before I ask it, I noticed that you said median awards were flat, and you also said the tort reform had been massively successful, so I take it that you believe that justice requires that median awards be spiraling upwards.

THEODORE EISENBERG (PANELIST)

Spiraling seems like a loaded term.

AUDIENCE PARTICIPANT

It was. My question is—the median award can hide a lot. As a former plaintiffs' lawyer, I was very surprised by what you said. I was wondering whether you accounted for differences in practices like med mal, or particularly obstetrics and gynecology, employment discrimination. I was wondering whether you accounted for differences in regions. I had always heard it was good to
practice in the Bronx, in North Carolina, and certain parts of the South. I was wondering whether you had any information about, let's say, the top five percent of awards, whether that has increased over time.

**THEODORE EISENBERG (PANELIST)**

The last I looked—I'm trying to remember. These data, there was no increase, I believe, in the mean or median punitive damages award from the Bureau of Justice Data on forty-five large counties from 1992 to 1996 or from 1996 to 2001. There was just no increase. Now, I think you're completely correct to—

**AUDIENCE PARTICIPANT**

But in a particular county.

**THEODORE EISENBERG (PANELIST)**

Pardon?

**AUDIENCE PARTICIPANT**

In a particular location, I wonder if some places were better places—

**THEODORE EISENBERG (PANELIST)**

Well, because there are so few trials and punitive awards are so rare, the data gets so thin that you really have trouble making any sort of reasonable statistical statements. But I think you're right. I mean, if you looking at the individual sort of case category level such as med mal, and then even within med mal, the story can be quite different. I think med mal has increased relative to inflation over time. But medical costs have increased relative to inflation over time, and so you know, you'd want an inflation index for each little industry as well as society as a whole.

Med mal is a complicated thing. We know that most people who suffer negligent harm by physicians never bring a claim. We know that most claims that are brought and that are meritless in fact do not prevail—not just most; the overwhelming majority. And we know that the size of awards correlates with the size of the harm. So medical mal is in some ways the most studied system because, unlike products liability, we can get an ex post assessment of the quality of care from the records in the case, and so there are several medical studies where you actually look at it. It turns out most of those studies show the system works reasonably well.

You can't stop people from filing lawsuits, and some of them will be weak. But as the case progresses, the overwhelming evidence is that the system sort of
works. The weak cases get filtered out. The strong cases get paid off, often not at trial, and you have to look at the substance.

WALTER K. OLSON (PANELIST)

Well, let me take issue with that. We don’t want to get sidetracked into it, but still the best known of the medical malpractice empirical studies, the Harvard one, found that a significant number of the cases considered meritless were in fact getting payments to conclude. There was a poor association between the merits of the case and the likelihood that it would result in litigation, and—

THEODORE EISENBERG (PANELIST)

That’s incorrect.

WALTER K. OLSON (PANELIST)

—and nearly everyone finds the cost of payouts is heavily concentrated on a very few specialties, and within those specialties it is not just some small percentage of incompetent lawyers who are being hit, but that an OB/GYN, orthopedic surgery, and neurosurgery, you know, if you practice in the litigious area, you are going to get sued and probably have payouts.

VICTOR E. SCHWARTZ (PANELIST)

I think you’re right. These averages tell us absolutely nothing. There are outlier verdicts. There are jurisdictions in the United States where forum shopping is rampant. We do call them judicial hellholes. Nobody’s ever disputed those in any particular way. So the outlier verdict is a threat. And if you know that in a jurisdiction—I think of a place in Mississippi, which is now much, much better, but a few years ago ten people got, what was it, $10 million each, and their average economic loss was $7,500. And the judge just let the plaintiffs’ lawyer do whatever he wanted. That causes fear, and that is not shown in the median statistics.

AUDIENCE PARTICIPANT

Hi. My question is for Mr. Olson. When Professor Eisenberg put his chart of the different jury systems and the perceived fairness up, I noticed the state of Louisiana was very highly rated, and—

THEODORE EISENBERG (PANELIST)

Well, that’s a bad rating, not a good rating.
Yeah. Invert them.

AUDIENCE PARTICIPANT

Right, but you had been talking about how the systems in Europe tend to be better. Well, Louisiana is, of course, influenced by European system and as a civil law system. I was wondering if you could talk about why Louisiana might be different.

WALTER K. OLSON (PANELIST)

Well, Louisiana, as I think people from Louisiana would be the first to tell you, is sui generis in any number of ways. And the fact that they inherit their procedure from the Napoleonic Code has not kept them from being a rather typical American jurisdiction or typically liberal on many issues of damages. I don’t know enough to get into the details about how it would differ from Alabama’s, Mississippi’s, Arkansas’s, to which it might be compared as a cultural belt—the Jackpot Belt, I once referred to it—along with the coastal areas of Texas, you know, which between them have produced a vastly outsized share of controversial verdicts and forum shopping issues and things like that.

Louisiana is by no means the most intense zone in that Gulf Coast belt, but it’s more like it than it is like Nebraska, you know, and why, not being from there, I hesitate to say.

AUDIENCE PARTICIPANT

Thank you.

AUDIENCE PARTICIPANT

I’d like to put this to the whole panel. In my town, the most active PI law firms, the back of the phone book type ones, you know, huge billboards everywhere, they never go to trial, and very rarely, I think, ever file suit. They write demand letters, and there’s provisions in state law for instant $10,000 payments for insurance companies. How does that get captured in your data, and isn’t that the vast majority of the transfer from the companies and insurance companies to the plaintiffs and their lawyers?

THEODORE EISENBERG (PANELIST)

I’m sorry, is this automobile or other?

AUDIENCE PARTICIPANT

I think it applies especially—the $10,000 PIP stuff is all automobile. But I
think just in PI work in general, at least in my town. I know that the big firms very, very rarely go to trial or even file suit. It's all done with demand letters.

**Theodore Eisenberg (Panelist)**

Just in the study—I did this a long time ago, but there's a big difference between the statement that they rarely go to trial and they rarely file suit. At least what I looked at in products liability was you rarely got any money, any substantial money, unless you filed suit, perhaps outside of auto. I agree, they rarely go to trial, but I think to get serious money, you need to file suit usually. Not always.

**Victor E. Schwartz (Panelist)**

You'll get the heartland of America. The demand letter with no lawsuit, a baseless claim, and the PI lawyer—not the top ones, not the ones who are on TV and who I'm always debating; they never file a frivolous lawsuit—but this part of the bar that files a case for $10,000, $7,500, and then makes an offer to settle for what the legal costs would be for the defense. The insurers get their checks out. They pay them. The sanctions against frivolous claims don't work because they're rarely put in. And if this audience were the National Federation of Independent Businesses and the 800,000 businesses that they represent, they would have applauded you when you finished your statement because that's what the small business of America face. They're not captured by data. They are small claims. They're settled for just a little under the defense costs, and then their insurance goes up. That's a home run, what he's talking about. That's real America.

**Walter K. Olson (Panelist)**

Employment is another area where it's very hard to look at filings and be confident that you're capturing most of the settlements because in the employment area, typical of the a number of other ones, the plaintiffs don't want that to be on record or to go through the trouble. They want settlement. Both sides have an interest in keeping the filing from taking place, which does not mean there's not going to be a settlement.

**David C. Vladeck (Panelist)**

Well, with employment law you have the other problem of arbitration. I mean, if you just look at the tableau of employment cases, you know, a huge percentage of them never go to court because there is an arbitration agreement that would be enforced. And so—
DAVID C. VLADECK (PANELIST)

Many, many, many employers, the large employers, now require employees to sign arbitration agreements. The Supreme Court in a case just a few years ago involving Wal-Mart or one of the big companies upheld the use of arbitration clauses in employment agreements. And so you have very big companies requiring arbitration agreements as a condition of employment.

THEODORE EISENBERG (PANELIST)

But that confirmed—the study I put up was about waiver of jury trials, but the requirement of mandatory arbitration is much more common in the employment contracts in the SEC database than any other contract, but those are not representative. Those are—to be in the database, you have to be a material contract in an accounting sense. So the contracts you’re seeing in the EDGAR database are, you know, CEOs or people whose contracts are in some sense material to the company. But those, far more than the other classes of contracts, had arbitration requirements, and I think many employees see that—employment really is different in terms of underlying, perhaps wrongful activity in a number of lawsuits.

DAVID C. VLADECK (PANELIST)

It was. Circuit City v. Adams is the case.¹⁴

DAVID M. SCHIZER (MODERATOR)

So with apologies to the rest of you, we have time for one more question and a very quick answer.

AUDIENCE PARTICIPANT

This question is directed to Professor Vladeck. You talk about the erosion of legal services in areas outside the corporate world. One of the potential problems that I perceive is the possible threat of non-lawyers offering legal services in a number of very low areas. One example might be estate planners. The other might be accountants. Some of this encroachment is casual. Some of it is actually very proactive, encouraged by anti-lawyer activists. Do you see this as a credible threat to legal profession in the long haul, and if it is, what would be some of the solutions?

DAVID C. VLADECK (PANELIST)

Well, I have always had concerns about a profession that aggressively engages in its own self-regulation. To be sure, there are unauthorized practice of law charges filed against people who are charlatans, who are masquerading as lawyers. Those people are criminals, and they ought to go to jail. But there are people who provide legal services in areas in which lawyers will just not offer services. And I'm all in favor of finding some way to certify those people to provide targeted legal services to those who would otherwise not get it, but subject to some regulatory overlay.

I also think that the boundaries of what constitutes the practice of law need to be rethought. In Arizona, there is a famous dispute between the title search people and the bar that went back and forth between the state Supreme Court and the state legislature over the ultimate question of whether the legislature or the state supreme court could set that boundary. I am wary of the idea that state courts of last resort should do so—without some check, because the tendency to preserve the lawyer monopoly is strong. There are restrictions on non-lawyers engaging in activities that one could call legal services, but could easily be defined in some other way, which would permit non-lawyers to fill the void that the legal profession has not filled. I think we as a society need to grapple with, and state legislatures need to get involved, in defining the boundaries of services that only lawyers should provide.

After all, we should all be worried about a legal system that claims an absolute and unconditional right to regulate itself, and at times aggressively patrols the boundaries of what constitutes the practice of law. In most states, there is no statute that defines what constitutes the unauthorized practice of law. More often, it is a common law rule that has evolved over years, inaccessible to anybody without a law degree.

DAVID M. SCHIZER (MODERATOR)

We need to leave it there. And you should stay where you are because in a moment, as soon as our panel leaves Senator Mitch McConnell will be coming in to speak in this room, so we're actually not taking a break. But we've gotten wonderful questions. The panel is terrific. Thank you all.