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Challenges to Rule of Law and Gender Equality Globally (with transcript)

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Steve Barnes: Welcome to *Case in Point*, produced by the University of Pennsylvania Law School. I'm your host, Steve Barnes. In this episode, we'll be talking about the challenges to the rule of law and gender equality globally, and we're pleased to have with us two experts who can provide their insights into these critical topics. First, we have Indira Jaising, founder of the Lawyers' Collective, a senior advocate at the Indian Supreme Court, and a former Additional Solicitor General of India, who is now currently a Bok Visiting International Professor here at Penn Law. Also with us is Rangita de Silva de Alwis, the Associate Dean for International Programs here at Penn Law, and as well a lawyer and an expert on women's rights and human rights. Thank you both for joining us. It's great to have you with us here to take on this subject.

So, Indira, first to you please, could you tell us a little bit about what you're doing here at Penn Law as a Bak Visiting International Professor.

Indira Jaising: Dean Rangita invited me to be the visiting global professor for a period of three weeks. I'm here. I'm taking a seminar. And this seminar is basically to do with the way Indian law has evolved around **cause lawyering** and so I'll be here for three weeks.

Steve Barnes: Great. So you say cause lawyering. I assume that means advocating on behalf of a client or a cause in some specific or large perspective.

Indira Jaising: Yes. It's both. It is very often a client, an individual woman who's aggrieved by an act of discrimination. Or it could be a cause, as you rightly say, which raises issues which go beyond the individual litigant.

R. de Silva de Alwis: So, _____, as you said, cause lawyering can also be described or defined as impact litigation, litigation that goes beyond changes in the petitioner's life or petitioner's pleadings but would have enormous societal change in the community and in the country. And one such case I think which would have profound implications for democracy in India in this case that Indira is working on and worked on just before she came to Penn Law. She submitted her pleadings to the Supreme Court of India, and this was a case that really challenges recent developments in India, in the states of Rajasthan and Haryana, which asked those standing for office in the Panchayati Raj, at the local government level, to show that they had passed a certain educational qualification and owned toilets, bathrooms, as a part of running for office.

Steve Barnes: Right. So, just so I understand this correctly, at the local government or municipal level, candidates for public office were being – or are required, rather, to pass educational tests or qualifications as well as have a working bathroom, correct?

R. de Silva de Alwis: Exactly.

Indira Jaising: Yes. As Rangita rightly points out, it's a case which would impact at least 50 percent of the population of a given geographical unit. The reason is that there are many people, according to the 2011 census, which is the most recent census – more than 50 percent of the people in the rural areas have never been to a school. And therefore to insist that unless they had passed a certain level of schooling they would not be able to stand for an election would mean to effectively disenfranchise a large segment of the population. And my argument has been that this is like discriminating against them on the ground of poverty. Because it is not as if they don't go to school because they don't want to. India is a very aspirational country.

Right now I can say with confidence there's not a single person in India who wouldn't want to go to a school. You talk to young women and ask them, "What would you like to do when you grow up?" and some will turn round and tell you, "I want to be a pilot." Others will turn round and tell you, "I want to be a doctor." But that's not the point. The point is: do they have those opportunities? And the answer to that is clearly no. The answer is no because the government has not provided adequate schools in the rural areas, which makes it impossible for them to get the kind of education that they aspire for. And in that situation, to tell somebody that you can't run for office if you don't have an education is to effectively say, "You don't matter."

Steve Barnes: Just a quick question: is primary education in India free, in other words, government-provided? Or is it a fee-based system?

Indira Jaising: It was only in the year 2009 that a law was passed giving to people the right to primary education, free. This law was not implemented till 2010, 2011. And even today – it's all right to have a law on paper you know. Where are the schools on the ground? That's the question. And even if there are schools on the ground, there could be multiple reasons why people don't go to school. I'm told that some girl children don't go to school because the schools don't have toilets for women. Or it could be because they're working in the fields. Or it could be that their parents need them at home more than they're needed in school. So it still doesn't make any sense.

And even if the argument of the government of India was that "We have provided free education," it was done only in the year 2000. And to become eligible to vote you would have to reach the age of 21 or 18, which means it would take you till something like 2025 before you can even aspire to get a primary education.

R. de Silva de Alwis: So, Steve, as I have told you this before, and Indira knows, I often refer to Indira as the Ruth Bader Ginsburg of South Asia. And I see this particular case as part of the continuum of cases that she has argued on behalf of women. She has, step by step, brick by brick, dismantled discrimination against women in the law in India. And this case is but part of that journey. I want to refer to some of Indira's cases because these are landmark cases that challenge gender discrimination in the law and in practice in India, starting with I think the Olga Tellis case, which is one of the pioneering public interest law cases in India, which opposed government ousting of pavement workers, pavement hawkers in the Delhi streets.

Steve Barnes: Do you mean like street vendors in other words?

R. de Silva de Alwis: The street vendors, the pavement hawkers. Indira has continued to really address the needs not just of women but women who are marginalized. And I think what was interesting in that particular case, in Olga Tellis, was that the court ruled that although these women would be displaced that that displacement would take place at the end of the monsoon season – so it was a more humane decision – and that they would be compensated.

There are other landmark cases which have had cross-border impact. Because I know that what happens in India, especially Indira's work, is not limited to India. I think what is fascinating about this work is in the way it has influenced and impacted and has resonated in the South Asian region, in the Asian region, and has really helped to create new norms globally on gender discrimination. So, for example, her cases on behalf of women like Vandana Shiva and Gita Hariharan, which dismantled discriminatory family laws that disallowed women to be equal guardians of their children during the father's lifetime, are universal. These norms that discriminate against women are seen in other parts of the world, in other laws. And these two cases have helped as persuasive authority in challenging similar norms in Nepal, in Bangladesh, in Sri Lanka, and even in Latin America.

Steve Barnes: Just to pull that string a little bit please, Indira, could you describe a little bit, just to step back, a very quick crash course on the Indian

legal system? So you are a senior advocate in the Indian Supreme Court. How do you get a case and how do you litigate it within that system?

Indira Jaising: India is very unusual. You can start cases at the supreme court level.

Steve Barnes: You can.

Indira Jaising: And we have what is known as Article 32 in the Indian constitution, which says that if there is a case of violation of fundamental rights, you can actually bring a case directly to the Supreme Court of India, and that has helped us a lot. And Dr. Ambedkar, who was one of the chief architects of the constitution – he said that article 32 is the heart of the Indian constitution. Because he knew that this was not a country in which people could afford the luxury of waiting. By the time you've begun a case at the grassroots level and reached the supreme court, your life is probably going to be over. And so this article was written into the constitution. And many of the cases that she's mentioning were brought directly in the Supreme Court of India.

And, Rangita, the Olga Tellis, this Panchayati case, resonated with my past because they insisted that you should have a toilet. I turned round and I said to the judge, "At the end of the day, it was more than 25 years ago I litigated the rights of the homeless. So tell me" – I asked the judge a question. I said, "Tell me: if a person is homeless, how would you expect them to own a toilet? If you don't own a roof over your head, where is the question of your owning a toilet?" So that's what the Olga Tellis case was about. It was about hundreds and thousands of people who had made their home on the pavement by putting together a piece of plastic with a few bamboos, and they lived there.

We did manage to take this case to court and we said, "They cannot be removed because they have a right to live. And if you remove them from the streets, they will die. Because their means of livelihood is tied up with where they live. So they are living on the pavements not because they love to live there but because that's the only way they can find a job." These women were working as maids and cleaning women in the houses of upper-class people in that neighborhood. And those very upper-class people were saying, "We want them out because they look so ugly on the pavement." So somewhere the cases all connect.

And the same thing happened to the street vendors, the hawkers. They were told that they were hawking without a license. So in that case my question to the court was that: "It is the state which gives the license; it is the state which denies the license." So my challenge was: "On what basis can you deny a license to a person to be a street vendor? Either you provide the license or you do not prevent them from hawking." And they were selling a variety of commodities. It could be pens and pencils or notebooks like that or it could be food. And they were servicing a large majority of working people whose only availability of food was going down to these hawkers and having a meal at lunchtime. So that is another case in which we succeeded. And that was also brought to the Supreme Court of India, where they insisted that the municipal corporation must issue licenses to the hawkers.

R. de Silva de Alwis: And the connection between the Olga Tellis case and this most recent case of the Panchayati Raj – those who are disenfranchised from running for office if they don't have a toilet or education – has a disproportionate impact, once again, on women. Just like in the pavement hawkers cases where they were mainly women, here too those who might be disenfranchised because of the qualification of education and toilets are women. And this is really rolling back some of the advances that India has made in bringing women to the table under the 74th and 75th constitutional reform, which call for 33 percent of women at the village council level, which brought in a million women to the Panchayati Raj. So this is really an erosion of those gains that had been made to strengthen democracy in India.

Indira Jaising: Yes. We've had this very unusual amendment to the constitution which puts in place what we call self-rule and local self-government. And at that level, which would affect many of the rural areas, there is a 33-percent reservation quota for women only, for standing for elections to those constituencies. Because it was seen as a measure of political empowerment. So the point that I did make to the supreme court is that you have to look at this as a measure of political empowerment, not social and economic empowerment. Which does not mean that political empowerment won't lead to social and economic. But you cannot collapse the difference between the two.

So, in order to be politically empowered, it doesn't matter whether you're literate or not literate. If you're looking for a job in a university, obviously you would insist that you have a qualification. But this law was specifically to bring women out of the home, to make them lose their dependency on the menfolk, to

make them participants in public life. And, as Rangita was saying today, it's about citizenship. It's about –

R. de Silva de Alwis: Public participation.

Indira Jaising: Participation. How do you become an aware and participatory citizen? You can do it through this method of running for office and offering yourself public service.

R. de Silva de Alwis: Right. And it has an impact that is unanticipated. Because women have been at the table because of that constitutional reform, there has been changes at the village level. Fathers see more in their daughters and value their daughters more. And this is empirical research done at MIT and at Harvard, the Kennedy School, show that because women are at the Panchayati Raj in positions of power, the girl child is allowed to go to school and is retained longer in schools and educational institutions by their fathers because fathers see more for their daughters because of the possibilities that these women bring to the table.

Steve Barnes: Opportunities for them and the family _____.

[Crosstalk]

R. de Silva de Alwis: So there is that connection.

Indira Jaising: Yes. As she says, being at the table was the critical turning point. And strangely enough, Rangita, the results of the recent election in Bihar, at which the ruling party or ruling combination of **Nitish Kumar** and **Lalu Prasad**, got the majority, it was said that the majority of the voters were the women voters. They came out in large numbers to vote for the government at the state level. Now, the point, as she points out: it's not who they voted for; it's the fact that they came out in large numbers because they felt that was the only way to determine their own destiny.

And let me tell you that a lot of the interviews that have been done in Bihar have shown that when women were asked, "Why did you come out and vote and what made you vote for this party?" they said very clearly that one of the programs of the current government was that every girl child would be given a cycle to cycle to school. And they *were* given these cycles to cycles to school, free of charge. When you talked earlier about the right to education, this is how the right to education has to be incentivized. You can't just say, "Well, here's a law which gives you the right to education" and expect that everything is going to go fine.

And another all-India policy that we had to make the right to education a reality is that for these children to be given midday meals in school. So they weren't – there was a law which mandated that all children who go to school would be given a free and hot, freshly-cooked meal. And these are the different ways in which the lives of women have been impacted in India.

R. de Silva de Alwis: Right. And the ways in which it has addressed the devaluation of the girl child too. Because having women at the table is a way to create those new images of power. But also the Food for Education program was really multifaceted. It called for mothers to come together to prepare those midday meals, to provide education on food security and the nutrition value of food. So there were these very inextricably interlinked programs that helped in different ways to not just empower women but to also social justice programs that helped in social change.

Indira Jaising: Constitution of India is very much focused on social change. And so we as citizens, as lawyers – whenever we look at a program or whenever we criticize a program, we have this one test in front of us: how is it going to advance social justice? What will it do for gender justice? And that's how we evaluate our programs and that's how we give our inputs into programs.

R. de Silva de Alwis: So I think what was remarkable about Indira Jaising's trajectory as a leading feminist lawyer – in fact, *the* leading women's rights lawyer in India – were the ways in which she very astutely and strategically went about identifying these discriminatory areas in the legal system and then challenging them in the Supreme Court of India. And in that journey, what she did was, step by step, she dismantled discrimination in inheritance rights in the Kerala Christian family law. In the Vandana Shiva and Gita Hariharan case, she dismantled gender-based discrimination in the Hindu personal laws. And then she went about breaking down discrimination and challenging discrimination in the Muslim personal laws.

Steve Barnes: And these are national –

R. de Silva de Alwis: These are the personal laws of India which, taken together, discriminate against Hindus, Muslim, and Christian women. And I think what was so fascinating is the ways in which her life and her work as a lawyer intersected with the lives of these preeminent women in India. Vandana Shiva is one of the leading environmentalists and scholars in India. Gita Hariharan is a very

well-known economist. And Mary Roy is the mother of the legendary Booker Prize-winning author, Arundhati Roy.

And so I think what was so tremendously powerful was the ways in which she used the constitution, as the supreme law of the land, and she went to the temple of justice. She calls the supreme court – although she's fought so many battles, fought so many wars in that house of justice, she still calls it the temple of justice. She uses the temple of justice as the alter on which these women's rights cases are litigated and to strike down discrimination in the legal system in India.

So what she has done is not just piecemeal work. This has intergenerational impact. This has really impacted the destinies of women in India and in South Asia.

Steve Barnes:

Could you talk a little bit about those two cases in particular? And also what it's like to be a litigator in the Indian Supreme Court. And obviously there is a robust press in India, and what it's like to be an advocate with these cases that are part of a major national dialogue for one of if not the largest populaces in the world.

Indira Jaising:

Yes. First of all, as Rangita points out, we live in a country in which we are governed by what are known as personal laws. So what does it mean to say you're governed by personal laws? It means that the law which governs you in matters of family – so guardianship, inheritance, et cetera – is governed by the religion to which you belong. And that's the reason why Hindus have a separate law; Muslims have a separate law; Christians have a separate law. Much as we do not like this system and would prefer to see a common civil law, it is not something that we can wish into existence. We have to deal with the fact that these communities are still wedded to their own specific religion and things like that, and we have to find a way in which to respect their sensitivities but don't compromise on gender justice.

So that was the thinking behind it: that I know that I cannot abolish these different laws. It can only be done by a parliament, a legislature. But even parliament finds itself disadvantaged in doing it because they cannot do it without the popular will, the public support. And there is not that kind of public support for abolishing these laws. And so the only route open to me was to systematically challenge, one by one by one, each and every separate law.

And I was very clear in my mind that I didn't want to just say, "Well, you know, the law of the majority community is fine. It's

only the minorities who have a problem." In that, there are many people in India who say that. And in fact, today we are passing through times where the ruling party is a very majoritarian party. And there is a tendency in the ruling party to look down upon the laws relating to minority communities. And that makes our challenges even more.

But to come back to the period when I was litigating, I decided to start with each of these laws separately. So the first one was Mary Roy's case where a Kerala law said that a daughter would not inherit anything significant from her father. Now, this was the Syrian Christian community and it was a very wealthy community. It's a community which owned huge amounts of land, lots of coffee estates and lots of tea estates. And so what would happen when a father died is that the entire estate would go to the son. So it was Mary Roy who – what can I say? She's more amazing that her illustrious daughter, Arundhati Roy, feisty. She decided she wasn't going to accept this kind of discrimination. And she came to the supreme court with this case.

Of course her case was very straightforward: how can you discriminate between a daughter and a son? And it was thanks to her persistence that she won the case. And so here was a woman who seven years ago had been thrown out by her own family. And the other tragedy of the situation is that her own mother, who could have also parted with some property to her, actually favored her own son. And that goes to the point that she was raising about this son preference phenomenon in India, and in many Eastern societies. Even her own mother gave property to the son and not the daughter.

But Mary, being who she was and is, decided to pick up her life in her own hands. And she did two things simultaneously. One is she challenged the law. But she didn't just challenge the law. She went ahead and she became one of the most prominent educationalists in Kerala. She set up a school, and all those same very upper-class men who were opposing her battles for equal laws were sending their children to her school. So it was such a contradiction, you know? On the one hand, you don't want her to get her share or property, and on the other hand, you send your own children to this school. But she fought it out and, thanks to that judgment, Syrian Christian women in Kerala are now entitled to equal rights.

And similarly, when it came to the Hindu law, Gita Hariharan was a writer also, an author, and she wanted to make a small investment in the name of her son. And the Reserve Bank of India

said, "We cannot accept this investment from you unless his father signs on it." And she said, "Why? This is my self-earned income. I'm an author. I'm earning money from my books and all I want to do is put aside a small amount of money for my son." And that's what led us to challenge the Guardianship Act, which said that the father alone was the natural guardian. And that changed the law and it brought in guardianship for mothers and fathers.

And finally, when it came to the Muslim law, again there was a spectacular woman, **Saru**. And the Indian government had passed a law which says that after a divorce, a Muslim woman would not get any maintenance from her husband except for three months of maintenance. And you need to know that most – many women, rather, not most, not all; things are changing now – but they were housewives. And if a housewife was to be divorced, that too unilaterally, and she was told that she would get only three months of maintenance, there was little she could do.

R. de Silva de Alwis: Indira builds her litigation on the foundation of the Indian constitution as well as on the human rights conventions, especially the convention on the elimination of discrimination against women. So her cases – these cases are really considered groundbreaking cases on how international human rights conventions are integrated and translated and transformed into national litigation and law-making. So in each of these cases she has cited the convention on the elimination of discrimination against women as the foundation, as the bedrock of rights for women. And I think that has helped these laws and litigation initiatives to have a trans-border life of their own. So, other jurisdictions, whether it's in Nepal or Bangladesh or Pakistan or Sri Lanka or South Africa, use these cases as persuasive authority, as comparative laws in their own litigation efforts.

Indira Jaising: Yes. I did have the privilege of being elected to the CEDAW committee in the year 2009. And so that helped me to of course increase my exposure to international law. But even before that, India as a country has been very open to accepting jurisprudence from international law and other countries. We do in our country refer very extensively to cases decided in this country. And there is no bar –

Steve Barnes: Meaning the United States.

Indira Jaising: Yes, in the United States. And there is no bar in our courts from citing judgements of the supreme court of other countries, including United States and England, which I think is a very good

thing. Because it really helps us, as she said, to fertilize our ideas with the best that you can get in the world. So, yes, there are remarkable cases of the Indian Supreme Court which have used international law to give content and meaning to the statutory laws of the country. And one of them of course is the Vishaka judgment, which was a turning point in Indian legal history. It dealt with the issue of sexual harassment at the workplace. And it does borrow very heavily from CEDAW and from the conventions relating to sexual harassment at the workplace.

R. de Silva de Alwis: So the CEDAW was used as an interpretive tool to fill in the gaps in the national law. So in the Vishaka case, there was no national law on sexual harassment. And the CEDAW was used to fill in that gap. And that brings me to Indira's work as an architect of lawmaking. Apart from litigation, she was an architect of the domestic violence law of 2005 in India. And that also is really one of the most comprehensive laws on domestic violence. Although they didn't get everything that they asked for, they did broaden the concept of violence to include not just physical abuse but sexual abuse, economic abuse, and emotional and psychological abuse. They broadened the concept of family to include not just the nuclear family but those in intimate partner relationships and widows and divorcees.

So there was this effort, parallel to the litigation, to change the legal system through law-making. And I think that's also a very interesting facet of Indira's narrative. But also a narrative that to some extent spans these changes in Indian law.

Steve Barnes: So, for both of you, what are some of the key global issues, legal developments, or events related to gender equality and human rights that you are tracking now?

R. de Silva de Alwis: So, this is really a pivotal moment in the global women's movement as well as in international jurisprudence on women's rights. We are marking the 20th anniversary of the Beijing Conference, the Fourth World Women's Conference, which really galvanized the global women's movement and the global gender jurisprudence. We are also marking the 15th anniversary of UN Security Council Resolution 1325, which called for women's leadership at the peace and security table, at peace and conflict resolution, making and building.

Plus we have just – the world has just adopted the sustainable development goals. And for the first time, these goals – goal number 5.1 calls for ending gender discrimination and violence

against women. So there's a confluence of events that really makes this moment tremendously important. And just last month the new global study on Security Council Resolution 1325 was presented to the UN's Secretary General, which maps the changes that have taken place in the last 15 years in the landscape of women, security, and peace, and how much more there is to progress in this area.

And just last month the UN passed UN Security Council Resolution 2242, which really looks at the gaps in some of those UN Security Council resolutions, and most of all the ways in which they can be implemented. So, yes, as we see around the world, women's bodies have become the terrains of violence, right? And women, as Zainab Bangura, the UN Special Representative on Gender Violence and Conflict says, this is really the moral cause, the ways in which women and violence against women has become a tactic not just of war but of terrorism. It is really now the newest tool in terrorism, as we see with the Boko Haram, with ISIS, and the _____ women: that women are the newest kind of weapon in war. It is another bomb. It's another machete. It's another gun.

Indira Jaising:

Rangita has really rounded it up. But to kind of put it in one sentence, last week Rangita had organized this conference on women in national security, dealing with very many of these issues. And one of the participants actually said – I think he was a UN representative and he was from Spain. I don't remember. And when he was asked this question, his answer was that the attainment of complete substantive equality for women is the biggest challenge of the century. And it's almost like saying that some of the biggest battles in the field of civil rights were fought around the abolition of slavery and now the next generation of the biggest fight *is* the battle for equality for women. It's kind of a challenge of the century. It's not just the challenge for any country or any institution. But it's almost as if everyone who lives on this globe is being challenge to make a commitment to the concept of equality for women.

Steve Barnes:

So, final question. You're both well-known advocates, lawyers, and experts on gender equality and women's rights. For students of the law who seek to engage in these issues in some of the ways in which you have, with great impacts, and in other ways, what do you recommend for them to do?

Indira Jaising:

Well, you know, I don't have any grand and big recommendations to make. But let me tell you, for example: I've been noticing the way Rangita's going about it, and one of the ways is that she's

bringing into Penn Law some amazing women from different parts of the world. And what I find really fascinating – and I think these students are lucky – this opportunity to interact with people who have walked the talk. So if you just wanna ask me what I bring to the table at Penn University in just a brief period of three weeks, I think I bring to the table the opportunity for students and faculty – I've been meeting a lot of faculty also – to meet those of us who are sometimes very – in a very derogatory manner they're referred to as quote/unquote "activists." But I think "activist" is a very powerful word. Activists have the power to change the universe, to change the world, which others don't necessarily have.

And for her to be able to bring people like this – I've met many. There was one before me who was working in the ICC, and the students had the opportunity to meet with her. And these are the small ways in which I think big change happens. And I'm a great believer in what I call minimalism. And I really have noticed in my own work that sometimes changes which look very minor have an impact which is very major. So I would just say that people should value experience. To the same level that they would value academic work, they much value experiential knowledge.

R. de Silva de Alwis: As Indira pointed out, it was said a couple of days ago that the movement for gender equality is the cause of our time. But I think for long it was considered a cause for women, by women. But currently that has changed to include men, that men have joined this cause of our time as not just the cause for women but as a human cause, as a global cause; that it is not just the right thing to do; it's the smart thing to do. You can make both a human rights case but a very powerful business case why women should be at the table and why women should have equal rights under law. The most recent Mackenzie global report states unequivocally that if women have the same opportunities that men have to participate in the market, it would add \$28 trillion to the global GDP.

Secondly, I think just on a very symbolic level, it is so powerful to see how, for starting here at Penn Law, how the young men of Penn Law have embraced this cause as their cause. And they, side by side with their female counterparts, are taking leadership on some of these issues. And we see that being replicated around the world, not just here at Penn Law, but we see that in communities big and small that men, like you Steve, have joined this cause, this movement, and it is no longer seen as a women-only cause led for women by women. But it is really the cause of our time led by all.

Indira Jaising: I'd like to say one last thing, which I find very interesting, about being in this country and the debates that are going on here. I've noticed that recently the whole issue of equality has also come to the forefront, and I would say *inequality* rather has come to the forefront. In this country there's a lot of discussion going on about increasing inequalities of income. So if you analyze what is happening to trends in income of ordinary people – maybe that kind of research was part of the downturn of 2008. But the fact is that what it does it brings to the mainstream of this debate in this country the issue of inequality of incomes. And even there obviously women have a disparate impact. So the debate around equality or inequality is really going the right way.

Steve Barnes: Well, it's certainly my privilege to be part of this conversation, and we're delighted to host you here, Indira, at Penn Law, and to have you both as guests on this program. So I'd like to say thank you again. I certainly learned a lot. And we look forward to having you join us for the next episode of *Case in Point*.

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