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Roscoe Pound Round-Table Discussion

Judith Resnik
Yale Law School

Leroy Rountree Hassell Sr.

Margaret H. Marshall

Clifford W. Taylor

Lucy A. Dalglish

See next page for additional authors

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Roscoe Pound Round-Table Discussion

Authors

Judith Resnik, Leroy Rountree Hassell Sr., Margaret H. Marshall, Clifford W. Taylor, Lucy A. Dalglish, Luke Bierman, and Mark S. Curriden

Roscoe Pound Round-Table Discussion*

Participants: Judith Resnik** (moderator), Chief Justice Leroy Rountree Hassell, Sr., Chief Justice Margaret H. Marshall, Chief Justice Clifford W. Taylor, Lucy A. Dalglish, Luke Bierman, and Mark S. Curriden.

CHIEF JUSTICE SHEPARD Happily, Judith Resnik is with us to engage our panel. You know three of our colleagues—Chief Justice Hassell, Chief Justice Marshall, and Chief Justice Taylor—who are part of this discussion. We welcome Lucy Dalglish, whose name many of you will recognize because it shows up on briefs. As far as I can tell, although she has one pending in my court, I am not restrained from saying I thank her for her work.

MS. DALGLISH I think you made a decision last week on that. Didn't you?

CHIEF JUSTICE TAYLOR He would be the last to know.

[Laughter]

CHIEF JUSTICE SHEPARD Yes, much less whether we got it right or not. Ms. Dalglish is a reporter and a lawyer who does some wonderful work on behalf of our profession and the values for which the press stands.

Luke Bierman is someone who has been in and out of the academy, but many of us would have encountered him in his work: at the American Bar Association; as founding director of the Justice Center; and later, as adviser to a series of ABA presidents. He is now back at Albany Law School.

Mark Curriden is someone we have seen before, though not for a while. Mark, too, is a lawyer, but one who has built his career and reputation as a reporter and prizewinning author. If you take a very close look at how many genuine national legal reporters there are in the country, it is a very small crowd; and, Mark Curriden was one of them, doing absolutely marvelous work for the *Dallas Morning News*. He has now fallen into what I hope is

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** Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches procedure, federal courts, and seminars on sovereignty, citizenship, and equality. Her recent Articles include *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005), and *Whither and Whether Adjudication*, 86 B.U. L. REV. 1101 (2006).

more remunerative work at Vinson & Elkins, and it is a great pleasure to have him back.

PROFESSOR RESNIK This panel is called the “Pound Roundtable.” Chief Justice Shepard has charged us with reading, or rereading, Roscoe Pound’s 1906 speech “The Causes of Popular Dissatisfaction With the Administration of Justice.” Although this room does not actually have a roundtable, we will engage in the fiction that all of us are sitting around a table.

Pound’s speech is a challenging one to discuss. The speech is both opaque and multi-faceted, going in many directions at once, and including a range of different kinds of concerns. Within Pound’s talk is a major, substantive critique about legal rules and doctrine; in Pound’s view, the law made in courts was wrong, on the merits of its rules, in important and disabling ways. In addition, Pound also argued that legal institutions were badly organized—offering the wrong kind of processes. Further Pound claimed that the problems he identified were very difficult to fix.

Given the many criticisms leveled, one might wonder why the audience of judges and lawyers found the speech so appealing—so “popular” if you will. Part of the appeal of the talk for the judges at least could have come from the fact that Pound did not fault them for the problems that he described. Further, he offered hope, in that he argued that remedies were available: that judges and lawyers could usefully intervene to make changes.

So one hundred years later, we have once again gathered, as did Roscoe Pound’s initial audience, to consider problems of justice, but now circa 2006, and to consider what responses may be available. The plan this morning is to begin by spending some time thinking about one of the words in Pound’s title—“dissatisfaction”—to understand the different forms of dissatisfaction currently associated with the administration of justice. A second focus of our discussion will be on the title’s choice of the word “popular.” Over the last two days, we have heard the claim that “people” think “X” about the justice system, or that surveys reveal “Y,” or that pop culture shows us that people believe “Z” about courts. When we claim that “people” hold such attitudes, to whom are we adverting? What is the evidence or data that a particular point of view is widely shared?

Our third focus will be on making changes in process and substance. It is often easier to talk about process than about how substantive rules of law should be altered. We hope to address both substance and process. We know that there are sharp disagreements within those in the room about the role of courts in

this social order, and we hope to engage these differences rather than politely skirt them.

Further, the aspiration is that, while the conversation will begin at this end of the room (where the panel is sitting), we will also have a conversation of the whole. Because this room has two kinds of “chiefs” in it, both Chief Justices and the Chief Administrators of court systems, we hope our discussion will be one in which both segments of professionals devoted to the administration of justice are deeply engaged.

I should also note that we do have a court reporter here, and that this conversation is “on the record.” (In some courtrooms, presiding judges may have protective court reporters that edit a bit along the way; in this venue, the *Indiana Law Journal* will give us a chance to review the transcript before it moves from your lips to the printed page.) Because you are speaking for a record, please identify yourself so that the remarks can be properly attributed.

I think I have done enough by way of a preview of our session. Let us start then with three of the panelists—Mark Curriden, Lucy Dalglish, and Luke Bierman—all of whom are people who are new to this conference and have not yet spoken on panels during the last two days. These panelists all have insights about our first questions: What might be sources of “dissatisfaction” with the administration of justice? What is meant by “dissatisfaction”? And, when they use the term “popular,” what do they mean? I have asked them to launch us with brief comments. Mark, please begin.

MR. CURRIDEN I think my assignment is to come at it mainly from a journalist’s standpoint, maybe a little bit as a lawyer, having clerked for a judge as well. But my primary dissatisfaction as a journalist came from access issues. I was at the *Atlanta Journal Constitution* as their legal writer for seven years and then the *Dallas Morning News* for seven years. And the key areas of concern that I had with access—the major problems we are constantly seeing, and we still see it today in representing newspapers, including the *Dallas Morning News*—is the closing by trial courts of *voir dire*. Judges know that *voir dire* will be closed; they can close it. Of course, it takes us, the lawyers, time to appeal, file a mandamus, and get it heard before the court of appeals, or the supreme court, or the court of criminal appeals. By the time we get a reversal, the trial is well down the road; *voir dire* is over, the jury’s been picked, and, of course, the trial judges know that no court of appeals is ever going to order the trial court to start all over. For example, calling another—in a death penalty case in Texas, for example—650 jurors; dismissing all the jury that has already been

picked; and, thus wiping out about three, four, five hundred thousand dollars that have already been spent. That is a big frustration. The judges know that what they are doing violates the state constitution, and yet it goes on.

The other area is closed hearings, and they are not technically closed, they are just un-calendared. Frequently we see this in the trial courts where we have been following a major, high-profile case, go to check on it, and nothing has been calendared. There is nothing on the agenda anywhere, and then all of the sudden a plea has been taken last Thursday. It is like, wow! The lawyers got together, and by consent, met with the judge, they did a quick plea, and the case was over. Yes, it was in open court. Yes, if we just happened to be walking by, we could find out that the plea took place. That is a big frustration.

Two more things. One is poorly written orders or opinions. Truthfully, that is one of our major complaints. I am a lawyer, and I clerked for a federal appeals court judge. I will read a trial court, or even appeals court decision, and go: My God, what does this mean? And it is truly one of the big frustrations as a writer, and as a journalist who happens to also be a lawyer.

Finally, one of the big complaints is also complaints to me from judges, be it at the trial court or appellate court level, saying: you journalists just do not understand. They say: you are always intrusive, you are sticking your nose where it does not belong, you are trying to write about scandal, and you are always wanting information about the jurors; you journalists are not like it used to be. Well, as someone who wrote a book about a case from 1906—one hundred years ago—I got to tell you, journalists were much more intrusive in 1906 than they are today. Back in 1906 in Chattanooga, Tennessee, the case that I wrote about, they not only listed all the jurors' names who showed up for jury duty before the trial, but they listed their profession, they listed their home street address, etc. The courts actually provided that to the press so everyone would show up. And there was a lot of public pressure to get people to show up for jury duty. So I think that those are four of my big frustrations.

PROFESSOR RESNIK Given how broad is the header of “popular dissatisfaction with justice,” our pre-panel discussions committed us to trying to focus on one theme at a time. Further, we agreed that my job included being somewhat rude—interrupting people for clarification as well as to be sure that our conversation is inclusive. With this in mind, Lucy, you seem to be the next obvious person to comment, as we have started by discussing closing off access to courts with basically “illegal” decisions by trial courts misusing their

discretion. Also noted is the perception that judges have many complaints about the press. Would you like to continue with these threads?

MS. DALGLISH Sure, I will continue this thread.

PROFESSOR RESNIK Does what Mark has described sound familiar?

MS. DALGLISH Yes, it does. Why do we have a free press in this country? Well, any time the Supreme Court has had the opportunity to address that issue, they have said that the main reason is so that citizens have access to information that they can use to make educated decisions about laws. That is pretty much the crux of what—beyond the right to express yourself, there is also that component—the argument is, that people will make educated, informed decisions if they have access to quality information. That information can be about the executive branch, it can be about the legislative branch, and it is also about the judicial branch.

And I agree with everything Mark said. I have a full-time person on my staff who does nothing but access and prior restraint work in state and federal courts all over the country. Now, I am kind of a First Amendment wonk. I think it is the most fascinating thing in the world. And I just assumed that a lot of judges and lawyers were very well trained in what they could do under the Constitution in their courtrooms. I am kind of disappointed and disillusioned to find out that it is not the case. In fact, a lot of times reporters have a better idea of what the law actually is.

And just to get this out of the way, if any of you are interested in reading something in plain language, what we teach reporters, this is at our website, rcfp.org. It is our First Amendment Handbook, and there are a couple of chapters in there on access to courts. Your staffs and some people in your community might find that a useful resource.

But, reporters can only report on what they know. If they are making mistakes, sometimes the reason they are making mistakes, and not representing you the way you would like to be represented, is because they cannot get access to information that would flesh out the story. We see closed hearings. We see closed records. We see closed juries or anonymous juries. We see settlements. We see evidence—trial evidence—that is closed off.

Let me just give you a couple of really appalling examples of things that I have had to deal with over the last couple of years.

The issue of evidence. I hope you all know that once evidence is introduced in your courtroom, in any courtroom, it is public information unless there is an exceptionally good reason to make an individual piece of evidence not public, where you have to make particular written findings. You all remember Zacharias Moussaoui. That trial was going on, and a day before it started, the judge, Judge Brinkema, who I know had a tough job to do, closed down access to all of the evidence. She said no, the public is not going to see any of the evidence introduced. Maybe when the trial is all over, we will. By this time we had appealed a number of things to the Fourth Circuit, so we got together with a number of other media organizations, immediately challenged it, took it to the Fourth Circuit on a writ of mandamus, and within forty-eight hours had one. This was really amazing, because as Mark said, usually if you challenge something like that, the judges know they can get away with it because they are not going to stop the trial. The Fourth Circuit said this is so important; you are going to do it now. The Reporters Committee ended up being the repository of all of that evidence, and it is still on our website in case you would like to look at it. We became the distribution point to ease the burden on the court.

Probably the most troubling story that I am hearing about comes under the rubric of secret justice has to do with secret cases. Now, you all know that you can seal certain records; certain proceedings are closed. There are certain jurisdictions around the country where cases never show up on any public docket whatsoever. You do not know they exist. Did you know that three years ago there was a completely secret case in front of the United States Supreme Court? It was a case called *Bellahouel* out of the Eleventh Circuit. It is absolutely appalling that something could make it that far and there be no public track record of it. We have people in this country on—

PROFESSOR RESNIK Let me just push for a second. What is the subject matter of this secret case?

MS. DALGLISH They are largely drug trafficking, terrorism, and then a lot of just regular criminal stuff. Now, the *Bellahouel* case was a habeas case that got sealed. But a lot of them are about drugs, a lot of them are terrorism related or national security related, but a number of them are just regular fraud.

We did a project a few months ago at the Reporters Committee because I had been hearing that there were entire—dozens and dozens of—cases in U.S. District Court in the District of Columbia that officially did not exist. When I brought it up to one of the judges, he said: oh, you are so wrong, that just does not

happen. So I sent someone down to the court and had her look for missing docket numbers. We put her on the PACER system. She came up with 469 cases over the last four and a half years that did not exist. When you type in that number, it says: "Case sealed, no information available." When you go to the clerk, they say: "Well, that is in the vault, we cannot tell you anything about that." Well, the Chief Judge was astonished, but now we are finding out.

Those of you who live in Washington State probably know about the King County civil calendar, or civil cases that were closed. There were a whole bunch of them. I think it was the *Seattle Times* that came up with a bunch of cases that were completely closed. In Florida, the *Miami Herald* is doing the same thing in Broward County, I think. We know that there were people who were very wealthy and lived in Connecticut a few years back who were able to keep—

PROFESSOR RESNIK Thank you Jack Welch—by which I mean that the high-profile divorce of the former chief executive of General Electric included disclosures of economic benefits conferred upon him by the corporation and prompted discussion of when it was appropriate to close the files of "private" divorce proceedings.

MS. DALGLISH Yes, thank you Jack Welch. We are able to keep their divorces off the books. This is, I think, an appalling development. And the media would love to challenge all of this stuff. We do not have the money.

PROFESSOR RESNIK Well, here we sit, in a room full of the Chief Justices of states' highest courts, holding a good deal of power, under the doctrine of supervisory powers as well as through their authority as interpreters of legislation, the common law, and their respective constitutions. Are the examples (provided by Mark and by Lucy) illegal in the three states—Massachusetts, Michigan, and Virginia—represented on this panel by Chief Justices Marshall, Taylor, and Hassell? Have we just been hearing about a failure of enforcement from the top of those at the trial level, or are there legal justifications that any of the Chief Justices would like to proffer for some of the secrecy? I will ask in the order in which you are seated, and therefore we begin with Chief Justice Taylor.

CHIEF JUSTICE TAYLOR Well, I suppose this is the answer you might expect. I do not know of any secret dockets in Michigan. And, I actually think there probably are not any. Now, as to the sealing of cases, we do have some of that; I think not much that I know of. But where it is done, it is frequently done in cases where it probably should not be. For example, like the Welch divorce or something of that type where it had to just be embarrassing for someone to have this

information out.

As to the general comments, there is, in a country like this, an inevitable tension between the rights of the general community to be safe versus the public right to know. It is an age-old controversy, and is very difficult. The cases just out of the United States Supreme Court recently, highlights this, and it is a difficult situation. It is interesting to hear the comments of the media folks because they are interesting and thought provoking. I do not have any great answers to them, but I think there is an inevitable tension of which we are all aware.

PROFESSOR Chief Justice Marshall, tell us something about the law of
RESNIK Massachusetts on these issues.

CHIEF JUSTICE Let me answer your direct questions. Is any of this illegal? That is
MARSHALL a sweeping question. But I do not think there are any secret dockets in Massachusetts state courts. As for sealing or impounding cases, Massachusetts has tried hard to work with trial judges to make sure that does not routinely happen. The press sometimes plays an important role in bringing to our attention things of which we are not aware that may be happening at the trial level, so we encourage the media to inform us if it has any concerns.

There is a problem with impoundment of records. We have had a couple of cases suggesting that some records were routinely impounded by trial judges, often for what appeared to the trial judge to be good reasons, not thinking through the implications very carefully. Where do these cases occur most of all? In family court, divorce affidavits, things like that, with routine impoundment of records. We have had comprehensive education programs for trial judges about that. We now have a specific court rule that covers impoundment, requiring written findings as to why a case has to be impounded. So that when a case is appealed an appellate court can review the reason for the trial court decision. All of us who are appellate judges know that if a full record is not there, it is very hard to determine whether or not a trial judge abused his or her discretion. There is nothing better for appellate review than written findings and an explanation of why the trial judge acted. So, I think that we have done an enormous amount in that regard.

PROFESSOR Is that a new rule that your Court authored?
RESNIK

CHIEF JUSTICE It is not new. The rule has been there for some time. We have had,
MARSHALL as I think many of us in this room have, a joint judicial-media

committee, which is chaired by a Justice on my Court, which does many things. If you do not have such a committee, I strongly recommend it. The committee has held “law schools for journalists,” which we conduct in newsrooms of newspapers. The committee has conducted “journalism schools for judges” where journalists come to us to educate judges. We have a hotline for journalists. A journalist who goes to a court and the clerk at the counter says, you cannot have that record, it is in the vault, can call the hotline and that journalist can have immediate access to the committee to see if the matter can be resolved without necessarily having to commence a proceeding. Journalists and judges, and I think lawyers—I am pretty certain there are lawyers, but I cannot remember—serve on our judiciary-media committee. It is a very effective committee and it deals with the kinds of irritations that Mark and Lucy talk about.

PROFESSOR RESNIK Let me return to Michigan before turning to the experiences in Virginia. Chief Justice Taylor, do you have institutional structures like those in Massachusetts to have interaction between the press and the courts? Are there “hotlines”? I should add that any of the Chief Administrators from Michigan, Massachusetts, and Virginia are welcome to chime in as well, given that some of these questions may fall under their aegis.

CHIEF JUSTICE TAYLOR We do not seem to have quite the structure that Massachusetts does.

PROFESSOR RESNIK And now, Chief Justice Hassell, tell us about Virginia.

CHIEF JUSTICE HASSELL We do not have the structure that Massachusetts does either. From time to time I will meet with representatives of the press.

But we do not have that degree of structure. I met about two months ago with various representatives of the press in Virginia to discuss access issues. I think that by and large I feel rather confident that in Virginia the system works, and it works well. We have about five million proceedings in our courts each year, and in ninety-nine percent of those proceedings, I am sure there are not access issues.

Our presumption is all records that are filed are open records. They are open to the public. We do have in place, as we speak, a commission that is going to recommend a rule to me that will place certain limitations on what is available to the public, and also what will be available through the Internet. As a general proposition, all court documents and the contents therein are public documents. However, there are certain things, such as

Social Security numbers and dates of birth—what we would describe as confidential information—or certain information, such as information in certain types of sexual crimes, which we will not permit that to be released publicly. That call will be made by the trial judge, and ultimately, by my court on appeal. But the philosophy is that all court records are presumed to be open to the public, and there are certain prescribed exceptions to that overriding philosophy.

PROFESSOR RESNIK Let me now turn to Luke Bierman, who has been working in two more states—North Carolina and New York. His experiences give us an opportunity to learn about two more jurisdictions. Further, let me ask more generally about models of open access. Note that most of the court doctrine and the Chief Justices here speak about open access to courts, yet we have two “witnesses” here (Mark and Lucy) saying that despite those rules and precepts, they know of several instances of closures that seem to be illegal and yet, as a practical matter, have been extremely effective.

MR. BIERMAN I think what you are hearing, and what strikes me from listening to this sort of conversation, is that even in these really secret cases—super-secret cases that are not docketed and nobody knows about—the technology eventually allows us to find out about them. From a variety of resources we do learn about these things, and I think that that is reflective of changes that are occurring and what the technology can do.

After spending the better part of a decade at the ABA working with judges and lawyers, and working together from that perspective of the bench and bar, I have had the experience the last couple of years of working with very different constituencies. My experience there, albeit anecdotal, but working at this public policy think tank that I have run demonstrates to me that folks out there who are concerned about trying to do the business of America on a day-to-day basis—entrepreneurs, educators, etc.—that there is a great deal of uncertainty about how the courts do operate and why it takes so long for decisions to be made. Also, there are concerns about whether the technology can really, and is, in fact, really overtaking the capacity of the deliberative process that our courts are well known for. I think that there is a fair amount of concern among at least the public—the popular groups that I was dealing with for the last couple of years about. Some say: “I need a decision much quicker than I can get these things done through the court system.”

I think that if you look back over a hundred years and the sort of concerns that Pound raised, we certainly did over the time in between develop a slew of processes to respond to some of the

concerns that were raised a hundred years ago. The Federal Rules of Civil Procedure streamlined some things. ADR is in some ways an outgrowth of some of these concerns that were raised. And I think that there is—looking ahead maybe twenty-five or fifty years and thinking about the extent to which the technologies—the capacity of the younger generation to use technologies to deal with these things. I think that there are some legitimate questions. Not only are there secret cases out there that we eventually may find out about, but how we can respond in this changing environment to things that are happening much faster than perhaps the judicial process allows us to accommodate. I think Cardozo said that nine out of ten cases can only come out one way. Well, if that is the case, is ADR and is the current structure of the process sufficient as we are changing the way in which we use technology, the way in which information is gathered, and the way in which the public is empowered to use technology? We see that in the rise of pro se, we see that in the access that people are afforded, and I think there is a real challenge to use these technologies for the good of the courts, and for the kind of good things that the justice system can provide.

PROFESSOR RESNIK Well, you raise a few different questions we should try to sort out. One is that, when we are talking about the media, the implicit assumption may be that we are referring either to the press and maybe to TV. But I live in a world in which inside my classes, are people called bloggers. When we talk here about being “on the record,” let us be clear that what is said could well turn up on the Internet.

CHIEF JUSTICE MARSHALL Judith, could I just make a follow-up point? I want to go back to Mark’s question about hearings. I think that there is sometimes a disconnect between our jurisprudence and what a court may do when it gets a case on impoundment. A well-known lawyer—and a well-known lawyer does not have to be a famous lawyer, just somebody who may be well known to a clerk—says to the clerk: I have got a medical appointment this morning, could you just put this case on at ten of nine? Fine says the clerk. It turns out that the client is a well-known person who has been caught driving under the influence, and the lawyer knows there is probably a reporter who is going to cover the hearing.

Most of us know that the vast majority of our colleagues do not say wonderful things about the “fourth branch” very frequently. When Lucy talks about what the law is and what the rights are under the First Amendment and under the common law, it is not so much that judges are deliberately flaunting the law, but that the judicial branch does not always reflect the respect for what open proceedings really mean in our society. I am not talking about

secret proceedings. I am talking about our responsibility to make sure that the public really does have an understanding of what we in the judicial branch do all of the time.

PROFESSOR
RESNIK Given that this room is full of people who have authority to interpret law and to make rules that could make materials more accessible, and given the discussion by Luke about the new and multiple technologies, how should we think about making materials more accessible? Let me hold off on the questions of discovery documents, settlements, and confidentiality for the moment, but do let me also note that when we focus on actual trials, we are looking at a very small percentage of the litigation world.

MS. DALGLISH I can give you an example of how that plays out. I mentioned the Moussaoui case. The judge—the Fourth Circuit said to Judge Brinkema you have to release this stuff—thought the Associated Press would be the logical place to distribute it. But the mainstream media had gotten into kind of a little spat with the court administrator in Alexandria. They did not allow any of the media to have any space within that courthouse whatsoever. They all had to lease space four blocks away in an office building, and they were all ornery about it because it was very expensive. So they said we are not going to do them any favors. Make the court put it up on their own website.

Well, of course, that is a logical thing to assume the court would do. They said that is not what the Fourth Circuit order says we had to do, so we are not going to do it. So I get a phone call and they say: look, you were one of the parties that sued us. If you want this stuff, you can be the custodian. So every day I sent somebody down to pick up the material. We would post it, and we had people, we had mainstream media, we had bloggers. Within twenty minutes that stuff—once we posted it on our website—was posted on newspaper websites, it was on blogger websites, and it was on the CBS News website. This stuff went out almost instantly.

Ironically, two weeks after the trial, the judge enters an order saying to the court administration: okay, we have to post this on our website. And he said: but I gave it all away. So he called and he said: can you data-dump this back to us? And I said what? You did not keep anything? The response was: well, no, that is not what the Fourth Circuit told us to do, and I need it all back. So we then—this is going into more detail than you need, but you will find it amusing—dumped it back, and gave him access to our password. He gave us a virus.

[Laughter]

It crashed my system for two days.

PROFESSOR RESNIK Given some concern expressed by judges that people do not know enough about the justice system and the discussion by judges that they are eager to be better understood by the popular press, how should courts use their authority? Can we learn about which of the states represented here is rushing to be first at the gate to use new technologies to make more of courts' processes and decisions accessible and disseminated?

CHIEF JUSTICE MARSHALL I am on the web, Judith.

PROFESSOR RESNIK Are you all—all of the states here—on the web? Broadcasting your proceedings?

CHIEF JUSTICE MARSHALL Any day the Supreme Judicial Court hears oral argument, you can watch the court in action. It may be like watching paint drying on a wall, but it is very educational.

CHIEF JUSTICE HASSELL I have an observation.

PROFESSOR RESNIK Please do so, so we can hear from you and then we will turn to some comments from the audience.

CHIEF JUSTICE HASSELL Luke mentioned as a source of concern or frustration—I think his word was frustration—that people expect in this age of information technology that decisions would be made at a quicker pace and they seek a quicker resolution. I do not care about their expectations, and I truly do not care. And I do not care because as a jurist, information technology must serve and assist us, but it must not dictate how we resolve our cases, and it must not dictate the pace at which we resolve our cases.

I think it is critical that in the resolution of our cases, whether they are in the trial courts or the appellate courts, that we do so without delay. But as we have seemingly become a fast-food society, in that we expect results quickly, I hope there will never come a day in this great country in which we will change our judicial processes and become a servant to information technology, which I strongly, strongly advocate.

The other issue that Luke rose, which is troublesome to me, is the suggestion that perhaps we embrace other methods or embrace more intimately methods of ADR. I think there was a day when ADR served a useful purpose. I think it has come to the point,

though, where ADR has begun to essentially swallow rights that we have deemed sacred and that we have valued. I suspect that everybody in this room has a cell phone contract, and I also suspect, I can virtually guarantee that all of you in your cell phone contracts have got provisions in which you have waived your right to a jury trial. You have agreed to binding arbitration. You have agreed to—in some of your contracts, I think the Sprint contract—venue in certain places around the country that you will never step a foot in. But my point is I think it is now time for us to revisit and to become suspicious of these alternative-dispute-resolution mechanisms that were designed initially to reduce burdens upon the judiciary. But as a consequence of market forces and significantly unequal bargaining positions, we have contracted away, and all Americans have contracted away many of their rights, knowingly or unknowingly. I will be quiet.

PROFESSOR RESNIK I think that we have put forth a fair number of statements about the sources of “dissatisfaction,” and we have heard several claims about “popular,” perceptions as well as suggestions of proactive programs that courts could provide—from websites to case law. I want to note in this regard the development of doctrine that refuses to enforce the privatization represented by contracts insisting that consumers agree, before a dispute arises, that they will forego adjudication and use private arbitration instead. I am confident that there are people sitting in this room who have views on some of the propositions that have been stated. Given the many topics on the table, I think it will be more useful to follow up on one issue and then move to another. Since Chief Justice Hassell has just discussed the question about enforceability of mandatory contracts for arbitration and since this is a vibrant area of lawmaking in both state and federal courts, let us begin there.

I have a colleague in California who sends me all the California hot-off-the-press or hot-off-the-web decisions. Let me turn to Chief Justice Ronald George and ask about whether the promotion of alternative dispute resolution is swallowing adjudication. (Hereafter, we will circle back to the questions around techniques to make courts’ information more accessible.) Chief Justice George: tell us something about the law in California about enforceability of these contracts, which raise legal questions under common law, federal statutory law, and perhaps under constitutional law as well.

CHIEF JUSTICE GEORGE Our case law, and specifically California Supreme Court case law, reflects an approach that many of these ADR arrangements, and I share what my colleague from Virginia has just said about them, are basically contracts of adhesion. They are so at least in areas

that involve consumer rights, whether it is healthcare, or dealing with a brokerage, or bank entity, or something akin to that. Now, it is one thing if General Motors and the steel company want to get together and make any sort of arrangement. There is enough of an equality of bargaining power there that I suppose they can breed any kind of mechanism they want. But we have been invalidating some of the arrangements that really do not involve the knowing waiver or that do not involve any sort of choice when it is one-sided. There have been some where one side gets to choose a forum or gets to choose to arbitrate or can waive a jury trial, but not the other. And these things are patently improper, at least under our case law.

PROFESSOR RESNIK Let me offer two points about the relationship between state and federal law on these issues. One is the question of federal preemption under the Federal Arbitration Act. How free are states to make contract doctrine and when will federal law (currently very supportive of expansive interpretations of the FAA) preclude state decision making?

A second issue is about the legality of arbitration agreements in consumer contracts that purport to prohibit class actions and that require waivers of rights to aggregate claims. Let me ask the press folks on the panel a question: Have you ever tried—via the filing of lawsuits or other ways—to get access to arbitrations? And I do not mean the steelworker arbitrations, which are under labor-management contracts, but those arbitrations such as the one required by my cell phone contract with Verizon.

MS. DALGLISH There have been a couple of attempts, but I have to say the media has not covered this issue as closely as they should have. I do not think they quite get what has happened as quickly as you folks have understood it; but, yes. In fact, I have a special publication on our website under our secret justice series that is called ADR—alternative dispute resolution—What Do You Have A Right of Access To and What You Do Not. That publication, which explains to journalists what they can learn and how it works, is pretty depressing.

MR. CURRIDEN We also have challenged a couple of what we consider ADR; the summary jury trials that are set up, they are the one-day deals. We have been pretty successful in making those public in cases where there are real jurors, the state is actually issuing the summons, but if it is a private deal—non-court-related—then we have not been successful.

PROFESSOR RESNIK Let me be sure we are all clear on the distinctions among kinds of arbitrations. One kind is like the one in my cell phone contract, which provides that I am not supposed to file a lawsuit but to arbitrate instead. This kind of case comes into court when litigants argue that such clauses do not preclude their filing lawsuits or are otherwise unenforceable.

A different kind of arbitration, called court-annexed arbitration, stems from court-based rules. After I begin a lawsuit in court, I can be told that the kind of case I have filed is one in which the court requires that I go to arbitration (or more commonly now, to mediation). I know from my own research on federally based provisions that as of a couple of years ago, about ten federal district courts were authorized by statute to require mandatory arbitration, that seven had programs. Of those, only in the Eastern District of Pennsylvania could I find court rules that made clear where those arbitrations were to be held and that, because they were in a courthouse, I might be able to watch them.

Court-based ADR raises significant questions of public access. It is a mistake to equate courts with public access, and it is conceptually not a foregone conclusion that all that is ADR is private. What we have just heard is that not all that occurs in courts—including litigation of cases, let alone court-based ADR—is accessible to the public. Moreover, courts have the power to make some of the ADR provisions that they enforce more public, including through requiring aggregate accounting of information about outcomes and process.

MS. DALGLISH Well, I can tell you that when it comes to ADR, where we have gotten involved frequently is when the alternative dispute resolution is used and one of the parties is a public body. When I first started on this job six years ago, one of the things I was trying to do was sort of beat back the ABA. At one point they wanted to allow cities, school districts, counties, and everybody the ability to do ADR on personnel matters, so they could be closed. Every time we have challenged that involving a public body, we have won.

PROFESSOR RESNIK But I also want to say that courts have a role, and could generate rules providing, for example, that court-based arbitrations should be calendared and open. It is not intrinsic in court-based arbitration that it's secret. Moreover, as we have heard this morning, it is not intrinsic that adjudication is necessarily open. Rather what is required is action, rules, and enforcement. The question of the public-private divide ought not be segmented in our heads as a distinction driven by the difference between courts and ADR, because it is more complicated than that, as a matter of

rules, doctrine, and practice.

Let me turn to another comment from the floor.

MR. BYERS I have two comments; there have been two themes going right now.

First off, in terms of the access, we have heard from the media, and for years and years courts considered their proceedings and documents open, but I think you are seeing now a wave from state legislators going the other way. It is a reaction to, right or wrong, to identity theft. I know in our legislature, we had at least six pieces of legislation introduced that would restrict documents that we have been making public and putting on the Internet. These are documents that are available to a reporter or anyone else that come to the courts. So we are now seeing the tension, caught between the two, even when constitutional provisions say court proceedings are open, but now a wave of legislation that is saying: yeah, but do not put these things out. Then the reality is because of the number of documents we deal with, if they start restricting certain pieces of data, it becomes virtually impossible to make things available to the public. Even look at probate records now. The detail of financial information in just general probate records is huge! So I think we are going to see a wave of tension between the media wanting the access and the legislators starting to clamp down the other way.

The second comment: We do a poll every five years of our citizens about the courts on a whole variety of subjects. So I know with confidence what the people are saying. Their popular dissatisfaction in our state is that courts take too long, cost too much, and they are related. Because of the number of continuances and the length of time it takes to get something through court, with billable hours from attorneys, it winds up costing them too much to go in the superior court or the general jurisdiction courts. I think that is partly what drives arbitration, ADR, and all the other alternatives. I am very concerned about it because, and we saw data yesterday by one of the presenters, the majority of human disputes are no longer settled in courts. They are in administrative hearing bodies in the executive branch and they are in private judging. Every year we have a roundtable of general counsels, and they are telling us: unless courts can do a better job of getting quality decisions faster, we are going elsewhere; that the time it takes these global corporations to get a decision just does not work. Even if they lost, they would rather get a decision and move on, but they cannot; the system takes too long for them to stay in business in the global market and wait for our system. So I think we have got to look at ourselves and say:

the people are choosing to go elsewhere, maybe we do have to question some of the things.

PROFESSOR RESNIK Let me pause to underscore the question about the idea of “choice.” One version of arbitration is the model of the United Steelworkers versus GM or other labor-management contracts. Another version is the phone contract, and that one does not give the consumer a “choice.”

I know several people want to join this discussion. Chief Justice Wolff?

CHIEF JUSTICE WOLFF About thirty-six years ago—when I started practicing law—you could go to the courthouse and read the discovery in other people’s cases. It was a wonderful way to find things out, like who witnesses are, and who the experts are, and how answers to interrogatories were filed with the court. About twenty years ago that went away. And so it should not surprise any of us that court processes have become more and more private kinds of things. I mean, one of our state judges was telling me very recently that last year in the Eastern District Federal Court in Missouri, with about six or seven or eight active judges, he had thirty-two jury trials the whole year. So if you have private discovery and mediation or settlement discussions or something like that—and, by the way, the state courts try a lot more cases and are somewhat more accessible—but really what we are kind of moving to is a whole publicly financed system of private dispute resolution from start to finish. This is so because a lot of the stuff that was in discovery was not only interesting to me as a lawyer who might have a similar case, but I think some of it is imbued with the public interests as well.

PROFESSOR RESNIK Well, in terms of the history, we know that as far back as around 1200, courts in England functioned as record keepers for the community. In the United States, one of the reasons to build courthouses out of stone (rather than wood) was to protect the records stored therein from burning. In other words, the idea of courts as a source of information is hundreds of years old. Today’s questions are about whether that source of information is drying up.

One question is how much of the ADR-like activity is supported by public funding, and another is about how much people are exiting the public sector to “go private.” A third is about what attitude to take towards such a shift. Some people (including possibly some here) celebrate limiting the aegis of courts. Anyone want to champion the view that it is not such a bad idea for courts to do less? Chief Justice Taylor, in some of your written

comments, you have identified yourself with the position that courts should do less. Would you like to comment?

CHIEF JUSTICE TAYLOR Well, I think Mike Wolff raises a very interesting point, and it is provocatively stated, that the public processes are becoming increasingly private. I will say this: I think when courts enter into abrogating contracts that there is a real fear that they do not properly understand the various interests that are conflicting. Judges are quick to recognize the right to a jury trial, but they may not be as quick to appreciate what is given up if you allow the phone company to face a situation where they have full-blown litigation. In particular, what will this do to rates and such, and what is it that is actually covered by arbitration? Is it something that has to do with personal injuries or is it something that has only to do with disputes over monetary compensation for the service? I think there is a lot of interesting work that has been done on this tendency of judges to be quick to find things adhesive, which perhaps they do not fully understand.

PROFESSOR RESNIK Let me clarify the two questions before us. One may be a substantive disagreement about what doctrine courts should develop on mandatory consumer arbitration clauses. A distinct question is that of access to information about process and outcomes in mandatory arbitrations. For example, judges or legislators might be able to require, as a predicate to enforcement of these clauses in contracts, that companies proffering contracts to arbitrate also provide public information about outcomes, to enable us to assess some of the questions that Chief Justice Taylor has raised about the costs (both direct and indirect) of litigation and the rates at which the alternatives are used. Does rulemaking that links court's endorsement with some caveats appeal to you?

CHIEF JUSTICE TAYLOR Well, you know, that is not unappealing. I think you might be able to argue also that this really lends itself more to legislative consideration where you have broad societal interests as opposed to the two litigants in the proceeding. It may be the legislative body would choose to take this up. They can get all kinds of broad information and have very few problems with rules of evidence. You also tend to hear from a broader cross-section. To make that be feasible, that is a legislative consideration of these things: you of course have to have access to this information and usually legislatures are able to get this fairly quickly with their subpoena power.

PROFESSOR RESNIK State legislators have enacted statutes, often named "Sunshine in Courts," with Florida (aptly, given the word 'sunshine') leading the way. I also know that South Carolina has taken a leadership role in dealing with some kinds of secrecy. Chief Justice Toal,

could you explain some of the South Carolina court-based rules as well as any relevant legislation?

CHIEF JUSTICE TOAL The Chief Judge of our United States District Courts for the District of South Carolina and myself as Chief Justice of the state courts came together and developed a rule, and we used our rule-making authority. He did it with his group of federal judges as local rules, and I did it with my court as an amendment to our Rules of Civil Procedure. We developed a rule that bans secret settlements, and we used the constitutional authority in state court for open courts, as well as the administrative authority of myself as Chief Justice and my colleagues to say: If you come to a public court system to resolve your dispute and you ask us to approve the settlement of your dispute, then that settlement must be open to public inspection unless you have a hearing on the record in public and balance the competing interests of whatever you are trying to achieve by secrecy against the default of an open court system. We did that for a variety of reasons, one of which was our interest in maintaining public dispute resolution and open courts. We also were concerned, both myself and the Chief Judge of the federal court, about what we perceive to be the misuse of our enforcement authority as individual judges when we are asked by the parties: We can resolve this, but only if you make everything secret; anything in discovery that has been put into the public records has now got to be sealed. My colleague was worried about the Bridgestone/Firestone cases when he ultimately tried some and realized that for years the problems with these tires had been kept from public view by a series of confidential settlements enforced by judges. So his question and mine for my court was: Is that an appropriate role for me to have the hammer of my authority as a judge be used to make secret things, which if they had been disclosed to the public, could have prevented maiming and killing and all the rest of it in these very serious tort cases?

CHIEF JUSTICE MARSHALL Could I ask the Chief Justice a question?

PROFESSOR RESNIK That is one of the goals of this discussion, to have direct exchanges among you.

CHIEF JUSTICE MARSHALL If the parties commence a public civil proceeding, plaintiff against defendant, and they then reach a settlement—

CHIEF JUSTICE TOAL I am just about to get there.

CHIEF JUSTICE MARSHALL —where there is just a stipulation of dismissal.

CHIEF JUSTICE TOAL Exactly. If they want to make a private settlement after they have gone into the court, they cannot make confidential anything that is on the court record, but if they want to make a confidential settlement and they do not want the might and majesty of the court's contempt power to enforce it, then of course it is a private contract.

Now, Judith raises—in this very excellent article in the *Law Review*—some real issues about whether public policy ought to broaden some to look at whether these contracts can be entered into. That may be a mixed legislative question as well as a question for us as judges, but we came down on the side of trying to look at this slice of it from the standpoint of how should our judicial authority be used. But there is a much broader question that Judith is raising and the panelists are raising about what the public policy about access to these contractually agreed-to matters ought to be; whether my authority is being used. Now, if you come back into court with your private contract and I have to enforce it, it is going to be public. But the majority of them, of course, they never come back.

CHIEF JUSTICE TAYLOR Jean, let me ask you if the settlement says that the parties herewith stipulate to the agreement of May 24th to resolve this matter. That would be okay, right?

CHIEF JUSTICE TOAL No sir! The only thing that is okay for them to do is to say: We both enter into a voluntary dismissal with prejudice of this lawsuit. If they want to get into the business of anything that is beyond that, which involves a settlement, it has got to be on the public record if it is part of the order that settles the case. If my order simply says: "Dismissed with prejudice and both sides consent," that is okay. If it gets into the agreement of September the 21st, it has got to be on the record.

PROFESSOR RESNIK Comments from Indiana come next, via Chief Justice Shepard.

CHIEF JUSTICE SHEPARD I wanted to ask a question. It seemed to me that one import of what Cliff Taylor said earlier is that we judges sometimes think about only half of the equation or we pretend the question is one-dimensional. This leads me to ask whether, in your view, the real-world product of your action has been more disclosures? Or whether your reform has simply forced these decisions even farther underground, such that the actual outcome has been more secrecy rather than more openness?

CHIEF JUSTICE TOAL Well, of course, that is the argument, interestingly joined into by some of these professor-types that are up here lecturing us about

how open we ought to be, as well as general counsel of some of the corporations. They both gather together and cuss out my federal colleague and myself, and say: Ah, you did not go far enough, or you went too far; it really does not make any difference and has not had any effect. We do not have complete data, but what we have been able to survey leads us to the belief that it has not caused more settlements to go underground. We still have a good many settlements that are disclosed on the public record for other good and sufficient reasons to the parties. But there has always been a lot of private settling of lawsuits, and that continues.

- PROFESSOR RESNIK This discussion prompts at least two questions. One is for the journalists among us: Is this rule the ideal rule? Does it fix the problems you see? And then, from the perspective of the chief justices and court administrators: Is this a rule that you are likely to adopt, and is one that you would predict, looking forward, would become common in all of your jurisdictions? Further, what do the journalists here, our placeholders for the “public,” think about this rule?
- MS. DALGLISH It would be great. Yes, in general we like the South Carolina approach to everything, but it is such a small part of what the problem is.
- CHIEF JUSTICE TOAL I would just say that one of the reasons is that we did not proceed— With the greatest of respect for you all, we did not proceed from the notion that: Oh, we want to make everything very open and so forth. We were trying to address the use and misuse of our authority as judges, so, frankly, we would take our small piece of the pie that has to do with what we do best, which is deciding what the limits of our decision making and our authority are and how it is used. There is a whole other forum of which we are a part, but a small part, which deals with how open everything ought to be in the society.
- MS. DALGLISH That is a small part of what we do, the access to the settlements, which is kind of a losing battle. Unless there is a major public interest, like cases where you are trying to go into a state to find old settlements—a la Bridgestone/Firestone—you are trying to figure out what they are. Or like the Catholic Church, you might want to go and find out. You have reason to believe there is a body of law out there that nobody knows about. That is usually when the settlement stuff comes up.

But I am so busy putting out fires most of the time on prior restraints, closed hearings, and people sitting in jail with no public track record of how they got there. So that is, by far, a bigger

problem. But in answer, we agreed to reasonable measures on identity theft several years ago when the feds were leading the way. I agree that if you are doing it, you should only be collecting or releasing the last four digits of all account numbers and Social Security numbers. You should and can be circumspect in what you release. Our position is that as the ability to collect and manage data increases and improves electronically, you should be being careful. You should be careful about how you collect that information, and if you need to segregate it, segregate the data stuff. I think the feds, the way they are doing it with only the last four digits, makes it useful. It masks people's identities so that you cannot steal them, but it also allows reporters to look at the last four digits of a Social and say okay, that is the John Anderson from Greenville, not the John Anderson from Columbia. Also, you are able to distinguish people like that, so we realize that identity theft is an issue, but I think there are useful tools that you all can use, short of just closing down the records.

PROFESSOR RESNIK Mark, I know that you want to add a comment, and then we will take a break.

MR. CURRIDEN Yes, I think that is right, and I agree, I love Joe Anderson's and Chief Justice Toal's rules. I think that they are ideal. We saw them, especially some of the stuff I did on the tobacco and then on the pharmaceutical price-fixing cases. We are able to present that. And it is also—I think as regarding juror information—one of the big problems we have been seeing over and over and over again is whether it is documents or settlements or closed hearings. The excuse we get is: "well, we did it by consent." Let us just waive everything by consent.

I think that is where we get back to the arbitration. Now, putting on the big-firm hat for a minute, what is interesting is that in corporate-to-corporate disputes, we are seeing a bigger tendency, because arbitration has gotten so expensive and is so unpredictable, that big corporations suing big corporations no longer want to go to ADR. They want to take it to court, and they want their jury trial. We are starting to see that trend right now in new contracts being written. And so what you are going to get is exactly what the Chief Justice of Virginia was talking about. Yes, I mean the bottom line is that it will be the people taking advantage of people who cannot afford it, and who cannot afford to challenge it. It is a disadvantage issue.

CHIEF JUSTICE TAYLOR Mark, what about the rent-a-judge approach where, say, two corporations pick a retired judge to hear their case?

MR. CURRIDEN Still, the bottom line is that there are no rules. There is no guarantee that any of the rules of evidence are enforceable. What we see in private, what our litigators are seeing in pursuing private litigation, or arbitration, is that most of them want to split the baby. And you know what? If our company, or our corporation—be it Southwest Airlines or Bell or whoever it may be—litigates, we want to win, and we want to be able to appeal if we do not like this decision based on this evidence because we do not want this evidence to get in. We just see very unfair decision making.

CHIEF JUSTICE MARSHALL I think private decision-making is sometimes unfair. Reflecting on many conversations about the benefits of private dispute resolutions versus judicial rulings, I conclude that establishing precedents is very helpful. One of the things that arbitration does not do is create precedents. When you are in very fast-moving circumstances, as we are at the moment, lawyers need guidelines. Corporate counsel will often say: Just tell me what the rules are, I want to obey the rules. Even if you hire the best retired judge to act as arbitrator or mediator, and as you know, they are now building in a private appellate process, so you now rent your judge and you rent your appeals panel, and some of our colleagues are making wonderful money acting as appellate judges, that may take care of any arbitrary unfairness in non-judicial fora. It does not take care of complying with the rules of evidence or failing to establish legal precedents on which other parties can rely.

CHIEF JUSTICE TAYLOR Margaret, do you have to have a retired court administrator, too?
[Laughter]

PROFESSOR RESNIK We are now onto “hot” legal questions, about the role of arbitration and the market for arbitration, as well as about how much the Federal Arbitration Act (FAA) preempts local action. For example, if one crafts a contract that provides for a court to have more review of an arbitrator’s decision than is currently available under the FAA, is that provision enforceable? Currently, the federal circuits are split about whether contracting parties can confer more jurisdiction for federal review.

CHIEF JUSTICE MARSHALL I have not had that issue arise in a case. But I am not expressing any point of view because that issue may come before our court.
[Laughter]

PROFESSOR RESNIK For the record.

CHIEF JUSTICE MARSHALL But I tend to think that Chief Justice Toal is on to something. Litigants cannot tell the courts that they only want our judicial authority when they want our judicial authority, and do not want the full reach of judicial authority when it does not suit their needs. I review an appellate record, which does not comply with the rules of evidence, and then you ask me to tell you whether a case was fairly decided. How can I do that? I cannot. I think it is a problem if you tell a judge: I will confer jurisdiction on you when I want you, and take it away when I do not.

PROFESSOR RESNIK I teach and write about procedure, and I am struck by how much the model has shifted from one predicated on due process to open more aptly termed “procedure as contract;” increasingly, courts encourage parties to bargain and increasingly, issues arise about what has been agreed to and whether the provisions are enforceable. Your opinions are often about interpreting parties’ agreements and deferring to their decisions.

CHIEF JUSTICE MARSHALL To some extent you do that already. When I review a contract that says “Minnesota law will govern,” I sometimes feel like saying: Thanks very much.

[Laughter]

PROFESSOR RESNIK Well, as we take a break, let me ask you to consider, from your perspectives in different jurisdictions, do you have rules that cabin closure of information? Do you have case law that limits arbitration agreements? And, are you all in jurisdictions that make information available on the web? Do you have bloggers who disseminate decisions rapidly? And, in terms of rapid, we are supposed to be back in five minutes.

[A recess was taken.]

PROFESSOR RESNIK I know that California has some rules on access and information that are relevant, and I have spoken to a few others of you during the break. Given we are imagining ourselves at a “roundtable,” let me invite comments from various jurisdictions that relate to the examples already proffered. We will start with Chief Justice George.

CHIEF JUSTICE GEORGE I was interested to hear a couple of suggestions here that some of the proposals for openness came from legislative efforts. In California our experience, if anything, has been to the contrary. There have been some special interests, in fact, there was one

special interest who is a billionaire who actually is thought to have gotten through some legislation just for his own divorce proceedings, and that was not the end of it. Our courts had to cope with that and it was declared unconstitutional.

Our efforts in California have come mainly from our decisional law. There is a decision on the object of the court—NBC Affiliates—that set forth the right to open proceedings in California, court proceedings in civil cases. Also, as a result of a suggestion in that case, we have promulgated some rules that provide for a presumption of openness. And if a portion of the proceedings or any exhibits or documents, are to be sealed, a judge has to go through a certain process and make certain findings, and it has to be very narrowly tailored.

So I recognize from the standpoint of the press that this is not necessarily the solution because you cannot be running up with a writ every time there is a bad call. In California we have over 2000 bench officers, so it is quite a job to monitor this. So some of it really involves changing the judicial culture in terms of adhering to these things.

PROFESSOR RESNIK Let me probe that example some. We have heard about a presumption of openness, yet also about at least a few trial judges who lawfully or not close proceedings. What prompts the shift towards closure? Is it unhappiness with the press? The new threats of terrorism? Something else? How do cultures of either openness or closure emerge?

CHIEF JUSTICE GEORGE Well, I think it is a desire to accommodate the parties, and there was some mention of agreement. In fact, this NBC case involved Clint Eastwood and Sandra Locke going through a divorce, and the judge just said: “oh, you are celebrities. Fine. We will just put this off limits.” We felt that that was improper.

MS. DALGLISH Now you have raised something. I have not yet heard the magic initials yet today that I always hear when I talk to judges, and that is the O.J. case, where things got out of control.

I teach out at the Judicial College in Reno several times a year, and we have a course where we teach judges—and I recommend it highly—what the law is, how to deal with the media, and how to manage a high-profile trial. And if I had a nickel for every time a judge told me: “yeah, but you do not understand, I do not want to be the next Judge Ito.” Not that they think Judge Ito did anything wrong, they just thought Judge Ito became the focus of the case. There was all this negative attention, and one thing I have noticed about folks like you is that you love control, and that is probably a

good thing.

CHIEF JUSTICE
TOAL Maybe we do. What is not to love?

[Laughter]

MS. DALGLISH And a lot of judges equate control with the management of everything from the behavior in the courtroom to the management of the information that gets out about the proceeding. A lot of times—particularly in criminal cases, and particularly if you are like Terry Ruckriegle from Eagle, Colorado, and all of a sudden you have Kobe Bryant in your courtroom—you have got certain things that are going on, which you never in a million years thought you were going to have to handle. That is where I think we really have bigger problems and where bad law often gets made.

PROFESSOR
RESNIK Let me ask a factual question: how many of the jurisdictions in which you sit provide for a web broadcast? Can I watch all of the state supreme courts by just logging on? Please raise your hands. For the record, about a third of those in the room seem to be responding that their courts are “on the web.” I take it that the more common that experience, the less the concern about it. I know, Chief Justice George, that you wanted to comment or reply.

CHIEF JUSTICE
GEORGE I just wanted to say that the O.J. case represents a low point in terms of the perception of the benefits of televising. In fact, it was such that it caused years of delay before the California Supreme Court would agree to televise its proceedings, even though there is obviously no correlation between what goes on in the trial court.

PROFESSOR
RESNIK Are you televised now?

CHIEF JUSTICE
GEORGE We televise when there is a request for it.

CHIEF JUSTICE
MARSHALL You do not do it automatically?

CHIEF JUSTICE
GEORGE No. I think we could fund our budget by televising our oral arguments and having them sponsored by Sominex for people.

[Laughter]

We do it when it is requested. But one thing that we also have done, and this ties on to the mention of putting things on the web, we had the Michael Jackson case in a small community, and what

we did is adopt a rule. The judicial council did, on an experimental basis, and now we are doing it permanently. We put all these documents and all the filings on the web immediately, and it actually is very beneficial to the court. Instead of having, in a small community, literally scores and scores of reporters trying to swamp the clerk's office to get these documents, they are available immediately.

MS. DALGLISH That is uniform. Of course, that does not address the issue of why an indictment was not made public until the trial started, which is something that we sued over. But yes, you are going to find that your website is your best friend when it comes to a high-profile case.

PROFESSOR RESNIK And Mel Gibson's recent problems will provide the next example. I see from the hands raised that we are to move to the next jurisdiction, Colorado.

CHIEF JUSTICE MULLARKEY The statement that the web is your best friend is certainly not true. In the high-profile Kobe Bryant case, the media descended on Eagle, Colorado, a very tiny courthouse, with more satellite news trucks than you will see in your lifetime. The media called the parking lot "Camp Kobe." We did respond by putting pleadings on the web for the media so that we could avoid the problems of the clerk's office being inundated with requests. We made mistakes, however, and materials containing the victim's name were posted. We were pilloried for it. Web access is a "damned if you do, damned if you don't" choice for the courts.

These are very difficult cases to handle. The discussion today makes access issues seem cut-and-dried. It is too simple. Courts are overwhelmed because there is not money to address issues such as Social Security numbers, victims' names, children's names, and other confidential information, it will be extremely expensive.

I question how important this is to the public. It is important to the media when they want information on a particular case, but I do not know that it is very important to the public. I am concerned that the discussion is overly simplified and of questionable relevancy to the stated topic: the causes of public dissatisfaction with the courts.

PROFESSOR RESNIK Thank you for your comment, as it helps us to focus on the many facets of the speech by Roscoe Pound. He too noted that responding to problems in courts is hard, and your point underscores the difficulty of responding to the diverse problems that we are discussing. You have fairly asked if we are too quickly

equating the press with the public. Yet we have to question who we should be referring to as “the public” and what different segments may care about. Your comments have also prompted many hands.

CHIEF JUSTICE SAUFLEY I want to pick up on something that Mary Mullarkey said. I am going to say something really iconoclastic and get ready to run.

Everyone speaks about the presumption of openness. But first I want to tell you we watch what Margie Marshall does, and we find that if we do what she does, we get lots of success. We set up the Media Committee. It has been wonderful for criminal cases and for big cases that are interesting to the public. We find that we can channel the complaints and the concerns through this committee. We do not have to go through the expense of litigation. We are educating judges. We get the media in. That all works really well, and I highly recommend it.

At the same time we put together a committee on what to do with technology. Maine is fortunately—and I think this is true—way behind in technology. So we are getting to watch other states trying it and having the mistakes that really cause catastrophe. And one of the things that the tech committee presented to the court that we still have not grappled with gets right at this issue of the presumption of openness. We do presume that court records are open, but, in fact, I think one of the reasons people talk about rogue judges, the reason trial judges are doing these things—although I want to preface this as not having to do with the criminal cases, but more on the family and civil side—is that there is an assumption on the part of the public about their personal agony. The dispute between two human beings over their children, their sex lives, or their fiancés, is not something the public has much of an interest in. So there is this concern, as we get more technologically competent that all of those personal agonies will be on—available through the website.

And I was introduced to a new term; they refer to the folks as “Jammy Surfers.” Can you go online at three o’clock in the morning and find out what happened to your neighbors’ marriage? Can you find out what is going on in their children’s lives? Can you find out how much they are paying their lawyers to go through this dispute? There is a real push-back on the part of the Legislature, and, I think, the public, about having all of that information just readily available.

What we do not talk about very much is the phrase “practical obscurity.” When the files were in the Dover-Foxcroft Courthouse, you would have to travel four hours to get there and

pile through them. Or you would have to go down to the courthouse and face the clerk and say: "hi, I want to see my neighbors' divorce file." It really was not done much. The question is: have we ever grappled with the question of whether there is a presumption of openness in these cases, which are just two individuals trying to sort out their own private lives, and I just do not think we have the answers yet.

PROFESSOR RESNIK First, let us get a response from Mark here on the panel and then from others in the audience.

MR. CURRIDEN Actually, I think I somewhat agree with you on the aspect of the technology. I do not think there is an actual presumption that every public record will be put on the Internet. I think that there is a presumption that every public record is public and is open for public inspection at the courthouse. For example, I was on the ABA jury commission, and we got in the whole debate over juror records, and we said that we should never make any juror information public, and why. Well, it would be on the front page of the newspaper. When is the last time a juror was identified in the newspaper where the juror did not want to be identified, or even during the middle of the case?

And the biggest, most recent situation was the Martha Stewart trial. A juror was identified in the middle of the trial. Why? Well, the juror comes out to the defense and goes [indicating thumbs up], right in front of everyone.

MS. DALGLISH That was Tyco, no?

MR. CURRIDEN That was the Martha Stewart case.

MS. DALGLISH Okay. I thought it was the other one.

MR. CURRIDEN The bottom line is if a juror comes out in the middle of a trial and gives the "thumbs up" to the defense, you know that is going to be news. And I think, but I do believe, we could not find any other circumstances where a newspaper printed the names of the jurors and the jurors did not give an interview by consent after the end of the trial. We just could not find any.

The ending question at that meeting was: is that really why we want to protect juror names? Well, it could give people, like angry defendants, juror names, and there are other issues there. But I understand what you are saying regarding the issue of the Internet access. I am not sure that there is a constitutional

guarantee that every public record of all information must be on the Internet. I think that you have the right to police that information, but it must be made public somewhere that has easy accessibility for all.

MR. BIERMAN There may not be a constitutional right, but there certainly is an enhanced and increasing expectation that that kind of information is going to be out there, and it is not just because some people are nosy. You know, we have always had nosy neighbors. But it is also because there are some people, who may be neighbors, who are going through or thinking of going through the same thing and are learning how to do this. Again, we are in an enhanced information age, and the individual is incredibly empowered today to do this. The pro se litigants in your courts reflect a real desire by the individual not only to bus their own tables and make their own travel arrangements, but also to represent themselves, and the data supports that.

CHIEF JUSTICE HASSELL If I might interject, I think we have to remember, and I recognize that every state is somewhat different in terms of how it handles its information technology systems and who controls them, but the bottom line in Virginia is as follows—and I am glad I am a Chief because I determine what the bottom line is, and I say that in all humility but in all sincerity—for public documents, there is a presumption that they will be open to the public, available at the courthouse. Then there are exceptions in domestic relations cases and other types of cases—cases involving sexual crimes and other exceptions—but the presumption is you can go to the courthouse and you can have access to those documents.

When it comes to information technology, my position is a thousand percent different. And it is a thousand percent different because, number one, there is no constitutional right to have access to information via Internet or information technology. But secondly, we control it. As controllers of the information and as owners of the information technology system, I think that there are certain responsibilities incumbent upon us as stewards of the public to protect sensitive data that may be in that information. That approach may be parochial, but I do not care. And I do not care because as the owner and controller of the system, I believe that I have certain responsibilities to the public. I am simply not going to permit certain data to be placed on that system. We give you the access, and if you want to see something, you come down to the courthouse to see it.

MS. DALGLISH You know that journalists get divorced, too.

I felt when these issues first came up that I was going to have a lot

of resistance from the media. All of you were designing your electronic-access systems, and our position has always been: if it is public in a file cabinet, it should be public on the web. Then we backed off and said: “okay, we recognize there are problems with identity theft.” And now I think we have backed off and said: “okay, in family court cases, because most of you keep family court records public, although some of you do not—in New York, for example, you do not get that stuff in a file cabinet or anywhere else for the most part.” We always took the position that we know there are sensitive, family issues that are in these records, and if they need to be sealed by a judge, and a judge makes a finding, that is fine. Now, the states have put documents up, except for family court records. I am not really getting any pushback from the media on that, because, quite honestly, they do not use that stuff. Every once in a while you get a divorce, like the Jack Welch situation, that identifies the fact that courts are completely secret.

PROFESSOR RESNIK That case also identified some corporate practices of providing certain kinds of perks.

MS. DALGLISH Corporate practice, yeah.

PROFESSOR RESNIK What was interesting—and drew attention—was not only the profile of the individuals but the financial arrangements revealed.

MS. DALGLISH Yes, and there are some things that are. Every once in a while you will get a case like that. That is why I think you need to maintain access to that down at the courthouse, and that is why I would propose that those records stay public. But, like I said, journalists get divorced too, and they do not like to see all of those things. They do not like the “Jammy Surfers” looking at that stuff either. So I think I am almost ready to concede on behalf of America’s media. Almost.

PROFESSOR RESNIK Several people want to comment, and we have a limited amount of time. Let me try to accommodate more comments.

CHIEF JUSTICE DURHAM I am struck by the dynamic of the discussion as it has been emerging in the way it reflects cultural differences in our respective systems. Unlike California, for example, we had a great deal of legislative pressure in our state having to do with openness, in of all places, juvenile courts. There were concerns about child welfare. There were a couple of high-profile cases that generated a lot of interest, both in the media and in the legislature. The net result, by the way, of that particular interaction was a collaborative effort between the courts and the legislature, which resulted in opening up juvenile court proceedings. As you can

imagine, this was extremely controversial, especially within the courts. I have to say the experiment is two years old now, almost three years old, and it has turned into the biggest nonevent of the decade. I cannot tell you why. Perhaps it relates to this phenomenon that the media itself—reporters—respect the privacy of individual families, and it is widely regarded as a very successful move toward openness in an area where we never would have predicted it. So I think we have got to account for the complexity of cultural experiences in the individual states.

PROFESSOR RESNIK Let me add a footnote about Roscoe Pound's correct anticipation, in 1906, of the role that would be played by administrative law. Administrative adjudication is very important but also not very visible to the public nor readily accessible. For example, Veterans Affairs hearings are presumptively closed on the grounds that, like family court, the information is personal. Yet, like some of the critiques of the closing of family courts, through such limited access we know less systemically about how decision making is done. Again, one can also have mechanisms for more information without necessarily having total openness. For example, one could have databases of the decisions of Administrative Law Judges but not permit everyone to attend hearings. There are multiple forms of access, not all of which require same-time, live access.

MR. CURRIDEN Immigration hearings are all closed, but now there is a lot of focus on that. The line is, with journalists, if you really want to get attention, close it. If you want to get ignored, open everything. The journalists go: "ah, it is all open." We never used to cover school boards or the others, like bond issue hearings, until they closed them. Then all of a sudden: "oh, we have got to send a reporter down there, we have got to sue, and we have got to open it up and get in that hearing."

PROFESSOR RESNIK Let me ask those at the far back to comment.

CHIEF JUSTICE ANDERSON We began recently webcasting oral arguments before the Minnesota Supreme Court. It has been used for training appellate lawyers, at least that is what we have heard. We had about 1600 hits the first month.

We still restrict webcasting trial courts; it has to be by consent of the parties and the judge. And my primary concern there, of course, is turning a trial into a media event when in fact the courtroom should be a place where we are seeking the truth in a particular case. The adverse impact on individual lives in some of these high-profile cases is a concern for us.

We had an interesting experiment led by my predecessor to put some sunshine into child protection proceedings, and we opened those to the media. We found what you found, that it was a non-event. The media is not interested in covering such things, but it was resisted greatly at the time, but that resistance has gone away.

I would simply say that, with regard to the court data, we face the same kind of concern. You can obtain information at the courthouse. Our general rules deny public access to court data. Our rules are a work in progress, I would say. We have promulgated these rules, but we are still looking at them. We had an interesting dynamic at the public hearing for our data access rule committee, and at our Supreme Court when we considered the rules. Individuals representing poverty groups and leaders of communities of color opposed liberal public access to court data. It was their experience that data had been used unfairly to deny people housing.

PROFESSOR RESNIK Let us take the next comment.

MR. JERRY MARRONEY I am going to stick up a little bit for the trial judges. I am still recovering, since I was one for ten years. I think that a lot of things that have been mentioned are really good, but I think that for a lot of them, you also need to look at the practical side; at who is being impacted. Actual decisions really need to be made in the courtroom at the trial level. And we always tease about how much time the Supreme Court or Court of Appeals gets to look at something; months or sometimes a year later, they might get to think it all through thoughtfully. When you are a trial judge, you are instantly under fire. You are trying to make a call very quickly, but this is really tough stuff. It is stuff that we have been thinking through in Colorado pretty thoroughly. We have got our access policy, we have got training for the media, and we have got training for the judges by the media. We have got a lot of good things happening, but it is still very individualized, and very case specific.

No Mark, in most of the cases a juror's name does not need to be known until the issue rises in a trial court where somebody does give a thumbs up, then maybe there is an exception to that rule. But most of the time people do not need to know and frankly do not care about who is on the jury panel, and if they care about it, there is sometimes major concern about why they are caring about it. But, with most of the access issues in Colorado, we have tried to be very open.

I think people are ignoring statutes like crazy. Even internally we have public defenders coming into our information system that we

gave them access to, and using it inappropriately to get names of kids who are witnesses in other cases, which they are not authorized to do by statute. So there are a lot of tough issues that need to be addressed, and I think the main thing is working together with the press. The other thing is individually driven, because we have two fine representatives from the press here today who have high credibility, but, unfortunately, just like we have some judges who do not read the law and do not understand it, we have some press people who do not have any clue about what is going on and why, and so, it really is a major education piece for both of us to participate in, and really give the public what they are really interested in—in these settings, so—

PROFESSOR RESNIK We have just a bit more time before we have to wrap up.

CHIEF JUSTICE CAPPY Thank you. I just have a couple comments. We have just gone through the laborious process in the last two-and-a-half years to come up with a written, electronic-access policy. I agree with Leroy Hassell in terms of my own personal view, but we tried to broaden this by putting together the various interest groups that we thought were stakeholders in this issue, and getting them to come to some consensus with regard to electronic access. The prevailing philosophy was openness, and the prevailing philosophy, at least from my standpoint, was that if it were available by going to the clerk's office, it ought to be available on the electronic sites.

Lucy, with due respect to you particularly, and to your organization, somehow you have to communicate what you have said here this morning to my very fine reporters in Pennsylvania. There is a definite disconnect from what I am hearing from you and from the position in Pennsylvania. The prevailing media position in Pennsylvania is that there are no limitations on access. So I sit here and see you reason and try to balance, as we do from my perspective in trying to incorporate the stakeholders and getting all the views and then make a decision consistent with what Leroy has said. But what you are saying has not—at least in my experience—permeated your profession in terms of their understanding of the sensitive issues which are being discussed here this morning. So we both have work to do, particularly in Pennsylvania. But I suggest to you that if you have a national council or if you have national leadership in your profession, that somehow your decisions as a collective leadership are transmitted to the run-of-the-mill reporter, especially for very motivated newspapers who are trying to survive, particularly newspapers, in terms of the balance that you are offering here this morning.

PROFESSOR I regret that we do not have more time to talk. Given that
RESNIK constraint, let me offer a very quick summary of this session. During our first hour, most of the discussion was celebratory of openness. Our second hour has provided a “but see,” in the sense that comments have raised challenges about openness, that electronic access and private data (financial as well as personal) make for a more complicated picture and demonstrate some of the reasons why every filing in court might not be made available in general to the public.

A second set of concerns relate to questions of hierarchy. Several of the Chief Justices have provided descriptions and claims of positions and rules. Yet, we have also learned that “on the ground,” at lower echelons and for good and bad reasons, many people behave differently.

Yet another issue is the degree of authority that courts have over the various records we have discussed, as we might think about litigants’ rights to records and third-party access. A footnote here is the reminder about the questions, raised a few decades ago, about patients’ records. Doctors and hospitals claimed exclusive ownership. Here, like there, if we conceptualize records as a kind of property, it may well be that multiple owners can lay claim or have varying kinds of interests in the same materials. Genuine concerns about social policy exist which, as Roscoe Pound noted a century ago, make it hard to find the correct balance. Some will be dissatisfied and those of us with authority to make rules must know that we will have to contend with dissatisfaction with justice for some time to come.

Our thanks then again to Chief Justice Shepard for prompting us to reread Roscoe Pound and for pushing us to revisit the many issues he raised. Thanks as well to all our participants.

[Applause]

CHIEF JUSTICE Thanks to you all, so very much. Thanks to the panel and to its
SHEPARD leader.