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Washington University Journal of Law & Policy

Access to Justice: The Social Responsibility of Lawyers

Introduction

Karen Tokarz^{*}

A little over a decade ago, Washington University School of Law undertook an evaluation of the School's *Journal of Urban and Contemporary Law*. The students and faculty adopted a new name for the Journal—the *Journal of Law & Policy*—and revised its mission. The new *Journal* was designed as a symposium-based publication, committed to bringing together communities of scholars through a mutual and collaborative student and faculty process; to emphasizing interdisciplinary and multi-cultural visions of the law; to exploring the implications of technology and the consequences of economic globalization; and to influencing law and social policy.

Since the first volume of the new *Washington University Journal of Law & Policy* in fall 1999, the *Journal* has published a volume each year dedicated to Access to Justice. This volume marks the ninth annual Access to Justice volume published by the *Journal of Law & Policy*.

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Like the prior eight volumes dedicated to Access to Justice, most of the Articles and Essays in this volume are written by presenters in the School of Law's annual Public Interest Law & Policy Speaker Series, entitled "Access to Justice: The Social Responsibility of Lawyers." These presenters are prominent academics, practitioners, and authors from diverse backgrounds in areas such as international human rights, the economics of poverty, racial justice, immigration, capital punishment, conflict resolution, clinical legal education, government public service, and pro bono private practice, who share a commitment to access to justice.

The Public Interest Law & Policy Speaker Series was developed in 1998–99 in celebration of the School's nationally recognized Clinical Education Program, through which many of our students are introduced to public service and public interest law practice. The Series informs the Washington University community and wider community on issues of justice through the presentations of the speakers (that are posted on the law school's web site), through the Articles drawn from the presentations that are published in the *Journal*, and through the seminar course that accompanies the series in which students have the opportunity to meet with the speakers, read their work, and develop papers that focus on the speakers' ideas.

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LUCAS GUTTENTAG—IMMIGRANTS' RIGHTS IN THE COURTS AND
CONGRESS: CONSTITUTIONAL PROTECTIONS AND THE RULE OF LAW
AFTER 9/11

Lucas Guttentag, the National Director of the Immigrants' Rights Project of the American Civil Liberties Union Foundation, is widely respected as one of the nations' top immigration lawyers. He has litigated major immigrants' rights cases, including regional and national class actions for almost twenty years. He has argued many cases in federal courts of appeals through the country and successfully argued cases in the U.S. Supreme Court, including *I.N.S. v. St. Cyr* and *Calcano-Martinez v. I.N.S.*

In his Essay, Guttentag discusses immigrants' rights and the changes they have undergone since September 11 with the goal of revealing some of the shortcomings of recent legislation. Because

post-September 11 immigration legislation arose in a time of fear and hostility toward immigration and immigrants, Guttentag argues that the aftermath of September 11 cannot be ignored in assessing proposed immigration policy reform. Guttentag believes that September 11 was a watershed event that fundamentally altered the way the country thinks about immigration, and also exposed problems in the immigration system that long had festered with little attention. Guttentag argues that both the public and press began paying more attention to immigration policy following September 11.

Guttentag believes that September 11 affected not just the general view of immigration, but also specific policies and practices, which in turn threaten the core constitutional rights of immigrants. First, he argues that many non-citizens were detained after September 11. Second, he points out that people of Arab and Muslim origin were overtly discriminated against. Third, he notes that the Administration closed deportation hearings to prevent the public from knowing where an immigrant was, how he was being detained, and when his hearing would be scheduled. Guttentag has been instrumental in challenging these closed hearings on First Amendment grounds, and the federal courts are divided on whether they are constitutional.

Guttentag contends that the larger debate about American immigration policy reflects two longstanding and conflicting strands in America's response to immigration. On one hand, Guttentag believes that we truly are a nation of immigrants, and that the United States is the most generous country in the world in welcoming newcomers. At the same time, Guttentag asserts that we are xenophobic and have a history of racism. Sometimes, one strand predominates, and sometimes it is the other, but neither ever disappears. Both, he argues, inform our immigration policy. The challenge, Guttentag believes, is to recognize both strands and work to better our immigration policy in light of these inclinations, especially in this time of fear and insecurity post-September 11.

JOSEPH MARGULIES—MAKING SENSE OF CAMP DELTA

Joseph Margulies, Associate Clinical Professor at Northwestern University Law School, is the author of the recent book, *Guantánamo and the Abuse of Presidential Power*. In his book, Margulies traces

the development of the detention system established in 2002 by the Bush Administration at Guantánamo Bay Naval Station in Cuba. He argues that Guantánamo was conceived of as “the ideal interrogation chamber,” and that it now contains many prisoners held without charges under super-maximum security conditions. As the lead attorney in the Supreme Court case, *Rasul v. Bush*, Margulies draws on first-hand experience to challenge the present operation of Guantánamo as a “prison beyond the law.”

Margulies begins his Essay with an analysis of Guantánamo from the Administration’s perspective. According to Margulies, the Administration perceives September 11th as an intelligence failure and the Administration believes that an oppressive environment is necessary for interrogations to produce the type of intelligence sought. Margulies reveals and refutes three assumptions he believes are embedded in these positions. First, Margulies asserts that the Administration assumed that coercive interrogations in oppressive conditions were necessary to extract reliable intelligence, despite recommendations against the use of such coercive tactics from the FBI, the Military, Pentagon military planners, and the Judge Advocate Generals in every branch of the service. Second, Margulies suggests that the Administration assumed that the individuals subjected to these aggressive techniques actually possessed valuable intelligence, although no reliable screening existed and many detainees were found to possess no intelligence at all, let alone intelligence of significant value. Third, Margulies observes that oppressive conditions did not end when the interrogations were over. To Margulies, no moral justification remains for keeping prisoners in such severe conditions of confinement if they no longer are being interrogated.

Margulies describes his feelings of hope at learning in June 2005 that seventy percent of the prisoners on the base would be released, and most of the remaining thirty percent would be transferred to a new, medium security facility. Much to Margulies’ dismay, none of this ever came to pass. The mass release promised never took place, and a year later three prisoners committed suicide. Additionally, designs for the new facility were retooled to make it a super-maximum security compound, more oppressive even than the maximum security conditions used before. The Administration,

Margulies tragically concludes, may hold prisoners in these conditions for the rest of their natural lives.

LINDA GREENHOUSE—CHANGE AND CONTINUITY ON THE SUPREME COURT

Pulitzer-Prize winning author Linda Greenhouse has served as *The New York Times* Supreme Court correspondent since 1978, except for a brief period when she covered Congress in the 1980s. Ms. Greenhouse, who holds a Master of Studies in Law degree from Yale University, is the author of the recent book, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journal*.

Greenhouse frames the discussion of Supreme Court politics in her Article around Justice Robert Jackson's observation that "the Court influences appointees more consistently than appointees influence the court." Though Jackson served on the Court for only thirteen years, his views changed greatly during this time. In an early, unpublished opinion regarding the actions of the wartime military commission, Jackson suggested that the Supreme Court should not have reviewed President Roosevelt's exercise of his commander in chief authority. Ten years later, during the Korean War, Justice Jackson expressed a very different view of presidential authority, invalidating President Truman's seizure of the steel mills. Viewing presidential authority at its peak when utilized in conjunction with Congressional authorization, Justice Jackson posited that "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

Greenhouse argues that Jackson's transformation has several explanations. She notes that the former decision came shortly after Justice Jackson's appointment, when Jackson still was closely linked to President Roosevelt. However, by the time of the latter steel seizure case, Jackson was a seasoned Supreme Court Justice who had seen, during his year at Nuremburg, the consequences of unchallenged executive power. His position in the latter case suggests that the institution and the life experience he gained while serving on the Court had changed him.

Greenhouse cites other Justices whose personal politics evolved during their tenure on the Court, including Sandra Day O'Connor,

Clarence Thomas, and of course the focus of her research, Harry Blackmun. During his early years on the bench, Justice Blackmun's votes rarely were surprising. By the mid-seventies however, his views, especially regarding the rights of the poor, began to change. Greenhouse argues that what changed Blackmun most was his assignment to write for the Court in *Roe v. Wade*. Although he merely represented the Court in penning the opinion, it nevertheless attached to him. Greenhouse suggests that, because of his deep involvement in *Roe*, the commercial speech claim in *Bigelow v. Virginia* caught his attention, resulting in an opinion Greenhouse believes is his most important doctrinal contribution.

Although Blackmun himself denies that he changed very much while on the Court, Greenhouse presents statistics of his voting record that suggest the contrary. Beyond his involvement in *Roe*, Greenhouse points to Blackmun's mid-career move to Washington, D.C. to explain his evolving perspective. Neither Blackmun nor O'Connor had any Washington experience before being named to the Court, and both traveled and lectured widely during their tenure on the Court. Greenhouse agrees with what other theorists have concluded—that appointees with prior Executive Branch experience change very little, while appointees from out-of-town change the most. Considering current Chief Justice Roberts' prior experience as a White House and Justice Department lawyer, Greenhouse speculates that he may change very little while on the Court, while warning that predictions are as dangerous as they are irresistible.

RICHARD A. EPSTEIN—*BELL ATLANTIC V. TWOMBLY*: HOW MOTIONS TO DISMISS BECOME (DISGUISED) SUMMARY JUDGMENTS

Richard Epstein is the James Parker Hall Distinguished Service Professor of Law at The University of Chicago and the Peter and Kristen Bedford Senior Fellow at The Hoover Institute. A recognized antitrust expert and prolific writer, Professor Epstein has authored numerous books and articles on a wide-range of legal and interdisciplinary subjects.

In his Article, Epstein discusses how and when a plaintiff's case can be attacked for its legal or factual insufficiency. He argues that factual decisions are very complex and that discovery before a

summary judgment motion can be highly expensive, especially in antitrust cases. To minimize these costs, all courts allow some judgments to be entered at the close of pleadings and before discovery. The recent Supreme Court decision in *Bell Atlantic Corp. v. Twombly* solidified protocol on this issue by requiring that a complaint contain “enough facts to state a claim to relief that is plausible on its face.” Although Epstein welcomes the result of decision, he believes its reasoning is flawed and that, in reality, the case really is a disguised motion for summary judgment. Because, in *Twombly*, discovery would have supplied no new information of value, discovery was not needed. Therefore, Epstein argues, the proper principle is that courts should be more willing to enter final judgments at the close of the pleadings, especially where discovery is not likely to affect the outcome.

The *Twombly* case is an antitrust suit that tests the relationship between the Telecommunications Act of 1996 and the Sherman Act. The plaintiffs in the district court case sought to use the Sherman Act to claim that the four major local exchange carriers colluded to block competitive entry within the industry. However, the plaintiff class alleged no direct evidence of agreement between the exchange carriers and relied instead on public facts to prove their claim. Because of the thin evidence presented, the case was dismissed for containing no specifics as to when the conspiracy was formed, or how it operated.

That decision was reversed unanimously by the Second Circuit, but not on the ground that questions of fact could be raised only at the summary judgment stage. Instead, the Second Circuit did not rule out the possibility that a summary judgment motion could have proved relevant even after discovery. Writing for the Second Circuit, Judge Robert Sack invited Congress or the Supreme Court to weigh in on the potential abuses of discovery. When the Supreme Court did rule on *Twombly*, it spent much time addressing this issue, and then determined that heightened fact pleadings with more detailed specifics are unnecessary. According to the Court, all that is required for a sufficient pleading is “enough facts to state a claim to relief that is plausible on its face.”

Epstein criticizes this decision on several grounds. First, Epstein notes that the level of pleading specificity required in *Twombly* is

barely distinguishable from the levels adopted in the examples given in the Federal Rules of Civil Procedure. Second, Epstein suggests that the apparent difference between “conceivable” and “plausible” is not only fuzzy, but bears no relationship to any of the specific language in the Federal Rules. Additionally, and in conclusion, Epstein argues that *Twombly* really is a mini-summary judgment case, conducted at the close of the pleadings, and not any real solution to the contested meanings of “plausible” and “conceivable.”

WILLIAM E. KOVACIC—COMPETITION POLICY, CONSUMER
PROTECTION, AND ECONOMIC DISADVANTAGE

William E. Kovacic, E.K Gubin Professor of Government Contracts Law at George Washington University School of Law, is the chair of the Federal Trade Commission. He took a leave from his teaching position to join the federal agency as a commissioner in January 2006. He was the Commission’s General Counsel from 2001 through 2004, and previously worked at the commission from 1979 to 1983. During his career, Kovacic has been an adviser on antitrust and consumer protection issues to the governments of Armenia, Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Kazakhstan, Mongolia, Morocco, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe. He also has authored or coauthored numerous books and articles on antitrust law, competition policy, and consumer protection.

Kovacic begins by reflecting on his study of economics in the early 1970s and the improbability, at the time, that any of the events of the next thirty years could have transpired. Kovacic is certain that, as a student, he would have failed if he had predicted the eventual dissolution of the Soviet Union into independent, market oriented countries and eventual market reforms in China. Because of the near certainty at the time that such a scenario could not come to pass, Kovacic argues that the modern embrace of market-oriented reforms is one of the most remarkable stories of our time. In his Essay, Kovacic discusses how well-conceived competition policies can serve the poor and reduce barriers that reinforce economic disadvantage.

First, Kovacic identifies some of the phenomena that competition policy programs usefully can address to improve the welfare of economically disadvantaged populations. One important contribution of public policy to poverty reduction is the deterrence of supplier collusion in public procurement. Another example of an economic activity important to national prosperity are networks of transportation. Banking too effects prosperity by controlling the formation of new businesses, as unnecessary restrictions on entry into financial services harm owners especially of small businesses. Loosening regulations on entry into and participation in professional fields can help promote competition and expand the availability of important services, while relaxing incorporation and licensing requirements helps new businesses form to compete with government services already available, and tax policy favorable to new businesses helps such new ventures get off the ground. Additionally, technological innovations in communications have contributed greatly to the ease of doing business for all.

Second, Kovacic describes how consumer protection programs can complement competition policy measures by punishing and deterring fraud. Developments in transportation and technology have made fraud schemes both quicker and easier to perpetrate, especially against economically disadvantaged populations. In this section, Kovacic argues that consumer protection authorities must continue to develop special programs to address fraud and other consumer protection concerns among these disadvantaged groups, such as education programs to assist poor populations in recognizing and reporting misconduct.

In conclusion, Kovacic offers examples from his travels to reflect on the broader contributions to social welfare that competition and consumer protection programs can offer. In Vietnam, Kovacic explains that economic reforms have enabled many individuals to create small businesses, and now the carpet and garment weavers of the area have attracted a growing clientele of tourists and traders. In Egypt, Kovacic encountered furniture makers who began to trade with Israel after the reduction of regulatory obstacles. The business was entered into cautiously by both sides, but soon, the Egyptians reported, the Israelis went from being “the Jews to being our partners. . . . and our friends.” Kovacic uses this revelation to point out that as

consumers, when we are pleased with a product, we come to respect those who create it. As these positive encounters increase, Kovacic is sure that such respect will grow on both an individual and aggregate level.

CONCLUSION

This annual volume of the *Journal*, dedicated to Access to Justice, provides through the words and stories of real leaders a truly inspirational look at the social justice responsibilities and aspirations of lawyers to foster access to justice for all.