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Roundtable: Supreme Courts as Sources of Legal Change

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ROUNDTABLE
SUPREME COURTS
AS SOURCES OF LEGAL CHANGE

Ken Bode, moderator
The Honorable Randall T. Shepard
The Honorable Shirley S. Abrahamson
The Honorable Robert Benham
The Honorable Perry O. Hooper, Sr.
The Honorable E. Norman Veasey

*The Honorable Randall T. Shepard:*¹ I would like to introduce this roundtable by describing to you what Friday night is like in the Shepard house. It always begins at eight o'clock with a program called *Indiana Week in Review*, proof positive that imitation is the sincerest form of flattery. It then proceeds to a show that my wife and I call "The Screammers." PBS calls it *The McLaughlin Group*. It then proceeds to *Washington Week in Review*, with Ken Bode and his colleagues; and, assuming we are still awake, with our pecuniary interests in mind, we finish off the evening with *Wall Street Week* and Louis Rukeyser.

Really, the centerpiece of our Friday nights, intellectually the most useful, is the longest-running public affairs program on public television, *Washington Week in Review*. It reaches an average of 3.2 million people each week. As you would expect, a very high percentage of those are the opinion leaders of the nation.

Ken Bode comes to that task of hosting *Washington Week*, as he does to this symposium, with a remarkable career in reporting and teaching. A graduate of the University of South Dakota who earned his master's and his doctor's degree at the University of North Carolina, Ken Bode has served as the political editor for *The New Republic*. He spent a decade as national political correspondent for NBC News, where we all saw him regularly on NBC Nightly News, the Today Show, and elsewhere.

He has been a principal in CNN's Democracy in America project, for which he has assembled Emmy-winning programs and interviewed

1 Chief Justice of Indiana.

most of the leading political figures of our time. While undertaking this effort, he has taught or served as a fellow at Michigan State, at SUNY, at Princeton, and at Yale. He now serves as Senior Correspondent at WETA, public television's flagship station in Washington, D.C., and as Professor of Politics and the Media at DePauw University here in Indiana. This means that the people in our airport know him very well. It also means that his everyday life is a major logistical challenge; recognizing this, people in Indiana are all the prouder that he has chosen to live and raise his family here in our state.

This afternoon, Mr. Bode will be leading a dialogue on some of the leading issues of our times, interrogating and engaging with several of our colleagues on issues of substantive law, issues on which we as judges interact with society in the most dramatic ways: the war on crime, families and children, regulation of business, and tort reform. These issues involve many of the most urgent problems of our society. To introduce our moderator, then, I might finally say, as he would say on Friday night: To talk about these and other issues, here is the reporter and columnist who covers them. Ladies and Gentlemen, Ken Bode.

[*Applause*]

*Moderator Ken Bode:*² Thank you, Justice Shepard. I would have said, "Thank you for getting me out of Washington, where I cover politics, Congress, and other crimes,"

[*Laughter*]

Bode: —but as he's already told you, I live in Indiana, and so what I do mostly in Indiana is spend my time, at this time of year anyway, in high school gymnasiums, because my daughter is a basketball player and this is the wrap-up of the basketball season.

I'll tell you how closely we follow these things. I told Justice Shepard's clerk that I had to get out of here quickly tonight because it is the opening round of the girls' sectional tournament, and a few days later he called me, and he said, "Well, I'm delighted to see that you won't be in such a big hurry, because your daughter's team drew a bye. They don't play until Thursday night."

2 Moderator of the PBS show *Washington Week in Review*, Professor of Politics in the Media, DePauw University.

[Laughter]

Bode: He's very good, you know. You notice that Justice Shepard said that "After *Washington Week in Review*, if we're still awake, we watch Rukeyser."

[Laughter]

Bode: Nicely put! Thank you very much!

[Laughter]

Bode: Of all the introductions I have ever had, that is the most recent!

[Laughter]

Bode: It is true, however, that I have thought about this, and decided that I've never been in a room before where I'm the only person that is not automatically addressed as "Your Honor," so this must be the most distinguished company I've ever been in in my life. We're all old enough to remember Mayor Richard J. Daley, not the mayor we have now in Chicago, but his father, who once said, "This is the pinochle of my career."

[Laughter]

Bode: You know, in Washington I've noticed that the South has more or less taken over the city. You have Bill Clinton from Arkansas and Al Gore from Tennessee. You have Trent Lott from Mississippi and Newt Gingrich from Georgia. My distinguished panel here today is sort of a reflection of that same trend, it seems to me. We have here, from Georgia, Robert Benham; we have Perry Hooper, Sr., from Alabama; just at the Mason-Dixon Line is Norm Veasey, from Delaware; and the only genuine northerner on the panel is Shirley Abrahamson from Wisconsin; all of them very distinguished participants in this.

The two questions I am asked most about *Washington Week in Review* is, "When do you tape it?" Well the answer is we don't tape it. It's live. And the second question is, "How much rehearsal do you do?" And I will ask my panel here—I will tell you that we did just about as much rehearsal for this as we do for *Washington Week in Review*, and that's not much; right folks?

The Honorable E. Norman Veasey:³ Right. Slim to none.

Bode: Okay, slim to none.

3 Chief Justice, Delaware Supreme Court.

I know also, because I read their biographies, that we have an equal division between Republicans and Democrats here. I know, of course, that once you get to the court that doesn't matter at all, but we have two Republicans and two Democrats.

I really learned it doesn't matter, as a reporter, because I discovered that once that federal judges get appointed to the bench that they no longer are active in politics. But I remember going to see a federal judge once in your state, Justice Hooper, Robert Vance, who I spent a lot of time with when he was state party chairman, and so forth.

We were in his chambers talking, and I discovered that his interest in politics had not slacked at all in that period of time, and we were having tea, and we were talking about some particularly arcane question, and he said, "I can't remember; I'll have to check." And the way he checked was to pick up the phone, hit the first button on the automatic dial on his telephone, which rang at Democratic Headquarters.

[Laughter]

Bode: Now I don't expect we will have any partisan divisions on this panel this afternoon, and I'm not going to talk any longer. I'm going to ask my distinguished panel to take over the talking here, but we'll try to do this the way we do at *Washington Week in Review*, which is to say we won't shout at each other. But if you folks feel like interrupting and having a dialogue up here, that'll be fine, and we'll save some time at the end of this for a few questions from the audience.

We're going to begin with Perry Hooper, Sr., of Alabama, who is going to talk to us a little bit about tort reform. You said in your paper that I read, Mr. Hooper, that the role of the judiciary is not to create wealth, it is to protect wealth. Now, that sounds like a strongly sort of Republican idea, and you've been a Republican for twenty-four years as RNC member. Is that a reflection of an old view of yours?

*The Honorable Perry O. Hooper, Sr.:*⁴ I think it's a philosophy that I have—and by the way, Bob Vance and I were law clerks together just a few years ago, and we disagreed then, and, but he's a great guy. I guess what I mean—and also we mentioned something about the public aspect, that Dean Uelmen had mentioned earlier—is that the one-party system is the worst kind of partisanship you can have. Because in Alabama, the last time we had a Republican Chief Justice was in 1868. Then in 1994 just an old guy that had no better sense ran, and

4 Chief Justice, Alabama Supreme Court.

now we have a two-party system in Alabama. That doesn't mean we can't improve on it.

But I say this, that I think you judge people by their philosophy, not by their party or anything else, but I think the public has a right to know what you believe in. I've a long history of believing, for one, that the greatest thing in this country is—it took us a lot of years, many centuries, probably learned more in the seventeenth century preparing us for the eighteenth century—when they said “We hold these truths self-evident”

In order to have life, liberty, and the pursuit of happiness, it takes the Constitution and the Bill of Rights to preserve that. The greatest thing about this country is we have—more than any in the world—we have spiritual liberties, economic liberties, intellectual liberties, and they should be protected. And we're the greatest protector of that. And I think that this could answer some of the problems we're having in America today. See, we have something to be proud of. We're the system that protects people.

And when I say—by wealth, I mean both sides. It doesn't matter whether it's the poor or it's the rich. They have to be protected in court, and that's what we're doing. And my—you know if you talk to the guy on the streets, he doesn't really understand the judiciary, but he understands it when he knows that your purpose is to listen to both sides, have disputes settled and determine that.

And history tells me, just like when Burley back there mentioned, from North Carolina, that they believed in the balance of government, and it was what—1775?—well really it was even ahead of that, because John Locke did that when he wrote the Constitution for the Carolinas in the sixteenth century.

So I believe those balances of government are there to protect us, and so I think, and that's in our Constitution, just like in most states; that we believe in the balance of government. For the obvious reasons we must protect one another from one another. And that's why we say the judicial plays its role, the executive plays its role, and the legislative plays its role. And that's how I interpret these things, and that's why I mention that.

And that's why, when I make a decision, my decisions are based on what is best for America as we head into the twenty-first century, and I believe that if we all do that, and interpret these laws as well and as strictly as we can, that's the way that I believe you can protect the wealth of the individuals of America, which is America.

Bode: Now can I ask you something? You seemed in your paper to suggest that—at least I took away the idea that you favor a legislature which would agree to curb damages, and that you say that if a legisla-

ture decides to do that, it's the duty of the judge to uphold that law. Is that right?

Hooper: Well, that comes—that's not exactly correct. That's what I meant by the balance of government. The legislature belongs to the people. The people pass laws, and that's why I say those laws should not be turned unless they're violative of fundamental law beyond a reasonable doubt.

Now sometimes I think the court plays a major role. The BMW case is a great example of curbing some of these things, but when the legislature passes a law, it is my opinion—and we have some of them printed here, where I said this in the *Smith v. Schulte*⁵ case, when I made that statement. And what I'm simply saying is that if the legislature passes that law, unless it's violative of fundamental law beyond a reasonable doubt, I'm going to uphold it. And it gets back to what I'm saying—I believe in the balance of government.

Bode: Now you—I guess that probably all your—maybe some of your colleagues don't know this but that you're the first Republican Chief Justice in the twentieth century in Alabama, right? And you were elected by—

Hooper: Well, I'm the first member of the Supreme Court in the whole century, and that was until 1994. We just squeezed in at the end of the century. But this last time we elected another one in, so we seem to be improving.

[Laughter]

Hooper: And we have four on the Court of Criminal Appeals out of five, and two on the Court of Civil Appeals, so we're improving, but it took a long time. And—

Bode: I somehow thought that if I gave him a chance, he would make a political speech here. You know what I mean?

[Laughter]

Hooper: But let me say something about the two-party system. First—

Bode: But let me finish with this point I was going to make, if I could your Honor?

Hooper: All right. Okay.

Bode: And that is that he was also elected by 262 votes. I guess they call him "Landslide Hooper."

[Laughter]

Hooper: That's right. That's very true.

Bode: And it took them about nine months to recount this. Is that right?

Hooper: Eleven and a half months, and unfortunately, the first judge, a federal judge it went before was a Democratic judge, and they said what happened on this side was revulsive. The second was a Republican judge, a federal judge, said it was something worse than—well, not revulsive, but something along that line. Finally the United States Supreme Court says, "You're supposed to follow the law in the State of Alabama," and that's what we have now done, even though it's by 262 votes.

Bode: All right. We're going to move on to Shirley Abrahamson, who is an expert here on family law, family courts, what have you.

You made a series of proposals in your paper for various changes and reforms in family courts. Pick whatever ones or one that you'd like to talk about at the top and tell us about it.

*The Honorable Shirley S. Abrahamson:*⁶ Well, I think that the growing trend in the United States is to look at family courts very carefully to see how we can improve the resolution of family matters that come to courts. Let me put the family disputes in context. According to the National Center for State Courts, twenty-five percent of the total 1995 civil filings in the state courts were domestic relations cases, which the Center defines as involving divorce, child support and custody, domestic violence, paternity, and adoption.

The total number of domestic relations cases increased 4.1% since 1994 and seventy percent since 1984, with the most rapid growth in the area of domestic violence. With these statistics in mind, many states are seeking to improve how they handle families and children in the courts. Many are coming to believe that family legal problems can best be addressed through a holistic approach.

One approach being taken in some jurisdictions is the unified family court. There are different kinds of unified family courts. The underlying concept is that a family is often involved in multiple proceedings in different courts in the same jurisdiction. There is a growing sense that individual members of a family must be viewed as part of a family unit and their interrelated problems addressed together. In the unified family court approach, the various court divisions that adjudicate family problems are consolidated into a single operation so that one judge handles all matters relating to a particular family.

6 Chief Justice, Wisconsin Supreme Court.

I see an increasing number of jurisdictions turning to a unified family court. We do not have a unified family court in Wisconsin, but I think that we will see in the next year one or more pilot projects across the state examining a unified family court.

Bode: Let's get Justice Benham from Georgia, Robert Benham from Georgia, into the discussion here. A couple of years ago I went to a meeting of the United States Sentencing Commission to hear Attorney General Janet Reno speak, and I heard the basic members of the Sentencing Commission speak as well. There seemed to be a virtually unanimous opinion in that room that night that mandatory minimums don't work; that mandatory minimums in many ways destroy the judicial discretion, the function of judicial discretion; they load the prisons with people who have committed minor crimes in many cases.

And then I noticed that Ms. Reno got silent on the subject. We had a federal election, everybody endorsed mandatory minimums, and away we go. Can we really deal with questions like this in an electoral system with the kind of politics we've had over the last few years?

*The Honorable Robert Benham:*⁷ It's very difficult to deal with them. It's an emotional issue more than anything else, and let me tell you what drives the whole system. And the view, of course—even with drugs or any of the other crimes now—the view is that the drug problem is essentially a criminal justice problem, and if we are not solving the problem, it means there is a failure of the system, and so we seek to put in place mandatory sentences, forfeiture provisions, all kinds of methods to say that the problem can be solved through the legal process.

I think a real responsibility of judges, and the reason for the disenchantment, is that judges come to the bench to exercise their discretion, and if discretion is taken away, you might as well connect it up to a computer. That's why many judges are becoming disenchanting. They're the best and the brightest, but yet they aren't allowed to be creative in the way they handle legal matters, and I think that's one of the real big problems, and that's the disenchantment I hear from many judges.

And that's the question I hear from judicial candidates when we approach people about offering themselves for judicial positions. They say, "Well, we really don't have much to do these days because judges basically have to follow grid systems or mandatory sentences," and that's one of my big concerns. So I think that judges have an obligation to educate the public as to the real role of judges.

7 Chief Justice, Georgia Supreme Court.

Bode: Prosecutors seem to have the discretion in drug cases, for the most part, in negotiating the charges that will be brought. Is that right?

Benham: No question they do, and of course that forms the basis of many challenges to prosecution, determining whether selective prosecution is occurring. That's a challenge that is quite often made, and that, in some way, engenders disrespect for the system; and that is, people similarly situated will see others not prosecuted and then people they know prosecuted, especially in areas where—let's say, a high-crime area or people tend to fit a drug profile, and that engenders disrespect for the law.

Bode: What should judges do? How do you educate the public? What mechanism do you have to educate the public?

Benham: I think the creation of consortiums on law-related education will help. Some of the supreme courts have done that in various areas. Judges must be willing to speak out on some of these issues, and judges must be willing to face the real issue, and that is whether or not the law offers a panacea to all of the problems in society, and whether legislators ought to shoulder their responsibility, and whether the executive branch should shoulder its responsibility.

Bode: We have drug courts in many places. Norm Veasey, you were to talk about business courts. Delaware, the sort of center of corporate America, you say that business leaders complain about excessive verdicts. They complain about frivolous lawsuits. They complain about excessive delay in court scheduling because criminal cases take precedence over business cases. They complain about excessive lawyer's fees and no system of loser pay. Businessmen complain about these things. That's not a big surprise.

Veasey: No, it's not a big surprise, but something can be done about it—

Bode: What?

Veasey: —by the judiciary. First of all, I think that one of the things that we're doing in the Conference of Chief Justices is to instill a national model of—or national models—of professionalism that would deal with these issues: Frivolous lawsuits, Rambo tactics, delays and the like.

Some of the other things that have come up in these contexts of discussing the matters with business leaders, is value billing as distinct from the gouging type of billing that has been taking place. But at the end of the day, I think that one of the great reforms that's taking place around the country is the creation of business courts.

You mentioned drug courts as a specialized court. Shirley mentioned family courts. Specialized courts are a very important part of

the fabric of our judicial institutions. Business courts now are coming to the fore, and they're good. We've encouraged them. When I was Chair of the Section of Business Law, we created a commission to study business courts around the United States. Delaware was used as a model, because Delaware has had the Court of Chancery adjudicating corporate governance disputes, and it has developed quite a body of law over the last eighty or ninety years. That is one example, but that has expanded now, so that commercial disputes are being handled expeditiously in a number of states where they have assigned dedicated judges to a specialized form of court.

For example, New York has now, in the last year and a few months, blossomed as a commercial center. New York has always been a great financial center, but until the last year and a half, commercial cases were lost in the shuffle. But now there's a commercial division with five judges devoted to that. The time for getting cases adjudicated has dropped thirty percent, and the settlement rates have gone up eighty-five percent. So New York is a great model of a great commercial center that is devoted to this.

Some of the arguments that have been made about business courts, whether it's New York or some of the other states that are mentioned in my paper, is that they're elitist, and that's a troublesome problem. In Delaware we not only have the Court of Chancery, but we have summary procedures in our Superior Court for complex business matters. In creating that, we said that they should not displace the cases of ordinary citizens, and we did that in different language.

And New York, I think, has shown that the expeditious and specialized handling of business litigation has freed up more judicial time to deal more expeditiously with the other cases. Because expert judges are handling these cases, they're instilling firm case management techniques, and the consequence has been freeing up the system.

Now there are other states that are represented here: North Carolina, Wisconsin, New Jersey. There are about eighteen states that are, in one form or another, going to this kind of specialization, and I think it's a good move.

Bode: Shirley, did you want to say something?

Abrahamson: As a result of a governor's commission on business courts, we established a business court in Milwaukee with special rules about dollar amount jurisdiction, jury trials and discovery. Only six or seven cases used the court in a year.

So it's there if it's needed. But I'm glad we didn't set up a special court, because then we'd have a judge sitting around. We set up the

business court using the chief judge's power to assign judges to particular kinds of cases. Thus we can allocate judges as we need them.

And although we might want specialized courts like drug court, or family court, or business court, I favor rotation of judges. I favor a system whereby judges sit in a particular division, whether it be misdemeanor or felony or family or juvenile or children's court, for limited time periods, and then move to another division. I think rotation is very important to prevent burnout. Fresh blood is important for creativity and innovation. Judges can carry over techniques and ideas from one area to the other.

So although I may favor particular types of specialized jurisdictions, I do not want to be misunderstood. I favor a rotation of judges.

Bode: Norman?

Veasey: I would suggest that rotation of judges and specialization are not mutually exclusive, because if you have a judge who is ninety percent devoted to that judge's specialty, that's fine. The other ten percent can be used in rotation, or it could be eighty-twenty. But I think that there is a great benefit in getting the specialization to streamline the process and provide better quality.

Drug courts are a very good example. That's a very highly specialized, sensitive kind of handing of a societal and personal problem, and our judges in our drug courts may do that seventy-five percent of the time; the other twenty-five percent, they're doing general matters.

Family court judges do need to have this special expertise and sensitivity, but I'm concerned, as Shirley is, about burnout. One hundred percent family court diet is a problem, and I like a little bit of rotation in that area, but not a general rotation.

Bode: Anybody else want to—I'd like to move it to a sort of a round table here, and talk about some other subjects, if we could. Yesterday the American Bar Association passed a resolution calling for a moratorium on executions; that the system is so mixed up that it ought to be stopped and reconsidered. What do you folks think about that, starting with you.

Benham: Let me just speak briefly. That was yesterday at the ABA.

Bode: Yes.

Benham: I remember when the Supreme Court struck down the death penalty in a Georgia case. The statement was made that the imposition of the death penalty is what—it was like lightning striking. Unfortunately, we've come back to that same point. We can line up in our court two hundred murder cases, and there's no rhyme or reason as to who gets the death penalty and who does not get the death penalty. And the perception out in the public is that if you are rich, and you are influential, you can avoid the death penalty; that if you are

poor and you happen to be a minority, there is a heightened chance that you will be struck by lightning.

Bode: Mr. Hooper?

Hooper: Well, I'm not so sure about that exactly. I think maybe that O. J. Simpson case would make people feel that sort of thing because of the wealth being involved there. But I'm troubled a little bit about the ABA taking this position. I think it should go through the regular judicial proceedings. Things don't happen overnight; it takes—there's a lot of things you've got to correct.

I'm concerned, as—there's some things I disagree with Gerald Uelmen, but one of the things I do think is a problem that a jury can return a verdict on the death penalty and say, "Well, I want him to have life without parole." Then the judge turns around and says, "The death penalty." I think that does concern a lot of people.

The fact is, I'm not surprised that sometimes, based upon our reliance upon the jury in Alabama in a punitive damages matter, about not being able to correct it, that sometimes we have that looked at. But I'm not so sure that I'd go along with ABA, in my position. I'd just rather see it go through the judicial system and the legislative system.

Bode: Justice Veasey?

Veasey: I don't think we have much of a choice as judges on the death penalty except to make sure that they're handled well.

Bode: Well let me ask you this: Is the ABA right? Is that resolution right? Is it as sort of disjointed from state to state as it seems to be to the public?

Veasey: I don't know, because I don't know exactly what the resolution really means. One thing that we have to do in Delaware—we have a death penalty. We've had a lot of executions for a small state. The cases move along expeditiously. We have to follow the legislative mandate, and we have to do the best quality job that we can as lawyers.

And whatever the ABA says is an opinion that's out there, and there is that opinion out there. When I appeared for my confirmation as chief justice, I was asked about death penalty and what my position was on the death penalty. And I said, "I'm not going to tell you, Senator. That's a legislative decision, and it's your prerogative to make that decision. You've made that decision, and I'm going to uphold the law, and that's all I'm going to say about it."

Then he said to me, "Are you a conservative or a liberal?"

[Laughter]

Veasey: And I said, “Senator, I don’t know what that means, but I’ll apply a conservative process to decision-making.” He didn’t know what that means, and neither did I or anybody else!

[Laughter]

Abrahamson: Well, we’ve had a moratorium on the death penalty since 1850 in our state. The death penalty is not permitted. Life imprisonment is the maximum sentence. The legislature periodically looks at the adoption of the death penalty. The death penalty is an issue that divides people. They disagree about the death penalty on religious, ethical, and moral grounds. They disagree about the deterrent value of the death penalty. I doubt whether judges have special knowledge or expertise on those issues.

In a debate on the death penalty, I don’t know that it will be before the legislature again in Wisconsin, I think judges can tell legislators how much money it’s going to cost in the state if they adopt the death penalty. I don’t know those cost figures, because I’ve never had to check them, but I assume there are significant increases in prosecutorial needs, defense needs, and court needs because of increased time spent in the trial of a death case and additional appeals. The fiscal impact of the death penalty is a matter that a legislature should know.

Bode: Now I operate in a different kind of setting, obviously, than most state supreme court justices do. I operate in a political setting. I watched, in 1988, Michael Dukakis, who was against the death penalty, really be pretty badly hammered on that issue and on the issue of crime in that election.

Then I watched, in 1992, Governor Bill Clinton of Arkansas, who is one of the fastest learners in American politics to be sure, understand very well that his position on the death penalty, which was that he was for the death penalty and would enforce it, and did in Arkansas, was a position that really, in many ways, inoculated him against many of the same kinds of things that—many of the kinds of things—that happened to George Bush.

In fact, you’ll recall that Governor Clinton suspended his campaign in New Hampshire right smack in the middle of the Jennifer Flowers episode, flew to Arkansas, and presided over an execution at that time, a very, very controversial execution, I might add.

Gerald Uelmen just said to us that this is the biggest crocodile in the bathtub. Where do you look for reasoned leadership on this if we

don't look to Supreme Court Justices who have to impose that penalty; who have to deal with the appeals all the time?

Hooper: I think Justice Veasey just said it. Our job is to follow the law, the way I look at it.

Veasey: One of the things that we can exercise leadership about is, I think, what Shirley was alluding to, and that is to make sure that the system runs correctly, and that proper representation is there. When we go before legislatures to get budgets for contract attorneys and court-appointed lawyers, we make the argument that there should be that money provided for proper representation because that will make the system work more effectively and fairly and more swiftly, because there won't be a lot of retrials of mistakes that are made. We can exercise leadership in the process, but I don't really think we should be out front telling the legislature there should or should not be a death penalty.

Bode: Do you buy—question for all of you: Do you buy Professor Uelmen's analysis that there is a relationship between a judge who has to stand for election and the idea of overturning death sentences?

Benham: Unquestionably, it's an issue that comes up almost at every civic club speech, if you open it up for questions. If you're in a death penalty state, that'll probably be the first question. I think more importantly, that death is becoming a matter of economics, and that is what it's costing to try, to incarcerate and eventually execute individuals.

To give you an example, just recently we had a defendant come within an hour and a half of execution who had no lawyer, who had been on death row only a matter of a couple of years or so. We now have prosecutors making decisions not to seek the death penalty because most of the expense is borne by the local government, and that is, they must pay for all of the expenses at the trial level, and it might be a case where they would want the death penalty, but they just can't afford it. At the habeas level, when we appoint counsel just to handle the habeas, if we appoint a major law firm, it will cost them in the neighborhood of \$400,000 just to proceed with the habeas in a death penalty case.

Hooper: Well, I can only speak for Alabama, not the other states, but I know—now, I had a pretty heated race in the State of Alabama. The issue never came up. Crime never came up. This year we had a pretty tough race. Crime never came up. The only time this has ever come up, about—I guess about fifteen years ago, whereby a Court of Criminal Appeals Justice, Oxford graduate, brilliant individual, followed the law, and the young man who ran against him, and the justice was defeated that was on the Court of Criminal Appeals.

Now, that does happen, but it hasn't happened in a long time, and I believe in Alabama they rebel at this sort of thing. I think that people are wiser and a lot smarter than we think they are. I know that it may play a role in some of these states, but I think the most important thing in our state is that people truly believe you're following the law the best you can. So I just don't—you know, maybe it's happening in these other places, but it has not been an issue in the State of Alabama.

Bode: Justice Hooper, if a candidate ran against you in your last election who took Michael Dukakis's position on the death penalty, could you have beaten him?

Hooper: Well, that didn't become an issue. I beat him anyway.

[Laughter]

Bode: I know that.

[Laughter]

Bode: I know that. I'm asking you a hypothetical question. That's a political question, obviously.

Hooper: Well, I don't know. I can't say, because I am—number one, I don't pass the law. I think it is a law. It's for deterrent, not for—punishment doesn't play in my role, but to keep—like this last one we had, a guy that raped and murdered this young lady, seventeen years ago, then went to the death penalty and it was carried out. I believe if that had happened two years after that, we may not have as many death cases that we have had since then.

Bode: Okay. I don't want to dwell on this any longer. Let me move to something a little bit different. Professor Uelmen, in his introduction, it was mentioned that he had a conference recently in which he talked about the media, the mass media, and the courts. *The Ethical Questions*, I believe, is what the title of the conference was. What are the ethical questions where your profession and my profession intersect?

Veasey: Well, I agree with Bob Benham in saying that judges need to speak out on administrative issues, issues dealing with the administration of justice. You can't comment on a particular case, but I think you have to be wise enough to know that you're dealing in the milieu of the media. You have to have systems in place so that what you're doing or not doing is not misunderstood. I think this conference, the Conference of Chief Justices, is taking a big step toward making dealings with the media and assisting state courts in dealing with the media as a priority.

In Delaware we're a small state and we're a little laboratory; but one of the things that we've done is we've created a task force on citizens and the public. We've gone out to town meetings, and we've talked to people. We've talked to the media people. We've created a better level, I think, of understanding of the judicial system.

We've invited schools to come to our courts. We've gone to schools and talked to them. We've invited legislators to come to our court so that they see how we operate. I think we need to bring in some sunshine into what we do, demystify the process. We can't curse the darkness. We should light a candle.

Benham: Can I buy into that just briefly. Agreeing with what Norm has said, I think for too long courts left it to the media to determine what the court has done in a particular case. As a result, it gets a spin put on it, and it gets a twenty-second news bite put on it.

I think courts should also employ their own news people as public relations people to publish the opinions of the court, give summaries of their opinions, put issues before their courts on the internet, and have a thorough discussion of the issue. I learned years ago, even when I was campaigning, that if a news person showed up at my speech, I'd have a two-minute summary of what I spoke about, and I'd give them that summary and tell them they're welcome to stay if they'd like, but usually about ten minutes into my speech they'd leave and print my news release word-for-word.

[*Laughter*]

Benham: And I think courts need to learn from that. You know, we need our own media persons there at the court to print summaries of the court proceedings to hand out to the media, rather than just let them look at a case and say, "Oh, this is what the court meant."

Bode: Do you think that's going to get you a full twenty seconds on the news, Justice Benham, to have a press officer at the court? I think what I'm trying to get at is something a little bit different. There's been a debate around the country, obviously, about cameras in the courtroom, which seems to be pretty much settled most places except the federal courts. But the courts—the cases that really draw the intense publicity are the ones I'm talking about, and I don't just mean the Simpson case.

I covered a case in Louisiana when the governor of Louisiana, the most popular governor of Louisiana in modern times at that point, was prosecuted for conspiracy and bribery—two federal cases. Television stations in the State of Louisiana—is the Chief Justice from Louisiana here now?

Audience member: He was.

Bode: Two television stations from Louisiana went out and bought satellite up-link trucks for that trial. It was the trial of the century, and no matter where you were, whether it was in Shreveport or New Orleans, the judge would break the trial for lunch and there would be reporters on the steps of the court house every day at noon—not doing ten seconds, by the way; doing five minutes and then five minutes of debriefing—interviewing mostly the defense attorneys, because they were the ones who would talk there. The rule of the thumb was that the government leaked, the defense talked—

[*Laughter*]

Bode: —in that particular case; and I'm telling you, it's true. It is true. And by the end of the first trial, in which there was a hung jury, one juror voted for guilty and the other jurors voted for acquittal. The trial was retried and it was an acquittal. By the end of both of those trials, after all the publicity, that governor's reputation was ruined, absolutely ruined. He was in single digits.

Now, I think—I blame a great deal of that on my profession. The governor himself, who said, "I walk as close to the legal line as I can without ever stepping over," I mean you just shouldn't say those things if you don't want to wind up in court—

[*Laughter*]

Bode: —it seems to me. But in any case, he was not convicted of anything in that thing, and it was a massive amount of coverage. Those are the kinds of trials that bother me. The Simpson trial does too, but that kind of thing in particular. Mr. Hooper?

Hooper: Yesterday, or last night, I learned a lot from Steven Brill, and it seemed to me he was saying, "Let's get off of our ivory tower." As Justice Veasey was saying, we need to get out, talk about a system, what it's all about, and at first I said, "Man, that TV is terrible! It's hurting the whole system!" But see, was it the television, the news media? Was it the First Amendment or the way the case was being handled? It gives the public an opportunity to examine the judge in this trial, to examine the jury, the lawyers, so they can fully comprehend and understand this system.

I really just listened to what he had to say, and it made a real impact on me, and I think if we have any real weaknesses, we should let the klieg lights be on us. They're on America; why not be on the judicial system? And I think it's fine. You can't talk about your particular cases. We shouldn't talk about them. But let people know we

have nothing to hide but the greatest system in the world in the United States, and the greatest system to protect that liberty that we have is the judicial system. It's time we started being proud of it instead of ashamed of it.

Abrahamson: Are you being critical of your own profession?

Bode: Oh, I think in—you know, if we—yes, of course I am. I mean if we don't do it, we just leave it to you guys; right?

Abrahamson: Well, but we guys have a First Amendment. We guys believe in the First Amendment. We think that government regulation is generally a no-no. There are restraints, but generally restraints on the media are a no-no. So we're trained to say, you—and we don't even define who the press is—you, who define yourself as the press and the media and the public have a right to speak, and have a right to write. If the media is going to have controls, they're predominantly going to be from your bosses and from codes of ethics for you.

Wisconsin has had cameras in the courtroom since 1978. We can provide that judges don't give interviews during the case; that judges don't talk about pending or impending cases; and that judges take precautions to ensure a fair trial. We can take steps to ensure that the cameras and media in the courtroom don't make a circus of the courtroom, that people in the courtroom are treated well, that close-ups are not taken of the jury and witnesses.

But after that, for the most part, it is a matter of the media regulating itself. I'm sure you're not calling for government regulation, are you?

Bode: Oh, no. That's not what I'm saying.

Abrahamson: I didn't think you were.

Bode: No. What I was saying is I think that we contributed mightily to a guilty-until-proven-innocent public opinion in that particular case.

Abrahamson: Well, see—

Hooper: Ken, I think that one of the problems that I see—I know you're not bothered about television because you're seeing what you get, and maybe you do isolate it and have the ten-second shot, but what really concerns me is somebody covering a complicated issue in court, has no understanding whatsoever, and can just mislead the public to no end. And it's the writing that bothers me more than anything; and I don't know whether you can do anything about it, because you can't hire lawyers to be the court reporter. But that's one of the biggest problems I have, and that's why I'm most concerned that we still have the *Sullivan*⁸ case on the books, but it's there.

8 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Veasey: Could I mention something about the *Sullivan* case? I was privileged to go to Australia in November and give a lecture tour on corporate governance. One of the things that was going on over there was this whole thing about free speech. The High Court of Australia had decided a few years ago, implied into the constitution, something that was like *New York Times v. Sullivan*, that allowed the press to take a shot at a politician. That was a subject of current debate when we were in Australia, that the Parliament wanted to change the law so that the High Court did not have that right of judicial review. It made me very thankful in this country that we have the right of judicial review and that we have the First Amendment guarantee.

Bode: Now Justice Hooper made his comment about essentially television and the process of Court TV. I'd like to ask the rest of you, does Court TV—do you think Court TV contributes to a better understanding of the judicial process, or in selection of the cases that they put on, which are by far the most notorious cases or the most sort of exploitative cases, do they do just the opposite?

Abrahamson: I'm not in an TV market where I see Court TV, but we have had cameras in the courtroom for a number of years. Sometimes the public channels or the commercial channels will do gavel-to-gavel of a hearing in the Court of Appeals or the Supreme Court, or do a trial gavel-to-gavel. I think that's very educational. I think that viewers can learn a great deal.

Now, I agree that most of the cases in which TV is interested are criminal, and that many of our citizens think the courts do nothing else than criminal trials. We know that is not true. But nevertheless, I think TV can be very educational. If I could just make one other comment, I think that what we have to educate each other, and that means that the judges ought to be educated as to the needs of the media and as to what we can do to help them report accurately. So, for example, I had a meeting with the capitol press corps and I asked, "What can we do to help you?" They had some very good suggestions that we've put into effect. The media also have to understand the restraints on us.

Media representatives and the court are putting on educational programs around the state to educate the media how our Supreme Court works, how our Court of Appeals works, how our trial courts work. Sentencing seems to be a major issue between the media and the judges, and I think these sessions might help.

Now, another problem is the media people keep changing, so it's a continual process of education and re-education; but judges come and go, too.

Bode: I'm going to keep you on the docket here for just a second, if I could. In all of the hotel rooms in Indianapolis, in this hotel,

there is the newest Indianapolis magazine, and on the cover you see the top trial lawyer, I guess, in Indianapolis, or by somebody's definition, the top trial lawyer.

Well I don't know about who's the top trial lawyer, but I looked at that very carefully because I have a daughter in college who wants to go into the law—or thinks she does—and I did a count. There are the 50 top lawyers in Indianapolis in there, in bankruptcy, family trusts and estates, personal, and criminal. Of those, there are three women.

I look around this room, I don't see very many women who are chief justices of supreme courts. Justice Abrahamson, does it matter? Does gender matter at all in your job? Does it matter we've only had two women on the Supreme Court in the history of this country?

Abrahamson: It doesn't matter in the job. It may matter in getting to the job. You know when I went to law school in Indiana at Bloomington—

Bode: There was, by the way, a large debate in the staff upstairs while I was here, whether you went to the right law school.

Abrahamson: Of course I did.

[Laughter]

Abrahamson: Whichever law school you go to is the right one. And at that time I think there were two or three women who started. One finished—that was myself—and the dean took me aside and said he was very happy I was leaving Indiana.

[Laughter]

Abrahamson: Nothing personal. Although I was a little surprised. He said, "Well, you know we'd have a terrible time placing time you with a law firm." At that time the leading law firms would ordinarily automatically give offers to the top graduates of the law school. I would not be getting that kind of offer, because I was a woman.

But hiring practices have dramatically changed. So my response to you is that I think times have changed, much for the better, and that gender discrimination against men and women has decreased, and that's good. And I think law is a wonderful career for men.

[Laughter]

Abrahamson: And judging is a wonderful career for women. It's really tailor-made for women. You know judges complain that they are overworked and underpaid, and you know that's usually considered women's work.

[Laughter]

Abrahamson: And there's no heavy lifting, and if you decide you're going to have a family, the black robe is a perfect maternity dress.

[Laughter]

Abrahamson: Although there are few women in the room, we counted nine women chief justices, so that's about twenty percent. Women make up about twenty percent of the bar. I believe that across the country, about ten percent of judges are women.

Bode: Do any of you gentlemen want to comment on this question?

[Laughter]

Abrahamson: Carefully, gentlemen—carefully!

Hooper: I thought that was a very wise observation.

[Laughter]

Hooper: But we do have three out of five ladies on the Court of Criminal Appeals in Alabama.

Bode: All right. Okay. Now the kind of cases that come to the attention of the media obviously are not, for the most part, the daily work of most state supreme courts, and so forth. One case that has obviously got a lot of attention of the folks in my profession right now made its way to the Supreme Court, not in its fullest flower but in a way it did recently. Now it has been sent back to a lower court for some more work—or actually the Supreme Court hasn't decided what it's going to do, whether it's going to send it back or not. I want to ask you folks, how would you vote on the Paula Jones case? Should it go forward while the president is in office, or not?

Hooper: Well, I've never been an admirer of Bill Clinton. But I think—

[Laughter]

Hooper: —I think it would be a mistake. I think I would feel the same way about governors. I think during your term the problems that could arise and the problems of getting the guy tied up that's running your country, I would—I feel for Paula Jones, let me say that, but I just think it's a bad precedent, and I hope it doesn't happen, and I hope I don't have to rule on it.

Bode: Judge Abrahamson. I'm going around the table on this one, folks.

Abrahamson: I've been persuaded by both sides—

[*Laughter*]

Abrahamson: —at different times. Of course I haven't read the briefs, done research, listened to arguments or conferred with my colleagues. I was persuaded, on at least reading the newspapers, on both sides. I wonder if there isn't a potential for a middle ground of allowing the suit to go forward, but should the suit become too difficult in the sense of taking too much of the officials' time, that you can depend on the judge to stop it.

I don't know how I'd rule if I were faced with the issue. It's not until I'm absolutely faced with a case and the adrenaline pumps and I have to make that decision in conference that I do make it. But I think it's an important issue as to whether any government official, anybody, is above the law or should be treated differently versus letting the country's business go on without the chief executive officer being burdened by a civil matter. And the cartoonists have had a field day of showing what happens with the country while the president might be deposed.

Bode: Okay. As soon as the other two justices speak on this, I'm going to ask for a couple questions from the audience, so if you would like to join this discussion, please think of what you want to say. Justice Veasey?

Veasey: I'm not going to comment on it, because I just—I just don't think it—

Bode: Are you facing a case like this or something?

Veasey: No, no, I just don't think that it's the right place for me to comment on how a case that was argued before the U.S. Supreme Court ought to come out, because, first of all, I don't think that it's ethical; and secondly, I didn't hear the arguments, I didn't read the briefs, and for me to venture a guess, I think, would be presumptuous at this point.

But I will say two things. One, I think the public would benefit if the Supreme Court arguments were on television, because it is extremely thrilling to be in the Supreme Court and hear the give and take. It's pretty thrilling in our court, but it's probably even more thrilling there. They have more judges. So I really would like to see it on television, and the public could be better informed and would know better how our judicial system operates.

The other thing I'd like to say is, you mentioned the magazine that's in this hotel about the lawyers in Indiana. There's an article there quoting Greg Garrison, a very distinguished Indianapolis lawyer,

and the last paragraph of that article says that when we're commenting, whether it's the public or the media or whoever it happens to be, about cases as they go along, we ought to just step back and cool it and wait until the case is over, been all decided, and has come out, because if you take instant readings of judgments about how cases are going or should come out, it's just like a basketball game.

I went to the Pacers' game the other day, and the Pacers were behind by twenty points in the first half. They finally won the game and, you know, the game was decided in the last two minutes. So, I think, from the point of view of the media and the public, we shouldn't be making these instant judgments as cases go along.

Bode: Well maybe you brought the Pacers luck! Have you got time to go up to Bloomington for an I.U. game?

[Laughter]

Benham: I'll be very brief. I just don't think it's proper for judges to comment on pending litigation, either in our court or in other courts, so I won't comment on that case, but the fact that it's being litigated in the courts does show, in some way the citizens' respect for the court system. They tend to put everything in the court to resolve, and while it might be bad for us, it does show that the citizens still have faith in the judicial process, and I think that's good, because in this country we bring about change through the legal process.

Bode: You know I think—the only thing I would like to say about this is that, Norm Veasey you said that the Supreme Court arguments ought to be televised. Some time ago, maybe four or five years ago, maybe it's six or seven years ago, there was a publication of a series of tapes from some major Supreme Court arguments—*Sullivan*, and I think *Baker v. Carr*⁹ and so forth—and it was fascinating. Just to even listen to them was just fascinating, almost as interesting as going to Maryland and going through the archives out there and listening to Richard Nixon at ten o'clock at night on his telephone conversations, which, by the way, if you ever have nothing to do in Washington, D.C., I recommend you go out there and listen to the President of the United States at ten o'clock at night talking on the phone. You hear the ice cubes clinking in the glass and what have you. It's just an amazing experience to have.

But I do think Americans would listen to that, would watch that, those Supreme Court arguments. I think that eventually public television would run them. I hope they would. Probably C-Span would find

9 369 U.S. 186 (1962).

a way to put them on, and CNN would find a way to put them on, and if we get three and a half million people watching *Washington Week in Review*, most of whom I hope, Justice Shepard, are awake—

[*Laughter*]

Bode: —and watching, you do have far more watching something like that. I think it's an excellent suggestion. Any comments from the audience? Yes, sir?

Audience member: Have you ever had judges on your program panel?

Bode: No, I don't have news-makers on the program. We've debated whether to do that or not. And in fact the thirtieth anniversary of "Washington Week" is coming up in about a month, and we're trying to figure out now whether to sort of suspend the journalists for an evening and have maybe three or four people who've run for president on the program, three or four people who've been in the Senate, something like that on the program. A Supreme Court—retired Supreme Court Justice or something would be an interesting idea for that. There are not many of them around though.

Yeah?

Audience member: One of the questions about television coverage is that you have to distinguish, it seems to me, between public television coverage and commercial television coverage; and that there is an entertainment value in the O.J. Simpson trial, with a revenue event equal nearly to the Olympics and put soap operas out of business for a short time. And the question is: Can they follow the rules in such a competitive situation, and the question was really raised in the O.J. Simpson trial when he made a note, I believe, and the camera panned to the note in violation of all the rules. It just happened there wasn't anything on the note, but if it had said, "God, I'm sorry I killed her," you can bet that that would have been covered. So there's a real question of what you get when you marry entertainment and justice together; and it's all well and good to say, "Oh, they're wonderful," and "Let them come in," but I think it has to be considered carefully.

Bode: Well I think you folks have to set the rules on that one. I was not a big aficionado of watching the O.J. Simpson trial. I saw more than I wanted to on the news, and I remember that incident, and so forth. I seem to remember that the judge really shut them down over that, did he not?

Audience member: Well, setting the rules is all right, but the media has become a crocodile as well. You know, what we're talking about. The thing you could get in trouble with is shutting off the media.

Bode: There you have it. Okay. Before we break up tonight, I want to thank, first of all, our panel. I think they've done a terrific job.

[Applause]

Bode: And secondly, I don't want you folks to leave Indiana without me telling you something about this state that I'm sure you will remember. And that is that, per capita, Indiana has more Elvis impersonators than any other state in the country.

[Laughter]

Bode: But my favorite one is a Republican mayor from Jasonville, Indiana, whose political slogan is: Mayor by day—by night, The King.

[Applause and laughter]

Bode: Thank you very much.

