UNIVERSITY PROFESSORSHIP LECTURE

ARE THEY CLOSING THE COURTHOUSE DOORS?

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President Sexton, Provost McLaughlin, Dean Revesz, Judges, Honored guests, and Friends

It seems rather strange—perhaps even perverse—that someone on the cusp of his 78th year is giving an inaugural lecture. But since we are here, let me begin my saying that I've always believed an audience should know, as the youngsters say, where a speaker is coming from. And, in the spirit of full disclosure I warn you—your speaker is a real throwback. As many of you know, I often chant that inevitable and universal mantra of seniors, "it all used to be much better."

Sometimes it's difficult for me to realize that I've been involved with federal procedure for over half a century as commentator, teacher, and participant. I was extremely fortunate to have learned the basics from a stellar teacher at the Harvard Law School—the late Benjamin Kaplan—who became my mentor, and, in time, my colleague and friend. It was Ben who made me a procedure-wonk. In thinking about what to say today, for some reason I'm reminded of a recurring scene in mob movies. Just as a terrible fate is about to befall someone, the villain says "It's not personal, it's business." For me, the reflections that follow about what I have seen in the procedural world over the years are both "business" and personal."

Throughout the years I have believed in the purposes of the Federal Rules of Civil Procedure set out in Rule 1 by the people who wrote them about 75 years ago— "the just, speedy, and inexpensive determination of every action and proceeding." I fear we have strayed from that mandate. When the Rules were promulgated—in 1938—they embodied a justice-seeking ethos. The people who wrote them believed in citizen access to the courts and in resolving disputes on their merits, not by tricks or traps or obfuscation. So they established a relatively plainly worded,

simplified system. Because the rulemakers wanted to avoid the debilitating technicalities of the prior English and American procedural systems they created a streamlined pleading regime for stating a grievance that abjured factual detail, verbosity, and technicality. The objective was "Let's just get it on." Relatively little was demanded. The plaintiff only had to tell why and where it hurt and what he wanted, something metaphorically analogous to Oliver Twist's simple request in Charles Dickens' novel for "more gruel please." This was followed by wide-angle discovery into the dispute's merits, permitting the parties to secure any information relevant to the action. The objective was to resolve litigation based on the revealed facts, not on who was better at chicanery or hiding the ball. A summary judgment procedure was available when there were no factual disputes and the judge could resolve the lawsuit as a matter of law, but that motion was granted infrequently. Lawsuits were to be determined using the gold standard of Anglo-American dispute resolution: a trial and, when appropriate, trial by jury. Trying to get it right after an adversarial contest on a level litigation field always has seemed very American to me, like apple pie and baseball and the flag. And promoting its objectives appeared to me, as it had to my mentor, to be a worthy calling for one's life.

That was the conception in 1938, and for many years that vision of the civil justice process was pursued by the bench and bar and taught in law schools. But, of course, both our society and our profession have been altered dramatically, and American civil litigation has been transmogrified. Back then the typical lawsuit involved a single plaintiff and a single defendant jousting about what usually were relatively simple matters. Today, issues of science, technology, communications, economics, and legal complexity are commonplace. In the past few decades, we have experienced a tremendous growth in multi-party, multi-claim, multi-district disputes, and, of course, an extraordinary explosion of class and mass actions featuring disputes about highly intricate matters—dangerous pharmaceuticals, mass disasters, mind numbingly complex financial transactions, technology claims, defective products, and improper governmental conduct. Many

have recognized that disputes arising out of mass phenomena and globalized commerce and communication and information flow cannot be resolved the old fashioned way—one by one, thus putting pressure on our courts to modify existing procedural norms. Not surprisingly, these developments have been accompanied by an increase in caseloads, the protraction of lawsuits, the emergence of judicial management with its attendant impact on the very nature of the adversary system, and the development of transnational litigation presenting yet another set of complexities.

The societal and technological revolutions that followed World War II transformed the business of our national courts. Over the past 65 years, we have had the most extraordinary growth in federal law in this country's history. The workload of the federal courts when the Rules were birthed shows that only a relatively limited number of subject areas were involved—a touch of antitrust, a little copyright, a few patent cases, various interstate commerce matters, and diversity of citizenship cases. The securities laws were in their infancy, the civil rights revolution was yet to happen, and neuralgic statutes like RICO and ERISA and the impenetrable Patriot Act had yet been enacted. Today's worlds of civil rights, employment discrimination, environmental, consumer protection, and product safety litigation basically did not exist when the Federal Rules were formulated. Most of them still didn't exist when I was in law school; there were no courses on those subjects in the 1950's. It was a world of library books, fountain pens, manual typewriters, and carbon paper.

And over these years law unfortunately has become a business as much as a profession. It is highly competitive and territorial. Professional courtesy is often conspicuously absent. Lawyers on both sides of the "v."—and even on the same side of the "v."—troll for clients and play turf games. In many contexts there is so much money on the table that it promotes unprofessional motivations and behaviors. The mega-law firms, some now global in character, are partnerships in name only. The Supreme Court has validated lawyer advertising in the name of free speech

turning some members of the bar into TV pitchmen. Law firm marketing, replete with wining and dining, networking meetings at posh resorts, and glossy brochures, is now common place. And sometimes the deal making for leadership and fees in big cases among plaintiffs' lawyers has the feel of the haggling characteristic of the Grand Bazaar in Istanbul. On the defense side, the division of litigation spoils is more genteel and less visible.

On a much more positive note, because of the extraordinary legal developments designed to meet the quest for social justice that came to the fore in post-WWII America, we have something that really didn't exist in 1938—the public interest and social action bars. These professionals resort to the civil justice system to promote various ideological and humanitarian objectives. They deserve our greatest respect.

Much wonderful and creative legal work in the public interest has been done by lawyers pursuing the private enforcement of national policies—indeed, we sometimes call them "private attorneys general." Many of them work on a contingent fee basis and assume enormous litigation risks. Others have mixed motivations—both altruistic and entrepreneurial—but embedded in their activity often lies a strong desire to further the public policies underlying the actions they bring. These efforts go well beyond civil rights and legislative reapportionment. Asbestos was held accountable by the private bar. Tobacco was cabined by the private bar. Defective pharmaceuticals such as diet drugs and Vioxx are removed from our midst and illicit financial and market practices of companies such as Enron have been halted by the private bar. Today, attempts are underway to hold some of those responsible for the recent financial crisis accountable. And so, some Americans don't die or become incapacitated from defective products or toxic substances and important social and economic policies are enforced because of what these lawyers do. Their work product speaks for itself.

The rise of the public interest bar, so lovingly nurtured by this great law school, has led to the enforcement of numerous constitutional and statutory public policies; in effect we now have an indispensable satellite regulatory system augmenting the work of official agencies. Thus, today these "private attorneys general" can bring civil actions under laws relating to antitrust, securities, consumer protection, civil rights, employment discrimination, the disabled, and my personal favorite, age discrimination.

But a backlash has set in against the private enforcement of public policies. Special interests vilify the plaintiffs' bar as fee-hawking ambulance chasers. Americans have been defamed as litigious fortune hunters. Bogus statistics are propagated and fears are spread by claims that there is a litigation explosion and Americans pay a litigation tax rendering our companies uncompetitive. Politicians make merry with their attacks on our justice system cloaking themselves in the mantle of "tort reform," and urban legends about certain cases—sometimes even imagined cases—abound, typically in highly distorted form. The so-called McDonald's coffee cup case has been grotesquely misdescribed and, with the aid of simplistic media accounts, it became a cosmic anecdote. Last year—seven years after the case ended—HBO aired a documentary entitled Hot Coffee that finally puts the case in proper perspective.

All of this has been given traction by the Supreme Court, which seems to have a thumb on the justice scale favoring defendants that has had significant consequences on access to the courts. Two examples from securities law make the point. First, the Court has eliminated liability for aiding and abetting in certain contexts no matter how egregious the conduct and the number of people hurt, giving many miscreants a free pass. Second, despite the global nature of the securities market, making where a transaction is executed irrelevant (and often fortuitous), the Supreme Court has sharply limited the right of certain investors to sue for alleged fraud even when the defendant has taken advantage of the American capital marketplace. These and other decisions have blunted the effectiveness of our regulatory statutes. I fear that the Alien Tort

Claims Act, a human rights keystone, will suffer a similar fate in the Supreme Court in a few months.

This transformation of legal doctrine has been accompanied by a transformation in the way courts process civil cases. In particular, I've grown increasingly concerned about procedural changes that have resulted in the earlier and earlier disposition of litigation, often eviscerating a citizen's opportunity for a meaningful merit adjudication of his or her grievance. Remember the image suggested earlier—what I called the civil litigation gold standard—trial before a jury. Today, there are hardly any federal civil trials—let alone jury trials. Indeed, a contemporary cliché refers to "the vanishing trial." Many reasons have been offered, but, in my view, one of the most significant is that judges are terminating cases earlier and earlier. It has been a gradual, almost invisible process that my TV mentor, Fred Friendly, always referred to as making policy by one-degree-it-is.

This acceleration of case disposition has come about because courts have erected a sequence of procedural stop signs during the past 25 years. It began in earnest in 1986 when the Supreme Court decided a trilogy of cases invigorating the summary judgment motion. Since granting that motion terminates a case before trial, these decisions encourage its more frequent invocation by defendants. And judges, resonating to the Court's decisions employ summary judgment more frequently. Unfortunately, one fears that judges occasionally have inappropriately resolved trialworthy disputed fact issues or conclusorily characterized cases as "implausible," thereby disposing of them with trial. If nothing else, the summary judgment motion has become an expensive and time consuming pretrial stopping point with attendant delay, expense, and risk of premature termination.

In 1993, the Supreme Court's decision in Daubert v. Merrell Dow continued the trend by emphasizing the concept of "judicial gatekeeping." Daubert directs judges to oversee the

introduction of economic, scientific, and technological evidence, particularly when it takes the form of expert testimony. Daubert's high threshold for experts has been particularly burdensome for plaintiffs, who often must provide testimony or reports about the relevant technology, or pharmacology, or environmental impact, representing another procedural obstacle, another motion, another hearing, another potential issue on appeal, all causing more delay and expense. This plays into the hands of the billing-by-the-hour regime of the firms that usually represent corporate and other economically powerful interests; it has precisely the opposite effect on contingent fee and public interest lawyers who must bear these expenses without any assurance of reimbursement, let alone compensation. And when a Daubert challenge succeeds in eliminating an important plaintiff's expert, the case often is so weakened that it may be vulnerable to dismissal or abandonment.

More recently, judicially established heightened class action certification requirements have become a major obstacle. These effectively require some plaintiffs to establish certain aspects of their case long before trial and without testimony or a jury. The Supreme Court's recent decision in Wal-Mart v. Dukes has increased the burden of showing "significant proof" of a general policy of employment discrimination to secure class certification. This burden of pretrial persuasion represents another impediment to certification. Wal-Mart exemplifies a substantial line of cases imposing barriers to class actions.

The class certification motion thus has become another procedural stop sign undermining the utility of one of the most important joinder mechanisms for handling disputes arising from conduct damaging large numbers of people with small claims. If class representatives cannot clear the certification hurdle, as has become more common, individual actions are not pursued because they are not economically viable. Even when an attempt to block certification doesn't succeed, the very elaborate process created by the courts imposes additional cost and delay, especially when interlocutory appellate review of certification is sought, let alone granted. Perhaps even

more troublesome is the fact that increased costs and the heightened risk of non-certification inhibits the institution of potentially meritorious cases, leaving public policies under enforced and large numbers of citizens uncompensated.

And, another of the Court's recent class action decisions, AT&T Mobility v. Concepcion, replaces judges and juries with one-by-one arbitrators for resolving disputes better adjudicated by class action or other forms of aggregation. As a result, powerful economic entities have imposed no-class-action arbitration clauses on people with little or no bargaining power through take-it-or-leave-it adhesion contracts involving securities accounts, credit cards, mobile phones, car rentals, and many other social amenities and necessities. Concepcion is the latest example of boilerplate arbitration clauses trumping access to the courts even when there is contract unconscionability. Compelled private adjudication thus replaces the courts and process transparency. There was a time when the Fifth, Seventh, and Fourteenth amendments to our Constitution were treated more deferentially.

The Supreme Court has now erected an even earlier impediment on the procedural road map—heightened pleading requirements. I doubt there is an active Federal litigator in this room who hasn't employed or defended against a motion based on the Court's 2007 decision in Bell Atlantic v. Twombly and its 2009 expansion in Ashcroft v. Iqbal. The two cases turn their back on over sixty years of federal pleading jurisprudence with an effect so dramatic that cartoons have appeared showing lawyers complaining to clients that they've just gotten "Twomblyed in the Iqbals."

I think fondly (and nostalgically) about the actual language of the federal pleading rule, which only requires a "short and plain statement . . . showing that the pleader is entitled to relief," and I remember that the rulemakers drafted it that way to permit relatively easy access to court without technicality or formality. Rule 8 essentially was rewritten by the Supreme Court from

requiring “notice” of the claim to requiring facts “showing” a “plausible” claim with little guidance as to what that means. Justice Souter’s Twombly opinion only tells us it’s something more than purely speculative or possible, but less than probable. That’s not very helpful.

The Court was more specific in Iqbal, saying plausible means the pleading must show a reasonable possibility of relief. But how are district judges supposed to divine that? The Court invited them to use their “judicial experience and common sense.” To be a bit sarcastic. Does it mean that a newly appointed judge has no judicial experience to employ, and are we supposed to believe that common sense is generously and equally distributed among federal judges? In addition, the Court, instructed district judges to compare the challenged conduct to a hypothesized innocent explanation for the defendant’s actions, which sounds very much like an invitation to evaluate the case’s merits based on a single document—the complaint—without having the benefit of discovery let alone anything remotely approximating a trial or a jury. The result is a process that appeals too much to judicial subjectivity.

But, a complaint does not speak to judicial experience or common sense; that is irrelevant to stating the claim. Nor do plaintiffs—even the most masochistic of them—discuss hypothetical innocent explanations of the defendant’s conduct in their complaints. So what is a plaintiff supposed to plead? Some lawyers I have discussed this with feel that Twombly and Iqbal have so twisted the pleading structure that they now must negate any possible innocent explanation for the defendant’s conduct. That is not the type of pleading the rulemakers intended or what a rational twenty-first century pleading system should require. It amounts to the plaintiff anticipating and negating defenses to his claim, which is inappropriate pleading in every American procedural system I know anything about.

What is worse, the new plausibility regime may lead to resolving fact issues on a motion to dismiss, something that even the fact pleading systems of times gone by never allowed. A motion

to dismiss—for hundreds of years— has only determined the complaint's legal sufficiency. It asks a simple question—does the complaint state a claim the law recognizes? For example, suppose I allege one of my students gave me a dirty look. Whatever procedural system you test that pleading under—the Federal Rules, the codes, the common law—it would be dismissed if directing a dirty-look at another is not actionable under the governing tort law. But if such a tort existed, the case would proceed.

A pleading challenge never has had anything to do with what actually happened to the plaintiff, let alone who should prevail on the merits. As civil procedure instructors tell their classes each year, on a motion to dismiss, the judge only looks at the four corners of the complaint and nothing else to determine its legal sufficiency. Indeed, the judge is supposed to accept the facts pleaded to be true, and "bend over backwards" to interpret the complaint in the light most favorable to the pleader. But now the motion to dismiss may morph into a trial-type inquiry with the capability of terminating a case at its outset based on little more than judicial intuition. So in one "fell swoop," as they used to say in Brooklyn, the land of my youth, these two Supreme Court decisions have destabilized both the Rules' pleading standard and its motion to dismiss practice. Indeed, by empowering district judges to use subjective factors—judicial experience and common sense and evaluate possible innocent explanations to determine plausibility, the motion to dismiss begins to feel like an invitation to decide the merits of the plaintiff's claims at the very beginning of the case.

Moreover, Twombly and Iqbal both ignore the problem of information asymmetry. In many litigation contexts critical information is entirely in the defendant's possession and unavailable to the plaintiff. We no longer live in a simple world in which a buyer can appraise the strengths and weaknesses of a product, such as an oxcart or farming implement, before purchasing it. I can understand requiring a plaintiff to plead what he or she knows or should know with reasonable effort, but it is rather futile and a bit absurd to tell the pleader to state what he or she doesn't

know and cannot reach. That's what discovery is for. It was designed to provide each side with access to information otherwise unobtainable so that the litigation playing field would be level and more informed settlements and trials promoted.

Employment discrimination cases provide an example. Typically a fired employee is not told why. If facts must be pleaded to state a claim for discriminatory discharge, how can the plaintiff surmount the newly minted pleading requirement? How does the plaintiff show discriminatory conduct—let alone a pattern or practice of discrimination—without access to the employer's conduct regarding not only the plaintiff but other employees? The paucity of recent employment discrimination cases shows that in some parts of the nation they are not being instituted with any frequency—let alone surviving. Similarly, how does a pleader challenge illegal or unconstitutional governmental action without deposing members of the department in which the conduct took place? Because the Supreme Court has now denied plaintiffs the opportunity to employ even limited discovery before showing they can plead a plausible case, Twiqbal, as we call it, has shifted the information access balance in favor of those defendants best able to keep their records, conduct, and institutional secrets to themselves.

The new pleading principles were established in two contextually highly unique cases—one an extremely large antitrust case and the other an outgrowth of 9/11 involving claims by a Pakistani Muslim of illicit detention and harsh treatment against high ranking federal officials—the Attorney General and the Director of the FBI. It was quite unnecessary for the Court to have reached beyond the cases before it. Yet it announced that plausibility pleading applies to all federal cases. It simply makes no sense to apply the new pleading standard to the wide swath of relatively simple lawsuits that do not need detailed pleading or extensive gatekeeping with their attendant cost, delay, and risk of premature termination.

So where are we? The Supreme Court has moved the system from a notice pleading structure, which is what the pleading Rule was designed to be, to a fact pleading structure, which is exactly what the Rules were drafted to reject. As a result, even when the plaintiffs' claims may have merit, cases may not be initiated because the risk of losing without any prospect of compensation is too great or, if brought, they may be dismissed prematurely. Moreover, Twombly and Iqbal have created procedural playthings for defendants. Not surprisingly, the Federal Judicial Center reports motions to dismiss are now being made with increased frequency. More motions, more delays, more costs, more appeals, and potentially more inappropriate dismissals.

And just a few months ago, a plurality of Supreme Court Justices tried to push the termination clock back even earlier. In J. McIntyre Machinery v. Nicastro, the Justices divided 4-to-2-to-3 (a very unusual double play combination for you baseball fans), regarding the constitutional limits on jurisdiction over defendants who have not acted in the forum and cannot be found there. The plurality departed analytically and linguistically from the Court's personal jurisdiction jurisprudence going back 65 years to International Shoe v. Washington, and clearly signaled their desire to contract that jurisdiction. With the votes of the two concurring Justices, who also felt that the defendant's contacts with New Jersey did not meet constitutional standards, the Court's majority held that the Due Process Clause did not permit that state's courts to assert jurisdiction over an English manufacturer whose sizable metal-shearing machine allegedly seriously injured Nicastro in New jersey.

The McIntyre plurality demanded that the defendant not only have contacts with the forum, but have targeted the forum, and intended to submit to jurisdiction in that forum. That constrained view, if it ultimately prevails, means that a corporate defendant—perhaps domestic as well as foreign—can structure its distribution system and have its products or services initially reach only one state while avoiding the jurisdiction in almost any other state to which they are then shipped by the distributor. Thus, in many circumstances injured consumers and employees

may not be able to sue where they purchase or receive defective products or services, or live, or were injured; rather, plaintiffs may now have to litigate in distant fora—or abandon their claims altogether. Fortunately, the concurring Justices did not buy into that analysis.

Justice Kennedy's plurality opinion expressed concern for a hypothetical small Florida farmer selling to a local distributor who might vend his produce to grocers across the country and Justice Breyer's concurring opinion worried about an equally hypothetical Appalachian potter being sued in Alaska or Hawaii because one of his cups or saucers had been sent there by a large distributor. But the obvious beneficiaries of the case's restriction on personal jurisdiction will be manufacturers, and other significant commercial entities. Neither opinion acknowledged that the hypothesized farmer and potter could be protected by the principles of fair play and substantial justice recognized in International Shoe and later reaffirmed by the Court. Thus, McIntyre portends another stop sign may lie ahead, this one posted at the very Genesis of the case. At a minimum, the plurality opinion incentivizes defendants to challenge jurisdiction.

When one takes a panoramic view of these developments, and the increase in defenses that federal courts now demand be focused on early in the proceedings, such as preemption, standing, qualified and absolute immunity, exhaustion of administrative remedies, and statutes of limitation, as well as the fact that several amendments to the Federal Rules during this period have were intented to constrain and control discovery, there is no secret about what is happening, or frankly why, and who benefits. To use a sports metaphor, this all begins to feel like judicial piling on. The effect of these procedural shifts is seismic. Previously we had a commitment to trial and when appropriate, jury trial—all in public view. True, a trial has been merely a possibility in recent times because a settlement culture has become a dominating reality. Then the increased invocation of summary judgment began to replace the possibility of trial. Now we have a potentially dispositive pleading motion coming even earlier than the summary judgment motion, which, when granted, prevents any discovery or trial. Finally, the McIntyre plurality offers a

heightened possibility of dismissal for lack of jurisdiction. The cynical might ask: What's next? A sign posted on the court house door proclaiming "Closed"?

All of these pretrial obstacles have created procedural opportunities for defendants—stop signs that generate billable hours—that are being used with increasing (and statistically significant) frequency. Not surprisingly, for example, Twombly and Iqbal have led to an increase in dismissals. Today's reflexive defense response to a complaint—a motion to dismiss—is akin to that of Pavlov's dogs to the dinner bell. More motions, more delays, more costs, more appeals, and more early and possibly ill-advised dismissals. Let me suggest that the system is suffering from a significant case of premature terminations.

Not only is case disposition occurring earlier, it is based on less and less information regarding the facts and merits of a dispute. A trial provides live evidence, examination, cross-examination, and often the deliberation of a jury. Summary judgment is based on lawyers' papers. The motion to dismiss, however, is based only on one paper—the complaint. No discovery. No evidence. No witness testimony. No cross-examination. No voice of the community. Adjudication based on paper should be an exception. Adjudication based on a single paper as evaluated by subjective factors such as judicial experience and common sense and an abstract comparison to a hypothesized innocent explanation of the defendant's conduct is a process that is alien to me.

The Supreme Court has given primacy to efficiency and systemic cost reduction. In some respects this is understandable since there are concerns of uncertain dimension and significance that provide some justification for what has happened over the past quarter century. Our judges have very real docket pressures and discovery, particularly e-discovery, can be extremely resource-consumptive, particularly in large-scale cases. Undoubtedly there should be constant re-evaluation of how the civil system is functioning and, when a need has been established, change is

appropriate. However, the changes I have described have tipped the justice scales precipitously; our most important litigation values have been hurt by the proliferation of procedural stop signs producing collateral systemic costs that are far too high, especially when the supposed need for these changes lack any real empirical support and the motivations behind them are suspect.

A majority of the Justices in Twombly and Iqbal offered three propositions to justify the pleading changes: There is a threat of abusive behavior and frivolous lawsuits, litigation is expensive, and extortionate settlements against economic entities must be avoided. Presumably these also undergird the other stop signs as well. But, are these concerns real?

Assertions of abuse are not new. When I was the Reporter to the Federal Rules Advisory Committee, in the late 1970's and first half of the 1980's, the focus was on containing the pretrial process because that's where cost and delay reside. Even then, the defense bar and their clients were voicing complaints about abuse and frivolous litigation and the need for cost reduction—the drumbeat was constant and noisy. As the great baseball philosopher Yogi Berra might say, what we are hearing today is déjà vu all over again. But all of this was new to me and I was a bit naïve, so I spent months going to bar association meetings and judicial conferences asking people to tell me about abuse and frivolous litigation so that I could aid the Committee in pursuing intelligent rule revision. I listened and listened and listened. I was like Diogenes with a lamp searching for the truth about abuse and frivolity! After six months, I reported to the Committee that I had learned a great deal about these litigation scourges. I could tell them with considerable confidence that according to the practicing bar frivolous litigation is any case brought against your client, and abuse is anything the opposing lawyer is doing.

More than thirty years have now passed and I have lost my naïveté, but I cannot do much better. We have never defined either abuse or frivolousness; we have never measured their frequency; we don't know who is guilty of it. Yes, there are cases that most would agree should

not have been instituted and motions and discovery requests and objections better left unmade. How many? We don't know. Most assertions of abuse or frivolousness are anecdotal and subjective. They lie in the eyes of the beholder. Despite the absence of any real knowledge, these abstractions motivate judicial decision-making, apparently including that of Supreme Court Justices.

And what of extortionate settlements? How many times do they occur? Again, we simply don't know. We don't even know what an extortionate settlement is or how to recognize one. We don't have benchmarks. Some settling defendants proclaim, "oh, we were extorted." How do we know that's true? Cases are settled for a myriad of varied human and business reasons that simply reflect the self-interest of the parties, many having little to do with a litigation's merits or costs, such as fears about regulatory matters or concerns regarding public perception or a desire to clear a contingent liability off the books or a lack of resources to continue to litigate.

And what about costs? Of course, no one likes them. But again we really don't know that much. The limited empiric evidence we have, which often is simply impressionistic or superficial, focuses almost exclusively on defense costs—not the plaintiffs, nor the system's, nor society's. Ironically it suggests that in most cases costs are less than what they often are asserted to be, and that very high cost cases represent only a rather small slice of the federal workload. Even as to them we don't know how much of the cost and delay are the result of tactical decisions by the defense regarding making motions and resisting discovery that are driven by its economic self-interest regarding billing or reflect practices of attrition and dilatoriness, rather than hyperactivity on the plaintiff's part.

The judiciary has shifted the procedural system dramatically against plaintiffs by moving the spectre of case termination forward in time, restricting access to discovery, limiting forum choice, and converting screening motions into merit resolving dispositive motions. Could it be that it's

now the defense bar that has been empowered to extort settlements that are artificially low by subjecting plaintiffs to the costs, delays, and risks of running afoul of the various procedural stop signs that dot the pretrial landscape? Maybe that is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or maybe the fault lies on both sides? Or maybe extortion really is a nonissue—a rhetorical illusion? The point is, we simply do . . . not . . . know. Yet despite this vacuum of knowledge, dramatic procedural shifts have occurred based on unsubstantiated assertions and assumptions.

Many of the Justices seem singularly concerned about the litigation burdens on corporations and governmental officials. Shouldn't we care about the litigation burdens on plaintiffs? Shouldn't we also care about cases being dismissed prematurely despite obvious information asymmetry? Shouldn't we care that potentially meritorious cases involving important public and private matters are being deterred from being instituted or are dismissed because of some pretrial procedural stop sign? Shouldn't we care, for example, that possible antitrust and civil rights and consumer violations and product failures are not being deterred or compensated or that people are being detrimentally affected by improper government action? Don't all of those impose costs—perhaps unquantifiable ones—on society? Yet matters such as these never appear on the cost-benefit balance sheet. It is all lost in the cacophony about abuse, frivolousness, extortion, and expense.

What is happening jeopardizes this Nation's longstanding legislative and judicial commitment to the private enforcement of its fundamental public policies and constitutional principles. If the procedural rules are not receptive to lawsuits designed to vindicate those policies and principles or if cases pursuing that end cannot be lodged in a convenient forum or survive a motion to dismiss, they will not be instituted. That is not what our procedural system, as reflected in the words of Federal Rule 1, is designed to achieve. Yes, lawsuits should be resolved speedily and inexpensively. But remember that third word in Rule 1—"just." Seeking a "just" result is at

least as important as the other two objectives. I fear that after more than seventy years, the application of the Rules has lost its moorings, and some in the profession, have lost sight of the goals our procedural system should pursue.

By short circuiting the civil justice process the Supreme Court has downgraded our commitment to the day-in-court principle, diminished the status of the jury trial right, and substituted accelerated decision making by judges—or arbitrators—for adversarial trials of a dispute's merits and a jury. It should be obvious that procedural stop signs primarily favor defendants, particularly those who are repeat players—large businesses and governmental entities. Not surprisingly, people often ask me: "Is this a business oriented Supreme Court?" Or occasionally, someone will assert, with a certain bite in his or her voice: "The Chamber of Commerce seems to have a seat on the Supreme Court, any truth to that?" I don't believe it, but I do suppose that a number of the Justices, and other federal judges, have a clearly defined (or subliminal) predilection that favors business and governmental interests. Nor, do I think it unfair to say that the current Court and parts of the federal judiciary wish to limit litigation, which negatively impacts access and works against those in our lower and middle classes seeking entre to the system. That is an unfortunate echo of today's societal inequities and reflects the stunning disparity in people's power, income, and status in our Nation.

Frankly, I don't think a focus on gatekeeping, early termination, and erecting procedural stop signs befits the aspirations of the American civil justice system. To me this is a myopic field of vision. At a time when the complexities of American life and the need for that metaphoric level litigation field seem to be increasing constantly, our courts should focus on how to make civil justice available to promote our public policies—by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged. Our judges should concentrate on effectuating the vision of the rulemakers of the 1930's—citizen access and resolution of cases on their merits.

If necessity is the mother of invention, the time may have come to declare that our civil justice system is in a state of necessity, and we should try to resurrect the process many of us were proud to practice or teach. There are a myriad of possibilities other than erecting stop signs. The profession owes it to the larger community to employ its inventive skills and explore them. Our aspirations should be those that our Founders embedded in the Constitution, that committed us to the rule of law, and that motivated engraving "equal justice under law" on the front of our Supreme Court. They should not be to obstruct citizen access to our justice system by constructing a procedural Maginot Line around our court houses.

And that ends my inaugural thoughts. To those of you who harbor different views, I offer the solace that this also may have been my valedictory.