

A Conversation with Judge Harry T. Edwards*

On February 18, 2004, the Honorable Harry T. Edwards, Chief Judge Emeritus and Circuit Judge, United States Court of Appeals for the D.C. Circuit, delivered the 2004 Tyrrell Williams Lecture at Washington University School of Law in St. Louis. Rather than follow the usual lecture format, Judge Edwards participated in a “public forum.” He first answered questions sent to him by law students and members of the law school faculty in advance of his talk and then fielded inquiries from the audience. Most of the questions related to articles that Judge Edwards has written on collegiality in judicial decision making, judicial administration, social science models of decision making, interdisciplinary studies, the “harmless error” doctrine, legal education, and the legal profession.** Judge

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** See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002); Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999 (2002); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325 (2002); Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567(1997); Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995); Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession”*, 69 WASH. L. REV. 561 (1994); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837; Harry T. Edwards, *A Lawyer’s Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1983–84).

Edwards' answers to the questions raised at the public forum are reprinted below.

Dean Joel Seligman: Welcome to this year's Tyrrell Williams Lecture. This is the most important named lecture at this School of Law. It has been a vital part of our annual experience since it was introduced in 1949. We have been honored throughout the decades by the presence of extraordinary speakers, starting with Justice Felix Frankfurter, who I believe was one of the very earliest speakers. We have had several members of the Supreme Court, several members of the courts of appeals, and outstanding participants in public discourse, such as former Harvard President Derek Bok a few years ago.

Judge Edwards and I both have a connection to Michigan Law School. I suspect it will be of consequence to him to know that one of our wonderful speakers a few decades ago was the Honorable Wade McCree, who served for many years on the federal bench, then as Solicitor General, and finally as a member of the University of Michigan Law School faculty. Judge McCree was my colleague at the University of Michigan, and he was Judge Edwards' close friend.

Harry T. Edwards, at a consequential point in his career, was a Professor of Law at the University of Michigan, where he established a national reputation in labor law and also wrote learnedly on fields such as higher education. In 1980, he was appointed to the United States Court of Appeals for the District of Columbia Circuit, where he has served ever since. Between 1994 and 2001, he was Chief Judge. When he began his period as Chief Judge, this terribly important court was one that was notably as intellectually divided as any court in the country. Judge Edwards deserves tremendous acclaim for his success in building a much greater sense of collegiality on this bench.

In responding to questions, I relied extensively on these published works, occasionally amplifying previously stated views, but mostly parroting what I have said in the past. I am frank to acknowledge that my views on many of the subjects covered have not changed much during my twenty-four years on the bench. One subject with respect to which time on the bench has afforded me new and richer insights is judicial collegiality, a matter that I discuss at length in the aforementioned *Pennsylvania Law Review* article.—HTE

Judge Edwards has lived not only as a jurist who takes the duties of the bench terribly seriously, but has performed an important role as a public intellectual. In recent years he has written extensively on a wide range of topics that are of enormous consequence to the bench, the academy, and the bar. He joins us today for a conversation in which he will address some of these topics. Please join me in welcoming Judge Harry Edwards.

Judge Edwards: Thank you Dean Seligman for your gracious remarks. I have visited Washington University School of Law on a number of occasions to give speeches and participate in conferences, and I now serve as a member of the school's National Council. My time here always has been rewarding, both because of the school's sterling academic program and outstanding faculty, and also because I have a number of friends here with whom I enjoy spending time. It is a pleasure to be with you again.

I want to thank Dean Peter Wiedenbeck for so ably arranging today's program. I asked Dean Seligman to permit me to use a "public forum" format in this year's Tyrrell Williams Lecture, so that I could have a conversation with the audience. I appreciate his accommodation in allowing us to proceed in this way. I will first answer the questions submitted in advance by law students and faculty members and forwarded to me by Dean Wiedenbeck. I will then open the floor to entertain questions from the audience.

Question: In a recent article you described the importance of collegial deliberations to decision making by the courts of appeals. [Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003).] To what extent does the practice of assigning to appellate panels judges from another court—especially a district court—undermine deliberative refinement?

Judge Edwards: I will refer to "collegiality" and "collegial decision making" in responding to several questions, so let me first explain what I mean by these terms. When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what I mean is that judges have a common interest, as members of the

judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.

With this in mind, let me turn to the question about visiting judges. A rule that has been important to the rise in collegiality on the D.C. Circuit is an agreement among the judges that, absent a grave emergency, the court will not use visiting judges to decide cases on our docket. This rule is not meant to suggest any disrespect for our judicial colleagues from other courts. Rather, our judges believe that working without visiting judges allows us to interact with fewer distractions. The D.C. Circuit docket largely consists of very dense administrative law cases in appeals that often include huge records and numerous parties with their numerous briefs. It is not an inviting caseload for judges who are not used to it. We have also found that it is much easier to maintain the quality of our own work if we interact only with each other. We are very open and forthright in our critiques of one another, confident in the understanding that all that we say is “in house” and “among family.” Our thinking and writing thus benefit from a robust and healthy back-and-forth that makes for better individual opinions and a more coherent body of law generally. In short, to ensure expeditious issuance of our decisions, balanced work assignments among our judges, and coherence in the law of the circuit, we decided that only the judges of the court should do the work of our court. The rule allows us to maintain tight control over the law of the circuit. We can monitor and react to one another very closely. I think the rule has had a positive effect on the cohesiveness of our judges as a group and coherence of the law of our circuit. I have always believed that the adoption of this rule in the early-1990s represented a crucial turning point for the D.C. Circuit at a time when collegiality was at a low point.

District Court judges from our circuit faced a unique burden when they served as visiting judges on the Court of Appeals. Although our District Court colleagues are generally quite familiar with the law of the circuit, they necessarily experienced the tension of being asked to sit in judgment of their colleagues. I am not aware of any visiting District Court judge who ultimately let this effect his or her decision

making; however, I have heard some District Court judges say that sitting in judgment of other trial judges generates a certain self-consciousness that contributes nothing good to the decision-making process.

Question: Can a court be too large to maintain collegiality?

Judge Edwards: Yes, I think so. Appellate judging is a collaborative enterprise. If a court is too large, interactions between colleagues become diffuse. The number of times that one has occasion to work with any particular colleague decreases, and it consequently becomes harder to “read” and understand any single colleague’s concerns and interests. A couple of things can then happen. The discussion among judges, which is the essence of appellate decision making, can lose the robustness that comes with the candor of colleagues who know each other well and trust each other. And consensus on the nuance of an issue becomes less likely. Collaboration is limited to the large outline of an answer, while responsibility for the details falls more heavily on the individual drafting an opinion. The law of a circuit may consequently begin to reflect many disparate voices, rather than one coherent view.

Question: Is the Ninth Circuit too large?

Judge Edwards: Many judges on the Ninth Circuit are very happy with their court in its present form. The court is too large for my tastes, however. My court consists of eleven judges, all of whom have chambers in one courthouse in Washington, D.C. I view this to be an ideal situation. In contrast, the Ninth Circuit, at last count, consisted of twenty-six active judges and twenty senior judges—nearly fifty judges on the court of appeals, with the judges sitting in widely dispersed locations. This is not an arrangement that I would prefer. Many judges are convinced that collegiality enables better decisions and that smaller courts tend to be more collegial. I agree. In addition, as Judge Richard Posner has pointed out, given the size of the Ninth Circuit, the establishment of a viable process for rehearing cases en banc is very difficult. Because it is not feasible for the court to rehear cases en banc with all active judges sitting, the en banc court is limited to the chief judge plus a randomly chosen subset of the active members of the court. Under this procedure, a significant

number of judges, including, possibly, all of the panel members involved in the initial decision, do not participate in each en banc rehearing. This can skew the decision-making process, as the outcome of a case will depend, in part, on the “lottery” pursuant to which the en banc panel is chosen.

Question: How does a large law faculty, whose members are not forced to work with each other frequently and on an individual basis, maintain collegiality?

Judge Edwards: It is difficult due to the inherent nature of academia. Academics, and legal scholars in particular, are generally rewarded for individual achievement, not collaborative effort. In fact, there is little that is central to success in legal academy that requires collaboration. Individual faculty members may confer over matters of common interest, participate in faculty colloquia, and critique the work of one another. But they need not. An individual can be a brilliant scholar and a brilliant teacher without ever collaborating with his or her colleagues. It is only in clinical and administrative settings that collaboration is truly important in law school missions. And an individual law professor can be quite successful in the academy without ever engaging in either of those two endeavors.

In contrast, when it is done properly, appellate judging is a very different enterprise. When cases are heard and decided by multi-member panels, *collaboration is essential*. In an uncollegial environment, divergent views among members of a court often end up as dissenting opinions. Why? Because judges tend to follow a “party line” and adopt unalterable positions on the issues before them. This is especially true in the hard and very hard cases that involve highly controversial issues. Judges who initially hold different views tend not to think hard about the quality of the arguments made by those with whom they disagree, so no serious attempt is made to find common ground. Judicial divisions are sharp and firm. And sharp divisions on hard and very hard issues give rise to “ideological camps” among judges, which in turn beget divisions in cases that are not very difficult. It is not a good situation.

I want to make it clear that, when I speak of collegial decision making, I am not endorsing the suppression of divergent views among members of a court. Quite the contrary. In a collegial

environment, divergent views are more likely to gain a full airing in the deliberative process—judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached. This is not a matter of one judge “compromising” his or her views to a prevailing majority. Rather, until a final judgment is reached, judges participate as equals in the deliberative process—each judicial voice carries weight, because each judge is willing to hear and respond to differing positions. The mutual aim of the judges is to apply the law and find the right answer.

Judicial colleagues who are able to advance the common enterprise are cherished. The public measure of a judge is based almost entirely on the judge’s opinions. What the public does not always understand is that just as important to the decision making process is what the judge brings to the table in terms of his or her ability to collaborate: is the judge someone who colleagues can call on to test a theory? Does the judge ask probing questions at oral argument? Is he or she someone who contributes seriously to the conference following oral argument? Is the judge generous with his or her expertise and insights? Does the judge raise questions when he or she does not understand the contradictory view of a colleague? Does the judge possess a scholarly breadth that enhances his or her contributions to the process? In other words, collaborative decision making is the heart of our work, so judges have an incentive to promote collegiality. Law faculty members do not have the same incentive.

To the extent that collegiality is important to the work of law faculties, it can be promoted by strong leadership. In this way, judicial and academic institutions are very similar. There are social science studies indicating that people tend to follow the lead of those in charge. I think this is especially true if the suggestions of the leadership advance the enterprise. There is little doubt in my mind that a chief judge who values collegiality and who takes steps to nurture it is more likely to find him or herself with a more collegial court. I am sure that the same is true in a law school. In other words, it matters that this law school has a strong and visionary dean in Joel Seligman. I am sure that the positive steps that he has taken to make the law school great have drawn the faculty together in pursuit of goals that serve the best interests of the law school, even in instances

when all members of the faculty do not agree on a particular goal or on the steps to be taken to achieve it. This is how strong leadership promotes collegiality.

Question: You have expressed skepticism of the value of some forms of interdisciplinary legal studies, observing that where “the conversations [we]re devoid of prescriptions,” they are “the stuff of graduate schools, not law schools.” [Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, And My Alma Mater)*, 100 MICH. L. REV. 1999, 2001 (2002).] In your view, legal scholars and educators, unlike experts in other disciplines, “*must* be both descriptive and normative to pursue law and justice. We have an obligation not just to clarify legal issues but to help solve them and produce the best and most just answers to concrete problems.” [*Id.* at 2003.] Doesn’t the mixing of positive and normative analysis invite slanted recommendations driven by the author’s hidden policy preferences?

Judge Edwards: All recommendations come with a “slant,” so I do not view this as a problem. It is not a bad thing for legal scholars to offer concrete solutions to difficult problems in society, so long as their positive and normative analyses are supported by solid research, coherent reasoning, defensible data, and clear writing.

Question: In another context you have criticized inflammatory conclusions drawn from oversimplified empiricism. [Harry T. Edwards & Linda Elliott, *Beware of Numbers (And Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002).] How is a legislature or a court to guard against biased prescriptive analysis?

Judge Edwards: It is easy to guard against “biased prescriptive analysis” if a scholar reveals his or her reasoning and data. In the article to which you refer, my colleague, Linda Elliott, and I challenged a claim by legal scholars that federal appellate judges harbor an unprincipled bias against plaintiff/appellants. [*See* Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants’ Advantage*, 3 AM. L. & ECON. REV. 125 (2001).] We argued that the “thesis [was] specious, because it [was] founded on

flawed reasoning and deficient empirical research.” It was easy for us to assess the thesis, because the scholars’ data was fully exposed. It is noteworthy that, in a subsequent article, one of the scholars essentially retracted the original thesis. After “re-running the analysis” with refined data, the scholar found no statistically significant results to support the claim “that appellate courts reviewing tried cases tend to be more favorable to defendants than to plaintiffs.” [See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1477 n.87 (2003).]

Question: In your Collegiality article, you take issue with both the attitudinal and the strategic models of judicial decision making. [Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1652–62 (2003).] Most support for those models is found in studies of U.S. Supreme Court decisions. Intermediate courts of appeals are differently situated and are arguably the only truly constrained judicial decision maker. Trial courts are largely unconstrained in their findings of fact, and courts of last resort have broad discretion to declare the law. Intermediate appellate courts, in contrast, are hemmed in by both the record from below (facts) and precedent from above (law). You have estimated that in only five to fifteen percent of the cases that come before you are the parties’ arguments equally strong. Does this explain why social science models seem unsuited to the courts of appeals, and correspondingly, why collegiality seems to have greater force?

Judge Edwards: I think it is true that intermediate, appellate courts are more naturally constrained in their decision-making than are trial courts or the Supreme Court. Trial judges sit alone, so they normally do not experience the sort of collegial deliberations that are at the core of appellate judging. The Supreme Court, however, is a collegial body, and commentators have noted the group-decisional aspects of the Court’s work. However, the Supreme Court’s docket consists of many more “very hard” cases than do those of the lower appellate courts. The majority of the cases in the circuit courts admit of a right or a best answer and do not require the exercise of discretion. Lower appellate courts are thus constrained far more than

the Supreme Court. As a result, in the eyes of the public, the media, judges, and the legal profession, the Supreme Court is seen as more of a “political” institution than are the lower appellate courts. The Supreme Court also faces the burden of having to sit en banc in every case. This may mean that collegiality on the Court operates very differently from the collegial process at work in the lower appellate courts, where judges only rarely sit en banc.

Question: In your study of the harmless error doctrine, you distinguish the “guilt-based approach” from the “effect-on-the-verdict approach” and trace the dramatic expansion of the harmless error doctrine in recent decades. [Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995).] You observe that the two approaches are too easily conflated, because, “[a]t bottom, it is impossible for an appellate judge to consider whether an error has influenced a jury without thinking about the weight of the evidence against the defendant; and once an appellate judge lapses into this mindset, it is difficult to avoid guilt-based decisionmaking.” [*Id.* at 1173.] Isn’t the problem that both the guilt-based approach and the effect-on-the-verdict approach adopt an individualized ex-post perspective, attentive only to the facts and the defendant before the court, and ignore the ex-ante perspective, which would emphasize the consequences of the ruling on other actors (police, prosecutors, etc.) in future cases, and thereby vindicate the court’s role as the guardian of the integrity of the judicial process? The ex-ante perspective would not necessitate a bright-line rule that every constitutional error is harmful [*see id.* at 1207], because some constitutional protections are more important than others, and categorical distinctions could be developed by the accumulation of precedent (akin to the case law elaboration of procedural due process safeguards).

Judge Edwards: It is true that both the guilt-based and effect-on-the-verdict approaches rely on ex post perspectives. Both approaches require judges to guess about the consequences of errors after the fact. The guilt-based approach focuses on the weight of the evidence against the defendant to determine whether the error-free portion of the record is sufficient to uphold a verdict against the defendant. I reject this approach, because it allows judges to conflate

the harmless inquiry with our own assessment of a defendant's guilt. This approach is dangerously seductive, for our natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence.

The effect-on-the-verdict approach is quite different. Under this approach, appellate judges examine the record to determine whether the error might have influenced the jury, and hence contaminated the verdict; if that is the case, the appellate court has a duty to find that the appellant did not get the jury trial to which he or she was entitled. I recognize, however, that the effect-on-the-verdict approach is not always easy to apply. It is simple to state that the harmless-error analysis looks to the effect of the error on the verdict, rather than to the sufficiency of the evidence to support the verdict. It is yet another, more difficult thing for appellate judges to adhere to that analytical framework when confronted with the concrete facts of a particular case in which the defendant's guilt seems well established. It requires discipline, but that is our responsibility.

Neither approach aims to make the police and prosecutors fully accountable for all of their misdeeds. But this is not necessarily a bad thing. Our modern judicial system is based on the assumption that we ignore some errors because they do not prejudice either the defendant or the system. If every error was "reversible error," an extraordinary percentage of trial judgments would be reversed. In my view, it would demean the system to credit trivial errors.

I do not think the "case law elaboration of procedural due process safeguards" suggests a different approach. Under established case law, courts are forced to weigh the record in each case to determine the applicable due process safeguards. [*Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); see also *Mathews v. Eldridge*, 424 U.S. 319 (1976).] There are few categorical distinctions.

My concern with the harmless error doctrine, as applied, is that some judges may be too ready to find harmless error to avoid the burden of re-trial. This is a mistake. And we sometimes forget that the burden is on the government to prove that an error is harmless. This, too, perverts the judicial system.

Question: In *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript* [91 MICH. L. REV. 2191 (1993)], you describe the overall support and encouragement you received from many law school deans and faculty members for your proposals for changing legal scholarship and the law school curriculum. Now that over ten years have passed since your article's publication, what feedback have you received from law deans and faculty about the utility of your proposals and the progress made toward your ideals?

Judge Edwards: The "Growing Disjunction" article has been the subject of extensive commentary and debate over the past decade. And my proposals, which were described therein, have continued to find support among faculty and deans. Nevertheless, though there has been some progress in legal education in recent years, I believe that much remains to be done.

At a conference in 2000, Robert Clark, who was then Dean of Harvard Law School, aptly observed that,

[i]n the last 35 years, the most important development [that we have seen] has been the sheer growth and differentiation of legal education which reflects a similar pattern of development in the legal profession. . . . [T]he claim of the legal system on the economy and polity, both absolutely and in percentage terms, has gone up. The same can be said of the legal profession. It is much bigger And many more areas of life, economic and social, are covered by law.

The academy has responded to this—not necessarily consciously, quickly, or certainly not optimally—but it has responded. . . . [T]here are many more law schools, many more law students, many more professors, and a vastly bigger curriculum that covers many more subjects. As a result of this growth, there has been differentiation Now we have scholars who are high theorists, who are almost purely historians of law, and law and economics people. We also have many more interdisciplinary specialists [clinical law teachers, and experts in international law].

[T]his parallels developments in legal practice. It's a massive phenomenon, and it's quite natural—not necessarily good though.

[Robert C. Clark, Remarks at the 2000 Judicial Conference, United States Courts for the District of Columbia Circuit (Jun. 15, 2000), at 2–3, *available at* http://www.cadc.uscourts.gov/common/jconf/legal_edu_all.pdf.] In my view, Dean Clark is quite right when he says that many of the developments in legal education have not been pursued “consciously, quickly, or optimally,” and that many of these developments have not necessarily been good.

A greater effort has been made by the law schools to recruit PhDs who have a real interest in the law. This is good. Better clinical programs have developed in many more law schools, and more law schools now seriously credit the work of clinical faculty members. And this is also good. Generally, there are also many more courses now being taught in law school. In my view, this is not unqualifiedly good, as the expanded curriculum has led to some incoherence in legal education. In many law schools, at least two-thirds of student course-work is not guided by content—students study what they want in the second and third years of law school, often with no good pedagogical reasons for their course selections.

I also believe that there are still too many legal scholars who tend to discuss material from non-law disciplines without situating it in a meaningful legal context. I think that some of this is attributable to a misguided sense of intellectual superiority. I continue to hear some law professors who do work in non-law areas speak disdainfully of applying their work in legal contexts. Legal doctrine is dismissed as trite. And abstractions are favored over prescriptions. It makes little sense to me.

The other significant problem that I have noted in recent years is the prevalence of hiring policies heavily favoring candidates who have published major articles prior to beginning the application process. This necessarily favors persons who have earned PhDs and excludes bright young lawyers with significant practice experience. This exacerbates the distressing disconnection between legal education and legal practice.

I do not understand why law schools would consciously adopt hiring policies that effectively preclude brilliant practitioners from

entering the teaching market. Law schools are professional schools, not graduate schools. We grant JDs, not PhDs. Upon graduation, our students are qualified to seek licenses not available to persons who do not have a legal education. Thus, the public has a right to assume that holders of these licenses have attained a certain level of professional competence, share a commitment to a defined set of ethical norms, and accept the responsibility to interpret and practice the law in public-regarding ways. At its simplest level, law students must learn what the law is and how lawyers employ or enforce the law on behalf of clients.

This is not to denigrate the importance of theory in legal education. Good legal scholarship and teaching, as I envision it, is not wholly doctrinal. Rather, in my view, a good law teacher employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in law or in systems of justice. Ideally, then, a legal scholar always integrates theory with doctrine.

Law schools are not “trade schools,” so there can be no dispute that, in addition to theory, quality legal education also must include an understanding of relevant interdisciplinary considerations, analyses of social impacts, and proposals for reform. At bottom, however, a “professional education” must address certain skills with respect to which a trained “professional” should rightly be viewed as an authority. We are professionals because we can practice within defined legal systems, performing jobs that others in society are neither skilled nor certified to perform. There is certainly no excess of legal scholars who understand the nuances of legal practice, so it seems to me that law school hiring practices should allow for the hiring of candidates with practice experience, along with PhDs and other candidates who have spent no meaningful time working in the legal profession.

Question: Many students come to law school intending to practice public service law, but end up taking jobs in law firms. Putting aside financial pressures, what role, if any, does a law faculty have in this reversal, and what can be done to change it?

Judge Edwards: I sometimes sense an attitude of indifference among some legal scholars with respect to problems facing the legal profession. These academics seem to believe that theoretical

contemplation should not be subordinated to the demands of legal practice. But legal education inevitably shapes the profession, and if academicians abdicate their duty to communicate the profession's traditional commitment to the public good, they deliver students, by default, to the forces supporting an unbridled corporatizing of the profession.

A few years ago, Joseph A. Califano, Jr. gave a wonderful keynote address at the District of Columbia Bar's mid-year conference. His words capture my thoughts regarding the challenges that legal academics face in seeking to inspire law students to serve the public good upon graduation:

We lawyers must get our house in order. We must do so not simply out of our own self interest and desire for status and prestige in society. We must do so because in a turbulent democracy, lawyers are key to nourishing freedom and protecting it when it is threatened. Lawyers bear responsibility to craft ways for individuals to perceive and receive justice in a society that threatens to swallow citizens in ever larger and more impersonal government, corporate and union bureaucracies. Lawyers are key to prosecuting criminals and protecting law abiding citizens.

Without lawyers, equal protection is a phrase carved on a federal building. Without lawyers, legal segregation would still be a way of life in the nation's capital. Without lawyers, corrupt government will become the customary way of doing the public's business. Without lawyers, tenants['] rights would be subject to the whimsy of landlords, the First Amendment would be more rhetoric than reality, battered spouses and abused children would have little recourse. It is lawyers who must devise processes to assure that our scientific genius supports individual freedom and does not suppress it; and lawyers who must shape ways to cushion the harsh blows of free market forces on the individual.

Lawyers should be the most reliable life preservers for a people tossed in a sea of powerful government and private institutions, slammed by tidal waves of scientific discovery

and technological revolution. That's why it's worth a herculean effort to rebuild the credibility, respect and integrity of the profession.

[Joseph A. Califano, Jr., Address at the District of Columbia Bar's Annual 1997 Mid-Year Conference (Feb. 26, 1997).] The only way that legal academics can impart this message, however, is if they understand and respect the work of legal practitioners.

There are also concrete things that law schools can do to encourage students to consider public service work, either in public interest or government jobs, or in addition to their work with traditional law firms. First, law schools can ensure that students are exposed to an integrated model of legal education, one that fully embraces theoretical and doctrinal scholarship, critical legal studies, clinical education, strong involvement with members of the judiciary and practicing bar, international issues, and public-interest ventures. Faculty hiring should focus on diversity of perspectives, with no ideological or academic group having favored status. Theorists, critical legal scholars, and clinicians—all with very different interests—should flourish in an environment of mutual respect, sharing equal status and prominence on the faculty. Along with a full and integrated curriculum, students should be openly encouraged to consider and pursue diverse professional interests. A strong clinical program emphasizes the need and value of good practitioners, and generous scholarship awards or loan forgiveness programs for students committed to public interest work makes it possible for smart people to avoid debt and pursue legal careers that will serve the disadvantaged.

Question: In your concurring opinion in *United States v. Harrington* [947 F.2d 956 (D.C. Cir. 1991)], you expressed a concern that the federal Sentencing Guidelines unduly restrict the discretion of trial judges in sentencing. How should district court judges respond to this problem?

Judge Edwards: There are many federal judges who have problems with the Sentencing Guidelines, especially when coupled with mandatory minimum sentences. [See JOSÉ A. CABRANES & KATE STITH, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).] Nonetheless, district court judges, and

court of appeals judges as well, are obliged to follow the law. Unless the Supreme Court holds that the Guidelines are legally infirm or Congress passes legislation to change the law, we must adhere to the law as it is currently written.

Question: What was the reaction of your colleagues to your concurring opinion in *Bartlett v. Bowen* [824 F.2d 1240, 1242–44 (D.C. Cir. 1987) (Edwards, J., concurring)], in which the D.C. Circuit, having decided to grant an en banc rehearing, reconsidered its decision and denied rehearing?

Judge Edwards: I am not sure that I recall the “reaction” of my colleagues. In my concurring opinion, I wrote that the “clearly wrong” or “highly dubious” position urged by the dissent to determine when to rehear a case en banc was “a self-serving and result-oriented criterion” that was doing substantial violence to the collegiality that is indispensable to judicial decision making. Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case en banc in order to vindicate that judge’s position. Politicking will replace the thoughtful dialogue that characterizes a court where every judge respects the integrity of his or her colleagues. Furthermore, such politicking would impugn the integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it.

My concurring statement in *Bartlett v. Bowen* is the only time that I have actually discussed collegiality in an opinion, which is ironic in light of the fact that I did so at a time when collegiality, as I know it today, did not exist on the D.C. Circuit. That opinion is a testament to my desire for a collegial court at a moment when the D.C. Circuit was very much in the grip of ideological division. In an uncollegial environment at its worst, decisions to rehear cases en banc can result in disastrous, ideologically driven, and result-oriented judicial decision making. A high rate of en banc rehearings can be a symptom of an absence of collegiality. And, as my colleague Chief Judge Ginsburg has noted, it can also pose a threat to collegiality. It can both reflect and feed a court’s lack of confidence in the work of panels. However, the complete absence of en banc review may also be detrimental to collegiality, because panels may become too

independent of the rest of the court. On a collegial court, the court trusts panels to do their work, and the possibility of en banc rehearings constrains panels to be responsible to the full court. [See Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008 (1991); Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 260 (2002).]

Question: How does a troubled court become a more collegial one?

Judge Edwards: This is a good question. Unfortunately, there is no easy answer. In my *Pennsylvania Law Review* article, I discuss a number of factors that affect collegiality. I conclude with the following note:

The D.C. Circuit has changed dramatically in the years that I have been on the bench. In that time, it has gone from an ideologically divided court to a collegial one in which the personal politics of the judges do not play a significant role in decision making. In reflecting on this over the years, I have come to understand that there are a number of factors that may affect appellate decision making, some that should and some that should not. Among these factors are the requirements of positive law, precedent, how a case is argued by the litigants, the effects of the confirmation process, the ideological views of the judges, leadership, diversity on the bench, whether a court has a core group of smart, well-seasoned judges, whether the judges have worked together for a good period of time, and internal court rules. My contention is that decision making is substantially enhanced if these factors are “filtered” by collegiality. There are cross-fertilizing effects between collegiality and certain of these factors (such as internal court rules, leadership, and diversity), so that the factors both promote collegiality and enhance decision making when they are filtered by collegiality. In the end, collegiality mitigates judges’ ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits.

[Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1652–62 (2003).]

Question: Do you think that, because the Senate confirmation process is so politicized, state court judges and district court judges, looking towards trying to get a promotion to a higher court, may change the way they do their job?

Judge Edwards: I have no reason to believe that any of my judicial colleagues would tailor their decisions to garner political favor in future confirmation proceedings. That would be dishonest and totally at odds with our oath of office. It may happen at times, but I have never seen it.

The effect of public scrutiny in the confirmation process cannot be ignored, however. The ideologically driven image of courts resurfaces whenever judicial nominees' political views are scrutinized in the public eye. If an appointee joins the court feeling committed to the political party that ensured the appointment, the judge's instinct could be to vote in a block with other perceived conservatives or liberals. Even worse, a judge who has been put through an ideologically driven confirmation ordeal could take the bench feeling animosity toward the party that attempted to torpedo the appointment on ideological grounds. In short, by exaggerating the stakes in the trial and appellate nomination battles, interest groups on both sides may be encouraging the appointment of judges who will fulfill their worst fears. Focusing on the ideology of the nominee can be detrimental to collegiality if it promotes a self-fulfilling prophecy.

Even though most judges are able to resist the temptation to conform to the false perception created by a political confirmation process, the continued assessment of judicial performance in political terms could cause the public to believe that the judicial function is nothing more than a political enterprise. No matter how good the intentions of its servants, the judiciary will be sharply devalued and become incompetent to fulfill its role as mediator in a society with lofty but sometimes conflicting ambitions. This would be a horror to behold.

Dean Seligman: Judge Edwards, thank you so much.

Judge Edwards: Thank you, Dean. Once again, it has been an honor for me to visit with you, members of the faculty, esteemed

alumni and benefactors, and law students at Washington University School of Law. I have appreciated your kind hospitality during my visit.