

# THE ROLES OF LITIGATION

STEPHEN B. BURBANK\*

It has been my pleasure, over a number of years, to assist the Institute for Law and Economic Policy (ILEP) in planning and presenting conferences on topics of interest to the bar, the bench, and the academy. When Edward Labaton asked me to take the lead in organizing the conference out of which this issue of the *Law Quarterly* emerged, it seemed a good opportunity to recruit interesting people to pursue themes that are or should be of concern to those who conduct, preside over, or study litigation.

The 2002 ILEP conference, "Litigation in a Free Society," was divided into five program segments, each of which is represented by at least one Article here. Taken as a whole those program segments constitute one view of, or perspective on, the critical issues that confront litigation in the United States at the start of the millennium.

The first segment, "Litigation: Evidence or Emotion?," posed the question of the extent to which policy debates concerning litigation and the various statutory and other rules that attempt to shape the roles it plays should and can be disciplined or informed by facts. Unfortunately, a misunderstanding concerning the ground rules for publication and the relationship between lead papers, comments, and replies has deprived us of the interesting Article that was presented by Professors Kevin Clermont and Theodore Eisenberg. Fortunately, most of the underlying empirical work that the authors summarized and discussed is already in the public domain,<sup>1</sup> and their Article is available in another journal.<sup>2</sup> On question after question, from the proposition that restricting jury trials would reduce delay<sup>3</sup> to the notion that internationally foreign litigants fare badly in U.S. courts,<sup>4</sup> Clermont and Eisenberg have provided facts that call in question

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1. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. ECON. REV. 125 (2001); Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) [hereinafter *Xenophilia*].

2. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 1 (2002).

3. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Which is Speedier?*, 79 JUDICATURE 176 (1996).

4. See Clermont & Eisenberg, *Xenophilia*, *supra* note 1.

widely held views.

In this, of course, Clermont and Eisenberg are hardly unique. Empirical studies that debunk claims about various aspects of the U.S. litigation landscape have been available for decades, and the work of Marc Galanter in particular has long given them prominence in the legal literature.<sup>5</sup> Yet, Clermont's and Eisenberg's work is noteworthy for at least two reasons. First, they are law professors who came to empirical work without formal training in another social science discipline and after establishing their scholarly credentials in more traditional ways. Second, their work demonstrates possibilities to cast light on empirical questions by using existing databases. It thus offers reason to hope that more scholars whose primary allegiance is to law will be drawn to empirical inquiry, reassured that others have done it without expending years, or having to rely on external grants, to gather the data.

If the time and money required to do empirical work have contributed to the traditional reluctance of law professors to engage in it, so also has their lack of relevant professional training. Quantitative methods have become vastly more sophisticated since Underhill Moore studied parking in New Haven.<sup>6</sup> Whether, however, disillusionment with that part of the realists' project contributed to law faculties circling the wagons, the circle has long been broken. The resources for self-education in quantitative methods, as well as for collaborative work with those already privy to their secrets, exist in most good law schools today.

The reference to the "realists' project" may bring to mind another traditional barrier to the pursuit of empirical work by law professors: to wit, the lack of a perceived pay-off,<sup>7</sup> particularly for those early in their careers and hence concerned about promotion and tenure. Clermont and Eisenberg show that such work can be of interest to prominent journals, and they are by no means the only examples.

The perception of scholarly pay-offs, being part of the academic utility function,<sup>8</sup> lies in the eye of the beholder. For that reason and because of

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5. See, e.g., Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

6. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 30-35 (1986); John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980).

7. See KALMAN, *supra* note 6, at 34-35.

8. See RICHARD A. POSNER, *OVERCOMING LAW* 81-144 (1995); Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 11 (Stephen B. Burbank & Barry Friedman eds., 2002).

changes in the scholarship produced in law schools, one should perhaps mark a distinction between that which a scholar pursues because it is likely to advance his or her career and that which beckons because it is likely to contribute useful knowledge about the legal system.<sup>9</sup> For a scholar of the latter persuasion, skepticism about the impact of empirical work need not rest only on the failures of the realists.<sup>10</sup> Yet, at least in one lawmaking arena where the rules of the game are made—federal supervisory court rulemaking under the Rules Enabling Act—there has been a sea change in attitudes towards the use of empirical study to inform the enterprise, with the result that the question is no longer whether but when and how.<sup>11</sup>

It seems neither disrespectful of other disciplines nor overly protective of my own to suggest that securing the interest of more law professors in empirical work is important if data are to replace anecdotes in policy debates concerning, and as the predicates of, changes in the rules of the litigation game. That interest need not extend to the conduct of empirical research, whether with data created as part of the project or with those already existing. Certainly, law professors have the opportunity in their teaching to focus the attention of future policymakers, including future lawmakers, on the empirical perspective; the opportunity in their scholarship both to place their own findings and to translate findings by others (including those in other disciplines) in journals such individuals may be likely to read; and the opportunity in both to show the way to the responsible use of empirical data

Here, of course, the Article by Judge Edwards and Ms. Elliott, criticizing one aspect of Clermont's and Eisenberg's empirical work, sounds a cautionary note,<sup>12</sup> as did the comments at the conference of Professor Deborah Hensler, a distinguished social scientist and law professor who, as head of RAND's Institute for Civil Justice, has been

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9. Those who rebel at such a distinction may share Professor Geyh's view that public choice theory—here as applied to scholars rather than judges—is “tautological and explains nothing” if it permits including the desire to benefit others among that which an actor seeks to maximize. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1216 (1996).

10. See, e.g., Richard Lempert, “*Between Cup and Lip*”: *Social Science Influences on Law and Policy*, 10 LAW & POL’Y 167 (1988).

11. See, e.g., Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 242 (1997); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996); Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002).

12. See Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002).

involved in some of the most ambitious empirical studies of litigation ever undertaken.<sup>13</sup>

Judge Edwards is no stranger to debates about the use and limits of social science research in the study of legal institutions.<sup>14</sup> An accomplished scholar himself, he is also a distinguished judge who is properly concerned about the reputation of the judiciary. He understands that the standards which may currently lend prominence to a work of legal scholarship and enhance an author's career are not necessarily the standards called for when serious people have serious things to do.<sup>15</sup> He understands, therefore, that both that which is intended as playful or provocative and that which is offered as the most probable inference to be drawn from empirical data can do unwarranted harm. Thus, whether his questions involve research methodology for conducting a study or the inferences that are drawn from the results,<sup>16</sup> Judge Edwards reminds us that scholars have an infeasible obligation to attend to the potential consequences of their work and a corresponding obligation to take greater care the more serious those potential consequences are.

Readers of Judge Edwards' and Ms. Elliott's Article can make an independent evaluation of the force of their criticisms of the work of Professors Clermont and Eisenberg only after reading the articles upon which they are based.<sup>17</sup> It would be difficult to disagree with the notion that the data resulting from empirical inquiry alone often don't provide an adequate basis for normative judgment or policy prescription. In making such an independent evaluation, however, the reader should keep in mind that the criticisms in question here concern merely one aspect of work that, taken as a whole, ranges widely over numerous questions implicating public policy concerning litigation. And taken as a whole that work does demonstrate that (relatively) unvarnished facts at least have the potential to discipline rhetoric and hence, perhaps, to derail improvident lawmaking.

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13. See, e.g., JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

14. See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

15. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); see also Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

16. In her comments at the conference, Professor Hensler observed that there are "huge obstacles to drawing valid inferences about legal behavior," and that there is very little theory available to guide empirical research. In the latter regard, she concluded that perhaps the best "we can hope for are little theories."

17. I am informed that Professors Clermont and Eisenberg have prepared a response for publication in a forthcoming issue of the *Law Quarterly*.

The second segment of the 2002 ILEP conference program, “Contingent Fee Litigation,” sought a more focused examination of the same questions posed in the first, one that drew on experience in other countries as well as experience in this country. We were fortunate to persuade Professor Herbert Kritzer, a political scientist at the University of Wisconsin, to present the main Article.<sup>18</sup> Professor Hazel Genn of University College London, who has done pioneering empirical research on civil justice processes and access to justice in England, and Robert Heim of the Dechert firm, a nationally acclaimed class action litigator and important contributor to federal civil rulemaking, served as commentators.

Professor Kritzer’s Article draws on his extensive work on the contingency fee, work that, together with empirical studies of other aspects of litigation, has marked him as one of the most influential (as well as wide-ranging) social scientists in the country on litigation-related questions. In it he debunks “seven dogged myths” concerning the contingency fee, from the notion that contingency fees are a uniquely American phenomenon to the notion that most contingency fee lawyers accept most of the cases presented to them by people seeking their services. The latter myth, of course, is but a variation of another, elsewhere put to rest by Professor Kritzer but one that, like the Phoenix, is remarkably resilient. That is the myth that the contingency fee is to blame for much of the supposedly frivolous litigation with which our courts are supposedly burdened. Of course, this myth is all the more surprising in the age of Law and Economics, since one would assume that, as rational actors, contingency fee lawyers pick and choose their cases, mindful that the dollars spent on losers are their own. Professor Kritzer’s work has provided evidence that this assumption is correct and thus that those who regard frivolous litigation as a serious problem should look elsewhere for a whipping boy.<sup>19</sup>

Two of Professor Kritzer’s most interesting findings, each contrary to widespread beliefs, are that (1) most contingency fee lawyers are much more likely to rely on referrals from other lawyers and current and former clients than they are on print or direct mail advertising and (2) the interests of contingency fee lawyers and their clients do *not* routinely diverge. These findings are perhaps most interesting because they are related. The

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18. Herbert Kritzer, *The Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739 (2002).

19. See Herbert Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997); see also Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 212-15 (2001).

former finding makes it harder to single out the contingency fee as causal of changes in the profession one often hears associated with (usually in terms of decline) release from restraints on advertising and direct mail solicitation.<sup>20</sup> Of course, some of those harboring such views probably regard contingency fee practice with disdain in any event, in much the same way as has been customary in Britain, where it used to be called “litigation on spec.”<sup>21</sup> The latter finding makes it harder to believe that contingency fee lawyers are peculiarly afflicted or disabled by conflicts of interest. Purveyors of that view have always had to contend with knowledge that hourly billing carries its own conflicts baggage.<sup>22</sup> Kritzer’s work adds the element of concern about reputation to the mix, an element that his finding about the importance of referrals renders wholly unsurprising.

Just as hand-wringing about the decline of the legal profession, whether traced to the advent of advertising or some other cause, may be no more than a pious mask for disappointment at the loss of income resulting from increased competition (or for something worse),<sup>23</sup> so may demonstrations of disdain for the contingency fee. From that perspective (nay, probably from any perspective), it seems remarkable that within approximately a decade the British went from a position of virtual prohibition of “litigation on spec” to virtually universal tolerance of its somewhat more discreet cousin, the conditional fee. Indeed, as indicated in

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20. See *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988); *Bates v. Arizona*, 433 U.S. 350 (1977). Compare *Florida Bar v. Went-For-It*, 515 U.S. 618 (1995) (approving ban on direct mail solicitation of accident victims and their relatives for thirty days).

If civil justice in the United States is in ferment, it is no greater than the ferment besetting the legal profession. Indeed, the two phenomena may be related. There is reason to question whether there is any longer a “legal profession,” if by that term one means a group of trained individuals pursuing a set of common goals and united, even if loosely, by shared values. To be sure, in comparative context American lawyers have long been relatively entrepreneurial. With the advent of lawyer advertising, price competition, and other pressures towards what the advertising world calls “product differentiation,” entrepreneurship may be American lawyers’ most salient shared characteristic. And it is the hallmark of an entrepreneur to try to obtain a competitive advantage.

Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 691 (1997) (footnotes omitted).

21. See *id.*

22. See Kritzer, *supra* note 18, at 773 n.91.

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The social revolution of the 1960s, the quest for diversity on the bench it initiated, and the changes in the legal profession brought about both by that revolution and by the revolution of competition all may have contributed to the dissolution of the ties that bound bench and bar, which ties included shared professional values and a shared sense of abusive conduct.

Burbank, *supra* note 11, at 225 (footnote omitted).

Professor Kritzer's paper,<sup>24</sup> and as emerged even more clearly in the oral comments of Professor Genn, "tolerance" does not do justice to this *volte-face*. For, the initial acceptance and spread of the conditional fee in England resulted from increasing pressure on the legal aid budget and the eventual recognition that it could no longer support civil litigation by the middle class. We see in that relationship dramatic evidence, were it needed, of the importance of the conditional/contingent fee to access to court. Because the United States has never provided legal aid for civil cases that is worthy of the name, and because private litigation here has long served roles that in other countries are addressed through social insurance, administrative law, and the like, disdain for the contingency fee could always properly have been regarded as support for the status quo, or, less charitably, for unequal access to court.<sup>25</sup>

Finally, careful readers of Professor Kritzer's Article will note respects in which his findings vary depending on the type of contingency fee practice.<sup>26</sup> It thus reminds us of the potential dangers of drawing a map of litigation on the basis of only one part, usually the most prominent, of the landscape. In that regard, most of the complaints I hear about the contingency fee relate to a few litigations—*asbestos* and *tobacco*—that are hardly typical of the run either of tort (including mass tort) litigation or of contingency fee practice.<sup>27</sup> The misguided approach to procedural reform that treats all litigation as if it were complex litigation can at least be explained, if not justified, by the quest for uniform and transsubstantive regulation that has preoccupied modern American procedural policy.<sup>28</sup> No such justification is available when those who seek to "reform" the contingency fee, or any other aspect of litigation finance, seek to define problems by reference to the extraordinary instead of the ordinary.<sup>29</sup>

The third program segment of the 2002 ILEP conference, "The Holocaust and other Human Rights Litigation," considered the prospects for the use of litigation to enforce fundamental human rights, a possible way also to begin to understand the limits of litigation in the emerging

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24. See Kritzer, *supra* note 18, at 746-47.

25. See Burbank & Silberman, *supra* note 20, at 691-95; Yeazell, *supra* note 19, at 191 n.31, 211.

26. See Kritzer, *supra* note 18, at 752-53, 756-57, 769-72.

27. See Yeazell, *supra* note 19, at 207-11.

28. See Stephen B. Burbank, *The Costs of Complexity* (book review), 85 MICH. L. REV. 1463, 1465 (1987) [hereinafter *Costs of Complexity*]; Burbank, *supra* note 11, at 225-26; Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) [hereinafter *Procedure and Power*].

29. See Yeazell, *supra* note 19, at 216-17.

world order. A medical emergency prevented Professor Burt Neuborne from attending the conference, but his Article was ably summarized and supplemented by Melvyn Weiss, an extraordinary lawyer by any measure. Two sets of comments, the first by Professor Harold Koh, a prolific scholar, human rights lawyer, and official advocate, and the second by Samuel Baumgartner, put the issues raised in Professor Neuborne's Article in larger theoretical and comparative contexts. We present here Professor Neuborne's Article<sup>30</sup> and Mr. Baumgartner's commentary.<sup>31</sup>

Professor Neuborne is a distinguished scholar of constitutional and civil rights law who, over many years, has bridged the gap between the academy and the profession by practicing what he preaches. His Article is a very interesting chronicle of some of the holocaust-era litigation by a major player in that litigation. Without pretending to objectivity,<sup>32</sup> Professor Neuborne nonetheless poses a variety of hard questions about the litigation in which he was so centrally involved and for the success of which he undoubtedly deserves great credit.<sup>33</sup>

Mr. Baumgartner is a Swiss academic and public servant who has a rare appreciation of both the civil law and common law systems and a rare ability to conjoin deep knowledge of doctrine with theoretical and other perspectives that help to ensure that it remains our servant rather than our master. His commentary suggests that Professor Neuborne's account poses even harder questions for the future of human rights enforcement, including enforcement through litigation.

Passing the rather different views of certain foreign legal systems taken in these two contributions,<sup>34</sup> perhaps the most troubling suggestion in Mr. Baumgartner's commentary is that the "success" of Professor Neuborne and his colleagues may have been purchased at considerable cost, not just to the cause of human rights enforcement, but to American interests in other realms entirely. In that regard, some of the foreign attitudes that he reports as having been generated by the holocaust litigation sound familiar at a time when the American President's efforts to win support for action

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30. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002).

31. Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: the Holocaust-Era Cases*, 80 WASH. U. L.Q. 835 (2002).

32. See Neuborne, *supra* note 30, at 797-98.

33. See, e.g., *id.* at 827-35. For a collection and discussion of the many difficult legal questions in this litigation that were never resolved, see Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503 (2002). See also *id.* at 504 ("The published material is largely narrative and over-enthusiastic while the massive scholarship of lawyers and experts on both sides lies buried in court files.") (footnotes omitted).

34. Compare Neuborne, *supra* note 30, at 831-32, with Baumgartner, *supra* note 31, at 847-49.



in Iraq dominate the news media.

More generally, Mr. Baumgartner suggests that the litigation Professor Neuborne chronicles might have come out differently if conducted in other countries, not because their legal systems are “stacked in favor of defendants,” “hostile to the claims set forth in the Holocaust cases,” or “fortress[es] for the powerful,”<sup>35</sup> but because other countries have very different views about the roles that civil litigation (and judges) properly can play in social ordering.<sup>36</sup> As is true generally of comparative law, this perspective may be most valuable for whatever light it casts on our own arrangements.

If, as the Supreme Court has instructed us, it is a mistake to insist that ordinary disputes involving Americans be resolved in our courts, according to our law,<sup>37</sup> we should at least consider whether the same is true of extraordinary disputes. That is not only, and not primarily, because, as we have seen, people may not distinguish between them. It is one thing to insist that foreign corporations with appropriate affiliations to this country be subject to suit here, or that they “agree to live by the legal rules that allowed the social and economic system to flourish,”<sup>38</sup> and quite another that the disputes involving them should be resolved by a “legal process” that, at the end of the day, has very little to do with law, whatever democratic legal system one chooses for perspective on that question.

Views such as these are not likely to win friends, although I hope that they can influence people even when the litigation that prompts them involved perhaps the most sympathetic victims of perhaps the most vicious evil ever perpetrated. They are similar to the view I have elsewhere expressed of the critical importance of fidelity to law (including recognized means of changing it) by American judges in domestic disputes, even those most heart-wrenching.<sup>39</sup> There are limits to the

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35. Neuborne, *supra* note 30, at 832.

36. See Baumgartner, *supra* note 31, at 851-52; see also *id.* at 840.

37. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639-40 n.21 (1985); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). The Court has hardly been faithful to that instruction, however. See, e.g., Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 *LAW & CONTEMP. PROBS.* 103 (Summer 1994).

38. Neuborne, *supra* note 30, at 831.

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[F]idelity to the rule of law in a democracy requires that, in the end, the judiciary abide irrationality and irresponsibility in the political branches, unless it is manifested in behavior that the Constitution, fairly interpreted, reprehends. “Abide” does not mean accept without question, or for that matter, without insistence that legislative foolishness be clear for all to see.

Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 *COLUM. L. REV.* 1971, 2009 (1997).

malleability of “law,” including constitutional law. We do our courts (and ourselves) no favor by committing to them social problems for which existing rules provide no solutions and inviting them to transgress those limits. For people who believe that law, including international law, is nothing more than politics, the question may not be the same, but the answer should be, at least unless they can guarantee that the judges of the future will share their politics.<sup>40</sup>

The last two program segments of the 2002 ILEP conference explored, from different perspectives, questions about the control of litigation and the best means to reorient it, if reorientation is found to be in order. The fourth segment, “Securities Class Actions,” took up again a subject that has been a staple of ILEP programs and to which participants in those programs have made notable contributions, while the fifth and final segment, “Rulemaking and Reform,” investigated the limits of the federal court rulemaking enterprise in bringing about change.

The organizers had two goals in planning the segment on securities class actions, both of which are admirably met in the Articles published here. The first was to cast the light of empirical investigation on questions of importance to the policy decisions made by the Congress when it passed the Private Securities Litigation Reform Act of 1995 (PSLRA).<sup>41</sup> The second was to contribute to the then-robust debate concerning the use of auctions to select class counsel in securities cases. Apart from the authors of the main articles that I describe below, we were blessed with superb commentators, from an innovative theorist in the field, Professor Adam Pritchard, to an experienced, highly intelligent, and refreshingly candid federal judge, Shira Scheindlin.

For one inclined to skepticism about the public payoffs of empirical work, the PSLRA provides no reason for a change of mind. Yet, however shaky the empirical foundation of that legislation,<sup>42</sup> it would be a mistake to quit the house for that reason alone. Experience in the lawmaking enterprise that was the focus of attention in the fifth segment, federal supervisory court rulemaking, demonstrates that it is possible to shore up a shaky empirical foundation, whether to confirm the integrity of the original structure or to renovate it.<sup>43</sup>

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40. See Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOKLYN L. REV. 31 (1988).

41. Pub. L. 104-67, 109 Stat. 737 (1995).

42. See, e.g., Stephen B. Burbank, *The Class Action in American Securities Regulation*, ZZPInt 4, at 321, 330 (1999); Burbank, *supra* note 11, at 246.

43. See Burbank, *Procedure and Power*, *supra* note 28, at 516 (1993 amendments to Rule 11); see also *infra* note 72.

I have previously expressed the view that “theory is an irresponsible basis for lawmaking about something as important as access to court.”<sup>44</sup> By that I meant theory untested by experience, preferably experience reflected in reliable empirical data. According to that criterion, the PSLRA was an irresponsible statute, since a number of its provisions could predictably and consequentially affect access to court, and Congress lacked reliable empirical data to support the changes in the arrangements for securities class actions that those provisions effected.<sup>45</sup> From this perspective, the fact that Congress seriously considered making other, more radical changes provides no solace—indeed, it may be cause for greater concern—because the members’ attention was specifically drawn to the question of access by the SEC’s pleas not to disable the primary vehicle of statutory enforcement.<sup>46</sup>

One of the PSLRA’s most prominent innovations, albeit not a change that had the most obvious implications for the question of access, reposes in its provisions regarding the selection of a lead plaintiff, its rebuttable presumption in that regard in favor of the plaintiff with the largest financial interest in the relief sought (usually institutional investors), and its conferral on the lead plaintiff of the right, subject to court approval, to choose counsel for the class.<sup>47</sup> It is generally accepted that this innovation was adopted from ideas expressed in the legal literature. Those ideas reflected in turn both the insights of law and economics concerning the behavior of principals and agents and data that seemed to support the notion that it might be possible to harness the power of large investors to

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44. Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1947 (1989); *see also id.* at 1962 (discussing the “unfairness of pursuing sanction theories in the absence of facts, particularly theories that are in tension if not direct conflict with basic premises of our legal system and with the articulated premises of Rule 11”).

45. *See* Burbank & Silberman, *supra* note 20, at 694, 703.

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[T]he 1995 legislation was one of the few elements of legislative legal reform successfully enacted by a Republican Congress that had a far more ambitious agenda; it was enacted over the President’s veto, and its final form was considerably less hostile to private securities litigation than the initial bills on which it was based. An important reason for this amelioration, I take it, was the strong and consistent voice of the [SEC], which repeatedly reminded Congress of the critical role that private litigation plays in the enforcement of the securities laws and of the Commission’s inability to perform equivalently under any realistically conceivable funding scenario.

Burbank, *supra* note 42, at 330 (footnote omitted). Describing his ongoing research, Professor Cox stated that of a sample of 265 securities class actions issuing in a settlement, only nine involved situations that resulted in any SEC enforcement action. Telephone interview with Professor James D. Cox, Duke Law School (Oct. 4, 2002).

47. *See* 15 U.S.C. § 78u-4(a) (2002).

solve the problem of agency costs in securities class actions.<sup>48</sup>

Professors James Cox, a major academic figure in the corporate law area, has been a mainstay of ILEP's efforts to increase knowledge about securities litigation over many years. Here he and Professor Randall Thomas have contributed an interesting Article that seeks to shed light on some of the theoretical and empirical assumptions underlying the lead plaintiff provisions of the PSLRA.<sup>49</sup> Thus, their review of cases decided under that statute leads them to conclude that "the lead plaintiff provision has not eliminated the strong interest of class counsel in the initiation of securities class actions, so that they remain lawyer-driven notwithstanding the PSLRA."<sup>50</sup> They also report and begin to ask questions raised by data suggesting that institutional investors may not seek lead counsel status in a substantial number of cases and may even be dispreferred in some. But the burden of their paper is to explore with data rather than anecdotes the reported phenomenon of institutional investors failing to submit claims in securities class actions that have been settled and to do so, moreover, within the framework of the duties owed by such institutions to their investors.

Professors Cox's and Thomas's data, the imperfections of which they candidly acknowledge,<sup>51</sup> lead them to the tentative conclusion that institutional investors are not in many instances filing claims to money to which they are entitled and which it may be their legal duty to collect. Rather, however, than advocating any one explanation for that phenomenon, they are admirably content to note explanations that have previously been suggested, as well as to add their own speculations in that regard, all as part of an agenda for more research.

It is quite obvious that, in commenting on the Cox and Thomas Article, Professor Adam Pritchard has his own agenda, which is to reorient the goal of securities class actions from compensation to deterrence, if not to replace them all together with alternative methods of policing securities fraud.<sup>52</sup> Critical to the argument he constructs is the inference he draws from the main paper that "the compensation provided by securities class actions to defrauded investors has a negligible effect on investment

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48. See Elliott J. Weiss & John Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995).

49. See James D. Cox & Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?*, 80 WASH. U. L.Q. 855 (2002).

50. *Id.* at 858-59.

51. See, e.g., *id.* at 872-73.

52. See Adam C. Pritchard, *Who Cares?*, 80 WASH. U. L.Q. 883 (2002).

returns”<sup>53</sup> and the support he finds in it for the proposition that “[o]ne of the principal arguments of defenders of securities fraud class actions—that they provide important compensation to defrauded investors—is impossible to square with the available evidence.”<sup>54</sup>

Perhaps I am out of my depth—I am certainly out of my field—but I would have thought that, although the Cox and Thomas Article provides reason to doubt whether institutional investors are satisfying, or are likely to satisfy, Congress’s expectations in passing the PSLRA, it is not the gift that Professor Pritchard would like it to be. Put another way, I do not find in the Cox and Thomas Article that which would be necessary to turn Pritchard’s theory into a responsible basis for lawmaking.

Just because Congress turned to large investors to help solve perceived problems in securities class actions does not mean that such lawsuits are made possible exclusively or primarily for their benefit. The latter proposition certainly does not square with my recollection of the historical background of the 1933 and 1934 Acts. Perhaps it is true that “investors seeking to protect themselves from fraud do so through diversification, not lawsuits.”<sup>55</sup> Others of less sophistication or with fewer resources may rely, as we have encouraged them to rely, on the integrity of our securities markets.<sup>56</sup> Particularly at a time when greater resort to those markets by average Americans is touted as the solution to a variety of social problems, it would seem passing strange to tell them that compensation for fraud is not available.

The fourth segment of the 2002 ILEP conference also included a discussion of the use of court-sponsored auctions to select class counsel. The discussion was stimulated by Professor Lucian Bebchuk’s Article that is published here.<sup>57</sup> Professor Bebchuk is an imaginative and prolific scholar who brings the teachings of law and economics to bear on a wide range of corporate law and related issues. Since his Article was presented, there have been a number of important developments affecting the debate about auctions, chiefly the issuance of the final report of an influential Third Circuit Task Force.<sup>58</sup> The Article and those developments provide

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53. *Id.* at 884.

54. *Id.* (citation omitted).

55. *Id.*

56. *See, e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

57. Lucian A. Bebchuk, *The Questionable Case for Auctioning Counsel Positions in Securities Class Actions*, 80 WASH. U. L.Q. 889 (2002). Because Professor Bebchuk could not attend the ILEP conference, Professor Theodore Eisenberg presented his paper.

58. *See* THIRD CIRCUIT TASK FORCE ON SELECTION OF CLASS COUNSEL, FINAL REPORT (Jan. 2002), available at <http://www.ca3.uscourts.gov/classcounsel/final%20report%20of%20third%20>

reason to doubt that auctions should or will play an important role in the class actions of the future or that they have virtually any role to play in securities class actions under the PSLRA. Even if that is true, however, the phenomenon remains of interest because it illustrates more general features of today's litigation landscape in the federal courts.

In 1996 I expressed the view that the most important developments in civil justice over the preceding two decades had concerned power and argued that we had seen two related shifts in power within the landscape of federal civil procedure in that period. First, there was a shift in the locus of lawmaking power, as Congress insisted that it had a proper role to play in devising the rules of the game. Second, there was a shift in the locus of power at the trial (or pretrial) level, as trial judges insisted on playing a more active role in the game; that is, in the conduct of civil cases.<sup>59</sup> The experience with auctions can be seen as an illustration of the phenomena I described in 1996, as well as of the value of the general perspective.

Granting that federal courts have a special, although not unique, responsibility to protect the interests of clients who are members of a class, should one not draw a distinction between (1) court action designed either to regulate the existing market for legal services when it proves inadequate to serve the interests of the class as a whole or to referee existing competition between or among counsel and (2) an attempt by a court to create a new market according to the court's sense of the relevant criteria and declare a winner of the competition that it has elicited? From this perspective auctions are the cousins of managerial judging and of sanctions, another step in the move to empower federal judges at the expense of lawyers and their clients.<sup>60</sup>

Some of these steps in the power struggle between the federal courts and lawyers over the conduct of litigation landed the judiciary in hot water in Congress, spurred on by lawyers whose oxen had been gored, which is why I regard the two shifts in power as related.<sup>61</sup> Moreover, in my 1996 article I described the PSLRA as a fire alarm for those who still wish to contend for a monopoly of power in the federal judiciary to fashion the

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circuit%20task%20force.pdf (last visited Oct. 9, 2002). In re *Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001), cert. denied sub nom. Mark v. Cal. Pub. Empl. Ret. Sys., 122 S. Ct. 1300 (2002), in which the Third Circuit disapproved auctions for almost all cases subject to the PSLRA, was decided before the Task Force's report. For a subsequent decision of the Ninth Circuit taking a similar approach to the PSLRA, see In re *David Cavanaugh et al.*, 2002 WL 31051543; *id.* at n.19.

59. See Burbank, *supra* note 11, at 224-26.

60. See Burbank, *Costs of Complexity*, *supra* note 28, at 1478; see also Stephen B. Burbank, *Foreword: Causes and Limits of Pessimism*, 148 U. PA. L. REV. 1851, 1856 (2000).

61. See Burbank, *Procedure and Power*, *supra* note 28, at 514-16.

rules of the game.<sup>62</sup> Some of the decisions in which federal judges have ordered auctions in PSLRA cases indicate (were that required!) that the judiciary does not yield power without a fight.<sup>63</sup> If past is prologue, acceptance of the Task Force's recommendations would diminish the risk of congressional action on auctions, as would acceptance of the Third Circuit's interpretation of the PSLRA in the *Cendant* case.<sup>64</sup>

The fifth and last program segment of the 2002 ILEP conference examined the extent to which litigation reform can and should be effected by new or amended court rules given that institution's history and the demands of contemporary American politics. We were fortunate to have an immensely talented group of panelists to guide the discussion.

For two decades, Professor Richard Marcus has studied and written about federal practice and procedure with a sense of timing as to what is really important and a nuanced appreciation of the interplay of doctrine and litigation behavior that are unequalled among scholars of procedure. Fortunately, the federal judiciary has come to recognize his talents, with the result that he is now a central figure in the real world of rulemaking.<sup>65</sup> His Article is presented here.<sup>66</sup>

The commentators were no less distinguished. Suffice it to say of Judge Patrick Higginbotham that, as Chair of the Civil Rules Advisory Committee in the early 1990s, he sought to rescue the enterprise from the twin evils of ignorance and arrogance, proving again that politics need not be a dirty word (and that the federal judiciary desperately needs more effective politicians).<sup>67</sup> Allen Black is quite simply one of the best and most thoughtful lawyers in the country, a highly successful litigator and important contributor to numerous law reform efforts. After Judge Shira Scheindlin agreed to serve on the securities class actions panel, we realized that we had in her, a member of the Civil Rules Advisory

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62. *See id.* at 516.

63. *See, e.g., In re Bank One Shareholders Class Actions*, 96 F. Supp.2d 780 (N.D. Ill. 2000).

64. *In re Cendant Corp. Litig.*, *supra* note 58.

65. Professor Marcus has served since 1996 "as Special Reporter to the Advisory Committee on Civil Rules and worked on its review of discovery and class action rules." Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 903 n.13 (2002).

66. Marcus, *supra* note 65.

67. *See* Stephen B. Burbank, *Making Progress the Old-Fashioned Way*, 149 U. PA. L. REV. 1231, 1234-35 (2001) (defining politics as "the art of seeking to improve the human condition through intelligence, patience, persuasion, and compromise"). Charles Clark, the original and long-serving Reporter for Civil Rules, was thus no politician. *See* Charles C. Clark, *The Federal Rules of Civil Procedure, 1938-58, Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 448 (1958) ("reformers must follow their dream and leave compromise to others"), *quoted in* Marcus, *supra* note 65, at 903. This does not appear to be a judgment dependent upon an idiosyncratic definition. *See, e.g.,* KALMAN, *supra* note 6, at 115-20; Schlegel, *supra* note 6, at 312.

Committee, a double threat, and we thus prevailed on her also to serve on the panel for this segment, to which she made important contributions.

Professor Marcus's Article is typical of his work: informed and judicious—one might even say old-fashioned.<sup>68</sup> But it is also decidedly *not* old-fashioned in seeking to understand the rulemaking experience by reference to larger contexts, including one drawn from interdisciplinary scholarship.<sup>69</sup>

Although it may have taken the organized federal judiciary too long to grasp the risks run in seeking to attempt broad-scale reform of litigation through rulemaking, as Professor Marcus's paper makes clear, that message has been received, as also has the message that reason and the rulemakers' collective experience are no longer an acceptable basis for change.<sup>70</sup> He is quite correct to question the circumstances in which, and the form in which, systematically collected empirical data should be required before rulemaking can properly proceed. But, again, those are the when and how questions rather than whether, which seems to me evidence of progress.<sup>71</sup> At the Conference Mr. Black contended that the rulemakers had not been sufficiently careful in selecting the objects of their reform efforts, taking their cue too often from the anecdotal complaints of small segments of the bar. Together with Marcus's perception that there is a risk of precommitment once a proposal for change is published for comment, it may suggest that more attention needs to be given to bringing data to bear on the question whether a problem worthy of the rulemakers' attention exists.<sup>72</sup>

Were I to hazard any criticism of Professor Marcus's Article, it would be that he remains, for my taste, a bit too old-fashioned in the apparent nostalgia he feels for the simpler days when the experts controlled the process, Congress was essentially indifferent to it, and everyone had to live with the results. Put another way, he seems resigned to accept that

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68. This is a compliment. See Burbank, *supra* note 67.

69. See Marcus, *supra* note 65, at 908-34; see also ROBERT KAGAN, *ADVERSARIAL LEGALISM* (2001). This is also a compliment. See Stephen B. Burbank, *Procedure, Politics and Power*, J. LEGAL EDUC. (forthcoming 2003).

70. See Burbank, *supra* note 60.

71. See *supra* text accompanying note 11.

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The Advisory Committee [responsible for proposing the 1983 amendments to Rule 11] knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the costs and benefits of sanctions as a case management device.

Burbank, *supra* note 44, at 1927.



“many features of contemporary rulemaking resemble the aspects of American government that Professor Kagan describes.”<sup>73</sup>

Two of the commentators might have been thought to make a similar point, albeit for different reasons and from different perspectives. Thus, Judge Higginbotham observed that the “giants” of whom Professor Marcus speaks could not foresee the external forces that would interact with their product, and more generally that the fate of the rules is controlled by forces outside the rulemaking process. In sum, he contended, reforming the rules of procedure is not the same thing as using rules to reform litigation.<sup>74</sup> Judge Scheindlin, in turn, reminded us that the composition of the rulemaking bodies is determined from the top down, that with those selections comes the power to determine the agenda, and that interest groups know how an organized effort can also help to determine the agenda. From either Judge Higginbotham’s or Judge Scheindlin’s perspective, the messy and decentralized system Professor Kagan describes may appear in a different light, and resignation may seem an inappropriately tepid reaction.

But this *is* probably nothing more than a matter of taste. Professor Marcus’s Article is a thoughtful and comprehensive analysis of the state of contemporary federal supervisory court rulemaking, of interest to practitioners, judges, and scholars. It is, in sum, just what the organizers of the 2002 ILEP conference had hoped it would be.

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With all the attention in the media and in our legislatures, state and federal, to the supposed costs of civil litigation, it is important periodically to remind ourselves of its potential benefits.<sup>75</sup> Moreover, as the Articles presented here suggest, whether the question is costs or benefits, the responsible course is to seek data in preference to anecdotes and to recognize that data require sober interpretation (for which additional research may be required). These Articles also suggest that an appreciation

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73. Marcus, *supra* note 65, at 942.

74. *See id.* at 902 n.10; *see also* Burbank, *supra* note 60, at 1856 (“[A]ny attempt to reduce the expense of litigation can be defeated by the entrepreneurial ingenuity of the bar until such time as reformers directly alter the mechanisms by which the bar is compensated. In this country, of course, that would require legislation.”) (footnotes omitted). Judge Higginbotham also lamented the apparent view of contemporary rulemakers that a trial is a failure, which yields efforts akin to “sweeping the floor while the roof is on fire.”

75. *See* Stephen B. Burbank, *The Good, the Bad, and the Ugly* (book review), 79 JUDICATURE 318 (1996).

of either the costs or benefits of litigation, as of the roles that it plays and should play, may be facilitated by, and in an increasingly interdependent world sometimes requires, a comparative perspective.

Whether or not a desired change in litigation behavior finds support in documented experience, these Articles tell us that there are limits to the power of the judiciary to be the source of authority and, indeed, of the power of formal rules, whatever their source, to actually bring it about.<sup>76</sup> Thank goodness, because the forces of personal and institutional self-interest are so strong in this country that one who calls for attention to facts in at least some forms of lawmaking may indeed be baying at the moon,<sup>77</sup> while power is distributed so unequally that the messy, decentralized system in which we live may be our best protection against improvident change.

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76. Cf. J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUDIES 721, 746 (1994) (“Judicial independence is not primarily a matter of constitutional text.”).

77. “[M]embers of the political branches have different utility functions than do federal judges, and the rules of the game they play, including their norms of accountability, do not put a high premium on rationality.” Burbank, *supra* note 39, at 2008 (footnote omitted).