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ADDRESS

THE FOURTH ANNUAL FRANKEL LECTURE

WHO GIVES A HOOT ABOUT LEGAL SCHOLARSHIP?

Judge Alex Kozinski[*]

Good morning, ladies and gentlemen. I am pleased to be here at the University of Houston Law Center to deliver the Fourth Annual Frankel Lecture. I have been asked to speak on the relevance of legal scholarship to the judiciary. I note that whoever came up with the topic did not add the qualifier "if any," which shows a commendable degree of confidence. Then again, it may only be confidence in my ability to spin a yarn. Actually, I'm a big fan of legal scholarship, and I hope I can contribute some useful insights.

In thinking about the topic, I decided that it could be broken down into two parts. First, is legal scholarship relevant to the judiciary? Second, are there things that could be done to enhance the relevance of legal scholarship to the judiciary?

I don't want you sitting on the edge of your seat for the duration of the Lecture, so I won't keep you in suspense. The answer to both of these questions, in my view at least, is yes: Legal scholarship does matter, but it could matter more. Before I explain my conclusions, it's perhaps worth asking a preliminary question: Does—or should—anyone care about the relationship between judges and academics? Or should we take the attitude

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that judges and academics operate in different realms, and if they have something to say to each other, that's fine, but if they don't, that's just as well?

My own answer is that judges do care, and academics should care as well. That judges care can be inferred from the fact that judges rely on academic pieces in their work: Law review articles and legal treatises are cited in opinions on a regular basis. And it's not just any opinions, either; the opinions most likely to rely on the works of academics are those written in the gray areas of the law where precedent doesn't provide a clear-cut answer. In other words, the work product of academics often finds its way into the most difficult cases, suggesting that the authors of those opinions believe that the views of academics matter.

But do academics care? And should they? A lot of academics do care. I know this from the scores of law review article reprints, treatises and other writings I receive every year—each with a little note attached that goes something like this: "Dear Judge Kozinski. I enclose what may look like a brick, but is in fact a reprint of my 645-page article entitled 'Tweedle-dee v. Tweedle-dum: *The Law of Twins and the Twin of Laws*.' I hope you will find this of intense personal and professional interest and hope you will send me your reaction to the article once you've had occasion to read it. Sincerely, etc." Then, there is the inevitable P.S.: "No doubt you will note that one of your opinions plays a significant role in the development of footnote 845. If you write another case like that one, I hope you will not hesitate to cite me."

Well, the last part I made up—few academics are so bold to come right out and request a citation—but it's implicit. I try to oblige—especially if the article does, in fact, shed some light on a topic I'm pondering. In fact, it's not just the academics who do it. Years ago I gave standing orders to my clerks that, whenever possible, they should cite academic materials in my opinions, because that way the opinions would surely be read by the authors who would then cite me back.

There was a particularly apt example of this a few years ago. As some of you may be aware, one area of my jurisdiction as a federal judge is COGSA. No, it's not what you think. COGSA is the Carriage of Goods by Sea Act,[1] which governs bills of lading for maritime cargo—a very important, although somewhat dry, subject. The Ninth Circuit, being a sea-faring kind of circuit, gets tough COGSA cases once in a while, and I got one a few years

1. 46 U.S.C. §§ 1300-1315 (1994).

back. Now I don't know about you, but whenever I have a tough COGSA problem I turn to the writings of my friend Michael Sturley who, so far as I'm concerned, is Mr. COGSA.[2] Sure enough, Michael had a two-part article right on point.[3] So I wrote an opinion and, of course, threw Michael a bouquet by citing his article.[4] Then I sent Michael the slip opinion with a note saying, "You will find that your article played an important part in the development of the opinion, and I hope you like the product well enough to cite it next time you write on this subject, which I know you do about every two weeks." Well, I left out the last part, but Michael is no fool—he knew what I meant—and he sat right down and wrote another article, this time using my case as the centerpiece and explaining how I had resolved this difficult legal issue (and it *was* a difficult issue) just right.[5] Since then, I've been waiting for another COGSA case raising this issue so that I could cite Michael's more recent article.

So clearly some professors care about whether the stuff they write has an influence on judicial thinking. As best I can tell, though, some academics have almost a disdain for judicial interest in their work—or for whether and how their work will influence the outcome of cases. Now I can't be sure of this, but by just reading some of the stuff—or trying to—one gets the idea that effect on real world events is not a big interest of some authors. There's nothing wrong with this, in my view. Not everything written by academics needs to be directed to the judicial mind. One might write for practitioners or legislators, or simply to induce a generalized shift in the thinking of the legal community on a particular subject. The idea might be that once there is a shift in the thinking of the legal community, judges will be swept along. One way or the other, however, if ideas developed by legal academics are going to be more than just empty rhetoric—if they are going to affect the law, rather than merely

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2. *See, e.g.*, Michael F. Sturley, *An Overview of the Considerations Involved in Handling the Cargo Case*, 21 TUL. MAR. L.J. 263 (1997) (focusing on the doctrines that have developed under COGSA); Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT'L L. 609 (1996).

3. *See* Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act (Part I)*, 19 J. MAR. L. & COM. 1, 13-17 (1988); Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act (Part II)*, 19 J. MAR. L. & COM. 157, 158 (1988).

4. *See* Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 899-900 nn.3, 5 (9th Cir. 1989).

5. *See* Michael F. Sturley, *The Future of the COGSA Fair Opportunity Requirement: Is There Life After* Carman Tool *and* Chan?, 20 J. MAR. L. & COM. 559 (1989).

talk about it—these ideas will eventually have to be accepted by the judiciary. For better or worse, it's in the courtroom and in legal opinions where the rubber meets the road—no, it's still not what you think; it's the old Firestone jingle that many of you here probably don't even remember.

So starting with the premises that judges want to be affected by academics, and that academics want (or should want) to affect judges, the first question is: How well is the system working? Perhaps the best way to go about answering this question is to consider the various ways in which legal academics can influence judges. The first way is through casebooks. Do judges read casebooks? No, but their future law clerks do. And future lawyers—the ones who will soon be presenting cases in court—do. Some of the people who are reading casebooks today will be working on my opinions just six months from now; others will be presenting cases in a few years. Sure, teachers in the classroom make a big difference, but ultimately what lawyers take away from their law school experience is what is in the casebooks. Casebooks provide a common language that transcends particular law schools or generations of lawyers—I can usually get a knowing nod from my law clerks when I speak about the ships *Peerless*[6]—and casebooks also provide young lawyers with a fundamental outlook on the legal landscape, which in turn shapes their approach to cases. Eventually, lawyers may outgrow their contracts or torts casebooks, but it takes many years of practice. Some never do.

How important do I think casebooks are? So important that, once in a while, I write an opinion precisely for the purpose of getting into one. Mind you, it doesn't change the outcome of the case, but it does change the way I write the opinion. The classic example happened about ten years ago. I had grown tired of law clerks who thought California Chief Justice Traynor was the cat's pajamas because he didn't believe that any contract could be interpreted without the use of extrinsic evidence. Whenever I would get a case where I thought the contract language was clear, they would quote me back some idiot line from Traynor about how this merely reflected the effete linguistic prejudices of judges. It turns out that this came from Traynor's opinion in *Pacific Gas and Electric Co. v. G.W. Thomas Drayage & Rigging*

6. *See* Raffles v. Wichelhaus, 2 H.&C. 906, 159 Eng. Rep. 375 (Ex. 1864); *see also* A. W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287 (1989) (relating classic tale where buyer and seller of a cotton shipment from Bombay to England waited for two different ships to come in).

Co.,[7] which had found its way into every contracts casebook in the country. What the casebooks seemed to lack were cases responding to Traynor's argument.

So I decided to write one. The case, *Trident Center v. Connecticut General Life Insurance*,[8] involved what I'll call the two greedy law firms—although they weren't any greedier than anyone else might have been in their situation. I know it's hard to cast your minds back that far, but there was a time when we had mortgage interest rates running into the double digits, some in the high teens. The greedy law firms, along with an insurance company, decided to build their own office building on Olympic Boulevard in West Los Angeles, and they had the misfortune of taking out their mortgage when interest rates were at their peak.[9] Moreover, the canny lender, Connecticut General Life, put in a clause that, to all those with eyes to see, seemed to say that the mortgage couldn't be prepaid: The law firms "'shall not have the right to prepay the principal amount hereof in whole or in part'" for the first twelve years of the loan.[10] Despite this clause, the law firms argued that they were entitled to prepay after all, because when the contract said "never," it actually meant "always."[11] Well, that's a bit of a caricature, but not too far from the mark.

The district judge had a good laugh and dismissed the law firms' case without considering the proffered evidence.[12] We decided that, under the law of California, we were required to reverse to have the district judge consider the law firms' extrinsic

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7. 442 P.2d 641 (Cal. 1968). Traynor derided a judge's "primitive faith in the inherent potency and inherent meaning of words" as akin to

> "[t]he elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the word, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Précieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough . . . ."

Id. at 643-44 & n.2 (quoting STEPHEN ULLMANN, THE PRINCIPLES OF SEMANTICS 43 (1963)). Is this over the top or what?

8. 847 F.2d 564 (9th Cir. 1988).

9. *See id.* at 566 (commenting that, although a 12¼% interest rate was reasonable in 1983 when the loan was made, market rates had decreased dramatically by 1987).

10. *Id.*

11. *See id.* at 568 (noting that Trident sought to offer extrinsic evidence that the parties had agreed Trident could prepay at anytime, subject to a fee).

12. *See id.* at 566. The judge also sanctioned Trident for bringing a frivolous lawsuit. *See id.*

evidence.[13] But it struck me that this was an excellent case to point out some of the more absurd aspects of Traynor's position. After all, this was not a case involving a little old lady—or, given that this is being published in a law review, I should say diminutive senior matron—all of whose furniture was repossessed because she missed a payment on the refrigerator. No, the parties here were sophisticated; they had equal bargaining power; they used lawyers to document their transactions; they left a small patch of Idaho denuded of trees which were felled to paper their deal. If these folks couldn't write an agreement that would be binding, who could? And if we let these folks tell us that language is too uncertain to provide meaningful constraints on their conduct, what does that tell us about all those other words we use to control each other's behavior?

It struck me that this was the perfect case to provide a counterpoint to Traynor's high-falutin' rhetoric. If only I could somehow get this case in front of all those impressionable first-year law students, maybe they'd be less likely to swallow the Gospel according to Saint Traynor. So I wrote an opinion that didn't try to conceal my contempt for the Traynorian view. More important, the opinion provided an explicit refutation of Traynor's so-called logic. Among other passages, it contained the following:

> [E]ven when the transaction is very sizable, even if it involves only sophisticated parties, even if it was negotiated with the aid of counsel, even if it results in contract language that is devoid of ambiguity, costly and protracted litigation cannot be avoided if one party has a strong enough motive for challenging the contract. While this rule creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts.
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> It also chips away at the foundation of our legal system. By giving credence to the idea that words are inadequate to express concepts, *Pacific Gas* undermines the basic principle that language provides a meaningful constraint on public and private conduct. If we are unwilling to say that parties, dealing face to face, can come up with language that binds them, how can we send anyone to jail for violating statutes consisting of mere words lacking "absolute and constant referents"?[14]

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13. *See id.* at 569-70.
14. *Id.* at 569.

In a final zinger, the opinion concludes: "Be that as it may. While we have our doubts about the wisdom of *Pacific Gas*, we have no difficulty understanding its meaning, even without extrinsic evidence to guide us."[15]

As many of you here know, *Trident* did find its way into most contract casebooks, immediately following *Pacific Gas*, precisely as I had intended. Most contracts teachers—and the authors of most contracts casebooks—are mildly hostile to my position and tend to use *Trident* mostly for target practice. But no matter. Every year it gets read by thousands of law students. Nagging doubts they have about *Pacific Gas* and the Traynorian disdain for language find an echo in the *Trident* opinion. For many students, the fact that the Ninth Circuit wrote an opinion squaring off against *Pacific Gas* gives them the courage to speak out in class, perhaps jogging doubts in the minds of other students. No, I don't pretend that I get a majority of the students, but maybe I get one out of three, and maybe another one out of three is left in doubt. Traynor's death grip on the minds of law students has been broken.

Of course, the sine qua non of all of that was that *Trident* would make its way into the casebooks. How did I know casebook authors wouldn't simply ignore or overlook the opinion? After all, the Ninth Circuit isn't exactly where one would go looking for an exposition of contract law. And how could I be sure that authors of contract casebooks were not so sympathetic to the Traynorian view that they would just disregard *Trident*? The answer comes from that fount of popular wisdom, Jack Benny. Many years ago I saw Benny as a guest on Johnny Carson—or maybe it was Joey Bishop—and he was asked: "When you have guests on your show, do you mind it if they get more laughs than you?" Benny's answer was: "Certainly not. Every laugh they get on my show is my laugh too." I figured casebook authors may favor the Traynorian point of view on the parole evidence rule, but what they favor even more is having a good casebook. And how do you write a good casebook? By including many different points of view, particularly if they are expressed with some flair and passion. If the juxtaposition of *Pacific Gas* with *Trident* precipitates vigorous classroom discussion, the casebook author and the professor in the classroom will be satisfied because it's their show.

So in a sense, when I write an opinion like *Trident*, I am manipulating the casebook authors a bit, but it's a consensual manipulation. And the manipulation works both ways. What

15. *Id.*

casebook authors are telling me—implicitly at least—is this: "Face it, Kozinski, in a few years no one is going to read your opinions, no matter how right they may be. If you want to have a lasting influence on the law, write an opinion that we can fit into a casebook." Cases that would otherwise be forgotten wind up shaping the views of generations of new lawyers, simply because they fill a pedagogic niche. So one very important way a judge can have a lasting influence on the law—especially those of us who don't operate at the Supreme Court level—is to write opinions that appeal to the Jack Benny instinct of casebook authors and classroom professors.

Another facet of the symbiotic relationship between judges and academics is the time-honored practice of commenting on judicial opinions—sometimes taking a hatchet to them. It turns out that academics are very efficient at doing this. When I first became a judge almost two decades ago, I used to have mailing lists for my opinions. Whenever I wrote a First Amendment opinion, I would send it to all my friends who taught constitutional law. Whenever I wrote what I thought was a particularly spiffy copyright opinion, I would send it to any professor with whom I could claim a nodding acquaintance who taught intellectual property. And so on. Why? Because I wanted to be sure that they didn't somehow miss my words of wit and wisdom.

I should have been so lucky. Over the years, I've found that you can't hide from academic commentary even if you try. Some of my most obscure opinions concerning issues that would induce narcolepsy in all sentient beings more complex than a mollusk have been the subject of academic commentary. If the law professors miss a case, you can be sure that students—starved for a note topic—will find it. One law professor even tried to distill a new legal principle from one of my opinions—he called it the "Kozinski Paradox."[16] In an opinion by the name of *Hall v. City of Santa Barbara*,[17] I posited that rent control over mobile homes was a taking because it was more efficient than ordinary rent control, which is messy and leads to major inefficiencies.[18] This professor spent an entire article exploring the implications of a doctrine that said inefficient government actions are more likely to be constitutional than efficient ones.[19] Alas, *Hall v. City*

16. *See* William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865 (1991).

17. 833 F.2d 1270 (9th Cir. 1986), *wrongly overruled by* Yee v. City of Escondido, 503 U.S. 519 (1992).

18. *See id.* at 1279-80.

19. *See* Fischel, *supra* note 16, at 866-67 (arguing that inefficient regulatory

of Santa Barbara was overruled by *Yee v. City of Escondido*,[20] and the "Kozinski Paradox" went to that purgatory where all discredited legal theories go, waiting to be given new life by a more enlightened Supreme Court.[21]

Now you would think that talking back to judges after they have written an opinion would be the ultimate futile act. Let's say I write an opinion and six months later a law review article comes out showing convincingly that I was way wrong. Let's say the article is so persuasive that even I recognize the error of my ways, making me wish I had decided the case the other way. Well, too bad. Unless the case is still knocking around in my court because of a delayed action on a petition for rehearing—which virtually never happens—there is not a thing I can do about it. Worse still, my opinion—the wrong one—remains the law of the circuit and is binding on every judge on our court, and every district judge, bankruptcy judge and magistrate judge from Billings to Honolulu. If I get another case identical to the one I decided incorrectly, I am bound by my earlier decision to repeat the error.

You might think, therefore, that commenting on past cases is totally pointless. In fact, it's quite the opposite. Judges don't like to break with precedent. Thus, even if an earlier opinion is not binding because it comes from a court that cannot create binding authority—such as the opinion of another circuit or another state supreme court—judges generally like the security of treading on a beaten path. It is therefore entirely possible that the first opinion written in an area of the law will preempt the field and become the last word on the subject. Academic criticism—like a dissent—can blunt the force of that initial opinion or series of opinions and keep the area of law open for reconsideration by later cases.

I got a good taste of this recently in my *Lexecon* case.[22] The question presented was whether, once the panel on multidistrict litigation (MDL) transfers a case for the conduct of pretrial proceedings, the district judge in that district may engage in a practice that came to be known as "self-transfer"—essentially

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transfers should not usually be construed as takings).

20. 503 U.S. 519 (1992).

21. The Kozinski Paradox, however, lives on in the academic literature. *See, e.g.*, Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 275 & n.160 (discussing Kozinski Paradox).

22. *In re* American Continental Corp., 102 F.3d 1524 (9th Cir. 1996), *rev'd sub nom.* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

keeping the case for trial.[23] The parties in the case were Lexecon, Inc., a law and economics consulting firm out of Chicago, and the plaintiffs' securities law firm of Milberg Weiss Bershad Hynes & Lerach. Lexecon, and particularly one of its principals, Dan Fischel (now Dean of the University of Chicago Law School), had provided expert witness testimony opposing a variety of lawsuits brought by Milberg Weiss, including some involving the infamous Charles Keating savings and loan case in Phoenix.[24] It was in the context of that case that Milberg Weiss accused Lexecon of improper trial tactics, charges that were amplified in a letter from a Milberg Weiss partner to *The National Law Journal*.[25] Lexecon and Fischel brought suit in Chicago, raising a variety of claims such as malicious prosecution and defamation, and asking for gazillions in damages.[26] Noting the connection to the Keating mess, which was generating a large number of cases—most of which were filed in district court in Phoenix—the MDL panel transferred the case there for consolidated discovery, as authorized by 28 U.S.C. § 1407(a).[27]

The case came to our court twice. The first was prior to trial on a petition for writ of mandamus.[28] The district court had granted Milberg Weiss's motion for self-transfer and set the case for trial.[29] Lexecon's petition argued that the district court was without authority to try the case because section 1407(a) authorized MDL transfers only for purposes of consolidated discovery, not for purposes of trial.[30] This sounded like a pretty good argument to me after reading the statute, but the problem was that there were scores of cases holding precisely to the contrary. Lexecon was unable to cite a single case supporting its position. Under the circumstances, my colleagues decided that this did not meet the standards for mandamus, as the district court was not clearly wrong, and the issue could be considered after a final judgment.[31] The petition was denied in an unpublished order from which I filed a short dissent.[32]

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23. *See id.* at 1531.

24. *See id.* at 1528-31, 1548.

25. *See id.* at 1531; Kevin P. Roddy, Letter, *Defendants Tell Their Side of* Lexecon *Suit*, NAT'L L.J., Mar. 8, 1993, at 16.

26. *See American Continental*, 102 F.3d at 1529.

27. *See id.* 1531-32.

28. *See* Lexecon Inc. v. United States Dist. Court for the Dist. of Ariz., No. 95-70380, 1995 U.S. App. LEXIS 19193 at *1 (9th Cir. July 21, 1995).

29. *See id.* at *4.

30. *See id.*

31. *See id.* at *4-5.

32. *See id.* at *5-9 (Kozinski, J., dissenting).

The case went to trial in Arizona before an unsympathetic Phoenix jury, and Lexecon recovered, to use the precise technical term, bubkes. Lexecon appealed, arguing that it would have done a lot better before a Chicago jury.[33] As it happens—and it truly was a coincidence—the case was assigned to a panel of which I was a member. As you are no doubt aware, we give cases a much closer look during an appeal on the merits than on an interlocutory motion such as a mandamus petition, so this time around I got a chance to take a careful look at the legal landscape—not merely caselaw, but also academic commentary. What I found was quite amazing: Every single case that had passed on this issue—and there were many—had decided that self-transfer was hunky dory. And every commentary from the academy—every treatise, law review article, comment and note that addressed the subject—said the cases were wrong.

Here's what appears to have happened: The issue had first arisen in 1971 in the Second Circuit case of *Pfizer, Inc. v. Lord*,[34] which came before a two judge panel—why two judges and not three, I don't know—consisting of Judge Joseph Smith and Justice Tom Clark, retired, sitting by designation. A very short opinion, *Pfizer* concluded that self-transfer was OK.[35] Justice Clark's name on the opinion probably gave it cachet. Moreover, allowing the judge who presided over discovery to conduct the trial as well seemed eminently sensible, whereas sending the case back to the original district judge seemed messy and wasteful. So *Pfizer* said it's OK, and every other court followed suit, citing *Pfizer*. The practice of self-assignment became so well accepted that only 3,500 of 92,500 cases transferred under MDL—just four percent—ever made it back to the district where they were filed.[36]

Despite this judicial intransigence, the academics kept the flame alive, publishing article after article saying that self-transfer was not authorized by section 1407(a).[37] I got an insight

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33. *See In re* American Continental Corp., 102 F.3d 1524, 1531 (9th Cir. 1996), *rev'd sub nom.* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

34. 447 F.2d 122 (2d Cir. 1971).

35. *See id.* at 124-25.

36. *See American Continental*, 102 F.3d at 1540 (Kozinski, J., dissenting) (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 32).

37. *See, e.g.*, Ross Daryl Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 GEO. WASH. L. REV. 1145, 1159-64 (1989) (arguing that section 1407 requires that transferred actions be remanded to the transferring court); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41, 64 (1971) (noting that the language and

into how intense the academic interest in the issue was when I looked up the topic in *Wright & Miller* and found a discussion in the pocket part of my unpublished dissent in the earlier *Lexecon* mandamus petition.[38] The rest, as they say, is history. The majority of my panel affirmed and I dissented saying, essentially, forty million academics can't be wrong. Lexecon petitioned for certiorari and Charles Alan Wright filed a pro se amicus brief in support of the petition.[39] Despite the fact that there was no split among the circuits—in fact, my dissent was the only disagreement among the scores of federal judges who had considered the issue—the Supreme Court granted certiorari and reversed 9-0.[40]

OK, I'll take a little bit of credit for giving the *Lexecon* issue the visibility it needed to get the Supreme Court to pay attention, but much more of the credit goes to all those academics who, over the course of three decades, simply refused to grant legitimacy to the commonly accepted judicial wisdom. By withholding their approval, members of the academic community kept the issue alive for later reconsideration. Would the Supreme Court have granted certiorari had the academic community essentially ignored the issue? I seriously doubt it. This is the kind of procedural accommodation that courts are prone to just let go if they think they can get away with it, and only pressure from the academy forced the courts to take a hard look at the issue.

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legislative history of section 1407(a) are so clear that "[i]t originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion"); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in* California v. ARC America Corp., 59 ANTITRUST L.J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity. The plain language of the statute requires the Multidistrict Panel to remand transferred cases to the district of origin at or before the completion of pretrial proceedings . . . ." (footnote omitted)); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Policy?*, 23 MEM. ST. U. L. REV. 841, 866 (1993) (stating that "[i]t is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of § 1407 explicitly directs remand to the transferor court" (footnoted omitted)); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 804-09 (1985) (noting that "it seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial as well as pretrial purposes").

38. *See* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866, at 123 n.51 (2d ed. Supp. 1996).

39. *See* Rex Bossert, *MDL 'Power Grab': Critics Say Transferee Judges Should Not Try Multidistrict Litigation*, NAT'L L.J., Sept. 1, 1997, at A1.

40. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28, 32 (1998).

The idea of granting or denying legitimacy leads into a third way in which academics can have a profound influence on the judiciary, and that is by introducing an entirely new legal idea or line of argument. Modern courts can be innovative, but judges are reluctant to pick ideas entirely out of thin air. It's always much safer to follow some precedent, preferably an opinion by a prestigious court or at least a well-known judge. But, alas, there is a point in the development of any legal doctrine where there is no judicial precedent; some court has to be the first. That is a very uncomfortable position for a judge to be in: You write an opinion and have nothing to cite. Paradoxically, opinions are not supposed to be a matter of opinion; they are supposed to reflect the law, and this means at least someone out there who does law is supposed to agree with you.

In the absence of judicial precedent, a new idea often gains legitimacy through law review commentary. For example, let's say you were a cowboy judge about fifteen or twenty years ago. You read the Constitution and noticed that there was a provision there that seemed to guarantee the right to bear arms. You scoured the caselaw looking for the Second Amendment equivalent of *Brandenburg v. Ohio*[41] or *Miranda v. Arizona*,[42] but, alas, the only thing you found was a single Supreme Court case from 1939—*United States v. Miller*[43]—saying basically: The Second Amendment don't mean squat. You might also have found a 1976 case from the Sixth Circuit, holding that it was "inconceivable" that the Second Amendment establishes an individual right to bear arms.[44]

In such circumstances, you'd have had to be mighty brave—or mighty foolish—to decide a case on Second Amendment grounds. To begin with, few lawyers would raise the issue, so it would be hard to find a case where the issue could legitimately be inserted. Further, had you decided a case on Second Amendment grounds twenty years ago, it would have been reversed on appeal with a snicker. This is because the issue lacked legitimacy, and anyone raising it would have been considered a bit of a kook.

All of this has changed over the last ten or fifteen years. In 1987, Nelson Lund published an article in the *Alabama Law Review* titled *The Second Amendment, Political Liberty, and the*

41. 395 U.S. 444 (1969).

42. 384 U.S. 436 (1966).

43. 307 U.S. 174 (1939).

44. *See* United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (noting that if blanket protection for an individual's right to bear arms was inconceivable when *Miller* was decided, it must be even more so "in this time of nuclear weapons").

Right to Self-Preservation in which he argued that the Second Amendment did, in fact, create a personal right to bear arms.[45] This was followed in 1989 by Sanford Levinson's article in the *Yale Law Journal* titled *The Embarrassing Second Amendment*.[46] The Lund and Levinson articles generated a series of academic responses, both supporting and opposing their point of view,[47] and suddenly it's no longer so kooky to consider the Second Amendment as establishing an individual right to bear arms.

I read the Lund and Levinson articles—and maybe some others—and they made good sense to me, so in 1996 I dropped a footnote in an opinion by the name of *United States v. Gomez*[48] suggesting that 18 U.S.C. § 922(g)(1)—the statute that makes it a criminal offense to be a felon in possession of a firearm—might violate the Second Amendment if it were not subject to a justification defense.[49] And what do you think I cited in support of this rather startling conclusion? Why, of course, Nelson Lund and Sandy Levinson's articles. Alas, my two colleagues on the

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45. *See* Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

46. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

47. For support of Lund and Levinson, see Richard M. Aborn, *The Battle over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 438 n.107 (1995) (referring to Levinson's article as an "excellent examination of the Second Amendment"); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793-95 & nn.1, 3 (1998) (building on Lund and Levinson's work to compare the Second Amendment to a number of contemporaneous constitutional provisions and to conclude that its justification clause should not render the Amendment inoperative); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 551 (1991) (referring to Levinson's article as "insightful"); Roland H. Beason, Commentary, Printz *Punts on the Palladium of Rights: It Is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 ALA. L. REV. 561, 561-62 & n.2 (1999) (supporting the individual rights approach favored by Lund and Levinson and opining that the alternative approach could result in a society unable to protect itself from aggression); T. Markus Funk, Comment, *Gun Control and Economic Discrimination: The Melting-Point Case-In-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 776 n.76, 777 n.81, 779 (1995) (supporting the previous work of Lund and Levinson by accepting the theory that the Second Amendment supports an individual, as opposed to a collective, right to bear arms).

For opposition to the individual right view supported by Lund and Levinson, see Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 62 & n.12 (1995) (describing the theory that the Second Amendment confers an absolute individual right to firearms as "untenable"); Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 102 & nn.220-21 (1992) (referring to Lund's view of the Supreme Court's rejection of the collective rights theory as "one-sided").

48. 92 F.3d 770 (9th Cir. 1996).

49. *See id.* at 774 n.7 (noting that a justification defense may be constitutionally required because the "Second Amendment embodies the right to defend oneself and one's home against physical attack").

panel repudiated my footnote, so it did not become part of the law of the Ninth Circuit, but the issue continues to percolate through the courts. The issue was twice considered right here in Texas last year. In *United States v. Emerson*,[50] District Judge Cummings of the Northern District dismissed a criminal indictment for violating 18 U.S.C. § 922(g)(8) on the ground that it violated the Second Amendment.[51] Mr. Emerson, who was involved in a nasty divorce, was slapped with a restraining order after threatening to kill his wife's lover.[52] Unbeknownst to Emerson, section 922(g)(8) made it a federal offense to possess a firearm while under a restraining order.[53] After Emerson was arrested for possessing a gun, he moved to dismiss the indictment on the ground that section 922(g)(8) infringed his Second Amendment rights.[54] Judge Cummings wrote a lengthy opinion citing almost exclusively law review articles on both sides of the issue and concluded that the Levinson position made the most sense.[55] A couple of months later, Judge Furgeson of the Western District of Texas reached the opposite conclusion in another Second Amendment challenge to section 922(g)(8).[56] After reviewing all of the literature on both sides of the issue, Judge Furgeson praised the academic attention given to the Second Amendment but decided to go with the majority view[57]—acknowledging implicitly that there is a valid minority view, not just the kooky rantings of separatist skinheads.

An even more remarkable example of a new line of argument given legitimacy entirely by the travails of an academic is playing itself out in the Supreme Court even as we speak. I'm referring to *United States v. Dickerson*,[58] which involves a fairly run-of-the mill issue: A criminal defendant who challenged the adequacy of *Miranda* warnings given to him by police investigating a bank

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50. 46 F. Supp. 2d 598 (N.D. Tex. 1999).

51. *See id.* at 610 (holding explicitly that "18 U.S.C. § 922(g)(8) is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights").

52. *See id.* at 599.

53. *See id.*

54. *See id.* at 600 (explaining that Emerson claimed § 922(g)(8) violated his individual right to bear arms under the Second Amendment, though the government insisted that it was "well settled" that the Second Amendment makes no such individual guarantee).

55. *See id.* at 614.

56. *See* United States v. Spruill, 61 F. Supp. 2d 587 (W.D. Tex. 1999).

57. *See id.* at 589-91 (noting that although the academic community has been active in writing about the Second Amendment in recent years, precedent still indicates there is no individual right to bear arms).

58. 166 F.3d 667 (4th Cir. 1999).

robbery.[59] As most of you are aware by now, Congress tried to do away with *Miranda* in the Omnibus Crime Control Act of 1968.[60] Hidden within the interstices of that huge bill was a provision, 18 U.S.C. § 3501, which purports to abrogate *Miranda* and make confessions admissible so long as they are voluntary.[61]

Having signed section 3501 into law, the Nixon administration—and every other administration since then—proceeded to ignore it. Because section 3501 applies only in federal prosecutions, and because all federal criminal cases are brought in the name of the United States, you would assume that the section would remain dormant so long as the government chose not to invoke it. It would be a good assumption, but wrong. Starting in 1994, Professor Paul Cassell started a Normandy-like assault on *Miranda* and a concomitant effort to resuscitate section 3501. In a series of articles in a variety of legal journals, Cassell documented the social costs of *Miranda* and argued that Congress properly exercised its authority in section 3501 to abrogate what was only a prophylactic rule, not a constitutional right.[62]

Most of us watching Cassell from the sidelines figured he was spitting in the wind—or worse. Even if he was right on the merits, how could he get the issue before the courts so long as the government chose not to raise it? Well, he figured out a way. Dickerson had his confession suppressed because it was obtained in violation of his *Miranda* rights, and the government appealed the district court's refusal to reconsider.[63] The United States opposed the district court's decision on the usual grounds—the warning was adequate, the error was harmless or whatever—but Cassell filed an amicus brief on behalf of the Washington Legal Foundation raising section 3501 as an alternative ground for

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59. *See id.* at 671.

60. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in 18 U.S.C. § 3501 (1994)).

61. *See* 18 U.S.C. § 3501(a) (1994) (stating that trial judges shall admit any confession they deem to be "voluntarily given").

62. *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. REV. 1084 (1996); Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996); Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996).

63. *See Dickerson*, 166 F.3d at 695.

affirmance.[64] You know the rest: The Fourth Circuit, over a dissent by Judge Michael, held that Dickerson's statements were admissible because they satisfied section 3501.[65] The Supreme Court has granted certiorari and, to add icing to the cake, it invited Cassell, as amicus curiae, to argue on behalf of the constitutionality of section 3501.[66]

I don't know about you, but this strikes me as a monumental academic achievement. Regardless of the outcome in the case, it seems remarkable that in five short years a single law professor can bring an issue such as this out of the closet and force its consideration by the Supreme Court. Cassell, through his academic writings, has given this issue legitimacy, and an argument that a mere five years ago would have been received with a chuckle may now turn out to be the law of the land.

So I have discussed three ways in which academics influence judicial decision making: through their casebooks, by critiquing—and sometimes denying legitimacy—to court opinions, and by proposing and granting legitimacy to new legal doctrines. A fourth way is by synthesizing the caselaw in a particular area of the law and providing a new lens through which we can view legal problems. The classic example of this kind of scholarship is Louis Brandeis and Samuel Warren's 1890 *Harvard Law Review* piece, *The Right to Privacy*[67]—perhaps the most influential law review article ever published. Brandeis and Warren, frustrated with gossip-mongering nineteenth century journalists, analyzed existing American and English tort cases in areas such as defamation and unlawful distribution of private writings to suggest that the law protected an individual's right to privacy. They urged the courts to protect this right by creating tort remedies for excessive intrusion into a person's private life.[68] Cleverly, Brandeis and Warren didn't suggest that judges pull this new right out of a hat. Instead, their synthesis of existing doctrine gave judges a way to adopt the theory without making a giant leap from the comfort of precedent. Their article became the foundation of a broad right to privacy that was codified in the *Restatement of Torts* in 1939 and remains firmly entrenched in most states today.[69]

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64. *See id.* at 670.

65. *See id.* at 695.

66. *See* Dickerson v. United States, 120 S. Ct. 578, 578 (1999).

67. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

68. *See id.* at 219.

69. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977) (noting that Brandeis and Warren's article was the first to argue that the right to privacy should

A more recent example of scholarship that provided a new perspective on existing doctrine is Kathleen Sullivan's *Harvard Law Review* piece, *Unconstitutional Conditions*.[70] Sullivan's article came in very handy a few years back when I was trying to make up my mind in a case by the name of *Lipscomb v. Simmons*.[71] *Lipscomb* involved an Oregon statute that provided foster care benefits only to foster children placed with strangers, but not to those placed with their own relatives.[72] One plaintiff, Sheri Lipscomb, was a foster child with disabilities that required costly medical care.[73] She lived with her aunt and uncle until they could no longer afford Sheri's medical bills without foster care benefits from the state.[74] To get the care she needed, Sheri would have to go live with strangers—who would qualify for the benefits—or be placed in an institution.[75] Sheri's aunt and uncle sued the state of Oregon, claiming the foster care benefit statute violated equal protection.[76]

Oregon argued that it had a rational basis in denying benefits to relatives of a foster child: It saved the state a bucket of money.[77] My colleagues found this rationale sufficient to uphold the statute, but I dissented, based in part on Kathleen Sullivan's analysis of unconstitutional conditions.[78] Sullivan's work pinpointed the systemic concerns behind the concept that the state can't grant a benefit on the condition that the beneficiary surrenders a constitutional right.[79] Because Oregon had a responsibility to protect the rights of every individual child in its care—not just the rights of foster children as an amorphous group—the state violated its duty by providing benefits to some

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be expressly protected).

70. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

71. 962 F.2d 1374 (9th Cir. 1992) (en banc).

72. *See id.* at 1376.

73. *See id.* at 1386-87.

74. *See id.* at 1387.

75. *See id.*

76. *See id.* at 1376-77.

77. *See id.* at 1377 (noting that Oregon argued that the statute saved the state $4 million biannually).

78. *See id.* at 1384-91 (Kozinski, J., dissenting).

79. *See* Sullivan, *supra* note 70, at 1415. The article specifically addresses the effects of government coercion on rightsholders, the justification behind allowing government conditioning of benefits and the scope of the unconstitutional conditions doctrine. Ultimately, Professor Sullivan concludes that the doctrine serves several functions: guarding against government overreaching, barring redistribution of rights for which the government has obligations of equality and preventing an inappropriate hierarchy among rightsholders. *See id.* at 1506.

children in foster care but not others.[80] According to Sullivan, this sort of situation ran afoul of the government's obligation of evenhanded treatment among rightsholders.[81] With these concepts in mind, I wrote:

> More fundamentally, the state may not visit serious deprivations and hardships on children like Sheri . . . for the sole purpose of inducing the relatives of other children to provide free foster care. When the state acts *in loco parentis*, displacing the parents of an abused or neglected child, it takes on a grave responsibility *to that child*, stepping into the shoes of the parents whose place it takes. The decisions it makes with respect to the child must . . . be guided by an overarching objective: maximizing the child's welfare. Each child is entitled to have key decisions as to its care made in light of his own best interests, rather than to serve some collateral purpose. . . . [T]he child has a right to individualized, rational decisions, a right which grows out of his relationship with the state.[82]

Sullivan's article, then, helped me reconceptualize a familiar idea and approach Sheri's case in a new way. Who knows, I might have reached the same result without reading Sullivan's work—but her synthesis provided a template I could use to understand a tough problem more clearly.

A fifth way in which academics can affect the judicial process is indirectly, by proposing legislative changes, either in response to judicial decisions, or to deal with novel societal problems. One prominent example occurred in the context of the Civil Rights Act of 1991.[83] In the late 1980s, the Supreme Court decided a handful of cases that restricted the ability of employees to sue on the basis of discrimination.[84] The leading case, *Wards Cove*

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80. *See Lipscomb*, 962 F.2d at 1390 (Kozinski, J., dissenting) ("[A] blanket rule that precludes all relatives from obtaining financial assistance, effectively excluding some of them from the class of households that can provide foster care, cannot be squared with the type of rational, compassionate, individualized judgment we must expect from the state when it takes custody of the child." (citation omitted)).

81. *See* Sullivan, *supra* note 70, at 1506 (emphasizing a government obligation of "evenhandedness" on issues involving constitutional rights).

82. *Lipscomb*, 962 F.2d at 1388-89 (Kozinski, J., dissenting) (citations omitted).

83. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

84. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1022 & nn.119-21 (1991) (citing and briefly discussing cases that restricted the reach of federal discrimination statutes, increased the burden on plaintiffs relying on statistical evidence and imposed higher procedural barriers on employees).

Packing Co. v. Atonio,[85] reversed two decades of precedent that placed the burden of justifying a discriminatory business practice with the employer. *Atonio* shifted the burden to the employee, requiring that the employee prove the challenged practice was not significantly related to the employer's legitimate business objectives.[86]

Congress, concerned about the erosion of legal protections for minority employees, reacted with the Civil Rights Act of 1991. In passing the Act, which explicitly overruled *Atonio*,[87] Congress relied on an article by Candace Kovacic-Fleischer titled *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics as Substance*.[88] Professor Kovacic-Fleischer advocated a return to pre-*Atonio* caselaw and explicitly targeted her article at Congress.[89] She argued that the Supreme Court's about-face on employment discrimination threatened employees' ability to challenge discriminatory practices in the workplace.[90] By placing the burden on the employee to prove the employer lacked a legitimate business objective, *Atonio* severely limited the ability of a plaintiff to prove discrimination.[91] Congress agreed, adopting the ideas advocated in Kovacic-Fleischer's article and restoring the burden of proof to the employer.[92]

Another example, this time at the state level, involves a series of articles and studies by Professors George W. Pring and Penelope Canan proposing what have come to be known as anti-SLAPP statutes.[93] The acronym SLAPP stands for Strategic Lawsuits Against Public Participation and was coined by Professors Pring and Canan in a 1988 article by the same name

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85. 490 U.S. 642 (1989).

86. *See id.* at 658-59

87. *See* Civil Rights Act, 105 Stat. at 1071 ("The Congress finds that . . . the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections . . . ."). A specific goal of the Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court . . . prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)." *Id.*

88. *See* Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics as Substance*, 39 AM. U. L. REV. 615 (1990).

89. *See id.* at 662 ("Congress should restore the normal allocation of burdens of proof; that is, if plaintiff proves an employment practice or practices caused a disparate-impact, the burden then should shift to the employer to prove a business necessity for the practice.").

90. *See id.* at 659, 666 (describing the *Atonio* holding as "inconvenient, unfair, and unnecessary").

91. *See id.* at 658-59.

92. *See* Civil Rights Act, 105 Stat. at 1074.

93. *See generally* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996). Professors Pring and Canan provide a detailed bibliography of their articles and other publications. *See id.* at 223 n.2.

in the journal *Social Problems*.[94] Pring and Canan contended that individuals and public interest organizations who spoke out against corporate or government action were often targeted by lawsuits intended to silence their criticism.[95] They proposed measures that would allow targets of SLAPP suits to get the cases dismissed early in the proceedings by forcing plaintiffs to substantiate their allegations prior to discovery.[96]

In 1992, California was the first state to pass an anti-SLAPP statute, and in the intervening years, the law has been received with wild enthusiasm by the courts,[97] with the party invoking the statute prevailing in twenty-two cases out of the twenty-seven appellate decisions to date.[98] Pring and Canan's idea for anti-SLAPP laws has thus become a very powerful tool for discouraging certain types of lawsuits. Nor was their influence on the development of this area of the law limited to academic commentary: When the California Assembly decided to reevaluate the statute in 1998, it called on Pring and Canan to propose any reforms they felt could make the law more effective.[99] The two law professors have drastically changed the way business is done in the courts of California and ten other states that have adopted anti-SLAPP measures, from Nevada to Massachusetts.[100]

The final way in which academics affect the work of the judiciary is by fostering a grand idea that changes our fundamental approach to law in general, not merely in one particular area. One such grand idea was the legal realist movement,[101] which challenged the formalist notion that law is an

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94. *See* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

95. *See id.* at 506 (providing several demonstrative examples).

96. *See* PRING & CANAN, *supra* note 93, at 143 (also suggesting that courts put "a 'reverse chill' on future SLAPPs through monetary awards of attorneys' fees, litigation costs, and SLAPPback damages").

97. *See* Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1001-05, 1012 (1999) (detailing the lineage of the California anti-SLAPP statute); *see also* CAL. CIV. PROC. CODE § 425.16 (West Supp. 2000).

98. *See* Braun, *supra* note 97, at 1012-13.

99. *See id.* at 1010.

100. *See id.* at 1036-44 (describing and contrasting the anti-SLAPP statutes enacted by California, New York, Nebraska, Delaware, Georgia, Nevada, Minnesota, Massachusetts, Maine, Rhode Island and Tennessee). In general, the statutes in other states are significantly narrower and procedurally less flexible than California's anti-SLAPP statute. *See id.* at 1036.

101. *See generally* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 25-33 (1995) (tracing the history of the legal realist movement).

immobile structure that operates according to fixed, objective rules and substituted the view that law is amorphous and malleable, reflecting the preferences and prejudices of the judges who administer it.[102] This turned out to be such a powerful idea that it's now universally accepted, almost without question by lawyers, judges, legislators—virtually everyone involved in the administration of the law.

Nowhere is this better illustrated than in the struggles we have had during the past fifteen years over the confirmation of judges. Everyone now involved in the appointment and confirmation process—Democrats as well as Republicans, liberals as well as conservatives, those on Capitol Hill and those in the White House—everyone who has anything at all to say about who becomes a federal judge holds firmly to the view that you can control the development of the law by selecting the right people and stopping the wrong people from becoming judges.[103]

Another grand idea that has taken hold in the legal community after being proposed by academics is the law and economics movement.[104] When I was in law school in the early 1970s, law and economics were considered to be separate disciplines that had little to say to each other. Having studied economics as an undergraduate, I remember giving a copy of Ronald Coase's groundbreaking article *The Problem of Social Cost*[105] to my torts professor. He read it and reacted with bemusement—or perhaps amusement. His reaction was: "That's all fine in theory, but law deals with real problems in the real world." In 1970, however, Guido Calabresi published *The Cost of Accidents: A Legal and Economic Analysis*,[106] which was followed

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102. *See id.* at 27 (describing the legal realist's idea "that 'reality' is too complex and fluid to be capable of being governed by rules"); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1193-94 (1999) (noting that legal realists ascribe significant importance to judges' policy preferences).

103. *See, e.g.*, SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 3-4 (1997) (recognizing the selection of judges as part of the President's policy agenda); Carl Tobias, *Federal Judicial Selection in Time of Divided Government*, 47 EMORY L.J. 527, 565 (1998) ("Chief Executives and members of the Senate have long seen the choice of judges as an important means of affecting the law's development and of exercising political patronage." (footnote omitted)).

104. *See generally* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 301-420 (1995) (detailing the history of the law and economics movement).

105. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Professor Coase's article is regarded as "the most-cited article both in law and in economics." Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 759 (1996) (describing Professor Coase's article as the "runaway citation champion").

106. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC

fast on the heels by Richard Posner's *Economic Analysis of Law*[107] in 1972.

Suddenly the marriage of law and economics was not so farfetched. These scholars, and many others who have written on the subject,[108] have transformed the language and structure of many legal arguments. Incentives and disincentives, supply and demand, marginal cost and marginal benefit—all these terms and the concepts behind them have become the everyday building blocks of legal arguments. Their impact is felt not merely in areas such as antitrust, which have a more or less direct relationship to economics, but also in virtually all areas of the law.

Not all grand ideas take hold, of course. Critical legal studies,[109] and its offshoots—critical race theory,[110] critical feminism,[111] and the like—have had much tougher sledding and the jury is still out, so to speak, as to whether they will be accepted. My guess is that they will not, but perhaps that is because these ideas have not managed to persuade a majority of academics.[112] But what is important to note is that the grand

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ANALYSIS (1970). Judge Calabresi has also made the most-cited list. *See* Shapiro, *supra* note 105, at 769 (recognizing Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961), as the fifty-first most-cited law article).

107. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1977). Chief Judge Posner also has a law and economics article in the most-cited list. *See* Shapiro, *supra* note 105, at 770 (recognizing Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973), as the seventy-seventh most cited law article).

108. *See generally* James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfirmation of American Tort Law Theory*, 15 LAW & HIST. REV. 275 (1997) (tracing the lineage of and describing various contributors to the study of law and economics).

109. *See generally* MINDA, *supra* note 101, at 106-27 (dedicating a chapter to the description of the critical legal studies movement).

110. *See generally id.* at 167-85 (outlining the history of the critical race theory).

111. *See generally id.* at 129-47 (tracing the lineage of the critical feminism movement).

112. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 5 (1997) (combining these movements under the heading of "radical multiculturalism" and arguing that it is "[n]ot surprising[]" that "this movement has encountered resistance in the legal academy"). In June 1999, the *Minnesota Law Review* published a Symposium issue responding to Farber and Sherry's book. Many of the pieces maintained skepticism about the critical legal studies movements. *See, e.g.*, Anne M. Coughlin, *C'est Moi*, 83 MINN. L. REV. 1619, 1619 (1999) (describing those in the radical multiculturalism movement to be "loosely bound together by a commitment to what they call a politics of identity and by a sloppy, opportunistic use of postmodern ways of thinking about the nature of reality and the rule of law"); Matthew W. Finkin, *QUATSCH!*, 83 MINN. L. REV. 1681, 1682 (1999) (asserting that it is a logical inference that "something is wrong" with the way the radical multiculturalists reach their

transformative idea pretty much always comes from academia, and only after it becomes the consensus view there does it then get passed on to the legal community at large. Unlike the other functions that I have discussed, which might be performed, albeit less well, even in the absence of academic scholarship, the grand idea, by its very nature, is uniquely dependent on legal scholarship for its development.

A lawyer in 1970, for example, would have been very foolish to fill his brief with arguments based on economic concepts and using economic jargon. Few judges or law clerks would have understood what he was saying. Like my torts professor, they would have reacted with amusement—or more likely with impatience. No lawyer, on his own, could have undertaken the educative function of training the judiciary to understand and deal with economic concepts. It required a generation of development in the law schools and graduation of a sufficient number of students to whom these concepts are second nature, and the ascension of some of those professors and students to judicial positions, before economic concepts became a standard weapon in the arsenal of legal ordnance.

In describing the ways in which academics affect the judicial processes, I have, of course, cherry-picked my examples. I have cited articles that have, in fact, had a substantial impact on the development of the law. I should add, incidentally, that I could have picked many more examples for each of the points I made—at the risk of making this Lecture even longer than it is. But in the end, even if we gather up every single article and other academic writing that has made a difference, we would still wind up with a minority of all legal scholarship. Or to put it differently, there is a lot of legal scholarship out there that makes no difference at all, for one reason or another. And the existence of this large—possibly massive—body of useless scholarship is often cited for the notion that legal scholarship is, by and large, a big waste of time.

This, I suggest, is the wrong way to look at the situation. In any discipline, there will be many more false starts than successful ideas. In the end, though, the test is not whether a lot of what is produced turns out to be useless, but whether, in the aggregate, the effort bears fruit. False starts, bad ideas, wasted effort—all of these are the concomitants of any vibrant discipline. No one can tell ahead of time which ideas will bear fruit and

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conclusions); Steven G. Gey, *Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory*, 83 MINN. L. REV. 1707, 1709 (1999) (accusing the radical multiculturalists of foregoing truth for power).

which ones will be discarded. The point of academic discourse is to test a variety of ideas, and separate the good ones from the bad ones, and sometimes to refine good ones into better ones. It seems to me that, so long as we can point to a substantial number of academic works that make a significant and lasting difference in the development of the law, we have to adjudge the enterprise as successful.

That having been said, is there anything we can do to improve the odds—to strengthen the relationship between judges and academics by making academics more responsive to the needs of the judiciary and making judges more sensitive to feedback from the academy? Perhaps there is.

Here is an idea for judges. For years I was unaware of much of the academic criticism—positive and negative—of my opinions. Academics would sometimes send me reprints pointing out where they had cited one of my opinions, but this was more or less hit and miss. A few years ago one of my law clerks asked me whether I was interested in more consistent feedback, and when I said I was, he set up a system whereby every Friday I get a fax from Westlaw containing clips of law review articles and judicial opinions that make reference to me by name or to opinions I have written.

Good or bad—and believe me I get plenty of the latter—every Friday morning, waiting in my fax machine is the Westlaw fax informing me of what has been said about me in academic journals. It's not always pleasant to read, but it does provide me with the kind of feedback that judges generally don't see because no one likes to give a judge unsolicited bad news. To the extent we believe that academic criticism can be useful in helping judges to do a better job in the future, this has proven to be a very useful mechanism that other judges might consider adopting as a reality check.

Another idea, also involving technology, is to help law professors and students become aware of topics where judges would find academic commentary useful. Right now there is a curious discontinuity. I know for a fact that one of the most difficult problems for an academic—and particularly for a law student—is finding a topic to write about. At the same time, we in the courts are regularly running across issues for which there is no academic commentary at all, or the commentary that does exist is not very helpful. We wish we could tell some academic to write on a particular topic, but we have no mechanism for doing so.

It seems to me that this is precisely the kind of situation where technology can be used to match up supply and demand. What I envision is a web page—or a series of web pages—in which judges and their staffs can post legal issues that might deserve academic scrutiny. I first proposed this idea when I spoke on this topic at an AALS meeting a couple of years ago, and I am pleased to say that it is in the process of become a reality. One of my former law clerks, Professor Eugene Volokh of UCLA—who, incidentally, is the one who got me started on the Westlaw faxes—constructed such a web page that became operational in March 2000.[113]

Finally, and most radically perhaps, maybe we should give a little more thought about who becomes an academic. One way to make academic scholarship more useful to the judiciary is to have academics who are more attuned to the practical aspects of lawyering and judging. But it's difficult to have a sense of the practical without some practical experience. Someone who becomes an academic directly out of law school—or perhaps after one or two years of clerking—may not be in the best position to identify topics that have practical significance or to come up with practical solutions to the problems they do tackle. I therefore propose that law schools adopt a standard policy that no one will be invited to be a faculty member without at least three years of nonacademic, post-graduate experience.

I would be pretty liberal in defining what that experience could be—I would include private practice, clerking, working in government or working for a public interest organization. But it would have to be work that has a practical end—something other than producing a paper for publication or doing research toward the writing of a paper. It would have to be something in the real world.

These suggestions should be taken in the spirit I offer them—not as criticisms of the current system, but as ways to make the current system better. On the whole, however, I believe that legal academia and the judiciary have enjoyed a healthy and fruitful relationship and will continue to do so for many years to come.

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113. *See* <http://www.law.ucla.edu/lawtopic>.