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BEYOND CADILLACS AND RICKSHAWS: TOWARDS A CULTURE OF CITIZEN SERVICE

DWIGHT D. OPPERMAN PROFESSORSHIP INAUGURAL LECTURE

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I.
THE ENVY OF THE WORLD

Our civil justice system is, on one level, rightly the envy of the world. No other country produces the number of lawyers per capita that we do. No other system is as user-friendly to claimants in the ordinary civil courts as we are. Say, you are at a cocktail party, and you want to counter caustic comments from European visitors decrying our "bankrupt," empty shell of a democracy. They think we have no soul! Just rattle off the following features of our system. You will leave these nay-sayers speechless, many eager to emigrate to the United States:

Contingency Fees. Lawyers here can agree to finance your lawsuit by taking a contingency fee. In essence, you pay the lawyer's fees only if you win. You pay nothing if you lose. For many statutory claims, defendants pay your fee if you win—one way fee-shifting, we call it. In most other countries, by contrast, contingency arrangements are unlawful.

Risk-Free Litigation. Even if you have a less than certain claim, it may still make sense to sue because you will not be

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responsible for the other side's legal fees if you lose. Not so in the United Kingdom and many other countries. There, bringing a lawsuit requires you to bet the family home. Because if you lose, you will be paying the bills of both your lawyer and your adversary's lawyer.

"Pain and Suffering" Damages. I kid my students that I want them to take only "back" and "head" cases. (Of course, this is because I want them to do well, and in time "pay back" to the Law School.) Most systems allow recovery for economic loss; ours also permits recovery for "pain and suffering." Pain you suffer in your head (or your back) is, of course, difficult to measure, and difficult to disprove.

Civil Jury Trials. Unheard of in the modern world, we use juries in civil cases. Sure, there is a discretionary jury in some Canadian courts; but these judges rarely convene a jury in civil cases. If you remember your Oscar Wilde, in England, a civil jury is available only in certain libel cases. Bench trials are the norm for all other claims, and pretty much everywhere else. From the vantage of the plaintiff bar, a judge is a fact-finder whose instincts favor the establishment. When a jury is the fact finder, on the other hand, you can expect community judgments to be visited on the defendant.

Class Actions. Our equity courts created the class action device, permitting lawyers to sue on behalf of large numbers of people suffering a common wrong. The Rule 23 model, adopted in many of the states, permits you to sue on your own and for other persons who have not been consulted whether they want to bring suit or to have you bring the suit. Class members are invited to participate passively, awaiting notice of the action down the road when they will be given an opportunity to opt out of an action that is about to be settled or tried. It is an ingenious device, allowing lawyers to act as "private attorneys general"—to force putative wrongdoers to internalize the costs of their conduct, even when a large number of people may have incurred only modest (sometimes, even trivial) losses. Sweden and England are experimenting with joint actions, but these are hesitant moves. Europe remains wary of what many there regard as "lawyers' suits."

Preemptive Lawsuits. If we do not like Congress's efforts to regulate porn on the internet, we do not have to wait for prosecutions to be brought, or even for the Justice Department to

issue guidelines. We can bring preemptive lawsuits—facial challenges, on behalf organizational clients—to avoid the "chilling effect" of the laws.

Newsworthy Recoveries as a Daily Occurrence. Not surprisingly, the size of U.S. verdicts—however you measure them, in the aggregate, on average, per capita, by median—cannot be *imagined* elsewhere. Two years ago, I gave a talk in London to the Industrial Law Society, a distinguished group of British judges and employment law practitioners. Intending to grab their attention, I titled the remarks, "Why the U.K. Employment Law System is a Capitalists' Paradise". The Brits were confused: Aren't the Americans the only country in the developed world that provides no general statutory protection against wrongful dismissal? Don't we allow employers to fire employees without notice, for good or bad reasons, or for no reasons at all?

Patiently, I explained: Put aside the formal law. Look at the recoveries! If you total up all recoveries in the British employment tribunals, both unjust dismissal claims that are capped at £50,000 per case and discrimination claims that are theoretically uncapped, you end up in calendar year 2001 with an aggregate sum – for *all* claimants—of £3.9 million, or approximately $5 million. (This was not a fluke statistic—the aggregate sum was £3.53 million the year before.) Since Britain has about 1/7 of our population, that translates in U.S. terms to a total of $35 million. Thus, all British employee claimants received less as a group than the $54 million dollar settlement the EEOC recently secured against Morgan Stanley ($12 million of which is to go to the principal charging party and intervener, Allison Schieffelin).

II.

A CADILLAC FOR THE FEW; RICKSHAWS FOR THE MANY

The system, as I have described it, is a grand one, a Cadillac. It keeps our army of lawyers fully occupied, and our Law Schools fat and prosperous, easily the "cash cows" of their universities. But it is a Cadillac system only for individuals who either can afford to pay Cadillac-level fees or make enough money that their claims are valued at the Cadillac level, and thus can attract lawyers to prosecute their cause.

For the overwhelming majority of Americans, and certainly for those with modest incomes at the U.S. median of $25-35,000 a year, there is no Cadillac waiting in the wings. If they are lucky, they have a rickshaw at their disposal: perhaps they can find a local lawyer not terribly experienced, if at all, in the substantive area who helps them with a release or writes a demand letter fully expecting to exit from the scene if the company does not quickly make a settlement offer. Or they can go to one of the administrative agencies, like the EEOC, where their claims will be perfunctorily investigated, and then relegated to a kind of administrative purgatory—awaiting a disposition not likely to come.

We can understand the agency's dilemma. It is reluctant to release the claim because then a short statute of limitations will start running, and the claimant will in all likelihood have to proceed in court on his own, or simply drop the matter. And at the same time, the agency lacks the resources and possibly the will to seek adjudication of retail cases.

I may overstate the case by saying these people can use rickshaws, which, however arduous and time-consuming, can get you from place to place. More likely, these claims are merely orphans of the law. No one will come to their aid, neither adoptive parents or even foster homes.

Is this an unfair account? There are certain areas—medical malpractice may be one—where the contingency fee system works fairly well, although a Harvard Medical School study chaired by Paul Weiler found that the majority of malpractice claims go unredressed. In the employment field I know best this is an incontestable reality. Plaintiff lawyers expect an hourly fee from claimants in the neighborhood of $150-300 an hour even if they think the claimant can sue under a statute providing for fee-shifting if the claimant wins.

The existing data are fragmentary but revealing. In 1991, John Donohue found that plaintiff lawyers are not likely to take an employment discrimination case, regardless of merit, unless the employee earned more than $400 a week. William Howard's 1995 article reports the results of a survey of 321 plaintiff lawyers, all members of the National Employment Lawyers Association, the plaintiff employment bar association. Howard found that these lawyers required a retainer of at least $3,000-3,600. Lewis Maltby reports a 1995 study of plaintiff

lawyers finding that these lawyers would not take a case unless the employee had at least $60,000 in back pay damages.

Lawyers are certainly entitled to be paid for their work, and who can say $200 (or more) an hour is inappropriate—when lawyers representing companies typically charge two, three or more times that amount and often proceed with the help of a small army of associates each of whom is paid more than the plaintiff lawyer. What cannot be disputed, I think, is that, for most employees, a private lawyer in employment cases is beyond their reach.

There are some mitigating features we should note. At NYU, our law students, typically in their first year, represent unemployment claimants, though they do this without lawyers to help them. Our students also act as mediators for cases filed in small claims court and cases pending before New York City hearing officers. The Southern District has a very interesting program enlisting associates in law firms to act as counsel for pro se claimants for settlement purposes only.

Certainly, if a class action can be brought to tie together the claims of many, private lawyers can be found. Class actions are, however, hard to bring; they invite a good deal of collateral litigation before the merits can be heard. Plaintiff lawyers who know what they are doing will be highly selective in taking on such cases, and they will be understandably reluctant to litigate most of their cases even where they think class action certification is plausible. Rather, they maintain an inventory of class claims, the overwhelming number of which are destined to be settled on an aggregate basis at some fraction of their underlying value, with the court essentially rubber-stamping the deal.

How did we arrive at this state of affairs? I do not have a precise causal explanation. Let me offer two thoughts that might provide the seeds of such an explanation.

1. *The Decline of the Labor Movement & Withering Away of a Worker-Sympathetic Intellectual Class*

Part of the reason, I submit, stems from the decline of the labor movement, especially in private companies. From a high point of 35% of the workforce, unions now represent less than 10% of private sector workers. For our parents' generation, identification with the aspirations of people of minimum edu-

cation working in factories, offices and fields was an integral part of one's political, and even professional, identity. This is what the Democratic Party, what many universities, what other sectors of so-called "progressive" opinion were principally about. To be "left" or "liberal" was to be aware of the problems facing working people, and to contribute in some way to their cause. This self-perception of the intellectual class helped produce a corps of lawyers who either worked for unions or otherwise provided financial or other aid to organizations whose principal constituency were people of limited education and limited incomes.

We still give lip service to these people and these causes. But, under the cone of silence tonight, we would have to concede that from the 1960s on, to be "left" or "liberal" or "progressive" is to be principally concerned with other movements, say, the environment, abortion rights, the rights of gay couples, the rights of undocumented aliens, or human rights abroad. Sure, we care about the poor—but rarely the poor who are in this country lawfully, have jobs, but have trouble making their way economically. This change in intellectual orientation is reflected, I submit, in the clinical programs in the law schools and in the pro bono programs in the law firms.

The decline of labor unions has an even more direct effect on the provision of legal services to working people. In many shops, the union's lawyers provided a medley of services—not only traditional grievance work, but representation in worker's compensation claims, unemployment insurance cases and even housing disputes. And certainly in taking on workplace grievances, the unions provided effective advocacy; often, they were able to get you your job back if management had made an improper or poorly documented decision.

I recall my first job as a lawyer working for a law firm that represented Trade Council 6 of the Hotel Employees in New York. Every Thursday each of us interviewed 25 employees of the various hotels and restaurants who had grievances, all making little more than the minimum wage plus tips. On Friday, we presented our cases to Peter Seitz, the outside arbitrator who sat as the impartial arbitrator for the entire industry. We were able to get an answer that day, whether the employee was entitled to get his job, and whether he would get back pay. This was retail justice—no fancy discovery, no briefing—but it

provided a "day in court" before a neutral decision-maker. At some fundamental level, it worked.

2. *Mushrooming Costs of Litigation*

A second major factor diminishing the availability of lawyers for working people is the rising cost of litigation. This is not primarily due to improvements in technology. Technology may increase some start-up costs, but on the whole it helps make the plaintiff lawyer's life easier, by enabling greater use of standardized forms and electronic research libraries. The cost increase, I submit, comes largely from the expense and time commitments entailed in pre-trial discovery and motion practice. We have a system of automatic discovery in our civil courts. Some devices, like interrogatories, shift most of the costs to the other side, but they generally do not yield much useful information. Other devices, like depositions, are quite costly, in client distraction, lawyer time, and court reporter fees.

The pretrial discovery system was designed for complicated, high stakes battles, like securities and antitrust claims, but it has been extended—as a matter of right, without a showing of need—to all civil cases in federal court, and increasingly in state court as well. The costs of the process may create some settlement value, but they also pose a barrier to access by claimants.

I know from the employer's side that we generally assume that every case that cannot be quickly settled will require around $75,000-100,000 in legal fees and disbursements to move the case through summary judgment. Efficiency is not necessarily a strong suit of the defense bar, and the costs on the plaintiff's side will be less but not less than half that amount. If this is right, a case *unlikely* to be settled at the outset will require an investment of $50,000 in lawyer time on the plaintiff side. Of course, the case may settle, but it may not, and if it doesn't, as a plaintiff lawyer you are working against yourself. The effective cap on your fee is 30% of your investment (or $15,000) and, normally, you do not want to have to expend $50,000 (in opportunity costs) to get $15,000. (Fee-shifting statutes will generally not kick in unless the case goes to trial.) Plaintiff lawyers understandably will assiduously avoid these circumstances by not taking on such matters, or taking the case only a short distance to see if it will readily settle.

Discovery is "essential" to a fair outcome, many will say. I have represented firms for over 20 years, and in my experience in the overwhelming number of cases discovery helps the defense, if it helps anyone—by enabling defense counsel to pin plaintiffs down to a single story and creating a plausible basis for moving for summary judgment. There are plenty of other areas in our law—criminal law and labor arbitration are but two—where claimants and their representatives fare quite well, with minimal pretrial disclosure. We have adopted this high-cost system—initially designed for high- stakes disputes—virtually on auto pilot.

This is doubtless not a complete theoretical explanation but I suspect I have identified two important factors.

III.
WHAT IS TO BE DONE?

Identifying a problem is a lot easier than coming up with remedies. In my remaining time, I will attempt to suggest some areas where concrete improvements are possible. Let me take these points in reverse order.

Lowering Forum Costs

1. *The ADR Challenge*

One area I have followed closely is the ADR challenge in the employment arena. For good, old-fashioned capitalistic reasons, non-union employers are finding it in their self-interest to institute ADR systems for employee grievances, with the final step in the process outside arbitration before a neutral arbiter. Sometimes the companies also provide an insurance benefit to enable claimants to retain counsel up to some fixed amount. These companies are not doing this to avert unionization, which is a quite remote prospect. Rather, they are trying to avoid the uncertainties of a jury trial and minimize the costs of employment litigation.

Where these systems are properly designed—and employers are not trying to carve out an unfair advantage for themselves—forum fees and arbitrator fees are picked up by the company, and limited pre-hearing disclosure is provided—typically access to the personnel file and perhaps a deposition of a key decision-maker, absent a showing of cause to the arbitrator. The company also has strong incentives to be inclusive in

defining the categories of claims eligible for ADR, because it wants to keep as many claims as it can out of the courts. Mediation, also paid for by the employer, is typically required before any demand for arbitration becomes ripe. This step facilitates informal, creative solutions; at the least, it provides an opportunity for the grievant to have an early say. Because the process is user friendly, more claims are heard from a given company workforce than is the case where employees must proceed before an administrative agency or in court.

And where these systems are well designed, they meet the test of substantive fairness. The data Cornell researchers and I have collected from a number of sources, including an in-depth study of the claims experience of a major company (published in the Stanford Law Review) indicate comparable win rates, comparable average recoveries, and faster resolutions.[1]

So, where is the ADR challenge? Nearly 15 years after the Supreme Court in its *Gilmer* decision interpreted the Federal Arbitration Act to allow enforcement of predispute arbitration agreements that include statutory discrimination as well as contractual claims, the organized plaintiff bar is still opposed as a matter of principle, fighting as hard as its members can to block enforcement of these agreements with new theories replacing earlier theories as the latter fail to win judicial acceptance.

Sure there are significant process challenges. Publication of awards in a manner that preserves anonymity is something both sides of the bar should be working on. We also have to be vigilant to make sure that arbitration involves only a change of forum, not a compromise of substantive rights. But once those concerns are addressed, I believe we should welcome this new development in employment law because it promises to offer a more accessible form of justice than the Cadillac system—it offers the promise of, say, Saturns rather than rickshaws for the many, even if at the cost of Cadillacs for the few.

Why is the plaintiff bar so resolutely opposed? I am not a psychologist, but I suspect that their perspective is limited to the tip of the system with which they come into contact—the

1. *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005).

people who have Cadillac claims and therefore benefit from the leverage-enhancing effect of the civil jury and other features of U.S. civil adjudications. They do not generally come into contact with the retail claims, except when deciding not to take on these matters, or to handle them only to the extent of writing a demand letter and seeing whether the company will settle early.

In any event, whatever one's ultimate view of the desirability of such company-promulgated systems, what we should be focusing on is expanding the supply of advocates to represent employee claimants in this process.

2. *Streamlined Pretrial Discovery*

We need also to explore changes in the federal and state rules of civil procedure to alter the background assumptions of the system. The rule should be bare-bones pretrial disclosure and an early trial for most cases, with an opportunity to show cause for more extended pretrial discovery and motion practice. This goes against the trend of civil procedure theory for the last half-century, but the time is ripe to rethink our civil adjudicatory processes so that there is a better fit between the costs of the forum and the value of the case.

I note, for example, that no other country in the world uses the ordinary civil courts for employment cases. All other developed countries, including pre- and post-Thatcherite Great Britain, use labor courts or employment tribunals for claims brought by employees. It will be hard to transplant labor courts on U.S. soil, but with some modest modification of existing arrangements we can provide a more user-friendly process for most claims of people of limited means. We also should study the experience of the small claims courts to see whether their mandate and jurisdiction can be fruitfully expanded to play the needed role of an accessible tribunal for ordinary citizens.

Changing the Elite Litigation Culture
To a Culture of Citizen Service

Can we change the culture of our litigation system, and our profession? The present culture, I submit, is an elite culture. We need to figure out ways to promote a "culture of citizen service."

1. *Law School Clinical Education*

One place to start would be the clinical courses in our law schools. In many areas, they do provide needed representation for people of limited means. But more often than we might care to admit—what drives the design of clinical courses, and thus the type of cases selected, is the political and ideological agendas of the instructors. A growing number of law school clinics across the country have embraced the cause of undocumented aliens. I do not begrude the needs of these individuals or the value of the services clinics provide. It is a question of emphasis, of priorities. Who is willing to take on the claims of resident, documented aliens or, indeed, citizens who have a right to work in this country but who learn of a disturbing change in their pension plan or have been told that they will lose their job because a new contractor has been selected? Few clinical professors are willing to take on ordinary consumer claims, help people with their wills, help them negotiate a contract for their first home, help them with an individual bankruptcy, help them organize a union, help them run for union office, and the like.

A tremendous amount of resources are devoted to clinical education. Have we lost sight of a principal *raison d'etre* for these courses—to improve the delivery of services for people of modest means?

The clinics, I have been told, are principally about teaching skills to law students. But the type of retail claims and retail matters I am urging should be front and center in these courses would provide better training experiences for students, who otherwise are likely to play only a minor role in a lengthy, complex civil case challenging, say, an INS asylum ruling.

2. *Pro Bono Practices of Law Firms*

Much the same can be said of the pro bono practices of law firms. In the New York firms I am familiar with, there is little rhyme or reason in the pro bono matters selected. In many cases, the firms are talked into supplying an army of lawyers to help some public interest lawyer mount a high impact, high visibility challenge on some question of interest to the lawyer or his or her organization. I am certain some, perhaps much, good comes of this, but often the troops from the law

firms simply overwhelm the typically single, resource-strapped government lawyer from the city counsel's office into agreeing to a consent decree that wins plaudits for the law firms involved—but without accomplishing any sustainable improvement in client welfare or public policy. In the areas of homeless people's rights, we have several municipal offices trying to do the best they can with limited resources and in the teeth of community opposition to the building of shelters. The intervention of the law firms may result in a change in arrangements, which courts bless, but it is not clear we end up with better decisions or even improvements in the lot of the homeless.

My point here is not that law firm pro bono programs are not, or cannot be, valuable. It is that a greater willingness to embrace retail cases—the modest claims of people of modest means or modest education—is more likely to result in real, on-the-ground improvements, and also more likely to provide useful training experiences for law firm associates.

3. *Access to Justice for Pro Se Claimants.*

We have thousands of pro se claimants in our courts in New York, and thousands waiting for resolutions in the administrative agencies. One federal district judge says 40% of the filings in his court are brought by pro se claimants. Some pro se claimants are pranks, but others have plausible claims that simply cannot attract a private lawyer because they do not make enough money. These claimants need and deserve representation, and it should be an obligation of all lawyers in community either to devote some defined percentage of their work time over the year to represent such people, or to provide financial assistance to legal aid lawyers to take on such cases.

This is all quite fragmentary. I am outlining an agenda for concern, and thank you for the opportunity to present these preliminary thoughts.